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# Can Wrongful Death Damages Recovered by a Married Person Be Separate Property Under California Law?

William A. Reppy, Jr.\*

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I. INTRODUCTION

Existing California judicial precedent uniformly holds that damages recovered<sup>1</sup> by a married person based on the wrongful death of a relative of the married person during the marriage<sup>2</sup>—and while the spouses were not living separate and apart<sup>3</sup>—is entirely community property.<sup>4</sup> Under the theoretical basis for this community property classification, it is irrelevant that the person tortiously killed was a child or grandchild only of the plaintiff- or payee-spouse and had no legally recognized relationship to that party's husband or wife, who becomes owner of half the recovery because of its classification as community property.<sup>5</sup> This Article rejects this community property classification of all components of wrongful death recoveries as illogical.

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1. This Article refers to recovery of wrongful death damages without distinguishing between situations where a plaintiff-spouse recovers through a wrongful death judgment after litigation and situations where a plaintiff-spouse recovers based on a settlement agreement made with the tortfeasor or the tortfeasor's insurer. Whether the legally appropriate classification of the recovery is separate property of the plaintiff-spouse, community property, or a mix of both separate and community property could not turn on the difference between recovery after completed litigation and recovery based on a settlement agreement with the tortfeasor.

2. In the balance of this Article, when reference is made to recovery of wrongful death damages by a married person, it is to be assumed, unless stated otherwise, that the recovery is based on the death of a relative of the spouse that occurred during marriage and not before the marriage.

3. According to section 771 of the California Family Code, "accumulations" by a married person "while living separate and apart from the other spouse" are separate property of the acquiring spouse. A wrongful death recovery should be such an "accumulation[]." More importantly, a cause of action in tort for wrongful death arising at the time the plaintiff-spouse's relative is tortiously killed will be viewed as such an "accumulation[]." Thus, the courts will examine whether the plaintiff and his or her spouse were living separate and apart not at the time the funds constituting a wrongful death recovery were received by the married person, but at the time of death of the relative of the plaintiff-spouse upon which the cause of action asserted is based. So, if Husband and Wife are living apart and litigating their divorce when Wife's child is tortiously killed, the pair divorce but later remarry, and thereafter Wife collects \$1 million from the tortfeasor based on the child's death, the recovery is separate property by tracing the money back to the arising of the cause of action for wrongful death at a time section 771 was applicable. It is assumed in the balance of this Article that section 771 has no application to any discussion concerning a wrongful death recovery by a husband or wife (or a former husband or wife) unless the living-apart doctrine is specifically mentioned.

4. See discussion *infra* Part III.A–B.

5. See discussion *infra* Part III.A–B.

The line of precedents requiring this community property classification for wrongful death recoveries dates to a 1922 decision by a California court of appeal;<sup>6</sup> the decision held that a married person's wrongful death recovery should be classified in the same manner as recovery based on personal injuries tortiously inflicted on the body of that person during marriage.<sup>7</sup> The law in 1922 concerning classification of recoveries based on a married person's tortiously-inflicted personal injuries rested on an 1891 California Supreme Court decision<sup>8</sup> that was viewed—not unreasonably—as holding that no portion of the personal injury recovery (which was presumptively community property because it was acquired during marriage) could be classified as the victim-spouse's separate property by tracing it to a separate property source other than the tort cause of action itself. For example, if a victim-wife had her leg—which was part of her before marriage and hence her separate property, if viewed as property—sheared off in an accident negligently caused by a tortfeasor,<sup>9</sup> tracing the money damages to the separate leg would be impermissible.<sup>10</sup>

In the absence of an applicable statute, the approaches judges take in classifying recoveries based on personal injuries to a married person have changed substantially since 1922. A relatively new theoretical approach, which can be called “in-lieu tracing,” is now often applied. It asks what was lost by the victim-spouse that resulted in a recovery.<sup>11</sup> For example, if an insurance company pays benefits to a husband on a disability policy and the husband cannot work due to metastasized cancer but is beyond normal retirement age, the payment is seen as *in lieu of* retirement benefits.<sup>12</sup> Thus, the law applicable to classifying retirement benefits as community or separate would be employed, i.e., the payments would be traced to the premiums paid for the insurance.<sup>13</sup> If no statute precluded application of in-lieu tracing, a personal injury recovery based a spouse's lost leg in a tortiously-caused accident during marriage would be classified by tracing the money to the leg—something the victim-spouse brought to the marriage.<sup>14</sup> The amount of the total recovery based on the loss of the leg would be the

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6. *Keena v. United R.Rs. of S.F.*, 207 P. 35 (Cal. Ct. App. 1922). See *infra* text accompanying notes 55–63.

7. *Keena*, 207 P. at 37–38.

8. *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 25 P. 681 (Cal. 1891). See *infra* text accompanying notes 24–36.

9. See *infra* Part II.A.

10. See *infra* Part II.A.

11. See *infra* Part VI.A–D.

12. See *Saslow v. Saslow (In re Marriage of Saslow)*, 710 P.2d 346, 352 (Cal. 1985); *infra* Part VI.D.2; see also *Elfmont v. Elfmont (In re Marriage of Elfmont)*, 891 P.2d 136 (Cal. 1995).

13. *Saslow*, 710 P.2d at 357.

14. See WILLIAM A. REPPY, JR., COMMUNITY PROPERTY IN CALIFORNIA 146 (1980).

victim's separate property, even though the cause of action arose and payment was made during marriage.<sup>15</sup>

This Article concludes that modern in-lieu tracing precedents require overruling the 1922 wrongful death decision and its progeny that bar potential tracing of a married person's loss based on the death of a relative to a separate property source and that erroneously compel classifying all components of damages recovered as community property.<sup>16</sup>

Conversely, another line of older authority under which all wrongful death recoveries had to be classified as community property does not need to be overruled.<sup>17</sup> This line of cases began with a 1924 court of appeal decision<sup>18</sup> and was based on language then found in section 376 of the California Code of Civil Procedure (Section 376).<sup>19</sup> The 1924 court's interpretation of Section 376 was unsound from the outset, as this Article demonstrates.<sup>20</sup> In any event, in 1949 the statute was amended and the language was removed; this necessarily abrogated the second line of older precedents that mandated classifying 100% of a wrongful death recovery by a married person as community property.<sup>21</sup>

## II. DEVELOPMENT OF CALIFORNIA'S ORIGINAL NO-TRACING RULE EMPLOYED IN CLASSIFYING PERSONAL INJURY RECOVERIES IN GENERAL

### A. *The 1891 McFadden Decision*

The line of cases dealing with classification of wrongful death recoveries by a husband or wife that began in 1922 rests on a judicial borrowing of the approach used in classifying personal injury recoveries. Thus, analysis of the pertinent law properly begins with the earliest cases classifying property as community or separate when determining who should recover damages for a spouse's personal injury, e.g., a concussion suffered in an automobile accident.<sup>22</sup>

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15. *Id.*

16. *See infra* Part VII.

17. *See infra* Part IV.D.

18. *Sandberg v. McGilvray-Raymond Granite Co.*, 226 P. 28 (Cal. Ct. App. 1924). *See infra* text accompanying notes 71–85.

19. *See infra* Part IV.B.1.

20. *See infra* Part IV.B.

21. *See infra* Part IV.D.

22. *See McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 25 P. 681, 681–82 (Cal. 1891).

The first reported decision to consider how the community property system<sup>23</sup> applied to classify damages recovered by a husband or wife based on his or her tortiously-caused personal injuries was by the California Supreme Court in 1891.<sup>24</sup> In *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, a married woman was in a vehicle—described as a “three-spring buggy, without a top”<sup>25</sup>—that fell into the defendant’s unmarked and negligently-created street excavation

whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person and said internal injuries, she was confined to her bed for many months, and endured great *physical* and *mental suffering*. Her health is injured and impaired thereby . . . .<sup>26</sup>

A judgment for the plaintiff-wife was reversed because the jury had been instructed that her husband’s contributory negligence could not be imputed to her.<sup>27</sup> The trial court had refused the defendant’s request for this instruction on the ground that the wife’s recovery would be her separate property.<sup>28</sup> Since it would not be co-owned in community with her husband, his contributory negligence would be legally irrelevant because the husband would not profit from his own wrong.<sup>29</sup> But the California Supreme Court held that the trial court erred in declaring that the wife’s recovery would be her separate property and held that

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23. It followed two peculiar decisions of the California Supreme Court that declared that a wife’s cause of action in tort for personal injuries was her separate property under the common law of England in effect in California. *Matthew v. Cent. Pac. R.R. Co.*, 63 Cal. 450, 451 (1883) (negligent starting up of train caused wife to be violently thrown to the floor of a car; “[t]he cause of action is hers.”); *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 533–34 (1861) (false imprisonment caused injuries to wife and under “common law” she was “entitled to [compensation]”). It is hard to imagine how all of the justices participating in both of these cases could have forgotten that at the time of these decisions the state constitution contained a provision, CAL. CONST. art. XI, § 14 (1849), that required application of the civil law to marital property issues. This constitutional proviso had been vigorously debated at the initial constitutional convention before its adoption and constituted a major exception to the state’s adoption, in general, of the common law. See J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER 1849, at 257–69 (1850), excerpted in REPPY, *supra* note 14, at 9–12.

24. *McFadden*, 25 P. at 681.

25. Transcript on Appeal at 34, *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 25 P. 681 (1891) (No. 13,919).

26. *McFadden*, 25 P. at 682 (emphasis added). The treating physician testified that the victim-wife suffered “an anti-flexion of the second degree, combined with prolapsus.” Transcript on Appeal, *supra* note 25, at 38.

27. *McFadden*, 25 P. at 683.

28. *Id.* at 682.

29. *Id.* at 682–83.

[t]he right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action . . . and, if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is . . . community property of the husband and wife (Civil Code, §§ 162–164, 169[ ]) . . .<sup>30</sup>

The court was willing to trace the money the injured spouse received back to the cause of action but would not trace the cause of action back to the victim’s body.<sup>31</sup> When *McFadden* was decided in 1891, California Civil Code section 162 provided, “All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property.”<sup>32</sup> Section 164 then provided, “All other property acquired after marriage, by either husband or wife, is community property.”<sup>33</sup> If money damages were received during marriage, it is clear that the *McFadden* court did not view section 164 as barring classifying the victim-spouse’s damages as separate property by tracing them back to a tort cause of action that arose before marriage—“property owned . . . before marriage” under section 162.<sup>34</sup> The possibility of other kinds of tracing seems not to have been considered.

Four years later, the California Supreme Court expanded upon the significance of sections 162 and 164 as they then read in classifying personal injury damages.<sup>35</sup> The 1895 case involved personal injury damages arising out of an assault on a married woman, and the court held:

The separate property of the wife is declared in section 162, Civ. Code, to be “all property owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent”; and section 164, *Id.*, declares that “all other property acquired after marriage” by the wife is community property. Whatever may be the law in other states, in this state the separate property of the wife, which is

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30. *Id.* at 682 (some citations omitted).

31. *Id.*

32. This quote was taken from former section 162 of the California Civil Code which is now in section 770 of the California Family Code. In 1992 section 770 was enacted by section 10 of the Statutes of California, replacing section 5108 of the California Civil Code. In 1969 section 5108 was replaced by section 164 of the California Civil Code via section 9 of the Statutes of California.

33. This quote was taken from former section 164 of the California Civil Code which was renumbered as section 5110 of the California Civil Code in 1969. In 1992 section 5110 was repealed when it became Section 760 of the Family Code.

34. *McFadden*, 25 P. at 682–83.

35. *Lamb v. Harbaugh*, 39 P. 56 (Cal. 1895).



acquired by her after marriage, is limited to such as she acquires by “gift, bequest, devise and descent.” As a right of action for damages for a personal injury is not acquired by either of these modes, it is a part of the “other property acquired after marriage,” and is therefore community property.<sup>36</sup>

*B. Precedents and Secondary Authority Existing When McFadden Was Decided*

In *McFadden*, the cornerstone decision for the judge-made rule that 100% of personal injury damages arising out of a tort during marriage must be community property, counsel for the victim-wife made no argument in brief for a separate property classification. Instead, counsel argued that the fact the husband would own half of the wife’s recovery in community was not a sufficient basis for imputing the husband’s contributory negligence to the wife.<sup>37</sup> It is not surprising that counsel for the wife did not seek a separate property classification. Although the issue was *res nova* in California, all the then-reported precedents from other community property states that had considered the matter had held that a spouse’s personal injury damages had to be entirely community property because they were acquired

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36. *Id.* at 58. In Washington, when the law there also classified 100% of a married person’s personal injury recovery as community property on precisely the same logic as employed in *Lamb*, the courts there quaintly said they were applying the “waste basket definition of community property.” *Brown v. Brown (In re Marriage of Brown)*, 675 P.2d 1207, 1210 (Wash. 1984) (internal quotation marks omitted) (“This “waste basket” definition of community property results in property being characterized as community unless it meets the definition of separate property. . . . [F]ortuitous acquisition of damages for personal injury by a third party tort-feasor is community property because it does not fit within the definition of separate property.” (quoting *In re Marriage of Parsons*, 622 P.2d 415, 416 (Wash. App. 1981))). *Brown* ultimately overruled the cases that took this approach. *Lamb* cited the 1891 *McFadden* decision. *Lamb*, 39 P. at 58. In several other decisions on the books in 1922 (when the issue of classifying a wrongful death recovery was first decided in a reported decision) the court classified a married person’s personal injury recovery as community property and cited *McFadden*, including *Doyle v. Doyle*, 186 P. 188, 190 (Cal. Ct. App. 1919), and *Justis v. Atchison, T. & S. Railway Co.*, 108 P. 328, 329 (Cal. Ct. App. 1910).

37. In their petition for a rehearing, Respondents argued that the negligence of the husband there should not be imputed to his wife:

[T]o say that the negligence of the husband should be imputed to the wife for the reason that the judgment secured for the damages sustained by the wife is community property, is not a sufficient reason.

We cannot say that it is a common undertaking because the results of that undertaking may in some way accrue to the benefit of another party. In order to identify the party having this resulting interest in this judgment as being connected in a common undertaking with the other plaintiff, there must be something other and further than this.

Petition for a Rehearing at 4, *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 25 P. 681 (1891) (No. 13,919).

during marriage by a process other than inheritance, bequest, devise, or gift.<sup>38</sup>

In 1890, when *McFadden* was briefed and argued, there were two English language treatises in print on the law of Spain and Mexico<sup>39</sup> that included discussions of community property law<sup>40</sup> and that had been cited by the California Supreme Court as good sources of civil law principles.<sup>41</sup> Neither treatise addressed whether a recovery of damages for personal injuries by a married person was community property or the victim's separate property. One did suggest that, as a matter of civil law procedure (which would not be part of California law), if the wife were the tort victim, she was a necessary party in a suit for damages and she could not appear in court without her husband's permission, although the court could compel him to give his assent.<sup>42</sup>

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38. See *Holzab v. New Orleans & Carrollton R.R. Co.*, 38 La. Ann. 185, 188 (1886); *Cooper v. Cappel*, 29 La. Ann. 213, 215–16 (1877) (dictum); *Loper v. W. Union Tel. Co.*, 8 S.W. 600, 602 (Tex. 1888); *Ezell v. Dodson*, 60 Tex. 331, 332 (1883) (personal injury recovery not acquired by gift, bequest, or descent), *overruled in part by* *Graham v. Franco*, 488 S.W.2d 390, 395 (Tex. 1992).

39. GUSTAVUS SCHMIDT, *THE CIVIL LAW OF SPAIN AND MEXICO* (1851); 1–2 JOSEPH M. WHITE, *A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES; TOGETHER WITH THE LAWS OF MEXICO AND TEXAS ON THE SAME SUBJECT* (1839).

40. See SCHMIDT, *supra* note 39, tit. I, ch. IV, at 12–14; Ignacio Jordan De Asso Y Del Rio & Miguel Manuel Y Rodriguez, *Institutes of the Civil Law of Spain* (Judge Johnson trans., 1839), in 1 WHITE, *supra* note 39, bk. 1, tit. VII, cap. 5, at 60–63.

41. See, e.g., *Braly v. Reese*, 51 Cal. 447, 463 n.1, 464 n.d1 (1876) (citing SCHMIDT, *supra* note 39; WHITE, *supra* note 39); *Wilson v. Castro*, 31 Cal. 420, 433 (1866) (citing SCHMIDT, *supra* note 39); *Noe v. Card*, 14 Cal. 576, 604–05 (1860) (citing WHITE, *supra* note 39).

42. Asso & Manuel, *supra* note 40, at 272 (“[T]he wife cannot appear in suit without the permission of her husband, . . . and the judge may also, with cognisance of the cause, obligate the husband to give his assent.”). Conceivably the wife was viewed as a necessary party because the damages would be her separate property; but she also could have been a necessary party so the court could have before it the very person claiming to have been tortiously injured, even though the damages awarded would be community property subject to the husband's management, and for which, in most situations, he would be the party to bring suit in court. De Funiak writes that in Spain, by the sixteenth-century, a wife could sue for her own personal injuries without obtaining her husband's consent. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 81, at 198 (2d ed. 1971). In the same passage de Funiak quotes the Spanish statute book, *Las Siete Partidas*, which he dates as of 1263: “Wrong or dishonor [i.e., a tort] can be committed against any male or female of any age whatsoever.” *Id.* at 49. Based on this, de Funiak concludes: “Thus, the injury to the person of a wife was compensable to her to the extent that her property was injured or destroyed.” *Id.* By “compensable to her,” de Funiak intends to say that at civil law in Spain the recovery was the wife's separate property pursuant to *Las Siete Partidas*. I do not think Law 9—from which de Funiak quotes—supports this conclusion. Law 9 actually goes on to say, “[A] father can bring suit for damages for dishonor done to his son . . . and a husband can do this in behalf of his wife.” 5 *LAS SIETE PARTIDAS, UNDERWORLDS: THE DEAD, THE CRIMINAL, AND THE MARGINALIZED* 1356 (Robert I. Burns ed., Samuel Parsons Scott trans., 2001) (emphasis added). If any inference concerning classification is to be drawn from Law 9, this language could indicate that the recovery for the wife's personal injury damages would be community property

Nor, apparently, did legal treatises written in Spanish—that the California Supreme Court had, before the 1891 *McFadden* decision, been consulting to determine the fine points of civil law of marital property—address the issue concerning classification as community or separate property of personal injury damages. I have personally translated<sup>43</sup> the chapters on community property (bienes gananciales) in two of such treatises<sup>44</sup> that were most frequently cited by the California Supreme Court.<sup>45</sup> Neither treatise discussed or even alluded to whether under civil law a recovery of personal injury damages would be classified as community or separate property.

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managed by her husband. De Funiak also cites a commentary to Law 55, *Leyes de Toro*, for the proposition that a wife could sue without her husband's consent for her personal injury damages, suggesting this was so because they would not be community property. The passage cited, as translated by myself and Sandra Newmeyer, Duke Law School class of 2011, states:

Here, doubt is shed on whether a wife is required to show the husband's permission in order to defend in a criminal trial, in which she is accused. It is resolved by Acevedo, number 108, that common usage has established the lack of need for such permission, even if it is contradicted by our [statutory] law. But it appears to me that, without contravening the disposition of the law, one can say it is unnecessary to require the permission of the husband, because it can be supplied by the trial judge, and furthermore in that case the woman is required to satisfy the charges that have been brought against her. And when it is necessary [for the wife] to convey her property rights, it is recognized by Acevedo in number 81 that the husband's consent is not necessary; for the same reason it is unnecessary in this case [i.e., of a criminal prosecution]. This becomes evident in light of what is provided in Laws 77 and 78, which state that for a crime the married woman may lose in part or in whole her possessions of any type. The laws (77 and 78) prove without doubt that the present law and other laws that favor the husband, which require his consent so that the woman can convey and acquire property, have no effect, since otherwise one would have to say that the application of Laws 77 and 78 depend on the voluntary act of the husband, who would surely never give his consent for the conveyance of the wife's properties.

2 DON SANCHO DE LLAMAS Y MOLINA, *COMENTARIO CRITICO-JURIDICO-LITERAL A' LAS OCHENTA Y TRES LEYES DE TORO, COMENTARIO A' LEY 55 DE TORO 178-79* (Madrid, Imprenta de Repulles 1827). To me this says no more than that a wife managed her own separate property.

43. With help from numerous Duke Law School students over the past thirty years who were fluent in Spanish.

44. These treatises are Josef Febrero's *Libreria de Escribanos* and Joaquin Escriche y Martin's *Diccionario Razanado de Legislacion Civil, Penal, Commerical y Forense*. Each appeared in various editions. The editions I translated from were the 1834 edition of Febrero published in Mexico City and edited by Eugenio Tapia and generally referred to as "Febrero Mejicano" (often abbreviated in court citations as "Feb. Mej." or "Feb. Mex."), and the 1831 edition of Escriche published in Paris. See JOSEF FEBERO, *LIBRERIA DE ESCRIBANOSÉ INSTRUCCION JURIDICA TEORICO PRÁCTICA DE PRINCIPIANTES* tit. XI, cap. X, at 217 (1834); JOAQUIN ESCRICHE Y MARTIN'S *DICCIONARIO RAZANADO DE LEGISLACION CIVIL, PENAL, COMMERICAL Y FORENSE* 71 (1831). De Funiak disparages Febrero as a mere notario, not a scholarly Spanish jurisconsult. WILLIAM Q. DE FUNIAK, *PRINCIPLES OF COMMUNITY PROPERTY* 26 (1st ed. 1943). Yet Febrero's treatise was apparently widely available in California in the middle of the nineteenth-century and frequently consulted by lawyers and judges.

45. Illustrative cases include *Panaud v. Jones*, 1 Cal. 488, 499, 502-04, 515 (1851) (citing Tapia's FEBRERO, *supra* note 44, and ESCRICHE, *supra* note 44), and *Fuller v. Ferguson*, 23 Cal. 546, 565 (1864) (citing FEBRERO, *supra* note 44, on a community property issue).

### C. Tracing Separate Property Through Mutations

In the absence of any useful secondary material or judicial precedent dealing specifically with the classification of personal injury damages as separate or community property, the best theory that the wife's counsel in *McFadden* had for seeking a separate property classification was that the damages awarded constituted a "mutation" of an item of separate property the wife brought to the marriage: her womb—part of her own body—which was injured in the accident. The theory would have involved recognition of three mutations: (1) a healthy womb transformed into a damaged womb together with a cause of action in tort; (2) the cause of action transformed into a judgment; and (3) the judgment converted into money. This mutation theory had some support in an 1866 decision of the California Supreme Court and certainly was worth pursuing.<sup>46</sup> It was unhesitatingly applied in 1938 in a case where the wife's tortiously-damaged separate property was an item of tangible personalty—a motor vehicle—rather than a part of her body.<sup>47</sup> Applicability of the tracing-through-mutation theory might have been more apparent to the wife's attorney in *McFadden* had her leg (arguably her separate property and certainly not community) been sheared off and she sought damages in part so that she could buy a prosthetic leg to replace the natural leg.<sup>48</sup>

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46. *Peck v. Vandenberg*, 30 Cal. 11 (1866), stated the law of California to be (quoting from a Texas decision) as follows:

"[T]o maintain the character of separate property it is not necessary that the property of either husband or wife should be preserved in specie or kind. *It may undergo mutations and changes, and still remain separate property; and as long as it can be clearly and indisputably traced and identified, its distinctive character will remain.*" . . . Of course, to trace the property through its "mutations and changes" . . . requires evidence other than written . . . .

*Id.* at 38–39. In *Peck* the court favorably discusses a Louisiana case, *Dominguez v. Lee*, 17 La. 295 (1841), where the mutations of separate property went from something tangible to a cause of action and back to something tangible. *Peck*, 30 Cal. at 30. The wife's tutor (surely a fiduciary) had embezzled some separate property funds the wife had inherited. She settled her conversion cause of action against the embezzler by taking, during marriage, a grant of land from him, which was held to be her separate property by tracing back to the inheritance. *Id.*

47. *Scoville v. Kegl*, 80 P.2d 162, 167 (Cal. Ct. App. 1938) (\$600 recovery for damages to separately owned car segregated from balance of negligence case award to wife for her personal injuries, which was community property).

48. It does not necessarily follow that the prosthetic leg would remain community property when attached to the wife if it was purchased with community funds. The law might apply the fixtures doctrine to that situation, under which a structure paid for with community funds and built on a spouse's separate property becomes separate property and creates a right of reimbursement in the community. See *Warren v. Warren (In re Marriage of Warren)*, 104 Cal. Rptr. 860, 862–63 (Ct. App. 1972). A somewhat stronger case for applying the fixtures doctrine than the removable prosthetic leg would be \$10,000 of gold embedded in a spouse's teeth as a result of extensive dental work paid for with community funds. If the other spouse were to die with a will leaving all property

### III. APPLYING THE RESTRICTED TRACING RULE OF PERSONAL INJURY DECISIONS IN THE CLASSIFICATION OF WRONGFUL DEATH RECOVERY BY A SPOUSE

#### A. *The 1922 Keena Decision by the Court of Appeal*

Between 1891 and 1922, the California rule that 100% of personal injury damages awarded to a married person had to be classified as community property was repeatedly adhered to,<sup>49</sup> but developments outside California during this period initiated the formulation of what is now the overwhelming majority rule: the damages are part separate and part community depending on the nature of the loss compensated by each component of the damages.<sup>50</sup> A 1902 Louisiana statute that seemed on its face to classify 100% of a wife's personal injury damages as her separate property<sup>51</sup> was judicially construed as permitting a community classification for the amount of the damages reimbursing the community for medical bills incurred by the victim<sup>52</sup> and the amount of damages based on wages she lost due to the injury.<sup>53</sup> Additionally, a treatise published in 1910 proposed that, as a matter of judge-made law, part of the award for personal injury damages be traced to a "right violated"—a right to personal security—that was separate property of the victim-spouse.<sup>54</sup>

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over which he or she had testamentary power to children of a prior marriage, it would be almost absurd for the law to recognize the legatees as owners of a half interest in the gold-infused dentures affixed to the mouth of the surviving spouse, an outcome avoidable by application of the fixtures doctrine.

49. *See, e.g.,* Paine v. San Bernardino Valley Traction Co., 77 P. 659 (Cal. 1904); Henly v. Wilson, 70 P. 21 (Cal. 1902).

50. *See, e.g.,* Fredrickson & Watson Constr. Co. v. Boyd, 102 P.2d 627, 628–29 (Nev. 1940).

51. 1902 La. Acts 68, amending article 2402 of the Louisiana Civil Code to add the following exception to the basic definition of community property:

But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

52. Picheloup v. Gibbons, 120 So. 504, 504–05 (La. Ct. App. 1928). A Texas court made a similar miraculous interpretation of a statute dealing with classification of components of a recovery based on a married person's personal injuries. First enacted in 1968, what is now section 3.001(3) of the Texas Family Code provides that separate property of a husband or wife includes "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity," quoted in *Graham v. Franco*, 488 S.W.2d 390, 391 n.1 (Tex. 1972), from former section 5.01 of the Texas Family Code—which was repealed in 1997 and itself was formerly article 4651 of the Texas Civil Statutes. Notwithstanding the plain legislative choice not to make an exception to the basic rule classifying the damages as separate property for the amount of recovery based on medical expenses incurred, *Graham* held: "To the extent that the marital partnership has incurred medical or other expenses and has lost wages, both spouses have been damaged by the injury to the spouse . . . . The recovery, therefore, is community in character." *Id.* at 396.

53. *Simon v. Harrison*, 200 So. 476, 479 (La. Ct. App. 1941).

54. *See* GEORGE MCKAY, *A Cause of Action for an Injury to Separate Property, or for Violation of a Separate Right Is Separate*, in A COMMENTARY ON THE LAW OF COMMUNITY PROPERTY FOR

Since these new approaches were few in number and not tied to California law, it is not surprising that in 1922 a California intermediate appellate court addressed the issue of classifying a married person's wrongful death recovery in the same manner in which the *McFadden* court in 1891 had dealt with damages for injury to a wife's womb. The case was *Keena v. United Railroads of San Francisco*<sup>55</sup> and involved a four-year- and eight-month-old boy who was struck by the defendant's cable car and died from his injuries.<sup>56</sup> The decedent's father brought a wrongful death suit alleging negligence by the railroad.<sup>57</sup> The railroad pleaded, as a defense, that the child's mother had been contributorily negligent by allowing the boy to play on the street without reasonable supervision.<sup>58</sup> Judgment for the plaintiff father was reversed due to errors in jury instructions relating to contributory negligence.<sup>59</sup>

In a rehearing petition, the plaintiff father urged that the mother's contributory negligence was not an issue because the father alone had been awarded damages and they were his separate property; as a result, the wife could not benefit from her own wrong as she arguably would if the damages recovered were community property.<sup>60</sup> The court of appeal rejected the assertion that a married claimant's wrongful death damages should be classified as separate property:

In this state a father may maintain an action for an injury to, or the death of, a minor child. Code Civ. Proc. § 376. The mother, having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as a plaintiff. Code Civ. Proc. § 378. The proceeds of a favorable judgment in such an action become community property. Civ. Code §§ 163, 164, and 687.<sup>61</sup>

In reaching this conclusion, the court did not cite any precedent but, as the court did in *McFadden*, relied on what was then California Civil Code

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ARIZONA, CALIFORNIA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS, AND WASHINGTON (1st ed. 1910). "The cause of action takes the same character as the right violated . . ." *Id.* § 78, at 163. "Upon principle it would seem that the right violated should determine whether the right to recover is separate, or community property." *Id.* § 180, at 247. But McKay conceded that all the reported cases then on point held that personal injury recoveries by a spouse could not be traced to a separate property source, such as a separate right. *Id.* § 181, at 248.

55. 207 P. 35 (Cal. Ct. App. 1922).

56. *Id.* at 36.

57. *Id.*

58. *Id.*

59. *Id.* at 37–38.

60. *Id.*

61. *Id.* at 38.

section 163's definition of the husband's separate property as limited to assets coming to him "by gift, bequest, devise, or descent" if the acquisition was during marriage.<sup>62</sup> The wrongful death cause of action the husband brought in *Keena* did not meet this definition's test. In denying a hearing in *Keena*, the California Supreme Court declared: "We approve of that portion of the opinion [of the court of appeal] holding that the proceeds of the judgment in favor of the father is community property . . . ."<sup>63</sup>

### B. Subsequent California Decisions Consistent with *Keena*

*Keena* was followed in 1935 by another terse holding that "[t]he proceeds of a favorable judgment in an action brought by a father [for wrongful death of a child] are community property . . . ."—citing only *Keena*.<sup>64</sup> Three courts of appeal decisions in the 1960s similarly applied this rule without any analysis of why the money damages can be traced back to the cause of action for wrongful death, but the cause of action itself cannot be traced back to benefits the plaintiff-spouse was deprived of due to the death of his or her relative.<sup>65</sup>

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62. Former section 687 of the California Civil Code, relied on by the *Keena* court as well as section 163, provided in 1922: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either or as common or joint property of both." Former section 687 was enacted as part of the California Civil Code of 1872.

63. *Keena*, 207 P. at 38. This comment by the California Supreme Court was elicited by its disagreement with a passage in the opinion of the court of appeal in *Keena* in which that court held that the wrongful death damages were community property and stated: "[T]he proceeds of such a judgment passed to the surviving husband and wife, one moiety to each." *Id.* The common law term "moiety" described the equal shares of co-owners in common law joint tenancy and the interests of tenants in common having equal shares. *Green v. Skinner*, 197 P. 60, 61 (Cal. 1921) (surviving joint tenant takes moiety of property held with deceased joint tenant not as successor to the latter but by right created by the conveyance); *Thompson v. Jones*, 141 P. 366, 366 (Cal. 1914) ("[B]y this deed the two became tenants in common of the land, each owning an undivided moiety thereof."). The term "moiety" had no application to the civil law institution of community property. Indeed, in 1922 when hearing was denied in *Keena*, the California Supreme Court was still adhering to its odd theory that during marriage the husband had the entire ownership of community property (even the wife's earnings), the wife having merely a non-proprietary expectancy that would ripen into ownership of one half should she survive him. See *Spreckles v. Spreckles*, 158 P. 537, 539 (Cal. 1916). Somehow, however, the wife's lack of ownership did not bar imputing her negligence to her husband on the ground that she would benefit if he were permitted to obtain a community property recovery. The statement by the court of appeal that the wife acquired a half interest in the damages was inconsistent with the *Spreckles* theory that a wife had a mere expectancy in community property. Perhaps more significantly, the notion that a half interest "passed" to the husband himself—apparently directly and not derivatively based on his ownership interest in her acquisitions—undercut the theoretical basis for imputing her negligence to him when he brought suit. Thus, the California Supreme Court, in denying a hearing in *Keena*, concluded the sentence that approved the community property classification of the damages (quoted in part above in text) with these words: "[B]ut we disapprove of that portion of the opinion to the effect that the proceeds of the judgment pass to the parents, one-half to each." *Keena*, 207 P. at 38.

64. *Abos v. Martyn*, 52 P.2d 987, 987–88 (Cal. Ct. App. 1935).

65. *Casas v. Maulhardt Buick, Inc.*, 66 Cal. Rptr. 44, 51 n.6 (Ct. App. 1968); *Premo v. Grigg*, 46 Cal. Rptr. 683, 688 (Ct. App. 1965); *Cervantes v. Maco Gas Co.*, 2 Cal. Rptr. 75, 77–78 (Ct. App. 1960).

In 1947 the California Supreme Court in *Fuentes v. Tucker* stated, without any analysis, that “the proceeds of the judgment [for wrongful death] are community property.”<sup>66</sup> For this proposition *Fuentes* cited only the California Supreme Court’s comment in denying hearing in *Keena* and the 1924 court of appeal decision in *Sandberg v. McGilvray-Raymond Granite Co.*,<sup>67</sup> discussed below,<sup>68</sup> which classified damages recovered by a married person for wrongful death of a minor child as 100% community property on a legal theory very different from that employed in *Keena*.

Five years later in *Flores v. Brown*,<sup>69</sup> the California Supreme Court again made a one-sentence pronouncement about classifying damages recovered for wrongful death as separate or community property without any explanation except for citations to *Fuentes* and *Sandberg*: “[I]t is settled that a cause of action for injuries to either the husband and the wife arising during marriage and while they are living together is community property . . . , and the same rule is applicable to a cause of action for the wrongful death of a minor child . . . .”<sup>70</sup>

It is clear that no California appellate court decision has specifically considered why 100% of a married person’s wrongful death recovery must be community property and why there can be no tracing back to determine what kind of loss forms the basis for the plaintiff-spouse’s cause of action. The specific issue apparently has never been presented to an appellate court in California.

#### IV. THE THEORY THAT A CODE OF CIVIL PROCEDURE SECTION COMPELLED THE COURTS TO CLASSIFY SOME WRONGFUL DEATH RECOVERIES AS COMMUNITY PROPERTY

##### A. *The 1924 Sandberg Decision*

In the 1924 *Sandberg* case,<sup>71</sup> the eight-year-old son of Mr. and Mrs. Sandberg died due to the defendant granite quarry operator’s negligence in maintaining an attractive nuisance.<sup>72</sup> The boy’s father was the sole plaintiff

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66. *Fuentes v. Tucker*, 187 P.2d 752, 758 (Cal. 1947) (where two married couples sued for the wrongful death of minor sons of each of them in consolidated actions).

67. 226 P. 28 (Cal. Ct. App. 1924). *See Fuentes*, 187 P.2d at 758. *Sandberg* is discussed in detail below. *See infra* text accompanying notes 74–116.

68. *See infra* text accompanying notes 71–96.

69. 248 P.2d 922 (Cal. 1952).

70. *Id.* at 926 (citations omitted).

71. *Sandberg*, 226 P. 28 (Cal. Ct. App. 1924).

72. *Id.* at 29.



in the wrongful death action, but the jury was instructed to determine the pecuniary loss suffered by both the plaintiff and his wife, the mother of the child.<sup>73</sup> In its original opinion in the case, the California court of appeal held that the jury instruction was proper because the recovery would be community property, in which the mother had an interest, although the property was subject to the management of her husband.<sup>74</sup>

The defendant filed a petition for rehearing, renewing its argument that the jury should have been permitted to consider only damages to the husband caused by the child's death, but on a new and quite extraordinary theory.<sup>75</sup> The rehearing petition conceded that the wrongful death *cause of action* was community property.<sup>76</sup> Notwithstanding this, the defendant argued that Section 376, as worded at the time of the tort, made the *damages* awarded to the plaintiff father his separate property.<sup>77</sup> Dealing with recovery for the wrongful death of a minor child, the defendant contended, Section 376 was "based upon the common law, not the civil law."<sup>78</sup> Since the statute addressed "the common law remedies of a parent, . . . the legislature could not in reason be supposed to have had the question of community property in mind."<sup>79</sup> Thus, the father's recovery in *Sandberg* was said to be English common law separate property even though the cause of action was community property.

Not surprisingly, the court of appeal rejected this contention. In its opinion denying the petition for rehearing, the court quoted the following language of then Section 376 of the California Code of Civil Procedure:<sup>80</sup>

A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a *minor* child, and a guardian for the injury or death of his ward, *when such injury or death is caused by the wrongful act or neglect of another.*<sup>81</sup>

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73. *Id.* at 32.

74. *Id.* (citing *Keena v. United R.Rs. of S.F.*, 207 P. 35 (Cal. Ct. App. 1922)). *See supra* text accompanying notes 61–64.

75. *Sandberg*, 226 P. at 32–33.

76. "It is quite true that the father's right of action for damages is community property (C.C. 164). So is the right of action of the mother (same section)." Appellants' Petition for a Rehearing at 13, *Sandberg v. McGilvray-Raymond Granite Co.*, 226 P. 28 (Cal. Ct. App. 1924) (No. 2707). At this time Section 164 of the California Civil Code defined community property. CAL. CIV. CODE § 164 (1872) (current versions at CAL. FAM. CODE §§ 700, 760, 803 (2004)).

77. Appellants' Petition for Rehearing, *supra* note 76, at 13.

78. *Id.* Apparently, the defendant forgot that "the right of action for wrongful death, not having existed in the common law, is unqualifiedly statutory." *Bayer v. Suttle*, 100 Cal. Rptr. 212, 214 (Ct. App. 1972) (internal quotations omitted).

79. Appellants' Petition for Rehearing, *supra* note 76, at 13–14.

80. CAL. CIV. PROC. CODE § 376 (West 1872).

81. *Sandberg*, 226 P. at 33 (internal quotations omitted).

The intermediate appellate court conceded that it would be reasonable to hold that words of Section 376 “in so far as they relate to parties plaintiff, were intended to affect the procedure merely”<sup>82</sup> and would not implicitly classify the damages recovered as community property—a substantive rather than a procedural matter. The court might have added that the Civil Code contained the statutes dealing with the classification of marital acquisitions as community or separate property,<sup>83</sup> and that one would not have expected the legislature to have inserted into the Code of Civil Procedure substantive rules defining community property. Nevertheless, the court held:

An examination of the provisions of section 376, viewed in the light of the history of the legislation upon the subject-matter embraced therein, discloses a legislative intent to give the marital community a right of action for the death by wrongful act of a minor child. What is recovered in such a case is community property and therefore the husband, who has control of the community property,<sup>84</sup> is authorized to maintain the action. If the community is destroyed by the death or desertion of the husband, then the wife may sue. . . . [S]ection 376, in so far as it authorizes the husband to maintain an action for the death of a minor child, is framed upon the theory of the continuance of the marital community and that the husband is the representative thereof for the purpose of maintaining the action. There was no necessity of joining the wife as a party plaintiff.<sup>85</sup>

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82. *Id.* As stated in *House v. Pacific Greyhound Lines*, 95 P.2d 465, 469 (Cal. Ct. App. 1939), *overruled on another ground by* *Fuentes v. Tucker*, 187 P.2d 752 (Cal. 1947): “The purpose of section 376 of the Code of Civil Procedure was to designate the necessary party plaintiff in order that a defendant might be protected against multiplicity of actions and that a finality of the litigation might be assured.” These are solely procedural purposes for this statute.

83. In 1924 several Civil Code sections could have been cited, including former sections 162, 163, 164, 169, and 687.

84. In California, wives had no management of any community property until 1951 with the enactment of former Civil Code section 171c (enacted by 1951 Cal. Stat. 2860 and repealed in 1983), which gave wives control over their own uncommingled earnings. See William A. Reppy, Jr., *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1053 (1975). By statutes enacted in 1891, 1901, and 1917, the wife did, however, have veto power over the husband’s attempts to make gifts of community property, to encumber or sell community household furnishings, and to convey or encumber community realty. *Id.*

85. *Sandberg*, 226 P. at 33.

## B. Sandberg Was Erroneously Decided

### 1. Section 376 of the California Code of Civil Procedure Dealt Only with Procedural Matters

The notion that, under Section 376, when a child of the marriage was tortiously killed, the father/husband alone was the proper plaintiff meant that recovery would be community property, subject at the time to his exclusive management, may have had some initial appeal; but a closer examination indicates that the theory that the statute includes a directive to classify the recovery as community property is unsound. Suppose the child was killed after the child's parents were divorced based on the wife's adultery.<sup>86</sup> The father had never deserted the mother, and his child (the "family" under Section 376) and was not dead, so Section 376 made him alone the proper plaintiff.<sup>87</sup> Yet, because he was not married to the mother at the time the wrongful death cause of action arose, the recovery could not by any logic be community property, as without a marriage there is no community.

Moreover, if the legislature's designation of the father as the proper plaintiff in certain circumstances evinced an intent to have courts classify the damages recovered in a wrongful death suit as community property, then the statute's making the mother the proper plaintiff in all other circumstances must likewise implicitly carry with it an intent regarding classification of the damages she might recover. It seems clear from the *Sandberg* court's comment that the wife is entitled to be the plaintiff only after the community has been "destroyed" that *Sandberg* had concluded the legislative intent in enacting Section 376 was to classify the recovery as the wife's separate property when *she* was the plaintiff.<sup>88</sup> In a situation where the husband deserted his wife and child and days later the child was tortiously killed, there would seem to be serious doubts about the constitutionality of equating the father's desertion of the family to the severing of the husband-father's parental relationship to the child without any hearing to examine the reason for such desertion.<sup>89</sup> *Sandberg* implies that, because the mother is made the

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86. In 1939, Section 376 was amended to delete reference to the father's desertion of his wife and to provide instead that the action for wrongful death of a minor child should be brought by the "father of a minor, or if the father is dead *or the parents of said minor are living separate or apart and the mother of the minor then has care or custody of said minor*, then the mother . . ." 1939 Cal. Stat. 1759 (emphasis added). *Wexler v. City of Los Angeles*, 243 P.2d 868, 872 (Cal. Ct. App. 1952), assumed that the reference to parents "living separate or apart" included parents who had been divorced before the death of the minor child. Notwithstanding *Wexler's* creative holding, it seems impossible that the pre-1939 language of Section 376 referring to desertion of the husband could have been construed to include the situation where the parents were divorced at the time of the tort although the husband had never deserted the wife.

87. See CIV. § 376.

88. *Sandberg*, 226 P. at 33.

89. See *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). These cases establish that even a biological father who was never married to the mother has a

plaintiff, any recovery is her separate property, and the father has suffered no loss from the death of his child—a forfeiture similar to a decree cutting off his paternal rights. Courts decline to give an interpretation to a statute that renders it unconstitutional or even raises grave doubts concerning its constitutionality, when the wording thereof does not demand such an interpretation.<sup>90</sup> Certainly Section 376 as worded in 1924 was susceptible to the interpretation that it dealt solely with procedural issues and did not extend to substantive definitions of community and separate property.<sup>91</sup>

## 2. *Sandberg* Misunderstood the Living-Apart Doctrine

The *Sandberg* court was also just wrong in stating that desertion by the husband destroyed the community.<sup>92</sup> Even assuming the desertion referred to in Section 376 as worded in 1924 was a desertion the husband intended to be a permanent, “complete and final break in the marital relationship”<sup>93</sup> so

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relationship interest with their non-marital child with whom he has established a parental relationship, see *Lehr v. Robertson*, 463 U.S. 248 (1983), that is protected by the Fourteenth Amendment of the federal Constitution, at least where no other male has a claim as father. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

90. See *People v. Superior Court*, 917 P.2d 628, 633 (Cal. 1996) (quoting *Miller v. Mun. Court*, 142 P.2d 297, 303 (Cal. 1943)):

“If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.”

*Accord Jones v. United States*, 529 U.S. 848, 857 (2000) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”) The Court in *Jones* was quoting *United States ex rel. Att’y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909).

91. See discussion *supra* pp. 881–82.

92. *Sandberg*, 226 P. at 33.

93. *Baragry v. Baragry (In re Marriage of Baragry)*, 140 Cal. Rptr. 779, 781 (Ct. App. 1977) (construing “living separate and apart” in former section 5118 of the California Civil Code, the successor to Civil Code section 169, the living-apart statute enacted in 1872 and in effect in 1924 when *Sandberg* was decided). Today the living-apart statute, Family Code section 771, is gender neutral so that the husband’s earnings—not just those of the wife as under the statute in effect in 1924—during such a period of separation are separate property. *Bouquet v. Bouquet (In re Marriage of Bouquet)*, 546 P.2d 1371, 1378 (Cal. 1976), held that the version of the statute in effect in 1924 that benefitted only the wife was “patently unfair” due to gender discrimination and permitted application of the gender-neutral version of the statute in effect at the time of divorce in *Bouquet* to the husband’s acquisitions while living separate and apart from the wife and prior to enactment of the gender-neutral text, resulting in the wife being stripped of her community interest in such earnings, an outcome that the *Bouquet* court considered to involve retroactive application of the gender-neutral statute. Note also that, at the time of the death of their child due to a tortfeasor’s negligence, the parents, husband and wife, could be living separate and apart, each believing their

that a court would hold that the couple were “living separate” under the text of former California Civil Code section 169, then in effect,<sup>94</sup> the legal result would have been that the wife’s earnings and accumulations were her separate property, while those of the husband acquired while living separate and apart from her were community property<sup>95</sup> in which the wife had an interest, precluding any conclusion that the community had been “destroyed” or otherwise had ceased to exist.<sup>96</sup>

### C. A 1950 Decision Implicitly Rejects Sandberg

*Christiana v. Rose*,<sup>97</sup> a 1950 decision by the California court of appeal, is inconsistent with *Sandberg*’s suggestion that, if Section 376 names the mother as the appropriate plaintiff for a suit arising from the wrongful death of a minor child, all recovery must be her separate property and there can be no community property recovery based on damages suffered by the father/husband. The cause of action in *Christiana* arose after a 1939 amendment to Section 376 deleted reference to desertion of the family by the father and provided instead that the mother was the proper plaintiff when

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marriage was completely a dead letter, not due to desertion of the husband but rather by agreement of the spouses, perhaps an agreement following the wife’s initial suggestion that they should permanently separate (perhaps for religious reasons they also agreed not to divorce). Under the passage from *Sandberg* quoted in text, there being no desertion by, or death of, the father, he would be the proper plaintiff to sue, and all the recovery would be community property, depriving the wife of her claim under section 169 of the California Civil Code, as worded in 1924, that damages she suffered should be her separate property. Since *Sandberg* looked to section 376 of the California Code of Civil Procedure for legislative direction concerning classification of a wrongful death recovery, the wife’s invoking of section 169 of the Civil Code would have had to have been rejected. *Id.* See also *Espinosa v. Haslam*, 47 P.2d 479, 480 (Cal. Ct. App. 1935), where the husband and wife separated and the husband provided a home for his son, who decided at age eighteen to leave his father and move in with his mother, with whom he was living when at age twenty he was tortiously killed (having the status of a minor child under California law at this time). The court held that the father was entitled to sue for wrongful death under Section 376 because he had provided a home and support for the son, and thus there had been no “desertion of his family” (the Section 376 language) by the father. Under *Sandberg*, all the recovery would be community property even though the wife was living separate and apart from the husband and would be invoking (without success) Civil Code section 169.

94. As enacted in 1872, section 169 of the California Civil Code in 1922 provided: “The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.” Current version at CAL. FAM. CODE § 771 (West 2004).

95. See *Randolph v. Randolph*, 258 P.2d 547, 548 (Cal. Ct. App. 1953); see also *Brown v. Brown*, 147 P. 1168, 1169–70 (Cal. 1915) (husband’s earnings during pendency of divorce action were community property).

96. See *supra* text accompanying note 85. Even under the present gender-neutral living apart statute, section 771 of the California Family Code, the community is not “destroyed” even though earnings and accumulations of each spouse after the separation are the separate property of each acquiring party. Pre-separation community capital remains community property and will produce community-owned dividends, interest, and rentals. Such acquisitions are not the “accumulations” of either the separated husband or the separated wife but rather are the fruits of the community capital.

97. 222 P.2d 891 (Cal. Ct. App. 1950).

“the parents of said [deceased] minor are living separate or apart and the mother of the minor then has care or custody of said minor,”<sup>98</sup> as was the fact pattern in *Christiana*.<sup>99</sup> While an action to dissolve her marriage was pending, the wife sued the tortfeasor for wrongful death of the child of the marriage, proved only her own damages, and obtained a judgment upon which she collected.<sup>100</sup> After the divorce became final—it made no division of any community property—the father sued the ex-wife for half of the damages she had collected on the ground they were community property not distributed at their divorce, so that he owned half as a tenant in common.<sup>101</sup>

The court held<sup>102</sup> that Section 376 gave the wife standing to sue as heir<sup>103</sup> and that former California Civil Code section 169, the living-apart statute, made her recovery separate property,<sup>104</sup> and it stressed that her proof of damages at trial dealt solely with loss to her and not with loss suffered by the father.<sup>105</sup> Nevertheless, the court said that the father “could, and perhaps

98. 1939 Cal. Stat. 1759.

99. *Christiana*, 222 P.2d at 892.

100. *Id.* at 892–93.

101. *Id.* at 893.

102. The court declared that its theory that the wife’s recovery was her separate property was actually an “alternative” holding and that it was also affirming the judgment that the father take nothing in his action against the ex-wife on the trial court’s reasoning that her recovery had been community property and that the father was estopped by his actions during the prior divorce trial from claiming a former community interest. *Id.* at 892–96. Obviously, the recovery cannot be both separate property and community property, so one of the so-called alternative holdings has to be legally wrong. *Christiana* has been subsequently cited for the holding that the wife’s recovery was separate property as an “accumulation[]” under the living-apart statute, now codified at section 771 of the California Family Code. *Wall v. Wall (In re Marriage of Wall)*, 105 Cal. Rptr. 201, 203 (1972). Courts should ignore the portion of *Christiana* that assumed a separated wife’s recovery in the 1940s for wrongful death of a child of hers and her husband’s could be community property due to Section 376.

103. *Christiana*, 222 P.2d at 895.

104. *Id.* at 897.

105. *Id.* at 896. The mother ought to have been able to prove that the deceased child had regularly given substantial gifts each year jointly to her and her husband—his father. A gift to a cohabiting husband and wife in equal shares is probably community property under California law. *See Gonzales v. Gonzales (In re Marriage of Gonzales)*, 172 Cal. Rptr. 179, 182–84 (Ct. App. 1981); *see also Fuller v. Ferguson*, 26 Cal. 546, 565–66 (1864) (stating, in a discussion of Mexican law in effect in California before it was acquired by the United States that a lucrative acquisition by husband and wife jointly during marriage is community property); *Scott v. Ward*, 13 Cal. 458, 469 (1859) (also discussing Spanish and Mexican law in effect, which required that “property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title . . . belong[s] to the community”). The influential Washington case so holding, *In re Estate of Salvini*, 397 P.2d 811, 814 (Wash. 1964), should be persuasive. *But see Andrews v. Andrews*, 186 P.2d 744, 748 (Cal. Ct. App. 1947) (finding that a gift during marriage by the husband’s aunt to the husband and wife was held in tenancy in common. But the issue litigated was not whether it was community property as opposed to tenancy in common property owned in equal shares, but whether both spouses were the donee or just the husband alone). If the trier of fact in

should, have been joined as a plaintiff or defendant in the wrongful death action.”<sup>106</sup> Under section 169 as then worded, had he been made a party and proved his own loss arising out of the death of his child, the father’s recovery would have been community property. This is inconsistent with the apparent teaching of *Sandberg* that, in a fact situation where Section 376 declares the mother as a proper plaintiff, that designation carries with it the rule that all recovery is her separate property.<sup>107</sup>

#### D. Statutory Changes Abrogated the Sandberg Holding

*Sandberg* was an erroneous decision. Although it was twice cited by the California Supreme Court without explanation as to why,<sup>108</sup> it seems likely that the supreme court was approving merely the result—that the damages recovered there by the father-husband for wrongful death of a minor child, occurring when the spouses were not living separate and apart were community property—and that the supreme court did not intend to approve *Sandberg*’s reasoning that Section 376 as worded in 1924 contained provisions classifying wrongful death recoveries by married persons as community or separate property.<sup>109</sup> Surely approval of no more than the result in *Sandberg* was the basis for the California Supreme Court’s first citation of that case in *Fuentes v. Tucker*<sup>110</sup> because that citation was coupled with one to *Keena*, where the reasoning behind the community property classification—resting on the Civil Code sections defining community and separate property, and not on Code of Civil Procedure Section 376<sup>111</sup>—was inconsistent with the *Sandberg* opinion.<sup>112</sup>

In any event, *Sandberg* surely was legislatively abrogated in 1949, when Section 376 was amended to address only suits based on *injury* to a minor

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*Christiana* were to find by inference that the decedent, had he not been killed, would have continued making such gifts even after his parents separated, half the amount of such future gifts that could not be made due to the tortiously-caused death of the donor child would be the separate property of the plaintiff-mother due to applicability of the living-apart statute (which then benefitted only wives) and would be part of her wrongful death damages. Although she would have had standing to prove the loss of the total gifts that could not be made in order to have her half factored into her damages, she would not have had standing to collect in her wrongful death suit the community one-half of the gift that would have been made post-separation to her husband, as he was the sole manager of the community at the time and the proper plaintiff to recover such a loss.

106. *Christiana*, 222 P.2d at 896. It was subsequently established that in this fact situation, the plaintiff-mother’s failure to join the father as a party to the wrongful death suit gave the father a cause of action for damages against the mother. See *Hall v. Superior Court*, 133 Cal. Rptr. 2d 806, 812 (Ct. App. 2003) (following *Ruttenberg v. Ruttenberg*, 62 Cal. Rptr. 2d 78 (Ct. App. 1997)).

107. See *supra* notes 97–101 and accompanying text.

108. See *supra* text accompanying notes 67, 69–70.

109. See *supra* text accompanying notes 66–70.

110. See *supra* text accompanying note 67.

111. See *supra* text accompanying note 63.

112. See *supra* text accompanying note 66.

child, not death of the child, and former California Code of Civil Procedure section 377 was amended to provide, in the pertinent part:

When the death of a . . . minor person who leaves surviving him either a . . . father or mother . . . is caused by the wrongful act or neglect of another, his heirs . . . may maintain an action for damages against the person causing the death . . . . The respective rights of the heirs in any award shall be determined by the court.<sup>113</sup>

Today, no section of the California Code of Civil Procedure deals specifically with the wrongful death of a minor child. Section 377.60, entitled “Persons with standing,” says that when a relative has been tortiously killed, an action for wrongful death “may be asserted” by the decedent’s intestate heirs if the decedent leaves no issue.<sup>114</sup> Section 377.61 is, today, similar to the final sentence quoted from the 1949 revision: “The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.”<sup>115</sup> If the plaintiff is a married person and the issue arises as to whether the recovery is community or separate property or both, this statute should be viewed as referring the court to the Family Code provisions defining separate and community property<sup>116</sup> and to judicial decisions dealing with principles of tracing marital property through changes in form or to a source associated with the occurrence of a loss.

V. JUDICIAL AND LEGISLATIVE DEPARTURE FROM THE *McFADDEN* RULE  
THAT ALL COMPONENTS OF A PERSONAL INJURY RECOVERY BY A  
NON-SEPARATED MARRIED PERSON MUST BE COMMUNITY PROPERTY

A. *The Nevada Supreme Court Rejects McFadden’s Limitation on Tracing*

The first judicial departure from the rule of California’s *McFadden* decision that a damages award based on personal injuries to a married person could be traced to the cause of action on which it was based, but not further back as, for example, to the body of the spouse that was damaged, came from the Nevada Supreme Court in 1940. In *Fredrickson & Watson Construction Co. v. Boyd*,<sup>117</sup> the trial court had refused to instruct the jury in a wife’s personal injury case that her husband’s contributory negligence

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113. 1949 Cal. Stat. 2401–02.

114. CAL. CIV. PROC. CODE § 377.60 (West 2004).

115. *Id.* § 377.61.

116. *See* CAL. FAM. CODE §§ 760, 770 (West 2004).

117. 102 P.2d 627 (Nev. 1940).



could be imputed to her, and the Nevada Supreme Court said it should have been so instructed if her recovery was community property.<sup>118</sup>

But the Nevada Supreme Court held that trial court did not err because the damages to be recovered by the wife would be her separate property.<sup>119</sup> “[T]he judgment takes its character from the right violated, namely, the right of personal security.”<sup>120</sup> The court stressed that this “said right, the wife brings to the marriage.”<sup>121</sup>

*B. California Courts Consider the Nevada Approach to Classification of Personal Injury Damages Recovered by a Married Person*

In 1947, one dissenting justice on the California Supreme Court adopted the Nevada Supreme Court’s holding in *Fredrickson*, as applied to damages awarded a married person for pain, suffering, and disfigurement.<sup>122</sup> This

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118. *Id.* at 628.

119. *Id.*

120. *Id.* at 629.

121. *Id.* The court also quoted from GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY ¶ 398, at 296 (2d ed. 1925), which had asserted that the husband does not “‘hold the wife’s right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife’s physical pain and suffering are not his loss nor the loss of the community.’” *Fredrickson*, 102 P.2d at 629 (emphasis added); see also *supra* note 54. The Nevada Supreme Court’s use of this quotation suggests that the damages to the wife in *Fredrickson* consisted only of compensation for pain and suffering and did not extend to lost earnings or even reimbursement for medical bills incurred, as the community would have a claim to those components under McKay’s analysis. Nevertheless the Nevada Supreme Court declared without express qualification that “the judgment and proceeds flowing therefrom” were the wife’s separate property. *Fredrickson*, 102 P.2d at 629. In *Choate v. Ransom*, 323 P.2d 700, 702 (Nev. 1958) (emphasis added), the court said *Fredrickson* “held that a recovery by a married person for personal injuries is the separate property of that person.” The Nevada Supreme Court has never considered whether it would follow the lead of subsequent decisions in other states—cited in the next paragraph of this footnote—that classify the lost earnings and medical bill components of the recovery as community property. In 1975 the Nevada legislature amended section 123.130 of the Nevada Revised Statutes to provide in subdivision (1) that “[a]ll property of the wife owned by her before marriage, and that acquired by her afterwards . . . by an award for personal injury damages . . . is her separate property.” Subdivision (2) of this statute makes the same provision for Nevada husbands. Query if the Nevada Supreme Court will view this statute as barring it from holding that so much of the recovery as is based on lost earnings during marriage and on medical bills incurred during marriage should be classified as community property. Recall that Louisiana appellate courts did not feel so restricted by a similar statute enacted in that state. See *supra* notes 51–53 and accompanying text.

Other states followed Nevada in holding that a spouse’s pain and suffering damages should be judicially classified as the victim’s separate property. See *Brown v. Brown (In re Marriage of Brown)*, 675 P.2d 1207 (Wash. 1984); *Jurek v. Jurek*, 606 P.2d 812 (Ariz. 1980); *Rogers v. Yellowstone Park Co.*, 539 P.2d 566 (Idaho 1974); *Soto v. Vandeventer*, 245 P.2d 826 (N.M. 1952).

122. *Zaragosa v. Craven*, 202 P.2d 73, 78 (Cal. 1947) (Carter, J., dissenting); see also *Kesler v. Pabst*, 273 P.2d 257, 260–63 (Cal. 1954) (Carter, J., dissenting).

justice would have overruled the dictate of *McFadden* that the majority in the 1947 case fully approved.<sup>123</sup>

1. Death of the Non-Victim Spouse Held to Make *McFadden* Inapplicable

Five years later, however, in *Flores v. Brown*,<sup>124</sup> the California Supreme Court, without dissent on this point, seemed to concede the illogic of the *McFadden* mandate for classifying not only all the components of a spouse's personal injury recovery as community property, but also his or her recovery for the wrongful death of a minor child. In a single accident, the contributorily negligent husband and a minor child of the marriage were killed and the wife was badly injured.<sup>125</sup> The wife sued the driver of the other vehicle, asserting, inter alia, causes of action for her own personal injuries and for the wrongful death of her minor son.<sup>126</sup> Because the husband's death in the accident had dissolved the marriage and the community, the California Supreme Court held, "[T]he interests in any of these causes of action become separate property, and it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse."<sup>127</sup> Surely the court had in mind at least pain and suffering damages in referring to an "element[]" of the wife's recovery that is as a matter of logic "personal" to her. The "community property system" in California was not based on a universal community, rather, it recognized the existence of separate property during the marriage, and it had been settled that separately owned assets brought to the marriage could produce mutations that were likewise separate based on principles of tracing.<sup>128</sup> Thus, *Flores* made no sense in asserting that the existence of such a "system" made it impossible to "segregate" the pain-and-suffering component of a spouse's personal injury recovery in order to classify it as the victim's separate property except due to

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123. *Zaragoza*, 202 P.2d at 76–77 ("[T]he cause of action for personal injuries suffered by either spouse . . . as well as any recovery therefore, constitutes community property." (citing CAL. CIV. CODE §§ 162–164, 687 (current versions at CAL. FAM. CODE § 780 (West 1992)))).

124. 248 P.2d 922 (Cal. 1952). For a fuller discussion of *Flores*, see William A. Reppy, Jr., *The Effect of the Adoption of Comparative Negligence on California Community Property Law: Has Imputed Negligence Been Revived?*, 28 HASTINGS L.J. 1359, 1366–68 (1977).

125. *Flores*, 248 P.2d at 923.

126. *Id.*

127. *Id.* at 926 (emphasis added).

128. See, e.g., *Dimmick v. Dimmick*, 30 P. 547, 548 (Cal. 1892) (property brought into a marriage may maintain its status as separate property if it can be clearly traced, even if it undergoes mutations); see also *supra* text accompanying notes 46–48.

recognition that precedents like *McFadden* were to be found in the reports of decisions which the court was unwilling to overrule.

With respect to the damages that can be awarded to a spouse or to spouses for the wrongful death of a minor child, the *Flores* court stated: “Damages for wrongful death are the *sum* of those suffered by *each* heir or *parent*.”<sup>129</sup> This seemed to recognize that the damages each parent suffers when both seek an award of damages will not be the same in amount, and thus each claim is based on a personal loss.<sup>130</sup> If so, the award should not be community property, which treats each spouse as co-equal owners of a half interest in each asset so classified.<sup>131</sup>

## 2. Post-Injury Divorce Renders *McFadden* Inapplicable

Four years later, the California Supreme Court’s opinion in *Washington v. Washington*<sup>132</sup> confirmed that *Flores* should be read as expressing disenchantment with the *McFadden* approach to classification. In *Washington* a husband was tortiously injured during marriage but did not obtain a judgment for damages until after divorce. The issue was whether the damages were traceable to a community property cause of action, making the ex-wife co-owner of the damages.<sup>133</sup> The court rejected this view and said:

A rule permitting apportionment of the damages . . . has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the *community interests in the elements that clearly should belong to it*. . . .<sup>[134]</sup> Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may *the personal elements of damage such as past pain and suffering* be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and

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129. *Flores*, 248 P.2d at 927 (emphasis added). For purposes of calculating damages for wrongful death, the quoted passage treats the mother and father of the decedent the same as a son and a daughter of the decedent who might, as “heir[s]” of the decedent, be the plaintiffs in the wrongful death suit. *See id.* It could not be contended that the awards to such a son and daughter would have to be equal in amount.

130. *See id.*

131. *See* CAL. FAM. CODE § 751 (West 1994) (interests of husband and wife in community property are “equal interests”; CAL. FAM. CODE § 1101(a) (West 2002) (each spouse owns an “undivided one-half interest in the community” property)); *People v. Lockett*, 102 Cal. Rptr. 41, 44 (Ct. App. 1972) (wife owns “one half of her husband[’s] . . . earnings”).

132. 302 P.2d 569 (Cal. 1956).

133. *Id.* at 569–70.

134. I suggest the “elements” that the court has in mind here are lost earnings during marriage and cohabitation and reimbursement for medical bills incurred during marriage and cohabitation.

future loss of earnings are clearly attributable to him as a single person following the divorce.<sup>135</sup>

The ex-wife in *Washington* had sued the tort victim, her former husband, seeking a division of the personal injury damages he had recovered after their divorce.<sup>136</sup> Based on the above-quoted passage, she should have had a sound claim to half of the damages recovered by the ex-husband for lost earnings during marriage and to half of his recovery based on medical bills incurred during marriage. But the *Washington* court gave her nothing.<sup>137</sup> It held: “Since we have no rule permitting the apportionment of the elements of a cause of action for personal injuries between the spouses’ separate and community interests and since such a cause of action is not assignable, it must vest in the injured party on the dissolution of the marriage.”<sup>138</sup>

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135. *Id.* at 571 (emphasis added). The holding that divorce converts a personal injury cause of action arising out of a tort occurring when the spouses were cohabiting from community property to the separate property of the victim-spouse is no longer good law. Section 2603 of the California Family Code currently provides that damages for personal injuries “to be received” after divorce are community property if the cause of action arose during marriage and before a permanent separation of the spouses; but, the damages are a special type of community property not subject to the 50-50 division rule at divorce which, instead, may be awarded entirely to the victim-spouse by the divorce court according to guidelines laid out in the statute. CAL. FAM. CODE § 2603 (West 1994); *see also infra* note 148.

The supreme court in the above-quoted text has said that the *Washington* rule that the personal injury cause of action is converted from community property to the victim-spouse’s separate property applies when the marriage is “dissolved” after the injury is suffered but before a judgment awarding damages has been entered. *Washington*, 302 P.2d at 571. The death of the non-victim-spouse would “dissolve” the marriage just as would a divorce decree. The dictum that such a death converts the cause of action to the surviving victim-spouse’s separate property may or may not have been abrogated by the subsequent enactment of section 780 of the California Family Code (quoted *infra* at note 147), which classifies the cause of action as community property if it arose during marriage and while the spouses were cohabiting. CAL. FAM. CODE § 780 (West 1994). Section 780 contains no qualifying language indicating that the legislature thought about how long the community classification it mandated should endure and whether courts would have the power to terminate the community classification that section 780 initially attaches to the cause of action based on subsequent events, such as death of the non-victim-spouse. *Id.*

136. *Washington*, 302 P.2d at 569.

137. *Id.* This was not based on the theory that she waived the claim by not asking the divorce court to award her a community interest in the husband’s post-divorce recovery. *Id.* at 571. The *Washington* court indicated that the wife ought to have asked for an alimony award at divorce to make up for her being cut out of the tort award to the husband as his separate property for his lost earnings during marriage. *Id.*

138. *Id.* Query if the court would have been willing to classify the cause of action as 100% the separate property of the victim-husband if analysis of the basis for his tort claim recovery made it clear that only five percent of the total damages awarded were for pain and suffering and the great bulk of the award was based on evidence of a major loss of earnings prior to divorce and extensive medical bills paid before the divorce. *Washington* arose at a time that the living-separate-and-apart statute did not apply to husbands. *See supra* notes 94–95 and accompanying text.

It is important to recall that the strange judicially-imposed legal barrier to apportionment does not apply when the recovery is not for personal injuries but for wrongful death of a relative. By statute, “[a] cause of action”<sup>139</sup> can be asserted in one lawsuit by multiple relatives, such as by the decedent’s spouse along with multiple children of the decedent.<sup>140</sup> Although all the heirs must assert their claims in a single lawsuit, those claims are not equal in value.<sup>141</sup> California Code of Civil Procedure section 377.61<sup>142</sup> directs the wrongful death court to apportion the damages into appropriate shares for each co-plaintiff, a rule that would apply when the plaintiffs were husband and wife, the parents of the decedent.

### C. *McFadden Is Legislatively Abrogated*

A year after *Washington*, the California legislature enacted former Civil Code section 163.5, which provided: “All *damages*, special and general, awarded a married person in a civil action *for personal injuries*, are the separate property of such married person.”<sup>143</sup> From 1960 to 1968, the California courts of appeal three times construed “personal injuries” in this statute as not extending to damages sought by a married parent for wrongful death of a child.<sup>144</sup> The second of these decisions stated that in section 163.5

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139. This term is used in section 377.60 of the California Code of Civil Procedure, but the concept is more technical than that suggests. CAL. CIV. PROC. CODE § 377.60 (West 2005). For some purposes, such as calculating the statute of limitations separately for each heir entitled to sue, the cases view each heir as having a distinct cause of action. See *Cross v. Pac. Gas & Electric Co.*, 388 P.2d 353, 354 (Cal. 1964) (viewing each heir as having a distinct cause of action). But the heirs must sue together, and the damage awarded by the jury must be in a lump sum even though multiple heirs each make proof of losses pertaining only to the heir submitting such evidence. *E.g.*, *San Diego Gas & Electric Co. v. Superior Court*, 53 Cal. Rptr. 3d 722, 726 (Ct. App. 2007).

140. CIV. PROC. § 377.60(a).

141. See, *e.g.*, *Corder v. Corder*, 161 P.3d 172 (Cal. 2007) (affirming division of wrongful death settlement under section 377.61 of the California Code of Civil Procedure that accorded ten percent to decedent’s wife and ninety percent to decedent’s daughter); *Cate v. Fresno Traction Co.*, 2 P.2d 364 (Cal. 1931) (\$1 to decedent’s estranged husband, \$5000 to each of her four children—apportioned under former section 377 of the California Code of Civil Procedure); *Bartolozzi v. Mallegni (In re Riccomi’s Estate)*, 197 P. 97 (Cal. 1921) (15/16 to wife, 1/16 to mother, although both were heirs to half of decedent’s intestate estate—divided under former section 377).

142. Section 377.61 provides:

In an action under this article [concerning wrongful death suits], damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34 [governing damages the decedent suffered before dying]. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

143. 1957 Cal. Stat. 4066 (emphasis added).

144. *Casas v. Maulhardt Buick, Inc.*, 66 Cal. Rptr. 44, 51 n.6 (Ct. App. 1968); *Premo v. Grigg*, 46 Cal. Rptr. 683, 688 (Ct. App. 1965); *Cervantes v. Maco Gas Co.*, 2 Cal. Rptr. 75, 78 (Ct. App. 1960). In each case, alleged contributory negligence of one of the parents of the decedent was an issue, and each court held the defense could be asserted because the damages recovered by the non-negligent spouse/parent would be community property.

“[t]he Legislature did not mention damage suffered by the spouses as parents from the wrongful death of a child.”<sup>145</sup>

*D. The Legislature Revives McFadden for Specific Fact Situations*

Section 163.5 was repealed in 1969,<sup>146</sup> superseded by former Civil Code section 4800, applicable only at divorce, which provided in the pertinent part:

Community property personal injury damages shall be assigned to the party who suffered the injuries unless the court . . . determines that the interests of justice require another disposition . . . . As used in this section, “community property personal injury damages” means all money or other property received by a married person as community property<sup>[147]</sup> in satisfaction of a judgment for damages

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145. *Premo*, 46 Cal. Rptr. at 688.

146. 1969 Cal. Stat. 3313.

147. “[R]eceived . . . as community property” indicates the legislature thought that with its repeal of section 163.5 the California courts would revert to *McFadden* and resume classifying all elements of personal injury damages—where the injury occurred during marriage and before a final separation—as community property. However, the language in the statute did not compel such a result, and the courts could have adopted the nation-wide majority rule that, while damages for lost earnings during marriage and medical bills arising during marriage were community property, pain and suffering damages were the victim-spouse’s separate property. That approach recognizes some personal injury damages that are community property and would not have rendered the new section 4800 inoperable. The present statute concerning division at divorce of personal injury damages, Family Code section 2603, does not defer to the courts to classify the components of a recovery but defines the property that is to be divided in the same manner as under former section 4800 as

all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person’s personal injuries or pursuant to an agreement for the settlement or compromise of a claim for the damages, if the cause of action for the damages arose during the marriage . . . [and before separation].

CAL. FAM. CODE § 2603 (West 2006). “All money” would have to include the pain and suffering component of an award of damages. Thus, as of 1994, a statute precludes the California Supreme Court from overruling *McFadden* and its ilk by providing that the pain and suffering component of a recovery of damages for personal injuries is the victim-spouse’s separate property. *See* 1992 Cal. Stat. 490. In Part 2 of Division 4 of the Family Code, entitled “Characterization of Marital Property,” section 780 of the California Family Code provides:

Except as provided in Section 781 [dealing with injuries suffered by a spouse living separate and apart from the other spouse] and subject to the rules of allocation set forth in Section 2603, money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage.

for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages . . . .<sup>148</sup>

The term “personal injury damages” in the 1969 statute is almost identical to “damages . . . for personal injuries” in section 163.5, which had been repeatedly construed to exclude damages for wrongful death recovered by a married person.<sup>149</sup> This made the following rule applicable: “[w]here . . . legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, [courts] presume that the Legislature intended the same construction, unless a contrary intent clearly appears.”<sup>150</sup> That is, the new 1969 statute did not deal at all with wrongful death damages.

With slight linguistic modification,<sup>151</sup> the 1969 law remains in effect today as Family Code section 2603<sup>152</sup> and still applies only at divorce. Section 2603 compels the divorce courts to refer to personal injury damages as community property. However, due to a presumption in section 2603 that the victim-spouse be awarded such assets, the courts do not treat such funds as true community property which must be divided 50-50 between wife and

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148. 1969 Cal. Stat. 3333. This part of former section 4800 of the California Civil Code was renumbered as subsection (c) of the statute in 1970. 1970 Cal. Stat. 1726.

149. “Community property personal injury damages” was converted into “community estate personal injury damages” when section 2603 of the California Family Code became effective in 1994. 1992 Cal. Stat. 533. As used in statutes in the Family Code, “Community estate includes both community property and quasi-community property.” CAL. FAM. CODE § 63 (internal quotations omitted). An official comment by the California Law Revision Commission to section 2603 indicates the change was not substantive: “In the second sentence of subdivision (b), the former reference to community ‘property’ personal injury damages has been changed to community ‘estate’ personal injury damages for internal consistency.” *Family Code*, 22 CLRC REP. 1, 259 (1992). “Community estate” picks up personal injury damages that are quasi-community property acquired during marriage while the spouses were domiciled in another state before taking up domicile in California. Pre-1994 statutory law concerning quasi-community property would have caused such damages to be treated the same as true community property. See *Addison v. Addison*, 399 P.2d 897 (Cal. 1965), upholding as constitutional and applying California’s second attempt to create a category of quasi-community property in former Civil Code section 140.5, enacted in 1961, and quoted at page 899, note 3. As a result, the trio of 1960 to 1968 decisions (*see supra* note 144 and accompanying text) holding that damages for wrongful death recovered by a spouse were not “personal injuries” of the spouse under former section 163.5 of the California Civil Code, established the scope of “personal injuries” in today’s Family Code section 2603. The courts are therefore free, even at divorce, to classify a spouse’s wrongful death damages as separate property, wholly or in part, in an appropriate case.

150. *Moran v. Murtaugh Miller Meyer & Nelson, LLP*, 152 P.3d 416, 418 (Cal. 2007) (quoting *Doner-Griswold v. See (Estate of Griswold)*, 24 P.3d 1191, 1197–98 (Cal. 2001)); *accord O’Connor v. Vill. Green Owners Ass’n*, 662 P.2d 427, 432 (Cal. 1983) (revision of statute retaining verbatim passage that had been judicially construed “represents a legislative endorsement of [that] interpretation”); *Traverso v. People ex rel. Dep’t of Transp.*, 54 Cal. Rptr. 2d 434, 439 (Ct. App. 1996) (legislative use of identical language that had been judicially interpreted incorporates that interpretation).

151. *See supra* note 149.

152. *See supra* note 147.

husband upon divorce,<sup>153</sup> but treat the funds more like separate property. However, section 2603 will have no bearing on whether the expansion of the doctrine of in-lieu tracing—discussed below—will lead the California Supreme Court to disapprove *Keena* and similar decisions when the issue is classification of wrongful death damages received by a married person.

## VI. DEVELOPMENT OF THE IN-LIEU TRACING THEORY IN CALIFORNIA

### A. *Dictum in a 1908 Decision*

All of the earliest cases applying the theory of in-lieu tracing arose in a context in which direct tracing<sup>154</sup> could have been employed so that the consideration paid for the asset—separate or community—would control its classification, but the court concluded that direct tracing would produce an improper result.<sup>155</sup> In-lieu tracing was first alluded to in confusingly written and fleeting dictum in the 1908 California Supreme Court decision *Nilson v. Sarmant*.<sup>156</sup> The issue was whether a house and lot bought by the husband with community funds had become the wife's separate property when the vendor deeded it to the wife alone.<sup>157</sup> The party claiming the house was

153. CAL. FAM. CODE § 2550 (West 2004).

154. "Direct tracing" is a term used when the source of an acquisition—usually the consideration paid for it—is proved in court and its community or separate nature fixes the separate or community classification of the acquisition. See *Murphy v. Murphy* (Estate of Murphy), 544 P.2d 956, 964 (Cal. 1976) ("direct tracing to a separate property source"); *Stoll v. Stoll* (*In re Marriage of Stoll*), 74 Cal. Rptr. 2d 506, 508 (Ct. App. 1998); *Braud v. Braud* (*In re Marriage of Braud*), 53 Cal. Rptr. 2d 179, 195 (Ct. App. 1996); *Maggio v. Vahldieck* (*In re Estate of Luke*), 240 Cal. Rptr. 84, 91 (Ct. App. 1987).

155. Whenever a court declines to classify an item of property acquired by a married person based on the community or separate character of funds or other property or labor used to acquire the asset but reaches a different classification result by use of in-lieu tracing, a question arises as to whether the marital estate that supplied the consideration should be reimbursed for that contribution (either with or without interest). For example, in *Thigpen v. Thigpen*, 91 So. 2d 12 (La. 1956), the husband owned a fractional share of a building as his separate property and used community funds to insure the building against fire. *Id.* at 22. It burned down, and in-lieu tracing was used to classify the insurance proceeds paid out as the husband's separate property. "It may be," said the court, "that the owners of [the building] are indebted to the community for the amount of these premiums[,] but no claim is made herein for any such reimbursement." *Id.* Grace G. Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1281, 1289–90 (1986) (a generally useful article on the topic of in-lieu tracing), agrees that reimbursement is appropriate in a case like *Thigpen* but would deny it in other situations where the estate paying the consideration for, but getting no ownership interest in, an asset directly traceable to the payment due to a court's use of in-lieu tracing could have benefitted from its outlay under a different fact scenario.

156. 96 P. 315 (Cal. 1908).

157. *Id.* at 315.



separate property argued that the husband was making a gift of the land to his wife as evidenced by terms of the fire insurance coverage—coverage he had also bought with community funds—directing any policy proceeds to be paid to the wife.<sup>158</sup> The court said in response: “If the house and lot, although standing in her name, were not her separate property, the circumstance that insurance money would have been payable to her in the event of loss by fire would not make that money her separate property any more than the burnt house was.”<sup>159</sup> The suggestion seems to be that the insurance proceeds would take on the same classification—community or separate—as the insured property that burned down, even though some aspects of the policy would lead to a different result.

### B. *In-Lieu Tracing in Cases Involving Casualty Insurance*

*Nilson* was cited as an in-lieu tracing authority in *Belmont v. Belmont*<sup>160</sup> which appears to be the first case to base a holding on that theory. A divorce court had classified a \$85,000 promissory note payable to the husband as community property.<sup>161</sup> The husband owned a packing house as his separate property when he married his wife.<sup>162</sup> It burned down, and the intermediate appellate court inferred the husband used fire insurance proceeds to re-establish his packing house business elsewhere.<sup>163</sup> The court declared: “The proceeds of property insurance take the character of the insured property. *Nilson v. Sarment*, 153 Cal. 524, 529, 96 P. 315 . . . .”<sup>164</sup> The husband took the \$85,000 note upon sale of the re-established business.<sup>165</sup> The court of appeal held that by tracing back—through the insurance payment—to his pre-marriage separate property the husband had overcome the presumption that the note acquired during marriage was community property, and the judgment had to be reversed.<sup>166</sup>

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158. *Id.*

159. *Id.* at 317.

160. 10 Cal. Rptr. 227 (Ct. App. 1961).

161. *Id.* at 229.

162. *Id.* at 232.

163. *Id.*

164. *Id.* The court did not mention the likelihood that the husband had used community funds to acquire the fire insurance coverage.

165. *Id.*

166. *Id.* at 233. Just one year later, in *Russell v. Williams*, 374 P.2d 827 (Cal. 1962), the California Supreme Court may have implicitly disapproved of the 1961 *Belmont* decision. In *Russell*, spouses Dorothy and John owned a building in joint tenancy. *Id.* at 828. Dorothy obtained a Nevada divorce, and the court made no order dealing with property issues. John insured the structure against loss by fire, using his separate funds. *Id.* at 829. The structure burned down, and the insurer paid insurance proceeds to John. Dorothy contended that “the moneys paid by the insurance company under the subject policy constituted proceeds of the property that was destroyed and retain the character of that property.” Not so, held the court. The insurance contract was personal to John: “[T]he proceeds of a fire insurance policy are not a substitute for the property” lost.

It is apparent that *Belmont's* tracing of the insurance proceeds to the property damaged rather than to the premiums paid is logical, particularly when one considers that there is little, if any, relationship between the proceeds paid and the premiums paid, but there is a direct relationship between the proceeds paid and the value of the insured item.<sup>167</sup> On the other hand, if the insurance policy is taken out as a form of investment, tracing to the premium[s] paid is appropriate. This Article concludes that at least some components of an award of damages paid by a tortfeasor to a spouse for the wrongful death of a relative, such as his or her child, should be classified as the parent-spouse's separate property.<sup>168</sup> But if that spouse used community funds to make the most recent premium payment<sup>169</sup> on, for example, a

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*Id.* *Belmont* was not referred to. Blumberg, *supra* note 155, at 1281 n.158, says *Russell* is distinguishable from *Belmont* because decisions like *Russell* "do not present any marital property issues." But, since the Nevada divorce court in *Russell*, 374 P.2d at 828–29, "made no provision respecting any property rights of the parties"—one suspects this was an ex parte divorce, the court lacking jurisdictional power to affect property rights—how could the divorce eliminate *Belmont's* having accorded Dorothy the right to trace the insurance proceeds from a policy bought during marriage to the structure burned down, rather than to the consideration paid for the policy, if she had a right arising out of the marriage to invoke in-lieu tracing? That *Russell* apparently establishes that in-lieu tracing does not apply in the context of casualty insurance policy proceeds claimed by spouses has little if any bearing on the applicability of the in-lieu tracing principle to the classification of wrongful death damages received by a married person, given the California Supreme Court's adoption of in-lieu tracing post-*Russell* in classification contexts more closely relates to the wrongful death damages classification dispute than the classification proceeds of a casualty insurance contract. See *infra* text accompanying notes 176–212.

167. For example, a \$50,000 automobile bought with a husband's separate property cash could be totally destroyed in a wreck occurring shortly after he paid \$250 for an initial collision insurance premium with community funds, resulting in a payment from the insurer 200 times more than the sum paid with community funds. In *Jackson v. Jackson (In re Marriage of Jackson)*, 260 Cal. Rptr. 508 (Ct. App. 1989), the spouses used community funds to buy automobile insurance with \$300,000 in uninsured motorist coverage. *Id.* at 509. The wife was then injured in an accident tortiously caused by an uninsured driver, and the insurer paid \$85,000 to the wife's medical providers and \$225,000 to the wife and her attorney. *Id.* At divorce the issue was whether assets bought with the funds paid to the wife by the insurer were ordinary community property subject to 50-50 division, which they would be under direct tracing to the community funds used to pay premiums or were received by the wife in lieu of a tort case settlement that the tortfeasor or his insurer might have made in favor of the wife, since such settlement payments would have been awardable entirely to her at divorce under former section 4800(b)(4) of the California Civil Code (current version at CAL. FAM. CODE § 2603(b) (West 2004)). *Id.* at 511. The court held for the wife under the in-lieu tracing theory, stating: "The fact community funds were used to pay the premiums on the Fireman's policy does not compel a contrary result. . . . [U]ninsured motorist coverage is not an item of protection in most instances which a member of the consuming public consciously seeks out and buys." *Id.* at 512 (internal quotations omitted). In other words, the spouses did not view the premiums as making an investment in uninsured motorist coverage.

168. See *infra* text accompanying notes 250–85.

169. In California, with term insurance each premium paid is viewed as buying a distinct contract, unless the insured has become medically uninsurable—not the case in the hypothetical in the text—so that the separate or community character of previous premium payments is disregarded

\$500,000 term life insurance policy on the same child, proceeds paid upon the death of the child should be traced to the community payment, as that sum is governed by the terms of the investment, and that sum is not related to the actual pecuniary loss suffered by the parent upon his or her child's death.<sup>170</sup>

*C. In-Lieu Tracing Is Applied in Employee-Benefit Cases*

Certain contracts that provide for employee severance benefits constitute another area where California courts use in-lieu tracing, although direct tracing could be used to classify payments made under the contract to a married person as community or separate property (or a bit of both).<sup>171</sup> For example, if severance benefits are provided for in an employment contract made before actual termination of the spouse-employee's job was a consideration, direct tracing is applied, and the court would look to the amount of community and separate labor under the employment contract that earned the benefit.<sup>172</sup> On the other hand, if the right to severance benefit is created in a contract negotiated when the employer was instituting a separation plan and encouraging certain employees to take early retirement, in-lieu tracing is employed to make the classification of benefits, even though prior service (i.e., labor by the employee spouse) is a condition of eligibility to receive the benefit.<sup>173</sup> The payments to the employee are viewed as in lieu of lost earnings he or she incurs while seeking new employment.<sup>174</sup> If the employee taking early retirement is permanently separated from his or her spouse when the benefits are paid so that the

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in classifying the proceeds. See *Elfmont v. Elfmont (In re Marriage of Elfmont)*, 891 P.2d 136, 142 (Cal. 1995); see also *Pritchard v. Logan (In re Estate of Logan)*, 236 Cal. Rptr. 368, 372, 372 n.8 (Ct. App. 1987).

170. The \$500,000 proceeds from the term life insurance policy should be community even if, perchance, the parent-spouse also obtained a \$500,000 wrongful death judgment against the tortfeasor responsible for the death of the child, on which the plaintiff was unable to recover from the judgment-proof and uninsured defendant. In selecting a \$500,000 policy paid for with community funds, the parent-spouse could not have foreseen that such would be the amount of loss resulting from the death of the child, as the timing of that death was completely uncertain. The purpose of buying the policy was primarily investment.

171. See generally *Lehman v. Lehman (In re Marriage of Lehman)*, 955 P.2d 451, 456-59 (Cal. 1998).

172. See, e.g., *Horn v. Horn (In re Marriage of Horn)*, 226 Cal. Rptr. 666 (Ct. App. 1986) (discussing how a severance benefits provision included in union-negotiated employment contract made two years before termination of employee became an issue).

173. See, e.g., *Frahm v. Frahm (In re Marriage of Frahm)*, 53 Cal. Rptr. 2d 31, 35 (Ct. App. 1996) (only employees with one year of service to the employer eligible under the early retirement contract plan); *Lawson v. Lawson (In re Marriage of Lawson)*, 256 Cal. Rptr. 283, 285 (Ct. App. 1989) (amount of severance benefit tied to total period of employment, including time while married); *DeShurley v. DeShurley (In re Marriage of DeShurley)*, 255 Cal. Rptr. 150, 150 (Ct. App. 1989) (same).

174. See *Lawson*, 256 Cal. Rptr. at 288.

living-apart statute applies, the benefits are classified as separate property, although they would not have been paid but for substantial community labor by the employee spouse.<sup>175</sup>

*D. In-Lieu Tracing Appears in Cases Involving Personal Injuries Suffered by Married Persons*

1. *Marriage of Jones*

For purposes of this Article's conclusion concerning classification of wrongful death damages received by a married person, the most significant expansion of the use of in-lieu tracing is into classifying statutory or contractually-promised compensation payments arising out of a married person's suffering personal injuries or otherwise becoming disabled. The first decision to employ in-lieu tracing in this context was *In re Marriage of Jones*,<sup>176</sup> decided by the California Supreme Court in 1975. There the husband entered U.S. military service in 1957, married his wife in 1964, and lost a leg in active duty in Vietnam in 1969.<sup>177</sup> Under a statutory scheme providing for disability pay, the husband's community labor in combat helped him qualify for a disability award<sup>178</sup> tied to his years of service.<sup>179</sup> The California Supreme Court rejected the wife's direct-tracing contention that the award was 5/12 community because it was earned in part by community labor.<sup>180</sup> Rather, employing in-lieu tracing, the court held that the divorcing husband's disability benefits arose from "the personal anguish caused by the permanent disability as well as . . . from his compelled premature military retirement and from diminished ability to compete in the civilian job market."<sup>181</sup>

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175. *See id.*

176. 531 P.2d 420 (Cal. 1975).

177. *Id.* at 421.

178. *Id.* at 422.

179. *Id.* at 423.

180. *Id.*

181. *Id.* at 421. The *Jones* court also declared: "Pain, suffering, disfigurement or the loss of a limb, as here, is the peculiar anguish of the person who suffers it; it can never be wholly shared even by a loving spouse and surely not after the dissolution of a marriage by a departed one." *Id.* at 424. *Jones* also found support for its holding in the statute then in effect in California concerning the classification of personal injuries; the statute looked to marital status at the time of the receipt of monetary damages rather than the time of injury to classify them as community or separate property, with the issue in *Jones* being whether the wife had any interest in disability benefits to be paid post-divorce when the community had ceased to exist. *Id.* The time-of-receipt statute was enacted in 1968 as former section 169.3 of the California Civil Code, 1968 Cal. Stat. 1079, which had been renumbered by 1975, when *Jones* was decided, as Civil Code section 5126, 1969 Cal. Stat. 3342.

## 2. *Marriage of Saslow*

*In re Marriage of Saslow*,<sup>182</sup> decided by the California Supreme Court in 1985, differed from *Jones* in that in *Saslow* the husband's right to receive disability payments was not a benefit automatically attached to his employment status but instead arose out of a private contract he had voluntarily entered into.<sup>183</sup> The husband had used only community funds to obtain the contractual coverage, but that played no controlling role in the court's classification of benefits.<sup>184</sup> The court held that a determination should be made as to whether the husband's intention in entering into the contract was (1) to obtain a replacement for future lost earnings during a period where he would have been working if not disabled or, (2) to obtain a pension supplement for a period of time after he would have retired.<sup>185</sup> If his intent was the latter, the court would employ direct tracing to premiums paid; if the former, under in-lieu tracing, insurance payments received prior to the contemplated age of retirement, when the husband was living separate and apart from his wife and after the divorce, would be his separate property, even though the coverage was purchased with community funds.<sup>186</sup>

## 3. *Marriage of McDonald*

A few months after *Jones*, the 1975 court of appeal decision, *In re Marriage of McDonald*,<sup>187</sup> relied on *Jones*—also a 1975 decision—in applying the in-lieu tracing theory to classify a husband's workers' compensation award as his separate property.<sup>188</sup> The court found that the money paid to the injured worker would replace his lost earnings after

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Effective 1980, the legislature removed the time-of-receipt test from former section 1526 in favor of a time-of-injury analysis. 1979 Cal. Stat. 1971. Although the California Supreme Court has departed from some aspects of *Jones*, as in *Saslow v. Saslow* (*In re Marriage of Saslow*), 710 P.2d 346, 346–49 (Cal. 1985) (noting at page 349, the 1979 revision of former section 5126 of the California Civil Code), *Jones* has been favorably cited post-1980 by both the state supreme court and courts of appeal for its holding that disability benefits are to be classified using the in-lieu tracing approach rather than direct tracing. See, e.g., *Elfmont v. Elfmont* (*In re Marriage of Elfmont*), 891 P.2d 136, 142 (Cal. 1995); *Raphael v. Bloomfield*, 6 Cal. Rptr. 3d 583, 586–87 (Ct. App. 2003). These citations of *Jones* indicate that the judge-made in-lieu tracing approach, and not former section 1526, is now considered to be the basis for the separate property classification in *Jones*.

182. *Saslow*, 710 P.2d 346.

183. *Id.* at 348.

184. *Id.* at 350–52.

185. *Id.* at 351–52. But see *Rossin v. Rossin* (*In re Marriage of Rossin*), 91 Cal. Rptr. 3d 427 (Ct. App. 2009) (holding that the wife's intent in buying a private policy of disability insurance was not to be considered and instead direct tracing to separate funds used to pay premiums controlled classification of benefits where the policy was fully paid for and the wife had begun to receive benefits before marrying the husband).

186. *Saslow*, 710 P.2d at 352.

187. 125 Cal. Rptr. 160 (Ct. App. 1975).

188. *Id.* at 162.

separation from his wife and after divorce and therefore should be classified as his separate property.<sup>189</sup> The *McDonald* court disregarded the likelihood that the injured spouse qualified for an award under the state's statutory no-fault scheme of workers' compensation based on community labor (i.e., direct tracing was eschewed).<sup>190</sup>

#### 4. *Marriage of Fisk*

At the time of the *McDonald* and *Jones* decisions, the California statute dealing with classification of personal injury damages provided that such damages would be the victim-spouse's separate property if *received* after the payee began living separate and apart from his spouse, which was the fact pattern in *McDonald* and *Jones*.<sup>191</sup> Accordingly, the court in *McDonald* did not have to decide whether the workers' compensation award constituted personal injury damages under the statute, because holding that the statute did apply would not have changed the result: both the statute and the judge-made in-lieu tracing theory would classify the award as the husband's separate property.<sup>192</sup> However, between *McDonald* and the date of the husband's injury in the 1992 court of appeal decision *In re Marriage of Fisk*,<sup>193</sup> former Civil Code section 4800(b)(4), the classification statute, was rewritten to provide that a married person's personal injury damages would be community property "if the cause of action for the damages arose during the marriage" and before separation; this abrogated the prior rule that receipt of the damages after separation would require classifying personal injury damages as the separate property of the victim-spouse.<sup>194</sup>

In *Fisk*, the husband suffered an on-the-job injury two years before separation, although the workers' compensation award was paid to him after he began living separate and apart from his wife.<sup>195</sup> The wife argued that the husband's workers' compensation award was, in the language of section 4800(b)(4), "money or other property received . . . by a person in satisfaction of a judgment for damages for his or her personal

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189. *Id.* The court observed that a workers' compensation award "does not . . . include pain and suffering as personal injury damages do," as did the statutory disability pay award in *Jones*, but this difference did not serve as a basis for distinguishing *Jones* and its use of in-lieu tracing. *Id.*

190. *Id.* at 161–62.

191. *Id.* at 160; see *Jones v. Jones (In re Marriage of Jones)*, 531 P.2d 420 (Cal. 1975); 1979 Cal. Stat. 1971.

192. See *McDonald*, 125 Cal. Rptr. at 160.

193. 4 Cal. Rptr. 2d 95 (Ct. App. 1992).

194. This provision was first enacted in 1979 as part of subdivision (c) of section 4800. 1979 Cal. Stat. 1971; see also *Fisk*, 4 Cal. Rptr. 2d at 100 n.4.

195. *Fisk*, 4 Cal. Rptr. 2d at 97.

injuries . . . .”<sup>196</sup> *Fisk* held that a “workers’ compensation permanent disability award is not a satisfaction of judgment for damages in an action at law . . . .”<sup>197</sup> Because it did not include a pain-and-suffering component, the workers’ compensation award differed from a tort judgment based on a plaintiff’s suffering personal injuries.<sup>198</sup> In addition it was “significant” that the statute applied “only to judgments.”<sup>199</sup> That is, the legislature’s choice of the word “judgment” to the exclusion of “award” was deliberate.<sup>200</sup> Since no statute addressed the issue in *Fisk* of classifying workers’ compensation awards, the court held that the judge-made rule of in-lieu tracing was applicable, and the payments were the husband’s separate property.<sup>201</sup>

##### 5. *Raphael v. Bloomfield*

*Raphael v. Bloomfield*<sup>202</sup> expanded on the in-lieu tracing of *Fisk* by apportioning a workers’ compensation award into community and separate property components.<sup>203</sup> In *Raphael*, the wife was permanently disabled by a job-related injury and received a lump sum workers’ compensation award of \$311,859.04 six months before she began living separate and apart from her husband.<sup>204</sup> At divorce, the trial court classified all of the award as community property because the wife received it before separation, and the

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196. *Id.* at 100 n.4 (quoting 1979 Cal. Stat. 1971). The wife also argued in *Fisk* that if the workers’ compensation award was to be classified as the husband’s separate property, the community (and the wife as to half) was entitled to reimbursement for community funds spent on care of the injured husband during the seven months he was unable to work (prior to the receipt of the award), under former California Civil Code section 5126(b). *Id.* This reimbursement claim was legally valid if, in the language of former section 5126(a), the husband’s workers’ compensation award was “money or other property received . . . in satisfaction of a judgment for damages for personal injuries,” the identical language of former section 4800(b)(4) of the California Civil Code. *Id.* The *Fisk* court’s analysis applied to the phrase as used in both sections 4800(b)(4) and 5126(a). *Id.*

197. *Id.*

198. *Id.* at 100. “Moreover,” added the court, “workers’ compensation is awarded without regard to fault.” *Id.* However, that seems not to be a basis for distinguishing such awards from tort judgments based on similar personal injuries. For example, if stored dynamite exploded at a place of business injuring a spouse who was on the job as an employee there as well as a non-employee visitor, both victims could recover for lost wages resulting from their injuries on a no-fault basis—the visitor in a strict liability tort suit in a court of law and the employee under the workers’ compensation statutes via an administrative tribunal. See *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1165 (Cal. 1978) (strict liability in tort originated as a limited concept imposed, “for example, upon keepers of wild animals, or those who handled explosives or other dangerous substances, or who engaged in ultrahazardous activities”).

199. *Fisk*, 4 Cal. Rptr. 2d at 100.

200. See *id.*

201. *Id.* at 100–01.

202. 6 Cal. Rptr. 3d 583 (Ct. App. 2003).

203. *Id.* at 590.

204. *Id.* at 584.

court did not employ in-lieu tracing.<sup>205</sup> The court of appeal reversed, holding that precedents such as *Jones*, *McDonald*, and *Fisk* required it to “examine[] the purpose of the disability payments.”<sup>206</sup> After such an inquiry, the court in *Raphael* stated that “a lump sum permanent disability award received *prior to* separation is the injured spouse’s separate property to the extent it is meant to compensate for the injured spouse’s diminished earning capacity (and/or medical expenses) *after* separation.”<sup>207</sup> The court concluded:

To the extent a portion of the lump sum award represented benefits that, in the absence of wife’s settlement, would have been paid prior to the parties’ separation (i.e., the weekly disability payments she would have received from the time of the settlement until separation), those payments would be community property . . . .<sup>208</sup>

*Raphael* can be explained only if the community got a present, defeasible estate and the wife a future interest (an executory interest). The community or separate “character of property is determined by its status at the time of its acquisition.”<sup>209</sup> In *Raphael* the lump sum award—viewed as a *present interest* in property acquired during marriage and before separation—had to be 100% community property because it was then unknown whether the spouses would separate or divorce or their marriage would terminate by death before all the funds were expended.<sup>210</sup> In essence, *Raphael* holds that, at the time of acquisition, while the community received a present interest, the wife’s separate estate received a future interest—a springing executory interest that would become a present possessory

205. *Id.* at 585.

206. *Id.* at 586.

207. *Id.* at 587; accord *Hatcher v. Hatcher*, 933 P.2d 1222, 1226 (Ariz. Ct. App. 1996) (portion of lump sum workers’ compensation award based on permanent disability received by spouse during marriage viewed as a replacement for post-divorce earnings became separate property at divorce); *Cupp v. Cupp (In re Marriage of Cupp)*, 730 P.2d 870, 872 (Ariz. Ct. App. 1986) (same).

208. *Raphael*, 6 Cal. Rptr. 3d at 590. According to *Ruiz v. Ruiz (In re Marriage of Ruiz)*, 122 Cal. Rptr. 3d 914, 916–17 (Ct. App. 2011), *Raphael* places the burden on the injured spouse of proving how much of a lump sum workers’ compensation award she received is not community property but rather is separate property received in lieu of wages that would have been paid or medical bills that would have been incurred after the spouses permanently separated.

209. *In re Miller*, 187 P.2d 722, 726 (Cal. 1947); see also *Buol v. Buol (In re Marriage of Buol)*, 705 P.2d 354, 357 (Cal. 1985) (“The status of property as community or separate is normally determined at the time of its acquisition.” (quoting *Bouquet v. Bouquet (In re Marriage of Bouquet)*, 546 P.2d 1371, 1376 (Cal. 1976))). *Miller* goes on to say after the quotation in text: “Subsequent changes in the form of the property do not alter its nature as separate or community.” 187 P.2d at 726.

210. See *Raphael*, 6 Cal. Rptr. 3d at 590.



interest,<sup>211</sup> and divest the community estate (which held a fee simple subject to an executory interest), should the wife and husband begin to live separate and apart.<sup>212</sup>

*E. In-Lieu Tracing Should Be Employed in All Tort Recovery Cases Where a Statute Does Not Dictate the Classification Approach*

1. Two Statutes Bar Use of In-Lieu Tracing

The foregoing consideration of the history of classifying personal injury funds received by a married person as separate or community property and

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211. Such a theory is also necessary to explain *Saslow v. Saslow (In re Marriage of Saslow)*, 710 P.2d 346 (Cal. 1985). See *supra* text accompanying notes 182–86. Any present interest in the contract rights against the insurance company issuing the disability policy to the husband there could only be community property at the time the disability insurance contracts were entered into, as no permanent separation of the spouses or termination of their marriage could be predicted at that time. See *Saslow*, 710 P.2d at 357. Under one of the disability insurance contracts acquired by the husband, payments would commence being made to him upon his becoming disabled, would be reduced when he attained age seventy-five, and would continue to be made at the reduced rate until his death. *Id.* at 347–48. On remand from the supreme court, the trial court was to determine at what age the spouses envisioned the husband ceasing work and retiring. *Id.* at 352–53. If that were found to be age sixty-five, the classification of community and separate interests at the time of acquisition of this policy would be as follows: The community received a present interest, which, under the estate system for classifying interests in property, would be a fee simple subject to an executory interest. *Id.* As community property, this present interest would be subject to equal management by the husband and wife, CAL. FAM. CODE § 1100(a) (West 2004), unless the wife agreed contractually to sole management by the husband. The husband’s separate estate received when the disability insurance contract was purchased a future interest in the form of an executory interest that might or might not become possessory. Permanent separation of the spouses after the husband became disabled before age sixty-five—or a divorce or the wife’s death after such disability occurred and before husband was sixty-five—would result, due to application of in-lieu tracing, in the community’s present interest being divested and the husband’s separately-owned executory interest becoming possessory. But when the contract was made, the community estate also received not just a present interest but its own future interest, an executory interest that could divest in whole or in part the separate estate of the husband that became possessory when his executory interest was converted into a present interest. Because the spouses agreed to buy a flow of funds to be paid after the husband became sixty-five—the date on which the spouses thought he would retire—the law would treat the spouses as acquiring a supplemental pension to be paid to him beginning on his sixty-fifth birthday. See *Saslow*, 710 P.2d at 357. These benefits would be classified by direct tracing, not in-lieu tracing. If only community funds had been paid to the insurance company, the flow of money paid after the husband became sixty-five would be community property, even though the spouses were permanently separated, due to direct tracing. If the husband turned sixty-five after a divorce, the flow of money thereafter would be former community property owned by the ex-spouses in tenancy in common unless the divorce court had specifically dealt with this potential flow of money in which the community had an interest under direct tracing. The ex-wife’s tenancy in common interest would be subject to her sole management (unless, again, she had waived management powers by joining in the disability insurance contract as a party to waive management power). If the ex-husband became sixty-five after his marriage ended by his wife’s death, he might own the flow of money as tenant in common with the wife’s legatee under her will.

212. Under in-lieu tracing theory, if at the time of such a final separation some medical bills arising out of the wife’s injury remained unpaid, the community ought not to be divested of sufficient funds to pay such bills.

of the development of in-lieu tracing in the classification of such funds establishes the following: (1) The California Supreme Court realizes that classifying 100% of a married person's personal injury recovery as community property is quite illogical, as some of the funds compensate for harm that is personal in nature, such as pain and suffering.<sup>213</sup> But, (2) two statutes, Family Code section 2603, applicable at divorce, and section 780, applicable during marriage, apparently<sup>214</sup> will be viewed as legislative barriers to correcting the illogical classification with respect to "personal injury damages." Notably, however, (3) that statutory term is narrowly interpreted.<sup>215</sup> (4) In-lieu tracing will be applied if a married person has received funds to compensate for personal injuries and neither of these two statutes applies where the funds are traceable either to a disability insurance policy or to an award by a workers' compensation tribunal. Then, (5) the lump sum will be broken down into component parts (6) with some classified as community property and some as the victim-spouse's separate property, as was done in *Raphael*, the 2003 workers' compensation case.<sup>216</sup>

Workers' compensation awards are based on strict liability theory.<sup>217</sup> A wrongful death cause of action is statutory and usually sounds in negligence,<sup>218</sup> although recovery has been granted on a strict liability theory.<sup>219</sup> But when the issue is whether in-lieu tracing is appropriate, the

213. See *supra* text accompanying notes 124–29, 132–35.

214. Recall that courts in Louisiana and Texas, dealing with statutes that on their face seemed to require classification of all or some components of a spouse's recovery of personal injury damages as the victim's separate property, concluded that the statutes did not bar them from classifying certain components as community property by use of the judge-made in-lieu tracing theory. See *supra* notes 52–53 and accompanying text. I think it unlikely that a California court would undercut a clear legislative directive as has happened in Louisiana and Texas.

215. See *supra* text accompanying notes 146–50; see also *supra* text accompanying notes 196–200. On the other hand, *Klug v. Klug (In re Marriage of Klug)*, 31 Cal. Rptr. 3d 327, 332 (Ct. App. 2005), construed the term damages for "personal injuries" as used in section 781 of the California Family Code (companion statute to section 780, which *Klug* necessarily would have construed similarly) and section 2603 very broadly. Damages for "personal injuries" as used in these statutes was held to embrace a wife's recovery of money damages based on a legal malpractice claim against her attorney, who had assisted her husband in secretly hiding \$2 million worth of community property assets in offshore accounts! *Id.* at 337. Surely such an interpretation of "personal injuries" is untenable.

216. *Raphael v. Bloomfield*, 6 Cal. Rptr. 3d 583 (Ct. App. 2003), discussed *supra* in text accompanying notes 202–12.

217. See, e.g., *Bell v. Indus. Vangas, Inc.*, 637 P.2d 266, 272 (Cal. 1981).

218. See, e.g., *Helling v. Lew*, 104 Cal. Rptr. 789 (Ct. App. 1972).

219. The term "wrongful act" in what is now section 377.60 of the California Code of Civil Procedure (West 2004 & Supp. 2011), which defines the California wrongful death action, is construed to mean any tortious act, so that the wrongful death plaintiff can base his or her claim on a theory of strict liability in tort, thereby not having to prove fault by the defendant. See, e.g., *Barrett*

fact that most wrongful death cases involve negligence seems to provide no sound basis for distinguishing *Raphael*'s use of in-lieu tracing<sup>220</sup> to classify personal injury damages arising out of a statutorily based claim (workers' compensation) based on no-fault principles. Note, too, the similarity that in both wrongful death and workers' compensation claims, damages do not include a pain and suffering component.<sup>221</sup>

## 2. *Keena* Can Be Overturned by the Court of Appeal

It follows, then, that *Keena* is truly ripe for judicial abrogation, insofar as it bars tracing a wrongful death cause of action to the type of loss the damages are intended to compensate.<sup>222</sup> The California Supreme Court should disapprove the entire line of *Keena*-based precedents. Moreover, because "there is no horizontal stare decisis in the California Court of Appeal,"<sup>223</sup> it appears that each court of appeal in the state is authorized to jettison these precedents without waiting for the California Supreme Court to do so.<sup>224</sup> Although the California Supreme Court did indicate approval of *Keena*'s result by appending an "Opinion of the Supreme Court Denying Hearing" to the court of appeal opinion,<sup>225</sup> because it did not grant a hearing, the opinion is not supreme court precedent.<sup>226</sup> Moreover, the opinion was not published in the California Reports, which collect precedents of the California Supreme Court, but in the California Appellate Reports, where decisions of the courts of appeal appear.

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v. Superior Court, 272 Cal. Rptr. 304, 307 (Ct. App. 1990) (strict liability for death caused by defective product, a piece of earth-moving equipment).

220. *Raphael*, 6 Cal. Rptr. 3d at 590.

221. See *supra* note 198; see also *infra* note 249 and accompanying text.

222. For a discussion of *Keena*, see *supra* Part III.A.

223. *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d 506, 510 (Ct. App. 2008); accord *Jessen v. Mentor Corp.*, 71 Cal. Rptr. 3d 714, 721 (Ct. App. 2008) (court not bound by contrary decision of different division within the Second District); *McCallum v. McCallum*, 235 Cal. Rptr. 396, 400 n.4 (Ct. App. 1987) (court of appeal not bound to follow decision out of a different district); 9 WITKIN, CALIFORNIA PROCEDURE § 498, at 558–60 (5th ed. 2008).

224. The technical terminology of the process is this: The California Supreme Court would "disapprove" these cases. If Division One of the First Appellate District, which decided *Keena*, were to clean up the law in this area, it would "overrule" *Keena* and "decline to follow," due to erroneous reasoning, decisions of other courts of appeal. See, e.g., *supra* note 65 (cases holding in accordance with *Keena* that 100% of a wrongful death recovery received by a spouse had to be community property because tracing beyond the accrual of the cause of action was not allowed).

225. See *supra* note 63 and accompanying text.

226. See *Thompson v. Dep't of Corr.*, 18 P.3d 1198, 1202 (Cal. 2001) (dealing with an order to stay execution of a death sentence made without granting a hearing, where the court declared: "[U]nlike our decisions rendered after granting review, hearing oral argument, and preparing a written opinion, our minute orders are not binding precedent."); see also Leonard Donald Dungan, Comment, *Courts: Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying a Hearing After Judgment*, 28 CALIF. L. REV. 81, 87 (1939) ("The statements of the court [in denying a hearing] that it approves . . . of part of the opinion below seem to be no more than dicta . . .").

Additionally, the California Supreme Court's statement in *Flores v. Brown* that a spouse's recovery for wrongful death is community property<sup>227</sup> is clearly dictum and not binding on the courts of appeal, as the *Flores* holding was that after a marriage is dissolved by death, the cause of action in the surviving parent is separate property;<sup>228</sup> the court had no need to comment on the pre-dissolution status of the cause of action. The California Supreme Court's similar statement in *Fuentes v. Tucker*<sup>229</sup> about a wrongful death recovery being community property was apparently also dictum.<sup>230</sup> The court stated that because the husband was the sole manager of the community, it was error to have permitted the wife/mother of the decedent to be a party to the suit; however, the court actually held that the defendant suffered no prejudice,<sup>231</sup> which meant that the court did not have to decide if the cause of action was community property.

#### VII. APPLYING IN-LIEU TRACING TO THE SEVERAL COMPONENTS THAT CAN MAKE UP A WRONGFUL DEATH MONEY JUDGMENT

##### A. *The Texas Precedents*

Texas courts first employed in-lieu tracing to classify wrongful death damages received by a married person in 1900 in *Bohan v. Bohan*.<sup>232</sup> The court there explained why its decision earlier that year, *Brush Electric Light & Power Co. v. Lefevre*,<sup>233</sup> had not abolished the rule that in personal injury cases the contributory negligence of one spouse would be imputed to the other spouse to bar recovery of damages, if the recovery would have been community property co-owned by the negligent spouse.<sup>234</sup> In *Lefevre*, the mother's wrongful death recovery was her separate property:

When it is remembered that young Lefevre was over 21 years of age at the time of his death, and whatever he might have contributed towards the support of his mother, had he lived, would have been a gift to her, and clearly her separate property, it seems equally clear

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227. See *supra* text accompanying note 70.

228. *Flores v. Brown*, 248 P.2d 922, 925, 927 (Cal. 1952).

229. 187 P.2d 752 (Cal. 1947).

230. See *supra* text accompanying note 66.

231. *Fuentes*, 187 P.2d at 758.

232. 56 S.W. 959 (Tex. Civ. App.—Galveston 1900) (no writ).

233. *Brush Electric Light & Power Co. v. Lefevre*, 55 S.W. 396 (Tex. Civ. App.—Galveston 1900), *rev'd on another ground*, 57 S.W. 640 (Tex. 1900).

234. *Bohan*, 56 S.W. at 960.

that the amount awarded the mother by the jury in lieu of, or as compensation for, the loss of such probable contributions by the son, would also be her separate property.<sup>235</sup>

In the more recent wrongful death case where in-lieu tracing was employed, *Johnson v. Holly Farms of Texas, Inc.*,<sup>236</sup> decided in 1987, the jury in the wife's suit for wrongful death of her minor daughter was instructed that it could award damages consisting of three components: "(1) pecuniary loss; (2) loss of companionship; and (3) mental pain and anguish."<sup>237</sup> Because the husband's contributory negligence was an issue, the mother/wife would obtain a full recovery only if each damage component was correctly classified by the trial court as her separate property.<sup>238</sup> The intermediate appellate court so held. Pecuniary loss consisted of

the care, maintenance, support, services, advice, counsel and contributions of pecuniary value that the child would have given the parent. Each of those items is in the nature of a gift from the child . . . [and we] classify that kind of pecuniary loss as the separate property of the spouse suffering the loss.<sup>239</sup>

*Holly Farms* classified the loss of companionship damages awarded to the wife as her separate property by following Texas Court of Appeals precedent<sup>240</sup> that based its classification on a Texas Supreme Court decision, *Whittlesey v. Miller*.<sup>241</sup> *Whittlesey* had held that damages recovered by a wife's asserting a loss of her husband's consortium claim due to his tortiously-inflicted physical injuries were her separate property because they were a "personal injury recovery" under a Texas classification statute (now section 3.001(3) of the Texas Family Code).<sup>242</sup>

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235. *Id.* Texas courts in wrongful death cases do not face the possibility that gifts the deceased child was precluded from making due to being tortiously killed might have generated community property. See *Bradley v. Love*, 60 Tex. 472, 477-78 (1883). Unlike the law in California (*see supra* note 105), in Texas if a donor makes a gift jointly to a husband and wife, they do not hold the property in community, but each spouse takes an undivided half interest as separate property (i.e., tenancy in common property is created).

236. *Johnson v. Holly Farms of Tex., Inc.*, 731 S.W.2d 641 (Tex. App.—Amarillo 1987) (no writ).

237. *Id.* at 646.

238. *Id.* at 646-47.

239. *Id.*

240. *Williams v. Steves Indus., Inc.*, 678 S.W.2d 205 (Tex. App.—Austin 1984), *aff'd*, 699 S.W.2d 570 (Tex. 1985). The Texas court of appeals said: "We see no practical distinction between the loss of spousal consortium and the loss of companionship of children; both constitute damage to emotional interests." *Id.* at 210.

241. 572 S.W.2d 665 (Tex. 1978).

242. *Id.* at 669; TEX. FAM. CODE ANN. § 3.001(3) (West 2006).

Finally, *Holly Farms* classified the damages recovered for mental pain and anguish based on a Texas Supreme Court decision, *Graham v. Franco*,<sup>243</sup> which declared that even without the statute calling for a separate property classification of personal injury damages, principles of in-lieu tracing would require Texas courts to reach the same result as to recovery for pain and suffering through judge-made law.<sup>244</sup>

In sum, in *Holly Farms*, all of the components of damages recovered by a married person based on the wrongful death of a family member were classified as separate property of the payee. This was based on: (1) the court's own in-lieu tracing analysis for loss of financial contributions from the decedent, and (2) precedents that classified certain elements of personal injury damages recovered by the victim-spouse as separate property when the tort involved the spouse herself and not a tortiously killed family member.<sup>245</sup> Each such precedent employed in-lieu tracing based on the Texas Supreme Court's interpretation of what is now Texas Family Code section 3.001(3)<sup>246</sup> or on the Texas Supreme Court's statement as to what the judge-made law would be in the absence of that statute.

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243. 488 S.W.2d 390 (Tex. 1972); see *Holly Farms*, 731 S.W.2d at 646 (citing *Graham*).

244. *Graham*, 488 S.W.2d at 394. The issue of what the classification rule would be without the statute arose in *Graham* because article 16, section 15, of the Texas constitution is construed as barring the Texas legislature from enacting statutes that depart from the basic Spanish-Mexican law of 1840 with respect to what constituted separate and community property. See *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925). The Texas Supreme Court had previously in *Ezell v. Dodson*, 60 Tex. 331 (1883), used *McFadden*-type "logic" (focusing on the marital status of the tort victim-spouse when she or he suffered personal injuries) to classify all personal injury damages received by a spouse after a tort during marriage as community property. If *Ezell* was consistent with civil law, then the statute seeking to reverse its holding violated article 16, section 15. *Graham* quoted the community property treatises by McKay and De Funiak, see *supra* notes 42, 54, 121, to conclude "that injuries to the wife were her separate right under the Spanish and Mexican law upon which our system of community property law was based." *Graham*, 488 S.W.2d at 394. *Graham* also quoted *Chicago, Burlington & Quincy Railroad Co. v. Dunn*, 52 Ill. 260, 264 (1869), which traced the cause of action for personal injuries to the body of the spouse that she brought to the marriage: "'Who is the natural owner of the right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain.'" *Graham*, 488 S.W.2d at 393-94.

245. *Holly Farms*, 731 S.W.2d at 646-47.

246. See *supra* text accompanying note 52 describing the Texas Supreme Court's engrafting onto this statute a rule that the portion of the recovery for the victim-spouse's medical bills that would reimburse the community for having paid such expenses or relieve the community of its obligation to pay such expenses in the future should be classified as community property.

B. *Applying In-Lieu Tracing to Classify the Components of a California Wrongful Death Recovery*

According to the recent California Supreme Court decision in *Corder v. Corder*,<sup>247</sup> damages recoverable in a wrongful death suit fall into two broad categories: (1) direct “financial benefits” to the plaintiff from the decedent “reasonably to be expected in the future, and (2) the monetary equivalent of loss of comfort, society and protection” arising out of the death.<sup>248</sup> The first category is comprised of several distinct types of financial benefits. Unlike Texas, which recognizes a third broad category of wrongful death damages, the California Supreme Court does not recognize Texas’s third category and instead bars California courts from granting recovery “for the grief or sorrow attendant upon the death of a loved one.”<sup>249</sup>

1. Loss of Direct Financial Benefits

a. *Lost Bequests, Devises and Inheritances by Intestate Succession*

“[T]here might be a reasonable expectation that if the life of a deceased had continued he might have accumulated a greater estate, and that the increased estate would have been inherited by the statutory beneficiaries as his heirs.”<sup>250</sup> Wrongful death damages recovered by a married person based on the theory that, but for the death, the married person would have acquired the property by intestate succession at the decedent’s death at a normal age should be classified under the in-lieu tracing approach as the lost inheritance would have been classified. Usually it would be separate property of the heir/spouse.<sup>251</sup>

Suppose, however, the decedent were the child or grandchild of the husband and wife suing for wrongful death, the decedent’s sole heirs, who would take an inheritance “equally” under section 6402(b) of the California Probate Code.<sup>252</sup> The statute does not say how the husband and wife take equally, but equality could exist in these three ways: (1) if each took a distinct portion of the estate as his or her separate property, (2) if they took

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247. *Corder v. Corder*, 161 P.3d 172 (Cal. 2007).

248. *Id.* at 183 (quoting *Benwell v. Dean*, 57 Cal. Rptr. 394, 398 (Ct. App. 1967)).

249. *Id.* *Accord* *Krouse v. Graham*, 562 P.2d 1022, 1028 (Cal. 1977) (no compensation for “sorrow and distress . . . . ‘Nothing can be recovered as a solatium for wounded feelings.’” (quoting *Ure v. Maggio Bros. Co.*, 75 P.2d 534, 538 (Cal. Ct. App. 1938))).

250. *Corder*, 161 P.3d at 183.

251. *See* CAL. FAM. CODE § 770(a)(2) (West 2004).

252. Subsection (b) of section 6402 applies if the intestate takers are parents of the decedent. CAL. PROB. CODE § 6402(b) (West 2009). Subsection (d) calls for grandparents who are the closest kin of the decedent to take “equally.” *Id.* § 6402(d). It is also theoretically possible that the husband and wife could be collateral co-heirs of the intestate, each being, for example, decedent’s second cousin. As the decedent’s closest kin they would take “equally” under subsection (d).

the inheritance as community property,<sup>253</sup> or (3) if they took the inheritance 50-50 as tenants in common. The statute defining an inheritance received by a married person during marriage as the person's separate property addresses an inheritance received by "a" and "the" married person in the singular<sup>254</sup> and therefore possibly could be construed as not applicable where the husband and wife were co-equal heirs. De Funiak argues that such a statute should be construed so as to be consistent with the civil law of Spain and Mexico from which California's community property regime was derived and under which the spouses as co-heirs would own the inheritance as community property.<sup>255</sup> If the California courts agree with De Funiak, wrongful death damages received by either<sup>256</sup> or both of the spouses in lieu of a community property inheritance should be classified as community property.

The same analysis applies to bequests and devises that the plaintiff-spouse or spouses prove they lost due to the tortiously-caused death of a decedent. If the decedent had a will—or had been proved to have decided on making a will—with an open-ended bequest or devise to the wife or husband alone (such as "all my personalty"), the future acquisitions of the decedent that would have passed through the will had the decedent not died prematurely would have been the separate property of the party recovering damages for wrongful death.<sup>257</sup> Under in-lieu tracing, damages awarded due to property not passing via such a will would likewise be separate property.

On the other hand, consider a decedent whose will made a joint devise in equal shares to a husband and wife—the plaintiffs in the wrongful death suit—and whose will did not specify whether they were to take the property as community property, tenancy in common, or joint tenancy. Courts agreeing with De Funiak's view as to the proper construction of Family Code section 770(a)(2) should classify the damages based on the lost devise

253. "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and *equal* interests." CAL. FAM. CODE § 751 (emphasis added).

254. Section 770 of the Family Code (emphasis added) provides: "(a) Separate property of a married person includes . . . (2) All property acquired by *the* person after marriage by . . . descent."

255. DE FUNIAK & VAUGHN, *supra* note 42, § 69, at 154 (citing NOVISIMA RECOPLIACION DE LAS LEYES DE ESPANA, bk. X, cap. 4, law 1 (1805)). See also the nineteenth-century California cases concerning lucrative acquisitions (which would include inheritances). *Supra* note 105.

256. The statute of limitations for the wrongful death could run against one of the parent co-heirs of the decedent but be tolled as to the other so that only he or she obtains a judgment that includes damages for the lost inheritance that would have been received by both. See *San Diego Gas & Electric Co. v. Superior Court*, 53 Cal. Rptr. 3d 722, 726 (Ct. App. 2007). That only the one parent was able to sue should not alter the community property classification of the recovery, as the plaintiff who is not time-barred should be viewed as representing the community.

257. See CAL. FAM. CODE § 770(a)(2) (West 2004).



or bequest by either husband or wife alone, or by both as plaintiffs in a wrongful death suit (or as recipients of a settlement payment) as community property.<sup>258</sup>

*b. Loss of Gifts of Cash or Other Property*

If, but for having been tortiously killed, the wrongful death decedent would have made gifts of property to the wife alone or to the husband alone, they would be the donee's separate property;<sup>259</sup> thus wrongful death damages received by a spouse based on the theory of lost gifts would be separate property of the claimant under in-lieu tracing. California courts seem to accept the civil law rule that *inter vivos* gifts made by a donor to the husband and wife jointly are classified as community property.<sup>260</sup> If there were evidence that the decedent had, for several years before dying, made annual gifts of \$22,000 (or \$24,000 or \$26,000 as the annual gift tax exclusion increased)<sup>261</sup> by check made out to the decedent's child and the spouse of that child, a trier of fact in a wrongful death trial could well conclude that such a giving practice would have continued had the decedent not been tortiously killed. Damages awarded to the spouses or to one of them based on such evidence would be community property under in-lieu tracing, as would an appropriate portion of a settlement payment to the spouses or one spouse alone made by the tortfeasor after being advised of such potential evidence.

*c. Lost Earnings of a Decedent Who Was a Minor Child of Husband or Wife or Both*

The decedent could be a young teenager or a pre-teen who was a much-sought-after model, screen star, musician, etc., whose tortiously-caused death put an end to a stream of income the young person was collecting as such a celebrity. The California court of appeal held in 1939 in *Santos v. Santos*<sup>262</sup> that the earnings of an unemancipated minor child of the husband or the wife, but not of both, were the separate property of the parent-

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258. See *supra* note 255 and accompanying text.

259. CAL. FAM. CODE § 770(a)(2).

260. See *supra* note 105.

261. By doing so the decedent-donor doubles the federal gift tax annual exclusion by creating two donees. See 26 U.S.C. § 2053(b) (2006). I understand the practice to be rather common.

262. 89 P.2d 164 (Cal. Ct. App. 1939). *Santos* involved a putative marriage where the parties took out a marriage license believing in good faith that they needed to do no more to acquire lawful marital status. *Id.* at 165. The court applied community property law by analogy, *id.* at 166, so it is clear the result would have been the same as to ownership of the earnings of the minor child at issue had the marriage been lawful rather than putative. See also section 7500(b) of the California Family Code section, which provides that if one parent of the minor child is dead, the surviving parent "is entitled" to the earnings of the minor child.

spouse.<sup>263</sup> This rule should control the classification of wrongful death damages recovered by that parent based on such lost earnings when the spouse of the parent is not related to the deceased child.<sup>264</sup> Texas has held that the earnings of an unemancipated minor who is the child of both the husband and wife are community property.<sup>265</sup> De Funiak says that “[u]nder the presumption in favor of community property, certainly it must be presumed that this is the manner in which the parents do hold [such earnings] together, and this must be accepted as the rule.”<sup>266</sup> Section 7500(a) of the California Family Code, in stating that the parents are “equally entitled” to the earnings of an unemancipated child of both, does not specifically direct the courts to achieve such equality by classifying such income as community property in situations where the parents are married to each other and cohabitating at the time of receipt.<sup>267</sup> Nevertheless, I am confident that California courts will reach that result by following Texas and De Funiak and that such a rule will control the classification result under in-lieu tracing in wrongful death cases as well.

*d. Loss of Support the Decedent Owed as a Matter of Law to the Spouse-Claimant*

In some situations, by statute, a child owes a duty to support his mother or father or both.<sup>268</sup> If the decedent child owed such support at the time of his or her death or if it could be reasonably found that circumstances would have arisen after the wrongful death of the child that would have caused the decedent to owe a duty to pay financial support to his mother or father, then a component of a wrongful death award should include damages based on the loss of such support. If the decedent were not a child of the spouse of the parent owed support by the child, the logic that led the *Santos* court to hold that earnings of a minor child would be the separate property of the

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263. *Santos*, 89 P.2d at 165.

264. See CAL. FAM. CODE § 7500 (West 2004).

265. See, e.g., *Ins. Co. of Tex. v. Stratton*, 287 S.W.2d 320, 323 (Tex. App.—Waco 1956) (no writ).

266. DE FUNIAK & VAUGHN, *supra* note 42, § 68.1, at 150. In California, all property acquired during marriage is presumed to be community. See, e.g., *Rossin v. Rossin (In re Marriage of Rossin)*, 91 Cal. Rptr. 3d 427, 431 (Ct. App. 2009). This presumption is said to be “fundamental” to the community property system. *Duncan v. Duncan (In re Duncan’s Estate)*, 70 P.2d 174, 179 (Cal. 1939).

267. See CAL. FAM. CODE § 7500(a).

268. “Except as otherwise provided by law, an adult-child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work.” CAL. FAM. CODE § 4400.

child's parent when that parent's spouse was not related to the child probably would apply to the classification of support payments owed a parent whose spouse was not related to the obligor.<sup>269</sup> In both situations the source of the income is a relationship not connected to the marriage and one that very likely was established before the marriage. Wrongful death damages recovered by the parent whose spouse was not related to the decedent would then be, under in-lieu tracing, the recipient's separate property.

How would the law classify statutorily-mandated support payments made by an adult-child to both of his disabled parents or to one disabled parent, married to the other parent of the adult-child—a parent-spouse who was not disabled and not entitled to support? The payments are not gifts. Although in some situations a parent's abandoning the child will forfeit the parent's right to statutorily-mandated support,<sup>270</sup> there is no requirement that the parent have expended money or provided labor to care for the child at any time for the parent to be entitled to support.<sup>271</sup> Thus, support payments received do not have the character of onerous acquisitions.<sup>272</sup> Nevertheless, there seems to be no separate property source, such as a right of personal security that arose before marriage, underlying one spouse's or both spouses' right to support from an adult-child. It should follow, then, that the general presumption in favor of the community<sup>273</sup> will apply to the support payments, even if made to just one spouse. That will control the classification of wrongful death damages based on lost support payments.

*e. Loss of Services the Decedent Would Have Provided*

If it is found to be reasonably likely that the decedent, if living, would have provided ““services having a financial value””<sup>274</sup> to a wrongful death plaintiff, that party may recover damages equal to what it would cost to pay someone to perform the services.<sup>275</sup> According to the California Supreme Court, these damages fall into the category of damages based on loss of direct *financial* benefits because the economic value of the services can

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269. See *supra* notes 262–64 and accompanying text.

270. See CAL. FAM. CODE § 4411.

271. Consider the case where the mother or father, at the time of the child's birth, is totally disabled and remains so into the child's adulthood, when the duty of support arises.

272. See *Washington v. Washington*, 302 P.2d 569, 573 (Cal. 1956) (Carter, J., concurring) (community acquisitions have their source in an onerous title, i.e., they are earned by labor of a spouse, or both spouses, or arise out of payment of consideration that was community); DE FUNIAK & VAUGHN, *supra* note 42, § 62, at 127.

273. See *supra* note 266.

274. *Corder v. Corder*, 161 P.3d 172, 183 (Cal. 2007) (quoting *Griffey v. Pac. Electric Ry. Co.*, 209 P. 45, 48 (Cal. Ct. App. 1922)).

275. See *Martin v. Mansfeldt*, 223 P.2d 501, 504 (Cal. Ct. App. 1950).

readily be ascertained, even though the decedent would not have provided money to the heir asserting the wrongful death claim.<sup>276</sup>

The nature of the lost services will determine whether the damages received based on the loss thereof are classified as community or separate property, or a mix of both. If at the time of death the decedent had been providing no-charge nursing care for his mother and did not view this nursing care as a gift to his mother, wrongful death damages based on the value of nursing services the parent ceased receiving on death of her child should be classified as community property. This is because the receipt of the services relieved the community of an obligation to provide basic care for the wife/mother as a member of the community. A community-benefit test is employed at divorce to classify debts as community or separate in the process of making an equal division of the community property,<sup>277</sup> and it seems proper to borrow the community-benefit test when classifying wrongful death damages based on loss of services received by a spouse. If the decedent would have provided services to both spouses without having the state of mind that a gift was being made, damages recovered based on the loss of such services by either spouse or both should likewise be community property, even if the decedent was related by blood to only one of the spouses.

Can the presumption in favor of community property classification be overcome by evidence that the decedent, while alive, had stated that he considered that he or she was making a gift to his or her mother in performing nursing services for her, thereby raising the inference that such a state of mind would have continued into the future as nursing services were provided, had the decedent not died? There is no clear answer. Federal gift tax law does not view a gift of services as taxable on the ground that no property is involved.<sup>278</sup> Section 770(a)(2) of the California Family Code classifies “all property” received by gift after marriage by a spouse as his or her separate property. A court would probably hold that the community

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276. *Corder*, 161 P.3d at 183. It would seem that a loss of “care” the decedent would have provided to the claimant-spouse, see *Krouse v. Graham*, 562 P.2d 1022, 1025 (Cal. 1977), and “protection” that would have been so provided, *Corder*, 161 P.3d at 183; *Krouse*, 562 P.2d at 1025, should be included in the wrongful death damages subcategory of loss of “services,” because they can be valued based on the cost of hiring someone else to provide the care and protection. But *Krouse* and *Corder*, without analysis, dubiously lumped these types of loss with loss of society and comfort.

277. See *Frick v. Frick (In re Marriage of Frick)*, 226 Cal. Rptr. 766, 774–75 (Ct. App. 1986) (debt on loan taken out to raise funds to pay real property taxes on realty that was owned 43.54% by the community, the balance being separate property of the husband, was 43.54% a community debt).

278. See *Comm’r v. Hogle*, 165 F.2d 352, 353 (10th Cir. 1947); see also 26 U.S.C. § 2501(a) (2006) (taxing gifts of “property”).

property presumption attached to wrongful death damages received during marriage based on a loss of gifted services cannot be overcome due to the absence of law viewing services as the equivalent of property.

2. Damages for Loss of Comfort and Society that the Decedent Would Have Provided

Recall<sup>279</sup> that a Texas court classifying wrongful death damages received by a spouse based on loss of society (consortium) due to the tortious killing of the spouse's child found it appropriate to apply, by analogy, the classification previously made in a Texas case where the harm to the spouse was loss of consortium provided by the other spouse, resulting in a separate property classification. This analogy must be rejected in California. A 1995 California court of appeal decision held that damages for loss of spousal consortium must be classified as community property because they are damages for "personal injur[ies]" under what is now section 780 of the California Family Code. Section 780 defines personal injury damages received by a spouse based on a tort occurring during marriage as community property.<sup>280</sup> It has been shown, however, that the California legislature could not have intended any part of wrongful death damages to be "personal injur[ies]" to a spouse within the scope of section 780.<sup>281</sup> Accordingly, in-lieu tracing should be employed, if possible, to classify the loss of society portion of the wrongful death damages received by a married person.

The society and comfort of which the claimant-spouse was deprived must be of a nature that could not be replaced by hiring a companion; otherwise, the damages would fall under the lost "services" subcategory of direct financial loss.<sup>282</sup> The monetary award received for loss of society is based on the spouse's loss of the joy and pleasure of interacting with a

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279. See *supra* notes 240–42 and accompanying text.

280. *Meighan v. Shore*, 40 Cal. Rptr. 2d 744, 749 (Ct. App. 1995). *Craddock v. KMart Corp.*, 107 Cal. Rptr. 2d 881 (Ct. App. 2001), assumed that a community property classification would have been appropriate for damages claimed by a husband for loss of his wife's consortium arising out of a tort, as to which the wife's negligence was 10% of the cause of the resulting injuries. The *Craddock* court stated that the issue it faced was whether to apply Family Code section 783, under which the wife's negligence would not be imputed to the husband and would entitle him to a 100% recovery, or Civil Code section 1431.2, under which the tortfeasor the husband sued was liable for non-economic damages only to the extent of his 90% of fault in causing the accident. *Id.* at 888. Section 783, as judicially expanded to deal with comparative negligence in *Lantis v. Condon*, 157 Cal. Rptr. 22, 24 (Ct. App. 1979), would not have been at issue if damages for loss of spousal consortium were classified as separate property, for it could not then have been contended that the negligent wife would have benefitted from her own wrong had the husband obtained a 100% recovery.

281. See *supra* text accompanying notes 148–50.

282. See *supra* text accompanying notes 274–77.

relative for whom the claimant has feelings of love or affection.<sup>283</sup> Such good feelings are not property. Since the loss of society damages are not awarded as a replacement for lost property, classic in-lieu tracing arguably cannot be done in this situation. One possible judicial response to this conclusion is a holding with respect to the loss-of-consortium component of wrongful death damages that the community property presumption attaching to the cause of action arising during marriage, and damages flowing from it, cannot be overcome. Loss of society damages would thus be community property, even if the decedent were not related to the spouse of the claimant receiving a share of such damages.

Alternatively, California courts could trace such damages to a nonproprietary source, such as the capacity of the claimant-spouse to feel pleasure in sharing experiences with a beloved relative—the decedent.<sup>284</sup> Such a capacity, although not property, was possessed by the claimant-spouse before marriage and, in that sense, is analogous to property that is separate because it was owned by a spouse before marriage. Under this approach, the fact that the relationship of the claimant-spouse with the decedent did not begin until after the claimant married does not compel a community property classification.<sup>285</sup> Particularly in cases where the decedent was not related to the person married to the party recovering wrongful death damages, the separate property classification seems more intuitively correct, since a community classification would treat the unrelated spouse as suffering equally along with the claimant.

#### VIII. CONCLUSION

The development of the in-lieu tracing doctrine—particularly as it is now applied in workers' compensation cases like *Raphael*—requires overruling the 1922 *Keena* decision, the source of the rule that a wrongful

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283. “[F]actors relevant in assessing a claimed loss of society, comfort, and protection may include the closeness of the family unit at issue, the warmth of feeling between the family members, and the character of the deceased as ‘kind and attentive’ or ‘kind and loving.’” *Corder v. Corder*, 161 P.3d 172, 184 (Cal. 2007) (quoting *Krouse v. Graham*, 562 P.2d 1022, 1026 (Cal. 1977)).

284. The Texas Supreme Court, in its decision holding damages for loss of spousal consortium to be separate property, said the recovery is based on “damages to the emotional interests” of the claimant-spouse. *Whittelsey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978).

285. The illogic of making the classification turn on when the relationship began can be illustrated by a hypothetical case. Wife is the aunt of two nieces, A and B, tortiously killed, leaving Wife as their sole heir. A was born and began interacting with Wife six months before Wife married Husband; B was born and began interacting with Wife ten months after the marriage. Surely it would be legally indefensible to classify Wife’s damages based on loss of society with A as her separate property, but damages based on loss of society with B as community.

death award received by a spouse must be classified as 100% community property. Most components of such a wrongful death award can be traced to a separate source via in-lieu tracing, resulting in a separate property classification. An inability to overcome the presumption that property acquired during marriage is community property may lead to classifying one or two of the possible components of the wrongful death recovery received by a married person as community property.