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## Reimbursement of Community Contributions to a Spouse's Education upon Divorce: California Civil Code Section 4800.3

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## California Practicum

*The California Practicum is a series of articles dealing with subjects of significance to California attorneys. The purpose of the Practicum is to inform the reader of practical problems on the cutting edge of California law in both the state and federal forums, and to act as an initial resource for finding solutions to those problems.*

- A. Reimbursement of Community Contributions to a Spouse's Education upon Divorce: California Civil Code Section 4800.3 . . . . . Suzanne E. Rand
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### A. Reimbursement of Community Contributions to a Spouse's Education upon Divorce: California Civil Code Section 4800.3

*When the California Legislature passed California Civil Code section 4800.3, it attempted to create a remedy for the circumstances posed by the highly publicized case of *In re Marriage of Sullivan*. The legislature created a new cause of action for "reimbursement" of funds contributed to the education or training of a spouse. The question remains whether reimbursement is an equitable and workable remedy for the Sullivan type situation. This comment analyzes the section and suggests possible approaches to litigation of a section 4800.3 claim.*

#### I. INTRODUCTION

The case of *In re Marriage of Sullivan*<sup>1</sup> presented an issue of great concern to many people, those within the legal community and the public at large. To the public at large this highly publicized<sup>2</sup> case in-

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1. *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984), 134 Cal. App. 3d 634, 184 Cal. Rptr. 769 (1982), vacated.

2. See Allen, *Court Recognizes Marital 'Interest' in Medical License*, L.A. Daily J., January 13, 1982 at 1, col. 3; Arnold, *Divorcee Entitled to Share Doctor's Future Earnings*, L.A. Times, January 12, 1982 at 1, col. 6, 7; Sullivan, *Divorce American Style, Is Killing Me By Degrees*, L.A. Times, January 19, 1982, Part II, at 5, col. 1, 2; *Doctor Ordered to Share Value of M.D. Degree with Ex-wife*, L.A. Daily J., December

volved concepts close to the hearts of many present and future "young professionals." To some, the prospect that a medical degree might be community property constituted a financial threat; to others it constituted the only means of compensation for years of support throughout the marriage. To the legal community the question of whether a medical degree should be community property raised a conflict between traditional property concepts and basic equitable considerations. Although the issue has been ruled upon many times before in many courts throughout the country,<sup>3</sup> it remains an area in which judicial remedies vary widely.<sup>4</sup> The California legislature attempted to remedy the situation presented by the *Sullivan* case by amending California Civil Code sections 4800 and 4801, and adding section 4800.3.

Section 4800.3 provides reimbursement to the community, upholding prior case law that a professional degree is not property.<sup>5</sup> Having taken effect on January 1, 1985, it applies retroactively to unfinalized property settlements in pending divorce proceedings.<sup>6</sup> Although the California Supreme Court remanded the *Sullivan* case to be decided in accord with section 4800.3, the law has yet to be tested or applied.<sup>7</sup> This comment will focus on three major areas: (1) an analysis of the section and how it might be construed; (2) whether the law will provide a workable remedy for the supporting spouse in a "career threshold, no asset divorce;"<sup>8</sup> and (3) how a litigant should approach a claim under section 4800.3.

## II. CALIFORNIA CIVIL CODE SECTION 4800.3

### A. *The Structure of the Section*

Subsection (a) of section 4800.3 defines "community contributions

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11, 1980, at 2, col. 4. Much commentary on this issue has been published. For a comprehensive listing, see Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 229 n.7 (1983).

3. For a comprehensive listing of the cases deciding the issue of whether a professional degree is community property, see Mullenix, *supra* note 2, at 228 nn.6-7.

4. For a summary of the various remedies granted by the courts, see *In re Marriage of Washburn*, 101 Wash. 2d 168, 677 P.2d 152 (1984).

5. California courts have held that a professional degree is not property. See *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979); *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

6. CAL. CIV. CODE § 4800.3 (West Supp. 1985). The section has limited retroactivity. Constitutional arguments have been raised against limited retroactivity under CAL. CIV. CODE §§ 4800.1 and 4800.2 (West Supp. 1985) and are conceivable here. However, the supreme court has impliedly sanctioned the section's retroactivity in the *Sullivan* decision. See *supra* note 1.

7. 37 Cal. 3d at 762, 691 P.2d at 1020, 209 Cal. Rptr. at 354.

8. The phrase "career threshold, no asset divorce" is taken from Comment, *For Richer or Poorer—Equities In The Career-Threshold, No-Asset Divorce*, 58 TUL. L. REV. 791 (1984).

to education or training.”<sup>9</sup> The body of the statute, subsections (b) and (c), provide the basis for claims. Subsection (b), clauses (1) and (2) state the circumstances which “trigger” reimbursement. If subsection (b) is satisfied, then subsection (c), clauses (1), (2) and (3) act to provide circumstances in which reimbursement “shall be reduced or modified.”<sup>10</sup> Therefore, the section has essentially two parts: subsection (b) provides reimbursement and subsection (c) limits it.

The legislature defined the scope of the section under subsections

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9. CAL. CIV. CODE § 4800.3 provides in full:

Community contributions to education or training

(a) As used in this section, “community contributions to education or training” means payments made with community property for education or training or for the repayment of a loan incurred for education or training.

(b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

(1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.

(2) A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to Section 4800 but shall be assigned for payment by the party.

(c) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including but not limited to any of the following:

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, nothing in this subdivision shall limit consideration of the effect of the education, training, or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to Section 4801.

(3) This section is subject to an express written agreement of the parties to the contrary.

CAL. CIV. CODE § 4800.3 (West Supp. 1985).

10. *Id.*

(d) and (e). Subsection (d) states that the section is “the *exclusive remedy* of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party.”<sup>11</sup> Subsection (e) states that the statute is subject to express written agreement. Although the structure is uncomplicated, the language of the statute is broad, ambiguous, and leaves much room for judicial construction.

### B. Construction of the Section

To date, the only case to construe section 4800.3 is *In re Marriage of Sullivan*.<sup>12</sup> The dissent succinctly analyzes the majority’s construction of the section.<sup>13</sup> First, the decision refers to “compensation” rather than “reimbursement.”<sup>14</sup> Secondly, the court seems to be taking the point of view of the supporting spouse, whereas section 4800.3 focuses on reimbursement to the *community*, not an individual spouse.<sup>15</sup>

The *Sullivan* decision adds further ambiguity to an analysis of the future application of the section. A central issue to any claim under the section, and the main issue raised by the dissent’s focus on the distinction between compensation and reimbursement, is how the courts will define “community contributions.”

The distinction between compensation and reimbursement is highly significant to the supporting spouse’s claim. Compensation is a much broader remedial base than strict reimbursement of funds previously expended.<sup>16</sup> It seems probable that in this area the supporting spouse, wielding *Sullivan* as authority, will seek compensation, whereas the spouse holding the degree will attempt to restrict the claim solely to reimbursement.<sup>17</sup>

### C. Analysis of the Section

Reimbursement is a new remedy created by the section. While section 4800.3 is entitled “Community contributions to education or

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11. *Id.* (emphasis added).

12. 37 Cal. 3d at 762, 691 P.2d at 1020, 209 Cal. Rptr. at 354 (Bird, C.J., for the majority).

13. 37 Cal. 3d at 770-71, 691 P.2d at 1025-26, 209 Cal. Rptr. at 359-60 (Mosk, J., concurring and dissenting).

14. *Id.* at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359.

15. *Id.*

16. “Compensation on the other hand, may be payment in any sum for any lawful purpose; the Legislature also obviously did not intend to give such a blank check to trial courts.” 37 Cal. 3d at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359 (Mosk, J., concurring and dissenting).

17. See *infra* note 55. The supporting spouse should allege a claim for compensation, and alternatively, for reimbursement.

training,"<sup>18</sup> it is stated later in the text that reimbursement shall be provided to the community. The section does not follow any clear judicial or legislative trend. It bears no similarity to the one other jurisdiction whose legislature has enacted a statute expressly in response to this problem.<sup>19</sup> The section creates an area of first impression in California which cannot accurately be analogized to any existing substantive family law remedies.<sup>20</sup>

Subsection (a) is the definitional clause of the section. "Community contributions to education or training" are defined as "payments made with community property for education or training or for the repayment of a loan incurred for education or training."<sup>21</sup> This will be the major area of litigation. As the Law Revision Commission Comment states, "Subdivision (a) does not detail the expenditures that might be included within the concept of 'community contributions.' These expenditures would at least include cost[s] of tuition, fees, books and supplies, and transportation."<sup>22</sup> The section does not allow for reimbursement of contributions made from quasi-community property.<sup>23</sup>

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18. CAL. CIV. CODE § 4800.3 (West Supp. 1985). Training is not defined by the section. Therefore, it might be training for any type of work position, not only that involving a professional degree. If training is defined to include, for example, training to be a plumber or a beautician, the section will have an effect on a large number of marriages.

The section expressly applies only upon dissolution of *marriage*. Palimony situations are not covered by the section. If the parties have lived together but have not married they are not subject to the statute. Palimony partners may, therefore, assert the claims previously available to married spouses, such as claim that the professional degree is jointly-acquired property. See *supra* notes 3-4.

19. Most states do not specifically refer to professional education or licenses in their community property statutes. One exception is Indiana. See IND. CODE tit. 31, Ch. 11.5 § 31-1-11.5-11(c) (1980):

(c) When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the existing property. However, this award may be made only for the financial contribution of one [1] spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

*Id.*

20. Practitioners should note that reimbursement is not the same as a property right, asset or obligation. A claim can be made in the same manner as a community property claim, but practitioners should be aware of potentially defective pleadings. See *infra* notes 47-55 and accompanying text.

21. CAL. CIV. CODE § 4800.3(a) (West Supp. 1985).

22. CAL. CIV. CODE § 4800.3, Cal. L. Revision Comm'n Comment (West Supp. 1985).

23. Quasi-community property was included in the section as originally proposed by the Law Revision Commission. See *Recommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM'N REPORTS 229, 240 (1984).

Subsection (b), clause (1) is the operational provision of the statute. If community contributions *substantially enhance* the earning capacity of the party, then the community shall be reimbursed. The focus is therefore on the spouse who has gained the degree or training. The Law Revision Commission Comment adds little to the meaning of “substantially enhance.” It states:

[t]he education or training must *demonstrably enhance* earning capacity . . . . However, it is not required that the party actually work in an occupation to which the enhancement applies; community contributions were made to the enhancement for the benefit of one party, who retains the potential to realize the enhancement in the future.<sup>24</sup>

Therefore, two undefined areas in which judicial construction could change the entire effect and purpose of the law arise: how to define “community contributions” and how to define “substantial enhancement.”<sup>25</sup> Additionally, the amount reimbursed must be reimbursed with interest at the legal rate.<sup>26</sup>

Clause (2) supersedes former section 4800(b)(4) and exempts educational loans from community liabilities. Therefore the party holding the degree is assigned the liability. This provision focuses on personal liability, not community liability, unlike the rest of the section. Although consistent with the aim of attempting to provide an equitable remedy for the supporting spouse, this provision contradicts the section’s focus on “community” funds. If funds are to be reimbursed to the community, and not directly to the supporting spouse, it is inconsistent not to assign other liabilities incurred to the community. This inconsistency highlights the lack of a logical basis for the main function of the section—reimbursement to the *community*.

The community is clearly an abstract entity. Property acquired during the marriage is certainly community property.<sup>27</sup> However, in the *Sullivan* type situation, expenditures clearly benefit the non-supporting spouse, whereas the supporting spouse and the community retain little or no assets. It seems more logical to directly reimburse the supporting spouse, rather than the community. Moreover, it is the supporting spouse whose interests the section ostensibly aims to protect.<sup>28</sup> It seems even more illogical for the spouse who has origi-

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24. CAL. CIV. CODE § 4800.3, Cal. L. Revision Comm’n Comment (West Supp. 1985) (emphasis added).

25. See *infra* notes 55, 56 and accompanying text.

26. Reimbursement with interest is consistent with the view throughout the section that the supporting spouse’s interests are similar to a financial investment and can be recompensed monetarily.

27. CAL. CIV. CODE § 4800 (West Supp. 1985).

28. The Law Revision Commission Recommendation states that “[t]he plain inequity of this situation has generated efforts to provide recompense for the working spouse . . . . All factors considered a more equitable solution . . . is to require the student spouse to reimburse the community.” *Recommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM’N REPORTS 229, 233, 235

nally been the beneficiary to *again* indirectly benefit when community property is divided. This contention is supported by the section's own standards: under subsection (b) the community is reimbursed only for contributions which have *substantially enhanced* the earning capacity of *the party*. Because reimbursement does not come into effect unless one party's lifestyle has been "substantially enhanced" from the other party's support, the effect is to ensure that the party with the degree takes twice.<sup>29</sup>

Subsection (c) mandates that reimbursement be reduced or modified if "such a disposition [would be] unjust."<sup>30</sup> The subsection states that reimbursement "shall" be reduced given certain circumstances, thus indicating a reduction is mandatory. Had the section used the word "may," it might have allowed the court to use its own discretion.

Although the language mandates reduction of the reimbursement when necessary, it leaves the door open for the courts to use their own discretion in determining what type of disposition would be unjust.<sup>31</sup> Circumstances which are unjust include, but are not limited to: (1) circumstances where the community has already received substantial benefit from the enhanced earning capacity gained by the degree;<sup>32</sup> (2) circumstances where the supporting spouse was also educated or trained; and (3) circumstances where the education and training received by the non-supporting spouse enables the supporting spouse, later in the marriage, to receive education and training.<sup>33</sup>

Additionally, subsection (c), clause (1) imposes a rebuttable presumption that the community *has not* substantially benefited from contributions if the marriage lasts less than ten years.<sup>34</sup> Conversely,

(1984). Other commentators agree that reimbursement should be to the community. See Mullenix, *supra* note 2, at 278.

29. In California, community property is divided equally. See CAL. CIV. CODE § 4800(a) (West Supp. 1985). This means, in most cases, that the student spouse will receive fifty percent of the contributions reimbursed to the community.

30. CAL. CIV. CODE § 4800.3(c) (West Supp. 1985).

31. The Law Revision Commission Comment states, "Subdivision (c) is intended to permit the court to avoid the requirements of this section in an appropriate case." CAL. CIV. CODE § 4800.3, Cal. L. Revision Comm'n Comment (West Supp. 1985).

32. CAL. CIV. CODE § 4800.3(c)(1) (West Supp. 1985).

33. CAL. CIV. CODE § 4800.3(c)(2) (West Supp. 1985). The language of subsection (c) is difficult to interpret without referring to the Law Revision Comment. This subsection was passed in the same form as the original version proposed by the Law Revision Commission recommendation and is in need of rewriting.

34. The original version of the section did not contain the rebuttable presumption mechanism. It did propose under subsection (b) (1) that community contributions be limited to those made within ten years before commencement of the proceeding. *Rec-*



the presumption is that the community has substantially benefited if the marriage lasts longer than ten years.<sup>35</sup> In the case where the marriage has lasted less than ten years, such as in *Sullivan*, it is difficult to understand why a higher standard of proof is necessary. The intent of subsection (c) is to reduce or modify reimbursement. However, clause (1) mandates that the finder of fact presume that the community has not benefited from the party's education. The logical inference from the presumption is that having given no benefit to the community, the supporting spouse is left with nothing, resulting in a manifestly unjust situation. Although subsection (c) purports to reduce reimbursement in unjust circumstances, the rebuttable presumption mechanism functions to override the subsection's "unjustness" requirement, thereby nullifying it.

Subsection (d) is crucial to the effect of the section. It stipulates that reimbursement "is the *exclusive remedy* of the community or a party for the education or training and *any resulting enhancement of the earning capacity of a party.*"<sup>36</sup> Many other jurisdictions have applied a variety of remedies to the *Sullivan* type situation.<sup>37</sup> In these jurisdictions, the courts have invoked their powers of equity to fashion an appropriate remedy. Because this section excludes parties from pursuing other remedies, it expressly limits the court's powers of equity unless the section is expressly overruled or its operation is "unjust."<sup>38</sup>

Subsection (d) also provides that the section shall not be construed so as to impact any possible support order. This is certainly protective of the spouse who has not been educated or trained. However, the logical inference from the section itself is that one spouse has supported the other spouse while he or she gained a professional degree or training.<sup>39</sup> Thus if the spouse could support both parties in whole or in part, the spouse is most probably not eligible for spousal

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*ommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM'N REPORTS 229, 240 (1984). The commission noted "The 10-year limitation is *admittedly arbitrary*, but is designed to achieve simplicity and justice in the ordinary case." *Id.* at 237 (emphasis added). What an ordinary case would be is not explained.

35. CAL. CIV. CODE § 4800.3(c)(1) (West Supp. 1985).

36. CAL. CIV. CODE § 4800.3(d) (West Supp. 1985) (emphasis added). In reality, the educational degree itself has no value. It is the increased earning capacity which accompanies the degree that is truly valuable. See Mullenix, *supra* note 2, at 275.

37. See *supra* notes 2-3.

38. The California Supreme Court has implicitly approved the section in *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

39. The supporting spouse may be either male or female. See, e.g., *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D. 1984) (husband not entitled to reimbursement alimony because he did not forego career plans or advancement for wife's medical practice). However, it should be noted that generally the supporting spouse is a woman. See Mullenix, *supra* note 2, at 299 n.7.

support, which is partially based on need.<sup>40</sup> The necessity for this provision is questionable.

Although the section may be the exclusive remedy for a supporting spouse, subsection (e) provides an exemption for express written agreements. The subsection does not state the time at which the agreement must be made, therefore an agreement might be antenuptial, made during the marriage or even made as a property settlement after the dissolution of the marriage.<sup>41</sup>

The agreement must be written. This precludes informal oral agreements between the parties. Generally, marital relations are not conducted in the same manner as contract agreements. Most married couples do not formalize their marital aspirations after pursuing arms length negotiations.<sup>42</sup> Most aspirations are expressed orally, if they are discussed at all. It would be safe to say that, upon entering a marriage, the parties have a strong belief that the marriage will last for a long period of time. In many marriages, the supporting spouse would not view his or her support as an investment or a formalized contractual agreement. Reciprocity is generally assumed. This subsection is exemplary of the basic problem inherent in the theoretical underpinning of the section as a whole. The problem is that the section attempts to remedy the unfulfilled expectations of the marital relationship. The reality is that the supporting spouse's expectations of a future marital relationship, including all of its intangible feelings, needs, and goals, can never truly be remedied by a court of law.<sup>43</sup>

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40. See CAL. CIV. CODE § 4801. Section 4801(a)(1) was companion legislation to section 4800.3 and added contributions to a spouse's education or training as a factor to be considered by the court when making a spousal support award. CAL. CIV. CODE § 4801(a)(1) (West Supp. 1985).

41. California recognizes many types of marital agreements, including pre- and post-marital agreements, separation agreements, transmutation agreements, and property settlement agreements. See CAL. PRAC. GUIDE: FAM. L., (TRG) § 9:1 (1985). The agreement should meet the basic requirements for the agreements stated above. If consulted to draft an agreement, counsel should expressly state within the agreement that the accord is meant to supersede section 4800.3.

42. Family law practitioners should note the value of an antenuptial agreement protecting the supporting spouse's interests as a preventative measure.

43. Many law review commentaries have addressed this issue: see *supra* notes 2, 3.

### III. FUTURE APPLICATION OF CALIFORNIA CIVIL CODE SECTION 4800.3

#### A. *Does the Section Provide a Workable Remedy?*

The case of *In re Sullivan* was remanded for a property settlement consistent with California Civil Code section 4800.3. The question whether Janet Sullivan, and others in her position, have been afforded an equitable remedy is a subjective one.<sup>44</sup> What should be examined is whether the statute is "workable," i.e., whether the result of its application in the trial court conforms with the legislature's intent. Unfortunately, legislative intent will provide little guidance to the courts, as the final version of the section is almost exactly the same as the initial Law Revision Commission version.<sup>45</sup> Although the courts will have a certain amount of leeway in the application of the section, their decisions will most definitely be limited to the facts presented to them. Therefore the parties play a crucial role in the development of this area through the manner in which they litigate their claims.

#### B. *Approaches to a Claim under California Civil Code Section 4800.3*

The family law practitioner must begin by informing clients of the existence of a new right to reimbursement. Where the facts elicited in the initial interview may indicate even a minimal amount of support of a spouse earning a professional degree or training,<sup>46</sup> a practitioner may be liable for malpractice if a claim under section 4800.3 is not filed.

In many *Sullivan* type circumstances, the appropriate choice of relief is summary dissolution.<sup>47</sup> However, the existence of a reimbursement right complicates the requirements for summary dissolution. Moreover, parties may pursue summary dissolution without the aid

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44. If the courts limit reimbursement to tuition, books and other minor academic expenses, the supporting spouse gains very little. The true value of the professional degree is its enhancement of the holder's earning capacity. The supporting spouse has not been recompensed for her expectancy of a better lifestyle, a higher standard of living. Most law review commentaries address this issue. See *supra* notes 2, 3. But see *Recommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM'N REPORTS 229, 234 (1984) ("to give the working spouse an interest in half the student spouse's increased earnings for the remainder of the student spouse's life because of the relatively brief period of education and training received during marriage is not only a windfall to the working spouse but in effect a permanent mortgage on the student spouse's future").

45. 17 CAL. L. REVISION COMM'N REPORTS at 229, 240 (1984).

46. See *supra* note 19.

47. Marriages with little or no assets, no children and which last less than five years are good candidates for summary dissolution. See CAL. CIV. CODE §§ 4550-4554 (West Supp. 1985).

of an attorney. However, if the parties do consult with an attorney for guidance, the attorney must be sure to explain the implications of the section on the dissolution procedure.<sup>48</sup>

To commence the dissolution proceeding, counsel must prepare an appropriate pleading. The California Judicial Council has created forms which must be used where mandated by the California Rules of Court.<sup>49</sup> As of the date of this article, no Judicial Council Form has been prepared to expressly provide for a stipulation concerning section 4800.3.<sup>50</sup> Therefore, when completing the petition or response, counsel must pay close attention to item 5 of the current Judicial Council Form.<sup>51</sup>

Item 5 concerns declarations of community and quasi-community assets and obligations. Counsel may insert a "catch all" statement to cover relief granted by section 4800.3.<sup>52</sup> However, counsel should note that a reimbursement right is not a community property interest and may not, therefore, be bound by the doctrine of *res judicata*.<sup>53</sup> If reimbursement is not alleged in the initial pleading, it could possibly be alleged at a later date, or in court. Counsel for the respondent should note that if reimbursement is declared, such a declaration is a statement of fact which, unless controverted, is taken as true. Therefore, when drafting the response, counsel should be sure to contro-

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48. Counsel should note that under the California Rules of Court summary dissolution forms are mandatory. Cal. Rules of Court Rule 1273 (1985). See Cal. Rules of Court Form 1295.10, 1295.20, 1295.30. Clients should be advised that under form 2195.10(9), which asks for a statement of community assets, reimbursement should be stated within the parties' settlement agreement. Reimbursement may be precluded if under item 9 the parties state that there are no community assets or liabilities. Cal. Rules of Court Form 1295.10(9) (Rev. January 1, 1985).

49. Cal. Rules of Court Forms 1281, 1282 (Rev. January 1, 1983) (Judicial Council of California Form for petition for dissolution and response).

50. Before filing or serving an official form, counsel should make sure that it is the most recent version. A comprehensive list of current Judicial Council Forms is available from the court of the practitioner's jurisdiction.

51. Cal. Rules of Court Forms 1281, 1282 (Rev. January 1, 1983).

52. Petitioner might state the following: "Petitioner is informed and believes that the community has a right of reimbursement for community contributions towards respondent's professional degree (or substitute: training). Petitioner asks leave to amend this petition or to file an appropriate pleading to allege the exact nature of such contributions when they are ascertained." If the petitioner has records of expenses or a clear recollection of the contributions that have been made, counsel may itemize the claims of contribution and attach the itemization to the petition. See Cal. Rules of Court Form 1285.55 (Property Declaration).

53. However, if a statement is made concerning community property, or if item (a) of forms 1281 or 1282 is marked stating that there is no community property, the allegations become *res judicata*.

vert the basis for reimbursement in general, or to controvert specific itemizations set out by the petition.

Counsel should also note that the section has an effect on spousal support. California Civil Code section 4801(a)(1) states that the court must consider certain factors as a basis for spousal support. One of the factors is the extent to which the spouse who was initially supported in turn subsequently supports the spouse to gain professional training or a degree.<sup>54</sup>

The two key areas concerning negotiation and litigation of claims for reimbursement are: (1) how community contributions are determined; and (2) what constitutes substantial enhancement of earning capacity. The petitioner should allege the broadest definition of community contributions possible. This issue should be relatively easy for a court to determine, as it is based on past actual circumstances.<sup>55</sup> Substantial enhancement is a much more difficult area because it entails an evaluation of a future course of action.<sup>56</sup>

Counsel should tailor discovery to elicit facts concerning the community's contributions. Those facts will become important during trial, especially if the petitioner is asking the court to include living expenses and other items in its definition of community contribu-

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54. CAL. CIV. CODE § 4801(a)(1) (West Supp. 1985). *See also supra* note 42. A supporting spouse could possibly use section 4801(a)(1) to claim spousal support while pursuing his or her own education or training.

55. *See supra* note 17. Petitioner should allege not only tuition, books, supplies and laboratory fees, but other support considerations such as living expenses, transportation costs, health care and entertainment. Accordingly, respondent should allege the narrowest definition possible, academic fees only.

56. Reimbursement is only granted if community contributions substantially enhance the earning capacity of a party. The problems presented by this issue were reviewed by the Law Revision Commission:

Despite the virtues of a reimbursement right, there are a number of problems that must be resolved. The reimbursement right is appropriate in the typical situation where the student spouse receives education that substantially enhances his or her earning capacity. But in some cases the education may not enhance the student spouse's earning capacity, or may enhance it only marginally, or may enhance it but the student spouse engages in other work to which the enhancement is irrelevant. In these cases the equities change. If there is no enhancement or only a marginal enhancement of the student spouse's earning capacity, the basis of the reimbursement right—that the community contributed funds for the economic benefit of the student spouse—fails. The reimbursement right should apply only where enhancement of the student spouse's earning capacity is substantial. This will ensure fairness in imposing on the student spouse the economic burden of reimbursement and will avoid litigation over small expenditures such as weekend seminars whose impact on the student spouse's earning capacity is speculative or intangible. *Where enhancement of the student spouse's earning capacity is substantial but the student spouse does not take advantage of this, reimbursement should nonetheless be required. The higher earning potential is still available to the student spouse, who may take advantage of it in the future.* The student spouse should not be able to avoid the reimbursement requirement simply by working at a lower-paying job until the marriage is dissolved.

17 CAL. L. REV. COMM'N REPORTS at 235-36 (emphasis added).

tions. Although the petitioner may have provided monetary support for the other spouse's education, he or she may not know the spouse's actual expenses.

Thorough discovery should be pursued, during which the petitioner may propound a Request for Admissions.<sup>57</sup> The effect of a Request for Admissions would be to solidify the parties' positions on what items shall be included as community contributions. If the respondent admits that certain somewhat questionable items, such as living expenses, should be included, or if the respondent does not comply with the request, then the court should take great deference to the parties' stipulations.

Counsel may want to specifically state contentions concerning reimbursement in the At Issue Memorandum and during the Mandatory Settlement Conference.<sup>58</sup> Many courts and litigators will be unaware of or unfamiliar with the statute, and it will be advantageous for counsel to take every means possible to present the issues and the parties' contentions. One way to clearly state the petitioner's or respondent's contentions concerning the definition of community contributions is to submit a settlement conference trial brief.<sup>59</sup>

If the case is not settled out of court and proceeds to trial, petitioner's counsel should attempt to introduce as much evidence as possible concerning community expenditures. This will aid the court in its determinations and perfect the record for appeal. Because this section has not been tested in the trial courts, determinations concerning its "gray areas," community contributions and substantial enhancement, are inherently appealable.

If an appeal is contemplated, counsel should request a Statement of Decision from the court.<sup>60</sup> Statements of Decision are especially appropriate when a property interest or obligation is controverted at trial. Counsel should be aware that "[a]fter a party has requested such a statement, *any party* may make proposals as to the content of the statement of decision."<sup>61</sup> Therefore, counsel should file a proposal in every case where a property interest is at issue.

Counsel should also note that, in general, reversals and modifica-

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57. See CAL. PRAC. GUIDE: FAM. L., (TRG) § 11:61 (1985); CAL. CIV. PROC. CODE § 2033 (West 1983) (for procedural information concerning requests for admissions).

58. See CAL. PRAC. GUIDE: FAM. L., (TRG) § 13:28-13:32 (1985).

59. Since court rules differ jurisdictionally, counsel should check to determine whether a trial brief is mandatory.

60. See CAL. PRAC. GUIDE: FAM. L., (TRG) § 15:26-15:47 (1985).

61. CAL. CIV. PROC. CODE § 632 (West Supp. 1985).

tions of awards made by the trial court are governed by an "abuse of discretion" standard.<sup>62</sup> The appellate courts may also be reluctant to review whether certain community contributions are covered under the law, deeming the question one of fact, and therefore not within its scope of review. Where the amount of reimbursement is small, the client may wish to accept the trial court's ruling rather than pursue appeal.

#### IV. CONCLUSION

Although the Supreme Court has created more confusion out of an already confusing section,<sup>63</sup> the trial courts should have less trouble construing the section if litigants provide them with an adequate legal and factual basis for their decisions. A claim for reimbursement of community contributions for professional education and training is unique to California family law, and thus creative litigation is possible. Counsel should urge the courts to adopt workable standards and to interpret equitably any poorly worded provisions which might encumber the section's equitable goals.

SUZANNE E. RAND

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62. CAL. PRAC. GUIDE: FAM. L., (TRG) § 16:64 (1985).

63. See *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (court uses the word compensation instead of reimbursement).