

**Amendment to 08-05-03**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2640 to read as follows:

1       §2640

2           (a) "Contributions to the acquisition of the property," as used in this section, include  
3       downpayments, payments for improvements, and payments that reduce the principal of a loan used  
4       to finance the purchase or improvement of the property but do not include payments of interest on  
5       the loan or payments made for maintenance, insurance, or taxation of the property.

6           (b) In the division of the community estate under this division, unless a party has made a  
7       written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver,  
8       the party shall be reimbursed for the party's contributions to the acquisition of the property to the  
9       extent the party traces the contributions to a separate property source. The amount reimbursed shall  
10      be without interest or adjustment for change in monetary values and shall not exceed the net value of  
11      the property at the time of the division.

12          (c) A party shall be reimbursed for any separate property contributions made to the separate  
13      property estate, including assets or debts, of the other spouse during the marriage, unless there has  
14      been a transmutation in writing pursuant to Family Code section 850, et seq., or a written waiver of  
15      the right of reimbursement. The amount reimbursed shall be without interest or adjustment for  
16      change in monetary values.

(Proposed new language underlined; language to be deleted stricken.)

## RESOLUTION 8-05-2003

### DIGEST

#### Dissolution: Separate Property Contribution to Separate Property of Other Spouse

Amends Family Code section 2640 to provide reimbursement to a spouse who contributed separate property to the other spouse's separate property

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

None known

#### Reasons:

This resolution amends Family Code section 2640 to provide reimbursement to a spouse who contributed separate property to the other spouse's separate property. This resolution should be disapproved because parties should be given the same rights of reimbursement regardless of the length of the marriage.

Currently, section 2640 provides that if a spouse uses his or her separate money to pay for a house held as community property, that money is considered a gift to the community in the absence of a writing stating otherwise. Most couples are unaware of this rule or unwilling to extensively document such transfers in anticipation of divorce while the marriage is going well. As a result, the contributing spouse loses half of his or her contribution.

In contrast, where community property is used to pay for a spouse's separate property, courts have devised formulas for "recapturing" such contributions and the gain in value attributed to them. (See *In Re Marriage of Moore* (1980) 28 Cal.3d 366 ; *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621; *In Re Marriage of Allen* (2002) 96 Cal.App.4th 497; *In Re Marriage of Wolfe* (2001) 91 Cal.App.4th 962.)

While there appears to be no equitable reason to distinguish between contributions of community property to separate property or the contributions of separate property of one spouse to the separate property of the other, this resolution replaces one inequity with another by distinguishing between contributions depending on the length of the marriage, creating a rebuttable presumption for reimbursement in marriages of less than 10 years and leaving reimbursement to the discretion of the court for longer marriages.

This resolution also continues to treat separate property differently from community property by making the reimbursement of separate property contributions subject to a rebuttable presumption whereas the current law makes reimbursement of community property contributions absolute. Thus, this resolution is likely to create additional confusion concerning administration of contributions by spouses to separate and community property.

### SECTION/COMMITTEE REPORT

#### FAMILY LAW SECTION

Recommendation: **APPROVE IN PRINCIPLE IF AMENDED**

#### Reason:

If amended, the committee would support the resolution. The amendment suggested is to delete that part of the first sentence of section 2640 (c) , at line 12-13 that reads "There shall be a rebuttal presumption affecting the burden of proof, that in a marriage of less than ten years," and the last full sentence

beginning on line 17 - 19 that reads "In a marriage of more than ten years, the court shall have discretion to reduce or modify any claim for reimbursement to the extent that the circumstances of the case would render full reimbursement unjust."

The problem with reference to a ten year period is that it creates uncertainty, and would lead to increased litigation. It is unnecessary and makes more sense to just allow the reimbursement.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2640 to read as follows:

- 1 §2640  
2 (a) "Contributions to the acquisition of the property," as used in this section, include  
3 downpayments, payments for improvements, and payments that reduce the principal of a loan used  
4 to finance the purchase or improvement of the property but do not include payments of interest on  
5 the loan or payments made for maintenance, insurance, or taxation of the property.  
6 (b) In the division of the community estate under this division, unless a party has made a  
7 written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver,  
8 the party shall be reimbursed for the party's contributions to the acquisition of the property to the  
9 extent the party traces the contributions to a separate property source. The amount reimbursed shall  
10 be without interest or adjustment for change in monetary values and shall not exceed the net value of  
11 the property at the time of the division.  
12 (c) There shall be a rebuttable presumption affecting the burden of proof, that in a marriage  
13 of less than 10 years, a party shall be reimbursed for any separate property contributions made to the  
14 separate property estate, including assets or debts, of the other spouse during the marriage, unless  
15 there has been a transmutation in writing pursuant to Family Code section 850, et seq., or a written  
16 waiver of the right of reimbursement. The amount reimbursed shall be without interest or  
17 adjustment for change in monetary values. In a marriage of more than 10 years, the court shall have  
18 discretion to reduce or modify any claim for reimbursement to the extent that the circumstances of  
19 the case would render full reimbursement unjust.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

### STATEMENT OF REASONS

Existing Law: Allows a spouse to be reimbursed for separate property contributions to the acquisition of community property. Existing law also allows the community to be reimbursed for contributions made to the separate property of one party. However, the law does not presently allow reimbursement where one spouse uses his or her separate property for the benefit of the other spouse's separate estate.

This Resolution: Allows for separate property reimbursement for contributions made to the other spouse's separate estate in certain circumstances.

The Problem: Since the adoption into law of Family Code section 2640, the Legislature and courts have determined that the pre-existing theory, that any contribution of separate property by one spouse to the community or by the community to one spouse's separate property was a "gift" and therefore not subject to reimbursement, was not viable or accurate in today's society. If this is true, then contributions by one spouse, after marriage, to the separate property estate of the other spouse should not be viewed as a "gift"

and be reimbursed if no written waiver, per Section 2640, exists. There have been significant and conflicting appellate court rulings on this issue. See, *Marriage of Wolfe* (2001) 91 Cal.App.4<sup>th</sup> 962 and *Marriage of Cross* (2001) 94 Cal.App.4<sup>th</sup> 1143. *Marriage of Cross* also conflicts with established law in the *Moore/Marsden* (*In re Marriage of Moore* (1980) 28 Cal.3d 366, *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426) and *In re Marriage of Frick* (1986) 181 Cal.App.3d 997 cases. An illustration of how the added language would be applied is as follows:

Husband owns a separate property residence at the time of marriage. Wife contributes \$50,000 of her separate funds, after marriage, to remodel Husband's separate property residence. Existing law does not allow Wife to be reimbursed; her contribution is deemed to be a "gift" from Wife to Husband. Under the proposed legislation, the court could order reimbursement to Wife for her separate property contribution.

#### **IMPACT STATEMENT**

This legislation does not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Diane Wasznicky

#### **COUNTERARGUMENT**

##### **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY:**

This resolution attempts to create a category of rights and liabilities distinct from those common to marriage and existing domestic partnership by hand-picking certain privileges from both bodies of law and deleting basic liabilities common to both, such as a support obligation. Eliminating obligations would gut the domestic partnership laws and would leave the domestic partner with the least bargaining power unprotected.

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This law arbitrarily distinguishes a party's ability to be reimbursed for separate property contributions to the separate property estate of their spouse, based on the length of the marriage. Parties should be afforded the same opportunity for separate property reimbursement, regardless of the whether the marriage lasted for 2 or 20 years. The 10 year limitation should be deleted.