

Defining Immediate Benefit Under California Evidence Code Section 973(b) in Light of Current California Community Property Laws

INTRODUCTION

Suppose Husband and Wife use community property¹ funds to buy a tool shed. The shed collapses on Husband and injures him. Husband sues the manufacturer for his personal injuries and the cost of the collapsed shed. In its defense, the manufacturer subpoenas Wife to question her about why the shed might have collapsed. Wife answers the subpoena by invoking her privilege to not testify against her spouse² under California Evidence Code section 970.³

Claiming that Wife waived the privilege, the defendant asks the court for an order compelling Wife to testify.⁴ The defendant relies on Evidence Code section 973(b).⁵ This section pro-

¹ All property acquired during marriage that is not separate property is community property. CAL. FAM. CODE § 760 (West 1994). Separate property is all property owned prior to marriage, property acquired during marriage by inheritance or gift, and profits from separate property. *Id.* § 770.

² The California Evidence Code recognizes two marital privileges. The first is the privilege not to testify against one's spouse. CAL. EVID. CODE § 970 (West 1995). The other is the privilege not to testify about marital communications. *Id.* § 980. *See* Developments in the Law, *Privileged Communications*, 98 HARV. L. REV. 1450, 1564 (1985) [hereinafter *Privileged Communications*] (proposing that, although two privileges often overlap, different rationales support each privilege).

³ Section 970 of the California Evidence Code states that a married person can choose not to testify against her spouse in any proceeding unless a statute compels her testimony. CAL. EVID. CODE § 970.

⁴ *See* CAL. CIV. PROC. CODE § 1991 (West Supp. 1996) (stating that party can request court order compelling witness to testify).

⁵ Section 973(b) of the California Evidence Code states that a witness spouse waives the privilege not to testify against her spouse if the party spouse prosecutes or defends a suit for the immediate benefit of the witness spouse. CAL. EVID. CODE § 973 (b) (West 1995).

vides that the witness spouse⁶ waives the privilege in civil proceedings⁷ when the party spouse brings or defends the action for the "immediate benefit"⁸ of the witness spouse.⁹ Defendant manufacturer claims that Wife waived the testimonial privilege because she will benefit from any recovery by her husband through community property law.¹⁰

⁶ As used in this Comment, a "witness spouse" is a married person who is not a party to the lawsuit. See 1 CALIFORNIA LAW REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES, THE MARITAL "FOR AND AGAINST" TESTIMONIAL PRIVILEGE F-5 (1956) [hereinafter LAW REVISION COMM'N] (using same terminology). A "party spouse" is the partner of the witness spouse who is bringing or defending the lawsuit. 1 *id.* The terms are merely a way of distinguishing the role of each spouse in the lawsuit. 1 *id.*

⁷ A spouse cannot invoke the testimonial privilege in a number of proceedings. CAL. EVID. CODE § 972 (West 1995). These include civil actions in which the proceeding is between spouses, actions to transfer property because of one spouse's incapacity, and juvenile court proceedings. *Id.* A spouse also cannot use the privilege in a number of criminal actions. *Id.* These actions include cases in which one spouse committed a crime against a family member, a crime against a third party while attempting to harm the other spouse, or bigamy. *Id.* If the crime occurred prior to marriage, the witness spouse cannot use the privilege. *Id.* A witness spouse also cannot use the privilege if the party spouse is defending charges under § 270 (child abandonment or neglect) or § 270(a) (failure to provide support) of the California Penal Code. *Id.*

This Comment only discusses the use of the testimonial privilege in civil cases because it addresses instances in which the community estate would financially benefit. See *infra* notes 18-21 and accompanying text (discussing whether community property recovery is immediate benefit to witness spouse).

⁸ "Immediate benefit" is a term of art. See 20 WORDS AND PHRASES 135-46 (West Supp. 1994) (defining immediate benefit). This Comment refers to the term as California Evidence Code § 973(b) uses it. See CAL. EVID. CODE § 973(b).

⁹ CAL. EVID. CODE § 973(b).

¹⁰ California is a community property state. See CAL. FAM. CODE § 750 (West 1994) (authorizing community property form of title). Community property includes assets that the spouses earn during the marriage. *Id.* § 760. Therefore, the community property recovery by one spouse in a lawsuit belongs to both spouses. See *id.* § 751 (stating that interest of each spouse in community property is present, existing, and equal); *id.* § 780 (stating that personal injury recoveries are community property if cause of action arose during marriage).

Personal injury awards won after divorce, however, are the separate property of the injured spouse. *Id.* § 781. Upon death or divorce, each spouse gains sole ownership of half of the community property regardless of who earned it. See *id.* § 2550 (stating that court shall divide community property equally at divorce); CAL. PROB. CODE § 100 (West 1991) (stating that upon death of one spouse, each spouse receives one half of community property).

In community property states,¹¹ courts often have problems discerning whether a lawsuit recovery by one spouse is an immediate benefit to the witness spouse.¹² Generally, the community property estate¹³ receives recoveries and is liable for the debts that both spouses incur during the marriage.¹⁴ Community

¹¹ The eight states that follow community property law are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:3 (1982) (listing eight community property states). Wisconsin is the only state to adopt the Uniform Marital Property Act. See WIS. STAT. ANN. § 766 (West Supp. 1993).

¹² See generally ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.14, at 234-40 (2d ed. 1993) (discussing general community property rules). Witness spouses can arguably be immediate beneficiaries in community property states because once the party spouse recovers, each spouse has an equal interest in the property. *Id.* See also CAL. FAM. CODE § 751 (stating that spouses have coexisting and equal interests in community property). In common law marital property states, on the other hand, the spouse who earned the property owns it. See generally MCCLANAHAN, *supra* note 11, § 2:25 (stating general common law marital property rules).

¹³ The "community estate" includes both community property and quasi-community property. CAL. FAM. CODE § 63 (West 1994). "Quasi-community property" means all property that would have been community property if a married person had acquired it while residing in California. *Id.* § 125.

¹⁴ *Id.* § 910. Section 910 states that the community estate is liable for all debts either spouse incurs during or prior to the marriage, regardless of which spouse incurred the debt. *Id.* However, the community estate is not liable for some separate property debts of a married person. See *id.* § 911 (stating that community estate is not liable for separate property debts incurred prior to marriage). As long as the non-debtor spouse keeps a separate deposit account for her earnings, creditors can only get to the earnings of the debtor spouse. *Id.*

The community estate generally will receive any recovery from a suit by only one spouse, automatically benefitting the witness spouse. See *id.* § 751 (stating that community property interests are present, existing, and equal). An exception to the general rule that all community property recoveries are present, existing, and equal exists in the area of tort recoveries. See *id.* § 2603 (setting rules for division of tort recovery at divorce). After divorce, the spouse who suffered the injury receives all of the award as separate property. *Id.* The witness spouse may receive part of the award if the court finds that the interests of justice require it. *Id.* In no event is the non-injured spouse to receive more than half of the recovery. *Id.*

The community estate will also benefit when the party spouse is a defendant and counter sues or mounts an affirmative defense, such as asserting an ownership interest. See, e.g., *Tobias v. Adams*, 258 P. 588, 592 (Cal. 1927) (holding that wife had to testify because she had joined with her husband in answering complaint). The *Tobias* court held that both spouses had waived the marital privilege by joining as defendants. *Id.* But cf. *Stein v. Superior Court*, 344 P.2d 406, 408 (Cal. Dist. Ct. App. 1959) (holding that wife can invoke privilege when plaintiff joins husband and wife as defendants); *Hagen v. Silva*, 293 P.2d 143, 146 (Cal. Dist. Ct. App. 1956) (holding that when both spouses answer jointly and assert claims in answer, they waive marital privilege). In *Hagen*, the defendants alleged in their answer that they owned the note at issue and held the deed of trust. *Id.* at 145. They did not file a claim or cross complaint, but the answer entitled them to a judgment. *Id.*

property law in California provides that each spouse owns one half of the community property, regardless of who earned the assets.¹⁵ According to Evidence Code section 970, a non-party witness spouse may protect the marriage by invoking the testimonial privilege and refusing to testify against the party spouse.¹⁶ However, section 973(b) waives the privilege if the party spouse is prosecuting or defending the action for the immediate benefit of the witness spouse.¹⁷

The California Courts of Appeal are split on the issue of whether a community property recovery by the party spouse is an immediate benefit to the witness spouse.¹⁸ The First District found no immediate benefit under section 973(b) when the party spouse sued a partnership for part ownership of land.¹⁹ It allowed the witness spouse to invoke her privilege not to testify.²⁰ By contrast, the Third District, found that under community property law a witness spouse would have equal management and control of a personal injury recovery by the party spouse. The court held that this would immediately benefit the witness spouse under section 973(b) and compelled the witness spouse to testify.²¹

This Comment analyzes the split of authority between the California courts and concludes that a community property recovery by a party spouse is not an immediate benefit to the witness spouse. Therefore, the witness spouse should be allowed to invoke the testimonial privilege. Part I presents a history of the testimonial privilege and its waiver in California.²² Part II discusses the conflict between the California Courts of Appeal concerning the interpretation of immediate benefit²³ and the

¹⁵ See CAL. FAM. CODE § 751 (stating that spouses' interests in community property are coexisting and equal).

¹⁶ See *id.* § 970 (stating that married persons usually do not have to testify against their spouses).

¹⁷ *Id.* § 973(b).

¹⁸ Compare *Duggan v. Superior Court*, 179 Cal. Rptr. 410, 413 (Ct. App. 1981) (holding that community property recovery is not immediate benefit to witness spouse) with *Hand v. Superior Court*, 184 Cal. Rptr. 588, 591-92 (Ct. App. 1982) (holding that community property recovery is immediate benefit to witness spouse).

¹⁹ *Duggan*, 179 Cal. Rptr. at 413.

²⁰ *Id.*

²¹ *Hand*, 184 Cal. Rptr. at 591-92.

²² See *infra* notes 29-42 and accompanying text (discussing history of testimonial privilege).

²³ See *infra* notes 46-81 and accompanying text (discussing split among circuits as to

legislative intent underlying its use.²⁴ Part III proposes a statutory amendment codifying the First District's narrow interpretation of immediate benefit.²⁵ Additionally, Part III argues that the proposed amendment reflects legislative intent,²⁶ accords with other areas of the law,²⁷ and supports the language of section 973(b).²⁸

I. BACKGROUND

California law has generally incorporated the common law testimonial privilege for married persons,²⁹ although the scope

interpretation of immediate benefit).

²⁴ See *infra* notes 82-110 and accompanying text (discussing legislative intent underlying testimonial privilege and its waiver).

²⁵ See *infra* note 114 and accompanying text (proposing statutory amendment).

²⁶ See *infra* notes 117-32 and accompanying text (arguing that proposed amendment furthers legislative intent underlying privilege).

²⁷ See *infra* notes 133-42 and accompanying text (arguing that proposed amendment is consistent with established rules in other areas of law).

²⁸ See *infra* notes 143-44 and accompanying text (arguing that amendment conforms with facial interpretation of § 973(b)).

²⁹ See generally 8 JOHN H. WIGMORE, EVIDENCE § 2227 (3d ed. 1961) (discussing evolution of testimonial privilege for married persons). The origin of the privilege is unknown, but it existed by 1580. 8 *id.* See also *Bent v. Allot*, Cary 94-95, 21 Eng. Rep. 50 (Ch. 1580) (documenting first use of privilege). In *Bent*, the defendant called his wife to testify, but he would not allow the plaintiff to cross-examine her. *Id.* The court held that the husband could refuse to allow his wife to testify on cross-examination, but if he refused, he could not use his wife's testimony. *Id.* In the 1600s, judges used the privilege to avoid compelling a wife to testify against her husband in situations which could result in his death. See 8 WIGMORE, *supra*, § 2227 (claiming that if wife helped to convict her husband, she would commit petit treason, or harm, to head of household).

Later, courts disqualified both husband and wife from testifying on behalf of or against each other. See 1 LAW REVISION COMM'N, *supra* note 6, at F-10 (citing English case which stated that it is impossible for one spouse to give unbiased testimony about another). Spouses could not testify for each other because the law saw them as one and the court did not want to cause marital discord. *Id.*

An exception to the rule that spouses could not testify on behalf of or against each other existed in cases of necessity. See 8 WIGMORE, *supra*, § 2239 (explaining that exception existed at common law in cases of necessity). Under the necessity exception, the court could compel a spouse to testify. 8 *id.* § 2227. Usually this exception applied to instances in which one spouse committed a violent act against a family member. See, e.g., *People v. Pittullo*, 253 P.2d 705, 708 (Cal. Dist. Ct. App. 1953) (allowing wife to testify about husband beating her); *Soule's Case*, 5 Me. 407, 408 (1928) (allowing wife to testify against husband who had injured her while he was drunk); *Cargill v. State*, 220 P. 64, 67 (Okla. 1923) (allowing wife to testify against husband who had raped her seven-year-old daughter); *Pennsylvania v. Stoops*, Add. 381, 382 (Pa. County Ct. 1799) (allowing into evidence wife's deathbed statement that husband was trying to murder her). Ironically, in the few

of the privilege has fluctuated over the past century.³⁰ During the first half of this century, the witness spouse needed the consent of the party spouse to testify on behalf of or against the party spouse.³¹ In 1966, the legislature amended the privilege to its present form in Evidence Code section 970.³² Currently,

cases in which the court did not allow the injured spouse to testify, the aggrieved spouse was usually the husband. *See, e.g.*, *Ector v. State*, 74 S.E. 295, 296 (Ga. Ct. App. 1912) (refusing to hear husband's testimony that wife had attempted to stab him); *Turnbull v. Commonwealth*, 79 Ky. 495, 496 (1881) (refusing to hear husband's testimony regarding wife's malicious wounding of him). The rationale behind the necessity exception was that marital harmony no longer existed and therefore it did not warrant protection. *Id.* *See also* *Soule's Case*, 5 Me. at 408 (stating that rationale of protecting marital harmony loses its influence when family members abuse each other).

³⁰ *See generally* 1 LAW REVISION COMM'N, *supra* note 6, at F-10 (discussing history of marital privilege in California). In 1851, the California legislature codified the common law rule which disqualified spouses from testifying for or against each other. *Id.* By 1863, the legislature allowed judges to compel spousal testimony except in divorce actions or as to communications between the spouses during the marriage. *Id.* The new statute compelling spousal testimony treated husbands and wives as any other witness and stated that they were competent to testify. *Id.* In 1872, Civil Procedure Code § 1881(1) was enacted, which allowed the party to decide whether the witness spouse would testify. The statute provided that neither spouse may testify for or against the other without consent of the other spouse. *Id.* There were exceptions, however, for civil actions between the spouses and for criminal actions in which one spouse committed a crime against the other. *Id.* at F-10 to F-11.

The rationale behind the privilege is twofold. *See* 8 WIGMORE, *supra* note 29, § 2228 (arguing that there are two reasons for courts to use testimonial privilege). The first reason to use the privilege is to protect the couple from marital discord. 8 *id.* The other reason is to avoid the socially uncomfortable situation in which one spouse must condemn the other publicly. 8 *id.*

³¹ 1 LAW REVISION COMM'N, *supra* note 6, at F-10.

³² *See* CAL. EVID. CODE § 970 (allowing witness spouses to invoke privilege). The California Law Revision Commission raised concerns that the party spouse would abuse the privilege in situations in which testimony would not disrupt the marriage relationship. *See* 1 LAW REVISION COMM'N, *supra* note 6, at F-17 (arguing that privilege should only belong to witness spouse). According to this reasoning, the witness spouse is more likely than the party spouse to exercise the privilege for its intended purpose. *Id.* The witness spouse is the spouse most likely to weigh the harm to the marital relationship without considering the outcome of the lawsuit. *Id.*

The Commission thus suggested that the witness spouse alone should be able to assert the privilege. *Id.* Following the Commission's recommendations, the California legislature limited the privilege to situations in which the witness spouse chooses not to testify against the party spouse. *See* CAL. EVID. CODE § 970. The party spouse could no longer invoke the privilege. *See* John R. McDonough, *The California Evidence Code: A Précis*, 18 HASTINGS L.J. 89, 107 (1966) (noting this "important" change in spousal testimonial privilege).

Additionally, the Commission suggested that the privilege not extend to situations in which the witness spouse refused to testify for the benefit of the party spouse. *See* 1 LAW REVISION COMM'N, *supra* note 6, at F-14. The Commission argued that the rationales under-

the witness spouse can choose to not testify against the party spouse in any civil proceeding.³³ By amending the privilege, the legislature sought to ensure that married people would use it to avoid marital conflict.³⁴

Additionally, the legislature also codified a privilege waiver in situations in which the party spouse prosecutes or defends an action for the immediate benefit of the witness spouse.³⁵ It was

lying the privilege did not logically extend to this situation. *Id.* The Commission pointed out that it is difficult to imagine a scenario in which a party would not want someone to testify on her behalf. *Id.* Testimony that benefits the party spouse is unlikely to cause marital discord. *Id.* Therefore, the California legislature also abolished the privilege in situations in which the witness spouse's testimony would benefit the party spouse. *Id.* California joined a number of other states in abolishing the privilege of a spouse not to testify for the benefit of the other spouse. *See id.* (listing states that have abolished this form of privilege).

³³ CAL. EVID. CODE § 970.

³⁴ *See* 1 LAW REVISION COMM'N, *supra* note 6, at F-14 to F-15 (discussing rationale behind amendments to privilege).

³⁵ To ensure that married people would not use the privilege in bad faith, the legislature codified two provisions detailing when the witness spouse waives the privilege. The first provision states that the witness spouse waives the privilege whenever she has already testified in any proceeding in the action. CAL. EVID. CODE § 973(a). The second provision states that the witness spouse waives the privilege when the party spouse brings or defends the suit for the immediate benefit of the witness spouse. *Id.* § 973(b). *See also* COMMENT — ASSEMBLY COMMITTEE ON JUDICIARY, *reprinted in* CAL. EVID. CODE § 973, at 574-75 (West 1966) [hereinafter JUDICIARY COMMENT] (stating that purpose of subdivision (b) is to preclude couples from unfairly using their marital status to avoid giving testimony). Ironically, most of the cases the legislature cited in passing this statute addressed situations in which the husband and wife were both parties. *See, e.g., Ex Parte Strand*, 11 P.2d 89, 90 (Cal. Dist. Ct. App. 1932) (holding that wife must testify if she joins as party plaintiff to recover on behalf of community estate). Only two cases addressed the testimonial privilege when only one spouse is a party. *See Rothschild v. Superior Court*, 293 P. 106, 107 (Cal. 1930) (holding that wife is immediate beneficiary when recovery benefits community estate); *Marple v. Jackson*, 193 P. 940, 943 (Cal. 1920) (holding that witness-spouse husband did not have to testify even though defendant accused husband and wife of fraud).

An uncodified waiver concerning statements by the witness spouse in situations in which a hearsay exception applies may also exist. *See First Nat'l Bank v. DeMoulin*, 205 P. 92, 94 (Cal. Dist. Ct. App. 1922) (holding that extrajudicial statement by witness spouse is admissible if it would be admissible under hearsay exception). *But see* Naomi G. Litvin, Note, *The Marital Testimonial Privilege: California Evidence Code Section 970 and Ivey v. United States*, 18 HASTINGS L.J. 222, 227 (1966) (arguing that testimonial privilege should extend to extrajudicial statements).

Courts have found two instances in which witness spouses waive the privilege. *See* John E. Breckenridge, Note, 44 CAL. L. REV. 945, 947 (1956) (noting two cases in which court held that spouses waived privilege). First, courts find a waiver of the privilege when both spouses join as plaintiffs or defendants. *See, e.g., Tobias v. Adams*, 258 P. 588, 592 (Cal. 1927) (holding that wife must testify because she joined husband in answering complaint). Second, courts hold that spouses waive the privilege when the party spouse is not a real party in interest. *See, e.g., Sylvester v. Kirkpatrick*, 180 P.2d 36, 41 (Cal. Dist. Ct. App. 1947)

concerned that without the waiver, married couples would take advantage of the privilege to immunize witness spouses from testifying in cases in which they had a direct interest.³⁶ The legislature did not want to unjustly thwart fact-finding by allowing couples to use the privilege in bad faith when the testimony would not harm the marriage.³⁷ However, the legislature failed to define immediate benefit.³⁸ Consequently, the courts have not been able to agree on the definition of the phrase.³⁹ This has produced uncertainty regarding when witness spouses may use the privilege.⁴⁰

The legislative history of the privilege and its waiver demonstrates that the legislature wanted married persons to use the privilege and to use it in good faith.⁴¹ However, the language

(holding that husband must testify because wife disclaimed interest in property and was no longer party).

³⁶ See JUDICIARY COMMENT, *supra* note 35 (stating that purpose of § 973(b) is to preclude couples from unfairly using their marital status to avoid testifying).

³⁷ *Id.* *Tobias* and *Marple* exemplify one way a married couple might use the privilege in bad faith. See *Tobias*, 258 P. at 592-93 (finding waiver of witness spouse privilege when debtor-husband denied fraudulent conveyance by relying on contract made with wife); *Marple*, 193 P. at 941 (finding witness spouse's testimony inadmissible when couple attempted to defraud creditors by transferring community property to non-debtor spouse's separate property).

Another way married couples might use the privilege in bad faith is to name only one spouse as a party in order to allow the other spouse to use the privilege. See *Credit Bureau v. Smallen*, 249 P.2d 619, 623 (Cal. Dist. Ct. App. 1952) (holding that husband waived marital communication privilege when he sued for performance of contract between husband, wife, and defendant, but failed to name wife as party); see also Michael G. Walsh, Annotation, *Existence of Spousal Privilege Where Marriage Was Entered Into for Purpose of Barring Testimony*, 13 A.L.R.4th 1305, 1312 (1982) (arguing that court should bar spouses from invoking privilege when they married only to avoid testifying).

³⁸ Neither the statute nor the accompanying comments discuss how to interpret the term "immediate benefit." See CAL. EVID. CODE § 973(b); JUDICIARY COMMENT, *supra* note 35 (describing purpose of waiver without defining immediate benefit).

³⁹ Compare *Duggan v. Superior Court*, 179 Cal. Rptr. 410, 412-13 (Ct. App. 1981) (holding that witness spouse is not immediate beneficiary of community property recovery) with *Hand v. Superior Court*, 184 Cal. Rptr. 588, 591-92 (Ct. App. 1982) (holding that personal injury recovery by party spouse is immediate benefit to witness spouse).

⁴⁰ See, e.g., *Sabado v. Moraga*, 234 Cal. Rptr. 249, 254 (Ct. App. 1987) (stating in dicta that type of action determines whether or not plaintiff brought action for immediate benefit of witness spouse). In *Sabado*, the court was uncertain whether the husband's defamation and civil rights suit would be an immediate benefit to the wife. *Id.* at 254. Although the Third District Court of Appeals decided *Sabado* on unrelated grounds, it stated that California courts had not settled the issue. *Id.* at 254-57.

⁴¹ See 1 LAW REVISION COMM'N, *supra* note 6 (presenting Law Revision Commission's recommendations and comments); see also McDonough, *supra* note 32, at 89 n.4 (stating

of the statute is vague and supports at least two different interpretations of immediate benefit.⁴² Consequently, married people must look to court decisions interpreting section 973(b) to determine the extent of the waiver in civil litigation.

II. The Current State of the Law

The California courts have not reached a consensus regarding the meaning of "immediate benefit."⁴³ Currently, a split of authority exists between California appellate courts about whether successful community property lawsuits result in an immediate benefit to the witness spouse.⁴⁴ The answer to this conflict may have serious consequences for witness spouses who want to invoke their testimonial privilege.⁴⁵

A. The Conflict

California Courts of Appeal do not agree whether a witness spouse is an immediate beneficiary of a community property recovery.⁴⁶ The First District held that a community property recovery is not an immediate benefit and allowed the witness spouse to invoke the privilege.⁴⁷ By contrast, the Third District held that a personal injury recovery by the party spouse is an immediate benefit to the witness spouse.⁴⁸ Therefore, the wit-

that legislature seriously considers Law Revision Commission recommendations); *infra* note 100 (citing Judiciary Committees' comments supporting Law Revision Commission comments).

⁴² See *supra* note 39 (discussing two different interpretations of immediate benefit).

⁴³ See *supra* note 39 and accompanying text (describing conflict between California's First and Third District Courts of Appeal).

⁴⁴ See cases cited *supra* note 39.

⁴⁵ See *Hand v. Superior Court*, 184 Cal. Rptr. 588, 591-92 (holding that witness spouse must testify against party spouse in personal injury cases). The *Hand* interpretation would restrict the use of the privilege to instances in which the party spouse's action only involved separate property. See *supra* note 1 (defining "separate property" as property owned before marriage, property acquired during marriage by inheritance or gift, and profits from separate property).

⁴⁶ Compare *Duggan v. Superior Court*, 179 Cal. Rptr. 410, 412 (Ct. App. 1981) (holding that witness spouse is not immediate beneficiary of community property recovery) with *Hand*, 184 Cal. Rptr. at 560 (holding that personal injury recovery by party spouse is immediate benefit to witness spouse).

⁴⁷ *Duggan*, 179 Cal. Rptr. at 412-13.

⁴⁸ *Hand*, 184 Cal. Rptr. at 560.

ness spouse must testify. This split has created confusion as to when witness spouses may invoke the privilege.

1. The *Duggan* Decision

In *Duggan v. Superior Court*,⁴⁹ the First District Court of Appeal held that a witness spouse is not an immediate beneficiary of a party spouse's community property action. In this case, the plaintiff husband brought an action against a partnership for part ownership of real property.⁵⁰ The plaintiff's wife claimed the testimonial privilege under section 970 and refused to testify at the defendant's deposition.⁵¹ Defendants, who held the deed, argued that plaintiff's wife waived the privilege under section 973(b) because she would immediately benefit from her husband's action.⁵² The defendants obtained an order from the trial court compelling plaintiff's wife to testify.⁵³

The plaintiff appealed, seeking a writ of prohibition on the ground that the order violated the marital privilege.⁵⁴ The First District court agreed with the plaintiff and reversed the trial court order compelling the wife to testify.⁵⁵ The court held that a community property recovery by the party spouse did not make the witness spouse an immediate beneficiary.⁵⁶

The court noted that no case had previously interpreted the meaning of immediate benefit under section 973(b).⁵⁷ Therefore, it relied on the definition of the phrase "immediate benefit" in Civil Procedure section 2019(a)(4).⁵⁸ The *Duggan* court

⁴⁹ 179 Cal. Rptr. 410 (Ct. App. 1981).

⁵⁰ *Id.* at 411. *Duggan* sued a dissolving partnership seeking to establish a 15% ownership of real property. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 411-13.

⁵⁶ *Id.* at 412-13.

⁵⁷ *Id.* at 412.

⁵⁸ *Id.* at 411. At the time *Duggan* was decided, § 2019(a)(4) of the California Code of Civil Procedure stated that service of a subpoena on a deponent is not necessary if the deponent is an immediate beneficiary of the action. CAL. CIV. PROC. CODE § 2019(a)(4) (West 1983) (current version at CAL. CIV. PROC. CODE § 1987(b) (West Supp. 1996)). The other party may give notice to the attorney of the party who is bringing or defending the suit instead of to the deponent. *Id.* The current version does not use the immediate benefit

cited two cases that defined the language of the Civil Procedure statute.⁵⁹ According to those cases, only people represented by a nominal party⁶⁰ or the actual parties to the suit are immediate beneficiaries.⁶¹ The *Duggan* court employed this definition and held that plaintiff's wife was not an immediate beneficiary of her husband's civil action because she did not fall into either of these categories.⁶²

2. The *Hand* Decision

The Third District Court of Appeal, in *Hand v. Superior Court*,⁶³ reached a different conclusion than the *Duggan* court by looking to community property rules regarding management and control.⁶⁴ In *Hand*, the plaintiff sued his doctor for malpractice.⁶⁵ The plaintiff's attorney told the defendant doctor that the plaintiff's wife would not attend a deposition because she planned to invoke the testimonial privilege.⁶⁶ The trial court denied the defendant's motion to compel testimony and the defendant appealed.⁶⁷

language. See CAL. CIV. PROC. CODE § 1987(b) (revising § 2019(a)(4) so as to omit use of term "immediate benefit").

⁵⁹ *Duggan*, 179 Cal. Rptr. at 412.

⁶⁰ See BLACK'S LAW DICTIONARY 1049 (6th ed. 1990) (defining "nominal defendant" as person who is not liable but is necessary to lawsuit). Plaintiffs or defendants only join a nominal party because the cause of action would be technically defective if they failed to do so. *Id.*

⁶¹ See *Waters v. Superior Court*, 377 P.2d 265, 271-72 (Cal. 1965) (defining immediate benefit under Code of Civil Procedure § 2019(a)(4)). The California Supreme Court remanded *Waters* to the trial court to determine whether a sole shareholder is an immediate beneficiary of a suit against a corporation. *Id.* at 272. Prior to remanding the case, the court attempted to define immediate benefit. *Id.* at 271-72. The court said that an immediate beneficiary is someone who would have an immediate right to the nominal plaintiff's recovery. *Id.* See also *Southern California Edison Co. v. Superior Court*, 500 P.2d 621, 625 (Cal. 1972) (holding that unnamed plaintiffs in class action are immediate beneficiaries). The court stated that the best way to define an immediate beneficiary is as someone who has an immediate right to the recovery as soon as the nominal plaintiff recovers. *Id.* Because class actors will receive a pro rata share in the recovery, they are immediate beneficiaries. *Id.*

⁶² *Duggan*, 179 Cal. Rptr. at 413.

⁶³ 184 Cal. Rptr. 588 (Ct. App. 1982).

⁶⁴ See *id.* at 589-92.

⁶⁵ *Id.* at 589.

⁶⁶ *Id.*

⁶⁷ *Id.*

In its decision, the Third District first noted that the plaintiff's wife had not yet invoked the testimonial privilege.⁶⁸ Therefore, the court explained the case arose under Civil Procedure Code section 2019(a)(4).⁶⁹ This statute allows one party to give notice of a deposition to the other party's attorney if the deponent is an immediate beneficiary of the action.⁷⁰

Although the issue arose under Civil Procedure Code section 2019(a)(4), the court addressed whether a witness spouse is an immediate beneficiary under Evidence Code section 973(b).⁷¹ The court stated that section 973(b) and Civil Procedure Code section 2019(a)(4) similarly define immediate benefit.⁷² The issue under both statutes is whether a personal injury recovery is an immediate benefit to the witness spouse.⁷³

In analyzing the issue, the *Hand* court focused on the effect of community property law on personal injury recovery.⁷⁴ Community property laws would allow plaintiff's wife to have management and control over the money once the plaintiff recovered.⁷⁵ Therefore, the court concluded that the witness spouse

⁶⁸ *Id.*

⁶⁹ *Id.* See also *supra* note 58 (discussing Civil Procedure Code § 2019(a)(4)).

⁷⁰ See *supra* note 58 (explaining § 2019(a)(4) of Civil Procedure Code).

⁷¹ *Hand*, 184 Cal. Rptr. at 589-92.

⁷² *Id.* at 589.

⁷³ *Id.* at 589-90.

⁷⁴ The *Hand* court cited *Rothschild v. Superior Court*, 293 P. 106 (Cal. Dist. Ct. App. 1930), a case that considered whether a witness spouse is an immediate beneficiary in a personal injury case. *Id.* at 590. As in *Hand*, the husband in *Rothschild* sued for personal injury damages and his wife attempted to invoke the testimonial privilege. *Rothschild*, 293 P. at 106. The *Rothschild* court ruled that because personal injury damages are community property, the witness was an immediate beneficiary. *Id.* at 108.

Some commentators might read *Rothschild* to hold that a witness spouse is an immediate beneficiary any time a recovery would benefit the community estate. *Hand*, 184 Cal. Rptr. at 591. The *Hand* court chose to follow this interpretation. *Id.* However, one could also argue that *Rothschild* is no longer persuasive for two reasons. First, the legislature has narrowed the scope of the privilege since *Rothschild*. See *supra* note 32 and accompanying text (discussing Law Revision Commission's suggestion to narrow privilege). Therefore, a broad interpretation of the immediate benefit waiver is now unnecessary to narrow the privilege. Second, in 1930, personal injury damages did not become the separate property of the party spouse at divorce. See *infra* notes 133-35 and accompanying text (discussing propriety of distinction between separate property and community property personal injury recoveries).

⁷⁵ See CAL. FAM. CODE § 1100 (West 1994) (stating that both spouses have equal right to manage, control, and dispose of community property).

was an immediate beneficiary of the party spouse's suit.⁷⁶ It held that the defendant could give notice of the wife's deposition to the plaintiff's attorney and that the wife could not invoke the testimonial privilege at the deposition.⁷⁷

The answer to the conflict presented in the *Duggan* and *Hand* decisions will have serious consequences for witness spouses who want to invoke their testimonial privilege.⁷⁸ If courts follow the Third District's approach, the spousal privilege will protect the marital relationship in only a few cases.⁷⁹ However, if the courts choose to follow the reasoning in *Duggan*, the spousal privilege will protect the marital relationship to a much greater degree.⁸⁰ In deciding which approach to follow, California courts should closely examine the legislative intent behind section 973(b) and its waiver.⁸¹

B. The Legislative Intent—A Balancing Test

In enacting both the marital privilege in section 970 and the corresponding waiver in section 973(b), the California legislature balanced two competing state interests.⁸² The first interest was to protect and promote marriage.⁸³ The second interest was to

⁷⁶ *Hand*, 184 Cal. Rptr. at 591.

⁷⁷ *Id.*

⁷⁸ See *supra* note 45 and accompanying text (discussing inability of witness spouses to use privilege to protect marriage if recovery is community property).

⁷⁹ See *Hand*, 184 Cal. Rptr. at 591 (noting that under *Hand* interpretation, witness spouse can only invoke privilege when recovery is separate property of party spouse). The amount of community property in proportion to the separate property of each spouse varies. In traditional marriages, in which the couple marries at a young age, most of their assets are community property because they did not have time to accumulate assets prior to marriage. See *supra* note 1 (defining separate property as property owned before marriage). Therefore, we might assume that when married people bring lawsuits, the action will affect the community estate.

⁸⁰ See *Duggan*, 179 Cal. Rptr. at 412-13 (holding that witness spouse is not immediate beneficiary of party spouse's community property recovery). Under *Duggan*, a witness spouse would be able to invoke the privilege regardless of whether the recovery is separate or community property. *Id.*

⁸¹ See *supra* note 32 and accompanying text (discussing legislative intent in passing privilege and waiver provisions).

⁸² See *infra* notes 83-85 and accompanying text (discussing balance of state interests in codifying privilege and its waiver).

⁸³ See *Privileged Communications*, *supra* note 2, at 1581 (arguing that basis for privilege is that people believe marriages deserve societal support). The spousal testimonial privilege appears to be a way for the state to promote marriage. Cf. *Hill v. Hill*, 142 P.2d 417, 419-22

encourage efficient fact-finding.⁸⁴ The legislature attempted to balance these competing interests to reach the most reasonable result.⁸⁵

Some commentators, led by Professor Wigmore, advocate abolishing the testimonial privilege.⁸⁶ They argue that the privilege unjustly thwarts fact-finding.⁸⁷ They believe that the state and the complainant have a right to the information that the witness spouse refuses to divulge.⁸⁸

Others argue that there is no guarantee that compelling one spouse to testify against the other will bring all the facts to light.⁸⁹ They argue that the privilege actually helps to reveal the

(Cal. 1943) (holding that, because marriage relationship is essential to organized society, married couples cannot contract in way that encourages divorce); *Marriage of Dawley*, 131 Cal. Rptr. 3, 8 (Ct. App. 1976) (holding that couples may not contract with each other in manner that would encourage divorce because of state policy to foster and protect marriage). In dicta, the *Hill* court stated that public policy should encourage the maintenance of the marital relationship and prevent the spouses from separating. *Hill*, 142 P.2d at 422. See also CAL. FAM. CODE § 1612(a)(7) (West 1994) (stating that parties may contract as to any matters except those that violate public policy).

⁸⁴ See JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 72 (4th ed. 1992) (stating that theory behind most rules of evidence is elicitation of truth). Exclusionary rules insure that the evidence parties admit at trial is as reliable as possible. *Id.*

⁸⁵ See *id.* (arguing that privileges involve sacrifice of truth for some higher social value). Balancing the state interests in protecting marriages and fact-finding has led to a number of evidentiary privileges. See, e.g., CAL. EVID. CODE § 954 (West 1995) (protecting attorney-client communications); *id.* § 994 (protecting physician-patient relationship).

⁸⁶ See 8 WIGMORE, *supra* note 29, § 2228 (arguing against testimonial privilege). Professor Wigmore feels strongly that the privilege results from a sentimental regard for the marital relationship and that it is not a result of rational lawmaking. 8 *id.* He has even gone so far as to say that the privilege is an "error of law." 8 *id.* Professor Wigmore argues that there are only two reasons for the privilege. First, it avoids discord in the marital relationship. 8 *id.* Second, society feels a general repugnance toward compelling one spouse to condemn the actions of the other. 8 *id.* Neither of these rationales, Professor Wigmore argues, justifies immunizing a spouse who might have committed a civil wrong. 8 *id.*

⁸⁷ See 8 *id.*; see also *People v. Langtree*, 30 P. 813, 814 (Cal. 1883) (claiming that marital relationship is less important to society than obtaining truth); JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 327, 339-45 (1927) (noting that, due to privilege, prosecution of man who commits civil crimes only in presence of his wife will be impossible).

⁸⁸ See 8 WIGMORE, *supra* note 29, § 2228 (arguing that peace of families should not get in way of justice for third parties); see also Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 679 (1929) (noting that testimony of witness spouse is often not enough to mar an otherwise happy marriage).

⁸⁹ See Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1392

true facts by avoiding situations in which a witness spouse would feel compelled to commit perjury.⁹⁰ They also point out that society occasionally forgoes fact-finding if the cost to individual rights is too high.⁹¹ For example, criminal defendants have the right to not testify.⁹² Attorneys, doctors, spouses, and certain other witnesses also have testimonial privileges.⁹³

The California Law Revision Commission,⁹⁴ a group which recommends changes in antiquated or unjust California laws, was aware of these criticisms of the privilege.⁹⁵ However, it did not suggest abolishing the privilege altogether.⁹⁶ Rather, the Commission advocated drafting the privilege narrowly to allow witness spouses to use it only when their testimony might harm their marriage.⁹⁷ It thought that the importance of the marital relationship overrides society's need for the full truth in judicial proceedings.⁹⁸

The legislature adopted the Commission's conclusion by codifying its recommendations.⁹⁹ In fact, both the California Assem-

(1973) (claiming that truth is only one way to achieve justice). Professor Reutlinger argues that truth in and of itself is not justice. *Id.* He claims that it thus may not be fair to compel testimony of the witness spouse. *Id.*

⁹⁰ See Comment, *The Husband-Wife Privilege of Testimonial Non-Disclosure*, 56 NW. U. L. REV. 208, 210 (1961) (arguing that if judge compels witness spouse to testify, witness spouse is apt to commit perjury in order to protect marital harmony). This result would defeat the purpose of compelling testimony in the first place. *Id.*

⁹¹ See Reutlinger, *supra* note 89, at 1392 (arguing that discovering truth has cost).

⁹² See U.S. CONST. amend. V (stating that criminal defendants do not have to testify against themselves); see also *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that when evidence is found in violation of Fourth Amendment, courts should exclude it).

⁹³ See *supra* note 85 (discussing evidentiary privileges).

⁹⁴ The legislature created the Law Revision Commission to recommend changes in California laws that appear to be antiquated or unjust. See CAL. GOV'T CODE § 8280 (West 1992) (creating Law Revision Commission); *id.* § 8289 (stating purpose of Law Revision Commission).

⁹⁵ See 1 LAW REVISION COMM'N, *supra* note 6, at F-14 to F-15 (acknowledging that there are scholars who legitimately criticize use of testimonial privilege). The Commission also questioned the logic of the testimonial privilege when the other party is not able to examine the witness spouse. See *id.* at F-15.

⁹⁶ See *supra* note 32 (discussing recommendations of Law Revision Commission regarding privilege).

⁹⁷ See 1 LAW REVISION COMM'N, *supra* note 6, at F-14 (noting that restricting use of privilege to witness spouse would address one main criticism of privilege).

⁹⁸ See *id.* at F-14 to F-15 (concurring with general opinion that legislature should use privilege to protect marital harmony).

⁹⁹ See CAL. EVID. CODE § 970.

bly and Senate Judiciary Committees issued special reports on the bill that became the California Evidence Code. In these reports, the legislative Judiciary Committees stated that the Law Revision Committee comments expressed the legislature's intent.¹⁰⁰

Although the legislature wanted the privilege to protect marriages, it nevertheless wanted to discourage married couples from using the privilege when testimony would not harm the marriage.¹⁰¹ To accomplish this, the legislature also codified a waiver of the privilege.¹⁰² Section 973(b) states that a couple waives the privilege when the party spouse brings the action for the immediate benefit of the witness spouse.¹⁰³ The legislature feared that without this waiver, couples might take advantage of their marital status and invoke the privilege to unfairly immunize one spouse from testifying.¹⁰⁴

The legislature clearly supports the privilege¹⁰⁵ and the waiver,¹⁰⁶ although the legislative history concerning the definition of the phrase "immediate benefit" is scarce. Consequently, courts must interpret the phrase as they deem appropriate. However, if the courts find that a community property recovery is an immediate benefit, witness spouses cannot use the privilege in most

¹⁰⁰ See SENATE COMM. ON JUDICIARY, REPORT ON A.B. 333 (1965 Regular Sess.), *reprinted in* JOURNAL OF THE SENATE, LEGISLATURE OF THE STATE OF CALIFORNIA 1573 (1965) (declaring that Law Revision Commission comments reflect legislative intent); ASSEMBLY COMM. ON JUDICIARY, REPORT ON A.B. 333 (1965 Regular Sess.), *reprinted in* JOURNAL OF THE ASSEMBLY, LEGISLATURE OF THE STATE OF CALIFORNIA 1712 (1965) (declaring that Law Revision Commission comments reflect legislative intent).

¹⁰¹ See JUDICIARY COMMENT, *supra* note 35 (discussing legislative intent in providing waiver).

¹⁰² See CAL. EVID. CODE § 973(b).

¹⁰³ *Id.*

¹⁰⁴ See *supra* note 32 (stating rationale for post-1966 privilege and waivers).

¹⁰⁵ See *supra* note 32 (discussing legislative history of privilege); see also *Burch v. George*, 866 P.2d 92, 114 (Cal. 1994) (Mosk, J., dissenting) (stating that courts should look to recommendations of Law Revision Commission to determine legislative intent); *Cooper v. Poster*, 20 Cal. Rptr. 2d 84, 86 (Ct. App. 1993) (stating that Law Revision Commission Comments are helpful in determining legislative intent); *Reeves v. Reeves*, 284 Cal. Rptr. 650, 652 (Ct. App. 1991) (stating that courts may consider Law Revision Commission Comments to assist in determining legislative intent); *Reutlinger*, *supra* note 89, at 1360 (arguing that, by failing to repeal privilege, legislature has made conscious policy decision that protecting marriage outweighs any positive benefits of full disclosure).

¹⁰⁶ See JUDICIARY COMMENT, *supra* note 35 (stating that legislature provided waiver so that married persons would not use privilege in bad faith).

circumstances.¹⁰⁷ To avoid this result, the legislature must clarify the statute.¹⁰⁸

III. THE PROPOSAL

Unclear guidelines and uncertainty about legislative intent have led to conflicting interpretations of section 973(b).¹⁰⁹ An amendment to section 973(b) can clarify the meaning of immediate benefit and eliminate the current split between the California courts.¹¹⁰ Once the legislature amends the statute, courts can apply the rule without guessing about legislative intent.¹¹¹

This Comment proposes that the legislature amend section 973(b) to codify the holding in *Duggan*.¹¹² The legislature should add the proposed amendment after the current language of section 973(b) to provide:

A community property recovery from an action brought or defended by a party spouse is not an immediate benefit to a witness spouse for the purposes of Evidence Code section 973(b).

¹⁰⁷ See *supra* note 79 and accompanying text (discussing inability of witness spouses to use privilege to protect marriage if community property recovery is immediate benefit).

¹⁰⁸ When courts cannot agree on the legislature's intent, the legislature must do something to indicate how it would like the courts to interpret the statute. See *infra* notes 110-11 and accompanying text (discussing benefits of clarifying intent by statutory amendment).

¹⁰⁹ Compare *Duggan v. Superior Court*, 179 Cal. Rptr. 410, 412 (Ct. App. 1981) (holding that witness spouse is not immediate beneficiary of community property recovery) with *Hand v. Superior Court*, 184 Cal. Rptr. 588, 589-90 (Ct. App. 1982) (holding that personal injury recovery by party spouse is immediate benefit to witness spouse).

¹¹⁰ See *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 380-81 (1969) (stating that courts give great weight to subsequent legislation declaring intent of earlier statute); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990) (stating that courts should presume statutory amendment clarifying doubtful meaning indicates legislative intent regarding original statute); *Simpson v. Smith*, 263 Cal. Rptr. 110, 112 (Ct. App. 1989) (stating that amendment to statute after court interprets it indicates legislative intent to change law).

¹¹¹ See *Simpson*, 263 Cal. Rptr. at 112 (stating that court should interpret amended statute as new indication of legislative intent). Once the legislature states that a witness spouse is not an immediate beneficiary of a community property recovery, courts will not follow the *Hand* decision.

¹¹² See *Duggan*, 179 Cal. Rptr. at 412 (holding that witness spouse is not immediate beneficiary of community property recovery).

This amendment is consistent with the legislative intent behind section 973(b),¹¹³ its preceding language, community property law, and the Civil Procedure Code.¹¹⁴

Courts should follow the legislature's intent as closely as possible in this area.¹¹⁵ A privilege reflects a policy decision,¹¹⁶ and policy decisions are the realm of the legislature.¹¹⁷ When legislatures choose a policy, courts overstep their authority by reading a waiver provision so broadly that they void both the privilege and its underlying policy. Although the definition of immediate benefit is unclear, the legislative intent indicates how the legislature wanted courts to apply section 973(b).¹¹⁸ The legislature intended that witness spouses have the option of invoking the privilege if their testimony might harm their marriage.¹¹⁹ It

¹¹³ See *infra* text accompanying notes 119-24 (arguing that proposed amendment conforms to legislative intent).

¹¹⁴ See *infra* text accompanying notes 131-40 (arguing that proposed amendment conforms with tort and civil procedure definitions of immediate benefit); see also *infra* text accompanying notes 141-42 (arguing that proposed amendment is consistent with facial interpretation of § 973(b)).

¹¹⁵ See *Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (stating that Supreme Court's duty in interpreting statutes is to find interpretation that is most harmonious with statutory scheme and purposes); *People v. Chacon*, 28 Cal. Rptr. 2d 177, 180 (Ct. App. 1994) (stating that cardinal rule of statutory interpretation requires courts to construe statutes with common sense and in reasonable manner that is consistent with their purpose); *People v. Carvajal*, 249 Cal. Rptr. 368, 376 (Ct. App. 1988) (stating cardinal rule of statutory interpretation).

¹¹⁶ See *Reutlinger*, *supra* note 89, at 1358 (stating that privilege is policy decision). Professor Reutlinger argues that privileges are not merely exclusionary rules. *Id.* Although the privileges do exclude evidence, they are merely a means of effecting a more important state policy. *Id.* The purpose of privileges is to foster the behavior or status of people out of court. *Id.*

¹¹⁷ See *Mirkin v. Wasserman*, 858 P.2d 568, 581 (Cal. 1993) (stating that court should avoid assuming legislative duties that involve policy decisions because role of legislature is to debate and resolve policy); *Snyder v. Boy Scouts of America*, 253 Cal. Rptr. 156, 160 (Ct. App. 1989) (stating that courts cannot rewrite statutes that involve policy decisions); *Dominey v. Department of Personnel Admin.*, 252 Cal. Rptr. 620, 625 (Cal. Ct. App. 1988) (stating that policy decisions are inherently legislative). But see *Westminster Mobile Home Park Owners' Ass'n v. City of Westminster*, 213 Cal. Rptr. 640, 652 (Cal. Ct. App. 1985) (stating that legislative guidance is not enough if legislature fails to establish effective mechanism to assure that courts implement policy properly).

¹¹⁸ See *supra* notes 101-04 and accompanying text (discussing legislative intent underlying privilege and waiver).

¹¹⁹ See *supra* note 41 and accompanying text (noting that legislature obviously wanted married couples to use privilege because it chose to codify privilege).

also wanted to make sure that married people use the privilege in good faith.¹²⁰

The proposed amendment furthers legislative intent by allowing witness spouses to invoke the marital privilege if testifying would harm their marriage.¹²¹ It also discourages bad faith use of the privilege by retaining its current safeguards.¹²² These safeguards include the waiver provisions in section 973¹²³ and allowing the witness spouses, rather than the party spouses to decide whether to testify.¹²⁴

The *Hand* interpretation of immediate benefit fails to meet the legislative goal of allowing witness spouses to invoke the privilege because it would often compel spouses to testify in situations in which they exercise the privilege in good faith.¹²⁵ According to *Hand*, a community property recovery inures to the immediate benefit of the witness spouse.¹²⁶ Therefore, even if a witness spouse chooses to invoke the privilege because testifying might harm the marriage, the witness spouse must still testify.¹²⁷

¹²⁰ See JUDICIARY COMMENT, *supra* note 35 (stating that purpose of waiver is to prevent couples from using privilege in bad faith).

¹²¹ The proposed amendment would allow witness spouses to use the privilege in almost all situations unless one of the waiver provisions applied to the case. See CAL. EVID. CODE § 973. The broader *Hand* definition, on the other hand, would not allow the witness spouse to use the privilege in any situation in which the recovery would be community property. See *infra* notes 125-27 and accompanying text (discussing restrictive use of privilege under *Hand* interpretation).

¹²² The proposed amendment does not take away any current safeguards or expand the scope of the privilege.

¹²³ See CAL. EVID. CODE § 973.

¹²⁴ See *supra* note 32 (discussing changes to privilege in order to ensure couples use it in good faith).

¹²⁵ See *Hand*, 184 Cal. Rptr. at 591 (holding that spouses can only invoke privilege when recovery is separate property of party spouse). The amount of community property in proportion to the separate property of each spouse varies. In many traditional marriages in which the couple marries at a young age, most of their assets are community property because they did not have time to accumulate assets prior to marriage. See *supra* note 1 (defining "separate property" as property owned before marriage). Generally, the opposite is true for second marriages or for people who marry late because they have had time to earn a number of separate property assets.

¹²⁶ *Hand*, 184 Cal. Rptr. at 591 (holding that witness spouse must testify when there is community property recovery by party spouse).

¹²⁷ *Id.* The *Hand* court did not attempt to discern why the witness spouse wanted to invoke the privilege. See *id.*

Under *Hand*, a witness spouse will be left with three choices when the party spouse's recovery will be classified as community property. She can testify and potentially harm her marriage, refuse to testify and find herself in contempt,¹²⁸ or perjure herself.¹²⁹ The legislative history does not suggest that the legislature envisioned a witness spouse choosing from among these options.¹³⁰

The proposed amendment is also consistent with other areas of the law. For example, the *Duggan* interpretation is more appropriate in tort cases when one spouse is suing for personal injury damages. Generally, personal injury damages are community property at the time the party spouse receives the recovery.¹³¹ However, if the witness spouse dies, or if the parties divorce, the recovery becomes the separate property of the injured spouse.¹³² Therefore, the witness spouse benefits from the recovery only if the couple remains married. The witness spouse should not care whether a personal injury recovery is community or separate property because she will benefit from either recovery only during the marriage.¹³³ Therefore, characterizing a wit-

¹²⁸ If the witness refuses to testify, the court can hold her in contempt. CAL. CIV. PROC. CODE § 1991 (West Supp. 1995).

¹²⁹ See David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109-10 (1957) (arguing that privilege promotes truth by preventing likelihood of perjured testimony); see also *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555 n.2 (2d Cir. 1967) (stating that privilege is important in order to prevent possibility of perjured testimony).

¹³⁰ See *supra* note 32 and accompanying text (indicating that legislature intended for witness spouse to use privilege to avoid harming marriage by testifying).

¹³¹ CAL. FAM. CODE § 2603(b).

¹³² *Id.* The witness spouse can receive up to one half of the recovery if the court decides that this is in the interest of justice. *Id.* If the witness spouse dies soon after the recovery or settlement, the court usually divides the recovery equally between the surviving spouse and the witness spouse's estate. CAL. PROB. CODE § 100 (West 1991). However, the court in equity may decide to give the whole recovery to the injured spouse. CAL. FAM. CODE § 2603(b). Rather than award the witness spouse's heirs half of the party spouse's award, the injured spouse might use the award to compensate for medical expenses and loss of earnings. *Id.*

¹³³ If the witness spouse is not entitled to the personal injury award at divorce, and arguably upon death, then the award is similar to a separate property recovery. See *supra* note 1 (defining "separate property"). A separate property recovery is not much different than a community property recovery when the party spouse uses the recovery to improve the family's quality of life. The only real difference between a separate property and community property personal injury recovery is that the witness spouse cannot control the separate property during the marriage. See CAL. FAM. CODE § 1100.

ness spouse as an immediate beneficiary in personal injury actions is contradictory to the community property laws that divide tort recoveries.

The proposed amendment also conforms more closely to definitions of immediate benefit in other areas of the law. In addition to Evidence Code section 973(b), sections 2055¹³⁴ and 2019(a)(4)¹³⁵ of the Code of Civil Procedure use the term "immediate benefit." Courts interpreting the term under these provisions have narrowly interpreted it.¹³⁶ In these cases, an immediate beneficiary¹³⁷ is either a party¹³⁸ or a person represent-

¹³⁴ CAL. CIV. PROC. CODE § 2055 (West 1951) (current version at CAL. EVID. CODE § 976 (West 1995)). Section 2055 provided that a person must testify as an adverse witness if the witness was one "for whose immediate benefit" the plaintiff brought the action. *Id.*

¹³⁵ CAL. CIV. PROC. CODE § 2019(a)(4) (West 1984) (current version at CAL. CIV. PROC. CODE § 1987(b) (West Supp. 1996)). Section 2019 stated that a party does not need to subpoena a deponent if the deponent is an immediate beneficiary of the action. *Id.*

¹³⁶ See *Southern Cal. Edison Co. v. Superior Court*, 500 P.2d 621, 625 (Cal. 1972) (holding that unnamed class action plaintiffs are immediate beneficiaries); *Waters v. Superior Court*, 377 P.2d 265, 271 (Cal. 1962) (stating that immediate beneficiary is person who would have immediate right to some portion of recovery); *Freeman v. Jergins*, 271 P.2d 210, 225 (Cal. 1954) (holding that third party was not immediate beneficiary because he had no claim against defendants).

¹³⁷ In *Freeman*, the California Supreme Court held that a third party was not an immediate beneficiary merely because the plaintiff had an obligation to pay the third party part of the recovery. *Freeman*, 271 P.2d at 226. The court reasoned that the third party was not an immediate beneficiary because he chose not to join as a party. *Id.* Instead, he acquiesced in everything the plaintiff did. *Id.* at 225. Therefore, the third party could not receive more than the plaintiff, and any recovery the third party might receive would be from the plaintiff. *Id.*

Under this rationale, a witness spouse would not be an immediate beneficiary. The witness spouse is like the third party in *Freeman* because she acquiesces in everything the plaintiff party spouse does. Therefore, the witness spouse only has a claim against the party spouse, not the defendant.

¹³⁸ In holding that unnamed class action plaintiffs are immediate beneficiaries, the *Edison* court reasoned that the unnamed plaintiffs had a pro rata share in the recovery and therefore would have an immediate right to recovery once there was a judgment. *Edison*, 500 P.2d at 625. Under the *Edison* definition, witness spouses would not be immediate beneficiaries because they do not have a pro rata interest in the recovery. The witness spouse would only have a co-existing and equal interest in the party spouse's recovery, not a pro rata interest in the entire recovery. See CAL. FAM. CODE §§ 751, 760.

Critics of this application refer to a general statement in *Edison* which declares that the best definition of immediate benefit is an immediate share of the recovery. *Edison*, 500 P.2d at 625. However, this statement must be read in context. First, the court was referring specifically to class action plaintiffs who will recover a pro rata share directly from the defendant. *Id.* Second, the class action situation is a poor analogy because, once a witness spouse becomes a party, the 973(b) waiver applies. See *supra* note 35 and accompanying text (stating that testimony is compelled when both spouses are parties).

ed by a nominal party.¹³⁹ Neither of these definitions would classify a witness spouse as an immediate beneficiary.¹⁴⁰

Finally, the proposed amendment is more consistent with the current language of section 973(b) than *Hand's* broad definition. Simply because a witness spouse benefits from a lawsuit does not necessarily mean that the party spouse brought the suit *for the immediate benefit* of the witness spouse.¹⁴¹ Parties typically bring or defend a case to ask for compensation or to protect assets.¹⁴² Although a witness spouse might benefit from a given action, the benefit is not necessarily the party spouse's primary motivation in bringing or defending a suit.

The main objection to the proposed amendment is that it may excuse married persons who use the privilege in bad faith.¹⁴³ However, the *Hand* definition also allows witness spouses to use the privilege in bad faith in some circumstances. For example, a couple uses the privilege in bad faith when they transfer community property to the witness spouse's separate property to avoid the party spouse's creditors.¹⁴⁴ In this situa-

¹³⁹ The *Waters* court held that an immediate beneficiary is a person who would have an immediate right to at least some portion of the nominal plaintiff's recovery. *Waters*, 377 P.2d at 271. As an example, the court stated that a sole shareholder is not an immediate beneficiary of a corporation's lawsuit unless the corporation acts as the alter ego of the sole shareholder. *Id.* at 272. Under this definition, a witness spouse usually would not be an immediate beneficiary unless the party spouse is a nominal plaintiff. The fact that another person will benefit from the action, such as the sole shareholder or the witness spouse, does not mean that the beneficiary necessarily receives an immediate benefit.

¹⁴⁰ See *Duggan v. Superior Court*, 179 Cal. Rptr 410, 412 (Ct. App. 1981) (noting that none of Civil Procedure Code's definitions of immediate beneficiary apply to witness spouses); see also *supra* notes 136-39 (discussing why witness spouses are not immediate beneficiaries under Code of Civil Procedure cases).

¹⁴¹ For instance, it is difficult to argue that the plaintiff in *Hand* sued his optometrist for malpractice because he wanted to help his wife. More likely, the plaintiff wanted compensation for his loss of sight and any income he would lose because of the injury. See *Hand*, 184 Cal. Rptr. at 591. Although the plaintiff's wife would benefit from the recovery, it is unlikely that the plaintiff brought the suit for her benefit.

¹⁴² See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1-3 (1985) (stating that compensatory damages in form of money is most common remedy sought). Parties generally seek remedies to compensate for a harm or to prevent a harm before it happens. *Id.* at 2.

¹⁴³ See JUDICIARY COMMENT, *supra* note 35 (stating that purpose of § 973(b) is to preclude couples from unfairly using their marital status to avoid giving testimony). The broader *Hand* definition would compel witness spouses to testify in situations in which the couple chose to name only one spouse in order to immunize the other from testifying. The *Duggan* definition, though, would not be effective in this circumstance.

¹⁴⁴ See CAL. FAM. CODE § 850 (West 1994) (stating that married couples can transfer

tion, neither the *Hand* nor the *Duggan* definition of immediate benefit would compel the witness spouse to testify because the community estate would not benefit.¹⁴⁵ While the *Duggan* definition might allow a few couples to use the privilege in bad faith, this problem also applies to the *Hand* interpretation. The benefits of the *Duggan* definition far outweigh this minor problem.

The proposed amendment provides the courts with clear guidance regarding the meaning of section 973(b)'s immediate benefit language. It furthers the legislature's goal of encouraging married people to use the privilege in good faith.¹⁴⁶ Additionally, the amendment is consistent with other areas of the law and the current language of section 973(b).¹⁴⁷ Finally, the amendment would clarify when married couples may use the privilege without making them wait for a court ruling.¹⁴⁸

CONCLUSION

An inherent tension exists in balancing the testimonial privilege of married couples and the manner in which California community property law allocates benefits and liabilities. The legislature intended that spouses be able to invoke the testimonial privilege despite community property laws. Yet, the legislature also limited the privilege and codified the waivers to ensure that married couples would use the privilege in good faith. Balancing

property from community property to one spouse's separate property without consideration); *see also* Tobias v. Adams, 258 P. 588, 592 (Cal. 1927) (discussing marital privilege in context of husband using it to prevent wife from testifying about fraudulent transfer); Marple v. Jackson, 193 P. 940, 943 (Cal. 1920) (holding that witness spouse could invoke privilege even though plaintiff alleged that witness spouse had defrauded creditors).

¹⁴⁵ The successful defense of the suit would benefit only the separate property of the non-debtor spouse. The witness spouse would not be an immediate beneficiary under the *Hand* definition because the recovery is not community property. *See Hand*, 184 Cal. Rptr. at 591 (holding that witness spouse is immediate beneficiary when party spouse receives community property recovery).

¹⁴⁶ *See supra* notes 118-24 and accompanying text (arguing that proposed amendment does not infringe any safeguards and supports witness spouses who want to use privilege).

¹⁴⁷ *See supra* notes 131-42 and accompanying text (arguing that amendment conforms with other areas of law and supports facial interpretation of § 973(b)).

¹⁴⁸ *See supra* notes 109-11 and accompanying text (arguing that clear definition of immediate benefit will reduce litigation and confusion about when witness spouse can invoke privilege).

these two legislative goals leads to only one conclusion. The legislature should amend section 973(b) to codify the *Duggan* definition of immediate benefit.

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