COMMENTS

Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement"

Presumptions play a major role in the characterization of marital property. The California courts have indicated that a "common understanding or agreement" is essential to rebut a form of title presumption. However, the courts have failed to illuminate what evidence constitutes a common understanding or agreement. This comment reviews the rationale behind the common understanding or agreement doctrine and proposes a test for determining when a form of title presumption is successfully rebutted.

INTRODUCTION

In these times of double digit inflation,[1] characterization of property upon marital dissolution has great financial and sociological importance.[2] The California Supreme Court's recent deci-

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[1] OFFICE OF THE UNITED STATES PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT, *together with* ANN. REP. OF THE COUNCIL OF ECONOMIC ADVISERS, Table 30 at 189 (1981).

[2] Financially, each spouse's share of the property depends upon its characterization as either community or separate property. While each spouse is entitled to one-half of the community property upon dissolution, *see* CAL. CIV. CODE § 4800 (West 1970 & Cum. Supp. 1981), neither spouse has an interest in the separate property of the other. CAL. CIV. CODE § 5102 (West 1970 & Cum. Supp. 1981). *See, e.g.*, Fallon v. American Trust Co., 176 Cal. App. 2d 381, 384, 1 Cal. Rptr. 386, 389 (1st Dist. 1959). Characterization may also have substantial tax consequences. The equal division of community property either during marriage or upon dissolution ordinarily is not a taxable event. *E.g.*, Jean C. Carrieres, 64 T.C. 956, 964 (1975), *aff'd*, 555 F.2d 1350 (9th Cir. 1977); Edward

sion in *In re Marriage of Lucas*[3] adds in several ways to an understanding of the characterization issue.[4] First, it highlights the role of "form of title" presumptions.[5] Moreover, it holds that a

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M. Mills, 12 T.C. 468, 472 (1949). *See also* Osceola Heard Davenport, 12 T.C.M. (CCH) 856 (1953); Rev. Rul. 76-83, 1976-1 C.B. 213. Conversely, the equal division of property held in joint tenancy may result in a taxable exchange. *See* I.R.C. § 2515. For a general discussion of the tax consequences of marital dissolution, *see* TAX ASPECTS OF MARITAL DISSOLUTIONS: A BASIC GUIDE FOR GENERAL PRACTITIONERS (Cal. Cont. Educ. Bar 1979).

Sociologically, the court's ability to assign a residence to one spouse for use as the family home also depends on characterization. Where the property is held in joint tenancy, the court cannot grant one spouse the exclusive right to possession or divide or dispose of the property other than equally. Machado v. Machado, 58 Cal. 2d 501, 507, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); Ruddell v. Ruddell, 200 Cal. App. 2d 626, 627, 19 Cal. Rptr. 465, 465 (2d Dist. 1962); Schindler v. Schindler, 126 Cal. App. 2d 597, 605, 272 P.2d 566, 571 (2d Dist. 1954); Walker v. Walker, 108 Cal. App. 2d 605, 608, 239 P.2d 106, 108 (2d Dist. 1952).

[3] 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 852 (1980). In *Lucas* the couple purchased a single-family residence during marriage as joint tenants using a separate property down payment and the proceeds of a community property loan. The trial court awarded a separate property interest in the home to the wife based on principles of tracing. *See* note 8 *infra*. The California Supreme Court reversed, holding that in order to overcome the single-family residence presumption of Civil Code § 5110, a spouse must prove a "common understanding or agreement." *Id.* at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857. For a full discussion of the common understanding or agreement doctrine, *see* notes 7-18 and accompanying text *infra*.

[4] An important issue which the court has not addressed is the applicability of the statutory presumptions contained in California Civil Code § 5110 to property acquired before marriage. Although the case of In re Marriage of White, S.F. 24097 (1979), presented this issue to the court, the court decalendared *White* when it accepted *Lucas*.

[5] One of the primary criteria for determining the character of marital property is the form by which the parties acquired the property. The form of title has presumptive significance both in California Civil Code § 5110 and at common law. CAL. CIV. CODE § 5110 (West 1970 & West Cum. Supp. 1980) provides, in relevant part:

> [W]hen any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife.

"common understanding or agreement" between the parties is essential in order to characterize property contrary to its form of record title.[6] Nevertheless, the *Lucas* decision fails to articulate a test for determining whether or not proffered evidence is sufficient to rebut a form of title presumption.

This comment analyzes the common understanding or agreement doctrine as a means of rebutting a form of title presumption. It assesses the rationale behind the doctrine and articulates a test for determining when a form of title presumption is successfully rebutted. Application of this test unifies disparate past decisions and provides a measure of predictability for future cases.

I. The "Common Understanding or Agreement" Rebuttal to Form of Title Presumptions

A. Rationale

At the outset, one must distinguish the form of title presumptions from the "time of acquisition" presumption,[7] since the evi-

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Additionally, a common law presumption exists that property acquired by a joint tenancy deed is joint tenancy property. Machado v. Machado, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1005 (1932).

[6] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). The facts in *Lucas* directly concern only the single-family residence presumption. The discussion of the "common understanding or agreement" doctrine, however, readily applies to the other "form of title" presumptions. *See* In re Marriage of Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (2d Dist. 1981). The *Lucas* court cited several seminal common understanding or agreement authorities which dealt with other forms of title presumptions. 27 Cal. 3d at 813, 614 P.2d at 287, 166 Cal. Rptr. at 856, *citing* Machado v. Machado, 58 Cal. 2d 501, 375 P.2d 55, 25 Cal. Rptr. 87 (1962) (joint tenancy presumption), Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953) (joint tenancy presumption); Socol v. King, 36 Cal. 2d 342, 223 P.2d 627 (1950) (joint tenancy presumption). Thus, recognizing these decisions as the basis of its determination, the court indicated their continued viability. In re Marriage of Lucas, 27 Cal. 3d at 814, 614 P.2d at 288, 166 Cal. Rptr. at 856. Additionally, in overruling In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1st Dist. 1979), the court actively applied the common understanding or agreement doctrine to a title presumption arising from acquisition as "community property." In re Marriage of Lucas, 27 Cal. 3d at 815, 614 P.2d at 289, 166 Cal. Rptr. at 857.

[7] The "time of acquisition" presumption presumes that all property which a couple acquires during marriage is community property. See v. See, 64 Cal. 2d 778, 783, 415 P.2d 776, 779, 51 Cal. Rptr. 888, 891 (1966); Estate of Niccolls,

dence which rebuts each is significantly different.[8] The act of

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164 Cal. 368, 371, 129 P. 278, 279 (1912); Smith v. Smith, 12 Cal. 216, 224 (1859); In re Marriage of Lusk, 86 Cal. App. 3d 228, 234, 150 Cal. Rptr. 63, 67 (4th Dist. 1978). In order to gain the benefit of this presumption, its proponent must prove that the couple acquired the property during marriage. Courts have held, however, that the presumption will arise from one spouse's possession of the property during marriage. *See generally* Lynam v. Vorwerk, 13 Cal. App. 507, 509-10, 110 P. 355, 355 (1st Dist. 1910). Generally, courts find property in possession of one spouse after a marriage of long duration to be community in nature. *See, e.g.,* In re Estate of Jolly, 196 Cal. 547, 554, 238 P. 353, 355 (1925); Haldeman v. Haldeman, 202 Cal. App. 2d 498, 501, 21 Cal. Rptr. 75, 78 (3d Dist. 1962).

The "time of acquisition" presumption is ineffectual if a more specific presumption arises which suggests a contrary result. Thus, if the "form of title" presumption exists and record title stands in joint tenancy, the "time of acquisition" presumption is muted. *See* Cooke v. Tsipouroglou, 59 Cal. 2d 660, 665, 381 P.2d 940, 943, 31 Cal. Rptr. 60, 63 (1963).

[8] Only proof of a common understanding or agreement will rebut a form of title presumption. *See* note 13 and accompanying text *infra*. However, four methods exist to rebut the time of acquisition presumption. First, a couple may determine the character of property by agreement. *See* CAL. CIV. CODE §§ 4802, 5103, 5133 (West 1970); Estate of Nelson, 224 Cal. App. 2d 138, 143, 36 Cal. Rptr. 352, 354 (1st Dist. 1964). Proof of an agreement rebuts the time of acquisition presumption. For the requirements of an antenuptial agreement, *see* CAL. CIV. CODE §§ 5134, 5135. For cases allowing enforcement of antenuptial agreements that do not meet all these requirements, but which were fully executed, *see* Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 702, 299 P.2d 657, 659-60 (1956); Estate of Piatt, 81 Cal. App. 2d 348, 351, 183 P.2d 919, 921 (1st Dist. 1947). For further discussion of antenuptial agreements, *see* Comment, *Antenuptial Agreements under California Law,* 11 U.S.F. L. REV. 317 (1977). For cases allowing transmutation by agreement, *see, e.g.,* Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953); Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Haseltine v. Haseltine, 203 Cal. App. 2d 48, 21 Cal. Rptr. 238 (1st Dist. 1962); Mears v. Mears, 180 Cal. App. 2d 484, 4 Cal. Rptr. 618 (1st Dist. 1960); Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (2d Dist. 1954).

Second, tracing the property's acquisition to a separate property source overcomes the time of acquisition presumption. There are two methods available to show that property which a couple acquires from a commingled source is separate property: (1) direct tracing and (2) exhaustion. Estate of Murphy, 15 Cal. 3d 907, 918, 544 P.2d 956, 964, 126 Cal. Rptr. 820, 828 (1976). *See also* In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975). For a discussion of the exhaustion method, *see* See v. See, 64 Cal. 2d 778, 783, 415 P.2d 776, 779-80, 51 Cal. Rptr. 888, 891-92 (1966). For a general discussion of tracing, *see* Sutherland, *On Tracing and Apportionment of Separate and Community Property—and Preventative Law,* 4 COMM. PROP. J. 21 (1977); Comment, *The Mix-Hicks Mix: Tracing Troubles Under California's Community Property System,* 26 U.C.L.A. L. REV. 1231 (1979).

affirmatively specifying a form of ownership removes the property from the time of acquisition presumption and gives rise instead to a form of title presumption.[9] Whether property stands of record either as joint tenancy[10] or as community property,[11] a

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Third, proof that property has retained its separate character because of its mode of acquisition overcomes the time of acquisition presumption. CAL. CIV. CODE §§ 5107, 5108 (West 1970); George v. Ransom, 15 Cal. 322, 324 (1860); In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 455, 152 Cal. Rptr. 668, 673-74 (1st Dist. 1979); Rosenthal v. Rosenthal, 215 Cal. App. 2d 140, 144, 30 Cal. Rptr. 49, 51 (1st Dist. 1963); Mears v. Mears, 180 Cal. App. 2d 484, 498, 4 Cal. Rptr. 618, 627 (1st Dist. 1960). Included in this category of separate property are (a) property acquired by gift, devise, bequest, or descent, and (b) rents, issues and profits from separate property. CAL. CIV. CODE §§ 5107, 5108 (West 1970).

Finally, evidence that one spouse acquired the property while the parties were living separate and apart rebuts the time of acquisition presumption. The earnings and accumulations which either spouse acquires while living separate and apart or after a decree of legal separation are the separate property of each. CAL. CIV. CODE §§ 5118 (living separate and apart), 5119 (decree of legal separation) (West 1970 & Cum. Supp. 1981). The phrase "living separate and apart" applies only where the couple is living separate and apart with no present intention of resuming marital relations. Makeig v. United Security Bank & Trust Co., 112 Cal. App. 138, 143, 296 P. 673, 675 (1st Dist. 1931). *See also,* Comment, *Living Separate and Apart Under Section 5118 of the Family Law Act—Effects and Implications of the Baragry Decision,* 6 W. ST. L. REV. 183 (1978).

Notwithstanding the fact that different evidence is necessary to rebut each presumption, the form of title presumption and the time of acquisition presumption are occasionally confused. For example, in In re Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1st Dist. 1979), a married couple acquired a single-family residence as "community property." The down payment came from the wife's separate property and the balance of the purchase price from a community property loan.

Since the couple took title as "community property" a form of title presumption arose. *See* note 11 *infra.* However, the court did not distinguish this presumption from the time of acquisition presumption. Instead, the court allowed tracing to rebut the form of title presumption. *Id.* at 455, 152 Cal. Rptr. at 673-74. The court stated that a "common understanding or agreement" was not necessary to rebut the "form of title" presumption. This decision was clearly erroneous. As such, *Aufmuth* was expressly overruled on this point in In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).

[9] In re Marriage of Lucas, 27 Cal. 3d 808, 814, 614 P.2d 285, 288, 166 Cal. Rptr. 853, 857 (1980).

[10] Until modified by statute in 1965, when a deed described a couple as "joint tenants," the courts presumed that each spouse owned an undivided half interest in the property. *See, e.g.,* Machado v. Machado, 58 Cal. 2d 501, 505,

form of title presumption arises. In contrast to the weaker evi-

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375 P.2d 55, 58, 25 Cal. Rptr. 87, 89 (1962); Socol v. King, 36 Cal. 2d 342, 346, 223 P.2d 627, 629 (1950); Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, 1004 (1932). Because of the courts' limited ability to assign joint tenancy property, *see* note 2 *supra,* this presumption posed a special problem upon divorce. *See* FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON JUDICIARY RELATING TO DOMESTIC RELATIONS (1965) 2 APPEN. TO ASSEM. J. (1965 Reg. Sess.), at 122-23. It was apparent that couples were taking title as joint tenants without understanding the consequences. *See, e.g.,* Schindler v. Schindler, 126 Cal. App. 2d 597, 272 P.2d 566 (2d Dist. 1954); Jones v. Jones, 135 Cal. App. 2d 52, 60-61, 286 P.2d 908, 913 (1st Dist. 1955). *See also* Griffith, *Community Property in Joint Tenancy Form,* 14 STAN. L. REV. 87, 89 (1961).

To remedy these problems, the legislature enacted the "single-family residence exception" in 1965. CAL. CIV. CODE § 5110, as amended by 1965 Cal. Stats. c. 1710, p. 3843, § 1. This exception provides that when a couple acquires a single-family residence during marriage as joint tenants, the courts presume it to be community property upon dissolution or legal separation. Thus, this legislation altered the presumptive form of ownership to reflect more closely society's preference for characterizing the home as community property. *See generally* REVIEW OF SELECTED 1965 CODE LEGISLATION, at 40 (Cal. Cont. Educ. Bar 1965).

Presently, only property that is *not* a single-family residence is subject to the true joint tenancy presumption. *See* note 5 *supra.* Thus, if the family residence is a duplex or condominium, or is otherwise used in part as rental property, the exception will not apply. Since the legislative motive was to enable the courts to award one spouse the "family home," the legislature should consider expanding the exception. The legislative policy applies to all residential housing, not just single-family dwellings. The occupied half of a duplex is the equivalent of the family home. Additionally, with the growth of condominium ownership for principal residence purposes, expansion of the exception to include any dwelling which a couple owns and uses as a principal residence is imperative.

[11] The form of title presumption may attach to community property in either of two ways. First, if the deed recites "to husband and wife, as community property," the courts presume that the title disclosure reflects the true form of title. Second, a deed to "husband and wife" creates a presumption that the property is community. CAL. CIV. CODE § 5110, set forth in note 5 *supra. See, e.g.,* In re Marriage of Cadermartori, 119 Cal. App. 3d 970, 974-76, 174 Cal. Rptr. 292, 295-96 (2d Dist. 1981).

In order to gain the benefit of the latter presumption, an instrument must exist which adequately describes the parties as "husband and wife." A conveyance to "A and B, his wife" is a sufficient description. Cardew v. Cardew, 192 Cal. App. 2d 502, 513-14, 13 Cal. Rptr. 620, 626 (1st Dist. 1961). However, a deed to "A and/or B" is inadequate, despite inclusion of the same last name. Wilcox v. Berry, 32 Cal. 2d 189, 191, 195 P.2d 414, 415 (1948). Moreover, the presumption does not apply if the instrument recites a different intention—for example, when the deed describes the parties as joint tenants. Socol v. King, 36 Cal. 2d 342, 345, 223 P.2d 627, 629 (1950); Siberell v. Siberell, 214 Cal. 767,

dence needed to rebut the time of acquisition presumption,[12] only a common understanding or agreement will suffice to rebut the more specific form of title presumption.[13]

The rule requiring a common understanding or agreement is "supported by sound public policy considerations."[14] These considerations are protection of the parties' expectations and fairness. In a community property state, the law regards marriage as a sharing arrangement in which each party expects to share equally in its accumulations.[15] The community property system

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773, 7 P.2d 1003, 1004 (1932); King v. King, 107 Cal. App. 257, 259, 236 P.2d 912, 913 (2d Dist. 1951).

[12] *See* note 8 *supra*.

[13] All form of title presumptions require proof of a common understanding or agreement for rebuttal, whether the couple acquired a single-family residence as joint tenants, In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); In re Marriage of Trantafello, 94 Cal. App. 3d 533, 541, 156 Cal. Rptr. 556, 561, (2d Dist. 1979); Baron v. Baron, 9 Cal. App. 3d 933, 941, 88 Cal. Rptr. 404, 408-09 (2d Dist. 1970); during marriage by a deed to husband and wife, Wikes v. Smith, 465 F.2d 1142, 1146 (9th Cir. 1972); In re Marriage of Cadermartori, 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 (2d Dist. 1981); Mears v. Mears, 180 Cal. App. 2d 484, 500, 4 Cal. Rptr. 618, 628 (1st Dist. 1960); Williams v. Williams, 178 Cal. App. 2d 522, 526, 3 Cal. Rptr. 59, 63 (3d Dist. 1960); or in true joint tenancy. Machado v. Machado, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); Gudelj v. Gudelj, 41 Cal. 2d 202, 212, 259 P. 2d 656, 662 (1953).

Whether or not a common understanding or agreement exists is a question of fact for the trial court. In re Marriage of Mix, 14 Cal. 3d 604, 612, 536 P.2d 479, 484, 122 Cal. Rptr. 79, 84 (1975); Gudelj v. Gudelj, 41 Cal. 2d 202, 212, 259 P.2d 656, 662 (1953); In re Marriage of Trantafello, 94 Cal. App. 3d 533, 541, 156 Cal. Rptr. 556, 561 (2d Dist. 1979); McLellan v. McLellan, 23 Cal. App. 3d 343, 356, 100 Cal. Rptr. 258, 266 (2d Dist. 1972). However, one must adduce clear and convincing evidence in its favor. *See, e.g.*, In re Estate of Duncan, 9 Cal. 2d 207, 217, 70 P.2d 174, 179 (1937); In re Estate of Jolly, 196 Cal. 547, 553, 238 P. 353, 355 (1925); Ford v. Ford, 276 Cal. App. 2d 9, 12, 80 Cal. Rptr. 435, 438 (1st Dist. 1969). This evidence must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating mind. *See* B. WITKIN, CALIFORNIA EVIDENCE § 209 (2d ed. 1966).

[14] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).

[15] For a discussion of the basis and development of these expectations, *see* W. DE FUNIAK AND M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, §§ 11-11.1 (2d ed. 1971); Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1 (1936); Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. REV. 1 (1976); Vaughn, *The Policy of Community Property and Inter-spousal Transactions*, 19 BAY-

is based on the concept that all property which a couple acquires during marriage will accrue to the parties collectively.[16] When a married couple takes title to property in either joint tenancy or community property, common ownership of the property is implied. If a simple showing that the funds used to purchase the property were separate property could rebut this expectation, the non-contributing spouse might be uninformed of this contrary intent until the issue arose in litigation. This surprise would preclude the non-contributing spouse from preserving the presumption of common ownership.[17]

Furthermore, fairness requires that one spouse provide the other reasonable notice to overturn this expectation. It would be disconcerting to allow a spouse to suggest one state of affairs by the property's form of title while harboring undisclosed contrary

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LOR L. REV. 20 (1967).

[16] This expectation is embodied in the "time of acquisition" presumption. *See* notes 7 and 15 *supra*. The fact that this presumption affects the burden of proof implies that it must have been created to further a goal of substantive policy. *See generally* CAL. EVID. CODE § 605 (West 1966 & Cum. Supp. 1981). Additionally, this presumption is "fundamental in the community property system." Wilson v. Wilson, 76 Cal. 2d 119, 126, 172 P.2d 568, 572 (1945). Combination of these ideas with the community property policy of equality, *see* note 15 *supra*, makes it apparent that the policy of the presumption is to favor community property over other forms of ownership. The sharing principles embodied both in the foundational policy and in the form of title and time of acquisition presumptions help shape the expectations of the spouses. *See* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 11 (1977). *See also* In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).

[17] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). Securing alternate financing arrangements can preserve the presumption of common ownership. Generally, it is the down payment which emanates from a separate property source. Since courts presume that funds borrowed during marriage are community property, Gudelj v. Gudelj, 41 Cal. 2d 202, 210, 259 P.2d 656, 661 (1953); Bank of California v. Connoly, 36 Cal. App. 3d 350, 375-76, 111 Cal. Rptr. 468, 485 (4th Dist. 1973), altering the source of the down payment should suffice to preserve the common ownership status of the property. Securing a second mortgage from the seller for the amount of the down payment accomplishes this goal. Similarly, the "non-contributing" spouse could become a contributor by acquiring capital to use for part of the down payment. Drafting an agreement which states that the separate property contribution constitutes a loan to the community also solves the problem. Finally, the parties could enter a transmutation agreement altering the character of the down payment. *See generally* J. PUGH & W. HIPPAKA, CALIFORNIA REAL ESTATE FINANCE (2d ed. 1973).

intentions which could later control disposition of the property. Hence, consistent with the concept of common ownership and equality, the California courts require proof of a common understanding or agreement to overcome the form of title presumption.[18]

B. Test for a Common Understanding or Agreement

The cases demonstrate that a common understanding or agreement may be expressly written[19] or oral[20] or inferred from the conduct or declarations of the parties.[21] Any evidence which

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[18] *See* note 13 and accompanying text *supra*.

[19] Any written agreement between the parties may effectuate a change in the character of the property. *See, e.g.*, Estate of Watkins, 16 Cal. 2d 793, 797-98, 108 P.2d 417, 419 (1940) (joint and companion wills constitute an agreement between the spouses fixing the status of the property); Estate of Wilson, 64 Cal. App. 3d 786, 800, 134 Cal. Rptr. 749, 757 (5th Dist. 1976) (joint and companion wills not only constitute an agreement, but according to CAL. EVID. CODE § 622 (West 1966), truth of facts recited therein are conclusively presumed); McLellan v. McLellan, 23 Cal. App. 3d 343, 356, 100 Cal. Rptr. 258, 266 (2d Dist. 1972) (although couple originally took title in joint tenancy, subsequent written agreement effectively changed status of asset to community property). For a general discussion of express agreements, *see* 7 B. WITKIN, SUMMARY OF CAL. LAW, COMMUNITY PROPERTY, § 71 (8th ed. 1974). *See also* note 8 *supra*.

[20] An executed oral agreement may also alter the form of ownership. *See, e.g.*, Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659 (1956) (agreement altering form of record title may be oral); Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398, 398-99 (1934) (executed oral agreement between the parties is sufficient to alter the form of record title; execution occurs through declarations and acts which confirm and are consistent with the change of character). *See generally* 7 B. WITKIN, SUMMARY OF CAL. LAW, COMMUNITY PROPERTY, § 73 (8th ed. 1974).

[21] The courts also refer to these inferred agreements as "understandings" or "intentions of the parties." *See, e.g.*, Socol v. King, 36 Cal. 2d 342, 346, 223 P.2d 627, 629 (1950); Knego v. Grover, 208 Cal. App. 2d 134, 141, 25 Cal. Rptr. 158, 162 (4th Dist. 1962). However, in transmutation cases they are truly agreements since they require at least implied consent of the other spouse. *See* note 40 *infra*. Thus, these cases only serve as persuasive analogies when discussing "common understandings." The cases finding inferential agreements tend to cluster around certain core notions.

One set of cases congeals around the use of separate funds. Courts generally hold that the source of funds alone will not suffice to alter the form of record title. However, evidence of the source of funds is relevant to characterization. *See, e.g.*, In re Marriage of Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (2d Dist. 1981), In re Marriage of Knickerbocker, 43 Cal. App. 3d 1039, 1042, 118 Cal. Rptr. 232, 234 (1st Dist. 1974); In re Marriage of Wall, 30 Cal. App. 3d

makes it more probable that a couple intended to hold property

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1042, 1048; 106 Cal. Rptr. 690, 694 (2d Dist. 1973). The courts have been willing to overturn the "form of title" presumptions when the source of funds evidence is combined with other factors. *See, e.g.,* Mears v. Mears, 180 Cal. App. 2d 484, 507, 4 Cal. Rptr. 618, 632 (1960). In *Mears,* the couple acquired the property by a joint tenancy deed. They made payments on the property from a commingled account. In addition, both parties declared that the money used to purchase the house came from the "community pot," and they referred to the property as "our house." The court held that the declarations of the parties coupled with use of a commingled source of funds rebutted the form of title presumption. *See also* In re Marriage of Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (2d Dist. 1981) discussed in notes 44-50 and accompanying text *infra;* McLellan v. McLellan, 23 Cal. App. 3d 343, 356, 100 Cal. Rptr. 258, 266 (2d Dist. 1972).

Another group of cases centers on one spouse's exercise of management and control of the property to the exclusion of the other spouse. In Fanning v. Green, 156 Cal. 279, 104 P. 308 (1909), the wife acquired title to land as her separate property. The evidence established that the husband exercised exclusive management and control over the property. The evidence also showed that the husband collected the rents and used them as community property. The court held that these factors established that the parties' true intention was to hold the land as community property. *Id.* at 284, 104 P. at 311. *See also* Hammond v. McCollough, 159 Cal. 639, 642-43, 116 P. 216, 217 (1911) (husband's management and control of wife's separate property coupled with use for community purposes rebutted presumption).

In Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1st Dist. 1964), the land owned was the husband's separate property. *Id.* at 143-44, 36 Cal. Rptr. at 354. The wife, however, managed the property. The husband expressed a desire to provide for the wife and referred to the asset as their mutual property. Additionally, the parties filed a joint tax return on the property at that time when this could be done only if the property was community. The court held that these actions expressed the parties' intentions and rebutted the "form of title" presumption. *Id. See also* Salveter v. Salveter, 206 Cal. 657, 659-60, 275 P. 801, 802 (1929) (where husband transferred property to wife as her separate property in order to provide support for family without fear of losing it, uncontradicted evidence established the real intent and understanding of the parties); Long v. Long, 88 Cal. App. 2d 544, 549-50, 199 P.2d 47, 49-50 (2d Dist. 1948) (use of separate property for marital residence and large expenditures of community funds thereon showed that lots were treated as community property). For other cases using the filing of joint tax returns as a primary criterion, *see* Durker v. Zimmerman, 229 Cal. App. 2d 203, 206, 40 Cal. Rptr. 227, 229 (1st Dist. 1964); Nevins v. Nevins, 129 Cal. App. 2d 150, 159, 276 P.2d 655, 661 (2d Dist. 1954). For cases based on acquiescence in use of property contrary to form of title, *see* Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 6, 94 P. 94, 96 (1908); Hutchinson v. Hutchinson, 223 Cal. App. 2d 494, 501, 36 Cal. Rptr. 63, 67-68 (1st Dist. 1963); Blankenship v. Blankenship, 212 Cal. App. 2d 736, 740, 28 Cal. Rptr. 176, 180 (1st Dist. 1963); Smith v. Smith, 47 Cal. App. 650, 653, 191 P. 60, 61-62, (1st Dist. 1920).

in a form different from the form stated in the record title is admissible to prove a common understanding or agreement.[22] Moreover, if a common understanding or agreement exists, it conclusively determines the property's character.[23]

Whenever a couple expressly agrees to own the property contrary to the form of title, the problem of determining whether a common understanding or agreement exists is not complex. Statutes confer upon married persons the right to contract with each other regarding their property.[24] The parties' mutual consent provides sufficient consideration to support the contract.[25] However, statutes place the couple in a confidential relationship.[26] Thus, application of the law of trusts and contracts determines the validity of an express agreement.[27]

In contrast, when a common understanding or agreement depends upon the conduct or declarations of the parties, California courts have not developed a workable test for determining the

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[22] Huber v. Huber, 27 Cal. 2d 784, 788, 167 P.2d 708, 711-12 (1946); DeBoer v. DeBoer, 111 Cal. App. 2d 500, 504, 244 P.2d 953, 956 (2d Dist. 1952).

[23] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 881 (1980).

[24] CAL. CIV. CODE § 5103 (West 1970). This section provides that:
"Either husband or wife may enter into any engagement or transactions with the other . . . respecting property, which either might if unmarried; subject . . . to the general rules which control the actions of persons occupying confidential relationships with each other, as defined by Title 8 . . . of Part 4 of Division 3."

[25] CAL. CIV. CODE § 4802 (West 1970). Additionally, the law relaxes the Statute of Frauds requirement that land transfers must be in writing. No writing is required if the parties have executed an oral agreement. Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659 (1956); Tomaier v. Tomaier, 23 Cal. 2d 754, 757, 146 P.2d 905, 907 (1944). *See* note 20 *supra*.

[26] CAL. CIV. CODE § 5103 (West 1970), set forth in note 24 *supra*. This confidential relationship subjects the parties to rigorous standards. Neither party may obtain an unfair advantage over the other. Each is under a duty to exercise the highest degree of good faith, including full disclosure of the relevant facts. Estate of Cover, 188 Cal. 133, 143-146, 204 P. 583, 588-89 (1922); Dolliver v. Dolliver, 94 Cal. 642, 646, 30 P. 4, 5 (1892). For a general discussion of this confidential relationship, *see* 6 B. WITKIN, SUMMARY OF CAL. LAW, HUSBAND AND WIFE § 4 (8th ed. 1974 & Supp. 1980); 33 CAL. JUR. 3d, *Family Law* §§ 494-498.

[27] *See* note 26 *supra*. CAL. CIV. CODE § 5103 (West 1970 & Cum. Supp. 1981) expressly makes the law of trusts contained in CAL. CIV. CODE §§ 2215-2290.12 (West 1970 & Cum. Supp. 1981) applicable to the marital relationship. CAL. CIV. CODE §§ 2228-2240 (West 1970 & Cum. Supp. 1981), details the obligation of those subject to the trust relationship.

sufficiency of the evidence. Fortunately, the California Supreme Court's recent explication of the policies underlying the common understanding or agreement doctrine[28] allows extrapolation of such a test.

Under the proposed test, the trier of fact should be asked: "Would a reasonably prudent spouse in similar circumstances have been on notice that the other spouse intended to procure an interest contrary to that expressed in the record title?"

This test reflects the policies of protecting the parties' expectations and fairness. It also incorporates a common sense interpretation of the words "understanding or agreement." Additionally, the test lends predictability to an otherwise confused area.

First, the "notice" requirement mirrors the community property system's focus on the parties' expectations.[29] The test attempts to determine whether the parties' "personal" expectations have displaced their "general" expectations.[30] While accounting for the couple's conduct and declarations, the test is based on the supposition that the parties' incipient expectation is of common ownership. However, through reference to reasonable spouses,[31] the test acknowledges that if one spouse knows or should know that the other intends to acquire a contrary interest, the "personal" expectations of the couple should control characterization.[32]

Additionally, the test incorporates a common sense interpreta-

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[28] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). *See also* notes 13-16 and accompanying text *supra*.

[29] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). *See* notes 13-18 and accompanying text *supra*.

[30] The Court in *Lucas* states that it seeks to protect the parties' expectations. In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980). This statement refers to the "general expectations" which result from notions of community property and the form of title. *See* notes 14-18 and accompanying text *supra*. In contrast, "personal expectations" are those expectations which arise from the understanding or agreement of the parties.

[31] Preserving a party's expectations does not necessitate dispensing with standards of reasonableness. As in contract law the courts should only protect a party's reasonable expectations. *See, e.g.*, 1 A. CORBIN, CONTRACTS § 1 (1963) (hereinafter cited as CORBIN). An objective test establishes predictability since circumstances observable to a third party determine the result. The use of a third party observer model is the basic contract law approach. RESTATEMENT OF CONTRACTS §§ 227, 230 (1932).

[32] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).

tion of the phrase "understanding or agreement." The use of this phrase in the disjunctive indicates that facts establishing *either* an understanding *or* an agreement will suffice to justify a property interest contrary to the form of title.[33] An understanding should exist whenever one spouse sufficiently notifies the other of an intention contrary to the form of title.[34] It should not require the other spouse's assent, since such a requirement would suggest an agreement.[35] Notice, then, is the touchstone of an "understanding."

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[33] *E.g.*, In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); Machado v. Machado, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); Gudelj v. Gudelj, 41 Cal. 2d 202, 212, 259 P.2d 656, 662 (1953); In re Marriage of Trantafello, 94 Cal. App. 3d 533, 540, 156 Cal. Rptr. 556, 560 (2d Dist. 1979); In re Marriage of Frapwell, 49 Cal. App. 3d 597, 601, 122 Cal. Rptr. 718, 720 (2d Dist. 1975); In re Marriage of Wall, 30 Cal. App. 3d 1042, 1046, 106 Cal. Rptr. 690, 693 (2d Dist. 1973).

[34] "Notice" as the touchstone follows from the role of the parties' expectations in the development of the common understanding or agreement doctrine. *See* notes 13-18 and accompanying text *supra*. While the doctrine protects the parties' general expectations of common ownership, notification of a contrary intention would displace these general expectations. Since reasonable personal expectations arise from notice, a test centering on this concept is appropriate. For discussion of factors which convey notice, *see* notes 36-53 and accompanying text *infra*.

[35] The term agreement indicates that two or more persons have expressed themselves in harmony. 1 CORBIN, *supra* note 36, § 9; S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 2 (3d ed. 1957). Thus, assent to a proposition is essential to an agreement.

Moreover, in other areas of marital property, when California courts have desired mutual assent they have required an agreement. For example, the courts require an agreement between the parties in cases involving reimbursement rights. Where either spouse uses separate funds to improve a community asset, an "agreement" between the parties is the only basis for reimbursement. *E.g.*, In re Marriage of Epstein, 24 Cal. 3d 76, 82, 592 P.2d 1165, 1169, 154 Cal. Rptr. 413, 417 (1979); See v. See, 64 Cal. 2d 778, 785, 415 P.2d 776, 781, 51 Cal. Rptr. 888, 893 (1966); In re Marriage of Smith, 79 Cal. App. 3d 725, 743, 145 Cal. Rptr. 205, 213 (4th Dist. 1978). Thus, where a court desires the concurrence of the parties, it requires proof of an "agreement." None of the "common understanding or agreement" cases has ever discussed the concurrence of the parties. *Cf.* In re Marriage of Trantafello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (2d Dist. 1979), which upholds the "form of title" presumption "in the absence of any communicated intention to the contrary." *Id.* at 540, 156 Cal. Rptr. at 560. *See also* Beck v. Beck, 242 Cal. App. 2d 396, 51 Cal. Rptr. 491 (1st Dist. 1966), which stated, "In the absence of any showing that [intent] was communicated . . . it cannot . . . destroy the respective . . . interests of the parties." *Id.* at 411-12, 51 Cal. Rptr. at 498, 500-01.

C. Factors Evidencing Notice for an "Understanding"

Once notice is identified as the key to an understanding, the relevant question becomes what evidence will convey notice? Analysis of this question must delineate (1) the factors courts have found either insufficient or sufficient to constitute a "common understanding or agreement" and (2) the relationship these factors bear to the test's notice requirement. Although the courts' decisions in this area have been ad hoc, recourse to the proposed test provides a method for unifying these apparently disparate decisions.

An analysis of California cases reveals three recurring factors which are insufficient to justify a common understanding or agreement. These factors are one spouse's hidden intentions,[36] lack of intent to make a gift,[37] and use of separate funds in acquisition.[38]

Harboring a hidden intention clearly fails the proposed test's notice requirement.[39] Since a hidden intention is, by definition, uncommunicated, it fails to provide notice to a reasonably prudent spouse. Thus, the test properly excludes hidden intentions as the basis of a common understanding to rebut the form of title presumptions.

Identical reasoning applies if one spouse lacks the intent to make a gift to the community of property acquired with separate funds. The lack of intent to make a gift is a variant hidden intention, that is, it is the failure to disclose a lack of intent. Communication of this lack of intent is necessary to overcome the presumption that a party who utilizes separate property for community purposes intends to make a gift to the community.[40]

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[36] *See, e.g.*, In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); Machado v. Machado, 58 Cal. 2d 501, 506, 375 P.2d 55, 58, 25 Cal. Rptr. 87, 90 (1962); In re Marriage of Frapwell, 49 Cal. App. 3d 597, 601, 122 Cal. Rptr. 718, 720 (2d Dist. 1975); Beck v. Beck, 242 Cal. App. 2d 396, 411-12, 51 Cal. Rptr. 491, 498-99 (1st Dist. 1966).

[37] In re Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980).

[38] *Id.*; In re Marriage of Trantafello, 94 Cal. App. 3d 533, 540, 156 Cal. Rptr. 556, 560 (2d Dist. 1979); In re Marriage of Frapwell, 49 Cal. App. 3d 597, 601, 122 Cal. Rptr. 718, 720 (2d Dist. 1975); In re Marriage of Wall, 30 Cal. App. 3d 1042, 1046, 106 Cal. Rptr. 690, 693 (2d Dist. 1973).

[39] *See* notes 29-35 and accompanying text *supra*.

[40] A rebuttable presumption arises that separate funds used for community expenses constitute a gift to the community. In re Marriage of Lucas, 27 Cal.

Likewise, the use of separate funds alone does not produce a common understanding or agreement under the proposed test. The general expectation of the reasonable prudent spouse—that property which a couple acquires during marriage is community property—supports this result.[41] Moreover, the reasonable spouse would assume that the expended separate funds were a gift to the community.[42] Thus, since use of separate funds, standing alone, does not convey notice of a spouse's contrary intentions, the evidence does not satisfy the proposed test.

In addition to excluding insufficient factors, the proposed test aids in determining what combination of factors supports finding the existence of a common understanding or agreement.[43] The cases reveal several groups of factors which generally are sufficient to warrant a finding of a common understanding or agreement. These factors include (1) source of funds coupled with exclusive management and control, (2) treatment and use of the property contrary to the form of title, and (3) unilateral declarations of intent. In each of these situations, the behavior of one spouse gives constructive notice to the other of an intent to hold property contrary to its record title. Notification of this intent, in turn, generates an understanding.

The case of *In re Marriage of Mahone*[44] exemplifies how application of the proposed test simplifies determining the sufficiency of the evidence supporting a common understanding or agreement. In *Mahone,* the characterization issue concerned three parcels of real property, purchased with a combination of community property and the wife's separate property.[45] The couple took title to the properties in both of their names as joint tenants. Thus, a presumption arose that the property was held jointly.[46]

Prior to acquiring the properties, the husband received advice from the couple's accountant that a joint acquisition of realty

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3d 808, 816, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 858 (1980); In re Marriage of Epstein, 24 Cal. 3d 76, 82, 592 P.2d 1165, 1169, 154 Cal. Rptr. 413, 417 (1979); See v. See, 64 Cal. 2d 778, 785, 415 P.2d 776, 781, 51 Cal. Rptr. 888, 893 (1966).

[41] *See* notes 14-18 and accompanying text *supra.*

[42] *See* note 40 and accompanying text *supra.*

[43] By way of analogy, see the factors which give rise to an inferred agreement in transmutation cases, discussed in note 21 *supra.*

[44] 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (2d Dist. 1981).

[45] *Id.* at 22, 176 Cal. Rptr. at 276.

[46] *Id.* at 23, 176 Cal. Rptr. at 277. *See* note 10 *supra.*

would provide a needed tax shelter.[47] The husband discussed this advice with the wife. When the couple decided to purchase the properties, they secured a bank loan. Each party submitted evidence that a joint loan application and the taking of title in joint tenancy facilitated the loan. Moreover, the husband's testimony suggested that the lender wanted the title in joint tenancy. Finally, although throughout the marriage the husband controlled and managed the properties, upon separation he voluntarily relinquished management and control to the wife.[48] The court found that these facts evidenced an understanding between the parties and that the property was a combination of separate and community property, despite the joint tenancy presumption.[49]

Applying the proposed test to the facts in *Mahone* involves asking "would a reasonably prudent spouse in similar circumstances have been on notice that the wife intended to retain a separate property interest in the properties?" The husband knew that the reason for jointly acquiring the property was to provide a tax shelter. He also knew that the bank wanted a joint loan application and acquisition in joint tenancy. Moreover, the husband's voluntary transfer of management and control indicates that he understood that the properties were truly the wife's separate property. Thus, this case involves the use of separate funds, disclosed intent of the purposes for joint acquisition, and relinquishment of management and control. When combined, these factors warrant finding that the husband had notice that the wife intended to retain a separate property interest. Thus, the proposed test arrives at a result consistent with *Mahone*.[50]

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[47] In re Marriage of Mahone, 123 Cal. App. 3d 17, 22, 176 Cal. Rptr. 274, 276 (2d Dist. 1981).

[48] *Id.* at 23, 176 Cal. Rptr. at 277.

[49] *Id.* at 24, 176 Cal. Rptr. at 277.

[50] *Id.* at 22-24, 176 Cal. Rptr. at 276-77. Another case which exemplifies the efficacy of this test is In re Marriage of Wall, 30 Cal. App. 3d 1042, 106 Cal. Rptr. 690 (2d Dist. 1981). In *Wall* the characterization issue concerned an automobile which the wife purchased with her separate property. *Id.* at 1047, 106 Cal. Rptr. at 694. The couple took title to the car in both of their names as husband and wife. *Id.* at 1048, 106 Cal. Rptr. at 694. This gave rise to a presumption that the property was community. *See* note 11 *supra*. During ownership, the wife exercised exclusive dominion over the car. She kept it in her possesson, used it, and maintained it. After separation the wife continued to make payments on the car out of her separate property. Moreover, the hus-

Unilateral declarations should also provide the basis for an understanding that the record title is not controlling. No court has directly discussed this proposition. While courts uniformly hold that hidden intentions are an ineffective basis for an understanding,[51] the parties' declarations are germane to the existence of an understanding.[52] Clearly, one spouse's statement of contrary intent provides notice if the other spouse hears it. This communication dispels the hearer's "general expectations" and replaces them with the "personal expectations" which a reasonably prudent spouse would possess.[53] Thus, applying the test of

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band had knowledge of and consented to all of these actions. *Id* at 1049, 106 Cal. Rptr. at 695. The *Wall* court found that the car was the wife's separate property despite the community property presumption. *Id.* at 1049, 106 Cal. Rptr. at 695.

Applying the proposed test to the facts in *Wall* involves asking "would a reasonably prudent spouse in similar circumstances have been on notice that the wife intended to procure a separate property interest in the car?" The husband knew that the down payment funds were separate property and that the post-separation payments came from the wife's separate property. He also knew of his wife's proprietary conduct in buying, using, and maintaining the car. This case, therefore, involves exclusive management and control, use of the property contrary to the form of title, and the use of separate property funds. *Cf.* factors discussed in note 22 *supra*. When combined, these factors warrant the finding that a common understanding or agreement existed. 30 Cal. App. 3d at 1049, 106 Cal. Rptr. at 695. Since all of these factors run contrary to the form of title, they provide notice of the wife's contrary intentions. Thus, the proposed test arrives at a result consistent with *Wall.*

[51] *See* note 36 *supra.*

[52] *See, e.g.,* Estate of Nelson, 224 Cal. App. 2d 138, 143-44, 36 Cal. Rptr. 352, 355 (1st Dist. 1964); Mears v. Mears, 180 Cal. App. 2d 484, 507, 4 Cal. Rptr. 618, 632 (1st Dist. 1960). *Cf.* In re Marriage of Trantafello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (2d Dist. 1979), where the court upheld the form of title presumption because of "the absence of any communicated intention to the contrary." *Id.* at 540, 156 Cal. Rptr. at 560.

[53] Thus, where the contributing spouse declares, "This is not a gift," or "This is my house," the reasonable person would be on notice that the contributor did not intend to share the property. The case is harder when the purchaser declares, "I hope you understand that I bought this with my money." However, if this statement was coupled with exclusive use, notice to the reasonable spouse would be easily inferred. Thus, it is not enough to broadly categorize factors which suffice to show a common understanding or agreement. Such categorization would necessitate the same type of comparison which occurred under case law. The proposed test's utility lies in its ability to predict a result based on a quantum of variable evidence. Compilation of the relevant factors and application of the proposed test allows a determination based upon notice and the reasonable expectations of the parties. For other factors which

notice to a unilateral declaration will indicate whether "personal expectations" have been established and whether an understanding exists.

CONCLUSION

California law adopted the "form of title" presumptions to further the policy favoring common ownership of property which a couple acquires during marriage. The California Supreme Court requires a "common understanding or agreement" to rebut these presumptions, in order to protect the spouses' expectations. Unfortunately, the courts have failed to provide a standard to determine whether in fact a "common understanding or agreement" exists. The absence of a test forces attorneys to examine decided cases and compare each set of facts with prior determinations in order to assess the existence of a common understanding or agreement. This process is time-consuming for both the attorney and the judicial system.

In an attempt to fill this void, this comment proposes a test for determining the presence of a common understanding or agreement based upon "notice." The emphasis on notice protects the parties' expectations, which throughout has been the courts' primary concern. Additionally, the notice requirement encompasses a common sense interpretation of the phrase "common understanding or agreement" and this phrase's formation in the disjunctive.

Finally, this comment highlights several common factors relevant to the existence of a "common understanding or agreement." The discussion illustrates that satisfaction of the proposed test depends not only on the type of factors that exist, but also their relation to the test's seminal precept of notice. Thus, in combination the relevant factors must convey notice of one spouse's contrary intention. Instead of providing rigid "categories" of factors sufficient to provide notice, the test is malleable. It encourages looking to the effect which the factors have in concrete situations, while protecting the parties' expectations. As such, the test is both viable and practical, and lends certainty to this presently confused area of community property law.

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are relevant to this determination, *see* note 21 *supra*.