

Three's company, too.

Just how many parents, spouses and children can you have?

2023 Fiduciary Attorney Summit, Santa Barbara, CA

Monday, November 6, 2023

1:30 to 3:00 p.m.

(1.5 hours)

Alicia Gamez & Eric Bevan

1. What is a spouse (Alicia Gamez)

a. Why is it important how spouse/parent/child are defined at law?

- i. Fiduciaries need to know for purposes of trust administration
- ii. Need to understand the legal relationships for a variety of reasons
- iii. Changing recognition

b. Probate Code

- i. *Marvin* agreement or claims – contract based.
Unmarried partners living together can enter a variety of contracts, including but not limited to pooling their earnings to share property equally, holding property as joint tenants or tenants in common, or keeping their earnings and property separate. (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 674; *Hill v. Westbrook's Estate* (1950) 95 Cal.App.2d 599; *Della Zoppa v. Della Zoppa* (2001) 86 Cal.App.4th 1144.)
- ii. Common law spouse (other than California)
- iii. Married in another jurisdiction
 1. Does CA recognize the jurisdiction or not?
 2. What about domestic partner somewhere else?
- iv. Domestic Partnership and Same-Sex Marriage timeline:
 1. March 8, 2000, California voters approve Proposition 22, defining marriage as between a man and woman only.
 2. On February 12, 2004, San Francisco began issuing marriage licenses to same-sex couples. Eventually more than 4,000 lesbian and gay couples obtained marriage licenses
 3. On August 12, 2004, the California Supreme Court held that the city lacked authority to issue marriage

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licenses to same-sex couples and invalidated the licenses already issued, but declined to rule on whether the statutory exclusion of same-sex couples from marriage violates the state constitution.

4. California Domestic Partner Rights and Responsibility Act of 2003, effective January 1, 2005, resulted in extending the community property interest so that registered domestic partners after that date can also have a community property interest in the common residence, among other property.
5. April 2005, Judge Richard Kramer issued a decision holding that California's statutory exclusion of same-sex couples from marriage violates the state constitutional guarantee of equal protection and violates the fundamental right to marry.
6. On October 5, 2006, a divided panel of the California Court of Appeal ruled in a 2-1 decision that that California may continue to bar same-sex couples from marriage.
7. May 15, 2008, in a 4-3 ruling, the California Supreme Court strikes down state Proposition 22. The court said the gay marriage ban violated the state's constitution and "the right of an individual to establish a legally recognized family with the person of one's choice." Same-sex marriages are legally performed throughout the state.
8. November 5, 2008, Prop 8, which amends the state constitution to state that "only marriage between a man and a woman is valid or recognized in California," passes by a narrow margin.
9. May 26, 2009, California Supreme Court upholds the legality of voter-backed Proposition 8, but also uphold the legality of the nearly 4,000 weddings performed in San Francisco while the city was issuing licenses.
10. August 4, 2010, Chief U.S. District Judge Vaughn Walker rules Proposition 8 is unconstitutional under both the due process and equal protection clauses.
11. February 7, 2012, The U.S. Ninth Circuit Court of Appeals declares California's voter-approved ban on same-sex marriage unconstitutional in a 2-1 decision. A stay on same-sex marriages in the state remains in place.

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12. June 26, 2013, the U.S. Supreme Court strikes down the Defense of Marriage Act and ruled that the appellants in California's Proposition 8 did not have standing to bring the case. Governor Jerry Brown and Attorney General Kamala Harris ask that the stay on gay marriage be lifted as soon as possible.
13. June 28, 2013, the Ninth Circuit Court of Appeals lifts its stay on gay marriages. Governor Jerry Brown directs counties to begin issuing marriage licenses to same-sex couples immediately. Weddings are held at Los Angeles and San Francisco city halls.
14. January 1, 2020, Domestic Partnership status for heterosexual couples.

c. Void marriages

- i. Bigamy - Family Code § 2201
 1. *May* be recognized for purposes of inheritance
 2. Surviving spouses share in estate
- ii. Incest - Family Code § 2200

d. Multiple (3) Parents (Eric Bevan)

- i. Family Code §§ 7540, 7570, 7600, 8617 - See below
- ii. More than two parents
 1. Fam Code § 7612(c) - most commonly arises as petition to recognize parent other than presumptive parents -- think biological parent petitioning for recognition. *In re M.R.* (2017) 7 Cal.App.5th 886.
 - a. Standard: allow recognition of more than two parents "if the court finds that recognizing only two parents would be detrimental to the child."
 2. Family Code § 8617 - adoption context - parents waive termination of parental rights and duties and allows adoption by third person. *Adoption of E.B.* (2022) 76 Cal.App.5th 359.
 - a. Standard: best interests of child.
 3. Court can recognize more than 2 parents if appropriate under the respective standards. Family Code §§ 7612(c) and 8617 are not exclusive and can complement. *C.A. v. C.P.* (2018) 28 Cal.App.5th 27.
 4. Both Family Code §§ 7612(c) and 8617 look to relationship between child and adoptive or petitioning parent.
 5. Three parents permissible, but parents cannot have two spouses

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6. *Cf, Estate of Franco* (2023) 87 Cal.App.5th 1270, re presumptions under Family Code §7540.
 - a. Franco dies intestate survived by sister and niece. Franco had nonmarital child with a married woman who raised the child (Bertuccio) with her husband by agreement. Family Code § 7540 provides “the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage.” Bertuccio petitions for letters to administer Franco’s estate. Sister and Niece oppose and bring a summary judgment motion for a finding that Bertuccio was a child of the marriage, and the FC § 7540 marital presumption bars Bertuccio from proving Franco was his natural parent from whom he could inherit in intestate succession. Trial Court grants MSJ; Court of Appeal reverses because the trial court did not make requisite finding that the spouses cohabited at the time of conception.
 - b. FC § 7540 marital presumption codifies the principle that when husband and wife are living together as such, the integrity of the family should not be impugned. ‘The husband is deemed responsible for his wife’s child if it is conceived while they are cohabitating; he is the legal father and the issue of biological paternity is irrelevant.’ (*Estate of Cornelious* (1984) 35 Cal.3d 416, 464-465.) The Supreme Court noted social policies promoted by the presumption, including the integrity of the family and stability of inheritance. *Estate of Franco* (2023) 87 Cal.App.5th 1270, 1279.
 - c. “Right of inheritance is not an inherent or natural right but one which exists only by statutory authority, the law of succession is entirely within the control of the Legislature.” *Estate of Franco* (2023) 87 Cal.App.5th 1270, 1282, citing *Estate of Perkins* (1943) 21 Cal.2d 561, 569.

e. Spouses that die in the middle of divorces (Alicia Gamez)

- i. Summary of property:

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1. Community property – all of decedent's interests to Surviving spouse (Prob C. 100; 6401)
 2. Separate Property – a portion to surviving spouse (Prob C. 6401)
 3. Quasi Community property – a portion to surviving spouse (Prob C. 101; 6401)
- ii. Timing is everything – where are you in the divorce?
If a party dies during the pendency of a dissolution proceeding, the rules that apply depend on whether death occurred
- Before bifurcation of the status issue, on the death of either party, the family court proceeding abates because dissolution is personal to the spouses or RDPs and the probate court has jurisdiction (*Marriage of Hilke* (1992) 4 Cal.4th 215, 221) The marital or RDPship status has not terminated;
 - After bifurcation of the status issue
If there has been a bifurcation and termination of the marital or RDPship status but a party to the dissolution proceeding dies before the final judgment of dissolution is entered, the case will continue to be tried in the family law court;
Conditions imposed by the bifurcation order on a party are binding on that party's estate. Fam C §2337(c); *Marriage of Allen* (1992) 8 Cal.App.4th 1225. The personal representative of the deceased spouse or RDP's estate will be substituted as a party to the dissolution proceeding in place of the deceased spouse or RDP. CCP §§377.31, 377.41; *Kinsler v Superior Court* (1981) 121 Cal.App.3d 808.
 - After the parties' rights have been adjudicated or the case has been submitted;
the family law court retains jurisdiction to enforce rights adjudicated before the death of a party. *McClenny v Superior Court* (1964) 62 Cal.2d 140, 144; *Marriage of Lisi* (1995) 39 Cal.App.4th 1573, 1575.
or
 - After entry of the family court judgment, but before it becomes final (see §4.70)
If a party dies after trial and submission of the case to the family court judge for decision but before judgment, the court may nevertheless render judgment in the case. CCP §669; *Frederick v Superior Court* (2014) 223 Cal.App.988.

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- **Marvin action.** Because the property interests of a couple living in a Marvin relationship are derived from contract law (see *Marvin v Marvin* (1976) 18 Cal.3d 660) and not from the status as married persons or RDPs, a case may be brought against the deceased spouse or partner's estate based on contract law. The case generally is brought as a regular civil action but may require a creditor's claim in a probate proceeding.

When a party to a Marvin agreement has died, a claim under *Marvin v Marvin*, supra, which is a contract action that generally is filed in civil court, may be filed in a probate proceeding in some situations. See, e.g. *Byrne v Laura* (1997) 52 Cal.App.4th 1054 (when surviving cohabitant's creditor's claim to enforce Marvin agreement rejected, survivor filed complaint against estate on several grounds; court held it was error to grant motion for summary judgment on cause of action for damages for failure to pay debt on rejected claim). See also *Estate of Fincher* (1981) 119 Cal.App.3d 343, 350 (once widow was properly before probate court seeking determination of her community property interest in her husband's estate, trial court had power to determine whole controversy, including her claim under alleged Marvin agreements).

- iii. *Welch v. Welch* (2022) 79 Cal.App.5th 283
 1. Spouses in dissolution proceedings enter mediation and come out with 5 page mostly handwritten settlement agreement (MSA), that listed and divided properties and interests, was signed by parties and attorneys. MSA provided for a later formal judgment.
 2. Wife dies before MSA reduced to a judgment or language of the judgment final.
 3. Husband tries to petition as surviving spouse without MSA; Son opposes and seeks to enforce MSA.
 4. MSA is enforceable.
- iv. Is there a legal decree of separation?
- v. If you die before divorce, you die as a married person so update will to counter any presumptions, and other estate planning.
- vi. What if someone comes from another state to California?
 1. How is their property treated in a CA divorce?

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vii. Important:

1. Personal representative, usually surviving spouse, holds privilege.
2. ATROs prohibit moving assets. Advice to divorcing parties, promptly draft and sign new wills; revoke trust -- requires notice to other spouse.
3. update beneficiary designations.

f. Probate Code § 5040 et seq.

- i. Severs former spouse inheritance rights under certain instruments
- ii. § 5040(e): a provision other than a provision of a life insurance policy
- iii. Probate Code 5040 et seq applies only to former spouse. There is no presumption of severance as to in-laws or step-children identified by name (rather than by relationship).
- iv. *Egelhoff v Egelhoff* (2001) 532 U.S. 141 - ERISA preempts state law

g. Community Property/Separate property

i. *Marsden* analysis

1. House with a mortgage
2. Split between community and separate property
3. When community funds are used to make payments to reduce the principal balance of a separate property mortgage, the community acquires an apportionable ownership interest in the mortgaged property consisting of a dollar-for-dollar reimbursement for those payments and an interest in the appreciation of the separate property.
Marriage of Moore (1980) 28 Cal.3d 366; *Marriage of Marsden* (1982) 130 Cal.App.3d 426. See *Marriage of Ramsey & Holmes* (2021) 67 Cal.App.5th 1043. This is often referred to as the Moore-Marsden doctrine or rule.

Courts have extended the *Moore-Marsden* rule to community expenditures for improvements to the owner's separate property. See *Bono v Clark* (2002) 103 Cal.App.4th 1409; *Marriage of Allen* (2002) 96 Cal.App.4th 497. The community's pro tanto interest under the Moore-Marsden rule, however, does not include reimbursements for payments toward

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- mortgage interest or property taxes. *Marriage of Nevai & Klemunes* (2020) 59 Cal.App.5th 108, 116.
- ii. *Pereira Van Camp*
1. Business that is partially community and partially separate
 2. House
 3. Allocation of business interest between separate and community property. *Pereira v Pereira* (1909) 156 Cal.1 and *Van Camp v Van Camp* (1921) 53 Cal.App.17 established the doctrine of equitable apportionment in a dissolution action when allocating appreciation and profits of a business between separate and community property interests. The allocation takes into account how one spouse's or RDP's efforts, skills, or talent, which are presumed to be community in nature, increased the value of the separate property business during the marriage or RDPship. *Beam v Bank of America* (1971) 6 Cal.3d 12; *Estate of Neilson* (1962) 57 Cal.2d 733.
 - a. Under the *Pereira* approach, the court allocates to the separate property owner the value of the separate property on the date of marriage or registration of domestic partnership or date of acquisition, whichever is later, plus a reasonable rate of return on the investment, and allocates the balance of the profits or increased value to the community as arising from community efforts.
 - b. Under the *Van Camp* approach, when either or both spouses or RDPs provided services regarding the separate property, the court allocates to the community reasonable compensation for the efforts of the providing spouse or RDP (if the community had not already received such compensation) and allocates to the separate property the balance of the profits or increased value as attributable to the normal earnings on the separate property investment.
 - c. Under an equitable apportionment or hybrid approach, the court applies the *Pereira* formula when the business grows during marriage due to community property efforts, notwithstanding the fact that the spouse received a fair salary during

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marriage. See *Marriage of Dekker* (1993) 17 Cal.App.4th 842, 854.

2. Parent/Child Relationship (Eric)

a. What is a parent?

- i. Family Code and Parent Code both have rules on parent/child relationships

b. Probate code § 6453 “natural parent”

- i. (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code).
- ii. (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of § 7630 of the Family Code unless any of the following conditions exist:
 1. (1) A court order was entered during the parent's lifetime declaring parentage.
 2. (2) Parentage is established by clear and convincing evidence that the parent has openly held out the child as that parent's own.
 3. (3) It was impossible for the parent to hold out the child as that parent's own and parentage is established by clear and convincing evidence, which may include genetic DNA evidence acquired during the parent's lifetime.
- iii. (c) A natural parent and child relationship may be established pursuant to Section 249.5.

c. Family Code § 7540

- i. Child of Wife cohabiting with H during conception to birth is a factor in the Estate of Franco (see above)
 1. Estate of Franco
 2. Surviving Sister of W was trying to get biological child
 3. Court found surviving sister had not shown that biological child's parents were co-habiting
 4. Court sent back down for further proceedings

d. Family Code § 7570 et seq

- i. Voluntary declaration of parentage.

e. Family Code 7600 Uniform Parentage Age

f. What is a child?

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- i. Probate Code
- ii. Family Code 7610:
 1. (a) proof of birth
 2. (b) proof of adoption.
- iii. Family Code 7611: Natural child if a child under Probate Code §§ 7540 or 7570 or:
 1. (a) presumed parent and the child's natural mother are, or have been, married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court
 2. (b) Before the child's birth, the presumed parent and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true
 - a. (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.
 - b. (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.
 3. (c) After the child's birth, the presumed parent and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:
 - a. (1) With the presumed parent's consent, the presumed parent is named as the child's parent on the child's birth certificate.
 - b. (2) The presumed parent is obligated to support the child under a written voluntary promise or by court order.
 4. (d) The presumed parent receives the child into their home and openly holds out the child as their natural child.
 5. (e) The child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied.

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3. Real World Case Studies on how these principles can play out

- a. Planning allows certainty and predictability
- b. Court costly, slow, emotional, unpredictable
- c. **Example – timing is everything (Eric Bevan)**
 - i. Hypothetical (B v. B)
 1. Married in CA
 2. CA Community Property
 3. Moved out of state (FL)
 4. Divorce
 5. Co-trustee accusing each other of fiduciary duty for withdrawals
 6. Death during divorce
 7. What happens to the property?
 8. Considerations
 - a. Is there a Uniform Disposition of Community Property on Death Statute?
 - b. Was property still CA Community property?
 - c. Was it transmuted?
 - d. How did disposition change because of death?
 - e. Is there any kind of elective share under state law?
 - f. Is there any kind of estate planning component – power of appointment, for example?
 - g. Are there trust obligations?
- d. **Example: (Alicia Gamez)**
 - i. Marry 1990s
 - ii. Trust 2000
 - iii. Divorce 2017
 - iv. H dies 2020
 - v. Estate planning/trust:
 1. Marital trust
 2. But no pour over will by H
 3. Effect of the divorce severed any rights of surviving spouse under trust
 4. Remainder beneficiaries under trust were W's children
 5. Effect of the divorce was to remove W
 6. But does that mean she gets skipped over and the assets go to W's children who were residuary beneficiaries

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7. End result: Divorce court confirmed separate property to each spouse separately, so the trust got defunded. Thus decedent's (H's) assets had to get distributed through probate, not the trust.
8. How could the parties have acted to achieve a better, more controlled outcome?
 - a. Going to court is difficult
 - b. Planning is beneficial

e. Example: (Eric Bevan)

- i. Hypothetical: Estate of A.W.
 1. Married, divorced, married, divorced, died
- ii. Retirement accounts
 1. Federal law preempts state law
 2. ERISA accounts
 3. Thus CA state law that presumes divorced spouse as pre-deceased is trumped by federal law on retirement accounts
 4. *Egglehoff* (US Supreme Court case) (plan document trumps state law)
 5. Potential solution?
 - a. Ex-spouse agreed to a waiver
 - b. Not always feasible – amicable?
 - c. Effect of waiver?
 - d. Cannot be selective
 6. Take away:
 - a. Life insurance – update
 - b. Retirement accounts – update
 - c. Residuary beneficiaries and alternate beneficiaries - update
- iii. Life insurance

4. Questions & Discussion