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INTRODUCTION

Existing California judicial precedent uniformly holds that damages recovered² by a married person based on the wrongful death during marriage³ – and while the spouses were not living separate and apart⁴ – of a relative of the spouse recovering the damages is entirely

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² This Article refers to recovery of wrongful death damages without distinguishing between the situation where the avenue of the recovery is collection by a plaintiff-spouse of a wrongful death judgment after litigation and the situation where payment is based on a settlement agreement made by the tortfeasor or the tortfeasor’s insurer. Whether the legally appropriate classification of the recovery is separate property of the plaintiff-spouse, community property, or a mix of both separate and community property could not turn on the difference between recovery after completed litigation and recovery based on a settlement agreement with the tortfeasor.

³ In the balance of this Article, when reference is made to recovery of wrongful death damages by a married person, it is to be assumed, unless stated otherwise, that the recovery is based on the death of a relative of the spouse that occurred during marriage and not before the marriage.

⁴ By statute, Cal. Fam. Code § 771, an “accumulation” by a married person “while living separate and apart from the other spouse” is separate property of the acquiring spouse. A wrongful death recovery should be such an “accumulation.” More importantly, a cause of action in tort for wrongful death arising at the time the plaintiff spouse’s relative is tortiously killed will be viewed as such an “accumulation.” Thus, the courts will examine whether the plaintiff and his or her spouse were living separate and apart not at the time the funds
community property. Under the theoretical basis for this community property classification in these cases, it is irrelevant that the person tortiously killed was a child or grandchild only of the plaintiff- or payee-spouse and had no legally recognized relationship to that party’s husband or wife, who becomes owner of half the recovery because of its classification as community property.

The line of precedents requiring community property classification of wrongful death recoveries that this Article would overrule as illogical under current approaches to classification dates to a 1922 decision by a California Court of Appeals\(^5\) that took the position that a wrongful death recovery by a married person should be classified in the same manner as recovery based on personal injuries tortiously inflicted on the body of that person during marriage. The law in 1922 concerning classification of recoveries based on a married person’s personal injuries tortiously inflicted rested on an 1891 California Supreme Court decision\(^6\) that was viewed – not unreasonably – as holding that no portion of the personal injury recovery, which was presumptively community property because acquired during marriage, could be classified as separate property of the victim spouse by tracing it to a separate property source other than the tort cause of action itself. An example of the kind of tracing not allowed would be a case where the bulk of the recovery was based on the victim-wife’s having had her leg – which was part of her before marriage and hence her separate property, if viewed as property. – sheared off in the accident negligently caused by the tortfeasor. Tracing the money damages to the separate leg would be impermissible.

\(^{5}\) Keena v, United Railroads, 207 P. 35 (Cal. App. 1922), discussed at text accompanying nn. 32-35, infra.

\(^{6}\) McFadden v. Santa Ana, Orange & Tustin Ry. co., 25 P. 681 (Cal. 1891), discussed at text accompanying nn. 9-26, infra.
The approaches that judges take in classifying recoveries based on personal injuries to a married person where no statute deals with the classification issue have changed substantially since 1922. A relatively new theoretical approach now often applied, which can be called “in-lieu tracing,” asks what was lost by the victim spouse that resulted, for example, in an insurance company paying him or her a sum of money. Thus, if an insurance company pays out on a disability policy benefits to a husband who, due to metastasized cancer, has become unable to work at his job and the husband is beyond normal retirement age, the payment is seen as in lieu of retirement benefits, and the law applicable to classifying retirement benefits as community or separate would be employed, i.e., the payments would be traced to the premiums paid for the insurance. If no statute precluded application of in-lieu tracing, a personal injury recovery based on loss of a leg by a spouse in a tortiously caused accident during marriage would be classified by tracing the money to the leg, something the victim spouse brought to the marriage. So much of the total recovery as was based on loss of the leg would be the victim’s separate property, even though the cause of action arose and payment was made during marriage.

This article concludes that the modern in-lieu tracing precedents require overruling of the 1922 wrongful death decision and its progeny that bar any consideration of the nature of the loss suffered by the married person who recovers damages based on death of a relative that could result in tracing to a separate property source and that compels classifying all components of damages recovered as community property.

Another line of older authority under which wrongful death recoveries had to be classified as 100 percent community property does not need to be overruled. This line of cases began with a 1924 Court of Appeals decision and was based on language that in 1924 was found in section 376 of the Code of Civil Procedure. The 1924 court’s interpretation of section 376 was unsound from the outset, as this article demonstrates. In any event, the language on which it was based was legislatively removed from that statute upon a revision of it in 1949, an amendment which necessarily abrogated the second line of older precedents that mandated classifying 100 percent of a wrongful death recovery by a married person as community property.

7 See Marriage of Saslow, 710 P.2d 346, 352 (Cal. 1985); see also Marriage of Elfmont, 891 P.2d 136 (Cal. 1995).

I. DEVELOPMENT OF CALIFORNIA’S ORIGINAL NO-TRACING RULE EMPLOYED IN CLASSIFYING PERSONAL INJURY RECOVERIES IN GENERAL

A. The 1891 McFadden Decision

Since the line of cases dealing with classification of wrongful death recoveries by a husband or wife that began in 1922 rests on judicial borrowing of the approach used in classifying personal injury recoveries, analysis of the pertinent law properly begins with the earliest cases involving classifying as community or separate property recovery of damages for a spouse’s personal injury. e.g., a concussion suffered in an automobile accident.

The first reported decision to consider how the community property system applied to the issue of classifying damages recovered by a husband or wife based on tortiously caused personal injuries to him or her was by the California Supreme Court in 1891. In McFadden v. Santa Ana, Orange & Tustin St. Ry. Co., a married woman was in a vehicle – described as a

9 It followed two peculiar decisions of the California Supreme Court that declared that a wife’s cause of action in tort for personal injuries was her separate property under the common law of England in effect in California. Matthew v. Central Pacific RR. Co., 63 Cal. 450, 451 (1883) (negligent starting up of train caused wife to be violently thrown to the floor of a car; “[t]he cause of action is hers.”); Sheldon v. Steamship Uncle Sam, 18 Cal. 526, 533-34 (1861) (false imprisonment caused injuries to wife, and under “common law” she was “entitled to compensation.”). It is hard to imagine how all of the justices participating in both these cases could have forgotten that at the time of these decisions the state constitution contained a provision, Cal. Const. art. XI, § 14 (1850), that required application of the civil law to marital property issues. This constitutional proviso had been vigorously debated at the initial constitutional convention before its adoption and constituted a major exception to the state’s adoption, in general, of the common law. See Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October 1849 at 257-269 (1859), excerpted in William A. Reppy, Jr., Community Property in California 9-12 (1980).

10 25 P. 681 (Cal. 1891).
“three-spring buggy, without a top”\textsuperscript{11} – that fell into the defendant’s unmarked and negligently-created street excavation,

whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person, and said internal injuries, she was confined to her bed for many months, and endured great physical and mental suffering. Her health is injured and impaired thereby . . . \textsuperscript{12}

A judgment for the plaintiff wife was reversed because the jury had been instructed, erroneously, that contributory negligence of her husband could not be imputed to her. The trial court had refused this instruction requested by the defendant on the ground that the wife’s recovery would be her separate property, Since it would not be co-owned in community with her husband, his contributory negligence would be legally irrelevant because he would not, if the recovery were the wife’s separate property, profit from his own wrong. But the trial court was wrong in declaring that the wife’s recovery would be her separate property, held the California Supreme Court:

The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action . . . ; and if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is community property of the husband and wife (Civ. Code, secs. 162-164, 169) . . . \textsuperscript{13}

\textsuperscript{11} Transcript on Appeal, p. 38, folios 113-114, McFadden v. Santa Ana, Orange & Tustin Ry co., No. 13919, Supreme Court of California (1891).

\textsuperscript{12} 25 P. at 682 (italics in the original). The treating physician testified that the victim wife suffered “an anti-flexon of the second degree, combined with prolapsus.” Transcript on Appeal, supra note 11, p. 34, folio 100.
In the quoted passage the court is willing to trace the money the injured spouse receives back to the cause of action but will not trace the cause of action back to the victim’s body. When *McFadden* was decided in 1891, Civil code section 162 provided, “All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents issues and profits thereof, is her separate property.” Section 164 then provided, “all other property acquired after marriage, by either husband or wife, is community property.” It is clear that the *McFadden* court did not view section 164, in a case where money damages were received during marriage, from tracing money damages back to a cause of action in tort that arose before marriage – “property owned before marriage” under section 162 – to make the money damages separate property of the victim spouse. The possibility of other kinds of tracing seems not to have been considered.

The California Supreme Court four years later expanded upon the significance, in classifying personal injury damages, of the texts of sections 162 and 164 as they then read. The 1895 case involved personal injury damages arising out of an assault on a married woman, and the court held:

The separate property of the wife is declared in section 162, Civ. Code, to be ‘all property owned by her before marriage, and acquired afterwards by gift, bequest, devise or descent’; and section 164, Id., declares that ‘all other property acquired after marriage’ by the wife is community property. Whatever may be the law in other states, in this state the separate property of the wife, which is acquired by her after marriage, is limited to such as she acquires by ‘gift, bequest, devise and descent.’ As a right of action for damages for personal injuries is not acquired by either of these modes, it is part of the ‘other property acquired after marriage,’ and is therefore community

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13 Id.
B. Precedents and Secondary Authority Existing When McFadden Was Decided

In McFadden, the cornerstone decision for the judge-made rule that 100 percent of personal injury damages arising out of a tort during marriage must be community property, counsel for the victim wife made no argument in brief for a separate property classification. Instead counsel argued that the fact the husband would own half of the wife’s recovery in community was not a sufficient basis for imputing the husband’s contributory negligence to the wife. That counsel for the wife did not seek a separate property classification is not surprising.

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14 Lamb v. Harbaugh, 39 P. 56, 58 (1895). In Washington, when the law there also classified one hundred percent of a married person’s personal injury recovery as community property on precisely the same logic as employed in Lamb, the courts there quaintly said they were applying “th[e] ‘waste basket’ definition of community property.” Marriage of Brown, 675 P.2d 1207, 1210 (1984) (ultimately overruling the cases that took this approach), quoting Marriage of Parsons, 622 P.2d 415, 416 (Wash, App. 1981): “This waste basket definition of community property results in property being characterized as community unless it meets the definition of separate property. . . . [F]ortuitous acquisition of damages for personal injury by a third party tort-feasor is community property because it does not fit the definition of separate property.” Brown, 675 P.2d at 1210, quoting Parsons, 622 P.2d at 416.

Lamb cited the 1891 McFadden decision, 39 P. at 58. Other decisions where the court classified a married person’s personal injury recovery as community property while citing McFadden that were on the books in 1922 when the issue of classifying a wrongful death recovery was first decided in a reported decision include Doyle v. Doyle, 186 P. 188, 190 (Cal. App. 1919), and Justis v. Atchison, T. & S.F. RY. Co., 108 P. 328, 329 (Cal. App. 1910).

15 [T]o say that the negligence of the husband should be imputed to the wife for the reason that the judgment secured for damages sustained by the wife is community property, is not a sufficient reason. [¶] We cannot say that it is a common undertaking because the results of that undertaking may in some way accrue to the benefit of the husband. In order to identify the party having this resulting
Although the issue was res nova in California, all the then-reported precedents from other community property states that had considered the matter had held that a spouse’s personal injury damages had to be entirely community property because acquired during marriage by a process other than inheritance, bequest, devise, or gift.16

In 1890, when McFadden was briefed and argued, there were in print two English language treatises on the law of Spain and Mexico17 that included discussions of community property law,18 and which had been cited by the California Supreme Court as good sources of civil law principles.19 Neither treatise addressed whether a recovery of damages for personal injuries by a married person was community property or the victim’s separate property. One did suggest that, as a matter of civil law procedure (which would not be part of California law), if the wife were the tort victim, she was a necessary party in a suit for damages; she could not appear

interest in this judgment as connected in a common undertaking with the other plaintiff, there must be something further than this.


17 Gustavis Schmidt, The Civil Law of Spain and Mexico (1851); Joseph M. White, A New Collection of Laws, Charters and Local Governments of Great Britain, France and Spain etc (1839) (usually cited in the reported cases as White’s Recopilacion, White’s Recop. or White’s Rec.).

18 The Schmidt treatise addresses community property in chapter IV, section 1, at pages 12-14; White’s Recopilacion does so in volume 1 by way of the English translation by Johnson of Book I, tit. VII, cap. 5, § 1, pp. 60-63, of the Institutes of the Civil Law of Spain (1839), written by the jurisconsults Ignatious Jordan de Asso y del Rio and Miguel Manuel y Rodriguez.

19 See, e.g., Braly v. Reese, 51 Cal. 447 (1876), citing the Schmidt treatise (supra n. 18)at 463 n. a1 and White’s Recopilacion at 464 n. d4; Wilson v. Castro, 31 Cal. 420, 433 (1866)(citing Schmidt); Noe v. Card, 14 Cal. 576, 605-06 (1860) (citing White’s Recopilacion)
in court without her husband’s permission, although the court could compel him to give his assent.\textsuperscript{20}

\textsuperscript{20} Asso & Manuel, supra note 18, as reproduced in translation in 2 White’s Recopilacion 272 (1839): “[T]he wife cannot appear in suit without the permission of her husband, . . . and the judge may also, with cognizance of the cause, obligate the husband to give his assent.”

Conceivably the wife was viewed as a necessary party because the damages to be awarded would be her separate property; but she also could have been a necessary party so the court could have before it the very person claiming to have been tortiously injured, even though the damages awarded would be community property subject to the husband’s management and for which, in most situations, he would be the party to bring suit in court.

De Funiak writes that in Spain by the sixteenth century a wife could sue for her own personal injuries without obtaining her husband’s consent. William Q. De Funiak and Michael J. Vaughn, Principles of Community Property § 81, p. 198 (2d ed. 1971). In the same passage De Funiak quotes the Spanish statute book, Las Siete Partidas, which he dates as of 1263 (id, § 29): “Wrong or dishonor [i.e., a tort] can be committed against any male or female of any age whatsoever.” Based on this, De Funiak concludes: “Thus, the injury to the person of a wife was compensable to her to the extent that she was wronged or dishonored by such injury . . . .” Principles § 81 at 198, quoting his translation of Part. 7, tit. 9, ley 9 of the Partidas. By “compensable to her” De Funiak intends to say that at civil law in Spain the recovery was the wife’s separate property pursuant to Las Siete Partidas. I do not think law 9 supports this conclusion. Law 9 actually goes on to say “[A] father can bring suit for damages for dishonor done to his son . . . ; and a husband can do this on behalf of the wife.” Las Siete Partidas, vol 5, Underworlds 1356 (Robert I. Burns, ed, 2001) (translated by Samuel P. Scott) (emphasis added.) If any inference concerning classification is to be drawn from Law 9, this language could indicate that the recovery for the wife’s personal injury damages would be community property managed by her husband.

De Funiak also cites (Principles, supra, § 81, p. 198, n. 14) a commentary to Law 15, Leyes de Toro (1505), for the proposition that a wife could sue without her husband’s consent for her personal injury damages, suggesting this was so because they would not be community property. The passage cited, as translated by myself and Sandra Newmeyer, Duke Law School class of 2011, states:
Nor, apparently, did legal treatises written in Spanish -- that the California Supreme Court had, before the 1891 *McFadden* decision, been consulting to determine the fine points of civil law of marital property – address the issue concerning classification as community or separate property of personal injury damages. I have personally translated\(^{21}\) the chapters on

Here doubt is shed on whether a wife is required to show the husband’s permission in order to defend in a criminal trial, in which she is accused. It is resolved by Acevedo, no. 108, that common usage has established the lack of need for such permission, even if that is contradicted by our own [statutory] law. But it appears to me that, without contravening the provisions of such law, one can say it is unnecessary to require the permission of the husband, because it can be supplied by the trial judge and further more because the woman is required to answer the charges that have been brought against her. And when it is necessary for the wife to convey her property rights, it is recognized by Acevedo in no. 81 that the husband’s consent is not necessary; for the same reason it is not necessary in this case [i.e., of a criminal prosecution]. This becomes evident in light of what is provided in laws 77 and 78, which state that for committing a crime the married woman may lose in part or in whole her properties of any type. The laws (77 and 78) prove without doubt that the present [local?] law and other laws that favor the husband which require his consent so that the wife can convey and acquire property, have no effect, since otherwise one would have to say that the application of laws 77 and 78 depend on the voluntary act of the husband, who surely would never give his consent for the conveyance of the wife’s properties.

\(^{2}\) Don Sancho de Llamas y Molina, *Comentario Critico-Juridico-Literal a’ las ochenta y tres Leyes de Toro, Comentario a’ ley 55 de Toro ¶ 17*, pp. 178-179 (Madrid 1827). To me this says no more than that a wife managed her own separate property.

\(^{21}\) With help over more than 30 years of numerous Duke Law School students who were fluent in Spanish.
community property (bienes gananciales) in two of such treatises\textsuperscript{22} that were most frequently cited by the California Supreme Court.\textsuperscript{23} Neither treatise discussed or even alluded to whether a recovery of personal injury damages would under civil law be classified as community or separate property.

\textit{C. Tracing Separate Property Through Mutations}

In the absence of any useful “precedent” in the form of secondary materials dealing specifically with the classification of personal injury damages as separate or community property, the best theory that counsel for the wife in \textit{McFadden} had for seeking a separate property classification was that the damages awarded constituted a “mutation” of an item of separate property the wife brought to the marriage, her womb – part of her own body -- which had been injured in the accident. The theory would have involved recognition of three mutations: (1) a healthy womb transformed into a damaged womb together with a cause of action in tort; (2) the cause of action transformed into a judgment; and (3) the judgment converted into money. This mutation theory had some support in an 1866 decision of the California Supreme Court.

\textsuperscript{22} Josef Febrerero’s Librería de Escrribanos and Joaquin Escriche y Martin’s Diccionario Razanado de Legislacion Civil, Penal, Commerical y Forense. Each appeared in various editions. The editions I translated were from the 1834 edition of Febrero published in Mexico City and edited by Eugenio Tapia and generally referred to as Febrero Mejicano (abbreviated in court citations as Feb. Mej. or Feb Mex.) and Escriche’s 1831 edition published in Madrid. The chapter in Fedbero Mejicano on bienes gananciales is tit. 11, cap. X, at pp. 217 et seq, and the chapter on that topic in the 1831 Escriche edition, is found at pp. 71 et seq.

De Funiak disparages Febrero as a mere notario, not a scholarly Spanish jurisconsult. William Q. De Funiak, Principles of Community Property 26 (lst ed. 1943). Yet Febrero’s Librería de Escrribanos was apparently widely available in California in the middle of the nineteenth century and frequently consulted by lawyers and judges.

\textsuperscript{23} Illustrative cases include Panaud v. Jones, 1 Cal. 488 (1851), quoting Febrero on community property law at p. 515 (cited as “1 Feb. Mej §19”), also quoting Febrero at 502, 503; quoting Escriche at 504 (cited as “Escriche Dic. De Leg.”); Fuller v. Ferguson,
Court and certainly was worth pursuing. It was unhesitatingly applied in 1938 in a case where the wife’s separate property that was tortiously damaged was an item of tangible personalty – a motor vehicle – rather than a part of her body. Applicability of the tracing-through-mutation theory might have been more apparent to the wife’s attorney in McFadden had her injury been the shearing off of her leg (arguably her separate property and certainly not community), with the wife seeking recovery of damages in part so that she could buy a prosthetic leg to replace the natural leg.

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24 Peck v. Vandenberg, 30 Cal. 11 (1866), stated the law of California to be (quoting from a Texas decision) as follows:

“[T]o maintain the character of separate property it is not necessary that the property of either husband or wife should be preserved in specie or kind. It may undergo mutations and changes, and still remain separate property; and as long as it is clearly and indisputably traced and identified, its distinctive character will remain.” . . . Of course, to trace the property through its “mutations and changes” . . . requires evidence other than written . . .

Id at 38-39 (italics in the original). In Peck the court favorably discusses (id. at 30) a Louisiana case, Dominguez v. Lee, 17 La. 297 (1841), where the mutations of separate property were from something tangible to a cause of action and back to something tangible. The wife’s tutor (surely a fiduciary) had embezzled some separate property funds the wife had inherited. She settled her conversion cause of action against the embezzler by taking, during marriage, a grant of land from him, which was held to be her separate property by tracing back to the inheritance.

25 Scoville v. Keglor, 80 P.2d 162. 167 (Cal. App. 1938) ($600 recovery for damages to car segregated from balance of negligence case award to wife for her personal injuries, which was community property).

26 It does not necessarily follow that, if the prosthetic leg were purchased with community funds, when attached to the wife it would remain community property. The law might apply to that situation the fixtures doctrine, under which a structure paid for with community funds and built
II. APPLYING THE RESTRICTED TRACING RULE OF PERSONAL INJURY DECISIONS IN THE CLASSIFICATION OF WRONGFUL DEATH RECOVERY BY A SPOUSE

A. The 1922 Keena Decision by the Court of Appeal

Between 1891 and 1922, the California rule that 100 percent of personal injury damages awarded a married person had to be classified as community property was repeatedly adhered to, but developments outside California during this period initiated the formulation of what is now the overwhelming majority rule: the damages are part separate and part community depending on the nature of the loss to be compensated by each component of the damages. A 1902 Louisiana statute that seemed on its face to classify 100 percent of a wife’s personal injury damages as her separate property was judicially construed as permitting a community on a spouse’s separate property land becomes separate property, creating a right of reimbursement in the community. See Marriage of Warren, 104 Cal. Rptr. 860, 862-63 (1972). A somewhat stronger case than the removable prosthetic leg for applying the fixtures doctrine would be a spouse’s having $10,000 worth of gold embedded in his or her teeth as a result of extensive dental work paid for with community funds. If the other spouse were to die with a will leaving to children of a prior marriage all property over which he or she had testamentary power, it would be almost absurd for the law to recognize the legatees as owners of a half interest in the gold-infused dentures affixed to the mouth of the surviving spouse, an outcome avoidable by application of the fixtures doctrine.

27 See, e.g., Paine v. San Bernardino Valley Traction Co., 77 P. 659 (Cal. 1904); Henly v. Wilson, 70 P. 21, 22 (Cal. 1902).

28 1902 La. Acts no. 68, amending article 2402 of the Louisiana Civil Code to add the following exception to the basic definition of community property:

But damages resulting from personal injuries to the wife shall not be part of the community, but shall always be and remain the separate property of the wife and recoverable by her alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now
classification for the amount of the damages reimbursing the community for medical bills incurred by the victim\textsuperscript{29} and the amount of damages based on wages she lost due to the injury.\textsuperscript{30} Additionally, a treatise published in 1910 proposed that part of the award for personal injury damages be traced to a “right violated” – a right to personal security -- that was separate property of the victim spouse, according to the author..\textsuperscript{31}

Since these new approaches were few in number and not tied to California law, it is not surprising that a California intermediate appellate court in 1922 approached the issue of classifying a married person’s wrongful death recovery in the same manner in which the \textit{McFadden} court in 1891 had dealt with damages for injury to a wife’s womb. The case was

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provided by law.
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\textsuperscript{29} Picheloup v. Gibbons, 120 So. 504, 504-05 (La. App. 1928). A similar miraculous interpretation of a statute dealing with classification of components of a recovery based on a married person’s suffering personal injuries was made in Texas. First enacted in 1968, what is now Tex. Fam. Code § 3.001(3) provides that separate property of a husband or wife includes “the recovery for personal injury damages sustained by the spouse during marriage, except any recovery for loss of earning capacity,” quoted in \textit{Graham} v. Franco, 488 S.W.2d 390, 391 n 1 (Tex. 1972) from former Tex. Fam. Code § 5.01, itself formerly Article 4651 of the Texas Civil Statutes. Notwithstanding the plain legislative choice not to make an exception to the basic rule classifying the damages as separate property for the amount of recovery based on medical expenses incurred, \textit{Graham} held: “To the extent that the marital partnership has incurred medical or other expenses, both spouses have been damaged by the injury to the spouse . . . . The recovery therefore is community in character.” 488 S.W.2d at 396.

\textsuperscript{30} Simon v. Harrison, 200 So. 476, 479 (La. App. 1941).

\textsuperscript{31} George McKay, A Commentary on the Law of Community Property for Arizona, California, Idaho, Louisiana, and Nevada (1\textsuperscript{st} ed. 1910). “\textit{A Cause of Action for an Injury to Separate Property or for Violation of a Separate Right is Separate}. The cause of action takes the same character as the right violated . . . .” Id, § 78, at p. 163 (italics in the original). “Upon principle it would seem that the right violated should determine whether the right to recover is separate, or community property.” Id. § 180, at p. 247. But McKay conceded that all the reported cases then on point held that personal injury recoveries by a spouse could not be traced to a separate source, such as a separate right. Id., § 181, at p. 248.
Keena v. United Railroads and involved a boy four years and eight months old who was struck by the defendant’s cable car and suffered injuries from which he died. The decedent’s father brought the wrongful death suit alleging negligence by the railroad, which pleaded as a defense that the child’s mother had been contributorily negligent by allowing the boy to play on the street without reasonable supervision by her. Judgment for the plaintiff father was reversed due to errors in jury instructions relating to contributory negligence.

In a rehearing petition the plaintiff father urged that contributory negligence of the mother should not have been an issue because the father alone had been awarded the damages, i.e., they were his separate property, and as a result wife could not benefit from her own wrong as she arguably would if the damages recovered were community property. The Court of Appeal rejected the claim that wrongful death damages should be classified as separate property of a married claimant:

In this state a father may maintain an action for an injury to, or the death of, a minor child. Code. Civ. Proc. § 376. The mother, having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as a plaintiff. The proceeds of a favorable judgment in such an action become community property. Civ. Code. §§ 163, 164, 687.

No case was cited, the court relying, as did McFadden, on the statutory definition of the husband’s separate property in what was then Civil Code section 163 as limited to assets coming to him “by gift, bequest, devise or descent,” if acquisition was during marriage, which could not be said of the cause of action for wrongful death the husband had brought in Keena.


33 Id at 38.

34 Former Civil Code section 687, relied on by the Keena court as well as section 163, provided in 1922: “Community property is property acquired by husband and wife, or either, after marriage, when not acquired as the separate property of either or as common or joint property of both.”
In denying a hearing in \textit{Keena} the California Supreme Court declared: “We approve of that portion of the opinion [of the Court of Appeal] holding that the proceeds of the judgment in favor of the father is community property . . . .”\textsuperscript{35}

\textbf{B. Subsequent California Decisions Consistent with Keena}

\textsuperscript{35} Id. This comment by the California Supreme court was elicited by its disagreement with a passage in the opinion of the Court of Appeal in \textit{Keena} appearing later in the paragraph in which that court held that the wrongful death damages were community property that stated: “[T]he proceeds of such a judgment passed to the surviving husband and wife, one moiety to each.” 207 P. at 38.

The common law term “moiety” described the equal shares of co-owners in common law joint tenancy and the interests of tenants in common having equal shares. Green v Skinner, 197 P. 660, 61 (Cal. 1921) (surviving joint tenant takes moiety of property held with deceased joint tenant not as successor to the latter but by right created by the conveyance); Thompson v. Jones, 141 P. 366, 366 (Cal. 1914) (“by this deed the two became tenants in common, each owning an undivided moiety thereof”). The term “moiety” had no application to the civil law institution of community property. Indeed, in 1922 when hearing was denied in \textit{Keena}, the California Supreme Court was still adhering to its odd theory that during marriage the husband had the entire ownership of community property (even the wife’s earnings), the wife having merely a non-proprietary expectancy that would ripen into ownership of at least a half should she survive him. Spreckles v. Spreckles, 158 P. 537, 539 (1916). Somehow, however, the wife’s lack of ownership did not bar imputing her negligence to her husband on the ground she would benefit if he were permitted to obtain a community property recovery.

The statement by the Court of Appeal that the wife acquired a half interest in the damages was inconsistent with the \textit{Spreckles} theory that a wife had a mere expectancy in community property. Perhaps more significantly, the notion that a half interest “passed” to the husband himself, apparently directly and not derivatively based on his ownership interest in her acquisitions, undercut the theoretical basis for imputing her negligence to him when he brought suit. Thus, the California Supreme Court in denying a hearing in \textit{Keena} concluded the sentence quoted in part above in text that approved the community property classification of the damages with these words: “but we disapprove of the portion of the opinion to the effect that the proceeds of the judgment pass to the parents, one-half to each.”
Keena was followed in 1935 by another terse holding that “[t]he proceeds of a favorable judgment in an action by a father [for wrongful death of a child] are community property . . .,” citing only Keena. Three court of appeals decision in the 1960's similarly applied this rule without any analysis of why the money damages can be traced back to the cause of action for wrongful death but the cause of action itself cannot be traced back to benefits of which the plaintiff spouse was deprived due to the death of his or her relative.

In 1947 the California Supreme Court in Fuentes v. Tucker stated without any analysis at all that “the proceeds of the judgment [for wrongful death] are community property.” For this proposition Fuentes cited only the comment by the California Supreme Court in denying rehearing in Keena and the 1924 Court of Appeal decision in Sandberg v. McGilvray-Raymond Granite Co, to be discussed below, which classified as 100 percent community damages recovered by a married person for wrongful death of a minor child on a legal theory very different from that employed in Keena.

Five years later in Flores v. Brown the California Supreme Court again made a one-sentence pronouncement about classifying as separate or community property damages recovered for wrongful death without any explanation except for citations to Fuentes and Sandberg:


38 Fuentes v. Tucker, 187 P.2d 752, 758 (Cal. 1947), a case where two married couples sued for the wrongful death of minor son of each of them in consolidated actions.


40 See text accompanying notes 43-59, infra.

It is settled that a cause of action for injuries to either the husband and the wife arising during marriage and while they are living together is community property . . . , and the same rule is applicable to a cause of action for the wrongful death of a minor child . . . .

It is quite apparent, then, that no California appellate court has in a reported decision specifically considered why it should be that 100 percent of a married person’s wrongful death recovery must be community property and why there can be no tracing back to see what kind of loss to the plaintiff spouse was the basis for creation of the cause of action. The specific issue apparently has never been presented to an appellate court in California.

III. THE THEORY THAT A CODE OF CIVIL PROCEDURE SECTION COMPELLED THE COURTS TO CLASSIFY A WRONGFUL DEATH RECOVERY AS COMMUNITY PROPERTY

A. The 1924 Sandberg Decision

In the 1924 Sandberg case, the eight-year-old son of Mr. and Mrs. Sandberg died due to the negligence – maintaining an attractive nuisance – of the defendant, operator of a granite quarry. The boy’s father was the sole plaintiff in the wrongful death action that ensued, but the jury was instructed to determine the pecuniary loss suffered by both the plaintiff and his wife, the mother of the child. In its original opinion in the case, the California Court of Appeal held that the jury instruction was proper because the recovery would be community property, in which the mother had an interest, although subject to the management of her husband.

42 Id. at 926.


The defendant filed a petition for rehearing, renewing its argument that the jury should have been permitted to consider only damages to the husband caused by the child’s death, but on a new and quite extraordinary theory. The rehearing petition conceded that the wrongful death cause of action was community property. Notwithstanding this, argued the defendant, Code of Civil Procedure section 376, as worded at the time of the tort, made the damages awarded to the plaintiff father his separate property. Dealing with recovery for the wrongful death of a minor child, section 376 was “based on the common law, not the civil law,” the defendant contended. Since the statute addressed “the common law remedies of a parent, the legislature could not in reason be supposed to have had the question of community property in mind.” Thus the father’s recovery in Sandberg was English common law separate property even though the cause of action was community property.

The Court of Appeal, not surprisingly, rejected this contention. In its opinion denying the petition for rehearing, the court quoted the following language that then appeared in section 376 of the Code of Civil Procedure:

“A father, or in the case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is cause by the wrongful act or neglect of another . . .”

45 “It is quite true that the father’s right of action for damages is community property (C.C. 164). So is the right of action of the mother (same section).” Appellants’ Petition for a Rehearing 13, No. 2707, District Court of Appeal (3d Dist) (April 7, 1924). Civil Code section 164 at this time defined community property.


47 Appellants’ Petition for Rehearing, supra n. 45, at 13-14.

48 226 P. at 33.
The appeals court conceded that it could be reasonably held that these words in section 376 of the Code of Civil Procedure, “insofar as they relate to parties plaintiff, were intended to affect the procedure merely” and hence would not be implicitly classifying the damages recovered as community property, a substantive rather than a procedural matter. The court might have added that the Civil Code contained the statutes dealing with the classification of marital acquisitions as community or separate property and that one would not have expected the legislature to have inserted into the Code of Civil Procedure substantive rules defining community property. Nevertheless, held the court,

[a]n examination of the provisions of section 376, viewed in the light of the history of the legislation upon the subject matter embraced therein, discloses

a legislative intent to give the marital community a right of action for the death by wrongful act of a minor child. What is recovered in such a case is community property and therefore the husband, who has control of the community

property[51], is authorized to maintain the action. If the community is destroyed by death or desertion of the husband, then the wife may sue. . . . [S]ection 376, in so far as it authorizes the husband to maintain an action for the death of a minor child is framed upon the theory of the continuance of the marital community and


49 Id. As stated in House v. Pacific Greyhound Lines, 95 P.2d 465, 469 (Cal. App. 1939), overruled on another ground in Fuentes v. Tucker, 187 P.2d 757 (Cal. 1947): “The purpose of section 376 of the Code of Civil Procedure was to designate the necessary party plaintiff in order that a defendant might be protected against a multiplicity of actions and that a finality of litigation might be maintained.” These are solely procedural purposes for this statute.

50 In 1924 several Civil Code sections could have been cited, including former sections 162, 163, 164, 169, and 687.

51 In California wives had no management of any community property until 1951 with the enactment of former Civil Code section 171c (enacted by 1951 Cal. Stats. ch. 1102, § 1, p. 2860), that give the wife control over her own uncommingled earnings. By statutes enacted in 1891, 1901, and 1917, the wife did, however, have veto power over the husband’s attempts to make gifts of community property, to encumber or sell community household furnishings, and to convey or encumber community realty. See William A. Reppy, Jr., Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977, 1053 (1975).
that the husband is the representative thereof for the purpose of maintaining the action. There was no necessity of joining the wife as a party plaintiff.\footnote{226 P. 33.}

\textit{B. Sandberg Was Erroneously Decided}

1. Section 376 of the Code of Civil Procedure dealt only with procedural matters

The notion that when a child of the marriage has been tortiously killed the father/husband alone, by virtue of section 376 of the Code of Civil Procedure, was the proper plaintiff meant that recovery would be community property subject at the time to his exclusive management may have some initial appeal, but a closer examination indicates that the theory that mention of the father as plaintiff carries with it a directive to classify the recovery is community is unsound. Suppose the child was killed after the child’s parents, the husband and wife, were divorced based on her adultery.\footnote{In 1939, section 376 was amended to delete reference to the father’s desertion of his wife and to provide instead that the action for wrongful death of a minor child should be brought by the “father of a minor, or if the father is dead or the parents of said minor are living separate and apart and the mother of the minor then has custody of said minor, then the mother.” 1939 Cal. Stats. ch. 425, § 1, p. 1795 (emphasis added). Wexler v. City of Los Angeles, 243 P.2d 868, 872 (Cal. 1952), assumed that the reference to parents “living separate and apart” included parents who had been divorced before the death of the minor child. Notwithstanding Wexler’s creative holding, it seems impossible that the pre-1939 language of section 276 referring to “desertion of the husband” could have been construed to include the situation where the parents were divorced at the time of the tort although the husband had never deserted the wife.} The father had never deserted the mother and his child (the “family” under section 376) and was not dead, so section 376 made him alone the proper plaintiff. Yet, since he was not married to the mother at the time the cause of action for wrongful death arose, the recovery could not by any logic be community property, as without a marriage there is no community.

Moreover, if the legislature’s designation of the father as proper plaintiff in certain circumstances evinced an intent by the lawmakers to have courts classify the damages to be
recovered in a wrongful death suit as community property, then the statute’s making the mother the proper plaintiff in all other circumstances must likewise implicitly carry with it an intent regarding classification of the damages she might recover. It seems clear from the Sandberg court’s comment that the wife is entitled to be the plaintiff only after the community has been “destroyed” that Sandberg had concluded the legislative intent in enacting section 376 was to classify the recovery as the wife’s separate property when she was the plaintiff. In a situation where the husband deserted his wife and child and days later the child was tortiously killed, there would seem to be serious doubts about the constitutionality of applying a statute construed to equate the father’s desertion of the family to the severing of the husband-father’s parental relationship to the child without any hearing to examine the reason for such desertion. But the implication of Sandberg is that because the mother is made the plaintiff, all recovery is her separate property, the law viewing the father as having suffered no loss on the death of his child, a forfeiture similar to a decree cutting off his paternal rights. Courts decline to give an interpretation to a statute that renders it unconstitutional or even raises grave doubts concerning constitutionality when the wording thereof does not demand such an interpretation. Certainly

54 Cf. Caban v. Mohammed, 441 U.S. 380 (1979) and Stanley v. Illinois, 405 U.S. 645 (1972). These cases establish that even a biological father who was never married to the mother has a relationship interest with their non-marital child with whom he has established a parental relationship (see Lehr v. Robertson, 463 U.S. 248 (1983)), that is protected by the Fourteenth Amendment of the federal constitution, at least where no other male has a claim as father (see Michael H. v. Gerald D., 491 U.S. 110 (1989)).

55 See People v. Superior Court (Romero), 917 P.2d 628, 633 (Cal. 1996):

“If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raises serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. (Miller v. Municipal Court (1943), . . . 828 P.2d 147 . . . )”

22
section 376 of the Code of Civil Procedure as worded in 1924 was susceptible of the interpretation that it dealt solely with procedural issues and did not extend to substantive definitions of community and separate property.

2. Sandberg misunderstood the living-apart doctrine

The Sandberg court was also just wrong in stating that desertion by the husband “destroyed the community.” Even assuming the desertion referred to in section 376 in 1924 was a desertion intended by the husband to be permanent, evincing a “complete and final break in the marital relationship” so that a court would hold that the couple were “living separate and apart.”

56 Marriage of Baragry, 140 Cal. Rptr. 779, 781 (App. 1977), construing “living separate and apart” in former Civil Code section 5118, the successor to Civil Code section 169, the living-apart statute enacted in 1872 and in effect in 1924 when Sandberg was decided. Today the living-apart statute, Cal. Fam Code. § 771, is gender neutral so that the husband’s earnings – not just those of the wife as under the statute in effect in 1924 -- during such a period of separation are his separate property. Marriage of Bouquet. 546 P.2d 1371, 1378 (Cal. 1976), held that the version of the statute in effect in 1924 that benefitted only the wife was “patently unfair” due to gender discrimination, permitting application at divorce of the gender-neutral version of the statute in effect at the time of divorce in Bouquet to the husband’s acquisitions while living separate and apart from the wife prior to enactment of the gender-neutral text, resulting in the wife’s being stripped of her community interest in such earnings, an outcome that the Bouquet court considered to involve retroactive application of the gender-neutral statute.

Note also that, at the time of the death of their child due to a torfeasor’s negligence, the parents, husband and wife, could be living separate and apart, each believing their marriage was completely a dead letter, not due to desertion of the husband but rather by agreement of the spouses, perhaps an agreement following the wife’s initial suggestion that they should permanently separate. (Perhaps for religious reasons they also agreed not to divorce.) Under the passage from Sandberg quoted in text, there being no desertion by or death of the father, he would be the proper plaintiff to sue, and all the recovery would be community property, depriving the wife of her claim under section 169 of the Civil Code, as worded in 1924, that
apart” under the text of former Civil Code section 169 then in effect, the legal result would have been that the wife’s earnings were her separate property, while those of the husband acquired while living separate and apart from her were community property in which the wife had an interest, precluding any conclusion that the community had been “destroyed” or otherwise had ceased to exist.

57 As enacted in 1872, section 169 in 1922 provided:

The earnings and accumulations of the wife, and her minor children living with her or in her custody, while she is living separate and apart from her husband, are the separate property of the wife.

58 Randolph v. Randolph, 258 P. 2d 547, 548 (Cal. App. 1953). See also Brown v., Brown, 7 P. 1168, 1169-70 (Cal, 1915) (husband’s earnings during pendency of divorce action were community property).

59 Even under the present gender-neutral living apart statute, Cal. Fam. Code. § 771, the community is not “destroyed” even though earnings and accumulations of each spouse after the separation are the separate property of each acquiring party. Pre-separation community capital remains community property and will produce community-owned dividends, interest and rentals.

 damages she suffered should be her separate property. Since Sandberg looked to section 376 of the Code of Civil Procedure for legislative direction concerning classification of a wrongful death recovery, the wife’s invoking of section 169 of the Civil Code would have had to have been rejected.

See also Espinosa v. Haslam, 47 P.2d 479 (Cal. App. 1935), where the husband and wife separated and the husband provided a home for his son, who decided at age 18 to leave his father and move in with his mother, with whom he was living when at age 20 he was tortiously killed (having the status of a minor child under California law at this time). The court held that the father was entitled to sue for wrongful death under section 376 because, since he had been willing to provide a home for a provide support for the son, there had been no “desertion of his family” (the section 376 language) by the father. Under Sandberg, all the recovery would be community property even though the wife was living separate and apart from the husband and would be invoking (without success) Civil Code section 169.
C. A 1950 Decision Implicitly Rejects Sandberg

A 1950 decision by the Court of Appeal, Christiana v. Rose, is inconsistent with suggestion of Sandberg that if Code of Civil procedure section 376 names the mother as the appropriate plaintiff to sue for wrongful death of a minor child of the husband and wife, all recovery must be her separate property and there can be no community property recovery based on damages suffered by the father/husband. The cause of action in Christiana arose after a 1939 amendment to section 376 had deleted reference to desertion of the family by the father to provide instead that the mother was the proper plaintiff when “the parents of said [deceased] minor are living separate and apart and the mother of the minor then has care or custody of said minor,” the fact pattern existing in Christiana. While an action to dissolve her marriage was pending, the wife sued the tortfeasor for wrongful death of the child of the marriage, proving only her own damages, and obtained a judgment upon which she collected. After the divorce became final – it made no division of any community property -- the father sued the ex-wife for half of the damages she had collected on the ground they were community property not distributed at their divorce, so that he owned half as tenant in common.

The court held that section 376 gave the wife standing to sue as heir of the deceased child and that former Civil Code section 169, the living-apart statute, made her recovery

Such receipts are not the “accumulations” of either the separated husband or the separated wife but rather are the fruits of the community capital.


1939 Cal. Stats. ch. 425, § 1, p. 1759.

The court declared that its theory that the wife’s recovery was her separate property was actually an “alternative” holding (222 P.2d at 895 and 896) and that it was also affirming the judgment that the father take nothing in his action against the ex-wife on the trial court’s reasoning that her recovery had been community property but that the father was estopped by his actions during the prior divorce trial from claiming a former community interest. Id. at 892-895. Obviously, the recovery cannot be both separate property and community property, so one of the so-called alternative holdings has to be legally wrong. Christiana has been subsequently cited for the holding that the wife’s recovery was separate property as an “accumulation[]” under the
separate property, stressing that all of her proof of damages at trial in the wrongful death suit she had brought dealt solely with loss to her and not at all to loss suffered by the father. Nevertheless, said the court, the father “could, and perhaps should, have been joined as a plaintiff or defendant in the wrongful death action.” Under section 169 as then worded, the father’s recovery, had he been made a party and proved his own loss arising out of the death of living-apart statute, now Cal. Fam. Code. § 771. Marriage of Wall, 105 Cal. Rptr. 201, 203 (1972). Courts should ignore the portion of Christiana that assumed a wife’s recovery in the 1940's for wrongful death of a child of hers and her husband’s could be community property.

The mother ought to have been able to prove that the deceased child had regularly given substantial gifts each year jointly to her and her husband, his father. A gift to a cohabiting husband and wife in equal shares is probably community property under California law. See Marriage of Gonzales, 172 Cal. Rptr. 179 (App. 1981); see also, discussing Mexican law in effect in California before it was acquired by the United States, Fuller v. Ferguson, 26 Cal. 546, 565 (1864) (lucrative acquisition by husband and wife jointly during marriage is community property); Scott v. Ward, 13 Cal. 458, 469 (1859)(same). The influential Washington case so holding, Estate of Salvini, 397 P.2d 811 (Wash. 1964), should be persuasive. (But see Andrews v. Andrews, 186 P.2d 744, 748-49 (Cal. App. 1947) (court says gift during marriage by Husband’s aunt to Husband and Wife was held in tenancy in common; but the issue litigated was not whether it was community property as opposed to tenancy in common property owned in equal shares but whether both spouses were the donee or just H alone). If the trier of fact were to find by inference that the decedent, had he not been killed, would have continued making such gifts even after his parents separated, half the amount of such future gifts that could not be made due to the tortiously-caused death of the donor child would be the separate property of the plaintiff mother due to applicability of the living-apart statute (which then benefitted only wives) and would be part of her wrongful death damages. Although she would have had standing to prove the loss of the total gifts that could not be made in order to have her half factored into her damages, she would not have had standing to collect in her wrongful death suit the community one half of the gift that would have been made post-separation to her husband, as he was the sole manager of the community at the time, the proper plaintiff to recover such a loss.

It was subsequently established that in this fact situation the plaintiff mother’s failure to join the father as a party to the wrongful death suit gives the father a cause of action for damages against the mother. See Hall v. Superior Court, 133 Cal. Rptr. 2d 806, 812 (App. 2003), following Ruttenbereg v. Ruttenberg, 62 Cal. Rptr. 2d 78 (App. 1997).
his child, would have been community property, which is inconsistent with the apparent teaching of *Sandberg* to the effect that, in a fact situation where section 376 says the mother is the proper plaintiff, that designation carries with it the classification rule that all recovery must be her separate property.

**D. Statutory Changes Abrogated the Sandberg Holding**

*Sandberg* was an erroneous decision. Although it was twice cited by the California Supreme Court without explanation as to why, it seems likely that the Supreme Court was approving merely the result – that the damages recovered there by the father-husband for wrongful death of a minor child occurring when the spouses were not living separate and apart were community property – and that the Supreme Court’s citation was not intended to approve the reasoning of *Sandberg* to the effect that section 376 of the Code of Civil Procedure in 1924 contained provisions classifying wrongful death recoveries by married persons as community or separate property. Surely approval of no more than the result in *Sandberg* was the basis for the California Supreme Court’s first citation of that case, in *Fuentes v Tucker*, because that citation was coupled with one to *Keena*, where the reasoning behind the community property classification – resting on the Civil Code sections defining community and separate property and not on section 376 of the Code of Civil Procedure – was inconsistent with that in the *Sandberg* opinion.

In any event, *Sandberg* surely was legislatively abrogated in 1949, when section 376 was amended to address only suits based on *injury* to a minor child, not death of the child, and former section 377 of the Code of Civil Procedure was amended to provide in pertinent part:

> When the death of a . . . minor person who leaves surviving him either . . . a father or a mother . . . is caused by the wrongful act or neglect of another, his heirs . . . may maintain an action for damages against the person causing the death . . . .

67 See text accompanying nn. 38-39 and 41-42, supra.

68 See text accompanying nn. 38-39, supra.

69 See text accompanying nn. 32-34, supra,
The respective rights of the heirs in any award shall be determined by the court.

Today, no section of the Code of Civil Procedure deals specifically with wrongful death of a minor child. Section 377.60, entitled “Persons with standing,” says that when a relative has been tortiously killed an action for wrongful death “may be asserted,” if the decedent leaves no issue, by the decedent’s intestate heirs. Section 377.61 is, today, similar to the final sentence quoted from the 1949 revision: “The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.” If the plaintiff is a married person and the issue arises as to whether the recovery is community or separate property or in part both, this statute should be viewed as referring the court to the Family Code provisions defining separate and community property\(^\text{71}\) and to judicial decisions dealing with principles of tracing marital property through changes in form or to a source associated with the occurrence of a loss.

IV. JUDICIAL AND LEGISLATIVE DEPARTURE FROM THE McFADDEN RULE THAT ALL COMPONENTS OF A PERSONAL INJURY RECOVERY BY A NON-SEPARATED MARRIED PERSON MUST BE COMMUNITY PROPERTY

A. The Nevada Supreme Court Rejects McFadden’s Limitation on Tracing

The first judicial departure from the rule of California’s McFadden decision that a damages award based on personal injuries to a married person could be traced to the cause of action on which it was based but not farther back as, for example, to the body of the spouse that was damaged, came from the Nevada Supreme Court in 1940. In Fredrickson & Watson Construction Co. v. Boyd\(^\text{72}\), the trial court had refused to instruct the jury in a wife’s personal injury case that her husband’s contributory negligence could be imputed to her, which it should have been, said the Nevada Supreme Court, if her recovery was community property.\(^\text{73}\)

\(^{70}\) 1949 Cal. Stats. ch. 1380, § 4, p. 2401.

\(^{71}\) Primarily Cal. Fam. Code §§ 760, 770.

\(^{72}\) 102 P.2d 627 (Nev. 1940).

\(^{73}\) Id. at 628.
But the trial court did not err, that court held, because the damages to be recovered by the wife would be her separate property. “The judgment takes its character from the right violated, namely the right of personal security . . . which said right the wife brings to the marriage.”

B. California Courts Consider the Nevada Approach to Classification of Personal

74 Id at. 629. The court also quoted from George McKay, A Treatise on the Law of Community Property ¶ 398, at p. 296 (2d ed. 1925), who had asserted that the husband does not “‘hold the wife’s right to personal security and should not be permitted to recover for the violation of this right. It does not belong to him nor to the community. The wife’s physical pain and suffering are not his loss nor the loss to the community’.” 102 P.2d at 629 (italics added). See also n. 31, supra. The Nevada Supreme Court’s use of this quotation suggests that the damages to the wife in Fredrickson consisted only of compensation for pain and suffering and did not extend to lost earnings or even reimbursement for medical bills incurred, as the community would have a claim to those components under McKay’s analysis. Nevertheless the Nevada Supreme Court declared without express qualification that “the judgment and proceeds flowing therefrom” were the wife’s separate property. Id. In Choate v. Ransom, 323 P.2d 700, 702 (Nev. 1958) (emphasis added), the court said that Fredrickson “held that a recovery by a married person for personal injuries is the separate property of that person.” The Nevada Supreme Court has never considered whether it would follow the lead of subsequent decisions in other states – cited in the next paragraph of this footnote -- that classify the lost earnings and medical bills components of the recovery as community property. In 1975 the Nevada legislature amended section 123.130 of the Nevada Revised Statutes to provide in subdivision (1) that “[a]ll property of the wife owned before marriage, and that acquired afterwards . . . by an award for personal injury damages . . . is her separate property.” Subdivision (2) of this statute makes the same provision for Nevada husbands. Query if the Nevada Supreme Court will view this statute as barring it from holding that so much of the recovery as is based on lost earnings during marriage and on medical bill incurred during marriage should be classified as community property. It will be recalled that Louisiana appellate courts did not feel so restricted by a similar statute enacted in that state. See notes 29 and 30, supra, and accompanying text.

Injury Damages Recovered by a Married Person

The Nevada Supreme Court’s holding in *Fredrickson*, as applied to damages awarded a married person for pain, suffering and disfigurement, was adopted by one dissenting justice on the California Supreme Court in 1947.75 This justice would have overruled *McFadden*, to the rule of which the majority in the 1947 case, however, gave full approval.76

1. Death of the non-victim spouse held to make *McFadden* inapplicable

Five years later, however, in *Flores v. Brown*,77 the California Supreme Court, without a dissent on this point, seemed to conceded the illogic of the *McFadden* mandate for classifying not only all the components of a spouse’s personal injury recovery as community property but also his or her recovery for the wrongful death of a minor child as community property. In a single accident, the husband, who was contributorily negligent, and a minor child of the marriage were killed and the wife badly injured. The wife sued the driver of the other vehicle, asserting, inter alia, causes of action for her own personal injuries and for the wrongful death of her minor son. Because the husband’s death in the accident had dissolved the marriage and the community, held the California Supreme Court, “the interests in any of these causes of action become separate property, and it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse.”78 Surely the


76 202 P.2d at 76-77 (“the cause of action for injuries suffered by either spouse . . ., as well as any recovery therefore, constitutes community property” – citing Cal. Civ. Code §§ 162, 163, 164, and 687).


78 248 P.2d at 926 (italics added).
court had in mind at least pain and suffering damages in referring to an “element[]” of the wife’s recovery that is as a matter of logic “personal” to her. Since the “community property system” in California was not based on a universal community but recognizes the existence of separate property during the marriage and since it had been settled that separately owned assets brought to the marriage could produce mutations that were likewise separate based on principles of tracing, *Flores* made no sense in asserting that the existence of such a “system” made it impossible to “segregate” the pain-and-suffering component of a spouse’s personal injury recovery in order to classify it as the victim’s separate property except due to recognition that precedents like *McFadden* were to be found in the reports of decisions which the court was unwilling to overrule.

With respect to the damages that can be awarded to a spouse or to spouses for the wrongful death of a minor child, the *Flores* court stated: “Damages for wrongful death are the sum of those suffered by each heir or parent.”

This seems to recognize that the damages each parent suffers when both seek an award of damages will not be the same in amount, and thus each claim is based on a personal loss. If so, the award should not be community property, which treats each spouse as co-equal owners of a half interest in each asset so classified.

2. Post-injury divorce renders *McFadden* inapplicable

That *Flores* should be read as the California Supreme Court’s expressing disenchantment with the approach to classification taken by *McFadden* was confirmed by that court’s opinion in *Washington v Washington*, decided four years later. The issue there was whether the personal

79 Id at 927 (italics added). The quoted passage treats the mother and father of the decedent for purposes of calculating damages for wrongful death the same as a son and a daughter of the decedent, who might, as “heirs” of the decedent, be the plaintiffs in the wrongful death suit. It could not be contended that the awards to such a son and daughter would have to be equal in amount.

80 See Cal. Fam. Code § 751 (interests of husband and wife in community property are “equal interests”); Cal. Fam Code § 1101(a) (each spouse owns an “undivided one-half interest in the community” property); People v. Lockett, 102 Cal. Rptr. 41, 44 (App. 1972) (wife owns “one half of her husband[‘s] . . . earnings”).

81 302 P.2d 569 (Cal. 1956).
injury recovery by a married man who was tortiously injured during marriage but obtained a judgment for damages against the tortfeasor after divorce was traceable to a community property cause of action so that the ex-wife was a co-owner of the damages, a view the court rejected. Said the court:

A rule permitting apportionment of the damages . . . has never been adopted in this state, and in the absence thereof, treating the entire cause of action as community property protects the community interests in the elements that clearly should belong to it. . . .\textsuperscript{82} Although such a rule may be justified when it appears that the marriage will continue, it loses its force when the marriage is dissolved after the cause of action accrues. In such a case not only may the personal elements of damage such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce.\textsuperscript{83}

\textsuperscript{82} I suggest the “elements” that court here has in mind are lost earnings during marriage and reimbursement for medical bills incurred during marriage.

\textsuperscript{83} 302 P.2d at 571 (emphasis added). The holding that divorce converts the cause of action for personal injuries arising out of a tort occurring when the spouses were cohabiting from community property to the separate property of the victim spouse is no longer good law. Family Code section 2603 currently provides that damages for personal injuries “to be received” after divorce are – if the cause of action arose during marriage and before a permanent separation of the spouses – community property, but a special type of community property not subject to the 50-50 division rule at divorce and instead awardable entirely to the victim spouse by the divorce court according to guidelines laid out in the statute. See also n. 94, infra.

The Washington rule under which the personal injury cause of action is converted from community property to separate property of the victim spouse is said by the Supreme Court in the passage quoted above in text to apply when the marriage is “dissolved” after the injury is suffered but before a judgment awarding damages has been entered. The death of the non-victim spouse would “dissolve” the marriage just as would a divorce decree. The dictum that such a death converts the cause of action to the separate property of the surviving victim-spouse may or may not have been abrogated by the subsequent enactment of Family Code section 780 (quoted
The ex-wife in *Washington* had sued the tort victim, her former husband, seeking a division of the personal injury damages he had recovered after divorce. Based on the above-quoted passage, she should have had a sound claim to half of the damages recovered by the ex-husband for lost earnings during marriage that would have been community property and to half of his recovery based on medical bills incurred during marriage. But the *Washington* court gave her nothing. It held:

> Since we have no rule permitting the apportionment of the elements of a cause of action for personal injuries between the spouses’ separate and community interests and since such a cause of action is not assignable, it must vest in the injured party on the dissolution of the marriage.

It is important to recall that the strange judicially-imposed legal barrier to apportionment does not apply when the recovery is not for personal injuries but for wrongful death of a relative.

infra at n. 95), which classifies the cause of action as community property if it arose during marriage and while the spouses were cohabiting. Section 780 contains no qualifying language indicating that the legislature thought about how long the community classification it mandated should endure and whether courts would have the power to terminate the community classification that section 780 initially attaches to the cause of action based on subsequent events, such as death of the non-victim spouse.

84 This was not based on the theory that she waived the claim by not asking the divorce court to award her a community interest in the husband’s post-divorce recovery. The *Washington* court did indicate that the wife ought to have asked for an alimony award at divorce to make up for her being cut out of the award in the tort case to the husband as his separate property for his lost earnings during marriage. 302 P.2d at 571.

85 302 P.2d at 571. Query if the court would have been willing to classify the cause of action as 100 percent the separate property of the victim husband if analysis of the basis for his recovery on the tort claim made it clear that only five percent of the total damages awarded were for pain and suffering and the great bulk of the award was based on evidence of a major loss of earnings prior to divorce and extensive medical bills paid before the divorce. *Washington* arose at a time that the living-separate-and-apart statute did not apply to husbands. See nn.57 and 58 supra, and accompanying text.
By statute, “a cause of action” can be asserted in one lawsuit by multiple relatives, such as by the decedent’s spouse along with multiple children of the decedent. Although all the heirs must assert their claims in a single lawsuit, those claims are not equal in value. Code of Civil Procedure section 377.61 directs the wrongful death court to apportion the damages into appropriate shares for each co-plaintiff, a rule that would apply when the plaintiffs were husband and wife, the parents of the decedent.

86 This term is used in California Code of Civil Procedure section 377.60, but the concept is more technical than that suggests. For some purposes, such as calculating the statute of limitations separately for each heir entitled to sue, see Cross v. Pacific Gas & Elec. Co., 388 P.2d 353, 354 (Cal. 1964), the cases view each heir as having a distinct cause of action. But the heirs must sue together, and the damage awarded by the jury must be in a lump sum even though multiple heirs each make proof of losses pertaining only to the heir submitting such evidence.. E.g., San Diego Gas & Elec. Co. v. Superior Court, 53 Cal. Rptr. 3d 722, 726 (App. 2007).


88 See, e.g., Corder v. Corder, 161 P.3d 172 (Cal. 2007) (affirming division of wrongful death settlement under Cal. Code. Civ. Proc. § 377.61 that accorded 10 percent to decedent’s wife and 90 percent to decedent’s daughter); Cate v. Fresno Traction Co., 2 P.2d 364 (Cal. 1931) ($1 to decedent’s estranged husband, $5,000 to each of her four children – apportioned under former Cal. Code Civ. Proc. § 377); Estate of Riccomi, 197 P. 97 (Cal. 1921) (15/16 to wife, 1/16 to mother, although both were heirs to half of decedent’s intestate estate – divided under former section 377).

89 Section 377.61 provides:

In an action under this article [concerning wrongful death suits], damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34 [governing damages the decedent suffered before dying]. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.
C. McFadden Is Legislatively Abrogated

A year after Washington, the California legislature enacted former Civil Code section 163.5, which provided:

All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person.\(^{90}\)

During 1960-1968, the California courts of appeal three times construed “personal injuries” in this statute as not extending to damages sought by a married parent for wrongful death of a child.\(^{91}\) The second of these decisions stated that in section 163.5 “[t]he Legislature did not mention damage suffered by the spouses as parents from the wrongful death of a child.”\(^{92}\)

D. The Legislature Revives McFadden for Specific Fact Situations

Section 163.5 was repealed in 1969,\(^{93}\) superseded by former Civil Code section 4800, applicable only at divorce, which provided in pertinent part:

Community property personal injury damages shall be assigned to the party who suffered the injuries unless the court . . . determines that the interests of justice require another disposition . . . . As used in this section, “community property personal injury damages” means all money or other property received by

\(^{90}\) 1957 Cal. Stats. ch. 2334, § 1, p. 4066 (italics added).

\(^{91}\) Casas v. Maulhardt Buick, 66 Cal. Rptr. 44, 51 n. 6 (App. 1968); Premo v. Grigg, 46 Cal. Rptr. 683, 688 (App. 1965); Cervantes v. Maco Gas, 2 Cal. Rptr. 75, 78 (App. 1960). In each case alleged contributory negligence of one of the parents of the decedent was an issue, each court holding the defense could be asserted because the damages recovered by the non-negligent spouse/parent would be community property.


\(^{93}\) 1969 Cal. Stats ch. 1608, § 3, p.3313.
a married person as community property \(^{94}\) in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for such damages . . . \(^{95}\)

\(^{94}\) “[R]eceived . . . as community property” indicates the Legislature thought that with its repeal of section 163.5 the California courts would revert to *McFadden* and resume classifying all elements of personal injury damages -- where the injury occurred during marriage and before a final separation -- as community property. However, the language in the statute did not compel such a result, and the courts could have adopted the nation-wide majority rule that, while damages for lost earnings during marriage and medical bills arising during marriage were community property, pain and suffering damages were the victim spouse’s separate property. That approach recognizes some personal injury damages that are community property and would not have rendered the new section 4800 inoperable. The present statute concerning division at divorce of personal injury damages, Family Code § 2603, does not defer to the courts to classify the components of a recovery but defines the property that is to be divided in the same manner as under former section 4800 as:

all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant an agreement for the settlement or compromise of a claim for such damages, if the cause of action for such damages arose during the marriage . . . [and before separation].

“All money” would have to include the pain-and-suffering component of an award of damages.

As of 1994, see 1992 Cal. Stats. ch. 162, § 10, p. 490, a statute precludes the California Supreme Court from overruling *McFadden* and its ilk by holding that the pain and suffering component of a recovery of damages for personal injuries is the victim spouse’s separate property. Located in Part 2 of Division 4, of the Family Code, entitled “Characterization of Marital Property, Family Code section 780 provides:
The term “personal injury damages” in the 1969 statute is almost identical to “damages . . . for personal injuries” in section 163.5, which term had been repeatedly construed to exclude damages for wrongful death recovered by a married person. 96 This made applicable the rule that

Except as provided in Section 781 [dealing with injuries suffered by a spouse living separate and apart from the other spouse] and subject to the rules of allocation in Section 2603, money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage.

95 1969 Cal. Stats. ch. 1608, § 8, p. 3333. This part of former Civil Code section 4800 was renumbered as subsection (c) of the statute in 1970. 1970 Cal. Stats. ch. 962, §3.5, p. 1726.

96 “Community property personal injury damages” was converted into “community estate personal injury damages” when Family Code section 2603 became effective in 1994. 1992 Cal. Stats ch. 162, § 10, p. 533. As sued in statutes in the Family Code, “‘Community estate’ includes community and quasi-community property.” Cal. Fam. Code § 63. An official comment by the California Law Revision Commission to section 2603 indicates the change was not substantive:

In the second sentence of subdivision (b), the former reference to community “property” personal injury damages has been changed to community “estate” personal injury damages for consistency. See [Family Code] Section 63 (“community estate”) defined).

“Community estate” picks up personal injury damages that are quasi-community property because acquired during marriage while the spouses where domiciled in another state before
“[w]here legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or similar language, [courts] presume that the Legislature intended the same construction, unless a contrary intent clearly appears.”

That is, the new 1969 statute did not deal at all with wrongful death damages.

With slight linguistic modification, the 1969 law remains in effect today as Family Code section 2603, which still applies only at divorce. Section 2603 compels the divorce courts to refer to personal injury damage as community property, but the courts actually treat such funds more like separate property, due to a presumption in section 2603 that the victim spouse should be awarded such assets, although true community property must be divided at divorce 50-50 between wife and husband. Whether the community property label used in section 2603 will discourage the California Supreme Court from overruling McFadden and its progeny so that taking up domicile in California. Pre-1994 statutory law concerning quasi-community property would have caused such damages to be treated the same as true community property. As a result, the trio of 1960-1968 decisions (see n. 91 supra and accompanying text) holding that damages for wrongful death recovered by a spouse were not “personal injuries” of the spouse under former Civil Code section 163.5 establishes the scope of “personal injuries” in Family Code section 2603 today. The courts are therefor free even at divorce to classify a spouse’s wrongful death damages as separate property wholly or in part in an appropriate case.


98 See n. 96, supra.

pain and suffering damages awarded to a married person based on his or her personal injuries suffered during marriage are classified as separate property when the issue arises during the marriage or at its termination by death of a spouse remains to be seen. However, section 2603 will have no bearing on whether the expansion of the doctrine of in-lieu tracing – discussed below -- will lead the California Supreme Court to overrule *Keena* and similar decisions when the issue is classification of wrongful death damages received by a married person.

V. DEVELOPMENT OF THE IN-LIEU TRACING THEORY IN CALIFORNIA

A. Dictum in a 1908 Decision

All of the earliest cases applying the theory of in-lieu tracing arose in a context in which direct tracing could have been employed so that the separate or community consideration paid for the asset at issue could have been referred to in order to control its classification but the court concluded that direct tracing would produce an improper result. In-lieu tracing was first

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100 “Direct tracing” is a term used when the source of an acquisition – usually the consideration paid for it – is proved in court and its community or separate nature fixes the separate or community classification of the acquisition. See *Estate of Murphy*, 544 P.2d 956, 964 (Cal. 1976) (“direct tracing to a separate source”); *Marriage of Stoll*, 74 Cal. Rptr. 2d 506, 508 (App. 1998); *Marriage of Braud*, 53 Cal. Rptr. 2d 179, 195 (App. 1996); *Estate of Luke*, 240 Cal. ptr. 84, 91 (App. 1996).

101 Whenever a court declines to classify an item of property acquired by a married person based on the community or separate character of funds or other property used to acquire the asset but reaches a different classification result by use of in-lieu tracing, a question arises as to whether the marital estate that supplied the consideration should be reimbursed for that contribution (either with or without interest). See *Thigpen v. Thigpen*, 91 So.2d 12 (La. 1956), where Husband owned a fractional share of a building as his separate property and used community funds to insure the building against fire. It burned down, and in-lieu tracing was used to classify the insurance proceeds paid out as Husband’s separate property. “It may be,” said the court, “that the owners of [the building] are indebted to the community for the amount of the premiums[,] but no claim is made herein for such reimbursement” Id. at 22. Grace G. Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers’ Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis, 33 U.C.L.A. L. Rev. 1250, 1281, 1289-90 (1986) (a generally useful article on the topic of in-lieu tracing), agrees that
alluded to in confusingly-written and fleeting dictum in a 1908 California Supreme Court decision, Nilson v. Sarment. The issue was whether a house (and lot) had become separate property of the wife when the husband bought it with community funds but had the vendor deed it to the wife alone. The party claiming the house was separate property argued that evidence that the husband was making a gift of the land to his wife appeared in the terms of fire insurance coverage on the house – coverage he had also bought with community funds -- directing that any proceeds that became payable under the policy should be paid to the wife. Said the Court in response:

If the house and lot, although standing in her name, were not her separate property, the circumstance that insurance money would have been payable to her in the event of the loss by fire could not make that money her separate property any more than the burnt house was.

The suggestion seems to be that the insurance proceeds would take on the same classification – community or separate – as the insured property that burned down, even though some aspects of the policy would lead to a different result.

**B. In-Lieu Tracing in Cases Involving Casualty Insurance**

*Nilson* was cited as an in-lieu tracing authority in what appears to be the first case to base a holding on that theory, Belmont v. Belmont, decided by a Court of Appeal in 1961. A reimbursement is appropriate in a case like *Thigpen* but would deny it in other situations where the estate paying the consideration for, but getting no ownership interest, in an asset directly traceable to the payment due to a court’s use of in-lieu tracing could have benefitted from its outlay under a different fact scenario.

102 Nilson v. Sarment, 996 P. 315 (1906).

103 Id at 317.

divorce court had classified a $85,000 promissory note payable to the husband as community property. The evidence showed that the husband owned a packing house as his separate property when he married Wife. It burned down, and, the intermediate appellate court inferred, Husband used fire insurance proceeds to re-establish his packing house business elsewhere. The court declared: “The proceeds of property insurance take the character of the insured property. **Nilson v. Sarment**, 153 Cal. 514, 519, 96 P. 315 . . . .”

Husband took the $85,000 note upon sale of the re-established business. The Court of Appeal held that by tracing back – through the insurance payment – to his pre-marriage separate property Husband had overcome the presumption that the note acquired during marriage was community property, and the judgment had to be reversed.

That *Russell* apparently establishes that in-lieu tracing does not apply in the context of proceeds of casualty insurance policies claimed by spouses has little if any bearing on the applicability of the in-lieu tracing principle to the classification of wrongful death damages received by a married person, given the California Supreme Court’s adoption of in lieu tracing post-*Russell* in classification contexts more closely related to the wrongful death damages.

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105 Id at. 232. The likelihood that Husband had used community funds to acquire the fire insurance coverage was not mentioned by the court.

106 *Belmont*, decided in 1961, may have been implicitly disapproved a year later by the California Supreme Court’s decision in *Russell v. Williams*, 374 P.2d 817 (Cal. 1962). Their spouses Dorothy and John owned a building in joint tenancy. Dorothy obtained a Nevada divorce, the court making no order dealing with property issues. John insured the structure against loss by fire, using his separate funds. The structure burned down, and the insurer paid insurance proceeds to John. Dorothy contended that “the moneys paid by the insurance company under the subject policy constituted proceeds of the property that was destroyed and retain the character of that property.” Id at 861. Not so, held the court. The insurance contract was personal to John: “the proceeds of a fire insurance policy are not a substitute for the property” lost. Id. *Belmont* was not referred to. Blumberg, supra n. 101 at p. 1281 n. 158, says *Russell* is distinguishable from *Belmont* because decisions like *Russell* “do not present any marital property issues.” But, since the Nevada divorce court in *Russell* “made no provision respecting any property rights of the parties” (374 P.2d at 828-829) – one suspects this was an ex parte divorce, the court lacking jurisdictional power to affect property rights – how could the divorce eliminate *Belmont’s* having accorded Dorothy the right to trace the insurance proceeds from a policy bought during marriage to the structure burned down rather than to the consideration paid for the policy if she had a right arising out of the marriage to invoke in-lieu tracing?
classification dispute than is the classification of casualty insurance contract proceeds. See text accompanying nn. 114-136 infra.

That Belmont made a logical holding in tracing the insurance proceeds paid out to the item of property damaged rather than to premiums paid is apparent when one considers that there is little if any relationship between the amount of the payment by the insurer and the amount of the premiums, but there is a direct relationship between the amount of the proceeds paid and the value of the insured item destroyed or its reduced value after being damaged. On

107 Example: a $50,000 automobile could be totally destroyed in a wreck occurring shortly after the spouse who bought it with his separate funds paid an initial periodic premium for collision insurance of $250, resulting in a payment to the spouse from the insurer 200 times more than the sum paid with community funds.

In Marriage of Jackson, 260 Cal. Rptr. 508 (App. 1989), the spouses bought with community funds automobile insurance that included $300,000 uninsured motorist coverage. Wife was then injured in an accident tortiously caused by an uninsured driver, and the insurer paid $85,000 to the wife’s medical providers and $225,000 to Wife and her attorney. At divorce the issue was whether assets bought with the funds paid to Wife by the insurer were ordinary community property subject to 50-50 division, which they would be under direct tracing to the community funds used to pay premiums, or were received by Wife in lieu of a tort case settlement the tortfeasor or his insurer might have made in favor of the wife, settlement payments that would have been at divorce awardable entirely to the her under former Civil Code section 4800(b)(4), now Family Code section 2603(b). The court held for Wife under in-lieu tracing theory, stating:

The fact community funds were used to pay the premiums on the Fireman’s policy does not compel a contrary result. . . . “[U]ninsured motorist coverage is not an item of protection in most instances which a member of the consuming public consciously seeks out and buys.” [Id. at 512.]

In other words, the spouses did not view the premiums as making an investment in uninsured motorist coverage.
the other hand, if the insurance policy is taken out as a form of investment, tracing to the premium[s] paid is appropriate. This article concludes that at least some components of an award of damages paid by a tortfeasor to a spouse for the wrongful death of a relative, such as his or her child, should be classified as the parent-spouse’s separate property.\textsuperscript{108} But if that spouse had used community funds to make the most recent premium payment\textsuperscript{109} on a $500,00 term life insurance policy covering the life of the same child, proceeds paid out on death of the child should be traced to the community payment, as that sum is governed by the terms of the investment, and that sum is not related to the actual pecuniary loss suffered by the parent upon his or her child’s death.\textsuperscript{110}

\textit{C. In-Lieu Tracing Is Applied in Employee-Benefit Cases}

Certain contracts that provide for paying severance benefits to employees constitute another area in which in-lieu tracing is used by California courts, although direct tracing could be, to classify payments made under the contract to a married person as community or separate property (or a bit of both).\textsuperscript{111} If severance benefits are provided for in an employment contract made before termination of the spouse’s job was considered as a possibility, direct tracing is used, the court looking to the amount of community and separate labor under the employment

\textsuperscript{108} See text accompanying nn. 162-191 infra.

\textsuperscript{109} With term insurance, in California, each premium paid is viewed as buying a distinct contract unless the insured has become medically uninsurable – not the case in the hypothetical in text – so that the separate or community character of previous premium payments is disregarded in classifying the proceeds paid out. See Marriage of Elfmont, 891 P.2d 136, 142 (Cal. 1995); see also Estate of Logan, 236 Cal. Rptr. 368, 372 and n 8 (App. 1987).

\textsuperscript{110} The $500,000 proceeds from the term life insurance policy should be community even if, perchance, the parent spouse also obtained a $500,000 wrongful death judgment against the tortfeasor responsible for the death of the child, on which the plaintiff was unable to recover from the judgment-proof and uninsured defendant. In selecting a $500,000 policy paid for with community funds the parent-spouse could not have foreseen that such would be the amount of loss resulting from death of the child, as the timing of that death was completely uncertain. The purpose of buying the policy was primarily investment.

\textsuperscript{111} See generally Marriage of Lehman, 955 P.2d 451, 456-459 (Cal. 1998).
On the other hand, if the right to severance benefit is created in a contract negotiated when the employer was instituting a separation plan and encouraging certain employees to take early retirement, in-lieu tracing is employed to make the classification of benefits, even though prior service (i.e., labor by the employee spouse) is a condition of eligibility to receive the benefit. The payments to the employee are viewed as in lieu of lost earnings he or she incurs while seeking new employment. If the employee taking early retirement is permanently separated from his or her spouse when the benefits are paid so that the living-apart statute applies, the benefits are classified as separate property, although they would not have been paid but for substantial community labor by the employee spouse.

D. In-Lieu Tracing Appears in Cases Involving Personal Injuries Suffered by Married Persons

1. Marriage of Jones

For purposes of the conclusion reached by this Article concerning classification of wrongful death damages received by a married person, the most significant expansion of use of in-lieu tracing is into the area of classifying statutory or contractually-promised compensation payments arising out of a married person’s suffering personal injuries or otherwise becoming disabled. The first decision to employ in-lieu tracing in this context was Marriage of Jones, decided by the California Supreme Court in 1975. There the husband entered U.S. military

112 E.g., Marriage of Horn, 226 Cal. Rptr. 666 (App. 1986) (severance benefits provision included in union-negotiated employment contract made two years before termination of employee became an issue).

113 See, e.g., Marriage of Frahm, 53 Cal. Rptr. 2d 31, 35 (App. 1996) (only employees with one year of service to the employer eligible under the early retirement contract plan);

Marriage of Lawson, 256 Cal. Rptr. 283, 285 (App. 1989) (amount of severance benefit tied to total period of employment, including time while married); Marriage of Deshurley, 255 Cal. Rptr. 150, 150 (App. 1989)(same).

114 531 P.2d 420 (Cal. 1975).
service in 1957, married Wife in 1964, and lost a leg in active duty in Viet Nam in 1969. Under a statutory scheme providing for disability pay, Husband’s community labor in combat helped to qualify for him a disability award, the amount of which was tied to his number of years of service. The California Supreme Court rejected Wife’s direct-tracing contention that sums Husband would receive were 5/12 community because earned in part by community labor. Rather, employing in-lieu tracing, the court held that the divorcing husband’s disability benefits arose from “the personal anguish caused by the permanent disability as well as from his compelled premature military retirement and from diminished ability to compete in the civilian job market.”

2. Marriage of Saslow

115 Id. at 422.

116 Id, at 423

117 Id, at 421. The Jones court also declared: “Pain, suffering, disfigurement or the loss of a limb, as here, is the peculiar anguish of the person who suffers it; it can never be wholly shared even by a loving spouse and surely not after the dissolution of a marriage by a departed one.” Id. at 424.

Jones also found support for its holding in the statute then in effect in California concerning the classification of personal injuries, which looked to marital status at the time of the receipt of monetary damages rather than the time of injury to classify them as community or separate property, 531 P.2d at 424, with the issue in Jones being whether Wife had any interest in disability benefits to be paid post-divorce when the community had ceased to exist. The time-of-receipt statute was enacted in 1968 as former Civil Code section 169.3, 1968 Cal. Stats. ch. 457, § 5, p. 1079, which had been renumbered by 1975, when Jones was decided, as Civil Code section 5126, 1969 Cal. Stats. ch. 1608, § 8, p. 3342. Effective 1980, the legislature removed the time-of-receipt test from former section 1526 in favor of a time-of-injury analysis. 1979 Cal. Stats. ch. 638, § 4, p. 1971. Although the California Supreme Court has departed from some aspects of Jones, see Marriage of Saslow, 710 P.2d 346, 341-349 (Cal. 1985) (noting at 349 the 1979 revision of former Civil code section 5126), Jones has been favorably cited post-1980 by both the state Supreme Court and courts of appeal for its holding that disability benefits are to be classified using the in-lieu tracing approach rather than direct tracing. See, e.g., Marriage of Elfmont, 891 P.22d 136, 142 (Cal. 1985); Raphael v. Bloomfield, 6 Cal. Rptr. 3d 583, 586-87) (App. 2003). These citations of Jones indicate that the judge-made in-lieu tracing approach and not former section 1526 is now considered to be the basis for the separate property classification in Jones.
Marriage of Saslow,118 decided by the California Supreme Court in 1985, differed from Jones in that the Saslow husband’s right to receive disability payments was not a benefit automatically attached to his employment status but instead arose out of a private contract the husband had voluntarily entered into. Husband had used only community funds to obtain the contractual coverage, but that played no role in the court’s classification of benefits to be paid out. The court held that a determination should be made as to whether (1) Husband’s intention in entering into the contract was to obtain a replacement for future lost earnings during a period where he would have been working if not disabled or (2) to obtain a pension supplement for a period of time after he would have retired.119 If his intent were the latter, direct tracing to premiums paid would be employed; if the former, under in-lieu tracing insurance payments received when the husband was, prior to the contemplated age of retirement, living separate and apart from his wife and payments received after divorce would be his separate property, even though the coverage was purchased with community funds.

3. Marriage of McDonald

A few months after Jones the 1975 court of appeal decision, Marriage of McDonald,120 relied on Jones – also a 1975 decision – in applying the in-lieu tracing theory to classify a husband’s workers’ compensation award as his separate property, finding that the money paid to the injured worker would replace lost earnings to him after separation from his wife and after divorce and therefore should be classified as his separate property.121 The McDonald court

118 710 P.2d 346 (Cal. 1985).

119 Id. at 351-352. But see Marriage of Rossin, 91 Cal. Rptr. 3d 427 (App. 2009), holding that Wife’s intent in buying a private policy of disability insurance was not to be considered and instead direct tracing to separate funds used to pay premiums controlled classification of benefits where the policy was fully paid for and Wife had begun to receive benefits before marrying Husband.

120 125 Cal. Rptr. 160 (App. 1975).

121 The court observed that a workers’ compensation award “does not . . . include pain and suffering as personal injury damages do,” id. at 162, as did the statutory disability pay award in Jones, but this difference did not serve as a basis for distinguishing Jones and its use of in-lieu tracing.
disregarded the likelihood that the injured spouse qualified for an award under the state’s statutory no-fault scheme of workers’ compensation based on community labor (i.e., direct tracing was eschewed).

4. Marriage of Fisk

At the time of the *McDonald* decision – as well as at the time of *Jones* – the California statute dealing with classification of personal injury damages provided that such damages would be the victim spouse’s separate property if received after the payee began living separate and apart from his spouse, which was the fact pattern in *McDonald* (as well as *Jones*). Accordingly, *McDonald* did not have to decide whether the workers’ compensation award there constituted “personal injury damages” under the statute, because a holding that the statute did apply would not have changed the result: both the statute and the judge-made in-lieu tracing theory required classifying the award as the husband’s separate property. However, between the date of *McDonald* and the date of the injury to the husband in the 1992 court of appeal decision in Marriage of Fisk, the classification statute, former Civil Code section 4800(b)(4), was rewritten to provide that personal injury damage recovered by a married person would be community property “if the cause of action for the damages arose during the marriage” and before separation, abrogating the prior rule that receipt of the damages after separation would require classifying personal injury damages as separate property of the victim spouse.

In *Fisk*, the husband suffered an on-the-job injury two years before separation, although the workers’ compensation award was paid to him after he began living separate and apart from his wife. Wife argued that Husband’s workers’ compensation award was, in the language of section 4800(b)(4), “money or other property received . . . by a person in satisfaction of a judgment for damages for his personal injuries . . . .” *Fisk* held that a “workers’

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122 4 Cal. Rptr. 2d 95 (App. 1992).

123 This provision was first enacted in 1979 as part of subdivision (c) of section 4800. 1979 al. Stats. ch. 638, § 1, p. 1971.

124 4 Cal. Rptr. at 97.

125 Id at.100 n. 4. Wife also argued in *Fisk* that if the workers’ compensation award was to be classified as Husband’s separate property, the community (and Wife as to half) was entitled to reimbursement for community funds spent on care of the injured husband during the seven
compensation permanent disability award is not a satisfaction of judgment for damages in an action at law . . .”126 Because it did not include a pain-and-suffering component, the workers’ compensation award differed from a tort judgment based on a plaintiff’s suffering personal injuries.127 In addition it was “significant” that the statute applied “only to judgments.” That is, the choice of the word “judgment” to the exclusion of “award” was deliberate by the legislature. Since no statute addressed the issue in Fisk of classification of the workers’ compensation award, the court held that the judge-made rule of in-lieu tracing as applicable, and the payments were the husband’s separate property..

5. Raphael v. Bloomfield

Raphael v. Bloomfield,128 expanded on the in-lieu tracing of Fisk by apportioning a workers’ compensation award into community and separate property components. There the wife was permanently disabled by a job-related injury and received a lump sum workers’ compensation award of $311,859.04 six months before she began living separate and apart from months he was unable to work (prior to the receipt of the award), under former Civil Code section 5126(b). This reimbursement claim was legally valid if, in the language of former section 5126(a), the husband’s workers’ compensation award was “money or other property received . . . in satisfaction of a judgment for damages for personal injuries,” the identical language of former civil code section 4800(b)(4). The Fisk court’s analysis applied to the phrase as used in both sections 4800(b)(4) and 5126(a).

126 4 Cal. Rptr at 100 n. 4.

127 Id at. 100. “Moreover,” added the court, “workers’ compensation is awarded without regard to fault.” Id. That seems not to be a basis for distinguishing such awards from tort judgments based on similar personal injuries. For example, if stored dynamite exploded at a place of business injuring a spouse who was on the job as an employee there, as well as a non-employee visitor, both victims could recover for lost wages resulting from their injuries on a no-fault basis, the visitor in a strict liability tort suit in a court of law and the employee under the workers’ compensation statutes via an administrative tribunal. See Daly v. General Motors, Corp., 575 P.2d 1162, 1166 (Cal. 1975) (strict liability in tort originated as a limited concept imposed, “for example, upon keepers of wild animals, on those who handled explosives or other dangerous substances, or who engaged in ultra hazardous activities”).

128 6 Cal. Rptr. 3d 583 (App. 2003).
her husband. At divorce the trial court classified all of the award as community property based on the wife’s having receiving it before separation and did not employ in-lieu tracing. Reversing, the Court of Appeal held that precedents such as Jones, McDonald, and Fisk required it to “examine[] the purpose of the disability payment[].” After such an inquiry Raphael concluded that a lump sum permanent disability award received prior to separation is the injured spouse’s separate property to the extent it is meant to compensate for the injured spouse’s diminished earning capacity (and/or medical expenses) after separation.

To the extent a portion of the lump sum award represented benefits that, in the absence of the wife’s settlement, would have been paid prior to the parties’ separation (i.e. the weekly disability benefits she would have received from the time of the settlement until separation), these payments would be community property.

6. Raphael is explainable only if the community got a present, defeasible estate and the wife a future interest (an executory interest)

129 Id. at 584.
130 Id. at 585.
131 Id. at 586.
133 Id. at 590.
The community or separate “character of property is determined by its status at the time of acquisition . . .”\textsuperscript{134} In Raphael the lump sum award -- viewed as a present interest in property acquired during marriage and before separation -- had to be 100 percent community property, because it was then unknown whether, before all the funds might be expended, the spouses would separate or divorce or their marriage would by death. Raphael in essence is holding that, while the community got a present interest at the time of acquisition, the wife’s separate estate received a future interest, a springing executory interest that would become a possessory present interest,\textsuperscript{135} divesting the community estate (which held a fee simple subject to an executory interest), should wife and husband begin to live separate and apart.\textsuperscript{136}

\textsuperscript{134} In re Miller, 187 P.2d 722, 726 (Cal. 1947). See also Marriage of Buol, 705 P.2d 354, 357 (Cal. 1985), quoting Marriage of Bouquet, 546 P.2d 1371, 1376 (Cal. 1976). Miller goes on to say after the quotation in text: “subsequent changes in the form of the property do not alter its nature as separate or community.” 187 P.2d at 726.

\textsuperscript{135} Such a theory is also necessary to explain Saslow, see text accompanying nn. 118-119, supra. Any present interest in the contract rights against the insurance company issuing the disability policy to the husband there could only be community property at the time the disability insurance contracts were entered into, as no permanent separation of the spouses or termination of their marriage could be predicted at that time. Under one of the disability insurance contracts acquired by the husband, payments would commence being made to him upon his becoming disabled, would be reduced when he attained age 75, and would continue to be made at the reduced rate until his death. Saslow, 710 P.2d at 347-348. On remand from the Supreme Court, the trial court was to determine when – i.e., at what age -- the spouses envisioned the husband ceasing work and retiring. Id. at 352-353. If that were found to be age 65, the classification of community and separate interests at the time of acquisition of this policy would be as follows: The community received a present interest, which under the estate system for classifying interests in property would be a fee simple subject to an executory interest. As community property, this present interest would be subject to equal management by the husband and wife. Cal. Fam. Code § 1100(a), unless the wife agreed contractually to sole management by the husband. The husband’s separate estate received when the disability insurance contract was purchased a future interest in the form of an executory interest that might or might not become possessory. Permanent separation of the spouses after the husband became disabled before age 65 – or a divorce or the wife’s death after such disability occurred and before Husband was 65 – would result, due to application of in-lieu tracing, in the community’s present interest being divested and the husband’s separately-owned executory interest becoming possessory.
E. In-Lieu Tracing Should be Employed in All Tort recovery Cases Not Involving

Situations Where a Statute Dictates the Approach to Classification

1. Two statutes bar use of in-lieu tracing

The foregoing consideration of the history of classification as separate or community property of funds received by a married person on account of his or her having suffered personal injury and of the development of in-lieu tracing in the classification of such funds establishes the following: (1) The California Supreme Court realizes that classifying 100 percent of a married person’s recovery of funds to compensate for personal injuries as community property is quite illogical, as some of the funds compensate for harm such as for pain and suffering that is

But the community estate also received when the contract was made not just a present interest but its own future interest, an executory interest that could divest in whole or in part the separate estate of the husband that became a possessory when his executory interest was converted into a present interest. Because the spouses agreed to buy a flow of funds to be paid after the husband became 65 – the date on which the spouses thought they would retire – the law would treat the spouses as acquiring a supplemental pension to be paid to him beginning on his 65th birthday. These benefits would be classified by direct tracing, not in-lieu tracing. If only community funds had been paid to the insurance company, the flow of money paid after husband became 65 would be community property -- even though the spouses were permanently separated -- due to direct tracing. If the husband turned 65 after a divorce, the flow of money thereafter would be former community property owned by the ex-spouses in tenancy in common unless the divorce court had specifically dealt with this potential flow of money in which the community had an interest under direct tracing. The ex-wife’s tenancy in common interest would be subject to her sole management (unless, again, she had waived management powers by joining in the disability insurance contract as a party to waive management power). If the ex-husband became 65 after his marriage ended by his wife’s death, he might own the flow of money as tenant in common with the wife’s legatee under her will.

136 Under in-lieu tracing theory, if at the time of such a final separation there remained unpaid some medical bills arising out of the wife’s injury, the community ought not to be divested of sufficient funds to pay such bills.
personal in nature. But, (2) two statutes, Family Code section 2603, applicable at divorce and section 780, applicable during marriage, apparently will be viewed as legislative barriers to correcting the illogical classification with respect to “personal injury damages.” However, (3) that statutory term is narrowly interpreted. (4) If a married person has received funds to compensate for personal injuries and neither of these two statutes applies because the source of the funds is not a judgment rendered by a court but rather the funds are traceable either to a disability insurance policy or to an award by a workers’ compensation tribunal, in-lieu tracing will be applied, and (5) a lump sum received will, for classification purposes, be broken down into component parts with (6) some components to be classified as community property some as the victim spouse’s separate property, as was done in Raphael, the workers’ compensation case.

Workers’ compensation awards are based on strict liability theory. A wrongful death cause of action is statutory and usually sounds in negligence, although a recovery has been granted on a strict liability theory. But when the issue is whether in-lieu tracing is appropriate,

137 See text accompanying nn 78, 82, and 83, supra.

138 Recall that courts in Louisiana and Texas, dealing with statutes that on their face seemed to require classification of all or some components of a spouse’s recovery of personal injury damages as the victim’s separate property, concluded that the statutes did not bar the them from classifying certain components as community property by use of the judge-made in-lieu tracing theory. See nn 29, 30 and accompanying text, supra. I think it unlikely that a California court would undercut a clear legislative directive as has happened in Louisiana and Texas.

139 See text accompanying nn. 91-92, supra; see also text accompanying nn. 126-127, supra. On the other hand, Marriage of Klug, 31 Cal. Rptr. 3d 327, 332 (App. 2005), gave the term damages for “personal injuries” as used in Family Code sections 781 (companion statute to section 780, which Klug necessarily would have construed similarly) and 2603 very broadly. Damages for “personal injuries” as used in these statutes was held to embrace a wife’s recovery of money damages based on a legal malpractice claim against her attorney, who had assisted her husband in secreting $2 million worth of community property assets in offshore accounts! Surely such an interpretation of “personal injuries” is untenable.

140 The term “wrongful act” in what is now Code of Civil Procedure section 377.60, which defines the California wrongful death action, is construed to mean any tortious act, so that the wrongful death plaintiff can base his or her claim on a theory of strict liability in tort, thereby not having to prove fault by the defendant. See, e.g., Barrett v. Superior Court, 272 Cal. Rptr. 304, 307 (App. 1990) (strict liability for death caused by defective product, a piece of earth-moving equipment).
that most wrongful death cases involve negligence seems to provide no sound basis for distinguishing Raphael’s use of in-lieu tracing to classify personal injury damages arising out of a statutorily based claim (workers’ compensation) based on no-fault principles. Note, too, the similarity that in both wrongful death and workers’ compensation claims, damages may not include a pain and suffering component.  

2. Keena can be overruled by the Court of Appeal

It follows, then, that Keena is truly ripe for overruling insofar as it bars tracing a wrongful death cause of action to the type of loss for which damages awardable are intended to compensate. Moreover, it appears that the Court of Appeal can itself overrule Keena and need not wait for the California Supreme Court to do so. Although that Court appended to the court of appeal opinion in Keena an “Opinion of the Supreme Court Denying Hearing” that indicated at least approval of the result reached there by the intermediate appellate court, because this Supreme Court opinion was rendered without that court’s granting a hearing, the opinion is not precedent of the Supreme Court. In addition, the opinion was not published in the California Reports, which collects precedents of the California Supreme Court, but in the California Appellate Reports, where decision of the courts of appeal appear. The Supreme Court’s statement in Flores v. Brown that a spouse’s recovery for wrongful death is community property is clearly dictum not binding on the court of appeals, as the Flores holding was that after dissolution of the marriage by death the cause of action in the surviving parent was her

141 See n. 127, supra, and text accompanying n.161, infra.

142 See text accompanying n. 35, supra.

143 See Thompson v. Department of Corrections, 18 P.3d 1198, 1202 (Cal. 2001), dealing with an order to stay execution of a death sentence made without granting a hearing, where the court declared: “[U]nlike our decisions rendered after granting review, hearing oral argument, and preparing a written opinion, our minute orders are not binding precedent.” See also, Leonard D. Dungan, Comment, Courts: Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying a Hearing After Judgment, 28 Cal. L. rev. 81, 87 (1939-1940) (“The statement of the court [in denying a hearing] that it approves . . . of part of the opinion below seems to be no more than dicta . . . .”)

144 See text accompanying n 42, supra.
separate property;\textsuperscript{145} the court had no need to comment on the status of the cause of action post-dissolution. The Supreme Court’s similar statement in Fuentes v. Tucker\textsuperscript{146} about a wrongful death recovery being community property apparently also was dictum. That classification lead the court to state that it was error to have permitted the wife/mother of the decedent to be a party because the husband was the sole manager of the community, yet the holding was no prejudice was caused to the defendant, which meant that the court did not have to decide if the cause of action was community property.

VI. APPLYING IN-LIEU TRACING TO THE SEVERAL COMPONENTS THAT CAN MAKE UP A WRONGFUL DEATH MONEY JUDGMENT

A. The Texas Precedents

Texas courts first employed in-lieu tracing to classify wrongful death damages received by a married person in 1900 in Bohan v. Bohan.\textsuperscript{147} The court there explained why its earlier decision that year, Bush Electric Light and Power Co v. Lefevre,\textsuperscript{148} had not abolished the rule that in a personal injury case the contributory negligence of one spouse would be imputed to the other to bar a recovery of damages by that other spouse, because the recovery would have been, at that time in Texas, community property co-owned by the negligent spouse. That was so because the mother’s recovery for wrongful death in \textit{Lefevre} was her separate property:

When it is remembered that young Lefevre was over 21 years of age at the time of his death, and whatever he might have contributed towards the support of his mother, had he lived, would have been a gift to her, and clearly her separate

\textsuperscript{145} 248 P.2d at 925, 927.

\textsuperscript{146} See text accompanying n. 38, supra.

\textsuperscript{147} 56 S.W. 959 (Tex. Civ. App. – Galveston 1900, no writ).

\textsuperscript{148} 55 S.W. 396 (Tex. Civ. App. – Galveston 1900), writ granted, rev’d on another ground, 57 S.W. 640 (Tex. 1900).
property, it seems equally clear that the amount awarded the mother by the jury in lieu of, or as compensation for, the loss of such probable contributions by the son, would also be her separate property.\(^{149}\)

In the more recent wrongful death case where in-lieu tracing was employed, Johnson v. Holly Farms of Texas, Inc., decided in 1987,\(^ {150}\) the jury in the wife’s suit for wrongful death of her minor daughter was instructed that it could award damages consisting of three components: “(1) pecuniary loss; (2) loss of companionship; and (3) mental pain and anguish.”\(^ {151}\) The husband’s contributory negligence being an issue, the mother/wife would obtain a full recovery only if each damage component was correctly classified by the trial court as her separate property. The intermediate appellate court so held. Pecuniary loss consisted of

the care, maintenance, support, services, advice, counsel, and contributions of pecuniary value the child would have given the parent. Each of these items is in the nature of a gift from the child . . . [and we] classify that kind of pecuniary loss as the separate property of the spouse suffering the loss.\(^ {152}\)

*Holly Farms* classified the loss-of-companionship damages awarded the wife as her separate property by following a Texas Court of Appeals precedent\(^ {153}\) that based the classification on a

\(^{149}\) 56 S.W. at 960. Texas courts in wrongful death cases do not face the possibility that gifts the deceased child was precluded from making due to being tortiously killed might have generated community property. Unlike the law in California (see n 65, supra), in Texas if a donor makes a gift jointly to a husband and wife, they do not hold the property in community, but each spouse takes an undivided half interest as separate property (i.e., tenancy in common property is created). See Bradley v. Love, 60 Tex. 472, 477-78 (Tex. 1883).

\(^{150}\) 731 S.W.2d 641 (Tex. App. – Amarillo 1987, no writ).

\(^{151}\) Id at. 646.

\(^{152}\) Id.

\(^{153}\) Williams v. Steves Industries, Inc., 678 S.W.2d 205 (Tex. App. – Austin 1984), aff’d, 699 S.W.2d 570 (Tex. 1985). The Texas Court of Appeals said: “We see no practical distinction between the loss of spousal consortium and the loss of companionship of children; both constitute damages to emotional interests.” 678 S.W.2d at 210.
Texas Supreme Court decision, Whittlesey v. Miller,\textsuperscript{154} which in turn had held that a sum of damages recovered by a wife’s asserting a cause of action for loss of her husband’s consortium due to physical injuries tortiously inflicted on him was her separate property because it was a “personal injury recovery” under the statute the Texas statute that classified damages awarded for such injuries to a spouse as separate property (now Texas Family Code section 3.001(3)).\textsuperscript{155}

Finally, Holly Farms classified the damages recovered for mental pain and anguish based on a Texas Supreme Court decision, Graham v. Franco,\textsuperscript{156} where that court declared that even without the statute calling for a separate property classification of personal injury damages principles of in-lieu tracing would require Texas courts to reach the same result through judge-made law.\textsuperscript{157}

\textsuperscript{154} 572 S.W.2d 665 (Tex. 1978).

\textsuperscript{155} Id. at 669.

\textsuperscript{156} 488 S.W.2d 390 (Tex. 1872), cited in Holly Farms at 731 S.W.2d at 646.

\textsuperscript{157} The issue of what the classification rule would be without the statute arose in Graham because article 16, section 15, of the Texas constitution is construed as barring the Texas legislature from enacting statutes that depart from the basic Spanish-Mexican law of 1840 with respect to what constituted separate and community property. See Arnold v., Leonard, 273 S.W. 799 (Tex. 1925). The Texas Supreme Court had previously in Ezell v. Dodson, 60 Tex. 331 (1883), used McFadden-type “logic” (focusing on the marital status of the tort victim spouse when she or he suffered personal injuries) to classify all personal injury damages received by a spouse after a tort during marriage as community property. If Ezell was consistent with Civil Law, then the statute seeking to reverse its holding violated article 16, section 15. Graham quoted the community property treatises by McKay and DeFuniak (see nn 20 and 31, supra) to conclude “that injuries to the wife were her separate right under the Spanish and Mexican law upon which our system of community property was based.” 488 S.W.2d at 394. Graham also quoted Chicago, B. & Q. RR. Co., v. Dunn, 52 Ill. 260, 264 (1869), which traced the cause of action for personal injuries to the body of the spouse that she brought to the marriage:

“Who is the natural owner of the right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing mental and physical pain.” [Quoted
In sum, in the Texas *Holly Farms* case, all of the components of damages recovered by a married person based on the wrongful death of a family member were classified as separate property of the payee based on the court’s own in-lieu tracing analysis concerning loss of financial contributions from the decedent and based on precedents that classify as separate property of the victim-spouse certain elements of personal injury damages recovered after a tort involving the spouse herself and not a family member who was tortiously killed. Each such precedent relied on employed in-lieu tracing based on the Texas Supreme Court’s interpretation of the operation of what is now Texas Family Code section 3.001(3)\textsuperscript{158} or on the Texas Supreme Court’s statement as to what the judge-made law would be in the absence of that statute.

**B. Applying In-Lieu Tracing to Classify the Components of a California Wrongful Death Recovery**

According to the recent California Supreme Court decision in Corder v. Corder,\textsuperscript{159} damages recoverable in a wrongful death suit fall into two broad categories: (1) direct “financial benefits” to the plaintiff from the decedent “reasonably to be expected in the future, and [2] the monetary equivalent of loss of comfort, society and protection” arising out of the death.\textsuperscript{160} The first category is comprised of several distinct types of financial benefits. Unlike Texas, which recognizes three broad categories of wrongful death damages, the California Supreme Court does not recognize Texas’s third category, barring California courts from granting recovery “for the grief and sorrow attendant upon the death of a loved one.”\textsuperscript{161}

\textsuperscript{158}See text accompanying n 29, supra, describing the Texas Supreme Court’s engrafting on to this statute a rule that the portion of the recovery for the victim-spouse’s medical bills that would reimburse the community for having paid such expenses or relieve the community of its obligation to pay such expenses in the future should be classified as community property.

\textsuperscript{159}161 P.3d 172 (Cal. 2007).

\textsuperscript{160}Id at 183, quoting Benwell v. Dean, 57 Cal. Rptr. 394, 399 (App. 1967).

\textsuperscript{161}161 P.3d at 183. Accord, Krouse v. Graham, 562 P.2d 1022, 1028 (Cal. 1977) (no compensation for “sorrow and distress . . . . ‘Nothing can be recovered as a solatium for wounded feelings . . . .’”).

a. Lost bequests and devises and inheritances by intestate succession: “[T]here might be a reasonable expectation that if the life of a deceased had continued he might have accumulated a greater estate, and that the increased estate would have been inherited by the statutory beneficiaries as his heirs.”

Wrongful death damages recovered by a married person based on the theory of loss of property that, but for the death, would have been acquired by intestate succession at the decedent’s death by natural causes usually will be classified under the in-lieu tracing approach in the same manner as the lost inheritance would have been classified. Usually it would be separate property of the heir/spouse.

Suppose, however, the decedent were the child or grandchild of the husband and wife suing for wrongful death, the decedent’s sole heirs, who would take an inheritance “equally” under Probate Code section 6402.

The statute does not say how the husband and wife take equally, but equality would exist if each took a share of the estate as his or her separate property, if they took the inheritance as community property, or if they took 50-50 as tenants in common. The statute defining an inheritance received by a married person during marriage as the person’s separate property addresses an inheritance received by “a” and “the” married person in the singular and therefore possibly could be construed as not applicable where the husband and wife were co-equal heirs. De Funiak argues that such a statute should be so construed so as to be consistent with the civil law of Spain and Mexico from which the California community property regime was derived, under which the

162 Corder, 161 P.3d at 183.
164 Subsection (b) of section 6402 applies if the intestate takers are parents of the decedent. Subsection (d) calls for grandparents who are the closest kin of the decedent to take “equally.” It is also theoretically possible that the husband and wife could be collateral co-heirs of the intestate, each being, for example, decedent’s second cousin. As the decedent’s closest kin they would take “equally” under subsection (d).
165 “The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests.” Cal. Fam. Code. § 751 (emphasis added).
166 Cal. Fam. Code § 770 (emphasis added) provides: “(a) Separate property of a married person includes . . . (2)All property acquired by the person after marriage by . . . descent.”
spouses as co-heirs would own the inheritance as community property.\textsuperscript{167} If the California courts agree with De Funiak, wrongful death damages received by either\textsuperscript{168} or both of the spouses in lieu of a community property inheritance should be classified as community.

The same analysis applies to bequests and devises that the plaintiff spouse or spouses prove they lost due to the tortiously-caused death of a decedent. If the decedent had a will – or had been proved to have decided on making a will – with an open-ended bequest or devise to the wife or husband alone (such as “all my personalty”), the future acquisitions of the decedent that would have passed through such a will had the decedent not died prematurely would have been the separate property of the party recovering damages for wrongful death. Under in-lieu tracing, damages awarded due to property not passing via such a will would likewise by separate property. If the decedent had a will making a joint devise in equal shares to the husband and wife plaintiffs in the wrongful death suit which did not specify whether they were to take the property as community property, tenancy in common or joint tenancy, courts agreeing with De Funiak’s view as to the proper construction of Family Code section 770(a)(2) should classify the damages received based on the lost devise or bequest by either husband or wife alone or by both as plaintiffs in a wrongful death suit (or as recipients of a settlement payment) as community property.

\textbf{b. Loss of gifts of cash or other property:} Gifts of property the wrongful-death decedent would have made to the wife alone or to the husband alone but for having tortiously been killed would have been the donee’s separate property,\textsuperscript{169} thus wrongful death damages received by a spouse based on the theory of lost gifts would be separate property of the claimant under in-lieu tracing.

\textsuperscript{167} De Funiak and Vaughan (2d ed), n. 20, supra, at § 69, p. 154, citing the Novisima Recopilacion (1805), lib. 10, tit. 4, leyes 1 et seq. See also the nineteenth century California cases concerning lucrative acquisitions (which would include inheritances) cited in n. 65, supra.

\textsuperscript{168} The statute of limitations for the wrongful death could run against one of the parent co-heirs of the decedent but be tolled as to the other so that only he or she obtains a judgment that includes damages for the lost inheritance that would have been received by both. See San Diego Gas & Elec. Co. v. Superior Court, 53 Cal. Rptr. 3d 722, 726 (app. 2007). That only the one parent was able to sue should not alter the community property classification of the recovery.

\textsuperscript{169} Cal. Fam. Code. § 770(a)(2).
It seems that California courts accept the Civil Law rule that *inter vivos* gifts made by a donor to the husband and wife jointly are classified as community property.\(^{170}\) If there were evidence that the decedent had for several years before dying made annual gifts of $22,000 (or $24,000 or $26,000 as the annual exclusion increased) by check made out to the decedent’s child and the spouse of that child\(^{171}\) a trier of fact in a wrongful death trial could well conclude that such a giving practice would have continued had the decedent not been tortiously killed. Damages awarded to the spouses or to one of them based on such evidence would be community property under in-lieu tracing, as would an appropriate portion of a settlement payment to the spouses or one spouse alone made by the tortfeasor after being advised of such potential evidence at a trial.

c. Lost earnings of a decedent who was a minor child of husband or wife or both:

The decedent could be a young teenager or pre-teen who was a much-sought-after model, screen star, musician, etc., whose tortiously-caused death put an end to a stream of income the young person was collecting as such a celebrity. It was held in 1939 by the California Court of Appeal in *Santos v Santos*,\(^{172}\) that the earnings of an unemancipated minor child of the husband or the wife but not of both were the separate property of the parent spouse. This rule should control the classification of wrongful death damages recovered by that parent based on such lost earnings when the spouse of the parent is not related to the deceased child. Texas has held that the earnings of an unemancipated minor who is the child of both the husband and wife are community property.\(^{173}\) De Funiak says that “[u]nder the presumption in favor of the community property, certainly it must be presumed that this is the manner in which the parents

\(^{170}\) See n. 65, supra.

\(^{171}\) By doing so the decedent-donor doubles the federal gift tax annual exclusion by creating two donees. See 26 U.S.C. § 2053(b). The author understands the practice to be rather common.

\(^{172}\) 89 P.22d 164, 165 (App. 1939). *Santos* involved a putative marriage, the parties having taken out a marriage license while believing in good faith that no more needed to be done for them to acquire lawful marital status. The court applied community property law by analogy, id. at 166, so it is clear the result would have been the same as to ownership of the earnings of the minor child at issue had the marriage been lawful rather than putative. See also Family Code section 7500(b), which provides that if one parent of the minor child is dead, the surviving parent “is entitled” to the earnings of the minor child.

do hold [such earnings] together, and this must be accepted as the rule.”174 Family Code section 5700(a), in stating that the parents are “equally entitled” to the earnings of an unemancipated child of both does not specifically direct the courts to achieve such equality by classifying such income as community property in situations where the parents are married to each other and cohabitating at the time of receipt. Nevertheless, I am confident that California courts will reach that result, following Texas and De Funiak, and such a rule will control the classification result under in-lieu tracing in wrongful death cases as well.

d. Loss of support the decedent owed as a matter of law to the spouse-claimant In some situations a child by statute owes a duty to support his mother or father or both.175 If the decedent child owed such support at the time of his or her death or if it could reasonably be found that, after the wrongful-death of the child, circumstances would have arisen causing the decedent, if then alive, to owe a duty to pay financial support to his mother or father, a component of a wrongful death award should include damages based on the loss of such support. If the decedent were not a child of the spouse of the parent owed by support by the child, the logic that lead the Santos court to hold that earnings of a minor child would be the separate property of the child’s parent when that parent’s spouse was not related to the child probably would apply to the classification of support payments owed a parent whose spouse was not related to the obligor. In both situations the source of the income is a relationship not connected to the marriage and one that very likely was established before the marriage. Wrongful death damages recovered by the parent whose spouse was not related to the decedent would then be, under in- lieu tracing, the recipient’s separate property.

How would the law classify statutorily-mandated support payments made by an adult child to both his disabled parents or to one disabled parent, married to the other parent of the adult child, a parent-spouse who was not disabled and not entitled to support? The payments are not gifts. Although in some situations a parent’s abandoning the child will forfeit the parent’s

174 DeFuniak & Vaughan (2d ed.), n. 20, supra, at §68.1, p. 150. In California, all property acquired during marriage is presumed to be community, e.g., Marriage of Rossin, 91 Cal. Rptr. 3d 427, 431 (App. 2009), and that presumption is said to be “fundamental” to the community property system Estate of Duncan, 70 P.2d 174, 179 (Cal. 1939).

175 “Except as otherwise provided by law, an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work.” Cal. Fam Code. § 4400.
right to statutorily-mandated support,\textsuperscript{176} for the parent to be entitled to support there is no
requirement that the parent have expended money or provided labor to care for the child at any
time.\textsuperscript{177} Thus support payments received do not have the character of onerous acquisitions.\textsuperscript{178}
Nevertheless, there seems to be no separate property source, such as a right of personal security
that arose before marriage, underlying one spouse’s or both spouses’ right to support from an
adult child. It should follow, then, that the general presumption in favor of the community\textsuperscript{179}
will apply to the support payments, even if made to just one spouse. That will control the
classification of wrongful death damages based on lost support payments.

\textbf{e. Loss of Services the Decedent Would Have Provided.} If it is found to be reasonably likely
that the decedent, had she or he not died, would have provided “‘services having a financial
value’”\textsuperscript{180} to a wrongful-death plaintiff, that party may recover damages equal to what it would
cost to pay someone else to perform the services.\textsuperscript{181} Because the economic value of the services
can readily be ascertained, the damages fall into the category of damages based on loss of direct
financial benefits, according to the California Supreme Court, even though the decedent would
not have provided money to the heir asserting the wrongful death claim.\textsuperscript{182}

\textsuperscript{176} See Cal. Fam Code. § 4411.

\textsuperscript{177} Consider the case where the mother or father at the time of the child’s birth is totally disabled
and remains so into the child’s adulthood, when the duty of support arises.

(community acquisitions have their source in an onerous title, i.e., they are earned by labor of a
spouse, or both spouses, or arise out of payment of consideration that was community); De
Funiak & Vaughan (2d ed), n. 20, supra, at §62, p. 127.

\textsuperscript{179} See n. 174, supra..

\textsuperscript{180} Corder, 161 P.3d at 183, quoting, Griffey v Electric Ry, co., 209 P. 45 (Cal. App. 1922).


\textsuperscript{182} Corder, 161 P.3d at 183. It would seem that a loss of “‘care” the decedent would have
provided to the claimant spouse, Krouse v. Graham, 562 P.2d 1022, 1025 (Cal. 1977), and of
“protection” that would have been so provided, Corder, 161 P.3d at 183, Krouse, 562 P.2d at
1025, should be included in the wrongful-death damages subcategory of loss of “services”
because they can be valued based on the cost of hiring someone else to provide the care and
The nature of the lost services will determine whether the damages received based on the loss thereof are classified as community or separate property or a mix of both. If the decedent at the time of death had been providing at no charge nursing care for his mother and was not of the state of mind when doing so that he was making a gift to Mother, wrongful-death damages based on the value of nursing services the parent ceased receiving on death of her child should be classified as community property because the receipt of the services relieved the community of an obligation to provide basic care for the wife/mother as a member of the community. A community-benefit test is employed at divorce to classify debts as community or separate in the process of making an equal division of the community property, and it seems proper to borrow the community-benefit test when classifying wrongful-death damages based on loss of services received by a spouse. If the decedent would have provided services to both spouses without having the state of mind that a gift was being made, damages recovered by either spouse or both likewise should be community property, even if the decedent was related by blood to only one of the spouses.

Can the presumption in favor of community property classification be overcome by evidence that the decedent while alive had stated that he considered that he or she was making a gift to his or her mother in performing nursing services for her, raising the inference that such a state of mind would have continued into the future as nursing services were provided, had the decedent not died? There is no clear answer. Federal gift tax law does not view a gift of services as taxable, on the ground that no property is involved. Family Code section 770(a)(2) classifies “all property” received by gift after marriage by a spouse as his or her separate property. Probably a court would hold that the community property presumption attached to wrongful death damages received during marriage based on a loss of gifted services cannot be overcome due the absence of law dealing with services as being the equivalent of property.

protection. But Krouse and Corder, without analysis, dubiously lump these types of loss with loss of society and comfort.

See Marriage of Frick, 226 Cal. Rptr. 766, 774-75 (App.1986)(debt on loan taken out to raise funds to pay real property taxes on realty that was owned 43.54 % by the community, the balance being separate property of the husband, was 43.54% a community debt).

See Commissioner v. Hogle, 165 F.2d 352, 353 (10th Cir. 1948); see also 26 U.S.C. § 2501(a) taxing gifts of “property.”
2. Damages for loss of comfort and society that the decedent would have provided

It will be recalled\textsuperscript{185} that a Texas court having to classify a component of wrongful death damages received by a spouse based on loss of society (consortium) due to the tortious killing of the spouse’s child found it appropriate to apply by analogy the classification previously made in a Texas case where the harm to the spouse was loss of consortium provided by the other spouse, resulting in a separate property classification. This analogy must be rejected in California. A 1995 California Court of Appeals decision held that damages for loss of spousal consortium must be classified as community property because they are damages for “personal injuries” under the statute, now Family Code section 780, defining personal injury damages received by a spouse based on a tort occurring during marriage as community property.\textsuperscript{186} It has been shown, however, that the California legislature could not have intended any part of wrongful death damages to be “personal injuries” to a spouse within the scope of section 780.\textsuperscript{187} Accordingly, in-lieu tracing should be employed, if possible, to classify the loss-of-society portion of the wrongful death damages received by a married person.

\textsuperscript{185} See nn. 153-154, supra, and accompanying text.

\textsuperscript{186} Meighan v. Shore, 40 Cal. Rptr. 2d 744, 749 (App. 1995). Craddock v. KMart Corp., 107 Cal. Rptr. 2d 881 (App. 2001), assumed that a community property classification would have been appropriate for damages claimed by a husband for loss of his wife’s consortium arising out of a tort, as to which the wife’s negligence was ten percent of the cause of the resulting injuries. The Craddack court stated that the issue it faced was whether to apply Family Code section 783, under which the wife’s negligence would not be imputed to the husband, entitling him to a 100 percent recovery, or Civil Code section 1431.2, under which the tortfeasor the husband sued was liable for non-economic damages only to the extent of his 90 percent of fault in causing the accident. But section 783, as judicially expanded to deal with comparative negligence in Lantis v. Condon, 157 Cal. Rptr. 22, 24 (App. 1979), would not have been at issue if damages for loss of spousal consortium were to be classified as separate property, for it could not then have been contended that the negligent wife would have benefitted from her own wrong had the husband obtained a 100 percent recovery.

\textsuperscript{187} See text accompanying nn, 94-97, supra.
The society and comfort of which the claimant spouse was deprived must be of nature that the claimant could not replace by hiring a companion; otherwise the damages would fall under the lost “services” subcategory of direct financial loss.\textsuperscript{188} The monetary award received for loss of society is based on the spouse’s loss of the joy and pleasure of interacting with a relative for whom the claimant has feelings of love or affection.\textsuperscript{189} Such good feelings are not property. Since the loss-of-society damages are not awarded as a replacement for lost property, classic in-lieu tracing cannot be done in this situation. One possible judicial response to this conclusion is a holding with respect to the loss-of-consortium component of wrongful death damages that the community property presumption attaching to the cause of action arising during marriage – and damages flowing from it – cannot be overcome. Loss of society damages would be, then, community property, even if the decedent were not related to the spouse of the claimant receiving such damages.

Alternatively, the California courts could trace such damages to a nonproprietary source, the capacity of the claimant spouse to feel pleasure in sharing experiences with a beloved relative, the decedent.\textsuperscript{190} Such a capacity, although not property, was possessed by the claimant spouse before marriage and in that sense is analogous to property that is separate because owned by a spouse before marriage. Under this approach, the fact that the relationship of the claimant spouse with the decedent did not begin until after the claimant married does not compel a community property classification.\textsuperscript{191} Particularly in cases where the decedent was not related to the person married to the party recovering wrongful death damages the separate property

\textsuperscript{188} See text accompanying nn. 160-184, supra.

\textsuperscript{189} “[F]actors relevant in assessing a claimed loss of society, comfort, and protection may include the closeness of the family unit at issue, the warmth of feeling between the family members, and the character of the deceased as ““kind and attentive”” or ““kind and loving.””” Corder v. corder, 161 P.3d 172, 184 (Cal. 2007), quoting Krouse v. Graham, 562 P.2d 1022, 1026 (Cal. 1977).

\textsuperscript{190} The Texas Supreme Court, in its decision holding damages for loss of spousal consortium to be separate property, said the recovery is based on “damages to the emotional interests” of the claimant spouse. Whittelsey v. Miller, 572 S.W.2d 665, 669 (Tex. 1978).

\textsuperscript{191} The illogic of making the classification turn on when the relationship began can be illustrated by a hypothetical case. Wife is the aunt of two nieces, A and B, tortiously killed, leaving Wife as their sole heir. A was born and began interacting with Wife six months before Wife married Husband; B was born and began interacting with Wife ten months after the marriage. Surely it would be legally indefensible to classify Wife’s damages based on loss of society with A as her separate property but damages based on loss of society with B as community.
classification seems more intuitively correct, since a community classification would treat the unrelated spouse as suffering equally along with the claimant.

CONCLUSION

The development of the in-lieu tracing doctrine – particularly as it is now applied in workers’ compensation cases like Raphael that classify money damages received as a result of a spouse’s suffering personal injuries – requires overruling of the 1922 Keena decision, source of the rule that a wrongful death award received by a spouse must be classified as 100 percent community property. Most components of such a wrongful death award can be traced to a separate source via in-lieu tracing, resulting in a separate property classification. An inability to overcome the presumption that property acquired during marriage is community may lead to classifying one or two of the possible components of the wrongful death recovery received by a married person as community property.