# CALIFORNIA PUTATIVE SPOUSES: THE INNOCENT, THE GUILTY, AND THE LAW

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## INTRODUCTION

The putative spouse doctrine permits the court to include an otherwise void or voidable marriage under the protective umbrella of California's community property system.[1] The doctrine derives its literal meaning from the word "putative," which is defined as "reputed," "supposed," or commonly esteemed"[2] and applies to those "marriages" in which at least one of the parties believes that they are legally married.[3] The term is applied to a matrimonial union which has been solemnized in due form and celebrated in good faith by at least one of the parties but which by reason of some legal infirmity is either void or voidable.[4]

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1. A putative marriage exists if at least one of the spouses believes s/he is legally married but the marriage is void "because of some legal infirmity." Recknor v. Recknor, 187 Cal. Rptr. 887, 890-91 (Ct. App. 1982); Vargas v. Vargas, 111 Cal. Rptr. 779, 780 (Ct. App. 1974). For example, Husband and Wife 1 are legally married and later believe they are legally divorced. Husband then enters into a second "marriage" with Wife 2 but since the divorce from Wife 1 is invalid, Husband cannot be legally married to Wife 2. Wife 1 is a legal spouse and Wife 2 is a putative spouse. *See* Cal. Fam. Code § 2251 (West 2004) ("(a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall: (1) Declare the party or parties to have the status of a putative spouse. (2) If the division of property is in issue, divide . . . that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. This property is known as "quasi-marital property" . . . .").

2. BLACK'S LAW DICTIONARY 1432 (10th ed. 2009).

3. *Recknor*, 187 Cal. Rptr. at 891.

4. Krone v. Krone (*In re* Krone's Estate), 189 P.2d 741, 742 (Cal. Dist. Ct. App. 1948).

California's putative spouse doctrine is not a pure one. Putative spouses are included in the community property system by analogy only.[5] They are not considered legally married.[6] By contrast, same sex married couples are simply deemed legally married.[7] Only certain benefits and privileges of a legal marriage are available to putative spouses whereas all of the benefits and privileges of a legal marriage flow to registered domestic partners.[8] For some marital benefits, the spouse in a putative marriage must qualify as a good faith putative spouse.[9] Without such good faith, certain benefits of a legal marriage are denied to the guilty putative spouse.[10] As to the division of property upon annulment, putative spouses are treated the same as married spouses resulting in an equal division of their property.[11]

California courts traditionally applied the putative spouse doctrine if at least one of the "spouses" had a good faith belief in the existence of a legal marriage in the equal division of property upon annulment.[12] Even if one spouse lacked good faith, the doctrine still applied if the other spouse held such a belief.[13] One California appellate court has recently questioned the traditional interpretation of the putative spouse doctrine for property division by limiting putative spouse status to the innocent spouse only.[14] California appellate courts are also split as to whether the putative spouse doctrine can be applied to registered domestic couples.[15]

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5. Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 33 (1985).

6. *Id.*

7. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008), *superseded by statute*, CAL. CONST. art. 1, § 7.5 (2008), *as recognized in* Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (U.S. 2013).

8. For example, putative spouses are not entitled to a family allowance during the probate administration of the decedent spouse's estate. *See* Hafner v. Hafner, 229 Cal. Rptr. 676, 691 (Ct. App. 1986). And only good faith putative spouses have standing to bring a wrongful death claim for the death of a spouse. *See* CAL. CIV. PROC. CODE § 377.60(b) (West 2005) (defining "putative spouse" to mean "the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.").

9. Only an innocent or good faith putative spouse may bring a wrongful death action for the death of a spouse. *See* Ceja v. Rudolph and Sletten, Inc., 302 P.3d 211 (Cal. 2013). Only an innocent putative spouse may recover attorney's fees and costs in the annulment. CAL. FAM. CODE § 2255 (West 2004).

10. *See id.*

11. *See* CAL. FAM. CODE § 2251(a)(2) (West 2004).

12. *Id.*

13. *Id.*

14. *See* Tejeda v. Tejeda (*In re* Marriage of Tejeda), 102 Cal. Rptr. 3d 361, 367-68 (Ct. App. 2009) (holding that the guilt of one spouse does not preclude a finding of a putative marriage).

15. *Compare* Velez v. Smith, 48 Cal. Rptr. 3d 642, 656-57 (Ct. App. 2006) (holding that the putative spouse doctrine does not apply to registered domestic partners), *with* Ellis v. Arriaga (*In re* Domestic Partnership of Ellis & Arriaga), 76 Cal. Rptr. 3d 401, 406 (Ct. App. 2008)

This Article traces the historical roots of the putative spouse doctrine, its codification in California, its application in California, and recommends that California adopt a pure putative spouse system and simply include putative spouses as legal spouses for all purposes as it has done for registered domestic partners. To allow some but not all of the incidents of marriage to putative spouses is confusing, sometimes inequitable, and contrary to the expectations of the innocent spouse. California has a history of piecemeal legislation in family law without consideration of varying consequences and without regard to the historical purpose and policy of the rule.[16]

The putative spouse doctrine has historical roots in both the common law[17] and civil law systems[18] and was recognized and applied by California courts[19] long before its codification in 1969.[20] Before the doctrine was

(disapproving Velez and holding that the putative spouse doctrine applies to registered domestic partners), *disapproved of by* Ceja v. Rudolph & Sletten, Inc. 302 P.3d 211 (Cal. 2013).

16. One example of this piecemeal reactive legislation is in California's treatment and classification of personal injury damages. *See* Helen Y. Chang, *The Slip and Fall of the California Legislature in the Classification of Personal Injury Damages at Divorce and Death*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 345, 352 (2009).

17. The common law legal scholar Bracton and canonist Tancred wrote about putative marriage in the 12th century. "According to the law that they elaborated in the twelfth century, the impediments to a lawful marriage were so numerous and so secret that it must have been a common enough event for a man and a woman to believe that they were husband and wife, while in truth they were living in unlawful concubinage. Some of the evil effects of this unwholesome law were evaded by a doctrine of putative marriage." 8 THE PUBLICATIONS OF THE SELDEN SOCIETY 221 221-24 (F.W. Maitland et al. eds., 1894).

18. The putative spouse doctrine was recognized under Spanish law to legitimize children born to good faith putative spouses. *See* Casey E. Faucon, *Living Separate and Apart: Solving the Problem of Putative Community Property in Louisiana*, 85 TUL. L. REV. 771, 777-79 (2011) *citing* Las Siete Partidas pt IV, tit. XIII, law I (Robert I. Burns ed., Samuel Parsons Scott trans., 2001). The Las Siete Partidas dates from the thirteenth century. *Id.* at n.25. The putative spouse doctrine was also recognized under French law in the Code Napoleon. *Id.* at 779.

19. *See* Coats v. Coats, 118 P. 441, 443 (Cal. 1911) (reasoning that wife in good faith believed she was legally married, and stating: "To say that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and labored in the belief that she was his wife, shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice."); s*ee also* Jackson v. Jackson, 29 P. 957, 960 (Cal. 1892) (Harrison, J., concurring: It may be conceded that the parties to this action entered into the contract of marriage under such circumstances that it was valid to all intents and purposes until annulled by decree of the court; but the fact that the defendant had at that date a former wife living, from whom he had not been divorced, gave to the plaintiff the right to have the marriage annulled upon the discovery of such fact. . . . Upon its dissolution, there would arise the same equitable grounds for an equal division of the property that had been acquired by the parties during the existence of the relation of husband and wife as would exist upon the dissolution of any valid contract of marriage for a cause other than adultery or extreme cruelty. (citations omitted.)).

20. CAL. CIV. PROC. CODE § 4452, *repealed and replaced with* CAL. FAM. CODE § 2251.

codified, California courts exercised their equitable powers to recognize marital rights in property acquired by the parties during their putative relationship.[21] Putative spouse status was found if either spouse held a good faith belief in the existence of a legal marriage.[22] Upon such a finding, the relationship was deemed a "putative marriage" and marital property rights flowed to the putative spouses.[23]

California's putative spouse statute was considered a mere codification of existing judicial decisions[24] and absent legislation changing the doctrine, the courts should be bound by the doctrine of stare decisis. California courts have applied the putative spouse doctrine inconsistently as to the various benefits of a legal marriage. This article illustrates those inconsistencies and recommends that legislature clarify the putative spouse doctrine. Part I explains the historical origins of the putative spouse doctrine. Part II sets forth the doctrine's development in California. Part III discusses the various rights extended to putative spouses. Part IV examines the application and impact of the putative spouse doctrine for California

21. *See* Vargas v. Vargas (Estate of Vargas), 111 Cal. Rptr. 779, 781 (Ct. App. 1974):

Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men. Equity acts "in order to meet the requirements of every case, and to satisfy the needs of progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." Equity need not wait upon precedent "but will assert itself in those situations where right and justice would be defeated but for its intervention." (citations omitted.)

22. *See* Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 216 (Cal. 2013) ("[T]he putative spouse concept [is] a means for enabling a party to an invalid marriage to enjoy certain of the civil benefits of marriage if he or she believed in good faith that the marriage was valid.")

23. CAL. FAM. CODE § 2251 (West 2004). In addition to marital property rights, putative spouses are entitled to rights of succession at death and support. *See* Krone v. Krone (*In re* Krone's Estate), 189 P.2d 741, 742 (Cal. Dist. Ct. App. 1948) ("[T]he logic appears irrefutable that if according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all."); *see also* Smith v. Garvin (Estate of Leslie), 689 P.2d 133, 140 (Cal. 1984) (finding that a putative spouse was an intestate heir to the decedent's separate property under the California Probate Code); Goldberg v. Goldberg (*In re* Estate of Goldberg), 21 Cal. Rptr 626, 632 (Dist. Ct. App. 1962) (discussing the intestate succession rights of a surviving putative spouse, the court said that, "[a]s a putative spouse, Edith is entitled to the same share of the 'community' property as she would receive as an actual wife").

24. Monti v. Monti (*In re* Marriage of Monti), 185 Cal. Rptr. 72, 74 (Ct. App. 1982):

The Family Law Act codified already existing law regarding the status and property rights of the putative spouse. "The sections pertaining to void marriage are largely declaratory of existing law and are not intended to work significant substantive changes." . . . Thus, section 4452 merely codifies the substantive law existing before 1969 defining a putative spouse. Before that time, it was well-settled that the essential basis of a putative marriage *was a belief in the existence of a valid marriage*. (citations omitted.)

registered domestic partners. Part V concludes that the putative spouse doctrine applies to the putative marriage once one spouse qualifies as a putative spouse regardless of the guilt of the other, and that the doctrine should be applied in favor of same sex registered domestic partners.

## I. ORIGINS OF THE PUTATIVE SPOUSE DOCTRINE

### *A. Early English Law*

Although civil law is generally credited for developing the putative spouse doctrine, early English law at least as of the twelfth century recognized the putative spouse doctrine to legitimize children.[25] The doctrine continued to be recognized in the common law of England and in canon law in the thirteenth and fourteenth centuries.[26] According to the English 13th century jurist Henry of Bracton: "If a woman in good faith marries a man who is already married, believing him to be unmarried, and has children by him, such children will be adjudged legitimate and capable of inheriting."[27] Although legitimacy was conferred upon the children born to putative spouses, English law did not focus on any other civil effects such as property division or inheritance as between the spouses and, instead, simply recognized the need for equity in such situations.[28] The legitimacy of children born to putative spouses was later cast aside by the English common law.[29]

### *B. Early Spanish Law*

Spain first recognized the putative spouse doctrine in the thirteenth century in Las Siete Partidas otherwise known as "The Seven Books of Law."[30] Although the term "putative spouse" was not used, Las Siete

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25. *See* Blakesley, *supra* note 5, at 5-6.

26. *See* 2 SIR FREDERICK POLLOCK & FRANCIS WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 375-77 (2d ed. 1898).

27. *Id.* at 376 (quoting Bracton).

28. *See* Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71, 77 (2003) (citing POLLACK & MAITLAND, *supra* note 26, at 377.).

29. POLLACK & MAITLAND, *supra* note 26, at 377 n.3 ("The ultimate theory of English lawyers took no heed of good or bad faith and made the legitimacy of the children depend on the fact that their parents while living were never divorced.").

30. Marilyn Stone, *Las Siete Partidas*, THE GOTHAM TRANSLATOR (N.Y. Circle of Translators, New York, N.Y.), Sept/Oct 2003, *available at* http://www.nyctranslators.org/gotham-translator/docs/2003/September-October_2003.pdf.

> "Las Siete Partidas" or the Seven Books of Law, were created in the thirteenth century by the lawyers, theologians and scholars of the court of "the wise king," Alfonso X of Castile and Leon so that all the people in the diverse provinces of the realm would be governed by the

Partidas embraced the concept by conferring legitimacy onto children whose parents believed in good faith that their otherwise invalid marriage was valid:

> If between those who are married openly in the face of the church, such an impediment should exist that the marriage must be annulled on account of it, the children begotten before it was known that an impediment of this kind existed will be legitimate. This will also be the case where both parties did not know that such an impediment existed, as well as where only one of them knew it, for the ignorance of one alone renders the children legitimate. But if after it had been certainly ascertained that such an impediment existed between the parties, they should have children, all those born subsequently will not be legitimate.[31]

Although the Partidas did not address the division of any marital property between the spouses, Spanish law recognized the right of a putative spouse to share in the property acquired during the putative marriage.[32] The doctrine was ameliorative for an innocent putative spouse but punitive for a wrongful or guilty spouse.[33] Spanish law punished the bigamous spouse by way of branding, imprisonment, banishment, and loss of property.[34] If a bigamous husband died, he forfeited his interest in the property acquired during the putative marriage and the property was equally divided between the putative and legal spouse.[35] This division of property did not necessarily benefit the putative spouse because under traditional Spanish community property principles the innocent spouse already owned one-half of the property acquired during the putative marriage.[36]

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> same laws. Those laws were remarkable because they were written in "romance" rather than in the customary Latin and they are still used in Spain, Spanish America and the United States.

*Id.*

31. LAS SIETE PARTIDAS, Part IV., Tit. XIII, Law 1 (Scott trans., Burns ed., 2001).

32. *See* Wallace, *supra* note 28, at 78 (citing Smith v. Smith, 1 Tex. 621, 628 (1846) and Patton v. Cities of Philadelphia & New Orleans, 1 La. Ann. 98, 106 (1846)).

33. *Id.*

34. *See id.* ("That besides the ecclesiastical penalties those marry clandestinely will also be liable to civil ones; . . . but thus incur the penalty of confiscation of property, banishment, and just cause of being disinherited." (citing 1 White, New Recopilacion 45 (1839)); *see also id.* at 242 ("The married man who lives in concubinage. . . and if she is married, he forfeits the half of his property.").

35. *See id.* at 78-79 (citing *Patton*, 1 La. Ann. at 106).

36. *See* 1 WILLIAM Q. DEFUNIAK & MICHEAL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 261-62 (2d ed. 1971) ("The Spanish law of community very plainly provided that '[e]verything the husband or wife may earn during union, let them both have it by halves."').

### C. Early French Law

The Code Napoleon, adopted by France in 1804,[37] was completed at the order of Napoleon Bonaparte and became the governing law across much of Europe during the Napoleonic Wars.[38] The Napoleon Code recognized the putative spouse doctrine in Articles 201 and 202:

> Art. 201. A marriage which has been declared null draws after it, nevertheless, civil consequences, as well with regard to the married parties as to their children, where the marriage has been contracted in good faith.
>
> Art. 202. Where good faith exists only on the part of one of the married persons, the marriage is only attended by civil consequences in favor of such persons, and the children of the marriage.[39]

The putative spouse doctrine under the Code Napoleon was different from Spanish law in several respects. French law did not punish the guilty or wrongful spouse[40] and even if both spouses were "guilty," their children were still legitimate.[41] Spanish law denied legitimacy to children born to two guilty spouses.[42] Under French law, the civil effects ended when the putative marriage was declared null but under Spanish law, the civil effects terminated when the innocent spouse ceased to have a good faith belief in the existence of a legal marriage.[43]

Although French legal scholars agreed that a guilty spouse would not forfeit property rights, they disagreed as to how the marital property should be apportioned between the legal spouse, the putative spouse, and their children.[44] Denisart, Toullier, and Vazeille advocated an association or partnership theory which would confer one-half of the property acquired during the legal marriage to the legal spouse up until the putative

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37. L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 AZ. J. INTL. & COMP. L. 93, 99 (1998).

38. Wendy Meredith Watts, *The Parent-Child Privilege: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 593 (1987).

39. A BARRISTER OF THE INNER TEMPLE, CODE NAPOLEON, LITERALLY TRANSLATED FROM THE ORIGINAL AND OFFICIAL EDITION 57 (1804).

40. Joseph B. Henderson, Comment, *The Civil Effects of a Putative Marriage*, 1 LOY. L. REV. 54, 58 (1941).

41. *Id.* at 60.

42. Illegitimacy of their children was the punishment for the wrongfulness of the parents. *Id.*; *see also* Wallace, *supra* note 28, at 78 (citing L. Julian Samuel, *The Necessity for the Continuance of Good Faith in a Putative Marriage*, 6 TUL. L. REV. 306, 307 (1932)).

43. Wallace, *supra* note 28, at 80.

44. *Id.* at 80-82; *see also* Faucon, *supra* note 18, at 779-81.

marriage.[45] The putative spouse was entitled to one-half of the property acquired during the putative marriage.[46] Each marriage was viewed as a discrete association or partnership with the common (guilty) spouse.[47] French jurist Demolombe disagreed with the association theory, claiming that a good faith putative spouse would not necessarily receive the effects of a marital community and instead argued for a liquidation of each community with an apportionment to each spouse what he/she would otherwise be entitled under her own property regime.[48]

The French scholars concurred that the putative spouse could inherit from the common spouse but that the reverse was not true: the common spouse could not inherit from the putative spouse.[49] However, the scholars disagreed as to the devolution of a decedent common spouse's property interest among his children. Denisart and Toullier continued to apply an association theory and took the position that the children of each marriage were limited to the property acquired by the common spouse during the time of his marriage to their respective mothers.[50] Vazeille espoused more of a hotchpot theory arguing that all of the children should share equally in the common spouse's property regardless of the marriage periods.[51]

The French courts eventually followed the theory of jurists Aubry and Rau and protected the legal spouse by giving her a share of the property acquired during the putative marriage since the legal marriage had continued through the putative marriage.[52] The children all shared in the common spouse's putative property and the remaining one-half of the putative marital property was divided equally between the legal spouse and putative spouse.[53]

Notably, all of the early English, Spanish, and French scholars approached the putative spouse issue from a gendered perspective: all assumed a guilty, bigamous, wrongful husband with an innocent unknowing wife. This male-centric view of putative spouses is an outdated perspective

45. Wallace, *supra* note 28, at 80 (citing DENISART, 3 COLLECTION DE JURISPRUDENCE 614 (1784); M. TOULLIER, LE DROIT CIVIL FRANCAIS § 665 (4th ed. 1824); M.F.A. VAZEILLE, 1 TRAITE DU MARIAGE ET DE LA PUISSANCE PATERNELLE § 285 (1825)).

46. *Id.* at 81.

47. *Id.*

48. *Id.*; *see also* Blakesley, *supra* note 5 at 17-18.

49. Wallace, *supra* note 28, at 81.

50. *Id.*

51. *Id.*

52. 7 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS 75-76 (5th ed. 1913); Blakesley, *supra* note 5, at 17-18.

53. AUBRY ET RAU, *supra* note 52, at 75-76; Blakesley, *supra* note 5, at 17-18; Wallace, *supra* note 28, at 82.

in the 21st century, and any new interpretations of the putative spouse doctrine must reflect gender neutrality without paternalism.

## II. THE PUTATIVE SPOUSE DOCTRINE IN CALIFORNIA

The California Family Code defines legal marriage as a "personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."[54] In addition to consent and capacity, licensure and solemnization are also required.[55] Although marriage is generally perceived and accepted as a private and personal decision, the courts have long held that the state has an important interest in the institution of marriage and marriage is thus entitled to some regulation.[56] State regulations vary but typically proscribe limits for those who can marry such as age,[57] gender,[58]

54. CAL. FAM. CODE § 300 (West 2004 & Supp. 2014). Although this section has not been repealed, its "man and woman" limitation for marriage has been successfully challenged. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) and related Proposition 8 cases. *See also* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (holding that at least a part of the Defense of Marriage Act's prohibition on same-sex marriage was unconstitutional as violating the equal protection clause).

55. CAL. FAM. CODE § 300(a) (West 2004 & Supp. 2014) ("Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, [ ].").

56. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.").

57. The legal age of marriage in most states is 18. *See* Naomi Cahn and June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 481 (2007). Most states permit marriages for certain minors with parental consent and/or judicial consent. *See, e.g.*, 750 ILL.. COMP. STAT. ANN. 5/301 (West 1999).

> The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances: (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage; (2) a party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity; (3) a party was aged 16 or 17 years and did not have the consent of his parents or guardian or judicial approval; or (4) the marriage is prohibited.

*Id.*; *see also* MICH. COMP. LAWS ANN. § 551.103 (West 2005 & Supp. 2014); MINN. STAT. ANN. § 517.02 (West 2006 & Supp. 2014); N.C. GEN. STAT. § 51-2 (2013) (held unconstitutional by Fisher-Borne v. Smith, Nos. 1:12CV589, 1:14CV299, 2014 WL 5138914, at *2 (M.D.N.C. Oct. 14 , 2014); N.Y. DOM. REL. LAW § 7 (McKinney 2010); TEX. FAM. CODE ANN. § 2.101 (2006).

58. Currently, 37 states have legalized same sex marriage either by legislation, judicial decision, or popular vote. *See* PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last visited Feb. 25, 2015).

affinity,[59] consanguinity,[60] mental capacity,[61] and physical capacity.[62] In California, eighteen is the legal age for consent to marry.[63] However,

59. States typically prohibit incestuous marriages although some states permit first cousin marriages. *See, e.g.*, 750 ILL. STAT. ANN. 5/212(a) (West 1999 & Supp. 2014) (permitting marriages between first cousins over the age of 50 years or if one of them is permanently sterile): The following marriages are prohibited: (1) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties; (2) a marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood or by adoption; (3) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood; (4) a marriage between cousins of the first degree; however, a marriage between first cousins is not prohibited if: (i) both parties are 50 years of age or older; or (ii) either party, at the time of application for a marriage license, presents for filing with the county clerk of the county in which the marriage is to be solemnized, a certificate signed by a licensed physician stating that the party to the proposed marriage is permanently and irreversibly sterile; (5) a marriage between 2 individuals of the same sex; *see also* CAL. FAM. CODE § 2200 (West 2004) ("Marriages between parents and children, ancestors and descendents of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate."); N.J. STAT. ANN. § 37:1-1 (West 2002 & Supp. 2014) ("a. A man shall not marry or enter into a civil union with any of his ancestors or descendants, or his sister or brother, or the daughter or son of his brother or sister, or the sister or brother of his father or mother, whether such collateral kindred be of the whole or half blood. b. A woman shall not marry or enter into a civil union with any of her ancestors or descendants, or her sister or brother, or the daughter or son of her brother or sister, or the sister or brother of her father or mother, whether such collateral kindred be of the whole or half blood. c. A marriage or civil union in violation of any of the foregoing provisions shall be absolutely void."); N.Y. DOM. REL. LAW § 5 (McKinney 2010) ("A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: 1. An ancestor and a descendant; 2. A brother and sister of either the whole or the half blood; 3. An uncle and niece or an aunt and nephew. If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner."). In New Jersey, incestuous marriages between consenting adults is legal. Legislation has been proposed to criminalize certain incestuous relations. *See* Louis C. Hochman, *Incest Outrage: Bill Would Ban Sex Between Related Adults in N.J.*, N.J.COM (Jan. 21, 2015), http://www.nj.com/news/index.ssf/2015/01/incest_outrage_bill_would_ban_sex_between_related.html.

60. *See, e.g.*, CAL. FAM, CODE § 2200; 750 ILL. COMP. STAT. ANN. 5/212(a); N.Y. DOM. REL. LAW § 5; N.J. STAT. ANN. § 37:1-1. Incest is also subject to criminal punishment. *See* CAL. PENAL CODE § 285 (West 2014) ("Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or being 14 years of age or older, commit fornication or adultery with each other, are punishable by imprisonment in the state prison.").

61. *See* IND. CODE ANN. § 31-11-8-4 (LexisNexis 2007) ("A marriage is void if either party to the marriage was mentally incompetent when the marriage was solemnized."); NEB. REV. STAT. § 42-101 (2008) ("In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential."); N.J. STAT. ANN. § 37:1-9 ("No marriage license shall be issued when, at the time of making an application therefor, either applicant is infected with a

minors can legally marry with the consent of at least one parent and court approval.[64]

Although licensure and solemnization are required for a ceremonial or formal marriage, other types of marriages may also be legal.[65] An informal marriage by custom and cohabitation known as a common law marriage is still permitted in a minority of states.[66] Common law marriages generally require consent, capacity, cohabitation, and conduct.[67] A common misconception is that the parties must cohabitate for a specified period of time, but no state requires a minimum duration of cohabitation for a common law marriage.[68] Currently, fifteen states and the District of

venereal disease in a communicable stage, or is a person currently adjudicated mentally incompetent.").

62. N.Y. DOM. REL. LAW § 7 ("A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: 1. Is under the age of legal consent, which is eighteen years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage; 2. Is incapable of consenting to a marriage for want of understanding; 3. Is incapable of entering into the married state from physical cause; 4. Consent to such marriage by reason of force, duress or fraud; 5. Has been incurably mentally ill for a period of five years or more."); *see also* 750 ILL. COMP. STAT. ANN. 5/301 ("The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances: (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage; (2) a party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity; (3) a party was aged 16 or 17 years and did not have the consent of his parents or guardian or judicial approval; or (4) the marriage is prohibited."); OHIO REV. CODE ANN. § 3101.06 (West 2011) ("No marriage license shall be granted when either of the applicants is under the influence of an intoxicating liquor or controlled substance or is infected with syphilis in a form that is communicable or likely to become communicable.").

63. CAL. FAM. CODE § 301 (West 2004) ("An unmarried male of the age of 18 years or older, and an unmarried female of the age 18 years or older, and not otherwise disqualified, are capable of consenting to and consummating marriage.").

64. *Id.* at § 302 ("(a) An unmarried male or female under the age of 18 years is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry. (b) The court order and written consent of the parents of each underage person, or of one of the parents or the guardian of each underage person, shall be filed with the clerk of the court, and a certified copy of the order shall be presented to the county clerk at the time the marriage license is issued.").

65. *See* Jennifer Thomas, *Pitfalls and Promises: Cohabitation, Marriage and Domestic Partnerships*, 22 J. AM. ACAD. MATRIM. LAW 151 (2009).

66. *Id.*

67. *See generally id.* at 152-60.

68. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW CASES AND MATERIALS, 211 (4th ed. 2010) ("number of days and nights" sufficient for a common law marriage) (citing Madewell v. United States, 84 F. Supp. 329 (E.D. Tenn. 1949)).

Columbia recognize common law marriage under some circumstances.[69] States that recognize common law marriage include: Alabama,[70] Colorado,[71] Georgia (if created before January 1, 1997),[72] Idaho (if created before January 1, 1996),[73] Iowa,[74] Kansas,[75] Montana,[76] New Hampshire (for inheritance purposes only),[77] Ohio (if created before October 10, 1991),[78] Oklahoma,[79] Pennsylvania (if created before January 1, 2005),[80] Rhode Island,[81] South Carolina,[82] Texas,[83] and Utah.[84]

Several other variations to legal marriages also exist. Five states, including California,[85] permit marriage by proxy—allowing one of the parties to be represented at the ceremony by an agent or stand-in proxy.[86] Two states, California and Michigan, allow for a "confidential" or "secret"

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69. Thomas, *supra* note 65, at 151.

70. Lorren v. Agan, 960 So. 2d. 685, 687-89 (Ala. Civ. App. 2006).

71. *In re* Marriage of J.M.H., 143 P.3d 1116, 1117 (Colo. App. 2006).

72. GA. CODE ANN. § 19-3-1.1 (2010).

73. IDAHO CODE ANN. § 32-201 (2006), held unconstitutional by Latta v. Otter, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682, at * 28-29 (9th Cir. Oct. 7, 2014).

74. *In re* Toom, 710 N.W.2d (Iowa Ct. App. 2005).

75. Bahruth v. Jacobus, 154 P.3d 1184 (Kan. Ct. App. 2007).

76. Snetsinger v. Mont. Univ. Syst., 104 P.3d 445, 451 (Mont. 2004).

77. *In re* Estate of Buttrick, 597 A.2d 74,76 (N.H. 1991).

78. OHIO REV. CODE ANN. § 3105.12 (West 2011).

79. Davis v. State, 103 P.3d 70, 82 (Okla. Crim. App. 2004).

80. 23 PA. CONS. STAT. ANN. § 1103 (West 2010).

81. DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004).

82. Callen v. Callen, 620 S.E.2d 59, 62-63 (S.C. 2005).

83. Hart v. Webster, No. 03-05-00282-CV, 2006 WL 1707975, at *2 (Tex. Ct. App. June 23, 2006).

84. UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2013); *see also* Thomas, *supra* note 65, at 151. California abolished common law marriage in 1895. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 732 (1996).

85. Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455, 457 (2011). The five states permitting marriage by proxy are California, Colorado, Kansas, Montana, and Texas. *See* CAL. FAM. CODE § 420 (West 2004 & Supp. 2014); COLO. REV. STAT. ANN. § 14-2-109 (West 2014); MONT. CODE ANN. § 40-1-301 (2013); TEX. FAM. CODE ANN. § 2.006 (West 2006 & Supp. 2014); Kan. Op. Att'y Gen., No. 80-261 (Dec. 19, 1980), available at http://ksag.washburnlaw.edu/opinions/1980/1980-261.pdf.

86. Marriage by proxy is often used during times of war. Because of Operation Iraqi Freedom, California exempted overseas military personnel from actual presence for the licensure and solemnization requirement of a formal marriage. "[A] member of the Armed Forces of the Untied States who is stationed overseas and serving in a conflict or a war and is unable to appear for the licensure and solemnization of the marriage may enter into that marriage by the appearance of an attorney-in-fact, commissioned and empowered in writing for that purpose through a power of attorney." CAL. FAM, CODE § 420(b) (West 2004 & Supp. 2014). California later expanded proxy marriages for those who are physically unable to appear for the license and solemnization upon proof of "sufficient reason." *See* CAL. FAM. CODE § 426 (West 2004 & Supp. 2014). Sufficient reasons include hospitalization and incarceration. *Id.*

marriage to avoid any embarrassment for a child born out of wedlock or pre-marital cohabitation.[87] Other types of legal marriages include marriages by declaration,[88] marriages by contract,[89] and tribal marriages.[90]

The putative spouse doctrine is considered a curative device to validate an otherwise invalid marriage.[91] The doctrine is described as "the proverbial bridge" to the civil effects of a legal marriage for those who fail

87. *See* CAL. FAM. CODE § 500 (West 2004) ("When an unmarried man and an unmarried woman, not minors, have been living together as husband and wife, they may be married pursuant to this chapter. . . ."); MICH. COMP. LAWS ANN. § 551.201 (West 2005) ("When a person desires to keep the exact date of his or her marriage to a person of the opposite sex a secret, the judge of probate may issue, without publicity, a marriage license to any person making application, under oath, if there is good reason expressed in the application and determined to be sufficient by the judge of probate."); Ashley E. Rathbun, *Marrying Into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 227, 238 ("California has recognized confidential marriage since 1878. At the time the legislature codified confidential marriage, society considered it sinful for couples to live together before marriage.").

88. *See* MONT. CODE ANN. § 40-1-311(1) ("Persons desiring to consummate a marriage by written declaration in this state without the solemnization provided for in 40-1-301 shall, prior to executing the declaration, secure the medical certificate required by this chapter. The declaration and the certificate or the waiver provided for in 40-1-203 must be filed by the clerk of the district court in the county where the contract was executed."); *see also* TEX. FAM. CODE ANN. § 2.401(a) ("In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that: (1) a declaration of their marriage has been signed as provided by this subchapter; or (2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.").

89. N.Y. DOM. REL. LAW § 11(4) (McKinney 2010 & Supp. 2014) ("A written contract of marriage signed by both parties and at least two witnesses, all of whom shall subscribe the same within this state, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged before a judge of a court of record of this state by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded.").

90. Mark P. Strasser, *Tribal Marriages, Same-Sex Unions And An Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 211-12 (2010) ("As a general matter, courts have held that Native American marriages established in accord with tribal customs and usages were valid, as long as the marriage involved at least one tribal member and were on Native American lands."). The recognition of cultural customs as to marriage has also been applied to quakers. *See* N.Y. Dom. Rel. Law § 12 (McKinney 2010) ("The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.").

91. WEISBERG & APPLETON, *supra* note 68, at 213 ("Courts and legislatures often strain to recognize marriages that fail to comply with the formal requirements. In so doing, they have developed a variety of curative or mitigative devices – so-called because they cure or mitigate the harsh consequences of invalidity. The most important of these mitigative devices is the putative spouse doctrine.").

in their attempt to do so.[92] Exercising equitable powers, the courts have invoked the putative spouse doctrine to protect those who in good faith, attempted to comply with the formalities required for a legal marriage.[93] In general, the doctrine applies when at least one of the parties has a good faith belief in the existence of a legal marriage.[94] Even before its codification by the California legislature in 1969, the courts applied the doctrine to both void and voidable marriages.[95]

### *A. California Putative Spouse Cases Before the 1970 Codification*

One of California's earliest decisions to apply the doctrine is the 1892 case of *Jackson v. Jackson*.[96] In *Jackson*, the parties married in 1873.[97] Seventeen years later, the wife sought an annulment upon discovery of another and pre-existing legal wife whom the husband had married and left behind in Australia.[98] The husband admitted that he had legally married

92. Wallace, *supra* note 28, at 72 ("The putative marriage rule provides the proverbial bridge to civil effects in the event parties fail in their attempt to contract a valid marriage, believing in good faith they had done so. The putative marriage rule has been described as 'ameliorative or corrective,' designed to give innocent spouses to a legally null marriage the civil effects to which parties in a valid marriage enjoy.").

93. Ben Johnson, *Putative Partners: Protecting Couples from the Consequences of Technically Invalid Domestic Partnerships*, 95 CALIF. L. REV. 2147, 2162 (2007) ("Courts used their equitable jurisdiction to protect putative spouses because they recognized that 'equity demands that innocent persons not be injured through an innocent relationship.' A party declared to be a putative spouse gains all of the rights and benefits of a legal marriage, and thus the doctrine is generally invoked during divorce or estate proceedings. The doctrine was originally a product of the judicial system and was only codified later by state statutes.").

94. Stanley A. Coolidge, Jr., *Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866, 866 (1962) ("A putative marriage is one in which at least one of the parties has a good faith belief that the relationship existing between them is a valid marriage." (citations omitted)).

95. Void marriages are void ab initio as compared to voidable marriages which are valid until adjudicated invalid. *See* Steve Escalera, *California Marital Annulments*, 11 J. CONTEMP. LEGAL ISSUES 153, 155 (2000).

> Annulment law recognizes two types of invalid marriages. A void marriage contains a defect deemed by the particular state to be so serious that the union must be considered never to have taken place. Although a formal annulment proceeding would seem not to be required for these marriages, a party may still petition the court for a formal judicial record that such a marriage was void ab initio. A voidable marriage contains a defect that, although not serious enough to render the marriage auto-matically void, is of such a nature that out of fairness the state will allow the parties to the marriage (or, in some instances, an interested third party) to choose whether to ratify the marriage. A formal proceeding to "erase" the marriage is necessary. A voidable marriage may be ratified by continuing the relationship with knowledge of the defect.

*Id.*

96. 29 P. 957, 958 (Cal. 1892).

97. *Id.* at 957.

98. *Id.*

Elizabeth as his first wife.[99] However, he believed Elizabeth was dead since he had heard no news from her or her family for over seven years prior to his second marriage in California.[100] Upon discovery of the husband's first marriage to Elizabeth, the second wife requested that the husband transfer certain real property to her.[101] Believing the first wife deceased and, to avoid the making of a will and probate, the husband complied.[102] The parties subsequently discovered that Elizabeth was alive.[103] The second wife sought an annulment and the husband filed a cross-claim to set aside the transfer deed on the grounds of fraud and/or mistake.[104] The court annulled the marriage, vacated the transfer deed, and divided the property equally between the husband and the second wife.[105]

Although the court did not specifically refer to the second marriage as a putative one, the court noted that in the equal division of the transferred real property there was no other "community property" to be divided between the parties.[106] The court's obvious intent was to treat the second marriage as if it were a legal marriage and in the community property system. Of further significance is the concurring opinion which stated that upon dissolution of the void marriage, "there would arise the same equitable grounds for an equal division of the property that had been acquired by the parties during the existence of the relation of husband and wife as would exist upon the dissolution of any valid contract of marriage for a cause other than adultery or extreme cruelty."[107]

This equitable community property doctrine was again applied in the 1911 case of *Coats v. Coats*.[108] Ida and Lee were married in November 1887.[109] After eighteen years together, Lee sought an annulment of the marriage on the ground of Ida's physical incapacity to enter into the marriage state.[110] After the judgment of annulment became final, Ida filed an action for a division and share in the property accumulated during their

99. *Id.*
100. *Id.*
101. The value of the Los Angeles real property deeded to the second wife was $125,000.00. *Id.*
102. *Id.*
103. *Id.* at 958.
104. *Id.*
105. *Id.* at 959.
106. *Id.* at 960.
107. *Id.* (Harrison, J., concurring).
108. 118 P. 441, 444 (Cal. 1911).
109. *Id.* at 442.
110. *Id.*

relationship.[111] Ida was awarded $10,000 and Lee appealed.[112] In upholding the $10,000 judgment, the California Supreme Court stated that Ida's "share of the joint accumulations must be measured by what a wife would receive out of community property on the termination of the marriage."[113] In the absence of a statute directing the division of the property accumulated during a marriage that is subsequently annulled, the court applied by analogy community property principles that would otherwise apply to a legal marriage in the exercise of equity.

> Even though it may be true that, strictly speaking, there is no "community property," where there has not been a valid marriage, the courts may well, in dividing gains made by the joint efforts of a man and a woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property where a valid marriage is terminated by death of the husband or by divorce. The apportionment of such property between the parties is not provided by any statute. It must, therefore, be made on equitable principles. In the absence of special circumstances, such as might arise through intervening claims of third persons, we can conceive of no more equitable basis of apportionment than an equal division. Until the making of the annulment decree, the marriage was valid, and the property in question was impressed with the community character. Upon annulment, such property, even though it be no longer community property, should be divided as community property would have been upon a dissolution of the marriage by divorce or the death of the husband.[114]

Nine years later, the California Supreme Court exercised its equitable powers again to include a void marriage in the community property system.[115] In *Schneider v. Schneider*, Sarah (the wife) filed for divorce on the ground of cruelty and sought a division of the community property.[116] Sarah and Jacob had married in 1908 and lived together as husband and wife for eight years.[117] Jacob disputed the division of property because

111. *Id.*

112. *Id.*

113. *Id.* at 444-45. ("What she did, she did as a wife, and her share of the joint accumulations must be measured by what a wife would receive out of community property on the termination of the marriage. 'The law will not inquire whether the acquisition was by the joint efforts of the husband and wife, or attempt to adjust their respective rights in proportion to the amount each contributed thereto. The law will not concern itself with such an inquiry, but will leave the parties to share in the property in the same proportion as though the marriage contract was what the wife had every reason to believe it to be, i.e., a valid marriage.'").

114. *Id.* at 444 (citations omitted).

115. *See* Schneider v. Schneider, 191 P. 533 (Cal. 1920).

116. *Id.*

117. *Id.*

their "marriage" was void.[118] Although Sarah believed that she had legally divorced her first husband in 1905, the divorce was invalid which meant Sarah and Jacob's marriage was void.[119]

The court discussed the common law doctrine of dower[120] and reiterated the rule that a wife's right to dower must be premised on a valid marriage; a good faith belief in the existence of a legal marriage would not salvage a dower claim.[121] After reviewing several Texas cases involving putative marriages, the court distinguished the community property regime from the common law marital property system and held the common law rule "inapplicable" in deciding marital property rights in the community property regime:[122]

> This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons.[123]

The court concluded that Sarah was entitled to an equal division of the marital property, applying the same rule of property division for legal marriages.[124] "[W]here a woman is an innocent party to a void marriage she is entitled to the same interest in property acquired by the parties as if the marriage were valid."[125]

Subsequent cases continued to apply the same equitable principles to putative spouses in dissolution and probate proceedings.[126] The equitable putative spouse doctrine was later extended to intestate succession rights.[127]

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118. *Id.*

119. *Id.*

120. *See* 28 C.J.S. *Dower and Curtesy* § 4 ("Dower at common-law and under many statutes entitles the wife to a life estate, in a certain portion of all the lands of which the husband was seized or possessed at any time during the marriage, unless she is lawfully barred or has relinquished the right." (citations omitted).).

121. *Schneider*, 191 P. 533 at 534 ("In the states where the common-law right of dower exists it is generally held that a woman, in order to be entitled to dower, must base her claim upon a legal marriage. In those states if a man has a wife living, and enters into a second marriage, no matter how innocent of wrongdoing the other party to it may be, nor how gross the deception by which she enters into the marriage, she is not entitled to dower, not being his lawful wife." (citation omitted).).

122. *Id.* at 535.

123. *Id.* (citing Barkley v. Dumke, 99 Tex. 150 (1905)).

124. *Id.* at 535-36.

125. *Id.* at 534.

126. *See* Feig v. Bank of America, 54 P.2d 3, 7 (Cal. 1936) ("under the plainest principles of equity" the property as acquired by the putative spouses "should be marked by all the incidents of community property"); *see also* Macchi v. LaRocca, 201 P. 143, 144 (Cal. Dist. Ct. App. 1921);

In 1948, the California court recognized the succession rights of a putative spouse in *Estate of Krone*.[128] *Krone* was a probate case involving a putative wife's claim for an intestate share in her deceased husband's estate against his three children from a former marriage.[129] The children claimed that the putative wife could not inherit as a "surviving spouse" under the intestacy provisions of the Probate Code but the court disagreed:

> [T]he logic appears irrefutable that if according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all.[130]

The effect of *Krone* was to recognize a putative wife as a legal spouse for the purpose of succession.[131] Subsequent cases followed the same reasoning in recognizing the putative spouse's intestate succession rights.[132] The courts continued to expand the equitable putative spouse doctrine to other legal claims. In the 1957 case of *Aubrey v. Folsom*[133], the federal district court (applying California law) held that a putative spouse was entitled to federal Social Security benefits as a "widow."[134] One year later, a California appellate court held that a putative spouse qualified as an "heir" under California's Wrongful Death Act.[135]

Consistent with contract expectation principles, the equitable putative spouse doctrine protects the innocent spouse by realizing his or her property interests as if the parties had been legally married.[136] Towards this end, the

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Figoni v. Figoni, 295 P. 339, 340 (Cal. 1931); Taylor v. Taylor, 152 P.2d 480, 485 (Cal. Dist. Ct. App. 1944).

127. Krone v. Krone (*In re* Krone's Estate), 189 P.2d 741, 743 (Cal. Dist. Ct. App. 1948).

128. *Id.*

129. *Id.*

130. *Id.* at 741.

131. Kunakoff v. Woods, 332 P.2d 773, 777 (Cal. Dist. Ct. App. 1958).

132. Mazzenga v. Rosso, 197 P.2d 770, 772 (Cal. Ct. App. 1948); *In re* Foy's Estate, 240 P.2d 685, 686-687 (Cal. Ct. App. 1952); *In re* Goldberg's Estate, 21 Cal. Rptr. 626, 632 (Ct. App. 1962).

133. 151 F. Supp. 836, 840 (N.D. Cal. 1957).

134. *See* Speedling v. Hobby, 132 F. Supp. 833, 835-36 (N.D. Cal. 1955).

135. *Kunakoff*, 332 P.2d at 778 ("Since an heir of a person is one who is entitled to succeed at his death to his estate in case of intestacy by virtue of our statutes relative to succession, and since Manya succeeds to David's estate by virtue of section 201 of the Probate Code, she is David's heir. As an heir may bring an action for wrongful death under section 377 of the Code of Civil Procedure, and inasmuch as Manya is an heir, she is entitled to maintain the action."). Also, the Probate Code simply refers to the rights of a "surviving spouse." The inclusion of a putative spouse for some testamentary rights is by judicial interpretation. *See* discussion *infra* Part III.

136. *See* Estate of Leslie, 689 P.2d at 141-42 ("To accord a surviving putative spouse the status of "surviving spouse" simply recognizes that a good faith belief in the marriage should put

courts have consistently required that a putative union be founded upon the good faith belief in the existence of their legal marriage held by at least one of the parties.[137] The 1970 codification of the putative spouse doctrine was intended as a codification of existing substantive law and included the requirement of a good faith belief in the existence of a legal marriage.[138]

### *B. The 1969 Family Law Act (effective 1970)*

The codification of the putative spouse doctrine was part of a comprehensive revision of California's family laws which included the introduction of no-fault divorce.[139] The 1969 Act made California the first state to implement no-fault divorce and to eliminate fault as a basis for obtaining a divorce.[140] Prior to 1970, fault impacted the division of property in a divorce since the innocent spouse was entitled to a greater share of the community property.[141] The reasons behind the passage of no-fault divorce were many. Among the reasons were the need to reduce acrimony between the spouses, reduce the emotional harm to children, reduce the need for salacious evidence, reduce domestic violence, and eliminate the need for perjury.[142] Thus, the principal purpose of no-fault divorce was not necessarily to promote gender equality, but rather to reduce hostility and family conflict.[143]

Other states quickly followed California's lead, and with so many states enacting no-fault divorce reform legislation, the movement quickly

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the putative spouse in the same position as a survivor of a legal marriage."); *see also* Marvin v. Marvin, 557 P.2d 106, 124 n.18 (Cal. 1976) (" In a putative marriage the parties will arrange their economic affairs with the expectation that upon dissolution the property will be divided equally. If a 'guilty' putative spouse receives one-half of the property under section 4452, no expectation of the 'innocent' spouse has been frustrated.").

137. *Coats*, 118 P. at 444; *Feig*, 54 P.2d at 3*;* Lazzarevich v. Lazzarevich, 200 P.2d 49, 54 (Cal. Dist. Ct. App. 1948); Sanguinetti v. Sanguinetti, 69 P.2d 845, 847 (Cal. 1937).

138. *See In re* Marriage of Monti, 185 Cal. Rptr. at 74 ("Thus, section 4452 merely codifies the substantive law existing before 1969 defining a putative spouse.").

139. Ovvie Miller, *California Divorce Reform After 25 Years*, 28 BEVERLY HILLS B. ASS'N J. 160, 160 (1994) ("The Act represented the first comprehensive revision of the state's divorce law since the Civil Code of 1872. The legislation was the product of years of study and debate within and without the California state legislature.").

140. Assemb. Comm. Rep. on A.B. No. 530 & S.B. No. 252, 4 Cal. Assemb. (1969).

141. *See* Arnold v. Arnold, 174 P.2d 674, 676 (Cal. Dist. Ct. App. 1946); Belmont v. Belmont, 10 Cal. Rptr. 227, 233-34 (Dist. Ct. App. 1961).

142. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 15 (1985); Susan Westerburg Reppy, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306 (1970); Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 47 (2010).

143. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U.CIN. L. REV. 1, 4-5 (1987).

became a revolution.[144] The 1970's became known as the "divorce boom" decade.[145] At the core of the no-fault concept was the equal division of community property at divorce regardless of fault.[146] Although no-fault divorce was heralded as a fresh and modern approach to the anachronistic and punitive fault based divorce, no-fault divorce was and remains controversial, in particular as to its alleged impact on the feminization of poverty, the high divorce rate, and declining moral standards.[147]

The newly enacted putative spouse statute was deemed a mere codification of existing law and the courts continued to require a good faith belief in the existence of a legal marriage for putative spouse status.[148] The codification of the putative spouse doctrine was discussed in *In re Marriage of Cary*.[149] In *Cary*, Janet and Paul lived together for eight years, held themselves to others as husband and wife, had four children together, filed joint income tax returns, and acquired property together but never legally married.[150] In a broad interpretation of the putative spouse statute, the *Cary* court held that the non-marital partners were within the scope of the putative spouse statute.[151] As for the requirement of a good faith belief in the existence of a legal marriage for putative spouse status, the court noted, "We should be obliged to presume a legislative intent that a person, who by deceit leads another to believe a valid marriage exists between them, shall be legally guaranteed half of the property they acquire even though most, or all, may have resulted from the earnings of the blameless partner."[152] The court went on to state that "guilt" or "innocence" of the parties was irrelevant under the Family Law Act's no-fault regime; the marital property was equally divided.[153] *Cary* recognized that once one of the spouses has

144. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 82-83 (1991).

145. Caster, *supra* note 142, at 48.

146. Chang, *supra* note 16, at 352.

147. *Id.* at 352-354.

148. *See In re* Marriage of Monti, 185 Cal. Rptr. at 74-75 ("The codification of the putative spouse doctrine was not intended to make substantive changes to the case law before the enactment of the Family Law Act in 1969."); *see also* Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807, 811-12 (Ct. App. 1988).

149. Cary v. Cary (*In re* Marriage of Cary), 109 Cal. Rptr. 862 (Ct. App. 1973).

150. *Id.* at 864.

151. *Id.* at 862 ("The relationship between Paul, Janet, and their children must reasonably be deemed that of a Family, coming within the broad purview of the Family Law Act.").

152. *Id.* at 865-66.

153. *Id.* ("Nor may any 'guilt' or 'innocence' of the parties in their relationship after entering the illegitimate union be considered by the court. Sections 4452, 4509 and 4800 assure that the parties, without 'punishment' or 'reward' to either, shall receive an equal division of that which would have been community property had they been validly married.").

the requisite good faith belief, their relationship then qualifies as a putative marriage.[154] The guilt of one spouse does not disqualify the putative status of the marriage.[155] The California Supreme Court later rejected *Cary*'s holding that non-marital partners were within the scope of California's community property system.[156]

### *C. The Requirement of a Good Faith Belief in a Legal Marriage*

Prior to the codification of the putative spouse doctrine in 1969, California cases addressing the good faith requirement required only that at least one of the spouses hold a genuine or subjectively honest belief in the existence of a legal marriage.[157] Objective reasonableness in the existence of a legal marriage was not required.[158]

After codification of the putative spouse doctrine, the courts further defined the requirement of good faith to require that the belief in the existence of a legal marriage be objectively reasonable and not merely subjective.[159] "Good faith belief" is a legal term of art, and in both the civil and criminal law a determination of good faith is tested by an objective standard.[160] In *Vryonis*, the court held that the alleged wife's belief was not reasonable since the parties had never attempted to comply with the formalities for a legal marriage in California.[161] *Vyronis* was the first California case post-codification to require an objectively reasonable good faith belief in the existence of a legal marriage.[162]

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154. *Cary*'s inclusion of non-martial partners in California's community property system was later rejected by the California Supreme Court in the famous *Marvin v. Marvin* case. Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976) ("No language in the Family Law Act addresses the property rights of nonmarital partners, and nothing in the legislative history of the act suggests that the Legislature considered that subject. The delineation of the rights of nonmarital partners before 1970 had been fixed entirely by judicial decision; we see no reason to believe that the Legislature, by enacting the Family Law Act, intended to change that state of affairs.").

155. *In re Marriage of Cary*, 109 Cal. Rptr. at 865.

156. *Marvin*, 557 P.2d at 110.

157. Flanagan v. Capital Nat. Bank of Sacramento, 3 P.2d 307, 308 (Cal. 1931) (belief must be "bona fide"); Sutton v. Sutton, 303 P.2d 21, 23 (Cal. App. 4th Dist. 1956) (belief must be "honestly" held); Vallera v. Vallera, 134 P.2d 761, 763 (Cal. 1943) (belief in a legal marriage must be "genuine").

158. *Vallera*, 134 P.2d at 763.

159. Guo v. Sun (*In re* Marriage of Guo & Sun), 112 Cal. Rptr. 3d 906, 911 (2010). *disapproved by* Ceja v. Sletten, Inc., 302 P.3d 211 (Cal. 2013).

160. *See* Vryonis v. Vryonis (*In re* Marriage of Vryonis), 248 Cal. Rptr. 807, 813 (Ct. App. 1988) ("Without question, the hallmark of the law is reasonableness, and '[r]easonableness,' of course, is an objective standard, requiring more than good faith." (quoting *In re* Arias, 725 P.2d 664, 696 (Cal. 1986))).

161. *Id.* at 812.

162. Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 218 (Cal. 2013).

> A proper assertion of putative spouse status must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage. Where there has been no attempted compliance with the procedural requirements of a valid marriage, and where the usual indicia of marriage and conduct consistent with a valid marriage are absent, a belief in the existence of a valid marriage, although sincerely held, would be unreasonable and therefore lacking in good faith.[163]

The requirement of an objective good faith belief in a legal marriage was reiterated in *Centinela Hospital Medical Center v. Superior Court*.[164] In *Centinela*, the alleged putative husband claimed a good faith belief in the existence of a common law marriage.[165] Since California abolished common law marriages in 1895, the court held that the alleged husband could not have held an objectively reasonable good faith belief in the existence of a lawful marriage.[166] Likewise in *Welch v. State*,[167] the court rejected an alleged putative common law wife as a wrongful death heir, reiterating that "putative spouse status must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a valid marriage."[168] "[A] *subjective* good faith belief in a valid marriage by itself, even when held by a credible and sympathetic party, is not sufficient."[169]

In 2013, the California Supreme Court rejected the requirement of an objectively reasonable good faith belief in the existence of a legal marriage for putative spouse status.[170] In *Ceja v. Rudolph & Sletten, Inc.*, Nancy brought a wrongful death claim against the defendant claiming she was the putative spouse of the decedent.[171] The defendant challenged her standing for wrongful death purposes, arguing that she was not a putative spouse because she did not have an objectively reasonable good faith belief that her marriage to the decedent was legal.[172] Since the purpose of the putative spouse doctrine is to "protect the expectations of innocent parties and to achieve results that are equitable, fair, and just," and since pre-codification

163. *In re* Marriage of Vyronis, 248 Cal. Rptr. at 812.

164. 263 Cal. Rptr. 672 (Ct. App. 1989).

165. *Id.*

166. *Id.* ("Willis's belief was unreasonable as California abolished common law marriage in 1895 . . . . Without some effort to comply with Civil Code sections 4100 and 4200, *supra*, Willis's indicia, standing alone, are insufficient to support a reasonable, good faith belief in a lawful California marriage.").

167. 100 Cal. Rptr. 2d 430 (Ct. App. 2000).

168. *Id.* at 432.

169. *Id.*

170. Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 215 (Cal. 2013).

171. On September 9, 2007, Robert Ceja was killed in an accident on a construction site. *Id.*

172. The plaintiff knew of the decedent's prior marriage but signed a marriage license in which the decedent falsely represented that he had not been married before. *Id.* at 213.

cases did not adhere to an objective reasonable standard, the California Supreme Court concluded that only a subjective good faith belief in the existence of a legal marriage is required.[173] Although the court rejected a reasonable person test, the court explained that the reasonableness of the alleged spouse's belief could nevertheless be considered to assess credibility.[174]

### *D. Meretricious Partners Are Not Putative Spouses*

The *Cary* decision left a blurry legal line between meretricious partners and legal spouses by including cohabitants as putative spouses. The *Cary* holding was reiterated in 1975 in the *Estate of Atherley*.[175] In *Atherley*, the husband died survived by a legal wife and a putative wife.[176] Although the court incorrectly identified the second wife as a "putative spouse and as a "meretricious partner,"[177] the court nevertheless stated that "in a putative marriage a "guilty" spouse is treated the same as an "innocent" spouse; that is, the property at issue is divided as if the marriage were valid. . . ."[178] Although the guilt or innocence of a putative spouse did not affect the equal division of property, *Atherley* continued the conflation of meretricious partners and putative spouses.

In 1970, the California Supreme Court clarified the distinction between putative spouses and meretricious partners in the celebrity case involving actor Lee Marvin and his then live-in girlfriend Michelle Triola.[179] In *Marvin v. Marvin*,[180] the California Supreme Court addressed the requirements for putative spouse status and discussed the decision *In re*

173. *Id.* at 216.

174. *Id.* at 221 ("The good faith inquiry is a subjective one that focuses on the actual state of mind of the alleged putative spouse. While there is no requirement that the claimed belief be objectively reasonable, good faith is a relative quality and depends on all relevant circumstances. . . .").

175. 119 Cal. Rptr. 41 (Ct. App. 1975).

176. *Id.* at 44.

177. The *Atherley* court's conflation of "putative spouse" and "meretricious partner" is based upon *Cary*'s erroneous conclusion that meretricious partners are treated the same as putative partners and entitled to an equal division of the property. "We agree with Cary's holding that a meretricious spouse now has the same property rights as putative spouse." *Id.* at 48. This holding was subsequently been rejected by the California Supreme Court in *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

178. *Atherley*, 119 Cal. Rptr. at 47.

179. When their relationship ended, Michelle claimed that she and Lee Marvin had an oral agreement that she would give up her lucrative career as an entertainer and singer to devote her full-time to defendant as a companion, homemaker, housekeeper and cook in exchange for his promise to financially support her for life. *Marvin*, 557 P.2d at 110.

180. *Id.*

*Marriage of Cary*.[181] The *Marvin* court explained the historical development and different legal treatment for putative spouses versus meretricious partners.[182] Prior to 1970, the courts fashioned equitable remedies for putative spouses but limited non-marital partners to express contracts not based upon meretricious services; the courts had historically refused to recognize implied contracts for non-marital partners.[183] The *Marvin* court noted the substantial increase in the number of couples living together without marrying and that the failure of the courts to recognize an implied contract or equitable rights between non-marital partners contrasted with the judicial treatment of putative spouses.[184] Prior to the codification of the putative spouse doctrine, the courts fashioned a variety of equitable remedies for putative spouses including those based upon implied contract and quantum meruit.[185] Although the *Marvin* court rejected Michele's argument for palimony support, the court went on to hold that meretricious partners could enter into valid contracts inter se and assert equitable remedies against each other.[186]

The *Marvin* decision was a media sensation and was discussed and dissected in numerous newspapers and magazines.[187] "Palimony" became a

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181. Cary v. Cary (*In re* Marriage of Cary), 109 Cal. Rptr. 862 (Ct. App. 1973). The California Supreme Court in *Marvin* ultimately rejected the reasoning in *Cary* which permitted an equal division of the accumulated property between non-marital partners based upon the equal division rule in the Family Law Act. *Marvin*, 557 P.2d at 120.

182. *See Marvin*, 557 P.2d at 116-22. Although other states use "meretricious" to refer to unmarried cohabitating couples who have not attempted to get legally married, the California courts appear to use the term in reference to prostitution. *See* Zoppa v. Zoppa, 103 Cal. Rptr. 2d 901, 905 n.3 (Ct. App. 2001). Interestingly, other states have recognized a far broader definition of the word "meretricious" and have held that it covers couples cohabiting without the benefit of matrimony. *See, e.g.*, Milburn v. Milburn, 694 N.E.2d 738, 740; (Ind. Ct. App.1998); Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) (en banc); Sutton v. Widner (*In re* the Meretricious Relationship), 85 Wash. App. 487, 933 P.2d 1069, 1071 (Ct. App. 1997). But, as noted both in the passage quoted earlier from *Marvin* and from the authority cited in this paragraph, that is not the definition recognized in this state.

183. *Marvin*, 557 P.2d at 118.

> This failure of the courts to recognize an action by a nonmarital partner based upon implied contract, or to grant an equitable remedy, contrasts with the judicial treatment of the putative spouse. Prior to the enactment of the Family Law Act, no statute granted rights to a putative spouse. The courts accordingly fashioned a variety of remedies by judicial decision. Some cases permitted the putative spouse to recover half the property on a theory that the conduct of the parties implied an agreement of partnership of joint venture. Others permitted the spouse to recover the reasonable value of rendered services, less the value of support received. Finally, decisions affirmed the power of a court to employ equitable principles to achieve a fair division of property acquired during putative marriage. (citations omitted.)

*Id.*

184. *Id.* at 109-10.

185. *Id.* at 112-15.

186. *Id.* at 122.

187. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001).

household word and Michele's attorney Marvin Mitchelson became known as Hollywood's premier divorce attorney and later represented celebrities Sonny Bono, Tony Curtis, Joan Collins, Bianca Jagger, Carl Sagan, and Connie Stevens.[188] Although Michele lost her case in the California courts,[189] the door to the rights of unmarried cohabitants was now opened and the legal distinction between putative spouses and unmarried cohabitants became even more important since putative spouses are in California's community property system and unmarried cohabitants are not.

### *E. The 1992 Amendment*

The 1992 amendment of the putative spouse statute is codified in Family Code section 2251 and left its predecessor largely unchanged.[190] If a marriage is void or voidable and the court finds that either or both parties believed in good faith that the marriage was valid, the court shall "declare the party or parties to have the status of a putative spouse. . . ."[191] Upon a determination of putative spouse status, any property acquired during the putative marriage which would have been community property (if the marriage had been legal) is termed "quasi-marital property" and divided as if such property were community property.[192] Although the 1992 amendment was not a substantive change,[193] two California appellate courts interpreted the exact same statutory language diametrically.

188. See Linda Deutsch, *Marvin Mitchelson, 76; was Divorce Attorney for the Stars*, ASSOCIATED PRESS (Sept. 20, 2004), *available at* http://www.boston.com/news/globe/obituaries/articles/2004/09/20/marvin_mitchelson_76_was_divorce_attorney_for_the_stars/; Dennis McLellan, *Marvin Mitchelson, 76, Attorney, Pioneered Concept of Palimony*, L.A. Times (Sept. 20, 2004), *available at* http://articles.latimes.com/print/2004/sep/20/local/me-mitchelson20.

189. Marvin v. Marvin, 176 Cal. Rptr. 555 (Ct. App. 1981).

190. 1994 Family Code, 23 Cal. L. Revision Comm'n Reports 251 (1993) ("Section 2251 continues the first three sentences of former Civil Code Section 4452 without substantive change. A reference to the division governing property division has been substituted for the narrower reference to former Civil Code Section 4800. This is not a substantive change.").

191. Cal. Fam. Code § 2251 (West 2004) ("(a) If a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall: (1) Declare the party or parties to have the status of a putative spouse. (2) If the division of property is in issue, divide, in accordance with Division 7 (commencing with Section 2500), that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. This property is known as "quasi-marital property". (b) If the court expressly reserves jurisdiction, it may make the property division at a time after the judgment.").

192. *Id.*

193. *See* Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 216 (Cal. 2013).

In 1997, Xiao Hua Sun aka David Sun, a famous Italian/Chinese opera singer, met Xia Guo and began dating.[194] Ms. Guo knew that Mr. Sun was married and that his wife and two children lived in Italy.[195] Nevertheless, Mr. Sun and Ms. Guo relocated to the United States and cohabitated together for the next five years.[196] They decided to get married but first Mr. Sun needed to obtain a divorce from his wife.[197] Together they retained attorney Tonnie Cheng to file for a dissolution of Mr. Sun's marriage.[198] Ms. Guo completed the necessary paperwork for the dissolution and both parties apparently believed that the divorce was final.[199] On February 14, 2001, Mr. Sun and Ms. Guo were "married" in Las Vegas.[200] Each believed that Mr. Sun's Italian marriage had been properly dissolved.[201] Their marriage certificate was recorded on February 15, 2001 and issued on February 23, 2001.[202]

Unbeknownst to either of them, attorney Cheng did not file the dissolution papers until February 15, 2001, and the final judgment of dissolution was not filed until August 21, 2001.[203] Apparently, neither Mr. Sun nor Ms. Guo realized the legal significance of the filing date since they continued to live together as a married couple.[204] Indeed, Ms. Guo applied for Mr. Sun's immigration green card on the basis of their marriage; the green card was later issued in 2003.[205]

In 2007, after six years of living together as a married couple, Ms. Guo filed for divorce.[206] In 2008, Ms. Guo amended her petition to seek an annulment.[207] Mr. Sun claimed that theirs was a putative marriage based upon their good faith belief in the validity of their marriage.[208] The trial court found that Mr. Sun did not hold an objectively reasonable good faith belief in the validity of his marriage to Ms. Guo and therefore denied him

194. Opening Brief of Appellant at 2, Guo v. Sun (*In re* Marriage of Guo & Sun), 112 Cal. Rptr. 3d 906 (2010) (No. B215995).

195. *Id.*

196. *Id.*

197. *Id.* at 3.

198. *Id.*

199. *Id.* at 4.

200. *Id.*

201. *Id.*

202. *Id.* at 5.

203. *Id.* at 5-6.

204. *Id.*

205. *Id.* at 5-6.

206. *Id.* at 6.

207. *Id.* at 7.

208. *Id.* at 9.

putative spouse status.[209] In particular, because Mr. Sun was the party seeking putative spouse status, the trial court required him to hold the required good faith belief in the validity of the marriage. The trial court found that Mr. Sun did not have the requisite good faith belief and denied him putative spouse status.[210] Mr. Sun appealed and claimed that the court erred in failing to consider Ms. Guo's good faith belief in the validity of the marriage.[211] The Second District Court of Appeal affirmed.[212]

The court of appeals reiterated the equitable nature of the putative spouse doctrine and purpose to protect innocent spouses.

> [T]he statute is based on equitable principles and is meant to protect an *innocent* party who in good faith believed a marriage was valid. Hence, if Guo in good faith believed that the marriage was valid—as Sun contends—then the statute is meant to protect her. But she does not seek the statute's protection. Thus whether Guo had a good faith belief in the validity of the marriage is irrelevant to Sun's putative spouse claim.[213]

The court's interpretation of section 2251 is incorrect and unworkable. The plain language of the statute provides that if: "the court finds that *either* party or both parties believed in good faith that the marriage was valid, the court shall: (1) Declare the party or parties to have the status of a putative spouse."[214] If the putative spouse doctrine is indeed meant to protect an innocent spouse to give him or her the benefit of an expectation in a valid marriage, putative spouse status must be granted if either spouse holds a good faith belief in the validity of the marriage. For example, if Bigamous Husband marries Innocent Wife, the Guo and Sun court would hold that only the Innocent Wife can seek putative spouse status. If Innocent Wife claims putative spouse status at divorce, all of the property, including their earnings and retirement contributions acquired during their putative marriage would be characterized as quasi-marital property and divided equally. If Innocent Wife does not claim putative spouse status, Bigamous Husband cannot and the property acquired during their "marriage" would

209. Guo v. Sun (*In re* Marriage of Guo & Sun), 112 Cal. Rptr. 3d 906, 909 (Ct. App. 2010), *disapproved by* Ceja v. Sletten Inc., 302 P.3d 211 (Cal. 2013) (on the grounds that an objective good faith belief in the existence of a legal marriage is not required).

210. *Id.* at 911.

211. *Id.* at 909-10.

212. The court of appeals found there was substantial evidence that Mr. Sun did not have a reasonable good faith belief in the validity of his marriage to Ms. Guo. Mr. Sun challenged the trial court's finding but also claimed that the court erred in not considering Ms. Sun's belief in the validity of their marriage. Further, the court found no error in the trial court's interpretation of the putative spouse statute. *Id.* at 908.

213. *Id.* at 913.

214. *See* CAL. FAM. CODE § 2251(a)(1) (West 2004) (emphasis added).

presumably be divided according to common law rules of title and contribution. Allowing Bigamous Husband to claim putative spouse status simply gives Innocent Wife what she expected from a legal marriage. Any other rule leads to arbitrary results and is inconsistent with California's no-fault system.

Such was the conclusion of the California Sixth Appellate District Court of Appeals in *Marriage of Tejeda*.[215] In *Tejeda*, the bigamous husband and innocent wife were in a putative marriage for over thirty years.[216] When the husband petitioned for dissolution, the wife petitioned for a nullification and requested that property titled in her name be confirmed as her separate property.[217] The *Tejeda* court found the putative spouse statute "clear and unambiguous."[218] The court held that upon a finding that one spouse has a good faith belief in the existence of a legal marriage, the union itself becomes a putative marriage.[219] The property acquired during the putative marriage although titled in the innocent wife's name, was then characterized as quasi-marital property and divided equally between the putative spouses.[220] At first blush, this result may appear to give the bigamous husband a windfall but in fact, this property division merely gives the innocent wife what she expected from a legal marriage – equal division of the marital property. Indeed, the *Tejeda* court specifically rejected an interpretation of the putative spouse statute that would limit the doctrine to innocent spouses only.[221]

In reaching its decision, the *Tejeda* court considered both related statutes and the purpose of the putative spouse doctrine.[222] First the court considered sections 2254 and 2255 of the California Family Code. Section 2254 permits an order for support for an innocent putative spouse.[223] Section 2255 provides for attorney's fees and costs to innocent putative spouses.[224] Since the Legislature singled out the "innocent" party in providing for fees, and likewise singled out the "putative spouse" in providing for support, but did not limit quasi-marital property division to an innocent spouse, the *Tejeda* court concluded that the Legislature intended

215. Tejada v. Tejada (*In re* Marriage of Tejeda), 102 Cal. Rptr. 3d 361 (Ct. App. 2009).

216. *Id.* at 364.

217. *Id.*

218. *Id.* at 367.

219. *Id.* at 368.

220. The Court of Appeals affirmed the trial court's decision that the property was quasi-marital property. *See id.* at 364.

221. *Id.* at 369.

222. *Id.* at 368-69.

223. CAL. FAM. CODE § 2254 (West 2004).

224. *Id.* at § 2255.

for an equal division of the marital property even if one of the spouses was "guilty."[225]

The *Tejeda* court next addressed the statutory purpose of the putative spouse doctrine and stated:

> Disregarding guilt and innocence in property division also serves to support the purposes of the Family Law Act. The main focus of the act was to eliminate the artificial fault standard. The basic substantive change in the law engendered by the act was the elimination of fault or guilt as grounds for granting or denying divorce and for refusing alimony and making unequal division of community property. The equal division of community property was one of the ways of advancing the act's primary no-fault philosophy. The equal division of quasi-marital property likewise serves those purposes.[226]

The *Tejeda* court continues the historical understanding of the putative spouse doctrine which is to include the putative union in the community property system and fulfill the parties' expectations of a legal marriage. The Second Circuit Court of Appeals in the Guo and Sun case is simply wrong in its interpretation of the putative spouse statute.

## III. A PUTATIVE SPOUSE'S RIGHTS TO THE INCIDENTS OF A LEGAL MARRIAGE

The classic putative spouse doctrine is designed to accord all of the civil rights, privileges, and benefits of a legal marriage to the putative marriage.[227] Although California includes putative spouses in its community property system for an equal division of property, California's treatment of putative spouses is not a classic or pure application of the doctrine.[228] Property acquired by putative spouses is called "quasi-marital" property because true community property can only exist when there is a legal marriage.[229] By contrast, Louisiana establishes the exact same community property rights for putative spouses as legally married spouses rather than using an equivalent or analogue.[230] Although California provides for an equal division of the marital property, not all of the other civil effects of a legal marriage necessarily flow to putative spouses.[231] For

225. *In re Marriage of Tejeda*, 102 Cal. Rptr. 3d at 368-69.
226. *Id.* at 369 (citations omitted).
227. Blakesley, *supra* note 5, at 2.
228. *Id.* at 32-34.
229. *Id.* at 33.
230. *Id.* at 31.
231. *Id*. at 33-34.

these other "marital" benefits, California courts have interpreted the statutes to exclude the guilty spouse.

### *A. Wrongful Death*

Even before the putative spouse doctrine was codified, California courts recognized that a putative spouse had standing to bring a wrongful death claim.[232] Since a putative spouse is an heir for purposes of succession, she is an heir for purposes of maintaining an action for wrongful death.[233] As of 1975, California specifically included putative spouses in its wrongful death statute.[234] The most recent version of the California's wrongful death statute provides that a wrongful death action may be brought by a decedent's "putative spouse" if he or she was dependent on the decedent and held a good faith belief in the existence of a legal marriage.[235] California's wrongful death statute requires that the putative spouse meet two requirements for standing: (1) dependency, and (2) good faith.[236] These two requirements are not required for legally married couples.[237] By contrast, a putative spouse in Louisiana need not establish dependency in order to recover in a wrongful death action.[238]

As to the requisite good faith belief in the existence of a legal marriage, the California Supreme Court recently concluded that objective reasonableness was not required.[239] An honest subjective belief in the existence of a legal marriage is sufficient to qualify one as a putative spouse.[240]

At first glance, the exclusion of a guilty putative spouse from standing to bring a wrongful death action seems just since a guilty spouse should not profit from his or her deceit.[241] However, the guilty spouse is recovering nothing more than what the innocent spouse would have expected for the

232. Kunakoff v. Woods, 332 P.2d 773, 778 (Cal. Dist. Ct. App. 1958).

233. *Id.*

234. Blakesley, *supra* note 5, at 44.

235. CAL. CIVIL PROC. CODE § 377.60(b).

236. *Id.*

237. *Id.*

238. King v. Cancienne, 316 So. 2d 366 (La. 1975).

239. Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 221 (Cal. 2013).

240. *Id.*

241. *See* Janet LaTourette, *California Family Code § 2251 Adds Insult to Injury by Telling a Putative Spouse That Not Only is He or She Not Married, But the Person Who Deceived Him or Her is Entitled to an Equal Division of the Property Despite the Deception*, 32 WEST. ST. U. L. REV. 255 (2005) (arguing that an equal division of the quasi-marital property upon dissolution is a "windfall" to the guilty spouse).

surviving spouse from the existence of a legal marriage. Moreover, as a no-fault divorce state, "guilt" should be irrelevant.

### *B. Intestate Succession*

California courts have historically permitted putative spouses an intestate share of the decedent spouse's estate.[242] The California Probate Code is replete with references to the rights of the "surviving spouse" but does not specify whether a putative spouse qualifies as a surviving spouse for purposes of intestate succession.[243] In 1962, the court held that a surviving putative spouse was entitled "to the same share of the 'community' property as she would receive as an actual wife."[244] In 1984, the California Supreme Court definitively held that a putative spouse was entitled to succeed to an intestate share of the decedent spouse's separate property.[245] Although the court did not distinguish between innocent and guilty putative spouses, the court seems to imply that only innocent putative spouses would qualify for intestate succession. "To accord a surviving putative spouse the status of 'surviving spouse' (under the Probate Code) simply recognizes that a good faith belief in the marriage should put the putative spouse in the same position as a survivor of a legal marriage."[246] Guilty putative spouses do not qualify for succession rights to a decedent spouse's estate. Although this appears to be a fair outcome, the exclusion of a guilty putative spouse as an intestate heir to the innocent spouse's estate contravenes the innocent spouse's expectation in the existence of a legal marriage. The innocent spouse's expectation is that his or her surviving spouse is an intestate heir.

### *C. Family Allowance*

Pursuant to section 6450 of the California Probate Code, the "surviving spouse" of a decedent is entitled to a "family allowance" during the administration of the estate.[247] The purpose of the family allowance is to provide for the support of the persons designated in the statute during the

242. Smith v. Garvin (Estate of Leslie), 689 P.2d 133, 145 (Cal. 1984).

243. *See* CAL. PROB. CODE §§ 100-02 (West 2002); §§ 6401-6402 (West 2009); §§ 11445-46, 13650, & 13656 (West 1991).

244. Goldberg v. Goldberg (*In re* Estate of Goldberg), 21 Cal. Rptr. 626, 632 (Ct. App. 1962).

245. *Estate of Leslie*, 689 P.2d at 145.

246. *Id.* at 141-42.

247. Section 6540, subdiv. (a) provides that a surviving spouse is "entitled to such reasonable family allowance out of the estate as is necessary for [the spouse's] maintenance . . . during administration of the estate. . . ." CAL. PROB. CODE § 6540 (West 2009).

period between the decedent's death and the distribution of the estate.[248] Since the family allowance is a purely statutory creation intended to provide temporary support to dependents pending probate administration, the term "surviving spouse" has been construed narrowly to exclude putative spouses.[249]

Although a putative spouse may have been wholly dependent upon a decedent spouse for many years, the Probate Code meanly excludes both innocent and guilty putative spouses from any temporary support during probate administration. Putative spouses have most certainly agreed inter se, to support each other. The exclusion of putative spouses from receiving a family allowance makes little sense given its purpose and the wide discretion given to the probate court in deciding the amount and duration of the award.[250] We are also left with an inconsistency in the interpretation of a "surviving spouse" under the Probate Code. Illogically, a putative spouse qualifies as a "surviving spouse" for purposes of intestate succession but does not qualify as a "surviving spouse" for purposes of the family allowance while waiting for estate administration to end so that they can inherit.[251]

### *D. Spousal Support*

Section 2254 of the California Family Code specifically provides for support to a putative spouse:

> The court may, during the pendency of a proceeding for nullity of marriage or upon judgment of nullity of marriage, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable if the party for whose benefit the order is made is found to be a putative spouse.[252]

The California Supreme Court even awarded permanent support to a good faith putative spouse when there was a suggestion of fraud committed

248. Parson v. Parson, 56 Cal. Rptr. 2d 686, 687 (Ct. App. 1996).

249. Crocker Nat'l Bank v. Kelley (*In re* Estate of Anderson), 137 Cal. Rptr. 727, 730 (Ct. App. 1977), *superseded by statute*, Cal. Civ. Code § 3439.02; Hafner v. Hafner (*In re* Estate of Hafner), 229 Cal. Rptr. 676, 691 (Ct. App. 1986) ("[T]he Legislature did not provide for a family allowance for a putative spouse. . . .").

250. The probate court has a wide discretion in making an order for a family allowance, including its amount and duration. Fawcett v. Pinney (*In re* Estate of Fawcett), 43 Cal. Rptr. 160, 171 (Dist. Ct. App. 1965).

251. *In re* Estate of Hafner, 229 Cal. Rptr. at 688, 691.

252. CAL. FAM. CODE § 2254 (West 2004).

by the guilty spouse to induce the innocent spouse into the marriage.[253] Support awards appear limited to innocent or good faith putative spouses.[254]

Here again is a resulting inconsistency: California's wrongful death statute specifically limits claimants to *good faith* putative spouses but the requirement of good faith does not appear in section 2254 regarding the payment of support to a putative spouse yet the courts have implied the requirement of good faith for support. If the definition of a "putative spouse" requires good faith or innocence, then certainly there was no need to include those words in the wrongful death statute.

### *E. Attorney's Fees and Costs*

Section 2255 of the California Family Code provides that the court may order the payment of attorney's fees and costs to the innocent putative spouse in "proceedings to have the marriage adjudged void and in those proceedings based upon [a] voidable marriage. . . ."[255] The spouse applying for such fees and costs must be "innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage for which the a judgment of nullity is sought."[256]

Section 2255 is another example of California's patchwork legislation regarding putative spouses. If the definition of a "putative spouse" is limited to innocent spouses, section 2255 could have simply permitted the recovery for "putative spouses" rather than setting forth the requirement of innocence. The statutes pertaining to putative spouses are inconsistent.

## IV. CALIFORNIA REGISTERED DOMESTIC PARTNERS

### *A. Background*

In 1999, California became the first state to create a domestic partner registry.[257] Effective January 1, 2000, registered participants were granted certain limited rights analogous to married couples upon registration.[258]

253. *See* Spellens v. Spellens, 317 P.2d 613, 622 (Cal. 1957).

254. *See* Blakesley, *supra* note 5, at 41.

255. CAL. FAM. CODE § 2255 (West 2004).

256. *Id.*

257. The California domestic partners registry was created under A.B. 26, 1999 Leg., Reg. Sess. (Cal. 1999) (codified as amended at CAL. FAM. CODE §§ 297-299.6 (West 2004)).

258. A.B. 205, 2003 Leg., Reg. Sess. § 1(a) (Cal. 2003) ("This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring

While lacking full equal status as legally married couples, the domestic partner legislation created awareness as to the developing legal status of same-sex couples.[259] This domestic partner legislation was among the most generous set of rights to be established for same-sex couples nationwide.[260] In 2001, Assembly Bill 25 added additional rights to the domestic partner legislation: registered domestic partners had standing to sue for wrongful death, could adopt each other's children, and inter alia, were treated the same as married spouses under group health care plans.[261] Over the next two years, additional legislation continued to expand the rights of registered domestic partners.[262]

In 2003, California passed a broad comprehensive statute for registered domestic partners titled the Domestic Partner Rights and Responsibilities Act of 2003.[263] The Bill, which was codified in California Family Code section 297.5, provides:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.[264]

The new law was significant in: (1) including registered domestic partners in California's community property system; and, (2) the law applied retroactively to include those already registered as domestic partners.[265] Essentially, the new law was intended to provide domestic partners with almost all of the rights given to married couples.[266] The new law also meant that California's sometimes-complex community property

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and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.").

259. *See* Johnson, *supra* note 93, at 2155.

260. Ryan M. Deam, *Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003*, 35 PEPP. L. REV. 733, 743 (2008). Opposite sex partners over the age of 62 may also register as domestic partners. *See* CAL. FAM. CODE § 297(b)(4)(B) (West 2004).

261. A.B. 25, 2001 Leg., Reg. Sess. (Cal. 2001).

262. *See* Deam, *supra* note 260, at 745.

263. A.B. 205, 2003 Leg., Reg. Sess. (Cal. 2003) (codified as amended at CAL. FAM. CODE §§ 297-299.6 (West 2004)). Section 2 of the bill dubs the act the Domestic Partner Rights and Responsibilities Act of 2003. *Id.*

264. *Id.*

265. *Id.*; *see also*, Deam, *supra* note 260, at 746.

266. Johnson, *supra* note 93, at 2160.

laws would now apply to registered domestic partners but the precise details of such application remained open. One example is whether California's putative spouse doctrine applies to domestic partners.

### *B. Putative Domestic Partners*

In *Velez v. Smith*,[267] the First District Court of Appeal refused to extend the putative spouse doctrine to domestic partners.[268] Lena Velez and her partner Krista Smith met in 1989 and began a domestic partner relationship.[269] In 1994, they filed a declaration of domestic partnership with the City and County of San Francisco and again in 1996.[270] In the ensuing years, they purchased real property together, shared cars, living expenses, pets, and maintained joint bank accounts.[271] However, they had never registered as domestic partners with the State of California.[272]

If the court had applied the putative spouse doctrine in *Velez*, Velez still may not have qualified as a putative domestic partner. Since there was never any attempt to register with the State, neither partner could have held a belief in the existence of a state domestic partnership. Instead, the *Velez* court summarily refused to apply the putative spouse doctrine to domestic partners as outside the scope of the Domestic Partner Act and contrary to legislative intent.[273]

The *Velez* court missed two important points. First, the court overlooked the confusing and often competing local and state domestic partnership registries.[274] The new state law preempted local domestic partnerships created after July 1, 2000, provided that the domestic partners filed with the State. Family Code section 299.6 provides that a "[d]omestic partnership created under any local . . . ordinance or law before July 1, 2000, shall remain valid . . . provided a Declaration of Domestic partnership is filed by the domestic partners. . . ."[275] However, the law allowed

267. 48 Cal. Rptr. 3d 642, 656 (Ct. App. 2006).

268. *Id.* at 657-58 ("We acknowledge the objective of the most recent domestic partnership legislation to expand the rights of domestic partners, but we cannot engraft onto the statutory scheme putative spouse provisions that the legislature did not see fit to include. We must leave to the Legislature the task of affording standing to putative domestic partners to proceed with dissolution actions. Since the Domestic Partner Act has not done so, we find that appellant cannot proceed under a putative domestic partner theory.").

269. *Id.* at 644.

270. *Id.*

271. *Id.* at 645.

272. *Id.*

273. *Id.* at 657-58.

274. *See* Johnson, *supra* note 93, at 2153.

275. CAL. FAM. CODE § 299.6(a) (West 2004).

"municipalities to retain their domestic partnership registries provided that they offer the same or broader rights than the state."[276] Apparently, Velez believed she had a valid state domestic partnership because she incorrectly believed that their San Francisco domestic partnership was included in the state's system.[277] If Velez held a good faith belief in the existence of a valid state domestic partnership because of the San Francisco registration, such a good faith belief should have qualified her as a putative domestic partner.

Second, the court ignored the clear legislative mandate and purpose of the domestic partnership legislation. The application of the putative spouse doctrine to domestic partners would certainly have been consistent with the express legislative purpose to equalize the rights of same-sex couples with married couples:

> The act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality. . .by providing all caring and committed couples, regardless of their. . .sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interest in promoting stable and lasting family relationships.[278]

*Velez* was incorrect and in 2008, the Fourth Appellate District Court of Appeals applied the putative spouse doctrine to domestic partners.[279] In *In re the Domestic Partnership of Ellis and Arriaga*, Ellis and Arriaga signed and had notarized the necessary paperwork to register their domestic partnership with the Secretary of State.[280] Ellis believed the paperwork was duly filed and their partnership properly registered.[281] When Ellis discovered that their partnership was not registered with the State, he claimed to be a putative domestic partner.[282] The Fourth District Court of Appeal agreed and specifically rejected the holding in Velez:

> To the extent Velez is inconsistent with our conclusions, we respectfully disagree with its conclusion regarding putative domestic partnerships. The

276. Johnson, *supra* note 93, at 2161.

277. Appellant's Opening Brief at 7, Velez v. Smith, 48 Cal. Rptr. 3d 642 (Ct. App. 2006) (No. A110868).

278. A.B. 205, 2003 Leg., Reg. Sess. § 1 (Cal. 2003), *available at* http://www.assembly.ca.gov/LGBT_Caucus/laws/2003/ab0205/fulltextchapteredbill.htm.

279. Ellis v. Arriaga (*In re* the Domestic Partnership of Ellis and Arriaga), 76 Cal. Rptr. 3d 401, 406 (Ct. App. 2008), *abrogated by* Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211 (Cal. 2013).

280. *Id.* at 408.

281. *Id.*

282. *Id.* at 402.

> court in Velez stated that, if the Legislature had intended the putative spouse doctrine to apply to registered domestic partnerships, it would have expressly said so. As explained in detail, ante, however, the Domestic Partner Act was specifically designed by the legislature to make the rights and responsibilities of registered domestic partners as similar to the rights and responsibilities of married couples as permissible under California law, without actually recognizing a right of gay and lesbian couples to marry. The Domestic partner Act marked a sea of change in the manner by which rights were extended by law to registered domestic partners.[283]

The *Ellis* court correctly interpreted the Domestic Partner Act to superimpose California's complete body of family and marital law as appropriate onto domestic partners. Certainly, the putative spouses should receive the same consideration under the law.

## V. CONCLUSION

The putative spouse doctrine has a long history in both canon and civil law. As a community property state with a Spanish civil law heritage, California courts readily accepted the putative spouse doctrine to save otherwise void or voidable marriages, to permit an equal division of the property accumulated during the putative marriage. However, the inclusion of putative marriages into California's community property system was not holistic or pure but rather piecemeal. Complexities developed along gender lines since the wife was not always the innocent spouse and the cases failed to address whether the guilty spouse was precluded from certain benefits of marriage. The legislature and the courts addressed the application of other incidentals of marriage bit by bit with a resulting body of law that is inconsistent and confusing. Although a putative spouse is a "surviving spouse" for intestate succession, a putative spouse is not a "surviving spouse" entitled to a family allowance during estate administration.[284] Some of the statutes referencing a putative spouse require "good faith," other statutes do not.[285] Yet for those statutes that do not require good faith, the courts have ironically limited the definition of a "putative spouse" to those who are innocent and have a good faith belief in the existence of the marriage.[286]

In 1970, California became the first state to recognize no-fault divorce. Today, all of the states allow a spouse to obtain a no-fault divorce. In 1999,

283. *Id.* at 408-09.

284. *See infra* Part III.B and III.C.

285. *See infra* Part III.A.

286. *See infra* Part III.D.

California again led the way in recognizing domestic partnerships and later included domestic partners in California's family and marital property law systems. California's broad sweeping approach to domestic partners has not been taken with putative spouses. The unfortunate result is a patchwork of inconsistent statutes and judicial decisions.

California needs legislation adopting the putative spouse doctrine purely and wholly into its family and community property system. The fault or guilt of one spouse should not preclude the application of all marital benefits to the putative spouses. This is not a windfall to the guilty but instead simply a realization of the innocent spouse's expectations in a legal marriage.