

# Family Law Monthly

November 2005

Volume 2005 • Issue No. 11

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## Restraining Orders

# Automatic Temporary Restraining Orders [ATROs]: Protector of the Status Quo or Impermissible Restraint on Alienation?

By Marshall S. Zolla, Esq.  
and Deborah Elizabeth Zolla, Esq.\*

Family law attorneys customarily assume that the Automatic Temporary Restraining Orders ["ATROs"] set forth in Family Code Section 2040 apply to all property regardless of the circumstances. Most attorneys read the language set forth in Section 2040 literally to mean that spouses are restrained from transferring, encumbering or selling both community and separate property during a marital dissolution proceeding. From a plain reading of Section 2040, they would be correct. However, if one were to cross-reference to Family Code Section 2010 and its case law interpretation, it becomes evident that Section 2040 cannot be read alone. It must be read in conjunction with other sections of the Family Code.

There exists an unexplained conflict between Sections 2040 and 2010 and this conflict teaches an important lesson—it is not enough to read Sections in the Family Code in a vacuum. Thoroughness is always justified because the law is never as clear as might appear; the ATROs are a good example. Many believe that the law is clear—that ATROs are nothing more than a protective shield of the status quo. Closer scrutiny reveals, however, that ATROs can operate as a wrongful restraint on property which can be overcome only by creative analysis and technical mastery.

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 and  
**CALIFORNIA JUVENILE COURTS:**  
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**The Legislature’s Purpose in Enacting Family Code Section 2040**

The purpose of the automatic temporary restraining orders and statutes such as Family Code Section 2040 and Code of Civil Procedure Section 412.20, which prevent spouses from transferring or encumbering property, is to preserve the parties’ assets so the Court can divide the community property at the time of trial. This purpose is evident from Legislative Committee Reports which indicate that “[the restraining order[s] imposed under current law [are] intended to preserve the community assets and to prevent waste or concealment of property that may otherwise be determined to belong to the community.”<sup>1</sup>

In *Estate of Mitchell*<sup>2</sup> the appellate court held that the Automatic Temporary Restraining Orders in effect during a marital dissolution proceeding do not restrain severance of a joint tenancy. Following the decision in *Estate of Mitchell*, the Law Revision Commission released its tentative recommendation on proposed amendments to Family Code Section

<sup>1</sup> Legislative Committee Report for 1999 California Senate Bill No. 357, 1999 2000 Regular Session, describing the legislative intent and purpose of Fam. Code § 2040.

<sup>2</sup> *Estate of Mitchell* (1999) 76 Cal. App. 4th 1378, 91 Cal. Rptr. 2d 192.

2040.<sup>3</sup> One of the alternatives in the proposed Law Revision recommendations was to make ATROs inapplicable to situations in which there is no community property because the spouses have executed premarital or marital agreements to the effect that all property will remain separate property.<sup>4</sup> That recommendation was not enacted into law.

### The Unaddressed Conflict Between Family Code Sections 2040 and 2010

Family Code Section 2040 prevents a spouse from transferring separate property, but there exists an unaddressed conflict between Section 2040 and Section 2010, which provides that the Court has no jurisdiction over a spouse's separate property.<sup>5</sup> Recent California case law has reaffirmed the Legislature's intent in enacting Family Code Section 2010, explaining that the Court's jurisdiction over a spouse's separate property is strictly limited to determining the character of a spouse's separate property.<sup>6</sup>

### Representing the Spouse Seeking to Enforce the ATROs

<sup>3</sup> California Law Revision Commission Study FHL-911; First Supp. To Memo 99-84; Rel. 1-19-00.

<sup>4</sup> *Id.*

<sup>5</sup> Fam. Code § 2010; *In re Marriage of Buford* (1984) 155 Cal. App. 3d 74, 78; *Porter v. Superior Court* (1977) 73 Cal. App. 3d 793, which make clear that the Court lacks jurisdiction over the separate property of a spouse.

<sup>6</sup> *Allan v. Allan*, 2004 Cal. App. Unpub. LEXIS 7860 (Cal. App. 2d Dist. Aug. 26, 2004) (this case is not published and cannot be cited, but is helpful in understanding the concept that the Court has no jurisdiction over a spouse's separate property); *In re Marriage of DeGuigne* (2002) 97 Cal. App. 4th 1353, 1365; *In re Marriage of Braud* (1996) 45 Cal. App. 4th 797, 810; *In re Marriage of Buford*, above, 155 Cal. App. 3d at 78. The two statutes may be partially harmonized only through an analysis of the legislative history, indicating that section 2040 was for the limited purpose of maintaining temporary *status quo* and to permit gathering of evidence regarding characterization.

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Attorneys representing a spouse seeking to restrain a transfer or sale of the other spouse's property will advocate that Family Code Sections 2040(a)(2) and 1102 prevent a spouse from unilaterally engaging in transactions which significantly impact the assets and liability of the parties. To enforce the ATROs, that spouse would argue that Section 2040(a)(2) provides clear authority to restrain *pendente lite* alienation of all property, including separate property assets. This seems quite clear from the purpose of the statute, to preserve the parties' assets and permit gathering of evidence regarding characterization so the court can divide community assets at the time of trial. But it must be remembered that the ATROs themselves do not prevent a sale or transfer of property. No California case has so held. If a party sells or transfers property in violation of the ATROs, a bona fide purchaser acquires good title.<sup>7</sup> The

<sup>7</sup> Fam. Code § 2041.

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CALIFORNIA FAMILY LAW MONTHLY (USPS 004-548, ISSN 0882-7842) is published semi-monthly for \$398 per year by Matthew Bender & Co., Inc., 1275 Broadway, Albany, NY 12204-2694. Periodicals postage paid at Albany, NY and at additional mailing offices. POSTMASTER: Send address changes to CALIFORNIA FAMILY LAW MONTHLY, 136 Carlin Rd., Conklin, NY 13748-1531.

violation may be punished by contempt,<sup>8</sup> by a claim of breach of fiduciary duty<sup>9</sup> or by an adjusted (offset) allocation of community property. Thus, availability of a *Lis Pendens* in compliance with the recent opinion in *Gale v. Superior Court*,<sup>10</sup> described in greater detail below, becomes of more critical importance to assure effective prevention of an improper sale or transfer.

The party seeking to enforce an ATRO restraint would contend that all property at issue in the divorce may have an alleged community property interest and that Section 1102(a) precludes unilateral selling or encumbering of community real estate.<sup>11</sup> As a result of Sections 2040 and 1102, this position would contend that the other spouse is prohibited from selling, transferring or encumbering real property, regardless of whether a separate interest is alleged to exist.

The spouse seeking to enforce an ATRO restraint must counter a contention that no immediate need exists for the transaction proposed. The argument will be advanced that characterization of the allegedly separate property asset the other spouse proposes to alienate remains in dispute, that there has occurred no partial trial to determine the community or separate character of the asset in question, that other community assets do not exist sufficient to offset any loss which might be incurred from the proposed separate property transaction, and that there is no asset in financial crisis which would be “saved” by the proposed sale/refinance transaction. Therefore, there exists no factual or financial justification for a sale and the ATRO restraint should hold.

### Representing the Spouse Seeking to Sell, Transfer or Encumber Separate Property

Sections 2040(a)(2) provides the Court with discretion to allow a party to sell, transfer, or encumber

<sup>8</sup> Fam. Code § 233(c); Penal Code § 273.6.

<sup>9</sup> *In re Marriage of Quay* (1993) 18 Cal. App. 4th 961, 22 Cal. Rptr. 2d 537.

<sup>10</sup> *Gale v. Superior Court* (2004) 122 Cal. App. 4th 1388, 19 Cal. Rptr. 3d 554 [modified on denial of rehearing 10/22/04].

<sup>11</sup> Fam. Code § 1102(a) provides: “. . . either spouse has the management and control of the community real property, . . ., but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.”

their own separate property.<sup>12</sup> Assets can be transferred, sold or encumbered with the prior written consent of the other party or by order of court.<sup>13</sup> Review of the Legislative Committee Reports [which set forth the Legislature’s intent] leads to the conclusion that there is no legally cognizable justification to preserve assets which constitute separate property. This position is based on the premise that the jurisdictional limitations of Section 2010 deprive the family court of the power to act concerning separate property.

Attorneys representing the spouse seeking to transfer, sell or encumber separate property should make the 2010 argument, especially if it can be established that the property the client wishes to deal with is that spouse’s sole and separate property. A careful reading of Section 2010 and the cases cited<sup>14</sup> above elevates this position to one of persuasive merit.

A spouse requesting the Court’s permission to sell or encumber separate property with adequate financial safeguards has a surprisingly good chance of triggering the Court’s discretion to grant the request.<sup>15</sup> A spouse seeking leave of Court to deal with his or her separate property will advocate that proof of the separate character of the property moots necessity of a “determination of character” step in the proceeding and relies on Sections 2010 and 2108 to allow proper use or alienation of separate property assets without the undue restriction of the ATROs.

### *In re Marriage of Gale*

The recent Court of Appeal decision in *Gale v. Superior Court*<sup>16</sup> presents instructive facts and new

<sup>12</sup> Fam. Code § 2040(a)(2) provides, in pertinent part, that parties are restrained from the following:

Transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life . . . (Emphasis added.)

<sup>13</sup> *Id.*

<sup>14</sup> Fam. Code § 2010; *In re Marriage of Buford* (1984) 155 Cal. App. 3d 74, 78; *Porter v. Superior Court* (1977) 73 Cal. App. 3d 793, which make clear that the Court lacks jurisdiction over the separate property of a spouse.

<sup>15</sup> *Lee v. Superior Court* (1976) 63 Cal. App. 3d 705, 134 Cal. Rptr. 43.

<sup>16</sup> *Gale v. Superior Court, supra*, 122 Cal. App. 4th at 1388.

law. In *Gale*, husband, through the parties' Limited Liability Company ["LLC"], attempted to sell one of the parties' properties which had been conveyed to the LLC to manage. The purpose of the sale was to obtain funds to fulfill an obligation which husband unilaterally undertook on the company's behalf to invest in a mobile home park, an investment on which he hoped to receive a higher return on capital. Wife, a former real estate agent, thought the company was selling the property for too low a price, and filed a notice of *lis pendens* on the property. Husband filed a motion to expunge. The trial court denied husband's motion to expunge the *lis pendens* on the ground that the automatic temporary restraining orders issued at the outset of the case may have been violated by the husband's attempt to sell the property through the LLC. The Court of Appeal reversed. In doing so, the appellate court made clear that the ATROs did not prevent the husband from selling the property through the LLC? Why not? According to the Court of Appeal, the husband could sell the property through his company because he was doing so in the ordinary course of business, a well known exception to Section 2040. The Court of Appeal made clear that the wife's filing of a notice of *lis pendens* could not prevent the husband from selling the property because the wife failed to base the *lis pendens* on any specific real property as required under Code of Civil Procedure Section 405.20. The notice of *lis pendens* therefore had to be expunged.

*Gale* has *two* crucial lessons that are often not perceived. The first is that the "except in the ordinary course of business" loophole in Section 2040 can be accessed and used by a party who may buy and sell as part of their livelihood. Professionals who may fall into this category are developers, real estate syndicators, stock brokers, investors and they may contend their "ordinary course of business" exempts them from an ATRO restraint. Statutory authority exists to plug that loophole.<sup>17</sup> The second lesson is that a tailored and carefully drafted allegation in the Petition is necessary to support a Notice of *Lis Pendens* to effectively prevent an unauthorized sale, transfer or hypothecation of property. The standard form language customarily used in describing a party's community property in the Petition is no

<sup>17</sup> Fam. Code § 235 authorizes application for further temporary orders or an expanded temporary *ex parte* order.

longer acceptable. Neither is simply listing the property in a Preliminary or Final Declaration of Disclosure because it is not filed with the Court and would not effectively put third parties on notice, which is the whole purpose of a *lis pendens*. Because of the *Gale* case, family law practitioners are now on notice that continued use of such standardized language will result in a *lis pendens* being expunged.

### ***Lee v. Superior Court* and Application of Family Code Section 2108**

Family Code Section 2108<sup>18</sup> codified the holding in *Lee v. Superior Court*<sup>19</sup> to provide the Court with authority to permit a party to sell community or quasi-community property during a marital dissolution proceeding. If a party intends to request that the Court permit them to sell a piece of property, they should turn to *Lee* and Section 2108. Before the moving party makes such a request, however, they must first serve a Preliminary Declaration of Disclosure to comply with Section 2108.

The facts in *Lee* illustrate circumstances when a Court can allow a party to sell community property during a dissolution proceeding. In *Lee*, during marriage wife signed quitclaim deeds to a duplex where the parties resided and to an 8-unit apartment building. During the parties' dissolution proceeding, wife claimed she was coerced into signing the deeds and recorded a *lis pendens* on both properties which she alleged to be community property. Husband sought release of the *lis pendens* on the apartment building so he could sell it and utilize the proceeds for the financially troubled business. Husband claimed the business was " 'on the brink of total financial disaster,' that he had accounts payable in excess of \$56,000, and that he had an offer to buy the eight-unit apartment house at a price which would yield \$47,500 in cash." The trial court found that sale of the apartment building was necessary to save another community property asset, so ordered the *lis pendens*

<sup>18</sup> Fam. Code § 2108 provides as follows:

At any time during the proceeding, the court has the authority, on application of a party and for good cause, to order the liquidation of community or quasi-community assets so as to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. However, in no event shall the court grant the application unless, as provided in this chapter, the appropriate declaration of disclosure has been served by the moving party.

<sup>19</sup> *Lee v. Superior Court*, above, 63 Cal. App. 3d at 705.

expunged, permitted the sale of the apartment building with the proceeds to be used to pay debts on husband's business, which he claimed to be separate property, and ordered an accounting.

The Court of Appeal granted wife's petition for a writ with directions to the trial court to proceed with the sale once it had taken steps to protect the nature and extent of wife's community property interest; pending such action, the Court ordered the *lis pendens* reinstated. The Court of Appeal held that "the trial court could, with appropriate safeguards, have required one potential community asset to be sold to save another such asset." The lesson to be learned from *Lee* is that a party can successfully ask the Court to sell one property to save another.

### **Constitutional Issue: the Doctrine of Due Process of Law Can Affect Each Party's Position**

The state and federal Constitutions prohibit the government from depriving a person of property without due process of law.<sup>20</sup> "[T]he due process clause guarantees appropriate procedural protections and also places substantive limitations on legislative measures."<sup>21</sup> "[A] procedural due process claim possesses two components: first, that an individual has been deprived of a constitutionally protected liberty interest or property interest; and second, that this deprivation, while not necessarily unconstitutional, was rendered unconstitutional because it was undertaken without according the individual the appropriate hearing."<sup>22</sup> "[T]he latter guaranty sometimes described as substantive due process prevents government from enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to a proper legislative purpose.'"<sup>23</sup> ". . . the determination of when a substantive due process claim occurs is contextual."<sup>24</sup>

There is no reported case in California that addresses whether ATROs violate a husband or wife's right to procedural and/or substantive due process.

<sup>20</sup> Cal. Const., art. I, § 7, 15; U.S. Const., 14th Amend., § 1; *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal. 4th 761, 771, 66 Cal. Rptr. 2d 672, 678.

<sup>21</sup> *Kavanau v. Santa Monica Rent Control Board*, above, 16 Cal. 4th at 771.

<sup>22</sup> *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1030, 103 Cal. Rptr. 2d 711, 731.

<sup>23</sup> *Kavanau v. Santa Monica Rent Control Board*, above, 16 Cal. 4th at 771.

<sup>24</sup> *Galland v. City of Clovis*, above, 24 Cal. 4th at 1032.

In an unpublished opinion, the Court of Appeal for the Second Appellate District, in *In re Marriage of Egedi*,<sup>25</sup> held that the ATROs do not offend due process principles. The Court of Appeal noted the trial court's observation that husband ". . . had not briefed the [due process] issue, and noted the lack of any reported cases concerning the constitutionality of the challenged Family Code provisions during the ten years they had been in effect."<sup>26</sup>

In *Egedi*, husband owned, as separate property, a parcel of commercial property in Texas that he leased to a third party.<sup>27</sup> After husband and wife filed a joint petition for summary dissolution of marriage, husband sold the property to his brother and sister-in-law.<sup>28</sup> The trial court granted wife's motion to join the brother and sister-in-law.<sup>29</sup> The trial court found that joinder was necessary since the rent paid on the property determined husband's ongoing spousal support obligation.<sup>30</sup> The trial court denied husband's motion for reconsideration of the joinder order.<sup>31</sup> After husband's motion for a new trial was denied, he appealed from the trial court's ruling.<sup>32</sup>

On appeal, husband argued that the ATROs deprived him of due process in violation of the Fourteenth Amendment.<sup>33</sup> Husband relied on case precedent striking down statutes authorizing creditor attachment or replevin of a debtor's assets *without notice or a prior hearing*.<sup>34</sup> The due process portion of the Court's opinion focused on whether the ATROs deprived husband of a constitutionally protected property interest.

The Court of Appeal stated the issue as follows:

A spouse's property is not seized and withheld from *any* use under these provisions; rather, a

<sup>25</sup> *In re Marriage of Egedi*, 2004 Cal. App. Unpub. LEXIS 635 (Cal. App. 2d Dist. Jan. 26, 2004) (this case is not published and cannot be cited, but it is instructive in understanding whether ATROs violate a person's due process rights.)

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.*

spouse is prohibited from taking unilateral action harmful to the other spouse, and to the marriage, unless consent is obtained from the other spouse or from the court while a marital dissolution is pending. (Cf. *Randone v. Appellate Department*, *above*, 5 Cal. 3d at pp. 544–545.)<sup>35</sup>

The Court of Appeal held that the ATROs do not offend due process principles.<sup>36</sup> The Court reasoned that “. . . the temporary restriction on unilateral action is in keeping with the state’s vital interest in protecting marriage as an institution and the rights of both parties in dissolution proceedings.”<sup>37</sup> The appellate court’s conclusion is based on the premise that “[M]arital dissolution cases frequently raise questions as to whether property is separate or community in character, and *even where property is clearly separate*, there may be issues as to support and fees.”

In *Stone v. Godbehere*,<sup>38</sup> the Ninth Circuit Court of Appeal held that issuance of an injunction prohibiting transfer of **community property** without notice, without a showing of cause, or without judicial participation, did not violate husband’s right to procedural due process. The Court was not presented with the issue whether an injunction issued without notice which prohibited the transfer of **separate property** violates a spouse’s right to procedural due process. In *Stone*, husband appealed from a contempt conviction issued after the trial court found that he violated an injunction prohibiting the transfer of community property during the dissolution proceedings.<sup>39</sup> The injunction was issued pursuant to an Arizona statute that does not enjoin the transfer of *separate property*.<sup>40</sup>

The Ninth Circuit found that the State’s interest in preventing the waste or dissipation of marital assets outweighed husband’s interest in being able to transfer those assets.<sup>41</sup> The Court observed that “[T]he deciding factor justifying the lack of traditional procedural protections in this case is that the

risk of erroneous deprivation is minimal or nonexistent.”<sup>42</sup> According to the Ninth Circuit panel, the risk of erroneous deprivation is minimal or nonexistent because an injunction prohibiting a spouse from transferring community property is conditioned on an easily determined event, the filing of a divorce petition.<sup>43</sup>

Taking into account that the *Egedi* opinion is unpublished and therefore cannot be cited or followed by trial courts in California, it still remains an issue whether an ATRO restriction on the transfer of *separate property* violates a spouse’s right to procedural and/or substantive due process. California courts will most likely determine that the ATROs do not violate a spouse’s right to procedural and substantive due process for two chief reasons: First, ATROs do not deprive a spouse of his or her interest in separate property; the ATROs restrain a spouse’s ability to unilaterally transfer separate property during a dissolution proceeding, subject to certain exceptions codified in Family Code Section 2040(a)(2). Husband or wife can transfer separate property by obtaining written consent from the other spouse or by obtaining permission from the Court.<sup>44</sup> Second, ATROs bear a reasonable relation to a proper legislative purpose. The Court of Appeal’s unpublished opinion in *Egedi* is instructive in this regard. The State’s interest in protecting a spouse’s right to his or her equal share of community property justifies an automatic restriction at the start of a dissolution proceeding on a spouse’s ability to transfer property where character of the property may be unclear. If the ATROs did not apply to property claimed by one spouse as separate property, then the spouse with control over marital assets could prevent the other spouse from recovering his or her equal share of community property. The controlling spouse could transfer property to the detriment of his or her spouse under the guise that the subject property did not belong to the community.

### Writs and Appellate Proceedings Concerning Atros

For a party restrained and aggrieved by imposition of an ATRO property restraint, whether a trial court order refusing to lift the Automatic Temporary Restraining Orders is appealable or reviewable by writ

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Stone v. Godbehere* (1990) 894 F.2d 1131, 1134.

<sup>39</sup> *Id.* at 1133–1134.

<sup>40</sup> *Id.* at 1134.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Fam. Code § 2040(a)(2).

presents a complex and arguable issue. The easy answer is that orders granting injunctions, including restraining orders, are generally appealable orders.<sup>45</sup> Since there exists a remedy at law, writ relief is not technically available. However, if an argument can be made that a party will suffer irreparable harm notwithstanding the availability of appellate review [such as loss of a timely and significant marketplace opportunity], writ review of an order denying relief from an ATRO restraint may be appropriate. There is authority for making an irreparable harm argument.<sup>46</sup>

Authority also exists that the correct remedy for review of an injunctive order is to file notice of appeal, then seek a stay of the trial court order.<sup>47</sup> Because an ATRO restraint is a prohibitory injunction, obtaining a stay would not be helpful because the ATRO restraint would remain in effect. Affirmative lifting of the court order denying relief from the ATRO restraint is what is needed.

Assuming that the sale of separate property generates cash which can be set aside—hat is, the selling party does not immediately need the money for other business dealings, the party seeking relief could offer to place the funds in an escrow account subject to later distribution by the court after the character of the subject property has been determined by the court.

## Conclusion

Unreasonable restraints on alienation of property have been the subject of centuries of legal debate, a topic of legal complexity learned in the first year of law school and a concept still firmly enshrined as a basic tenet of modern law.<sup>48</sup> It is critical that

skilled family law practitioners be able to creatively perceive and argue when ATROs should apply and when they should not to best protect the concerns and financial interests of their clients.

<sup>45</sup> Code of Civ. Proc. § 904.1(a)(6).

<sup>46</sup> Civil Code § 711; *Wellenkamp v. Bank of America* (1978) 21 Cal. 3d 943, 948, 148 Cal. Rptr. 379, 382 and its progeny.

<sup>47</sup> In aid of appellate jurisdiction, courts will grant superseedeas in appeals where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him, provided, of course, that a proper showing is made. *Agriculturealk Labor Relations Board v. Tex-Cal Land Management, Inc.* (1987) 43 Cal. 3d 696, 709, 238 Cal. Rptr. 780; *People ex. rel. San Francisco Bay Conservation & Development Commission v. Town of Emeryville* (1968) 69 Cal. 2d 533, 537, 72 Cal. Rptr. 790, 792; *In re Marriage of Dover* (1971) 15 Cal. App. 3d 675, 93 Cal. Rptr. 384, 386.

<sup>48</sup> Cal. Const. Art. I § 1; Civil Code § 711; California Real Estate Law and Practice, Ch. 341 (Matthew Bender & Co.); Miller & Starr, California Real Estate 3d ed. § 9.38; Witkin 4 Summary of California Law, Real Property, 405–419 (9th ed.).