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For Better or For Worse 2022

### **Reimbursement Cases (General Overview).**

One of my topics for the 2022 For Better or For Worse program includes reimbursement claims. Reimbursement claims come in many different shapes and sizes and overlap with various concepts including equitable division of property, equitable division of debts, community liens, offsets, restitution etc. Thus, the term “reimbursement” may not always be used specifically as the courts may utilize any variety of remedies to achieve an equitable result.

### **Community funds expended on separate property.**

A distinction should first be made whether a community lien approach is taken versus requesting a simple reimbursement money judgment.

At the most basic level, if there is an increase in equity attributable to community capital contributions to separate property (such as real estate) or pursuant to community efforts (such as a separate property business) the courts generally apply a community lien analysis rather than pure reimbursement as case law recognizes the community’s entitlement to a share of the increase in value and profits associated with community contributions. Drahos v. Rens, 149 Ariz. 248 (App 1986); Cockrill v. Cockrill, 124 Ariz. 50 (1979). Thus, a reimbursement analysis would generally apply to situations where the community or separate property is merely entitled to a refund of monies expended. See Rothman v. Rumbeck, 54 Ariz. 443 (1939); Stock v. Stock, (memo dec. 2021) (where community funds purchased additional benefits in a separate property pension such did not make such interests community property, but rather the community was entitled to reimbursement plus interest).

Keep in mind the distinction between a reimbursement claim versus a restitution / unjust enrichment claim. For purposes of an unjust enrichment / restitution claim,

you must establish an absence of justification and that there is no other remedy at law. Pyeatte v. Pyeatte, 135 Ariz. 346 (App. 1982).

Note: A lien may be used to help secure a reimbursement judgment thus such requests are not necessarily mutually exclusive. See A.R.S. § 25-318 (E).

### **Community Payments toward Separate Debts.**

The general rule is that the community is entitled to reimbursement for its payment of a party's sole and separate debts. Pothoff v. Pothoff, 128 Ariz. 557, 562 (App. 1981).

### **Insurance Policy Payment cases.**

Rothman v. Rumbeck, 54 Ariz. 443 (1939). Insurance policy purchased with separate funds remained separate property. Where the premiums were paid during the marriage with community funds, Wife was entitled to reimbursement for ½ of community premium payments.

In Everson v. Everson, 24 Ariz.App. 239 (App. 1975), court ruled that Wife was entitled to a proportionate share of increase in cash surrender value of insurance policy as a result of community contributions (including funds from co-mingled non-traced sources).

Comments: Where there is an increase in equity pursuant to a return on investment, this will need to be measured and requested as opposed to mere reimbursement.

### **Reimbursement for Child Support / Spousal Maintenance Payments during Marriage.**

Child support and spousal maintenance obligations to a former spouse are of course sole and separate liabilities. When community funds have been used to pay such obligations, courts have been somewhat mixed as to whether reimbursement to the community is appropriate.

It goes without saying that the amounts expended must be corroborated by evidence to establish the community's claim. Deluna v. Petitto, 247 Ariz. 420 ¶¶ 20-21 (App. 2019) (court confirmed that community is generally entitled to reimbursement for its payment of a party's separate child support obligations, but claims must be supported by evidence and quantified where disputed).

Connell v. Connell (memo dec. 2019). Where wife knew that husband was paying his spousal maintenance child support obligation from community funds, she was not entitled to reimbursement. The Court distinguished Pothoff v. Pothoff, 128 Ariz. 557, 562 (App. 1981) as supporting reimbursement if community funds were used without the other spouse's knowledge.

Comment: Pothoff does not specifically make this a legal distinction. May want to also raise waiver, estoppel, or overall equity as a defense to such reimbursement claim.

### **Student Loan Reimbursement / Equitable Division.**

Student loans taken during marriage constitute a community debt. There are cases, however, that have assigned such debt to the party obtaining the education under equitable principles. There are also cases where the community was entitled to reimbursement of funds spent for a party's education even though such was during marriage.

Pyeatte v. Pyeatte, 135 Ariz. 346 (App. 1982). Wife was entitled to reimbursement under a theory of unjust enrichment for living expenses and educational expenses the community paid to put husband through law school. The court found that the spouses had an oral agreement that husband would subsequently support the wife while she earned a master's degree, which did not happen before the petition for dissolution was filed.

Fuller v. Pulsipher, memo dec. (App. 2013). Student loan debt during marriage assigned by trial court to the husband. Affirmed by CofA. May provide unequal division of debt if equity supports. Not limited to A.R.S. 25-318 (diversion / waste). Fact that community benefitted from husband's education was not dispositive.

Wisner v. Wisner, 129 Ariz. 333 (App. 1981). Community was not entitled to reimbursement for contributions to Husband's medical education / license. Divorce was 15 years later, and community received improved standard of living per husband's education. No unjust enrichment established, thus community not entitled to reimbursement.

Badalamenti v. Badalamenti, memo dec. (App. 2021). No reimbursement ordered where student loans were incurred during marriage and no Pyeatte type of verbal agreement between the parties (thus unable to establish unjust enrichment / restitution principles).

Lease v. Lease, memo dec. (App. 2013). Student loan incurred during marriage was assigned to wife by trial court. Court of Appeals reversed and remanded. Debt incurred during marriage presumed as community obligation. Trial court abused discretion in finding community did not benefit from wife's education.

Comment: Do not argue that a student loan incurred during marriage is a separate debt. Argue equitable division and/or restitution.

### **Separate Property Reimbursement Claims Against Community.**

The general rule is that separate property used for community purposes constitutes a gift to the community unless the SP can establish that there was an agreement for reimbursement by the community. Malecky, 138 Ariz. 121 (Div.2 1985); Baum v. Baum, 120 Ariz. 140 (App. 1978); Rosenthal v. Rosenthal (Memo dec. App. 2010).

An exception to this rule is carved out where payments are involuntary such as where there was insufficient community property to pay such debts, or the other party failed to cooperate in allowing community property to pay. Such could establish that the payor did not intend such as a gift. Baum, 120 Ariz. 140 (App. 1978); Hrudka v. Hrudka, 186 Ariz. 84 (App. 1996); Ivancovich v. Ivancovich, 24 Ariz.App. 592 (1975) (wife made involuntary payments where no access to community funds).

This naturally leads us to the Bobrow v. Bobrow analysis of post-service of process payments for community debts addressed in my separate article.

Sometimes a party may claim that his/her separate property contribution to the community constituted a loan. Absent an agreement between the parties that such constituted a loan (such as a signed note or stipulation), courts will generally find that such constituted a gift to the community and thus not order reimbursement. Nelson v. Nelson, 164 Ariz. 135 (App. 1990).

If there is an agreement that the separate property contribution was a loan the statute of limitations is tolled for loans during marriage. Otherwise, this would reinforce lawsuits between spouses during marriage. Id.

Keep in mind that the gift presumption does not apply where separate property funds are used on post-title joint tenancy property improvements. Separate property may be entitled to value added share associated with its contributions. Bowart v. Bowart, 128 Ariz. 331 (App. 1980); Whitmore v. Mitchell, 152 Ariz. 425 (App. 1987); Valladee v. Valladee, 149 Ariz. 304 (App. 1986).

### **Equitable Remedies - Reimbursement / Unequal Division.**

In rare cases, Courts have upheld reimbursement or unequal division despite gift presumptions. A legally presumed gift (such as changing real property title from separate to joint) does not by itself support unequal division. Unequal division limited to additional equitable considerations, extraordinary circumstances. Toth v. Toth, 190 Ariz. 218 (1997); Flower v. Flower, 223 Ariz. 531 (App. 2010); Inbodin, 223 Ariz. 542 (App. 2010).

### **Reimbursement / Equitable Division Where Dissipation / Waste:**

Reimbursement claims may also of course arise where there was a dissipation of community property and/or waste claims. Gutierrez v. Gutierrez, 193 Ariz. 343 (App.1998).

“Waste” is not a statutory term. A.R.S. § 25-318(c) – “excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of ... property.”

See also A.R.S. § 25-319(B)(11) (same language as applied to spousal maintenance).

Reasonable living expenses and replacement items purchased during separation period not determined as waste or dissipation of community assets. Nowak v. Nowak (memo dec. 2013).

Bad investments do not necessarily equate to marital waste. Spouses have equal power to bind the community. Court noted that if investment had been successful the community would have benefitted accordingly. Vansdottir v. Johnsen (memo dec. 2021).

Waste claim denied where husband had general knowledge wife was gifting money to her family and financial records were available during marriage to husband. Brown v. Dooner (memo dec. 2013).

Breach of fiduciary duties is not cited to enough in support of waste arguments. Each party owes the other such duty throughout the marriage, as well as during divorce proceedings as applied to community assets. Gerow v. Covil, 192 Ariz. 9 (App. 1998); Mezey v. Fioramonti, 214 Ariz. 599 (App. 2003).

Comment: If there is inadequate property to equalize or concerns about an unsecured reimbursement judgment, look to spousal maintenance award per waste claim. Also, request fraud language per bankruptcy concerns.

See Mitch Reichman 2015 Family Law Institute nationwide summary of Arizona and other state waste cases.

See Todd Franks, Kevin Park article – Fiduciary Duties Between Spouses and Management of Community Property (April 2000 and updates).

### **Defenses to Community Reimbursement / Restitution / Community Lien Claims.**

Such defenses are fairly broad and fact specific. Facts that support offsetting equities are generally fair game. Some are already addressed in case citations

elsewhere in this article. See generally Toth v. Toth, 190 Ariz. 218 (1997); Flower v. Flower, 223 Ariz. 531 (App. 2010).

Tester v. Tester, 123 Ariz. 41 (App. 1979). Community property claim regarding funds used to pay separate property mortgage (pre-Drahos case). No reimbursement or community lien ordered based upon the savings the community experienced by the parties residing at the residence rent-free and the community's receipt of net rental proceeds when the residence was rented ("mutual credits and debits"). See also Wayt v. Wayt, 123 Ariz. 444 (1979) (jointly titled home awarded to wife where mostly sole and separate funds from wife and husband did not work despite ability to do so); Hanrahan v. Sims, 20 Ariz.App. 313 (App. 1973) (equitable claim subject to equitable defenses such as benefits of living in separate property home).

Actions that result in loss to community may offset reimbursement claim. Craig v. Craig (memo dec. 2012) (where the husband refused without good cause to cooperate in refinance of mortgage).

Bottom line: Can always make equitable arguments. But need adequate facts to support.

### **Trial / Pretrial / Evidence Issues:**

Where wife removed \$200,000 from community accounts over 18-month period prior to divorce she did not establish what money was used for. Cannot merely state that used for living expenses and community obligations. Husband made prima facie case of waste / dissipation which wife failed to rebut. Husband was thus entitled to reimbursement of one-half funds removed. Moyer v. Moyer, memo dec. (2020).

Comment: This case not only reiterates the burdens of proof discussed in Guitierrez but addresses various arguments we often see. In this case, the wife claimed that husband threatened to cut her off from the accounts, etc., but the evidence showed that wife had access to and used community funds for her expenses and paid her bills from such accounts.

See also Ledo v. Ledo (memo dec 2015). Good discussion where husband took funds from sale proceeds of home during marriage and was provided opportunities to establish what funds for used for. Wife met initial burden to establish fund were unaccounted for. Husband failed to meet burden to account for funds.