SOLELY: *GRINIUS'* ARROGANT ADVERB

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1. Property Acquisition Forms

Except as otherwise provided by statute, all property acquired by a California domiciliary during marriage is community property.[1] Under two circumstances, property acquired during marriage is instead the separate property of the acquiring spouse:

1. Property acquired by gift, bequest, devise, or descent[2]; and
2. Rents, issues, and profits acquired from separate property.[3]

A spouse's separate property rights are also protected by California Constitution, article I, section 21.

A property acquisition usually comes in one of these forms:

1. An acquisition in exchange for consideration (i.e., a purchase); or
2. An acquisition without consideration (i.e., a gift).

A third acquisition form does not fit either of these categories: acquisition of loan proceeds. Loan proceeds are neither acquired through current consideration nor acquired through donative intent. Loan proceeds are acquired with a promise.

2. Two Community Property Rebuttal Standards

A. *Gudelj's* "Primary Reliance" Community Property Rebuttal Standard

Like other assets acquired during marriage, loan proceeds acquired during marriage by a California domiciliary are presumably community property.[4] A separatizer borrower may rebut this presumption by proving that the lender primarily relied on separate property when deciding to lend.[5]

In *Gudelj*, separatizer Husband purchased a partnership interest in a dry-cleaning business for $11,500, making a $1,500 separate property down payment and executing a $10,000 unsecured promissory note in Seller's favor. Husband testified at trial that shortly before the credit transaction, he and his mother had sold some real property for approximately $30,000 and contended that Seller must have relied upon Husband's separate property interest in those proceeds. Unfortunately, Husband failed to present evidence that Seller had been aware of that sale—a mistake. Thus, Husband presented no testimonial or documentary evidence regarding Seller's intent in extending him credit—a mistake. Husband needed a better lawyer. Although Husband had clearly failed to rebut the community property presumption, the trial court somehow characterized the $10,000 as Husband's separate property. Wife appealed. The Supreme Court had no difficulty reversing the trial court's clearly erroneous ruling. The court stated:

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> There is a rebuttable presumption that property acquired on credit during marriage is community property. [Citations omitted.] But "funds procured by the hypothecation of separate property of a spouse are separate property of that spouse." [Citation omitted.] The proceeds of a loan made on the credit of separate property are governed by the same rule. [Citation omitted.] In accordance with this general principle, the character of property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset. [Citations omitted.] In the absence of evidence tending to prove that the **seller primarily relied upon the purchaser's separate property** in extending credit, the trial court must find in accordance with the presumption [Citation omitted].[6]

This article respectfully contends that *Gudelj's* "primary reliance" rebuttal standard (hereafter, the "Evenhanded Rebuttal Standard") fairly protects community and separate property rights.

B. *Grinius'* "Sole Reliance" Community Property Rebuttal Standard

In *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, the Fourth District Court of Appeal purported to replace *Gudelj's* "primary lender reliance" rebuttal standard with a rebuttal standard under which loan proceeds are community property unless the separatizer borrower proves that the lender relied *solely* on the borrower's separate property when deciding to lend.

The *Grinius* facts included a restaurant *business* (which Husband and Wife operated, and which they stipulated was their community property) and the restaurant's *building* (which Husband subsequently purchased, taking title in his sole name). Husband financed the building purchase with

the proceeds from two purchase money loans, the primary one issued by the Small Business Administration. (The decision contains little discussion of the second loan, since the character of its proceeds would be the same as the character of the proceeds of the SBA loan.) Husband secured the SBA loan with his separate property securities and separate property real estate. At trial, Husband presented no lender intent testimony but did introduce into evidence SBA documentation listing nine loan conditions. Two of the loan conditions required Husband's separate property hypothecations (these conditions *benefited* Husband's attempt to rebut the community property presumption regarding the loan proceeds), but other loan conditions strongly relied on the *community's* ability to successfully manage the restaurant business and the *community's* ability to repay the loan from restaurant profits (these conditions *harmed* Husband's attempt to rebut the community property presumption regarding the loan proceeds). One of the loan conditions required Wife to sign all loan and hypothecation documents.

Although Husband had clearly failed to rebut the community property presumption, the trial court somehow ruled the loan proceeds Husband's separate property. Wife appealed. In his appellate pleadings, Husband disingenuously contended that the SBA loan was premised solely on separate property—a contention that annoyed the court of appeal. Husband needed a better lawyer. The court of appeal had no difficulty reversing the trial court's clearly erroneous ruling. The court of appeal stated:

> [Husband] presented no direct evidence of lender intent and instead offered circumstantial evidence to prove lender reliance on his separate property. [Citation omitted.] He argues the "SBA loan guaranty was premised solely on [his] posting of collateral consisting of his entire separate property." However, a review of the SBA loan conditions outlined on the loan guaranty authorization refutes this contention. The SBA required nine separate conditions, only two of which necessitated hypothecation of Victor's separate property. * * * Conditions three through five clearly suggest reliance on community interests. * * * Indeed, Victor stipulated to the community nature of the restaurant business. Yet, some of the same loan proceeds challenged here were used for operating capital for the restaurant and were specifically earmarked for the purchase of trade fixtures and the liquor license, assets unquestioningly found to belong to the community. This inconsistency clearly contradicts Victor's contention. * * * Loan conditions eight and nine demonstrate the SBA's concern about the operation and management of the restaurant business.[7]

After reviewing the SBA loan conditions, the court concluded:

> Accordingly, in the absence of evidence the SBA acted contrary to their official duties in this instance (Evid. Code, § 664), we find the loan was extended on both the ability of the community to repay the note and to manage the restaurant. Therefore, the SBA loan funds are a community asset, not [Husband's] separate property.[8]

Grinius advocated a "sole reliance" lender intent rebuttal standard:

> In early cases, the Supreme Court required a showing the lender relied **entirely** [emphasis in original] on the existing separate property of a spouse in extending the loan to characterize the loan proceeds as separate property. [Citations omitted.] The more modern and oft-cited formulation found in *Gudelj v. Gudelj* ... apparently relaxes the standard: "In the absence of evidence tending to prove that the seller **primarily** [emphasis in original] relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the [community property] presumption." [Citation omitted.] The *Gudelj* opinion cited no authority for this apparent change and had no opportunity to apply the standard since no evidence of lender reliance on separate property was proffered. * * * [¶] With the above review in mind, we restate the applicable standard: Loan proceeds acquired during marriage are presumptively community property; however, this presumption may be overcome by showing the lender intended to rely **solely** [emphasis added] upon a spouse's separate property and did in fact do so. Without satisfactory evidence of the lender's intent, the general presumption prevails.[9]

A loan officer would jeopardize her job if she testified at a divorce trial that she did not intend loan repayment from all possible sources, separate and community. Therefore, *Grinius'* "sole reliance" rebuttal standard is virtually impossible for a separatizer borrower to satisfy.

This article respectfully contends that *Grinius'* onerous "sole reliance" rebuttal standard (hereafter, the "Unattainable Rebuttal Standard") would inappropriately elevate community property rights over separate property rights.

3. The Unattainable Rebuttal Standard Is Unfair

The following hypothetical fact pattern illustrates judicial application of the disparate rebuttal standards.

When Hypothetical Husband married Hypothetical Wife, he had no income and possessed no assets. Separatizer Wife never worked during marriage because the $80,000 in monthly income generated by her extensive premarital assets proved sufficient to support both her modest lifestyle and Husband's extravagant spending. The parties had no premarital agreement.

One month after the wedding, Husband began working two days per week in his brother's grocery store, receiving W-2 wages of $800 per month. Two months after the wedding, Wife decided to invest $10,000 in a newly-formed company called Superior Start-up. Because her premarital assets were illiquid, Wife borrowed the $10,000 from Big Bank. Wife was the sole borrower. She hypothecated the loan against one of her separate property real estate parcels. Wife's loan application set forth her singular credit rating, her separate property assets, her $80,000 monthly separate

property income, and Husband's $800 monthly community property income. Three months after the wedding Husband quit his job, never to work again.

By the time of their divorce, Wife's premarital assets had been spent but the Superior Start-up investment was worth $1,000,000. At the divorce trial, Big Bank's Loan Officer testified that she had considered Husband's grocery store income—as well as Wife's separate credit, separate property assets, and separate property income—when deciding to make the loan. Loan Officer testified that she was aware of a lender's right to enforce against community property all loans—separate or community—and that she kept a copy of Family Code section 910 on her desktop.

Under the Evenhanded Rebuttal Standard, the $1,000,000 is Wife's separate property, which is a fair result. Extreme precedent such as the Unattainable Rebuttal Standard serves family law poorly. Under the Unattainable Rebuttal Standard, the $1,000,000 may well be community property, which is an unfair result. One would feel sympathy for Wife—and for the conscience of the bench officer who felt obligated to rule against her.

More extreme still, the Unattainable Rebuttal Standard may well have made the $1,000,000 community property, even if Husband had never been employed. Under examination by Husband's lawyer, Big Bank's Loan Officer would have admitted that when she made the loan decision: (1) it was possible that at future times Husband and/or Wife would receive community property income and acquire community assets, and (2) her Bank would look toward such income and assets for loan repayment pursuant to Family Code section 910.

Countervailing separatizer-friendly precedent is found in the de minimis rule.[10]

4. The Unattainable Rebuttal Standard Is Obiter Dictum

As explained above, the *Grinius* court of appeal had no difficulty in reversing the trial court's wrongheaded characterization of the loan proceeds as Husband's separate property. This was not a close call: those proceeds were clearly community property under *Gudelj's* Evenhanded Rebuttal Standard. There was no reason for the Fourth District Court of Appeal to have used its *Grinius* decision as a vehicle to assert the Unattainable Rebuttal Standard. The Unattainable Rebuttal Standard is obiter dictum.

Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.4th 1109, 1158, states: "'Dicta consists of observations and statements unnecessary to the appellate court's resolution of the case.' [Citation omitted.]" When a court of appeal is able to decide a case under the existing, lenient standard of proof, it would be dicta if the court were to attempt to impose a more onerous standard of proof unnecessary to its ruling.

A mathematical example illustrates the dictum nature of *Grinius'* Unattainable Rebuttal Standard. Presume that existing precedent required Litigant to satisfy Precondition #1 to rebut a presumption. Once the trial court has decided that Litigant has failed to satisfy Precondition #1, the Litigant lost. It would be unnecessary (and therefore obiter dictum) if a reviewing court of appeal were to add a Precondition #2 to impose a more onerous standard that Litigant had to satisfy. Litigant already lost by failing to satisfy Precondition #1 (the more lenient standard). A reviewing court's generation of a Precondition #2 (a more onerous standard) would be obiter dictum because Precondition #2 was unnecessary for the reviewing court to decide the case.

This mathematical example is analogous with *Grinius*. Because the SBA loan conditions so strongly relied on community assets and community efforts, Separatizer Husband had been unable to rebut the community property presumption under *Gudelj's* lenient Evenhanded Rebuttal Standard. (The Evenhanded Rebuttal Standard is analogous with Precondition #1 above.) Therefore, there was no need for the *Grinius* court to generate its more onerous Unattainable Rebuttal Standard to make Separatizer Husband lose his separate property claim. (The Unattainable Rebuttal Standard is analogous with the new Precondition #2 above.)

If a track competitor is unable to clear a five-foot high jump, there is no need to raise the bar to six feet to count him out of the competition. The *Grinius* court's Unattainable Rebuttal Standard is obiter dictum.

5. *Grinius* Violated *Auto Equity Sales*

The *Grinius* court's attack on *Gudelj* flouted California's hierarchy of courts. As the Supreme Court stated in *Auto Equity Sales v. Superior Court*[11]:

> Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. * * * **Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.** (Emphases added.)

Rules of Court provide: "The Supreme Court may order review of a Court of Appeal decision: [¶] (1) When necessary … to settle an important question of law…."[12]

As stated in a legal treatise:[13]

> * * * Review by the California Supreme Court differs fundamentally from review by the courts of appeal: **The court of appeal's primary function is to review for trial court error; but the supreme court's purpose is to decide important legal questions** and maintain statewide harmony and uniformity of decision. The supreme court's focus is not on correction of error by the court of appeal in a specific case. [People v. Davis (1905) 147 C 346, 348, 81 P 718, 719]. The supreme court may (and often does) deny review of cases that the justices think were "wrongly" decided in the court of appeal. [¶] **In practical effect, the supreme court functions as an "institutional overseer" of the state courts.**

The Unattainable Rebuttal Standard was a failed attempt by the Fourth District Court of Appeal to shift up from its proper role (correcting trial court error) into the Supreme Court's role (deciding important legal questions).

The Supreme Court may modify a prior Supreme Court decision. As stated in *Borelli v. Brusseau*: "…no rule of law becomes sacrosanct by virtue of its duration…."[14] Consider, for example, the sweeping changes in California family law accomplished by cases such as *In re Marriage of Brown*[15] and *In re Marriage of Pendleton & Fireman*.[16]

Although the Supreme Court may modify a prior Supreme Court decision, a court of appeal may not modify a Supreme Court decision. A court of appeal believing that a Supreme Court precedent should be changed should simply explain reasons the change is needed. As stated in *K.R. v. Superior Court*[17]: "… legal doctrine evolves over time, and appellate courts have the capability and the responsibility to recognize and explain such changes when they occur."

As stated in *Greek Theatre Association v. County of Los Angeles*[18]: "While the judicial pyramid does not permit us to do so [citation omitted], there is reason to reconsider the broad scope of the rule…. If we were not precluded by *Auto Equity Sales* … we would apply a narrower test, … [but] that option is not open to us."

The *Grinius* court of appeal valued decisions in *Estate of Holbert*[19] and *Estate of Ellis*[20] over the decision in *Gudelj*. It is unknown how the *Grinius* court came to consider itself qualified to express that preference. The *Grinius* court exceeded its authority by defying *Adams v. Southern Pacific Transportation*[21]: "As an intermediate appellate court, we must decide the … issue in conformity with the State Supreme Court's **last utterance in point**." (Emphasis added.) The *Grinius* court further disregarded California's established "judicial pyramid" by citing court of appeal cases as authorities. No such case could overrule *Gudelj*.

6. *Grinius'* "Cited No Authority" Criticism of *Gudelj* Fails

Grinius criticized *Gudelj's* Evenhanded Rebuttal Standard: "The *Gudelj* opinion cited no authority for this apparent change…."[22] This criticism makes no sense. The Supreme Court has the power to change any precedent, even its own.

Grinius' "cited no authority" criticism of *Gudelj* fails.

7. *Grinius'* "Applied No Standard" Criticism Of *Gudelj* Fails

Grinius criticized *Gudelj's* Evenhanded Rebuttal Standard: "The *Gudelj* opinion … had no opportunity to apply the standard since no evidence of lender reliance on separate property was proffered."[23] The errors in this statement are revealed through an analysis of each of the criticism's Components: the "no evidence proffered" Litigant Component and the "no opportunity to apply the standard" Court Component:

Litigant Component:	Separatizer Husband's *actual failure* to prove lender reliance on separate property. ("… no evidence of lender reliance on separate property was proffered.")
Court Component:	The *Gudelj* Supreme Court's *alleged failure* to apply the Evenhanded Rebuttal Standard to Husband's facts. ("The *Gudelj* opinion … had no opportunity to apply the standard….")

Through its confused juxtaposition of these Components, *Grinius* erroneously concluded that if a litigant has failed to prove a fact, a court has therefore failed to apply a legal standard. That conclusion makes no sense. It would mean that a litigant's failure to do *his* job necessarily results in a court's failure to do *its* job.

A hypothetical fact pattern illustrates the difference between a litigant's actual failure to prove a fact and a court's alleged failure to apply a legal standard. To win his breach of contract lawsuit, Hypothetical Plaintiff must prove certain facts, including Hypothetical Defendant's acceptance of his offer. Presume that Plaintiff has failed to prove Defendant's offer acceptance. Applying the correct legal standard, the trial court rules against Plaintiff. Plaintiff's failure to do his job (i.e., prove offer acceptance) has not prevented the court from doing its job (i.e., apply the legal standard). In fact, the contrary is true. Plaintiff's **failure** to do his job (i.e., prove offer acceptance) **provided the basis for** the court to do its job (i.e., apply the legal standard). In *Gudelj,* Husband's **failure** to rebut the community property presumption **provided the basis for** the Supreme Court, in applying its rebuttal standard, to rule: "… the record does not support the conclusion that the [$10,000] balance of the purchase price of the partnership interest was made from [Husband's] separate property."[24]

Grinius' "applied no standard" criticism of *Gudelj* fails.

8. Unclear Whether *Grinius* Intended to Accuse *Gudelj* of Stating Obiter Dictum

Did *Grinius* intend to accuse *Gudelj* of stating obiter dictum with its Evenhanded Rebuttal Standard? The answer is unclear: *Grinius* never mentions "dictum." And as just explained, *Grinius'* "applied no standard" criticism (an implied dictum accusation, perhaps?) fails because *Gudelj did* apply its Evenhanded Rebuttal Standard. The next section of this article explains the significance of *Gudelj's* Evenhanded Rebuttal Standard even if it *had been* dictum. Not all dictum was created equal.

9. Supreme Court Dictum May Not Be Disregarded Without a Compelling Reason

Even if the Evenhanded Rebuttal Standard *had been* dicta, the *Grinius* court of appeal should have *still* followed it—because there was no compelling reason not to. As stated in *In re Marriage of Witt*[25]:

> [Husband] seeks to avoid the clear import of Fabian by characterizing the court's discussion of Civil Code section 4800.2 as mere dictum. [Husband's] approach ignores that even dicta of the Supreme Court should not be disregarded by an intermediate court without a compelling reason.

As stated in *Dyer v. Superior Court*[26]: "Even when stated in footnotes, our Supreme Court's decisions bind us, and its dicta command our serious respect."

As stated in *Howard Jarvis Taxpayers Association v. City of Fresno*[27]:

> Fresno proposes that we reject the [California Supreme Court's] discussion as dicta. Even if the court's conclusions technically constitute dicta, we will not reject dicta of the Supreme Court without a compelling reason, not present here.

The *Grinius* court never alleged that there was a compelling reason for it to disregard *Gudelj's* Evenhanded Rebuttal Standard precedent. And if *Grinius had* made such an allegation, the allegation would have been incorrect because no such compelling reason existed.

10. *Brandes* Said It Right

In addition to reviewing the history of California's lender intent community property rebuttal standards, it is useful to acknowledge the current status of those standards. A notable indication is seen in *In re Marriage of Brandes*,[28] California's most significant recent lender intent case. *Brandes* does not cite *Grinius'* "solely relied" rebuttal standard. Instead, *Brandes* specifically cites *Gudelj's* "primarily relied" rebuttal standard:

> Linda also contends the court erred by rejecting her argument the 6,000 shares are community property under the lender's intent doctrine, since the stock was acquired partially on credit during the marriage. "There is a rebuttable presumption that property acquired on credit during marriage is community so that **'[i]n the absence of evidence tending to prove that the seller … primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption**.'" (*Bank of California v. Connolly* (1973) 36 Cal.App.3d 350, 375–376 [111 Cal. Rptr. 468]; see ***Gudelj v. Gudelj*** (1953) 41 Cal.2d 202, 210 [259 P.2d 656] (Gudelj).) The "presumption is rebuttable upon a showing that the loan was extended on the faith of existing property belonging to the acquiring spouse." (*In re Marriage of Stoner* (1983) 147 Cal.App.3d 858, 864 [195 Cal. Rptr. 351].) **Evidence of lender reliance on a spouse's separate property may be either direct or circumstantial.** (*Grinius*, *supra*, 166 Cal.App.3d at p. 1187.)[29]

The *Brandes* court seems to have intentionally made unmistakable its out-of-hand rejection of *Grinius'* "solely relied" rebuttal standard. Note that immediately after citing *Gudelj* for its "primarily relied" lender intent rebuttal standard, the *Brandes* court cited *Grinius* on a collateral issue: use of direct or circumstantial evidence.

11. Conclusion

Family law should balance community property rights against separate property rights in ways that respect both. When a lender enforces a separate property loan, Family Code section 910 grants the lender the power to execute on community property, whether it existed on loan date or arrived later. A loan officer would never testify at a divorce trial that she did not consider—and did not intend loan repayment from—all possible sources, separate and community. Thus, *Grinius'* Unattainable Rebuttal Standard is virtually impossible for a Separatizer borrower to satisfy.

The Unattainable Rebuttal Standard is obiter dictum born of a court of appeal's *Auto Equity Sales* violation. *Grinius'* attempted "cited no authority" and "applied no standard" criticisms of *Gudelj* fail.

Grinius never accused *Gudelj* of being obiter dictum. Even if *Gudelj were* obiter dictum, *Grinius* should have followed it because *Grinius* had no compelling reason not to.

The Unattainable Rebuttal Standard is not law in California and never has been. The Evenhanded Rebuttal Standard is mandatory authority on all California courts.

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1 FC, § 760.
2 FC, § 770, subd. (a)(2).
3 FC, § 7770, subd. (a)(3).
4 FC, § 760.
5 *Gudelj v. Gudelj* (1953) 41 Cal.2d 202.
6 *Gudelj v. Gudelj, supra,* 41 Cal. 2d at p. 210 (emphasis added).
7 *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, 1187-1189.
8 *Id.* at p. 1189.
9 *Id.* at pp. 1186-1187.
10 Civ. Code, § 3533.
11 *Auto Equity Sales v. Super. Ct.* (1962) 57 Cal.2d 450, 455 (emphases added).
12 Cal. Rules of Court, rule 8.500(b).
13 Cal. Prac. Guide Civ. App. & Writs (Rutter Group), § 13:1.
14 *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 654.
15 *In re Marriage of Brown* (1976) 15 Cal.3d 838.
16 *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39.
17 *K.R. v. Super. Ct.* (2017) 3 Cal.5th 295, 308-309.
18 *Greek Theatre Assn. v. County of L.A.* (1978) 76 Cal.App.3d 768, 784-785.
19 *Estate of Holbert* (1881) 57 Cal. 257.
20 *Estate of Ellis* (1928) 203 Cal. 414.
21 *Adams v. Southern Pac. Transp.* (1975) 50 Cal.App.3d 37, 40.
22 *Grinius, supra,* 166 Cal.App.3d at p. 1187.
23 *Grinius, supra,* 166 Cal.App.3d at p. 1187.
24 *Gudelj, supra,* 41 Cal.2d 202 at p. 210.
25 *In re Marriage of Witt* (1987) 197 Cal.App.3d 103, 106-107.
26 *Dyer v. Super. Ct.* (1997) 56 Cal.App.4th 61, 66.
27 *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914, 925.
28 *In re Marriage of Brandes* (2015) 239 Cal.App.4th 1461.
29 *Id.* at p. 1484 (emphases added).