

S203561

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**In re the MARRIAGE OF GREEN**

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**Julie R. Green,**  
Appellant,

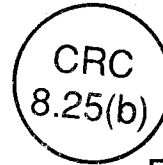
v.

**Timothy P. Green,**  
Respondent.

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SUPREME COURT  
**FILED**

DEC 11 2012



Frank A. McGuire Clerk  
Deputy

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First District Court of Appeal, Division Four  
(Case No. A129436)

Contra Costa County Superior Court (Case No. D0801292)  
Honorable Charles B. Burch  
Honorable Susanne M. Fenstermacher

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**APPELLANT'S ANSWER BRIEF ON THE MERITS**

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**ISSUES PRESENTED AS STATED  
IN THE PETITION FOR REVIEW**

1. Under what circumstances, if any, does the marital community have an interest in valuable pension credits that a married public employee is eligible for because of premarital public service, but which the employee-spouse purchases, or is eligible to purchase, during marriage?
  
2. Under what circumstances, if any, does the marital community have an interest in valuable pension credits that a married CalPERS employee is eligible for because of premarital public service, but which the employee-spouse purchases, or is eligible to purchase, during marriage?



## INTRODUCTION

Using community funds, Timothy Green purchased four years of service credit in the California Public Employees' Retirement System ("CalPERS") while married to Julie Green. Under the Public Employees' Retirement Law and prevailing case law, the Court of Appeal correctly characterized that credit as community property.

While married, both Timothy and Julie worked for local fire departments and accumulated credits and contributions in their respective CalPERS accounts. Also while married, they decided to increase their overall retirement benefits by purchasing additional years of service credit. After considering other options, the couple decided to buy four years of credit based on military service that Timothy performed before marriage. Timothy bought the credit using community funds, and during the marriage, all four years of service were credited to his CalPERS account, even though he elected to finance the purchase through a fifteen-year payment plan.

These four years of service credit are community property. In California, all property acquired during marriage presumptively belongs to the community estate. Here, the service credit was acquired during marriage with community funds. Although Timothy

had the opportunity to purchase the credit before marriage, he did not do so and therefore obtained no separate property interest in it. Any interest he had in the possibility of buying the service credit before marrying Julie was an expectancy, not a separate property right.

The credit is also community property because it enhanced Timothy's underlying CalPERS benefits. This Court has held that when the community owns an interest in an employee-spouse's retirement benefits, the community also owns an interest in those benefits as enhanced. Because the community undisputedly owns an interest in Timothy's CalPERS benefits, it also owns an interest in the purchased service years.

If the Court reaches the question of apportionment, as Timothy proposes in his brief, the four years of purchased service credit should be equally divided. Under California law, each spouse is entitled to half of the marital estate upon dissolution. Here, because the community acquired all four years of service credit during marriage, Julie is entitled to two of them. She should be allowed to continue to pay down half of the purchase price of the credit under the existing installment payment plan. Moreover, even if the Court concludes that Timothy has a separate property interest in the credit, his proposed

method of apportionment—reimbursing Julie for her share of the community’s payments during marriage—is inconsistent with this Court’s decisions and basic principles of community property law.

The Court of Appeal correctly characterized the four years of military service credit as community property. Appellant Julie Green respectfully requests that its decision be affirmed.

### **STATEMENT OF FACTS**

#### **I. Timothy and Julie Marry in 1992.**

Timothy and Julie Green married on May 16, 1992. (Appellant’s Appendix (AA) 143.) They were married for over fifteen years and now have two teenage sons. (AA 26, 34.)

Before marrying, both Timothy and Julie served in the United States Armed Forces, and after completing their military service, both took positions with local fire departments. (AA 105, 143.) Timothy served in the military for four years, from 1982 to 1986. (AA 143.) In 1989, Timothy was hired as a firefighter by the Dougherty Regional Fire Authority in Dublin, California, which merged with the Alameda County Fire Department in 1997. (AA 143.) The Dougherty Regional Fire Authority offered its employees the

opportunity to purchase service credit for prior military service.

(AA 143.)

Julie served in the military for two and a half years before marrying Timothy. (AA 51; Reporter's Transcript (RT) 10:27.) In 1990, Julie took a position as a firefighter/paramedic with the City of Oakland. (See AA 62.)

The Dougherty Regional Fire Authority, the Alameda County Fire Department, and the City of Oakland all participate in CalPERS, a retirement system for state employees and employees of local public agencies that contract with the system. (See AA 130-131, 143.)

While married, both Timothy and Julie made contributions to, and acquired years of service in, their respective CalPERS retirement accounts. (See AA 120, 130-131.)

## **II. During Marriage and Using Community Funds, Timothy Purchases Four Years of Additional Service Credit.**

On August 1, 2002, after more than ten years of marriage, Timothy purchased four years of service credit based on his prior military service. (AA 143; see also AA 131.) The community decided to purchase those years of service after considering other options, including buying credit based on both Julie's and Timothy's prior military service. (RT 8:26 – 27:10.)

Timothy elected to pay for the purchase through an authorized installment plan that financed the cost of the credit over a fifteen-year period. (AA 143.) The payments consisted of bi-monthly, pre-tax deductions of \$92.44 from Timothy's paycheck. (AA 78-81, 143.) Based on this payment plan, the total cost of the credit was \$33,278.40, with the last scheduled payment due on July 20, 2017. (AA 112, 143.) During the marriage, the community paid \$11,462.56 (or 34.44 percent) of the balance owed on the credit. (AA 112-113.)

With the addition of these four years of purchased service credit, Timothy accumulated approximately 19.415 service years in his CalPERS account during the couple's fifteen years and four months of marriage. (AA 120, 131.) Over the same time period, Julie accumulated approximately 14.988 service years, reflecting her years working as a firefighter minus the time she took off for maternity leave. (AA 120, 130.)

### **III. Timothy and Julie Separate in 2007.**

On October 1, 2007, the couple separated. (AA 143.) On March 12, 2008, Julie filed a petition for dissolution of marriage in Contra Costa County Superior Court based on irreconcilable differences. (AA 26-27.)

A key disputed issue in the dissolution proceedings was the division of the four years of purchased service credit. In May 2009, pursuant to a stipulation by the parties, the trial court (Hon. Susanne M. Fenstermacher) appointed an expert, Eric Moon, to prepare proposed orders to divide the community property interest in each spouse's pension and deferred compensation plans. (AA 43.) The order also specifically required Mr. Moon to verify whether Julie could continue to pay, post-separation, half of the balance owed on the purchased credit. (AA 43.)

In a July 2009 letter, Mr. Moon concluded that Julie could continue to pay for her share of the purchased service credit after dissolution. (AA 53.) He noted that, while Julie would not be able to pay CalPERS directly, "I do not see any problem with Julie reimbursing Timothy for her half of the payments." (AA 53.) Timothy agreed with Mr. Moon's conclusion. (AA 59, 90.)

With regard to the characterization of the credit, Mr. Moon proposed that it be deemed part community property and part separate property. (AA 113.) Specifically, Mr. Moon proposed that the fraction of the service credit already paid down with community funds

be treated as community property and the remainder as Timothy's separate property. (AA 113.)

Both parties opposed Mr. Moon's proposed division of the purchased service credit. Julie maintained that, because the couple purchased the credit during marriage using community funds, the entire credit belonged to the community. (AA 105-106.) Timothy, by contrast, claimed that he had acquired the separate right to purchase the credit before marriage, upon completion of his military service. (AA 90, 112-116.)

During the dissolution proceedings, Timothy's position on how the credit should be characterized and divided changed. At first, Timothy conceded that the fraction of the credit already paid for by the community was community property: "Of course, Mr. Green understands that that portion of the military buyback paid for with community funds prior to the parties' separation on October 1, 2007 is community property." (AA 59; see also AA 90 [similar].) Later, Timothy claimed that all four years of credit were his separate property and that Julie was entitled only to reimbursement of one-half of the payments toward the credit already made by the community. (AA 113.)

The trial court set the matter for trial. At trial, Julie represented herself in pro per, while Timothy was represented by counsel. (RT 1.)

The parties submitted a set of stipulated facts (AA 143-144), and both spouses testified about the considerations that led to their decision to purchase only credit years based on Timothy's prior military service. (RT 8:26 – 27:10.) They also both testified that the credit was purchased in 2002 because it was financially beneficial to do so at that time. (RT 10:19-23; RT 10:28 – 11:2; RT 14:22-27.)

Timothy stated that buying the credit earlier “would have been throwing money away,” in light of the then-applicable CalPERS benefit formula. (RT 14:22-25.)

Both Timothy and Julie also testified that they had decided not to buy service credit based on Julie's prior military service due to the possibility that she would retire early. (RT 5:2-17; RT 17:9-12.) Julie explained that she would have forfeited any time she purchased if she was unable to work until the prescribed retirement age as a result of disability or for any other reason. (See RT 5:2-7; RT 5:15-16.)

According to Julie's trial testimony, only two female firefighters in the 140-year history of the Oakland Fire Department had retired with a service retirement. (RT 5:9-15.) Julie had also injured her shoulder,



increasing the risk that she would not be able to work until retirement age. (RT 20:28 – 21:6.) Timothy testified that he had wanted to purchase both spouses' service credit, but that the possibility of Julie's early retirement drove the decision not to do so. (RT 16:18-20; RT 16:28 – 17:12.)

No other witnesses (expert or otherwise) testified at trial. And while neither party presented an actuarial estimate of the value of the four years of service credit, both parties' trial briefs estimated the value at \$140,000. (AA 105, 115.)

### **SUMMARY OF PROCEEDINGS BELOW**

#### **I. The Trial Court Rules that the Service Credit Is Timothy's Separate Property.**

The trial court (Hon. Charles B. Burch) ruled that the disputed service credit was Timothy's separate property. The court found that the couple had jointly decided to buy the credit (RT 38:6-9), but that the community's interest was limited to the funds paid toward the purchase of the credit (see RT 40:25 – 41:3). The court ruled that Timothy was required to reimburse Julie for half of those payments plus interest, an amount totaling \$6,699.54. (RT 40:25 – 41:3.)

In light of this ruling, the court issued an order awarding Julie half of Timothy's CalPERS retirement accumulated during marriage,

“exclusive of the military buyback portion of that plan.” (AA 156.) Julie’s share of the credits and contributions in Timothy’s CalPERS plan was placed into a separate non-member CalPERS account in her name. (AA 166-167.) The court also awarded Timothy half of Julie’s CalPERS benefits accumulated during marriage. (AA 137-141.)

## **II. The Court of Appeal Reverses.**

The Court of Appeal reversed, ruling that the military service credit was community property. (*In re Marriage of Green* (2012) 140 Cal.Rptr.3d 915, 917, review granted Aug. 29, 2012, S203561.) The court held that, “because the contractual right to receive four additional years of retirement credit based on premarital service was obtained during the marriage, it was ‘stamped a community asset from then on,’ notwithstanding the fact that the credit was based on service that predated the marriage.” (*Id.* at pp. 926-927, citation omitted, fn. omitted.)

In reaching this conclusion, the court rejected Timothy’s argument that he had obtained a separate property right to the credit after he had completed his military service and initially joined the Dougherty Regional Fire Authority, both of which occurred before marriage. The court concluded that, prior to the 2002 purchase of the

credit, Timothy had only an expectancy, not a property right to the service credit. (*Green, supra*, 140 Cal.Rptr.3d at p. 923.)

The Court of Appeal remanded to the trial court for a determination on the apportionment of the credit, after declining to adopt Julie's proposed division. (*Green, supra*, 140 Cal.Rptr.3d at p.927- 928.) In so doing, the court observed that "[i]t may be appropriate for the trial court to consider additional evidence regarding the value of the military service credit, and to hear further argument regarding the best way to divide the property." (*Ibid.*, fn. omitted.)

Timothy filed a petition for rehearing, pointing to what he perceived to be two factual errors in the court's decision and challenging the court's conclusion that the right to the credit did not accrue until it was purchased in 2002. The Court of Appeal amended its opinion to correct certain factual statements, but declined to modify its judgment or reasoning.

This Court granted Timothy's petition for review.

## STANDARD OF REVIEW

The characterization of property as community or separate property is a mixed question of law and fact, predominantly one of law, that is subject to de novo review. (E.g., *In re Marriage of Lehman* (1998) 18 Cal.4th 169, 184 [74 Cal.Rptr.2d 825, 955 P.2d 451] (*Lehman*)). A trial court's apportionment decisions are reviewed for abuse of discretion. (*Id.* at p. 187.)

## ARGUMENT

### **I. BECAUSE THE SERVICE CREDIT WAS PURCHASED DURING MARRIAGE USING COMMUNITY FUNDS, IT BELONGS TO THE MARITAL ESTATE.**

The Court of Appeal correctly concluded that the purchased service credit is community property. In determining the community or separate nature of property, California law “starts from the premise that all property acquired during the marriage is community property.” (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1103 [32 Cal.Rptr.3d 471, 116 P.3d 1152] (*Benson*)); see also Fam. Code, § 760 [“Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property”].)

This principle applies to employee retirement benefits.

(*Benson, supra*, 36 Cal.4th at p. 1103; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 844 [126 Cal.Rptr. 633, 544 P.2d 561] (*Brown*).) In deciding whether a retirement benefit was acquired during marriage, the determinative factor is time: “[I]f the right to retirement benefits accrues, *in some part*, during marriage before separation, it is a community asset.” (*Lehman, supra*, 18 Cal.4th at p. 179, italics added.) Thus, pension rights derived from employment during marriage are community property. (See *Brown, supra*, 15 Cal.3d at p. 844.) Likewise, retirement benefits payable “pursuant to a contract entered into during the parties’ marriage” are community property. (*In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1093 [114 Cal.Rptr.2d 6] (Corrigan, J.) (*Drapeau*).)

Based on these principles, the four disputed years of purchased service credit are community property. Under the CalPERS statutes, members acquire military service credit only after they actually purchase it. In this case, Timothy bought the credit during marriage, using community funds, and during marriage, CalPERS credited the full four years to his account. Before Timothy actually purchased the credit, he had only an expectancy, not a property interest in the credit.

A. CalPERS Employees Obtain Military Service Credit Upon Purchase.

CalPERS provides a defined retirement benefit plan to state employees and employees of public agencies that contract with CalPERS (also known as “contracting agencies”). (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 121 [105 Cal.Rptr.3d 414, 225 P.3d 546] (*Sonne*); Gov. Code, §§ 20460, 20022.) At retirement, CalPERS-covered employees (also known as “members”) receive a monthly retirement allowance that is based on a formula that includes factors such as service credit, final compensation, and a per-service-year multiplier. (*Sonne, supra*, 48 Cal.4th at p. 121.) The allowance consists of two parts: (1) an annuity that is funded by employee contributions, made as paycheck deductions throughout a member’s career, plus accumulated interest, and (2) a pension that is funded by employer contributions that, together with the annuity, must be sufficient to satisfy the amount specified in the benefit formula. (*Ibid.* [discussing Gov. Code, §§ 21350, 21362.2, subd. (a), 21363.1, subd. (a)].)

CalPERS allows members to increase their retirement benefits by purchasing elective service credit for certain types of prior employment. For example, members can buy credit based on service

in the Peace Corps or AmeriCorps (Gov. Code, § 21023.5) or service as a California Senate Fellow (Gov. Code, § 21020.5). (See generally Appellant’s Mot. for Jud. Not. (MJN), Ex. 1 [CalPERS report discussing different types of elective service credit], also available at <http://www.calpers.ca.gov/eip-docs/about/pubs/member/guide-calpers-service-credit-options.pdf>.)

Under Government Code section 21024, CalPERS members can buy up to four years of public service credit for prior service in the United States military. (Gov. Code, § 21024, subds. (a), (c)(2).) Once purchased, the credit increases a member’s overall retirement allowance by adding years to the basis on which the retirement benefit formula operates. (See, e.g., MJN, Ex. 1 at p. 3.)

Section 21024 prescribes how members may obtain military service credit. As an initial matter, the statute provides that, to be eligible to purchase military service credit, a member must work for a public entity that has contracted with CalPERS to offer the option to its employees. (Gov. Code, § 21024, subd. (f) [“This section shall not apply to any contracting agency nor to the employees of any contracting agency until the agency elects to be subject to this section by amendment to its contract . . . .”].) Further, to obtain service

credit, a member must specifically “elect[] to receive” it while employed by a CalPERS participant (Gov. Code, § 21024, subd. (e)), and then make payments in the amount and manner set forth in the statute and CalPERS regulations (Gov. Code, § 21024, subd. (b); Cal. Code Regs., tit. 2, § 575.1.)<sup>1</sup>

With respect to the amount, members purchasing military service credit must pay the employer’s liability for the credit. (See Gov. Code, § 21052 [members electing to purchase military service credit shall pay “an amount equal to the increase in employer liability, using the payrate and other factors affecting liability on the date of the request for costing of the service credit”]; see also Respondent’s Opening Brief (OB) at pp. 16-17 [payment for credits “reflects an amount equal to the employee contribution *and* the employer contribution; i.e. the entire value of the service credits,” fn. and quotation marks omitted].)<sup>2</sup> This is unlike credit earned for CalPERS

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<sup>1</sup> In his Motion for Judicial Notice, Timothy cites Government Code section 21051 as bearing on the issues in this case. (Respondent’s Mot. Jud. Notice at p. 4.) That provision, however, does not apply to the purchase of military service credit under section 21024. (Gov. Code, § 21024 [“Any member electing to receive credit for that public service shall make the contributions as specified in *Sections 21050 and 21052*,” italics added].)

<sup>2</sup> Members who requested costing of service credit between 2001 and 2003 also had the option to choose the payment formula set forth in



employment, which is funded by contributions from both the employer and the employee. (*Sonne, supra*, 48 Cal.4th at p. 121.) CalPERS uses a present-value method to calculate the price to buy elective service credit. (MJN, Ex. 1 at p. 32 [“projected retirement benefit increase” received from additional service credit is converted into “a lump sum cost in today’s dollars”]; see also OB at p. 16.)

With respect to the manner of payment, members can purchase credit either by a lump sum or through an authorized installment plan that deducts payments from their paychecks. (Gov. Code, § 21050, subd. (a); Cal. Code Regs., tit. 2, § 575.1.) A member who makes installment payments with pre-tax dollars may not suspend or cancel those payments. (See Gov. Code, § 21050, subds. (c), (d) [allowing member paying with after-tax dollars to stop or cancel payments without providing similar option for members paying with pre-tax funds].) In other words, once a member decides to buy credit and begins paying with pre-tax dollars, his purchase is irrevocable. (See *ibid.*; see also MJN, Ex. 1, at p. 32.)

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the 2000 version of statute. (See Gov. Code, § 21024, subd. (b).) The record before the trial court does not establish whether Timothy elected this optional cost formula when he purchased the service credit in 2002.

Thus, under the statute, a member of a contracting agency does not obtain military service credit unless and until (1) the agency contracts with CalPERS to offer the option to its employees, (2) the member elects to purchase the credit, and (3) the member pays for the credit either by a lump-sum payment or through an authorized installment plan.

B. The Military Service Credit Was Acquired in Full During Marriage.

The service credit that Timothy purchased under this statutory scheme is community property. As explained above, under the statute, a member obtains service credit only after electing to purchase it and making payments to CalPERS. In this case, it was during marriage that Timothy elected to buy the four years of service credit and that deductions from his paycheck began. (AA 143; see AA 78-81.) The credit was therefore acquired during marriage and is community property.

The four years of credit, moreover, were purchased in full during marriage. Even though the cost of the credit continues to be financed under a fifteen-year installment payment plan (AA 143), CalPERS credited all four years to Timothy's CalPERS account during the marriage (AA 131). As CalPERS explained in

summarizing the value of Timothy's retirement account accrued during the couple's fifteen-year marriage, "[t]he service credit for this period [May 16, 1992 through October 1, 2007] was 19.415 years. This amount includes service credit and associated contributions which were elected." (AA 131.)

At the same time, neither the United States military nor the Dougherty Regional Fire Authority (Timothy's employers before marriage) contributed funds to the purchase of the credit. As noted, CalPERS calculates the member's payment for military service credit as an amount sufficient to cover the employer's share of the liability. (Gov. Code, § 21052.) In other words, the community took on the obligation to pay the entire cost of the credit. (See OB at pp. 16-17 [cost of military service credit reflects "the entire value of the service credits," fn. omitted].)

The purchased service credit was also a considered part of Timothy and Julie's retirement strategy. (RT 38:6-7; RT 8:26 - 17:12.) This fact further bolsters the conclusion that the credit should be characterized as community property. (See *Drapeau, supra*, 93 Cal.App.4th at p. 1093 [fact that retirement benefit was an "important

part of [the couple's] financial planning for retirement" supported benefit's characterization as community property].)

Also supporting this conclusion, CalPERS itself presumes that military service credit purchased during marriage is community property. In a report entitled "A Guide to CalPERS Community Property," CalPERS states: "If the member elected and purchased any elective service credit during the marriage, *even if earned prior to the marriage*, we will consider it community property, unless the [court] order directs us to exclude the purchased service." (MJN, Ex. 2, at p. 15, italics added, also available at <http://www.calpers.ca.gov/eip-docs/about/pubs/member/calpers-comm-model-package.pdf>.) The report further explains that, unless otherwise provided in a marital dissolution order, purchased credit "will be divided according to when the service and contributions were credited and paid to the member's account." (*Id.* at p. 28.) Thus, under CalPERS's own understanding of the nature of elective service credit, the time of purchase, not the time of performance of the underlying non-CalPERS service, determines the community or separate character of the credit. Because the credit here was purchased during marriage, it is community property.

*Sonne*, in which this Court held that certain CalPERS service credit was separate property, does not lead to a contrary result. (See OB at pp. 21-22.) In *Sonne*, Husband earned service years in CalPERS while married to his first wife (Wife #1). (*Sonne, supra*, 48 Cal.4th at p. 122.) When the couple divorced, the court awarded Husband all of his CalPERS pension and retirement rights in exchange for equalizing payments to Wife #1. (*Id.* at pp. 122, 126.) Husband was unable to afford the equalizing payments and so subsequently transferred half of his accumulated member contributions and service credit to Wife #1 to satisfy his outstanding obligation to her. (*Id.* at p. 126.) Wife #1 then withdrew those contributions, thereby forfeiting her rights to receive a portion of Husband's future retirement allowance based on the transferred credit. (*Ibid.*) During his second marriage, Husband and Wife #2 used community funds to redeposit over 70 percent of the withdrawn contributions to reinstate the credit. (*Id.* at p. 123.) Upon dissolution of her marriage to Husband, Wife #2 claimed a community property interest in the redeposited service credit.

This Court held that, although the Husband-Wife #2 community had provided the funds needed to restore the credit, the service years

were the Husband's separate property. (See *Sonne, supra*, 48 Cal.4th at pp. 126-127.) The Court reasoned that the Husband had earned the years as deferred compensation for his CalPERS service before he married Wife #2. (*Id.* at pp. 125-126.) The community's redeposit contributions did not *purchase* the credit years; the contributions were merely a condition precedent to, and not consideration for, the reactivation of the already-earned credit. (See *id.* at p. 125.) Moreover, while the redeposit contributions restored the credit to Husband's account, they paid for only the annuity portion of the accompanying retirement benefits. (*Id.* at p. 127.) Most of the value of the credit—the associated pension benefits—was paid by Husband's employer as deferred compensation for the Husband's pre-marital labor. (*Id.* at pp. 127-128.)

The facts in this case are precisely the opposite. Here, instead of *redepositing* funds to restore already-earned CalPERS service credit, Timothy actually *purchased* the service credit, which was based on years of non-CalPERS service. (See MJN, Ex. 1 at p. 31 [CalPERS report on elective service credit, stating “[i]f you are a CalPERS member who served in the military you may be able to *purchase* this time as CalPERS service,” italics added].) The

payments required to obtain the credit, moreover, were consideration for that purchase; they did not simply reactivate credit already earned in CalPERS service. (See Gov. Code, § 21024.) And unlike in *Sonne*, where the Husband's employer paid for the pension benefits associated with the redeposited credit as deferred compensation for the Husband's pre-marital labor, Timothy's pre-marital employers did not fund the purchase price of the military service credit. (See Gov. Code, § 21052; OB 16-17.) For these reasons, *Sonne's* characterization of the redeposited service credit as separate property does not apply here. The four years of purchased military service credit were acquired during marriage using community funds and are therefore community property.

C. Before Marriage, Timothy Had Only an Expectancy in the Service Credit.

Timothy claims that the service credit is his separate property because he acquired a contingent property interest in it prior to marriage. (OB at p. 9.) According to Timothy, he accrued a right to the credit after he completed his military service and first began to work for a CalPERS contracting agency in 1989. (OB at p. 8.) This argument fails because, prior to actually purchasing the credit,

Timothy had only an expectancy, not a contingent property right in the credit.

As this Court explained in *Brown*, an expectancy is an interest in which “its holder has no *enforceable right* to his beneficence.” (*Brown, supra*, 15 Cal.3d at p. 845, original italics; see also *id.* at p. 845, fn. 6 [distinguishing between an expectancy and a “contractual right”].) Whereas a property interest is subject to characterization as either community or separate property, an expectancy ““is not to be deemed an interest of any kind.”” (*Id.* at p. 846, fn. 8, quoting Civ. Code, § 700.)

In this case, before the credit was purchased, Timothy had nothing more than the abstract opportunity to buy it. Under the CalPERS statute, CalPERS members obtain military service credit not merely by beginning employment with a contracting agency. Rather, a CalPERS member acquires such credit only if: (1) the local agency contracts with CalPERS to offer such credit to its employees, (2) the member elects to buy the credit, and (3) the member pays for the credit. (See Gov. Code, § 21024.) As the Court of Appeal correctly stated: “Here . . . there was no contract governing husband’s military service time before the parties purchased the credit, only a possible



expectancy that *if* Timothy continued to work for a CalPERS participant, and *if* section 21024 remained in effect, and *if* Timothy's employer continued to offer the option to buy military service credit pursuant to the statute, and *if* Timothy paid the requisite amount, he would be entitled to the benefit of the credit he purchased." (*Green, supra*, 140 Cal.Rptr.3d at p. 925, original italics.)

Moreover, as the Court of Appeal concluded, the right to the credit was not wholly within Timothy's control, because Timothy's employer could revoke the opportunity to buy military service credit any time before he actually purchased it. (*Green, supra*, 140 Cal.Rptr.3d at p. 922.) Indeed, the Legislature recently eliminated another type of CalPERS elective service credit as part of recent pension reform efforts. (See Gov. Code, § 7522.46, added by Stats. 2012, ch. 296, § 15 [eliminating additional retirement service credit, also known as "air time," effective January 1, 2013].) When an employer has the right to revoke the opportunity to obtain a benefit, the benefit is only an expectancy. (See *In re Marriage of Spengler* (1992) 5 Cal.App.4th 288, 297-298 [6 Cal.Rptr.2d 764] [holding that right to renew insurance coverage under an employment-related insurance policy was an expectancy because it depended in part upon

employer's continuing to provide the benefit]; *In re Marriage of Nelson* (1986) 177 Cal.App.3d 150, 157-158 [222 Cal.Rptr. 790] [yearly bonus awarded at the discretion of the employer is an expectancy].<sup>3</sup>

Timothy's opportunity to purchase the service credit before marriage is also quite unlike other forms of employee benefits that this Court has found to be property subject to division upon dissolution. For example, in *Brown*, this Court held that nonvested pension rights are a contingent interest in property, not an expectancy. (See *Brown, supra*, 15 Cal.3d at p. 845.) In *In re Marriage of Skaden*

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<sup>3</sup> In his Motion for Judicial Notice, Timothy asks this Court to judicially notice a CalPERS report opining that members have a "vested right" to "[p]urchase service credit under the terms that existed in the law when they provided service, if the member satisfies all eligibility requirements." (Appellant Julie Green's Opp. to Resp. Timothy Green's Mot. Jud. Notice, Ex. 3, at p. 13.) While the Court should deny Timothy's motion (see Appellant's Opp. to Mot. Jud. Notice), this report does not assist Timothy, because opportunities for optional retirement enhancements that require the employee to separately accept the offered enhancement and to pay consideration for it (as with CalPERS military service credit) are not vested contract rights. (See *Creighton v. Regents of Univ. of Calif.* (1997) 58 Cal.App.4th 237, 245 [68 Cal.Rptr.2d 125].) In addition, nothing prevents the Legislature from making reasonable modifications to public pension systems that do not result in net disadvantage to the employee. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 529-530 [286 Cal.Rptr. 283, 816 P.2d 1309].) Consequently, nothing would prevent CalPERS from eliminating the opportunity to purchase military service credit and providing a reasonably equivalent benefit.

(1977) 19 Cal.3d 679, 687-688 [139 Cal.Rptr. 615, 566 P.2d 249] (*Skaden*), the Court reached the same conclusion with respect to an employee's vested right to certain benefits payable upon termination of his employment. In both of these cases, the employee had earned a contractual right to the future payment of benefits as a form of deferred compensation for services rendered. (*Brown, supra*, 15 Cal.3d at p. 845; *Skaden, supra*, 19 Cal.3d at p. 687.) By contrast, a CalPERS-covered employee who has performed prior military service has no contractual right to the payment of benefits based on that service. Rather, to obtain the right to payment of any future benefit, he must enter into a separate agreement and pay separate consideration.

For similar reasons, the Court of Appeal's decision in *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529 [239 Cal.Rptr. 175] (*Joaquin*) is off point. (OB at pp. 9-10.) There, the court held that a lease renewal option that "merely extended[] or perpetuated" a pre-existing contractual right and required neither a new contract nor the payment of new consideration was a property right rather than an expectancy. (*Joaquin, supra*, 193 Cal.App.3d at p. 1534, italics)

removed.) Here, the right to the military service credit required a separate agreement and separate payment.

Because Timothy purchased the four years of credit during marriage and because he had no property right in the credit before he made the purchase, the credit belongs to the community estate.

## **II. THE MILITARY SERVICE CREDIT IS COMMUNITY PROPERTY AS AN ENHANCED RETIREMENT BENEFIT.**

The four years of service credit in this case are also community property because they enhanced retirement benefits that are undisputedly community property. In *Lehman, supra*, 18 Cal.4th at p. 174, this Court held that a nonemployee-spouse who owns a community property interest in an employee-spouse's retirement benefits owns a community property interest in those retirement benefits as enhanced. The Court reasoned that once the employee-spouse "has accrued a right to retirement benefits, at least in part, during marriage before separation, the retirement benefits themselves are stamped a community asset from then on." (*Id.* at p. 183.) And while the employee-spouse is free to modify the terms of his retirement plan and define the nature of his retirement benefits, the nonemployee-spouse owns an interest in the benefits as shaped by the

employee-spouse. (See *id.* at p. 179.) “What the nonemployee spouse possesses, in short, is the right to share in the pension as it is ultimately determined.” (*Id.* at p. 184, italics and internal quotation marks omitted.)

Applying this rule, the Court concluded that the community in *Lehman* owned an interest in Husband’s retirement benefits as enhanced by a “Voluntary Retirement Incentive” that credited Husband with three putative years of service and waived the normal actuarial reduction for taking early retirement. (18 Cal.4th at p. 175.) Even though the Husband was offered, and took advantage of, this opportunity to increase his benefits *after* marriage, the Court concluded that his ex-wife was entitled to her share of the Husband’s retirement benefits as enhanced by the incentive program. (*Id.* at p. 185; see also *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1015-1017 [16 Cal.Rptr.3d 220] (*Davis*) [employer-provided incentive granting employee the right to begin to receive pension benefits while still working enhanced employee-spouse’s retirement benefits earned during marriage and was, therefore, community property]; *In re Marriage of Babauta* (1998) 66 Cal.App.4th 784, 788-789 [78 Cal.Rptr.2d 281] [benefits of voluntary separation

incentive program offered by employer to replace employee retirement benefits owned by community estate].)

Under these principles, the purchased service credit in this case is community property. Because the community estate unquestionably owns an interest in Timothy's CalPERS benefits (see AA 137-141), the community also owns an interest in those benefits as enhanced by the service credit. (See *Lehman, supra*, 18 Cal.4th at p. 174.) Like the early retirement incentive in *Lehman*, the four years of service credit will increase the flow of retirement benefits accrued during the marriage, and like in *Lehman*, the community is entitled to the benefit of that increase. (See *id.* at p. 179.)

Indeed, the service credit in this case is more clearly community property than the early retirement incentive in *Lehman*. While in *Lehman*, Husband obtained the early retirement incentive *after* marriage, in this case, the credit was purchased using community funds *during* marriage. Thus, the retirement plan in effect during the life of the marital community already included the benefit-enhancing credit.

Timothy's arguments to the contrary all fail. First, Timothy contends that the credit is not derivative of community efforts. (OB at

pp. 14-15 [citing *Lehman, supra*, 18 Cal.4th at p.180 fn. 2].) This is incorrect because, “*practically by definition*, the right to retirement benefits that accrues, at least in part, during marriage before separation underlies any right to an enhancement.” (*Lehman, supra*, 18 Cal.4th at pp. 179-180, italics added.) Here, the purchased service credit is part of Timothy’s overall retirement benefit package. (See AA 131 [Timothy’s service years during marriage include both his earned years and purchased service credit]; see also *Lehman*, 18 Cal.4th at p. 185 [enhancement derives from underlying benefits because it “is not a separate retirement benefit, still less a benefit separate from the retirement benefit themselves”].) Furthermore, the credit was purchased during marriage using community funds and was part of the community’s joint retirement-planning decisions. (See RT 38:6-9; RT 8:26 - 17:12.) These facts all make clear that the purchased service credit derive from community efforts.

Timothy next seeks meaning in the assertion that the purchased service credit did not improve “the overall retirement benefit formula,” “make the non-military years more valuable,” “modify preexisting retirement credits, add fictive service years, or provide any unearned early retirement incentive.” (OB 13.) This suggestion is

irrelevant. Under *Lehman*, the community owns an interest in retirement benefit enhancements, and nothing in *Lehman* limits its application to any particular form of enhancement. (See 18 Cal.4th at p. 178; see also *Davis, supra*, 120 Cal.App.4th at pp. 1011-1012 [applying *Lehman* to retirement-disincentive program that paid retirement-eligible employees monthly pension payments while the employee continued to work and draw a salary].) Moreover, under *Lehman*, the addition of service years is an enhancement that belongs to the community. (18 Cal.4th at pp. 174-175.)

Timothy's final claim that the purchased credit years cannot be considered an enhancement because they are the equivalent of actual years of service for a CalPERS-participating employer (OB at p. 14) also lacks merit. Government Code section 21034, on which Timothy relies, provides that public service years are "credited" as prior or current service for the purpose of calculating retirement benefits. Nothing in the text of the statute, however, transforms purchased service credit into actual years of service worked for a CalPERS entity or speaks to when the right to service credit accrues for characterization purposes. (See Gov. Code, § 21034.) Indeed, CalPERS does not treat purchased service credit exactly like credit



earned by working for a CalPERS-covered entity. (See MJN, Ex. 1 at p. 31 [“Military service credit cannot be used to qualify you for retirement, health, or dental benefits vesting”].) In any event, the argument is irrelevant in light of *Lehman*’s conclusion that the community owns an interest in retirement benefits as enhanced by additional years of service. (18 Cal.4th at p. 178.)

In sum, because the four years of credit enhanced Timothy’s retirement benefits, which are undisputedly community property, the credit is properly characterized as community property.

**III. IF THE COURT ADDRESSES APPORTIONMENT, THE FOUR YEARS OF SERVICE CREDIT SHOULD BE DIVIDED EQUALLY.**

After the Court of Appeal held that the military service credit should be characterized as community property, it remanded for the trial court to decide the appropriate allocation of the spouses’ respective interests in the credit. (*Green, supra*, 140 Cal.Rptr.3d at pp. 928-929.) In his brief before this Court, Timothy argues that the trial court correctly apportioned the parties’ interests in the credit by awarding Julie half of the community’s contributions to the purchase price plus interest. (OB at pp. 15-20.) If the Court, after deciding the characterization question, reaches the issue of apportionment, the

credit should be split evenly between the parties, and Timothy's proposed method of apportionment—reimbursement—should be rejected.

A. Julie Is Entitled to an Equal Share of the Four Years of Service Credit.

Because all four credit years are community property, Julie is entitled to half of them. Under California law, community property is divided equally upon dissolution. (Fam. Code, § 2550; *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 422-423 [174 Cal.Rptr. 493, 629 P.2d 1].) In this case, the four years of military service credit were purchased in full during marriage. Even though the cost of the credit is being financed through a multi-year installment plan, the parties' interest in the four years of credit did not accrue over time. Rather, as reflected in CalPERS's own summary of Timothy's benefits, Timothy accrued over nineteen years of service credit during the parties' fifteen-year marriage, representing both the years he earned working as a firefighter plus the four purchased years.

(AA 131.)

The purchase of four years of service credit also cannot be revoked even though payments are still due and owing. While the CalPERS statute allows members paying for credit with after-tax

dollars to suspend or cancel their purchases, it does not contain a similar option for those members, like Timothy, who pay with pre-tax dollars. (See Gov. Code, § 21050.)

The CalPERS statute, moreover, specifically contemplates that service credit be divided between spouses. With the agreement of the non-member spouse, trial courts may order that contributions and service credit be divided into two separate accounts in the name of the member and the nonmember. (Gov. Code, § 21290, subd. (b); see also Fam. Code, § 2610, subd. (a); MJN, Ex. 2, at p. 16 [describing the “separation of account” method for dividing a member’s contributions, interest, and service credit upon dissolution].) Indeed, this is the method the trial court used to divide Timothy’s other CalPERS credit years. (AA 166-167.)

Julie should also be allowed to contribute her share of the post-separation payments. In proceedings before the trial court, both the court-appointed expert and Timothy agreed that such an arrangement could be made. (AA 53, 59, 90.) Therefore, if the Court reaches the apportionment issue, Julie should be awarded half of the four credit

years and should be allowed to reimburse Timothy for half of the remaining payments on the credit.<sup>4</sup>

B. Reimbursement Is an Inappropriate Apportionment Method.

Even if the Court concludes that Timothy obtained a separate property interest in the credit before marriage, Julie is entitled to more than reimbursement of the community contributions to its purchase. “Contrary to the rule adopted in most community property states, under which the community has only the right of reimbursement for payments made with community funds on the purchase price of property purchased by one spouse before marriage [citations], the rule developed through the decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds.” (*Forbes v. Forbes* (1953))

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<sup>4</sup> In its report on community property issues, CalPERS notes that “[i]f the member elected to purchase the service credit during the marriage, and only partially paid for it during the marriage period, we will prorate the purchase accordingly.” (MJN, Ex. 2, at p. 15.) The report, however, does not specifically address the situation in which the non-member spouse seeks to continue paying for her share of the balance owed. As explained above, both parties agree that such an arrangement can be made in this case, and nothing in the CalPERS statute forecloses such an equitable division of the purchased service credit. (See AA 53, 59, 90.)

118 Cal.App.2d 324, 325 [257 P.2d 721], citations omitted ; see also e.g., *In re Marriage of Moore* (1980) 28 Cal.3d 366, 371-372, 374 [168 Cal.Rptr. 662, 618 P.2d 208] [community paying down mortgage on house bought before marriage entitled to pro tanto share of appreciation of house's value].)

In *Sonne*, the Court held that, when a community contributes payments to restore credit previously owned by the employee-spouse, the community is entitled to a pro tanto share of the appreciation of the value of the credit. (48 Cal.4th at p. 129.) While in that case, the Court held that the community was entitled to only a pro tanto share of the *annuity* portion of the employee-spouse's restored service credit (*id.* at p. 129), this limitation does not apply in this case. Unlike with redeposited service credit in which employee contributions fund only the annuity portion of his benefits (*id.* at p. 128), employees purchasing military service credit under section 21024 pay for the entire value of the credits. (See Gov. Code, § 21052.) Thus, even if the Court concludes that Timothy had a separate property interest in the credit before it was purchased in 2002, Julie is entitled to share in the value of that credit.

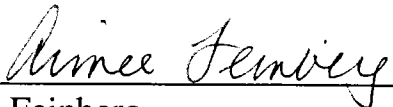
## CONCLUSION

The Court of Appeal correctly characterized the service credit as community property. Appellant Julie Green respectfully requests that its decision be affirmed.

Dated: December 10, 2012

Respectfully submitted,

April Rose Sommer

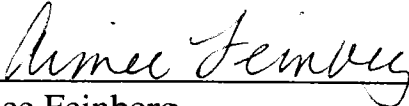
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**CERTIFICATE OF WORD COUNT  
(California Rule of Court 8.204(c)(1))**

This brief, including footnotes but excluding those portions of the brief excludable under California Rule of Court 8.204(c)(3), has a typeface of 14 point and contains 7,467 words as counted by the Microsoft Word word-processing program.

Dated: December 10, 2012

  
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Aimee Feinberg

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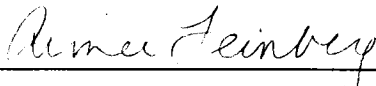
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