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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of JULIE R. GREEN and TIMOTHY P. GREEN.	
JULIE R. GREEN, Appellant, v. TIMOTHY P. GREEN, Respondent.	A129436 (Contra Costa County Super. Ct. No. D0801292)

In this case of first impression, we consider how to classify four years of credit in the California Public Employees' Retirement System (CalPERS) that respondent Timothy Green (Timothy) elected to purchase with community funds during his marriage to appellant Julie Green (Julie). Timothy was eligible to purchase the credit because he had performed four years of military service with the United States armed forces prior to the parties' marriage. (Gov. Code, § 21024.)[1] Over Julie's objection, the trial court characterized the military service credit as Timothy's separate property, and ruled that Julie was entitled only to reimbursement of the community funds used to pay for the service credit, plus interest. We conclude that, because the military service credit was purchased with community funds during the parties' marriage, it was community property. We remand to the trial court to determine the correct allocation of the credit.

[1] All further statutory references are to the Government Code unless otherwise specified.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Timothy served in the United States Air Force for four years (from July 23, 1982 to May 1, 1986). On June 16, 1989, he began working as a firefighter for the Dougherty Regional Fire Authority in Dublin. The fire authority was a participant in CalPERS. Julie and Timothy were married in May 1992.

In July 1997, the Dougherty Regional Fire Authority merged with the Alameda County Fire Department, which also is a participant in CalPERS. Timothy continued to work for the Alameda County Fire Department.

On August 1, 2002, Timothy exercised his right to buy service credit for his military service. The purchase was made pursuant to section 21024, which permits a CalPERS member to obtain up to four years of service credit for service with the United States armed forces. Timothy elected to pay for the purchase through an installment plan, paying $92.44 twice each month through payroll deductions for 15 years (scheduled to continue until July 2017). Before the parties separated on October 1, 2007, community funds in the amount of $11,462.56 were used toward the purchase of the military service credit.

Julie filed a petition for dissolution of marriage in March 2008. During dissolution proceedings, a dispute arose over whether to characterize Timothy's military service credit as separate or community property. A court-appointed expert proposed awarding a pro rata share (34.44 percent) of the purchased service credit to Julie, representing the percentage of payments toward the military service credit made with community funds.

Both parties opposed the expert's proposal, and they submitted briefs on the issue to the trial court. Julie sought to continue to pay half of the cost of future installment payments, and requested that half of the military service credit be placed into a separate account for her benefit through CalPERS. Timothy argued that because his right to purchase military service credit arose prior to the parties' marriage, all four years of

credit were his separate property. Timothy acknowledged, however, that community funds used to pay for the purchase before the parties' separation in October 2007 were community property.

A trial was held on the issue, and both parties testified regarding the purchase of the military service credit. The trial court ordered that the military service credit portion of the CalPERS pension in Timothy's name be awarded to Timothy as his separate property. Timothy was ordered to pay Julie the sum of $6,699.54, representing half of the installment payments made with community funds during the marriage toward the military service credit, plus interest at the rate of six percent.

Julie appealed after judgment was entered, challenging only the characterization of the military service credit.[2] After appellate briefing was complete, this court on its own motion accorded amicus curiae status to the American Academy of Matrimonial Lawyers, Northern California Chapter (Academy), and invited the Academy to submit a brief. The Academy accepted the court's invitation. Because Academy members who discussed the issue were not unanimous in their views as to the appropriate characterization and allocation of the military service credit, the Academy filed a brief containing two sections, one advocating reimbursement with interest, and the other advocating allocation of separate and community property interests in the credit. Timothy and Julie thereafter filed answer briefs.

II.
DISCUSSION

A. Overview of Applicable Law.

"The characterization of property as community or separate determines its division upon dissolution of marriage. Each spouse owns a one-half interest in all community property. ([Fam. Code,] § 751.) In general, community property is divided equally in the

[2] Timothy filed a motion in this court to dismiss the appeal, arguing that Julie had appealed from the judgment, but not two relevant posttrial stipulations and orders, and that she could not appeal because she entered into a stipulated agreement that benefited her. This court denied the motion.

aggregate when the marriage ends. ([Fam. Code,] § 2550; see [Fam. Code,] §§ 2600-2604.) However, separate property is not subject to a similar division, and belongs only to the owner spouse. ([Fam. Code,] § 752.)" (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1102.) We review the trial court's characterization of military service credit as separate property as a mixed question of law and fact that is predominately one of law, subject to de novo review. (*In re Marriage of Sonne* (2010) 48 Cal.4th 118, 124 (*Sonne*).)

Any analysis of the division of pension rights must be guided by our Supreme Court's seminal case, *In re Marriage of Brown* (1976) 15 Cal.3d 838 (*Brown*), which held that "the community owns all pension rights attributable to employment during the marriage." (*Id.* at p. 844.) *Brown* concluded that pension rights, whether or not vested, represent a property interest, and to the extent that such rights derive from employment during marriage, they comprise a community asset subject to division in a dissolution proceeding. (*Id.* at p. 842.) The court defined a "vested" pension right as one that "is not subject to a condition of forfeiture if the employment relationship terminates before retirement." (*Ibid.*) An employee can hold a "vested" but "immature" pension right, such as when the right to payment is subject to the condition that the employee survive until retirement. (*Ibid.*) Nonvested pension rights, by contrast, are contractual rights subject to a contingency or contingencies (usually, that an employee continue to work for his or her employer). (*Id.* at p. 846.)

At issue in *Brown* were the nonvested pension rights of husband, who accumulated retirement "points" pursuant to a plan under which he would forfeit his pension rights if he was discharged before he accumulated a threshold number of points. (*Brown*, *supra*, 15 Cal.3d at pp. 842-843.) The court distinguished such nonvested rights from a mere "expectancy," which is not a property right divisible upon dissolution of marriage. (*Id.* at pp. 844-845.) An "expectancy" is "the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent [citations], or of a beneficiary designated by a living insured who has a right to change the beneficiary [citations]." (*Id.* at p. 845, fn. omitted.) "[T]he defining

characteristic of an expectancy is that its holder has no *enforceable right* to his beneficence." (*Ibid.*, original italics.) The Supreme Court concluded that the nonvested property rights in *Brown* were more than a mere expectancy: "Since pension benefits represent a form of deferred compensation for services rendered [citation], the employee's right to such benefits is a contractual right, derived from the terms of the employment contract." (*Ibid.*) "[N]onvested pension rights are not an expectancy but a contingent interest in property." (*Id.* at p. 841.)

B. Process for Purchasing Military Service Credit.

Many public employees in California enjoy the benefit of membership in CalPERS. "Members of CalPERS, once vested, participate in a defined benefit retirement plan, which supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an annuity (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a pension (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (Gov. Code, §§ 21350, 21362.2, subd. (a), 21363.1, subd. (a).)" (*Sonne, supra*, 48 Cal.4th at p. 121, italics omitted.)

Section 21024 permits a CalPERS member to obtain up to four years of service credit for service with the United States armed forces.[3] Before the statute was amended in 2000, it provided that, in order to obtain such credit, the member must "contribute an amount equal to the contributions for current and prior service that the employee and his or her employer would have made with respect to him or her had he or she been in membership for a period equal to the military service and assuming that the employer's

[3] The statute is one of several that expands the definition of " '[p]ublic service,' " and provides CalPERS members the option to purchase service credit based on activities outside their employment for a CalPERS participant. (§ 21020 et seq.; e.g., §§ 21022 [service credit for time when member was laid off], 21023.5 [service credit for time in Peace Corps or AmeriCorps], 21029.5 [service credit for time in California National Guard].)

rate in effect at the time of election and his or her compensation at the beginning of his or her first period of service in membership with the employer under this section had been in effect for the period." (Stats. 1995, ch. 379, § 2.) In other words, whereas employers and employees generally both pay contributions to a member's CalPERS plan for credit earned during employment (*Sonne*, *supra*, 48 Cal.4th at p. 121), a member was required to pay both the employer and employee amounts for military service credit purchased pursuant to section 21024.

Sections 21050 through 21054 were enacted in 2000, to standardize the method for purchasing military service credit and other forms of credit based on service performed outside the CalPERS system. (Stats. 2000, ch. 489, § 18.) Section 21050 governs the method of payment for service credit.[4] Section 21052 governs the calculation of the contribution, and provides in relevant part that "[a] member . . . who elects to receive service credit subject to this section shall contribute, in accordance with Section 21050, 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. The methodology for calculating the amount of the contribution shall be determined by the chief actuary and approved by the board." (Stats. 2000, ch. 489, § 18.)

At the same time that the forgoing statutes were enacted, section 21024 was amended to provide that any member electing to receive credit for military service shall do so pursuant to sections 21050 and 21052. (Stats. 2000, ch. 489, § 13.) Members, such as Timothy, who requested costing of service credit between January 1, 2001, and December 31, 2003, had the option of making contributions pursuant to sections 21050 and 21052, or to make the payment calculated under section 21024 as it read before the statute was amended. (33C West's Ann. Gov. Code (2002 Supp.) p. 126.)

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4 As originally enacted, section 21050 provided that a member electing to purchase credit must do so by lump-sum payment, or in installment payments in accordance with governing regulations. (Stats. 2000, ch. 489, § 18.) The statute has since been amended to add various provisions regarding installment payments. (Stats. 2003, ch. 855, § 6; Stats. 2010, ch. 197, § 1.)

As for how contributions worked in this case, Timothy testified below that his fire department "elect[ed] to offer us certain add-ons and when my employer offers the military add-on, PERS takes a little bit more, that rate they pay each year." He further testified that his employer "ha[d] been contributing to allow members to buy military [service credit] since they first gave us that option. So my employer has been contributing their portion of it into the PERS system for many years." In its amicus brief, the Academy claims that this testimony misrepresented that Timothy's employer paid for a portion of his military service credit. The author acknowledges that Timothy was probably referring to the cost his employer paid to elect to be subject to section 21024, as opposed to payment for his particular military service credit. (See § 21024, subd. (f) [statute authorizing purchase of military service credit applies only if contracting agency elects to be subject to it].) Timothy confirms in his answer brief that this was what he meant, which is consistent with his testimony below that the employer contribution was "not an individual thing," meaning that his employer paid to enable its employees to purchase military service credit (§ 21024, subd. (f)), but not that his employer paid to purchase any individual employee's military service credit. It is thus undisputed that Timothy was responsible for the entire cost to purchase the military service credit.

As for the benefit that Timothy obtained by electing to purchase military service credit, section 21051, subdivision (a)(1) provides that a member electing to purchase service pays contributions that he or she would have made to the system for the period during which military service was performed, at a rate of contribution under his or her employer's formula at the rate age that applied when the employee was hired, and that the employee's compensation earnable on that date applies to the member during the period for which credit is granted. Before the statute was amended in 2000, section 21024 provided that a purchase of military service credit was based on the rate in effect at the time of election, and as well as on the compensation at the time of hire. (Former § 21024, Stats 1995, ch. 379, § 2.) The rate that a CalPERS member is paid on retirement, however, takes into account an employee's final compensation. (§§ 21353-21354.5.) Thus, whatever method was used to set Timothy's contribution to purchase

military service credit, he was able to purchase it based on his salary at the time of hire, but he will receive payment for the service credit based on his salary upon retirement.[5]

C. Community Property Interest in Military Service Credit.

Julie argues that the trial court erred in characterizing Timothy's military service credit as separate property, and we agree. As set forth above, in determining whether the community has an interest in pension rights, courts look to when a party acquired a property interest in them, such that the pension rights were more than a mere "expectancy." (*Brown, supra*, 15 Cal.3d at pp. 841, 844-845.) Here, there is no dispute that Timothy completed his military service before his marriage to Julie. There can also be no dispute that CalPERS members who had served in the military, and whose employers elected to be subject to section 21024, were eligible to purchase military service credit at the time that Timothy served in the military.[6] However, at the time that Timothy left the military, he had no property interest whatsoever in the CalPERS retirement plan, because he did not begin working for a CalPERS participant until three years later, when he began to work as a firefighter in 1989.

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5 After the Academy filed its amicus brief, Timothy filed an unopposed request for judicial notice of excerpts from the CalPERS annual reports for the years 1988-1989 and 2008-2009. He claims that the reports "help explain the nature of the employer subsidy to the military service credits," because they show the rate in effect at the time he was hired, as well as at the time of trial. We deny Timothy's request. "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Timothy does not direct us to any exceptional circumstances that would justify departing from this rule. (*Ibid.*) Nor does he direct this court to evidence indicating the specific rate upon which his contribution was actually calculated, so it is unclear that the annual reports are even relevant.

6 Section 21024 was enacted in 1995. (Stats. 1995, ch. 379, § 2.) However, it was derived from former section 20930.3, which was enacted in 1974. (Stats. 1974, ch. 1437, § 1; Historical and Statutory Notes, 33C West's Ann. Gov. Code (2003 ed.) foll. § 21024, p. 456.)

Even after Timothy started working for a CalPERS participant, and thus became eligible to purchase military service credit based on his premarital service in the military, his right to such credit amounted to no more than an "expectancy," which is not a property right divisible upon dissolution of marriage. (*Brown*, *supra*, 15 Cal.3d at pp. 844-845.) Section 21024, subdivision (e) specifically provides that the statute "shall apply to a member *only* if he or she elects to receive credit while he or she is in state service in the employment of one employer on or after the date of the employer's election to be subject to this section." (Italics added.) In other words, a member's right to purchase credit is dependent on his or her employer's election to be subject to section 21024. Although Timothy's employer apparently had been offering its employees the opportunity to purchase military service credit "for many years," it is unclear when it first elected to be subject to the statute. Presumably the employer could elect at some point to no longer be subject to section 21024, in which case employees who had served in the military would have no right to purchase credit based on that service, let alone a property interest in CalPERS credit based on that service.

Timothy characterizes his right to purchase military service credit as a " 'nonvested pension right[],' " which was a "contingent retirement interest" that was "subject to conditions that [we]re wholly within [his] control." He relies on cases that stress that a contractual retirement benefit " 'matures' when the employee has an *unconditional right to payment*, i.e., all the 'conditions precedent to the *payment of the benefits* have taken place or are *within the control of the employee*. [Citations.]' [Citations.]" (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 422, fn. 2, italics added; see also *In re Marriage of Castle* (1986) 180 Cal.App.3d 206, 214-215 [husband held property right even though contractual right to military retirement benefits contingent on avoiding court martial or dishonorable discharge]; *In re Marriage of Pace* (1982) 132 Cal.App.3d 548, 551, fn. 3 [pension right " 'matured' " if all conditions precedent to *payment* are within control of employee].) In *Gillmore* (unlike here), husband held vested and matured retirement benefits, and the only condition to receiving those benefits

was his actual retirement, at which point he would be immediately entitled to payment. (*Gillmore* at p. 422 & fn. 2.)

The Academy author advocating reimbursement also focuses on Timothy's ability to control a "condition precedent" to "activate" his military service credit. She relies on *In re Marriage of Skaden* (1977) 19 Cal.3d 679, which held that " 'termination benefits' " included in a husband insurance sales agent's agreement with his employer (entered into during the parties' marriage) were community property, subject to division upon dissolution. (*Id.* at p. 682.) The relevant contract provided that husband would receive certain benefits if he was terminated two years or more after the contract's effective date; the parties were still married two years after husband entered into the contract. (*Id.* at pp. 682-683.) The court held that the " 'vested' " but " 'immature' " rights in question, which were subject to an agreement, were "not a mere expectancy but a chose in action," and therefore property subject to division upon dissolution. (*Id.* at pp. 685-686.) Apparently analogizing the status of the military service credit *before* Timothy purchased it to the termination benefits in *Skaden*, the Academy author advocating reimbursement notes that " 'the fact that the payment of benefits, the right to which has vested, is subject to a condition whose fulfillment is wholly within the control of the employee spouse does not affect the vested nature of the right or degrade it into an "expectancy." ' " (*Id.* at p. 687.) In *Skaden*, the condition subject to the employee spouse's control was terminating his employment—once he did that, he would automatically receive termination benefits, as set forth in his employment agreement.

Here, by contrast, Timothy held no such unconditional, contractual right to the payment of benefits, or even a nonvested right to such credit, before he actually purchased military service credit during the parties' marriage, using community funds. The condition wholly within his control was the right to enter into a contract with CalPERS for the purchase of military service credit in the first place. Before that point, he did not hold a "*contractual right* [to the military service credit], derived from the terms of the employment contract." (*Brown, supra,* 15 Cal.3d at p. 845, italics added.)

He instead held no more than an expectancy, because he held "no *enforceable right*" to the service credit. (*Ibid.*, original italics.)

The trial court also mischaracterized Timothy's abstract ability to purchase military service credit as a property interest when it relied on *Sonne*, *supra*, 48 Cal.4th 118. *Sonne* involved the dissolution of a husband's second marriage. (*Id.* at p. 121.) Husband was a participant in CalPERS, and he transferred to his first wife her one-half interest in the service credit he earned during their marriage (8.677 years) upon the dissolution of that first marriage. (*Ibid.*) The first wife thereafter exercised her right to a refund of the accumulated contributions to the account, an election that permanently waived her right to any further claim on the retirement benefits, including any service credit (§§ 21292, subds. (a), (d)). (*Sonne* at p. 121.) During his marriage to his second wife, husband exercised his right to redeposit the contributions pursuant to section 20751, and paid for the redeposit with community funds through monthly payroll deductions. (*Sonne* at p. 121.) At the time husband and his second wife separated, the community had redeposited 70.83 percent of the scheduled payments, and the trial court concluded that the community was entitled to 70.83 percent of the service credit based on the redeposited amount. (*Ibid.*)

The Supreme Court reversed. The court concluded that because community funds contributed only to the annuity portion of the retirement allowance, the community was entitled only to a pro tanto share of the annuity, and not to a share of the pension component, which had been funded by employer contributions during husband's first marriage. (*Sonne*, *supra*, 48 Cal.4th at pp. 121-122.) Citing section 20756, the court noted that "a redeposit of member contributions for a prior period of service does not constitute consideration for the service credit for that period; it is merely a condition precedent to a credit for that previously rendered service." (*Sonne* at p. 125.) The trial court's "apportionment failed to consider that the right to the 8.677 years of service credit was Husband's separate property, which preexisted the Husband-Wife marriage, inasmuch as the service credit was offered in consideration for that prior 8.677 years of service." (*Ibid.*) The service credit at issue was earned during husband's marriage to his

first wife, and was not attributable to employment during the second marriage. (*Id.* at p. 126.) "[T]he community made a redeposit of a portion of Husband's accumulated contributions (Gov. Code, § 20012) for the period of the [first] marriage. Those contributions were converted into an annuity upon Husband's retirement. The obligation of the employer to contribute to the pension component, on the other hand, derived from Husband's service during the [first] marriage. Accordingly, the community had a claim only on the annuity component relating to the time period of the [first] marriage, and was entitled only to a pro tanto share of *that portion* of Husband's retirement allowance." (*Id.* at pp. 127-128, original italics.)

The redeposit of member contributions in *Sonne* is distinguishable from the purchase of military service credit in this case. In *Sonne*, the husband's right to 8.677 years of service credit was husband's separate property, because husband had obtained a *contractual right* to it during a previous marriage. (*Sonne*, *supra*, 48 Cal.4th at p. 125.) The community did not purchase the service credit by redepositing member contributions during husband's second marriage; instead, the redeposit was merely a "condition precedent" to receiving credit for previously rendered service. (*Ibid.*) In the present case, Timothy held no such contractual property interest in military service credit before he purchased it.[7] His payment for the credit was not simply a "condition precedent" to

[7] At the hearing regarding the characterization of the military service credit, the trial court focused the fact that, in *Sonne*, community funds were used only to redeposit the annuity portion of the retirement allowance, whereas the obligation of the employer to contribute to the pension component of husband's retirement fund derived from the husband's service during a previous marriage. (*Sonne*, *supra*, 48 Cal.4th at pp. 121-122, 127-128.) The court apparently assumed that the purchase of military service credit worked the same way, and that community funds were used only to purchase the annuity portion of Timothy's retirement benefits. The court concluded that "as the wife that had half of your community property invested in that buy-back, you [Julie] get one-half of the annuity—the value of the annuity. That's what the case [*Sonne*] says." As set forth above, the statutory scheme governing the purchase of military service credit contemplates that the cost of purchasing military service credit pursuant to section 21024 includes payment of both the employee and employer cost of the credit. (*Ante*, § II.B.)

obtaining previously earned credit under CalPERS, as it was in *Sonne*, because unlike in *Sonne*, Timothy did not previously have a right to such credit. (Cf. *ibid.*)

The Academy author advocating reimbursement relies on *In re Marriage of Lucero* (1981) 118 Cal.App.3d 836 (*Lucero*), which was cited favorably in *Sonne*. (*Sonne, supra*, 48 Cal.4th at p. 125.) In *Lucero*, husband withdrew retirement contributions from an employer retirement plan during the parties' marriage. (*Lucero* at p. 839.) Husband redeposited those funds after the parties separated, using his own separate funds. (*Ibid.*) The court characterized the pension rights held before redeposit as similar to the nonvested pension rights in *Brown*, because they amounted to "a nonvested pension subject to the single additional contingency of redeposit of retirement contributions previously withdrawn. Both are contingent contract rights, and thus both should be treated as property subject to division on dissolution of marriage." (*Lucero* at p. 843.) Because the right to redeposit contributions was a pension right that was attributable to employment during the marriage, husband's monthly retirement benefit was community property subject to division (after wife reimbursed husband for his separate property payment to reactivate the credit). (*Id.* at pp. 841-842.)

According to the Academy author advocating reimbursement, this case is analogous to *Lucero*, *supra*, 118 Cal.App.3d 836, except that community property was used to "activate" service credit owned by Timothy's separate estate, instead of the other way around (separate property being used to activate community-owned pension rights in *Lucero*). However, the pension rights that were "reactivated" in *Lucero* clearly were governed by a preexisting contract between the employee husband and his employer, meaning that they were contingent contract rights, and thus should be treated as property. Here, by contrast, 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.

In re Marriage of Spengler (1992) 5 Cal.App.4th 288, upon which Timothy relies, actually supports a finding that Timothy did not hold a property right to military service credit before he entered into an agreement to purchase the credit. *Spengler* held that the right to renew an employer-issued life insurance policy was not a property right, because although the renewal right had potential value, "in the absence of a right by the insured spouse to enforce that value, the renewal right is not 'property' within the meaning of the community property laws." (*Id.* at p. 299.) Likewise here, although Timothy's right to purchase military service credit had "potential value," he had no right to actually enforce that value until he entered into an agreement during the parties' marriage to purchase it. (*Ibid.*)

Both Timothy and the Academy author who advocates reimbursement also analogize Timothy's premarital interest in military service credit to a leasehold right held by husband in *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529. In *Joaquin*, husband executed a lease before marriage that included an option to renew, and husband exercised the option to renew the lease during the parties' marriage. (*Id.* at pp. 1531-1532.) The court held that the husband's exercise of his option to renew the lease "merely extended, or perpetuated, it for an additional five years," and the exercise of the option effected the transfer of a 10-year leasehold, relating back to the date the option was given. (*Id.* at p. 1534.) As such, the leasehold interest continued to be husband's sole and separate property. (*Ibid.*) The Academy author advocating reimbursement characterizes husband's purchase of military service credit as the "exercising [of] an option during marriage" that arose from "premarital sources," similar to what occurred in *Joaquin*. This argument is based on the premise that Timothy's right to purchase service credit was a property right before marriage, a premise that is far less clear than it was in *Joaquin*. In that case, the court noted that "an option is an indefeasible right in the optionee to have real property transferred to him upon his performance of a condition precedent (i.e., that which is required to exercise the option, manifesting acceptance of the optionor's offer). [Citation.] Once the optionee exercises the option, he has a right to specific performance of the transfer, relating back to the time the option was given.

[Citations.] Thus, the optionee's title to the property, at least in equity, was acquired at the time the option was originally given." (*Id.* at pp. 1532-1533.) Here, although Timothy's military service occurred before marriage, he held no such exercisable "option" until he was eligible to purchase military service credit through his employer. He had *no* right to purchase military service credit while he was actually on active duty, because he was not an employee of a CalPERS participant at that time. There was thus no right to which he "related back," as husband did in *Joaquin* when he renewed his lease.

Were this court to characterize Timothy's interest in his military service credit as his separate property based on the fact that his eligibility for credit depended on his premarital military service, this could lead to unintended consequences in other cases. For example, assuming that the right to military service credit becomes a property right upon the completion of military service, it would logically follow that this right would be characterized as community property if a service member performed all of his or her military service while married, then (while still married) began working for a CalPERS participant which provided its employees with the right to purchase credit pursuant to section 21024. If the CalPERS member divorced before actually purchasing military service credit, then later purchased credit with separate property after separation, the nonemployee spouse would arguably have a claim to that credit. This would be true even if the military service credit was purchased years after the parties divorced, and after the person eligible for credit had remarried.

In characterizing pension rights as separate or community property, "what is determinative is the single concrete fact of time. To the extent—and only to the extent—that an employee spouse accrues a right to property during marriage before separation, the property in question is a community asset." (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 183 (*Lehman*).) Once a 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." (*Ibid.*) Where a retirement benefit is payable pursuant to a contract entered into during parties' marriage before

separation, it is a community asset. (*In re Marriage of Drapeau* (2001) 93 Cal.App.4th 1086, 1093.) "For property characterization purposes, the critical question is when the right to [a] stream of income *accrued*." (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 736, original italics.)

Here, the military service credit was indisputably purchased *during* the marriage with community funds. We agree with Julie that because the contractual right to receive four additional years of retirement credit based on premarital military service was obtained during the marriage, it was "stamped a community asset from then on" (*Lehman*, *supra*, 18 Cal.4th at p. 183), notwithstanding the fact that the credit was based on service that predated the marriage.[8] (*Brown*, *supra*, 15 Cal.3d at p. 842; *In re Marriage of Drapeau*, *supra*, 93 Cal.App.4th at p. 1093; *In re Marriage of Benson*, *supra*, 36 Cal.4th at p. 1103 [presumption under Family Code that retirement plan acquired during marriage is community property].) We therefore reverse the judgment.

D. Allocation of Military Service Credit.

Having concluded that the trial court erred in characterizing Timothy's military service credit as his own separate property, the question remains how to allocate the credit. Julie argues that she is entitled to half of it (two years), to be placed in a separate

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8 Although we are aware of no California cases analyzing this issue, we note that courts in at least two other states have come to the same conclusion with respect to retirement plan service credit purchased during marriage based on military service prior to marriage. (*Lodrigue v. Lodrigue* (La.App. 2002) 817 So.2d 466, 470 [purchase occurring during existence of community based on service predating marriage is community property, based on presumption that property acquired with community funds is considered community property]; *Mahaffey and Mahaffey* (Or.App. 1989) 773 P.2d 806, 808 [credit acquired during marriage is a marital asset].) By contrast, a New York appellate court concluded that, because the characterization of a pension benefit is determined by the time period in which the credit was earned, military service credit purchased during a marriage based on service before the marriage was separate property. (*Valachovic v. Valachovic* (N.Y.App.Div. 2004) 9 A.D.3d 659, 660.) An Ohio appellate court (reviewing the issue as a factual one, under a deferential "weight of the evidence" standard of review) concluded that because the evidence in a dissolution proceeding established that military service accrued before marriage, the service credit purchased was separate property. (*Okos v. Okos* (Ohio App. 2000) 739 N.E.2d 368, 373.)

account pursuant to section 21294. (§ 21290 et seq.; Fam. Code, § 2610, subd. (a) [trial court shall make whatever orders are necessary or appropriate to ensure each party receives full community property share in any retirement plan].) However, this is inappropriate in light of the fact that installment payments for purchase of the credit will continue for several years. This means that, although Timothy entered into an irrevocable contract to purchase the four years of service credit using community funds during the parties' marriage, community funds were used to make only a portion of the necessary payments, calculated by the court-appointed expert below as 34.44 percent (124 out of the total 360 required payments for the service credit).

The Academy author who advocates apportionment of the separate and community property interests[9] argues that employing the "time rule" here would be appropriate, and analogizes this case to *Lehman*, *supra*, 18 Cal.4th 169. In *Lehman*, husband started to accrue a right to retirement benefits two years after the parties married, when he began to participate in the retirement plan offered by Pacific Gas and Electric Company (PG&E). (*Id.* at pp. 174-175.) The couple separated in 1977, and obtained a final judgment of dissolution in 1979. (*Id.* at p. 175.) Fourteen years later, in 1993, PG&E offered an enhanced retirement program, a voluntary program in which husband participated. (*Ibid.*) Under the program, husband was credited with three putative years of service. (*Ibid.*) By retiring early, husband received enhanced retirement benefits (based on those three years) of $708.91 per month. (*Ibid.*) The 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 the latter's retirement as enhanced." (*Id.* at p. 179.) The court noted, however, that "[t]he fact that a nonemployee

9 The author who advocates apportionment argues that the right to purchase military service credit was Timothy's separate property, a position we reject for the reasons set forth above. The Academy author acknowledges, however, that the military service credit is "a divisible community asset to the extent that the community acquired a benefit under that contract during the marriage." (See *In re Marriage of Branco* (1996) 47 Cal.App.4th 1621, 1623-1624, 1627, 1629 [community entitled to interest in property held separately by wife before marriage, because community contributed toward purchase of property through new loans using community funds].)

spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest in the latter's retirement benefits as enhanced does *not* mean that the enhancement is a community asset *in its entirety*." (*Id.* at p. 180, original italics.)

The *Lehman* court held that it was not an abuse of discretion for the trial court to apportion the retirement benefits between the community property interest of the employee spouse and the nonemployee spouse, and any separate property interest of the employee spouse alone, pursuant to the time rule. (*Lehman*, *supra*, 18 Cal.4th at p. 187.) "The use of the time rule is not unreasonable when the 'amount of the retirement benefits is substantially related to the number of years of service.' [Citation.] That is the case here. Reflecting Husband's length of service of 17.39 years during marriage before separation and his length of service of 32.67 years in total, the community property interest in Husband's retirement benefits as enhanced was fixed at 53.23 percent and his separate property interest was fixed at 46.77 percent." (*Ibid.*) The Academy author advocating apportionment argues that *Lehman* may be more on point here than *Sonne*, because the three years of "fictive service" used in the employer's enhancement formula in *Lehman* "merely constituted a device that would allow the retirement to be enhanced."

We conclude that it is appropriate to remand the case to the trial court for a determination of the proper allocation in the first instance. "The requirement is that the apportionment of retirement benefits between the separate and community property estates must be reasonable and fairly representative of the relative contributions of the community and separate estates. [Citations.] The basis for apportionment, however, is a matter committed to the judicial discretion of the trial court. [Citations.] The discretion to be exercised is that of the trial court, not a reviewing court. [Citation.]" (*In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 11.) It 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.[10] (E.g., *In re Marriage of Skaden*, *supra*, 19 Cal.3d at pp. 688-689 [because trial court incorrectly decided that termination benefits were not community property, lower court did not address questions of present valuation or other issues; case remanded because proper division should be left to sound discretion of trial court]; *In re Marriage of Drapeau*, *supra*, 93 Cal.App.4th at pp. 1095, 1099 [case remanded to trial court to apportion early retirement benefit consistent with appellate opinion, which reversed lower court's characterization of the benefit]; see also *Lehman*, *supra*, 18 Cal.4th at p. 180 [distinguishing characterization and apportionment].)

III.
DISPOSITION

Timothy's request for judicial notice is denied. The judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with our opinion. Appellant Julie Green shall recover her costs on appeal.

_____
Sepulveda, J.*

We concur:

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Ruvolo, P. J.

_____
Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

10 The Academy author advocating reimbursement states that it may be appropriate to ask Julie whether she wants reimbursement, rather than waiting until Timothy retires to see how much her share of the service credit may be worth at that time, an option that may be considered on remand.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Honorable Charles B. Burch
Counsel for Appellant:	April Rose Sommer
Counsel for Respondent:	Tarkington, O'Neill, Barrack & Chong, Robert A. Roth
Counsel for Amicus Curiae Northern California Chapter of the American Academy of Matrimonial Lawyers, upon the request of the First District Court of Appeal	Whiting, Fallon, Ross & Abel, Ann Fallon; Office of Barbara A. DiFranza, Barbara DiFranza,