In the Supreme Court of the State of California

RANDY VALLI
Appellant
vs.
FRANKIE VALLI
Respondent

OPENING BRIEF ON THE MERITS

ISSUES

Husbands and wives often acquire property during marriage in the name of one spouse or the other. Examples include: real property[1], vehicles[2], and/or insurance policies.[3] They do so for many reasons, such as to make it easier or possible to obtain a loan; for convenience; because a seller or broker fills out the paperwork in that fashion; or for no particular reason at all. Should the fact that title is listed in one party's name create an exception to the presumption

[1] See, e.g., *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578; *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336; *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624; *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176; *et al.*
[2] See, e.g., *In re Marriage of Buie and Neighbors* (2009) 179 Cal.App.4th 1170; *In re Marriage of Lucas* (1980) 27 Cal.3d 808; *et al.*
[3] See footnote 71 below.

fundamental to California marital law, namely that property acquired during marriage is community property, absent evidence that the parties intended for title to reflect actual ownership?[4]

Is the fiduciary duty implicated when community funds are used to acquire property in the name of one spouse during marriage? If so, on whom does the burden fall to overcome the presumption of undue influence? Must the benefiting party overcome the presumption or should the prejudiced party prove the existence of undue influence?

If community monies are used to acquire an asset during marriage from a third party in the name of one of the spouses, has there been a transmutation of those monies? In other words, if community property is used to acquire an asset titled in one spouse's name, is a Family Code section 852 writing required? Or, is this an exception to *Estate of MacDonald's* requirement that there be a writing "which expressly states that the characterization or ownership of the property is being changed"? [5]

All of these issues were directly impacted by the decision of the Second District Court of Appeal, hereafter referred to as "the Opinion."[6]

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[4] Fam. Code §760.
[5] *Estate of MacDonald* (1990) 51 Cal.3d 262, 272.
[6] B222435.

INTRODUCTION

This is a marital dissolution action between Frankie and Randy Valli. At trial, the Los Angeles County Superior Court determined that a $3.75 million life insurance policy with a cash value of $365,032 was community property, and awarded the policy to Frankie at that value. The court found that the policy was community property because the policy was acquired during marriage and the premiums were paid with community funds. Randy appealed, arguing that the policy was her separate property because she had been named the owner of the policy.

During marriage, Randy suggested to Frankie that they obtain the policy when he was in the hospital suffering from a heart condition. Neither party presented evidence, other than the fact that Randy was named the owner of the policy, that Frankie intended to make a gift of either the policy itself or its cash value which accumulated rapidly during marriage. The only evidence presented about the acquisition of the policy was that Frankie acted on Randy's suggestion to purchase life insurance; he had no plans on separating from her; and wanted to take care of her and their children if he were to die.

The Court of Appeal reversed the Superior Court on a straight presumption-of-title rationale. Its holdings, or the implications of them, are:

- Because Randy was named the owner of the policy, Frankie had the burden to prove by clear and convincing evidence that she was not the sole owner of the policy.
- Because the policy was originally acquired in Randy's name alone, the community property presumption did not apply.
- Because the parties acquired the policy from a third party (the insurance company), Randy owed no fiduciary duty to Frankie in connection with the transaction.
- Because the policy was acquired from a third party, the protections of Family Code section 852 did not apply.
- The policy's substantial cash value was Randy's separate property and all of the premium payments made with community funds during marriage, after the policy had been acquired, were deemed to be gifts to her.
- The presumption of undue influence did not arise, even though Randy would receive a substantial asset which was acquired with community funds without payment of any consideration to Frankie.
- Frankie had the burden of proving that Randy acquired title to the policy by undue influence.

The opinion resulted from confusion as to the relationship between the Evidence Code section 662 title presumption and the presumption that property acquired during marriage is community property. The court did not apply the principle that, if a transaction involving community property unfairly benefits one spouse, that spouse has a three-pronged burden of rebutting the presumption of undue influence.

The Opinion was incorrectly decided and should be reversed. Likewise, the Opinion relied upon the erroneous holdings in *Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, which should be examined and disapproved.

STATEMENT OF THE FACTS

Eighteen months before the parties separated, Frankie acquired the $3.75 million life insurance policy insuring his life.[7] Randy testified that she suggested getting a policy on Frankie's life while he was in the hospital with heart problems, and they agreed to obtain a life insurance policy "to protect [her] future."[8] She testified that Frankie told her that he was "going to make [her] the owner."[9]

When Frankie obtained the policy, he had no plans to separate from Randy.[10] He had medical problems and wanted to be certain that his family would be taken care of and his children could go to college.[11] The reason they purchased the policy was to provide financial security for the family when Frankie died.[12] As Randy put

[7] RT 181:15-20; RT 244:15-17 & 293:4-11; JA 20-24 & 56:7-10.
[8] RT 728:18-22 & 729:4-9.
[9] RT 728:23-28.
[10] RT 181:21-23.
[11] RT 181:24-182:2.
[12] JA 56:9-10.

it: "[The purpose was] to prepare for my future in case something did happen to Frankie."[13]

There was no evidence of any agreement or understanding as to the policy's character. The cash value of the policy was $365,032.[14] Randy was named "the owner."[15] Randy paid no consideration to Frankie to be listed as the owner of the policy.[16]

Barry Siegel has been the business manager for Frankie Valli and The Four Seasons musical group since 1994.[17] His office made the premium payments on the policy. Between March 7, 2003, when the first premium payment was made and December 3, 2008, the time of trial, a total of $512,675.75 in payments were made on it.[18] Frankie paid them all.[19]

The parties offered little testimony about the policy. Frankie testified that he did not want Randy to be the beneficiary of a policy on his life after separation because he wanted the death benefits to go to his children.[20] He testified that he

[13] RT 729:4-9.
[14] RT 245:12-18.
[15] RT 247:24-248:1.
[16] RT 450:10-15.
[17] RT 289:10-25.
[18] RT 291:5-292:5, 293:9-12; Trial Exhibit 52 [JA 155-158].
[19] RT 188:13-20.
[20] RT 188:3-12.

had established a child support trust to secure his child support obligation.[21] He was concerned about the estate taxes his children will have to pay upon his death. He would like his children to be able to keep the Four Seasons music catalog intact as it will be an ongoing source of income for them. The insurance that he obtained was part of the plan to help keep the catalog in the family after his death.[22]

At one point during the trial, the court asked if everyone agreed that the policy was community property.[23] Randy's attorney replied: "depending on how the evidence goes, it may be separate property, depending on the reasons why – that he acquired the policy and put her name on it."[24]

Randy offered no evidence as to why she was listed as the owner rather than just the beneficiary. She offered no testimony of any substance as to their discussions, her actions, or anything related to the acquisition beyond that it was a joint decision and that: "[The purpose for obtaining the policy was] to [protect/prepare for] my future in case something did happen to Frankie."[25] She also presented no evidence that Frankie understood that, by naming her the policy owner, he was making a gift to her of the policy's cash value and, more

[21] RT 866.
[22] RT 184:28-185:11.
[23] RT 450:22-451:3.
[24] RT 451:4-8.
[25] RT 728:5-729:9.

importantly, the right to assign the $3.75 million benefit that would be generated on his death.

The trial court applied the community property presumption and held that the policy was a community asset, awarded it to Frankie and ordered him to equalize the division of this asset by paying Randy for one-half of its cash value. The Court of Appeal reversed on a straight presumption-of-title analysis.

ARGUMENT

I.
EVIDENCE CODE SECTION 662 SHOULD HAVE NO ROLE IN CHARACTERIZING COMMUNITY PROPERTY

Title alone does not trump the community property presumption.

A. Dueling Presumptions:

The acquisition of an asset during marriage with community monies in the name of one of the spouses immediately invokes two competing presumptions. The first presumption is stated in Family Code section 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."

And, Evidence Code section 662:

> "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

Which should control? Should Randy be presumed to hold the policy on behalf of the marital partnership as community property under section 760 or on behalf of herself as separate property under section 662?

B. Rules of Statutory Interpretation: It is black letter law that when two presumptions conflict, the more specific one controls. Code of Civil Procedure section 1859 states:

> "THE INTENTION OF THE LEGISLATURE OR PARTIES. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

In *Rose v. State* (1942) 19 Cal.2d 713, 723-724, the rule was stated as follows:

> "It is well settled … that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates."[26]

[26] Restated in *Rader v. Thrasher* (1962) 57 Cal.2d 244, 252.

This rule of statutory construction was discussed in an analogous family law context in *Marriage of Delaney*[27] where the issue was the conflict between the statutory presumption of title and the common law presumption of undue influence when one spouse benefits from a marital transaction. In *Delaney*, the husband, who suffered from learning disabilities, signed a quitclaim deed conveying his separate property residence to himself and his wife as joint tenants. In the divorce, the wife argued that, pursuant to Evidence Code section 662, the husband had to overcome the presumption of title by clear and convincing evidence. The Court of Appeal disagreed, noting that there was a clear conflict between that statute and the common law presumption of undue influence embodied in Family Code section 721 resulting from a marital transaction benefitting one of the parties.

In resolving the conflict between these two statutes, the Court of Appeal looked to the rule that: "where two presumptions are in conflict, the more specific presumption applicable in particular cases must control over the more general presumption arising under ordinary circumstances"[28] and held "the presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title."[29]

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[27] *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991.
[28] Id. at p. 997; see also *McKay v. McKay* (1921) 184 Cal. 742, 746-747.
[29] *In re Marriage of Delaney, supra*, 111 Cal.App.4th at p. 997.

Similarly, in *Marriage of Fossum,* the Court stated: "the form of title presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other."[30]

The same is true for Family Code section 760. The conflicting presumption of title is a general presumption that applies in a wide variety of contexts. Its primary purpose is the enhancement of stability of titles and the protection of *bona fide* purchasers for value.[31]

Family Code section 760's community property presumption is far more specific because it applies only in the unique circumstances of a marital relationship.[32] Thus, when the two presumptions are in conflict, as they inevitably will be in a marital context, the community property presumption should prevail over the title presumption.

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[30] *In re Marriage of Fossum, supra,* 192 Cal.App.4th at p. 345.
[31] *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 294; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 185.
[32] *In re Marriage of Haines, supra,* 33 Cal.App.4th at pp. 287-288.

C. The Title Presumption Should Not be Used to Characterize Marital Property:[33]

Relying on record title to determine the character of marital property invariably shifts the burden of proof to the non-titled spouse and turns the presumption of community property upside down. If this were the law, a spouse could avoid our community property laws by having an asset titled in his or her name.

The most basic rule of our community property system is that all property acquired during marriage is community property unless it comes within a specific exception;[34] the major exceptions to the basic community property rule are those relating to separate property.[35] This is embodied in Family Code section 760 which provides:

> "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*."[36]

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[33] Adopting the argument of an amicus letter written in support of review by Kim Cheatum, CFLS, San Diego.
[34] *Meyer v. Kinzer and Wife* (1859) 12 Cal. 247, 251-252; *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 448.
[35] *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 289.
[36] Emphasis added.

The very language of this statute inevitably and irremediably conflicts with the common law presumption of title.

1. "All Property" Means Untitled and Titled Property In Either Party's Name: "All property" is all-inclusive, and includes property by which ownership is evidenced by title (e.g., real estate) and property for which there is no title (e.g., personal property). Moreover, a "married person" is in the singular. Hence, the community property presumption applies to the universe of all property, both untitled and titled, acquired during marriage by one spouse or both spouses.

2. "During Marriage" Means "Time" of Acquisition (Not Evidence of Title) Triggers the Community Property Presumption: Perhaps the most basic characterization factor is the time when property is acquired in relation to the parties' marital status.[37] "The character of property as separate or community is determined at the time of its acquisition." (*See v. See* (1966) 64 Cal.2d 778, 783.)

"The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved." *(Meyer v. Kinzer, supra*, 12 Cal. at p. 252.) As to these exceptions, "[t]he burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion and fraud." *(Id.* at pp. 253-254.) If "time" is critical, it follows that "title" is not.

[37] *In re Marriage of Haines, supra,* 33 Cal.App.4th at 291.

3. "Title" In Either Party's Name Is Irrelevant: "The law ... recognizes a partnership between the husband and wife as to the property acquired during marriage." *(Packard v. Arellanes* (1861) 17 Cal. 525, 537.) And either partner has management authority over partnership (or community) property, both personal (Family Code, section 1100, subd. (a)) and real (Family Code, section 1102, subd. (a)). Thus, each partner stands in a representative relationship to the marital partnership.

"To the community all acquisitions by either, whether made jointly or separately, belong. *No form of transfer* or mere intent of parties *can overcome this positive rule of law." (Meyer v. Kinzer, supra,* 12 Cal. at p. 251 [emphasis added].) "The [community property presumption] prescribes the effect of the acquisition of property by either spouse, and its operation cannot be defeated or evaded by the form of the conveyance, or the intention of the husband, in taking it in the name of his wife. In every form the community character of the property continues." (*Id.* at p. 255.) "Such status [of property acquired during marriage as community or separate] is not dependent on the form in which title is taken." *(In re Marriage of Buol* (1985) 39 Ca1.3d 751, 757.)

Just as *Marriage of Haines* decreed that Evidence Code section 662 has no applicability “where there is a conflict between the common law presumption in favor of title as codified in section 662 and the presumption that a husband and

wife must deal fairly with each other," this Court should decree that the title presumption has no applicability where it conflicts with the fundamental community property presumption.

D. There Is No Presumption Stemming From Property Acquired By a Married Person in His or Her Own Name During Marriage:[38] The Family Code does contain a presumption of title that aids the community property presumption, namely Family Code section 2581:

> "For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
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> "(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> "(b) Proof that the parties have made a written agreement that the property is separate property."

The joint title presumption is consistent with the community property presumption. Property acquired by the parties in joint title is presumptively community property under Family Code section 760 because the property was

[38] Adopting the arguments of Professor Charlotte K. Goldberg, Loyola Law School, Los Angeles.

acquired during marriage. Section 2581 strengthens that presumption by requiring written evidence to overcome it.

There used to be a separate property presumption regarding property titled in a wife's name. That was before there was "equal management and control" of community property. At that time, when a husband was the sole manager of community funds, there was a presumption that when he took community funds and acquired property and put the title in his wife's name, it was presumed to be her *separate* property. However, that presumption was abolished as of January 1, 1975, when equal management and control of community property went into effect.[39] Since then, title in the husband's name or the wife's name is treated the same way: an acquisition in one spouse's name is presumed to be community property, under the general community property presumption.[40]

Nevertheless, both *Marriage of Brooks & Robinson* and the Court of Appeal in this case have attempted to resurrect the presumption of sole title.

E. No Societal or Policy Interest Is Advanced by Permitting Evid. Code §662 To Trump Fam. Code §760: In concluding that the presumption of title could never be applied where it conflicted with the presumption of undue influence

[39] Family Code §803.
[40] *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 848, n.8 [Dictum].

resulting from a transaction benefiting one spouse, *Marriage of Haines* relied heavily on the unique nature of the marital relationship and the historical and statutory protections afforded to it:

> "It is the public policy of this state 'to foster and promote the institution of marriage.' (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 683.) '[T]he structure of society itself largely depends upon the institution of marriage . . . ." (Id. at p. 684.)"[41]

In part because of this, we have the fundamental presumption that property acquired during marriage by either spouse other than by gift or inheritance is community property unless traceable to a separate property source. The burden of proof to rebut this presumption is on the party contesting community property status.[42] This was explained in *Marriage of Baragry*, as follows:

> "Property acquired during a legal marriage is strongly presumed to be community property. [Citations.] That presumption is fundamental to the community property system [citation], and stems from Mexican-Spanish law which likens the marital community to a partnership. Each partner contributes services of value to the whole, and with certain limitations and exceptions both share equally in the profits."[43]

What societal policy is advanced by applying the presumption of title to the characterization and division of marital property? The answer is none. Quoting the Law Revision Comment to section 662, *Marriage of Haines* stated:

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[41] *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 287.
[42] *In re Marriage of Mix* (1975) 14 Cal.3d 604, 611-612.
[43] *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 448.

> "The presumption is based on promoting the public 'policy . . . in favor of the stability of titles to property.' (See §605.) 'Allegations . . . that legal title does not represent beneficial ownership have . . . been historically disfavored because society and the courts have a reluctance to tamper with duly executed instruments and documents of legal title. [FN.] Section 662 is concerned primarily with the stability of titles, which obviously is an important legal concept that protects parties to a real property transaction, as well as creditors. Here, however, our focus is on characterization of marital property as effected by a transmutation by quitclaim deed. The issue is how property should be divided between spouses upon dissolution. This case does not involve third parties nor does it place at risk the rights of a creditor. In any event, we note the law regarding transmutations makes reference to third party rights and affords protections against fraud in transmutations as follows: (1) a transmutation is subject to the laws governing fraudulent transfers (former Civ. Code, §5110.720 [Fam. Code, §851]); and (2) a transmutation of real property is not effective with respect to third parties that do not have notice of the transmutation unless it is recorded (former Civ. Code, §5110.730, subd. (b) [Fam. Code, §852, subd. (b)]). Thus, concerns of stability of title are lessened in characterization problems arising from transmutations that do not involve third parties or the rights of creditors.'"[44]

Not only does the Opinion fail to advance any legitimate public policy, it runs counter to many. It encourages perjurious (or at least highly questionable) testimony as to the parties' intentions and understandings in acquiring property, rewards sharp practice by one spouse in acquiring property in his or her sole name, erodes the fiduciary duty between spouses

[44] *In re Marriage of Haines, supra,* 33 Cal.App.4th at pp. 294-295.

by putting the burden on the disadvantaged party to establish undue influence rather than on the benefitted party to disprove it, and flips the community property presumption 180 degrees.

F. Conclusion: Property acquired during marriage is presumed community, and the burden is squarely on the party claiming that it is separate to prove that claim by a preponderance of evidence.[45] The application of Evidence Code section 662 reverses that presumption. Suddenly, without any evidence that the parties intended that property acquired in one party's name alone be that person's separate property, the burden is now on the community to prove that it has an interest in property acquired during marriage with community monies – and to do so by clear and convincing evidence. There is no societal interest furthered by such a rule and, in fact, it runs counter to the very essence of the community property system.

This is not to say that title is irrelevant in determining character. It is certainly a factor to be considered among others in determining whether the presumption of community property has been rebutted. But there should be no separate property presumption stemming from title requiring a heightened burden of proof to overcome it.

[45] *In re Marriage of Ettefagh, supra,* 150 Cal.App.4th at p. 1591.

II.
BROOKS & ROBINSON SHOULD BE DISAPPROVED BECAUSE IT EMPHASIZES THE FORM OF TITLE OVER THE COMMUNITY PROPERTY PRESUMPTION

In *Brooks & Robinson*, the parties purchased a home in 2000 using the husband's earnings for the down payment. Their real estate agent recommended that title be taken solely in wife's name because it would be easier to obtain financing. Husband agreed, although he was unaware that she took title as "a Single Woman." He made the payments on the deeds of trust, which were also solely in wife's name.

In 2005, the parties separated and husband continued to live in the home with the parties' seven-year-old son. As the home was in foreclosure, wife contacted ECG, a business that purchases distressed properties. ECG purchased the residence from her and she then filed a petition for dissolution of marriage. ECG evicted husband, who joined ECG in the dissolution case seeking to set aside the sale and cancel the deed. The trial court found that ECG was a *bona fide* purchaser and took title free and clear of husband's claims. He appealed and the Court of Appeal affirmed.

As between the husband and the *bona fide* purchaser for value, the Opinion correctly states the law relying on the policy favoring stability of title. However, in

the second half of the Opinion, the Court ventured on to decide that as between the husband and the wife, who was not even a party in the appeal, that husband had no interest as a matter of law in the residence that he had paid for with his community wages because title had been taken in her name alone for the purpose of acquiring a loan. For reasons discussed below, this portion of the Opinion should be disapproved.

The portion of the Opinion discussing the legal effect of husband's permitting wife to take title in her name alone might well be *dictum* since the case was properly decided based on ECG being a *bona fide* purchaser.

The court of appeal went on to hold that regardless of ECG's standing, husband had no interest in the property as a matter of law based on a straight presumption-of-title approach:

> "According to the 'form of title' presumption, the description in a deed as to how title is held is presumed to reflect the actual ownership interests in the property. [Citations.] This common law presumption is codified in [Evid. Code §662], which provides: '"The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."' [Citation.] The presumption is based 'on promoting the public "policy . . . in favor of the stability of titles to property." [Citation.] "Allegations . . . that legal title does not represent beneficial ownership have . . . been historically disfavored because society and the courts have a reluctance to tamper with duly executed instruments and documents of legal title." [Citation.]' (Ibid.) Thus, 'in the absence of any showing to the contrary, the status

> declared by the instrument through which [the parties] acquired title is controlling.'"[46]

The Court of Appeal rejected husband's argument that since wife acquired title during marriage, it was presumed community property. Relying on *Marriage of Lucas*,[47] the Court of Appeal held that the affirmative act of specifying title takes the property out of the general community property presumption:

> "[T]he mere fact that property was acquired during marriage does not, as [husband] argues, rebut the form of title presumption; to the contrary, the act of taking title to property in the name of one spouse during marriage with the consent of the other spouse effectively removes that property from the general community property presumption. In that situation, the property is presumably the separate property of the spouse in whose name title is taken."[48]

Husband argued that *Lucas* had been legislatively overturned, but the Court of Appeal disagreed, noting that this holding had survived, quoting *Lucas*, as follows:

> "*It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption.*"[49]

Since husband was challenging record title, *Brooks* held that his burden was to overcome title by clear and convincing evidence of an "agreement or understanding" to the contrary:

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[46] *In re Marriage of Brooks & Robinson, supra*, 169 Cal.App.4th at pp. 184-185.
[47] *In re Marriage of Lucas* (1980) 27 Cal.3d 808.
[48] *In re Marriage of Brooks & Robinson, supra*, 169 Cal.App.4th at pp. 186-187.
[49] Id. at p. 186 (emphasis in original).

> "The presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended."[50]

As explained in the amicus letter by the Association of Certified Family Law Specialists advocating review, the Court of Appeal misinterpreted the italicized statement in *Lucas*. *Lucas* dealt with a situation in which the parties had acquired real property during marriage in joint tenancy form. The issue was whether the parties had an agreement or understanding that notwithstanding the form of title the house would be the wife's separate property because she paid the entire down payment with her separate funds. *Lucas* stated that appellate courts "have taken conflicting approaches to the question of the proper method for determining the ownership interests in a residence purchased during the parties' marriage with both separate and community funds." In discussing their varied approaches, it noted that in 1965, the Legislature added the following provision to Civil Code section 164:

> "'[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.'"

In other words, *Lucas* dealt with the family law joint title presumption, which is now Family Code section 2581. It concluded that "[i]n the present case there is no

[50] Id. at p. 189.

evidence of an agreement or understanding that [wife] was to retain a separate property interest in the house," and therefore the family law joint title presumption prevailed. *Lucas* stated:

> "The presumption arising from the form of title is to be distinguished from the general presumption set forth in Civil Code section 5110 that property acquired during marriage is community property. *It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption.*"[51]

In stating "the presumption arising from the form of title," *Lucas* was referring to the family law joint title presumption; however, the *Brooks & Robinson* and now *Valli* courts quote this language as if it were referring to the general civil title presumption of Evidence Code section 662 -- which it clearly was not. Nothing in *Lucas* supports the argument that by specifying title to be taken in one spouse's name alone, the parties intended that it would be that spouse's separate property.

Brooks & Robinson held that the non-titled spouse must prove an agreement or understanding to overcome the presumption of title. This is a remnant of the *Lucas* era when oral agreements between spouses were sufficient to overcome record title. However, *Lucas* did not require that these oral agreements be proved by "clear and convincing evidence." In fact, that term cannot even be found in the

[51] *In re Marriage of Lucas, supra,* 27 Cal.3d. at pp. 814-815 (emphasis added).

opinion. Cases that interpreted *Lucas* found that mere "understandings"[52] or even inferences of understandings[53] were sufficient to overcome record title. This is a far cry from "clear and convincing," which has been defined as proof by evidence that is clear, explicit and unequivocal; proof that is so clear as to leave no substantial doubt; proof that requires a finding of high probability; or proof that is sufficiently strong to command the unhesitating assent of every reasonable mind.[54] There is nothing in *Lucas* or its progeny that supports requiring this level of proof to establish that an asset acquired during marriage with community property is presumptively anything but community property. And, by requiring such a heightened level of proof, both *Brooks & Robinson* and *Valli* conflict with *Lucas*.

Brooks & Robinson was simply wrongly decided. There was no evidence that the residence was intended to be anything other than community property. It has now led to *Valli* and the clearly erroneous finding that the act of naming one spouse as owner of a $3.75 million life insurance policy results in the unintended transmutation of the asset from community to separate property. The holding applies to any titled asset, including real property, annuities, insurance policies,

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[52] *In re Marriage of Scherr* (1986) 177 Cal.App.3d 314 [based on finding of substantial evidence].
[53] *In re Marriage of Mahone* (1981) 123 Cal.App.3d 17, 23.
[54] See *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193; *Tannehill v. Finch* (1986) 188 Cal.App.3d 224; *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 386.

investment accounts, other financial accounts of all types, automobiles, etc. Yet we know that spouses do not necessarily intend to change property from community property to separate property by titling property in the other party's name. Title is often taken in one spouse's name for convenience, not to define ownership. *Brooks & Robinson* wrongly elevated title held for convenience over the fundamental principles of our community property system.

III.
THE OPINION CONFLICTS WITH EXISTING LAW BY PUTTING THE BURDEN ON FRANKIE TO ESTABLISH UNDUE INFLUENCE RATHER THAN ON RANDY TO REBUT IT

Frankie raised the breach of fiduciary duty argument at trial in response to Randy's form of title argument. He argued that a presumption of undue influence would arise if the policy were characterized as Randy's separate property because she did not pay any consideration for her sole ownership of the policy, which had been purchased with community funds. Frankie argued that the form of title presumption was trumped by the undue influence presumption.[55] The trial court impliedly agreed, but the Court of Appeal did not.

[55] RT 961:2-11.

A. The Presumption of Undue Influence Arose by Operation of Law:

The "confidential relationship [between spouses] imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."[56] This has resulted in a rule that when an interspousal transaction advantages one spouse over the other, a presumption of undue influence arises.[57]

In re Marriage of Lange broadly defined the type of benefit that triggers the presumption of undue influence:

> "[A] fiduciary obtains an advantage if his position is improved, he obtains a favorable opportunity, or he otherwise gains, benefits, or profits. [Citation.] The burden of dispelling the presumption of undue influence rests upon the spouse who obtained an advantage or benefit from the transaction."[58]

This specifically applies to transfers of property without consideration:

> "The word 'advantage,' in this context, plainly does not mean merely that a gain or benefit has been obtained. Taking 'advantage of another' necessarily connotes an unfair advantage, not merely a gain or benefit obtained in a mutual exchange. * * * *Cases . . . involving property transfers without consideration, necessarily raise a presumption of undue influence*, because one spouse obtains a benefit at the expense of the other, who receives nothing in return. The

[56] Fam. Code §721(b).
[57] *Estate of Cover* (1922) 188 Cal. 133, 143-144; *In re Marriage of Haines, supra*, 33 Cal.App.4th at p. 287.
[58] *In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364.

> advantage obtained in these cases, too, may be reasonably characterized as a species of unfair advantage."[59]

Randy was definitely advantaged to Frankie's detriment.

- She requested that he buy the policy.[60]
- He purchased it with community funds.[61]
- The premiums were paid on the policy with community funds through the date of separation.[62]
- Between March 7, 2003, when the first premium payment was made and December 3, 2008, $512,675.75 in payments were made on it.[63]
- The policy had a cash value of $365,032 at time of trial.[64]
- Randy gave Frankie no consideration for the policy to be characterized as her separate property.[65]
- Randy will receive $3.75 million in death benefits on Frankie's life with virtually no insurable interest.[66]

Despite this, the Opinion states: "No such advantage was obtained here."[67]

In other words, the Opinion found that Randy did not benefit from being made the owner of the policy and thus the presumption of undue influence was not triggered. This is contrary to *Lange* and other cases that have defined "unfair advantage"

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[59] *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 731 (emphasis added).
[60] RT 728:5-22.
[61] JA 875; RT351:12-15.
[62] JA155; RT 291:9-26.
[63] RT 291:5-292:5, 293:9-12; Trial Exhibit 52 [JA155-158].
[64] JA 875.
[65] RT 450:10-15.
[66] Frankie has provided a child support trust and Randy's spousal support is only $5,000 per month.
[67] Opinion, p.10 [page citations are to Slip Opinion].

broadly. It is also contrary to common sense. She will be the owner of a $3.75 million dollar policy on her former husband's life with an immediate cash value of $365,032. That is a very substantial advantage by anyone's definition.

Since, under the Opinion, Randy receives an unfair advantage by having the policy deemed to be her separate property even though it was acquired with community funds, the presumption of undue influence arose. Thus, as a matter of law, she was required to rebut that presumption or see the policy characterized as community.[68]

B. Randy Failed to Rebut the Presumption of Undue Influence: Since Randy benefitted from a marital transaction, the presumption of undue influence attached as a matter of law and the burden was on her to introduce evidence to overcome it by a preponderance of evidence.

> "When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action 'was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of' the transaction."[69]

[68] *In re Marriage of Delaney, supra,* 111 Cal.App.4th at p. 998.
[69] *In re Marriage of Burkle, supra,* 139 Cal.App.4th at pp. 738-739.

This is important. Since Randy was the advantaged spouse, to overcome the presumption of undue influence it was her burden to satisfy a three-prong test by establishing:

1) The transaction was freely and voluntarily made;

2) With a full knowledge of all the facts; and

3) With a complete understanding of the effect of the transfer.

She arguably proved that the transaction was free and voluntary. However, she offered no evidence to establish that Frankie had "full knowledge of the facts" and a "complete understanding" that by naming her the owner he was making a gift to her for all purposes of 100% of the premiums, the cash value, and death benefits.[70]

There is absolutely no evidence in the record that Randy or anyone else explained to Frankie the significance of naming Randy the owner of the policy. There is absolutely no evidence that he (or anyone else) understood that naming Randy as the "owner" was effectuating a transmutation of the policy from community property (as provided for in an unbroken line of cases going back

[70] See *In re Marriage of Burkle, supra,* 139 Cal.App.4th at p. 738-739; *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 55; *In re Marriage of Fossum, supra*, 192 Cal.App.4th at p. 344; *et al*.

almost 100 years[71]) to her separate property, along with 100% of all premium payments thereafter made with community property.

Since Randy benefited, it was her burden to overcome the presumption of undue influence which arose as a matter of law. The Opinion, however, put the burden on Frankie to prove undue influence. It held: "There is not substantial evidence of undue influence."[72] In other words, Frankie had to prove it. *That is not the test*. Undue influence was presumed as a matter of law. It was Randy's burden to rebut that presumption and she did not do so. The Opinion placed the burden on the wrong party, contrary to every published opinion discussing the presumption of undue influence. Since Randy offered no evidence as to points (2) and (3), how could she overcome the presumption? She couldn't – and didn't. The Opinion misapplied settled law.

C. Fiduciary Duty Applies to All Transactions During Marriage:

Randy argued that the presumption of undue influence could not have arisen because she owed no fiduciary duty to Frankie in taking ownership of the policy. Citing Family Code section 721, she claimed that the fiduciary duty which spouses

[71] See 11 Witkin, *Summary* 10th ed. (2005) Comm.Prop, §47, p. 578, and cases cited therein.
[72] Opinion, p. 10.

owe each other only applies "in transactions between themselves."[73] Randy stated: "This was not a transaction 'between' Frankie and Randy. It was a transaction with a third party. . . ."[74] Accordingly, she argued, the undue influence never came into play, so the form of title presumption should be allowed to operate.[75]

The Opinion did not resolve whether the duty applied, finding instead that Randy prevailed whether it did or not.[76]

The answer is that the fiduciary duty applies to all dealings between spouses, or between one of them and a third party, concerning property. Family Code section 721 provides:

> (a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.
>
> (b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

[73] AOB 13.
[74] *Id.*
[75] AOB 13-14.
[76] Opinion, p. 10.

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> (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property. (Family Code §721 (emphasis added).)

Randy is incorrect in asserting that the fiduciary duty only applies to contractual agreements between spouses. If her position were correct, there would be no breach of fiduciary duty if a spouse sold a community asset to a third party without the consent of the other spouse, since it was not a "transaction between spouses."[77] Likewise, either spouse could acquire separate property during marriage using community property by the simple act of taking title in his or her name alone, so long as the other spouse is "aware" of the transaction.

The last sentence of Family Code section 721, subdivision (b), "is clear, prohibiting either spouse from taking 'any unfair advantage of the other.'"[78] The fiduciary duty applies not only to interspousal transactions, but any time a spouse deals with community property, even if he or she acts alone. For example, Family Code section 721, subdivision (b)(3), provides that a spouse may not profit from "any transaction by one spouse without the consent of the other spouse" concerning community property. If the fiduciary duty were limited to contracts between spouses, there would be no need for a spouse to disgorge profits made in a

[77] See, *contra*, Family Code §1102(a) – requiring joinder of both spouses in the sale of community real estate.
[78] *In re Marriage of Burkle, supra,* 139 Cal.App.4th at p. 730.

"transaction by one spouse." The fiduciary duty also extends to a spouse's management and control of community property, even if that spouse acts alone.[79]

Although Family Code section 721 does not define the word "transaction," it should be given a broad meaning consistent with the protections afforded spouses by the fiduciary duty. "Transaction" has been defined broadly in other contexts. For example, Probate Code section 1870 defines "transaction" for purposes of a conservatorship as including "making a contract, sale, transfer, or conveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right." As a further example, "Webster's Seventh New Collegiate Dictionary defines a 'transaction' as an 'act,' and a 'fact' as 'a thing done.[80]"

The word "transaction" as used in Family Code section 721 is not limited to contracts between spouses. It includes any act or dealing between spouses, or any conduct by either of them, concerning their property. The acquisition of the insurance policy in this case qualifies as a transaction between spouses. Randy asked Frankie to take out the policy and she participated in the acquisition of the policy by discussing it with Frankie and their business manager.[81]

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[79] Fam. Code §1100(e).
[80] *Nelson v. Municipal Court* (1972) 28 Cal.App.3d 889, 892, fn.4 (dealing with transactional immunity).
[81] RT 728:5-22.

Frankie did not obtain the policy unilaterally without Randy's knowledge or participation. The policy was her idea and she participated in the process of obtaining it. Her conversations with Frankie about the policy, when Frankie was in the hospital, obviously worried, under stress and very vulnerable, were dealings between spouses regarding the acquisition of property. Randy was the one who stood to gain from the policy. Had she not asked Frankie to take out the policy, it might never have been obtained. Frankie's testimony that he put the policy in Randy's name, trusting that she would use the proceeds of the policy for the support of their children, demonstrates that he was relying on their confidential relationship in obtaining the policy. It also demonstrates that his concern was for his children as well as for his wife, which is inconsistent with an intention to make it her separate property, which she could thereafter use however she wanted.

The fact that Frankie used community funds to acquire the policy in Randy's name is further evidence that the transaction resulted from the trust and confidence imposed by the marital relationship. The parties were married to each other when he purchased the policy, with no plans of separation. The parties occupied a confidential relationship that imposed a duty on each of them not to take advantage of the other. The acquisition of the policy was part of a seamless transaction that began with Randy's request. The facts are sufficient to constitute a "transaction between spouses" for purposes of Family Code section 721.

The argument that spouses are not subject to fiduciary duty vis-à-vis each other in their dealings with third parties is a dangerous one with the potential to destabilize the growing body of law regarding interspousal duties. As discussed above, fiduciary duty applies in transactions between Frankie and third parties involving Randy – especially when she initiated the transaction. To hold that it doesn't, as the Opinion does, not only conflicts with existing law, but creates a huge loophole through which fiduciary obligations between spouses will be eroded.

IV.
ACQUIRING AN ASSET DURING MARRIAGE WITH COMMUNITY PROPERTY IN ONE SPOUSE'S NAME IS A TRANSMUTATION TRIGGERING FAMILY CODE SECTION 852

The policy was acquired during marriage and paid for with community earnings, and after separation with Frankie's separate earnings. It was thus presumably community property. Although she denied doing so, Randy really claimed that this community property asset became, i.e., was "transmuted" into, her separate property by the act of her name being entered by the agent in the blank on the application for "policy owner." Relying on *Brooks*, the Opinion held that the initial acquisition of the policy from a third party (the company) did not constitute a transmutation:

> "'A "transmutation" is an *interspousal* transaction or agreement that works to change the character of property the parties *already own*. By contrast, the *initial acquisition* of property from a third person does *not* constitute a transmutation and thus is not subject to the [Family Code section 852, subdivision (a)] transmutation requirements [citation].'"[82]

Thus, both *Brooks* and *Valli* hold that the writing requirement in Family Code section 852 for interspousal transactions that change the character of property does not apply to initial acquisitions purchased *with* community monies or credit.[83] By this logic, community property earnings change into a separate property asset by sleight of hand without there ever being a transmutation. This is sophistry.

Pursuant to *Brooks*, an asset that is undeniably community becomes the separate property of one of the spouses based upon a decision to list one rather than the other as the policy owner. Insurance policies will typically be owned by one spouse or the other, often unbeknownst to the parties when they acquire it. That decision is often made by the insurance agent completing the application form. Does this mean that they are determining its character in the event of dissolution of marriage? This is an important point. As Randy argued below:

> "[A] life insurance policy is not the same as a house, a business, or other traditional assets. Unlike those assets, which are meant to be utilized during life, a life insurance policy is meant to be utilized after

[82] Opinion, at p. 11.
[83] Opinion, p. 11; *In re Marriage of Brooks & Robinson, supra*, 169 Cal.App.4th at p. 191.

> the insured's death. Consistent with this purpose, the owners of a life insurance policy deliberately designate the individual who stands to obtain the benefits of the policy when the insured dies…."[84]

She is correct. Life insurance policies are different. They are acquired for different reasons than a house or car. The designation of the policy owner is made for tax or estate planning reasons, or simply because that is the way the agent completed the application. People are not characterizing it as "community property" or "separate property." Moreover, it would be a surprise to most people to know that they have the option of taking ownership of a life insurance policy jointly.

If it stands, the Opinion will affect far more than just insurance policies. It will apply to any asset acquired in one spouse's name alone during marriage. As demonstrated in *Marriage of Barneson* (1999) 69 Cal.App.4th 583, "you don't just slip into a transmutation by accident."[85] That is precisely what Randy asks this Court to decree. While Randy argues that what happened here was not technically a "transmutation," her argument gives it precisely the same effect – a community asset became separate.

If the policy is Randy's separate property then a transmutation most definitely occurred. A transmutation is an "'agreement or common understanding

[84] JA 51:3-9.
[85] As quoted in *In re Marriage of Campbell* (1999) 74 Cal.App.4th 1058, 1065.

between the spouses'" to change character to property.[86] It has also been defined as "an interspousal transaction or agreement which works a change in the character of the property."[87] Or, as "a transfer of property rights between spouses which results in a change of legal or beneficial ownership of the property, either expressly or by operation of law."[88]

Prior to January 1, 1985, the law recognized transmutations involving oral or written agreements, or understandings inferred from conduct or statements which evidenced an intention to change the character of property.[89] This led to lengthy trials involving dubious testimony as parties attempted to establish an agreement or understanding to overcome record title. The Opinion invited that exact sort of testimony in this case.[90]

To remedy the problems that arose from transmutations based on unreliable evidence, the Legislature enacted Civil Code section 5110.730 (now Fam. Code

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[86] See *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 484-485, quoting *Estate of Levine* (1981) 125 Cal.App.3d 701, 705.
[87] *In re Marriage of Haines, supra,* 33 Cal.App.4th 277, 293; *In re Marriage of Cross* (2001) 94 Cal.App.4th 1143, 1147 (same).
[88] Gray & Wagner, *Complex Issues in California Family Law* (2009 ed.), §C3.01[1], p. C3-2.
[89] *In re Marriage of Weaver, supra,* 224 Cal.App.3d at pp. 484-485.
[90] Opinion, p. 8.

§852) on January 1, 1985, invalidating any transmutation that is not in writing.[91]

Family Code section 852 states:

> "*A transmutation* of real or personal property *is not valid unless* made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (Emphasis added.)

To satisfy the express declaration requirement, the "writing signed by the adversely affected spouse [is not valid unless it contains] language which expressly states that the characterization or ownership of the property is being changed."[92]

Under section 852, as strictly interpreted in *Estate of MacDonald*, and all subsequent cases, that agreement must be "in writing" by "express declaration." We know that no such written agreement exists here.

Family Code section 852 does not define "transmutation." The statute only recognizes the validity of those transmutations that meet the stringent writing requirement it establishes, and declares all other transmutations invalid. Section 852 was enacted to end matrimonial litigation as to oral agreements or conduct by a spouse that allegedly changed the character of property. As was explained in *Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1465-1466:

> In enacting section 852 . . ., the Legislature made a policy decision balancing competing concerns. When the rule now codified in section

[91] *Estate of MacDonald, supra,* 51 Cal.3d at p. 269.
[92] *Estate of MacDonald, supra,* 51 Cal.3d at p. 272.

> 852 was being considered, the Law Revision Commission stated as follows: 'California law permits an oral transmutation or transfer of property between the spouses notwithstanding the statute of frauds. This rule recognizes the convenience and practical informality of interspousal transfers. However, the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an 'agreement' or even to commit perjury by manufacturing an oral or implied transmutation. [¶] The convenience and practice of informality recognized by the rule permitting oral transmutations must be balanced against the danger of fraud and increased litigation caused by it. The public expects there to be formality and written documentation of real property transactions, just as it expects there to be formality in dealings with personal property involving documentary evidence of title, such as automobiles, bank accounts, and shares of stock. Most people would find an oral transfer of such property, even between spouses, to be suspect and probably fraudulent, either as to creditors or between each other. [¶] (Recommendation Relating to Marital Property Presumptions and Transmutations (Sept. 1983) 17 Cal. Law Revision Com. Rep. (1984) 205, 213-214, footnotes omitted.)

Application of Family Code section 852 to the facts of this case serves the policy goals of this state. Randy, in essence, is claiming that there was an implied understanding with Frankie to make the insurance policy her separate property.[93] Randy also argues that the act of naming her as policy owner is evidence of Frankie's intention to make the policy her separate property.[94] By stating that record title can be overcome by an "agreement or understanding," the Opinion

[93] See RT 728:5-27.
[94] AOB 17.

invites parties to litigate their intentions at trial. This is exactly the type of dispute that the Legislature sought to avoid by enacting Family Code section 852. Randy relied on conduct or oral statements by Frankie as evidence that he intended to make the insurance policy her separate property. *No written evidence documenting the transmutation was introduced, not even the policy itself or the application*. Her theory is nothing more than transmutation by conduct. The Opinion dealt succinctly with this obvious point as follows:

> "Frankie's attempt to recast Randy's theory as 'transmutation by conduct' is to no avail because the form of title presumption applies, and therefore a transmutation theory is not involved." (Opinion, p. 12.)

A valuable insurance policy acquired during marriage with community funds became Randy's separate property – yet no transmutation occurred. The Opinion holds that the presumption-of-title trumps transmutation and the body of law that has built up over the last 25 years. Despite a $3.75 million policy and $365,032 of community property cash value suddenly becoming separate property, the Opinion, and also *Brooks*, cleaves to the fiction that there was no transmutation. This reasoning is erroneous and brings California law right back to the pre-1985 era of proving "agreements or understandings."

Estate of MacDonald noted that Family Code section 852 was intended to remedy the problems created under prior law, which allowed transmutations to be

founded upon oral agreements or implications from spousal conduct.[95] *Brooks*, and now the Opinion, conflict with earlier cases that define transmutation. The narrow definition of transmutation adopted by *Brooks* and *Valli* encourages expensive or perjured testimony by spouses attempting to transform comments or conduct by one spouse into an agreement to change the character of property acquired during marriage, the very problem that Family Code section 852 addresses.

Both *Brooks* and the Opinion hold that record title can be overcome by an "oral agreement or understanding" – in other words "pillow talk." Isn't this exactly what Family Code section 852 was designed to avoid? Transmutation of property must be in writing to be valid. According to *Brooks* and *Valli*, anytime an asset is acquired during marriage in the name of one spouse, we need to litigate the existence of whether there was an "agreement," "understanding," or perhaps an inference of an understanding[96] to avoid the presumption-of-title. We are back to pre-1985 law.

[95] *Estate of MacDonald, supra,* 51 Cal.3d at p. 269.
[96] *In re Marriage of Mahone, supra,* 123 Cal.App.3d at p. 23.

CONCLUSION

Brooks and now *Valli* both conflict with the consensus of better-reasoned cases dealing with the effect of the presumption-of-title and role of fiduciary duty involving assets acquired during marriage. The decision of the trial court finding that the community property presumption prevailed, should be upheld. *Brooks & Robinson* should be disapproved to the extent that it elevates the presumption-of-title above the fundamental principle that property acquired during marriage with community earnings is presumed community – regardless of how title is taken.

Frankie also requests that he be granted his costs on appeal and whatever additional relief is deemed proper.

Dated: October 21, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Respondent Frankie Valli, hereby certify that, pursuant to Cal. Rules of Court, rule 8.504(d)(1), this brief contains approximately 9,059 words, including footnotes, as computed by the Microsoft Word 2007 word counter.

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