Supreme Court No. S193990
(Court of Appeal Second Appellate District No. B222435)
(Los Angeles Superior Court No. BD 414 038)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANKIE VALLI,

Petitioner and Respondent,

vs.

RANDY VALLI,

Respondent and Appellant.

APPLICATION OF GRACE GANZ BLUMBERG AND HERMA HILL KAY FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER AND RESPONDENT FRANKIE VALLI

Counsel for Amici Curiae
GRACE GANZ BLUMBERG (# 139450)
Distinguished Professor of Law Emerita
UCLA School of Law
405 Hilgard Avenue
Los Angeles, California 90095-1476
(310) 825-1334

Of counsel
HERMA HILL KAY (# 030734)
Barbara Nachtrieb Armstrong Professor of Law
University of California, Berkeley
School of Law
427 Boalt Hall
Berkeley, California 94704
(510) 643-2671

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER AND RESPONDENT FRANKIE VALLI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to rule 8.520(f) of the California Rules of Court, Grace Ganz Blumberg and Herma Hill Kay (together "Amici") respectfully request permission to file the attached brief in support of Petitioner and Respondent Frankie Valli. This application is timely, as it is filed within thirty days after the last reply brief was filed.

IDENTITY OF AMICI CURIAE

Amicus curiae **Grace Ganz Blumberg** is Distinguished Professor of Law Emerita at the UCLA School of Law, where she continues to teach the Community Property course on recall status. Professor Blumberg has been regularly teaching and writing in the area of California community property law since 1980. She is the author of COMMUNITY PROPERTY IN CALIFORNIA (5th ed. 2007), a case book now going into its sixth edition. She is the annotator of Blumberg, CALIFORNIA FAMILY CODE ANNOTATED, published annually by West. She was a reporter for the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002). For her distinguished work on the PRINCIPLES, she was named an R. Ammi Cutter Reporter by the Institute. Professor Blumberg is the author of many law review articles in the areas of family law and community property. She has also, for many years, written bi-monthly commentary for California Family Law Monthly (LexisNexis Matthew Bender). Despite her recent retirement, she continues to publish and teach.

Amicus curiae **Herma Hill Kay** is the Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley, School of Law. She has been teaching and writing in the areas of California Community Property Law and Family Law since 1960, and continues to be a full-time member of the Berkeley Law Faculty. She authored the first article analyzing California's quasi-community property statute, "Quasi-Community Property" in the Conflict of Laws, 50 Calif. L. Rev. 206 (1962). She was a member of the California Governor's Commission on the Family, which proposed the forerunner of the California No-Fault Divorce Law enacted as the Family Law Act in 1970. She later served as Co-Reporter of the Uniform Marriage and Divorce Act, which drew on the California statute to propose a similar no-fault divorce law. She has continued to publish and teach in these areas.

STATEMENT OF INTEREST

This appeal raises fundamental issues about California community property law. Those issues pertain to the characterization of property acquired during marriage, the definition of the term *transmutation*, and the identification and resolution of the tension between community property principles and rules of property ownership and common law principles and rules of property ownership. Amici seek to clarify these basic issues so that California community property law will continue to develop in a manner that is consistent with its basic principles and conducive to just results when a marriage is terminated by divorce or death.

NEED FOR FURTHER BRIEFING

Amici believe that further briefing is necessary to address matters not fully addressed by Petitioner's and Respondent's briefs thus far filed.

Amici are well versed in current community property law and, as legal scholars, are also conversant with the history of California community property law. Their historical examination of the issues presented by this case promises to illuminate the present controversy and furnish a solid foundation for its resolution.

AUTHORS AND MONETARY CONTRIBUTION

Pursuant to Rule 8.520(f), Amici confirm that no other party or counsel has authored this brief in whole or in part. No party, counsel, person, or entity has made a monetary contribution to the preparation of this brief, except Amici.

Accordingly, Amici respectfully request permission to file the proposed brief in support of Petitioner and Respondent, Frankie Valli.

Dated: December 19, 2011

Respectfully submitted,

Grace Ganz Blumberg
Distinguished Professor of Law Emerita
UCLA School of Law

Herma Hill Kay
Barbara Nachtrieb Professor of Law
University of California, Berkeley
School of Law

By: 
Grace Ganz Blumberg

Supreme Court No. S193990
(Court of Appeal Second Appellate District No. B222435)
(Los Angeles Superior Court No. BD 414 038)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANKIE VALLI,

Petitioner and Respondent,

vs.

RANDY VALLI,

Respondent and Appellant.

PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND RESPONDENT FRANKIE VALLI

Counsel for Amici Curiae
GRACE GANZ BLUMBERG (# 139450)
Distinguished Professor of Law Emerita
UCLA School of Law
405 Hilgard Avenue
Los Angeles, California 90095-1476
(310) 825-1334

Of counsel
HERMA HILL KAY (# 030734)
Barbara Nachtrieb Armstrong Professor of Law
University of California, Berkeley
School of Law
427 Boalt Hall
Berkeley, California 94704
(510) 643-2671

TABLE OF CONTENTS

Page

I. SUMMARY OF THE ARGUMENT.....1

II. FACTS OF THE CASE.....1

III. TRANSMUTATION.....2

A. The Legislative History of the Transmutation Statues.....4

B. The Contested Definition of the Term *Transmutation*.....5

C. The Use of the Term *Transmutation* in California Family Code Provisions and Case Law Interpretation of Those Provisions Supports Inclusion of Transmutive Purchases Within the Transmutation Statues.....11

D. Fulfilling the Purposes of the Family Code Transmutation Requirements.....16

E. The Transmutation Requirements Were Not Satisfied in the Instant Case.....20

IV. IF THIS COURT HOLDS THAT SECTION 852 DOES NOT APPLY TO TRANSMUTIVE PURCHASES, THE TRIAL COURT'S CONCLUSION THAT THE POLICY IS COMMUNITY PROPERTY IS NEVERTHELESS SUSTAINABLE BY PROPER APPLICATION OF BASIC PRINCIPLES OF COMMUNITY PROPERTY LAW AND CASE LAW PRECEDENT.....23

A. All Property Acquired By Either Spouse During Marriage is Presumed to be Community Property.....24

B. Evidence Code Section 662 Has No Application in Community Property Law..... 26

C. Assuming Arguendo That Evidence Code Section 662 May Have Some Conceivable Application in California Community Property Law, Section 662 Must Yield to the Community Property Presumption When the Two Presumptions Conflict..... 32

D. Rebutting Any Presumption Affecting the Burden Of Proof, Including the Community Property Presumption.....33

V. CONCLUSION.....40

TABLE OF AUTHORITIES

PAGE

STATE CASES

DeBoer v. DeBoer,
111Cal.App.2d 500, 505-506 (1952).....37, 39

Estate of Bibb,
87 Cal.App.4th 461, 468-471 (2001).....5, 7

Estate of MacDonald,
51 Cal.3d 262 (1990)..... 4, 7, 9, 10, 16, 17

Estate of Wilson,
64 Cal.App.2d 123 (1944).....37

Fanning v. Green,
156 Cal. 279, 283 104 P. 308 (1909).....35

Geller v. Anolik,
127 Cal.App.2d 21, 26 (1954) 35

Holmes v. Holmes,
27 Cal.App. 546, 150 P. 793 (1915) 35

Horsman v. Maden,
48 Cal.App.2d 635, 638-640 (1941).....38, 39

In re Marriage of Barneson,
69 Cal.App.4th 853 (1999).....4, 18, 33

In re Marriage of Benson,
36 Cal.4th 1096 (2005).....5

In re Marriage of Brooks & Robinson,
169 Cal.4th 176 (2008).....passim

In re Marriage of Cross,
94 Cal.App.4th 1143 (2001).....6

In re Marriage of Fossum,
192 Cal.App.4th 336 (2011).....27

In re Marriage of Haines,
33 Cal.App.4th 277 (1995).....27, 32, 33

In re Marriage of Holtemann,
166 Cal.App.4th 1166 (2008).....21

In re Marriage of Koester,
73 Cal.App.4th 1032, 1037, fn. 5 (1999).....18

In re Marriage of Lucas,
27 Cal.3d 808 (1980).....9, 10, 24, 30, 34, 36

In re Marriage of Neighbors,
179 Cal.App.4th 1170 (2009).....6, 13

In re Marriage of Starkman,
129 Cal.App.4th 659 (2005).....21

In re Marriage of Steinberger,
91 Cal.App.4th 1449 (2001).....6, 13

Mitchell v. Moses,
16 Cal.App. 594, 117 Pac. 685 (1911).....28

Murray v. Murray,
26 Cal.App.4th 1062, 1067 (1994).....28

Nilson v. Sarment,
153 Cal. 524 (1908).....26

Perkal v. Perkal,
203 Cal.App.3d 1198 (1988).....15

See v. See,
64 Cal.2d 778 (1966).....25

Schindler v. Schindler,
128 Cal.App.2d 597 (1954).....30

Siberell v. Siberell,
214 Cal. 767, 773 (1932).....30

Weaver v. Weaver,
127 Cal.App.4th 858, 870 (2005).....15

Williamson v. Kinney,
52 Cal.App.2d 98 (1942).....28, 37

Witt v. Witt,
197 Cal.App.3d 103, 108 (1987).....15

FEDERAL CASES

In re Summers,
332 F.3d 1240 (9th Cir. 2003).....6, 7, 13

CALIFORNIA STATUTES

Civil Code §164.....35

Evidence Code §662.....24, 26-30, 32-33, 38

Family Code §803.....34

Family Code § 850.....4, 5, 6, 8, 11, 12, 14, 16

Family Code §852.....1-6, 8, 12-14, 16-17, 19-24, 33

Family Code § 853.....21

Family Code § 2640.....14-16

CALIFORNIA LEGISLATIVE HISTORY

Bill Analysis, S.B. 1407, Senate
Judiciary Committee (4/17/2004).....14-15

California Bill Analysis,
S.B. 1407 Assem. (6/15/2004).....14-15

OTHER AUTHORITY

Stephen James Wagner, *Brooks & Robinson* and *Valli* Are Fundamentally Unsound, But There Are Ways to Eliminate or Minimize Their Effect, 2011 California Family Law Monthly 210, 212 (July issue), reprinted in LexisNexis as 2011-7 California Family Law Monthly 6 (2011).....11

2011 California Family Law Monthly 207-217
(July issue).....7

Back Page Commentary on Family Law
Issues: In re Marriage of Brooks & Robinson,
2009 California Family Law Monthly 179-181
(May issue).....7

2009 California Family Law Monthly 38-43
(February issue).....7

I. SUMMARY OF THE ARGUMENT

Amici contend that the trial court's community property classification of the life insurance policy should be affirmed. If, as the trial court concluded, the character of the insurance policy is controlled by Family Code section 852 transmutation requirements, the trial court's decision should be affirmed because the requirements of section 852 were not satisfied. If this Court concludes that section 852 requirements do not control characterization of the policy, the trial court's conclusion that the policy is community property may nevertheless be sustained by proper application of basic principles of community property law and case law precedent.

II. FACTS OF THE CASE

The significant facts of the case are largely undisputed. The issue is the legal conclusion that should be drawn from the facts. Frankie Valli had serious health problems and feared for the future of his wife Randy and their minor children. Frankie purchased a whole life insurance policy[1] with community property funds. He directed that

---

[1] A whole life insurance policy combines term life insurance with a savings feature.

his wife be named both the owner and the beneficiary of the policy so that she would be able to manage the proceeds for the benefit of the children and herself after his death. During marriage, Frankie paid policy premiums with community property funds.[2] However, the marriage did not end in Frankie's death. Instead, Frankie filed a petition for dissolution. At the time of trial, the policy had a cash value of $365,032. Frankie's wife, Randy, claimed the policy as her separate property. Frankie asserted that the policy was community property. The trial court held that the policy was community property.[3] The Court of Appeal for the Second District, Division 5, reversed and remanded. This Court granted a hearing.

III. TRANSMUTATION

The trial court held that the policy was community property because the transmutation requirements of Family Code section 852(a) had not been satisfied: Frankie never expressly declared in writing that he gave up any interest he otherwise had in the policy that

---

[2] Until the parties separated, Frankie paid policy premiums with his community property earnings. Thereafter, he paid premiums with his separate property earnings.

[3] Unless otherwise explicitly indicated, all facts are drawn from the superseded opinion of the court of appeal.

he purchased with community property funds and titled in his wife's name. If section 852(a) requirements apply, the policy is the community property of the marriage. In that case, there is no need to address the various presumptions and proof requirements that would apply if the transmutation statutes were not applicable. Amici's transmutation analysis begins with the fact that Frankie used his marital earnings to purchase the insurance policy. Because the purchase funds were indisputably community property, not merely presumptively community property, the foundational presumption that property acquired during marriage is community property is unnecessary to the analysis. If Frankie had taken title to the policy in his name alone or had titled the policy jointly in his name and his wife's name, the policy would indisputably be community property. The transmutation question is whether, in order to claim the policy as her separate property, Frankie's wife Randy must show that section 852(a) transmutation requirements were satisfied when Frankie used community property funds to purchase an insurance policy, to which title was taken in his wife's name. Thus, the first issue is whether the trial court correctly invoked section 852(a).

A. The Legislative History of the Transmutation Statutes

Prior to the enactment of Family Code sections 850-853, effective January 1, 1985, California case law liberally permitted spouses to change, or transmute, the character of their property. Transmutations could be proven by oral evidence and could even be inferred from the parties' behavior alone. Although case law liberality may have aptly reflected the informality of spousal transactions, the liberal transmutation rules were believed to give rise to fraudulent claims. Thus the Law Reform Commission drafted and the legislature enacted strict transmutation provisions. Family Code section 852(a) provides:

> 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.

In *Estate of MacDonald*,[4] this Court held that an *express declaration* must unambiguously indicate a change in the ownership of the property.[5] *MacDonald* observed, for example, that the phrase

---

[4] *Estate of MacDonald*, 51 Cal.3d 262, 272 Cal.Rptr.153, 794 P.2d 911 (1990).

[5] Id. at 264. Following *MacDonald*, *In re Marriage of Barneson*, 69 Cal.App.4th 583, 81 Cal.Rptr.2d 726 (1999), held that a husband's written instructions to *transfer* stock and securities into the name of his wife was insufficient to work a transmutation of his separate property to his wife's separate property because the term *transfer* is ambiguous. It might connote a change in ownership, but then again, it might not. Thus, the word transfer does not unequivocally indicate the necessary change in ownership. To

"hereby giving up any interest I may have in the property" would suffice. *In re Marriage of Benson*[6] held that the writing requirement is absolute; there are no exceptions to it.

B. THE CONTESTED DEFINITION OF THE TERM *TRANSMUTATION*

Although this Court has elucidated the formal requirements of section 852(a), it has not spoken on the breadth of the section 850 definition of the term *transmutation*. Clearly transmutation encompasses a change in the ownership of a constant asset, as when a husband deeds his separate property home to his wife and himself in joint tenancy. The words of the deed unambiguously indicate that he is giving up a one-half interest in the home, satisfying the express declaration requirement of section 852.[7] It is not clear, however, whether section 850 includes within the definition of *transmutation* transformative purchases from a third party, as when spouses purchase a home with community property funds and take title in joint tenancy form. Several California cases have included transformative

---

similar effect, see *Estate of Bibb,* 87 Cal.App.4th 461, 468-471, 104 Cal.Rptr.2d 415 (2001).

[6] *In re Marriage of Benson*, 36 Cal.4th 1096, 116 P.3d 1152, 32 Cal.Rptr.3d 471 (2005).

[7] *Estate of Bibb,* 87 Cal.App.4th 461, 468-469, 104 Cal.Rptr.2d 415 (2001).

purchases within the section 850 definition of transmutation.[8] However, *In re Summers*,[9] a Ninth Circuit bankruptcy case interpreting California law, purported to hold that transformative purchases are not included within the definition of transmutation. In *Summers*, a husband and wife used community property funds to purchase a family home, to which they took title in joint tenancy. The court's conclusion that section 852 requirements need not be met in the case of a purchase from a third party is dictum because, in any event, the joint tenancy deed specified and accepted by the parties satisfied the requirements of section 852(a). By taking joint title in

---

[8] *In re Marriage of Cross*, 94 Cal.App.4th 1143, 1148, 114 Cal.Rptr.2d 839 (2001), includes purchases from third parties within the definition of transmutation:

> Section 852 and cases interpreting section 852...address situations where a couple may agree to transmute the separate property or community property character of real or personal property—e.g., where a wife agrees to convert her separate property residence to community property or *where a wife buys a car for her husband with community property funds*. (emphasis added)

Cases applying section 852 transmutation requirements to purchases from third parties include *In re Marriage of Steinberger*, 91 Cal.App.4th 1449, 111 Cal.Rptr.2d 521 (2001), review denied (expensive diamond ring purchased with community earnings by husband and given to wife was substantial in value and, because the transmutation requirements were unsatisfied, remained community property), and *In re Marriage of Neighbors,* 179 Cal.App.4th 1170, 102 Cal.Rptr.3d 387 (2009) (when wife gave husband a blank check to purchase a Porsche automobile as his birthday present, the Porsche was not his separate property because an automobile is not an item of a personal nature and the transmutation requirements were not satisfied).

[9] 332 F.3d 1240 (9th Cir. 2003).

one form, such as joint tenancy, the parties necessarily relinquished any interests they might have under another form of joint title, such as community property.[10] In other words, despite its reasoning, *Summers* reached the same conclusion it would have reached had it applied the transmutation requirements. This was not the case in *In re Marriage of Brooks & Robinson*,[11] which held that transmutation requirements do not apply when community property funds have been used to a purchase property *titled in the name of one spouse alone.* The holding of *Brooks* was adopted by the court of appeal in the instant case. In both cases, the courts' failure to apply transmutation requirements improperly undermined community property entitlements.[12] Amici shall, for convenience, refer to the no-transmutation holding of *Brooks* as "the *Brooks* rule."

---

[10] *Bibb*, supra note 6.

[11] 169 Cal.App.4th 176, 86 Cal.Rptr.3d 624 (2009). For extensive criticism of *Brooks*, see the commentary of various family law specialists in 2009 California Family Law Monthly 38-43 (February issue) and Back Page Commentary on Family Law Issues: In re Marriage of Brooks and Robinson, 2009 California Family Law Monthly 179-181 (May issue). The decision of the court of appeal in the instant case has also been strongly criticized by family law specialists. See commentary in 2011 California Family Law Monthly 207-217 (July issue).

[12] *MacDonald* identified the protection of community property entitlements as a prominent reason for adopting the statutory transmutation requirements. *Estate of MacDonald,* 51 Cal.3d 262, 273. See text accompanying notes 17-21 *infra.*

For the reasons set out below, Amici contend that the scope of section 850 transmutation should be understood to include spousal purchases from third parties when there is variance between the character of the purchase funds and the form in which title to the purchased asset is taken. Consequently, the transmutation requirements of Family Code section 852(a) apply to such purchases. For convenience, we refer to such transactions as "transmutive purchases."

Under the *Brooks* rule, whether a separate property proponent is subject to strict transmutation requirements turns on insignificant details relating to the acquisition of an asset. If, for example, untitled property was initially purchased with community funds and sometime later was titled in one spouse's name alone, the transmutation requirements inarguably would apply to any claim that the initially community property asset had become the titled spouse's separate property. By contrast, because the home in *Brooks* was purchased with community property but never titled as community property before it was titled in the wife's name alone, *Brooks* held that the transmutation statutes did not apply when the wife claimed the home as her separate property. Profound differences in outcome should not

turn on insignificant details of asset acquisition. Yet that is the result of excluding from strict transmutation requirements all purchases from third parties in which the purchase and the titling of property are simultaneous.

Moreover, the distinction between the transmutation of a constant asset and a transmutive purchase from a third party is highly malleable. In a familiar illustration drawn from In re Marriage of Lucas,[13] decided by this Court before the enactment of the transmutation statutes, Brenda and Gerald Lucas entered a contract to acquire a Mini-Motorhome, and Gerald was designated the purchaser. The couple traded in a community property vehicle as a down payment. However, when Brenda later provided the balance of the purchase price from her separate property funds, Gerald did not object when Brenda requested and received title to the motor home in her name alone. This Court sustained, as supported by sufficient evidence, the trial court's determination that Gerald made a gift of his community property interest in the Mini-Motorhome to Brenda when she requested title in her name and he did not object. In *MacDonald,* [14]

---

[13] *In re Marriage of Lucas*, 27 Cal.3d 808, 817-818, 614 P.2d 285, 166 Cal.Rptr. 853 (1980).
[14] *Estate of MacDonald*, 51 Cal.3d 262, 270, fn. 6.

this Court cited the *Lucas* Mini-Motorhome transaction as an example of a pre-statutory "easy transmutation." It is not clear, however, how *MacDonald* understood the transaction. Was the parties' acquisition of the motor home simply a "transmutive purchase" in the sense that the community property down payment funded the purchase of Brenda's separate property Mini-Motorhome?[15] Or, was the contract designation of Gerald as the purchaser significant to the extent that the community acquired some sort of inception-of-right ownership interest in the Mini-Motorhome, which ownership interest was later transmuted into Brenda's separate property when she demanded title in her name alone and Gerald did not object? In any event, the application of the transmutation statutes ought not to be controlled by such minor and evanescent distinctions.

[15] If *Lucas* understood the Mini-Motorhome transaction as a transmutive purchase and the transmutation statutes do not apply to transmutive purchases, then the transmutation statutes have *not* abolished this form of "easy transmutation," despite the court's implication to the contrary in *MacDonald*.

C. THE USE OF THE TERM *TRANSMUTATION* IN CALIFORNIA FAMILY CODE PROVISIONS AND CASE LAW INTERPRETATION OF THOSE PROVISIONS SUPPORTS INCLUSION OF TRANSMUTIVE PURCHASES WITHIN THE TRANSMUTATION STATUTES

The language of section 850 does not explicitly include or exclude transmutive purchases. It merely says that, by agreement or transfer, spouses may, for example, "[t]ransmute community property to separate property of either spouse." One commentator argues, however, that section 850 implicitly includes transmutive purchases in its reference to transmutation by *agreement* of one or both parties. When a spouse purchases an asset with community property funds and takes title to the asset in the name of the other spouse alone, the claim of the titled spouse that the asset is her separate property is necessarily based upon the assumption that the purchasing spouse, in taking title her name alone, *agreed* to transmute the asset, which otherwise would have been community property, into the separate property of the titled spouse. Accordingly, the commentator concludes that transmutive purchases must comply with the statutory transmutation requirements.[16]

---

[16] Stephen James Wagner, *Brooks & Robinson* and *Valli* Are Fundamentally Unsound, But There are Ways to Eliminate or Minimize

Two other sections of the Family Code also support the view that section 850 includes transmutive purchases. First, subsection (c) of section 852 contemplates gifts that spouses traditionally give one another on special occasions, such as birthdays and wedding anniversaries. Typically, a spouse uses separate property or community property funds to purchase a gift, which he delivers, or has delivered, to his spouse. These gifts may be one-step transmutive purchases, as when a husband invites his wife to pick out her birthday present at a jewelry store and pays for the purchase with his community earnings, or a wife uses the internet to order a gift that is delivered to her husband. Typically the gifts are untitled. Thus delivery of the asset to the recipient, rather than the form of title, is the basis for considering the asset a gift. Subsection (c) of section 852 provides that an interspousal gift is not subject to subsection (a) transmutation requirements if it is a tangible article "of a personal nature that is used solely or principally by the person to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage."

Their Effect, 2011 California Family Law Monthly 210, 212 (July issue), reprinted in LexisNexis as 2011-7 California Family Law Monthly 6 (2011).

The language of section 852 (c) contains a negative pregnant, that is, that all spousal gifts that *are* substantial in value or are *not* of a personal nature are subject to subsection (a) transmutation requirements. This is how courts have interpreted the statute. Cases applying subsection (c) and finding that an interspousal gift is substantial in value or is not of a personal nature, have applied the requirements of subsection (a) and concluded that the purchased asset retained the character of the purchase funds because the transmutation requirements were not satisfied. Notably, these cases have not inquired whether there was any "transmutation," within the meaning of section 850, as do *Summers* and *Brooks*. See *In re Marriage of Steinberger*, 91 Cal.App.4th 1449, 111 Cal.Rptr.2d 521 (2001), review denied (expensive diamond ring purchased with community earnings by husband and given to wife was substantial in value and, because the transmutation requirements were unsatisfied, remained community property), and *In re Marriage of Neighbors*, 179 Cal.App.4th 1170, 102 Cal.Rptr.3d 387 (2009) (when wife gave husband a blank check to purchase a Porsche automobile as his birthday present, the Porsche was not his separate property because an automobile is not an item of a personal nature and the transmutation requirements were not

satisfied). Subsection (c) of section 852 may be read back into the section 850 definition of transmutation to support the conclusion that *all* transmutive purchases are subject to the section 852(a) requirement that the spouse whose ownership rights would be adversely affected must make a written express declaration that he gives up all ownership rights he would otherwise have in the asset.

Another provision of the Family Code that supports interpreting section 850 to include transmutive purchases is the 2004 amendment to Family Code section 2640, which added a new subsection (c):

> [a] party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, *unless there has been a transmutation in writing pursuant to Chapter 5 ... or a written waiver of the right to reimbursement.* (emphasis added)

The legislative history of the 2004 amendment shows that the two exceptions contained in the amendment were intended to bar reimbursement when the separate property contributor explicitly and unequivocally indicated in writing that his separate property contribution was a gift to his spouse.[17] Bill Analysis, S.B. 1407, Senate Judiciary Committee (4/17/2004) reports that:

---

[17] The legislative analysis of other iterations of S.B. 1407 (2004) also supports this reading.

> [t]his bill would allow reimbursement for separate property contributions of one spouse to the other spouse's separate property..., *unless there is a writing making the contribution a gift*. (emphasis added)

California Bill Analysis, S.B. 1407 Assem. (6/15/2004) explains:

> Specifically, this bill provides for reimbursement for the separate property contributions of one spouse to the separate property...of the other spouse, *unless a writing expressing the intent to make a gift* or waiving the right to reimbursement *has been executed*." (emphasis added)

Thus, in section 2640, subsection (c), the legislature must have meant to include transmutive purchases within the term *transmutation*. If, instead, the narrow *Brooks* definition of transmutation is applied to subsection (c), when a husband uses his separate property funds to purchase property that he instructs a third-party grantor to place in the name of his wife "as her separate property," there would be no Chapter 5 transmutation and the husband would be entitled to reimbursement of his separate property purchase

---

Compare subsection (b) of section 2640, which authorizes reimbursement for separate property contributions to the acquisition of community property and makes no exception for formally adequate transmutations. Consequently, case law has interpreted subsection (b) to authorize reimbursement when a spousal owner of separate property has transmuted that property into community property. The measure of reimbursement is the market value of the property on the date of transmutation. *Weaver v. Weaver*, 127 Cal.App.4th 858, 870, 26 Cal.Rptr.3d 121(2005); *Perkal v. Perkal*, 203 Cal.App.3d 1198, 1202, 250 Cal.Rptr. 296 (1988); *Witt v. Witt*, 197 Cal.App.3d 103, 108, 242 Cal.Rptr. 646 (1987)

funds. But if, in contrast, the husband deeds his separate property realty to his wife "as her separate property," there is a transmutation and consequently there is no reimbursement to the husband's separate estate. The legislature could not reasonably have meant to distinguish such similar transactions, both of which unequivocally indicate that the separate property contributor intended that his separate property contribution be a gift to his spouse. The legislative use of transmutation in section 2640 (c) sheds light on the meaning of transmutation in section 850. It indicates that section 850 should be understood to include transmutive purchases.

D. FULFILLING THE PURPOSES OF THE FAMILY CODE TRANSMUTATION REQUIREMENTS

Explaining the transmutation provisions, this Court stated in *MacDonald*:

> Manifestly, there are policy considerations weighing both in favor of and against any type of transmutation proof requirement. On the one hand, honoring the intentions of the parties involved in a purported transmutation may suggest that weight should be given to *any* indication of those intentions. On the other hand, the desirability of assuring that a spouse's community property entitlements are not improperly undermined, as well as concern for judicial economy and efficiency, support somewhat more restrictive proof requirements. The Legislature, in enacting section [852(a)],

> apparently thought it unwise to rely on some kinds of evidence to effect transmutations.[18]

Concern about undermining a spouse's community property entitlements, as well as about judicial economy and efficiency, is as equally present in the transmutive purchase cases as it is in the cases involving the change of character of a constant asset. It should not be necessary to trace a two-step transaction in order to fall within the transmutation statutes. Section 852 requirements should apply any time a claim is made that ownership of property is different from whatever its character would otherwise be, whether what it would otherwise be is already embodied in some form of title (which all agree would constitute a transmutation) or simply in the character of purchase funds used to acquire the contested asset. In other words, when property is purchased with community property funds and title is taken in a form that does not specify community property ownership, section 852(a) must be satisfied. When parties take title in a *joint* form other than community property, section 852(a) *is* satisfied because the receipt of title by the parties does signify their agreement to hold in that form and to give up any inconsistent property claims. However, when title is taken in the name of the purchasing spouse

[18] *Estate of MacDonald,* 51 Cal.3d 262, 273.

alone or the other spouse alone, the property remains community property unless the disadvantaged party has, in writing, expressly declared that he or she gives up all interest in the property.

Including transmutive purchases within the scope of the transmutation statutes is the only way to avoid meaningless distinctions that turn on accidents of transaction timing. To obtain the protection of the transmutation statutes, Frankie should not have to show that he initially purchased the policy, which was community property because of the source of the purchase funds, and subsequently had his wife named as beneficiary and owner of the policy. When purchase and titling are simultaneous, as they often are, the protection of the transmutation statutes should still be available. If that protection is not available, California spouses will continue to experience the harm that the transmutation statutes were designed to avoid, an accidental, or unintended, change in the character of spousal property.[19]

---

[19] "As *Barneson* demonstrates, you don't just slip into a transmutation by accident." *In re Marriage of Koester*, 73 Cal.App.4th 1032, 1037, fn. 5, 87 Cal.Rptr.2d 76 (1999).

Brooks[20] is illustrative of an accidental, or unintended, change in the character of community property. In *Brooks*, the husband purchased a family home with his community property earnings. It was undisputed that, on the advice of a realtor, he agreed to have his wife take title to the home in her name alone solely for the purpose of obtaining a more favorable interest rate on the purchase-money loan. The *Brooks* rule that the transmutation statutes are inapplicable to a purchase from a third party, led the court to conclude that, in agreeing to the form of title, the husband relinquished any interest he otherwise would have had in the home. If the court had instead applied the transmutation requirements of section 852, it would have concluded that the home was community property because the husband never "made in writing an express declaration" relinquishing his interest in the home.

Moreover, if transmutive purchases are controlled by the Family Code transmutation requirements, the administration of law is much simplified and results are much more certain.

---

[20] 169 Cal.App.4th 176, 86 Cal.Rptr.3d 624 (2009)

E. THE TRANSMUTATION STATUTES WERE NOT SATISFIED IN THE INSTANT CASE.

Frankie instructed his agent to list his wife Randy as the owner of the policy. Community property may be titled in the name of one spouse alone. It is commonplace to say that a married person owns, or holds, property as community property. Property held in the name of a married woman may be the community property of her marriage or her separate property.[21] Requesting that property acquired with community funds be titled in one spouse's name alone does not satisfy the requirement of an *express declaration in writing* that unambiguously demonstrates that the requesting spouse intends thereby to give up any interest he may have in the property.

Moreover, an express declaration that otherwise satisfies section 852 requirements is insufficient if it does not unambiguously indicate an intent to effect a *present* transmutation. Respondent hypothesizes that Frankie wished to ensure that the policy proceeds would not be

---

[21] See cases quoted and cited at notes 30 and 45 *infra*. Consider the common practice of taking title to federally insured community property bank accounts in the name of one spouse alone, with the consent of the other spouse. By holding multiple accounts in the name of the wife alone, the husband alone, and the couple jointly, married couples increase the amount of federally insured savings that they can hold in a single bank. Presumably, *Brooks* would conclude that a non-titled spouse had relinquished all interest in an account titled in the name of his spouse alone.

included in his estate when he died.[22] Assuming, arguendo, that Frankie's motive was to keep the life insurance proceeds out of his estate, requesting that title to the insurance policy be placed in Randy's name did not unequivocally work a *present* transmutation of his community property interest in the property. Analogously, Family Code section 853 provides that:

> A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the will.

As between husband and wife, a statement in an inter vivos trust that the separate property the husband placed in the trust was community property, was insufficient to work a transmutation under section 852(a) when there was no unambiguous indication that the husband intended thereby to *presently* transmute the character of the separate property he placed in the trust to community property.[23] In the instant case, the character of the insurance policy, whether community property or separate property, was never specified by Frankie. The

---

[22] Respondent's Brief, at 30.

[23] *In re Marriage of Starkman,* 129 Cal.App.4th 659, 28 Cal.Rptr.3d 639 (2005), review denied. Compare *In re Marriage of Holtemann*, 166 Cal.App.4th 1166, 83 Cal.Rptr.3d 385(2008), review denied, which sustained a finding that transmutation requirements were satisfied when a "transmutation agreement" contained explicit and unambiguous language of present transmutation, even though the agreement was incident to an estate planning trust.

policy was, at his direction, merely titled in Randy's name. Frankie never expressly renounced any interest he might otherwise have in the property. Title itself is ambiguous, because Frankie could have intended that Randy hold the property as the community property of their marriage. Moreover, to the extent that Frankie's designation of Randy as the title holder could conceivably be deemed to work a transmutation to her separate property, the transmutation may have been intended to take effect only at Frankie's death. Like the designation of the character of property in a will or inter vivos trust, given Frankie's anticipation of his own death, title in Randy's name was not unambiguously intended to work a present transmutation. Finally, it is also arguable that two basic requirements of section 852 were never satisfied. Frankie's oral instruction that title be placed in Randy's name, although uncontested, was never reduced to a writing. To the extent that the required writing was instead the written title to the insurance policy, the policy was never "accepted by the spouse whose interest in the property is adversely affected," because the policy was not delivered to Frankie.

In conclusion, if the transmutation requirements apply to characterization of the insurance policy, the issue is not, as Randy

argues, what Frankie intended when he had her named the owner of the policy, but is instead whether Frankie's instructions to put title in Randy's name satisfied the transmutation requirements of section 852(a). For the many reasons stated above, those requirements were not satisfied.

IV. IF THIS COURT HOLDS THAT SECTION 852 DOES NOT APPLY TO TRANSMUTIVE PURCHASES, THE TRIAL COURT'S CONCLUSION THAT THE POLICY IS COMMUNITY PROPERTY IS NEVERTHELESS SUSTAINABLE BY PROPER APPLICATION OF BASIC PRINCIPLES OF COMMUNITY PROPERTY LAW AND CASE LAW PRECEDENT.

If this Court concludes that transmutive purchases are not subject to section 852 requirements, three further questions must be addressed. (1) What evidentiary presumption applies when one spouse has acquired property during marriage and has titled the property in the name of the other spouse alone? (2) What evidence is sufficient to rebut that presumption? (3) What evidence is sufficient to counter the rebuttal evidence?

A. ALL PROPERTY ACQUIRED BY EITHER SPOUSE DURING MARRIAGE IS PRESUMED TO BE COMMUNITY PROPERTY.

The case law presumption that property acquired during marriage is community property applies to all property acquired by a spouse during marriage. The community property presumption is readily rebutted when title to property is taken jointly by the parties. Joint title taken by the parties together signifies not only a form of ownership but also an agreement of the parties to hold as specified.[24] Joint title overcomes the community property presumption and, incidentally, satisfies the strict transmutation requirements of section 852(a). When parties agree to take in one form of joint ownership, they necessarily give up any inconsistent claims of ownership. Joint title taken by the spouses together has given rise to what courts have sometimes called the "form of title" presumption.[25] (The "form of title presumption" arising from joint title is separate and distinct from the Evidence Code section 662 presumption addressed below.)

When a purchasing spouse takes title to property in his name alone during marriage, it is undisputed that the community property

---

[24] *In re Marriage of Lucas*, 27 Cal.3d 808, 814-815, 614 P.2d 285, 166 Cal.Rptr. 853 (1980).
[25] Id.

presumption applies and is not rebutted by the form of title. A spouse cannot make a gift to himself of his spouse's interest in community property. Thus, title in the purchaser's name alone has no bearing on ownership of the property. It does, however, permit the purchasing spouse to claim the asset as his separate property, in whole or in part, merely by tracing the purchase to a separate property source, because the form in which he took title is consistent with his assertion of a separate property interest. In order to rebut the community property presumption, therefore, the purchasing spouse must trace the acquisition to a separate property source.[26]

When property acquired during marriage is titled in the name of the non-purchasing spouse alone or when a purchasing spouse takes title in her name alone with the consent of the other spouse, the community property presumption still applies. The facts pertaining to the titling of the property may be evidence tending to rebut the presumption, but they do not avoid the community property

[26] See, for example, *See v. See*, 64 Cal.2d 778, 415 P.2d 776, 51 Cal.Rptr. 888 (1966).

presumption and the burden of proof imposed on the separate property proponent by that presumption.[27]

B. EVIDENCE CODE SECTION 662 HAS NO APPLICATION IN COMMUNITY PROPERTY LAW

Despite the community property presumption, when property acquired during marriage is titled in the name of a non-purchasing spouse alone or in the name of a purchasing spouse with the consent of the other spouse, *Brooks* abandoned the community property presumption and instead applied the Evidence Code section 662 presumption that the person who holds legal title to property is the owner of full beneficial title.[28] Evidence Code section 662, which codified a common law presumption, provides as follows:

---

[27] This principle was strongly emphasized by this court in *Nilson v. Sarment*, 153 Cal. 524, 96 P. 315 (1908). Where property was taken in the name of the wife with the husband's knowledge before the effective date of the married woman's presumption, the controlling presumption was the community property presumption. *Nilson v. Sarment* reversed a trial court determination that property was the wife's separate property, because the evidence was insufficient to overcome the community property presumption when the husband used community property funds to purchase the property, testified that he did not intend to make a gift to his wife, and the property was intended for family use.

[28] 169 Cal.App.4th 176, 185-190. *Brooks* is not the only community property case to invoke Evidence Code 662, but in all other cases its invocation has been both gratuitous and harmless because those cases involved quit-claim deeds, which satisfy formal transmutation requirements and, in any event, those decisions did not enforce the quit-claim deeds

> 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 evidence.

In the instant case, the court of appeal followed *Brooks* in invoking Evidence Code section 662. This is error for several reasons. First, section 662 codifies a common law presumption that the person who holds legal title to property is the beneficial owner of the property.[29] However, community property is not part of the common law, and community property has its own set of presumptions, which are inconsistent with section 662. The section 662 presumption is clearly inapt in a marital property system that presumes that property acquired during marriage is community property, because the community property presumption is triggered by the timing of acquisition, not by the form of title.

Second, when a spouse holds property in his name alone in a common law state, he *is* the legal owner of the property. In a community property state, however, when property acquired during

---

because they were obtained in violation of the advantaged spouse's fiduciary duty. See, for example, *In re Marriage of Haines*, 33 Cal.App.4th, 277, 39 Cal.Rptr.2d 673 (1995); and *In re Marriage of Fossum,* 192 Cal.App.4th 336, 121 Cal.Rptr.3d 195 (2011).

[29] The Law Revision Commission Comment to Section 662 states that "[s]ection 662 codifies a common law presumption recognized in the California cases." The California cases cited in the Comment do not concern property acquired by a spouse during marriage.

marriage is titled in the name of one spouse alone, legal ownership of the property may be held by the community estate or a spouse's separate estate. Stated otherwise, when property is acquired during marriage in one spouse's name in a community property state, the form of title does not indicate *legal*[30] ownership of the property. Hence Evidence Code section 662 has no application. Section 662 presumes that beneficial ownership follows legal ownership only when legal ownership is uncontested.[31] Thus, application of section 662 to property titled in the name of one spouse alone assumes the answer to the very question posed by the legal controversy: Which

---

[30] *Williamson v. Kinney*, 52 Cal.App.2d 98, 125 P.2d 920 (1942) holds that the community holds legal, as opposed to merely beneficial, title when community property has been acquired in the name of one spouse alone.

> Property acquired during their marriage in the name of either husband or the wife, or in the names of both, may be community property. There is no question of holding in trust, but rather a question of the nature of the estate or tenure. ... "The title to property may be vested in the marital community by a conveyance to either spouse. ... It is only where the deed expressly conveys the property to the wife 'as her separate property' that it may be said that she takes the legal title in trust for the community, where the consideration is paid from community funds..." [(quoting *Mitchell v. Moses*, 16 Cal.App.594, 117 Pac. 685 (1911).]

[31] *Murray v. Murray*, 26 Cal.App.4th 1062, 1067 31 Cal.Rptr2d 855 (1994) explains:

> Evidence Code section 662 has application, by its express terms, when there is no dispute as to where legal title resides but there is question as to where all or part of the beneficial title should rest.

estate *is* the legal owner of the property? It is not until that question is answered that the legal owner has been identified.

Third, the presumption of beneficial ownership embodied in Evidence Code section 662 is intended to facilitate the determination of ownership by recourse to legal title alone. Thus, the section 662 presumption of beneficial ownership arises solely from the words on the face of the title, without resort to collateral evidence of the other spouse's agreement to the form of the title. If, as all agree and *Brooks* itself acknowledges,[32] the presumption of beneficial ownership does not apply when property acquired during marriage is, without more, held in one spouse's name alone, it cannot logically apply when property acquired during marriage is held in one spouse's name alone and there is extra-title evidence of the other spouse's consent to the form of title: either that the spouse whose name is on title was not the purchaser, or the purchasing spouse secured the consent of the other spouse when taking title in her name alone.

Finally, Evidence Code section 662 serves no purpose in community property law. Community property law already contains a full complement of rules and presumptions necessary to characterize

---

[32] *Brooks & Robinson* acknowledges that the community property presumption applies in this circumstance, 169 Cal.App.4th176, 186-187.

the ownership of property acquired by spouses during marriage and to protect third parties who are good-faith purchasers from a spouse. Evidence Code section 662 adds nothing that is needed[33] and may introduce a foreign element that interferes with the proper application of California community property law. Some of the cases[34] that apply Evidence Code section 662 appear to confuse the section 662 presumption with the "form of title" presumption employed in *Lucas* and similar community property cases.[35] In community property case law, the "form of title" presumption applies only to joint title taken by the spouses together.[36] In these cases, the joint form of title signifies the spouses' agreement to hold the property as the title indicates.[37] The form of title presumption does not apply when property acquired

---

[33] See, for example, cases cited in note 28 supra, where invocation of section 662 was both harmless and unnecessary.

[34] *Id.*

[35] See, for example, *In re Marriage of Lucas*, 27 Cal.3d 808, 814-815, 614 P.2d 285, 166 Cal.Rptr. 853 (1980); *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003 (1932); *Schindler v. Schindler*, 126 Cal.App.2d 597, 272 P.2d 566 (1954).

[36] Although the cases cited in the note above occasionally speak somewhat overbroadly about the significance of title, all the "form of title" cases concern joint title held by the parties, either joint tenancy or community property title. Moreover, all the cases cited as precedent by the "form of title" cases concern title held jointly by husband and wife.

[37] *In re Marriage of Lucas,* 27 Cal.3d 808, 814-815, 614 P.2d 285, 166 Cal.Rptr. 853 (1980).

during marriage is held in one spouse's name alone. In such cases, the general community property presumption applies.

That title in one spouse's name alone does not create a presumption of beneficial ownership is reflected in several Family Code provisions. Subsection (d) of section 1100 contemplates that community property may be held in the name of one spouse alone without compromising community property (beneficial) ownership:

> [A] spouse who is operating or managing a business ... that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business..., *whether or not title to that property is held in the name of only one spouse*. (emphasis added)

The language of subsection (d) contemplates that community property personal property may be held in the name of one spouse alone without giving rise to any presumption that the spouse named in the title is the beneficial owner of the property. Similarly, section 1102 contemplates the possibility that community property realty may be held in the name of one spouse alone without altering its community property character. Finally, the 1975 prospective repeal of the married woman's special presumption means that property taken in

the name of a married woman alone is subject to the community property presumption, as is property taken in the name of a married man alone.

C. ASSUMING ARGUENDO THAT EVIDENCE CODE SECTION 662 MAY HAVE SOME CONCEIVABLE APPLICATION IN CALIFORNIA COMMUNITY PROPERTY LAW, SECTION 662 MUST YIELD TO THE COMMUNITY PROPERTY PRESUMPTION WHEN THE TWO PRESUMPTIONS CONFLICT.

Two decisions of the court of appeal have dealt with other apparent conflicts between application of Evidence Code section 662 and a competing community property rule. In *In re Marriage of Haines,*[38] a wife's quit-claim deed constituted a formally adequate relinquishment (transmutation) of her interest in a jointly owned home. However, the quit-claim deed was procured by her husband's undue influence. In resolving the ostensible conflict between section 662 and the presumption of undue influence that arises when once spouse gains an advantage over another, *Haines* held that section 662 should not be applied when it would conflict with the presumption of

[38] *In re Marriage of Haines*, 33 Cal.App.4th 277, 39 Cal.Rptr.2d 673 (1995).

undue influence. *In re Marriage of Barneson*[39] concerned an ostensible conflict between Family Code section 852 transmutation requirements, which were not satisfied when a husband "transferred" separate property securities to his wife, and the Evidence Code section 662 presumption that beneficial title is presumed to follow legal title. *Barneson*, relying on the principle that the more specific rule should control, held that the Evidence Code presumption should yield to the transmutation requirements of section 852. Following *Haines* and *Barneson*, the more specific community property presumption, which applies only to property acquired by a spouse during marriage, should prevail over the more general common law presumption, codified in section 662, that the owner of legal title is presumed to be the owner of beneficial title.

D. REBUTTING ANY PRESUMPTION AFFECTING THE BURDEN OF PROOF, INCLUDING THE COMMUNITY PROPERTY PRESUMPTION

Evidence sufficient to rebut any presumption affecting the burden of proof must fully counter the factual inference upon which the presumption is based, but it need not do any more than that. Thus,

---

[39] 69 Cal.App.4th 583, 81 Cal.Rptr.2d 726 (1999).

when property is untitled or titled in the name of the purchasing spouse alone, a separate property proponent need only trace the acquisition to a separate property source to overcome the community property presumption that arises from acquisition of property during marriage. But when property is titled in some form of joint and equal title, the form of title is tantamount to an agreement of the spouses to hold in that form. To overcome joint title, a spouse who claims an inconsistent ownership interest must show an agreement of the parties to hold otherwise than as indicated in the form of title, because an agreement is necessary to vary an agreement.[40] When written title to property was acquired in a married woman's name before 1975, community property law presumes that the property is her separate property.[41] The married woman's presumption was based on a two-step inference: first, given the prevailing regime of exclusive male management of the community property, the husband was the person who took title in his wife's name; and, second, that by doing so, he intended to make her a gift of the property. Thus, in addition to tracing to a source of acquisition other than the wife's separate

---

[40] *Lucas*, *supra* note 37.

[41] The married woman's presumption is now codified at Family Code § 803.

property, in order to overcome the presumption a husband was also required to show that he did not intend to make a gift of his interest in the property to his wife.[42]

The married woman's presumption was prospectively repealed, effective 1975. Yet to the extent that the statutory transmutation requirements are inapplicable to the facts this case, the underlying rationale of the married woman's presumption may survive its legislative abolition: a gift may be inferred from the form of title and the surrounding circumstances.[43] However, the burden of proof is now borne by the separate property proponent, as per the community property presumption, rather than the community property proponent,

---

[42]*Geller v. Anolik*, 127 Cal.App.2d 21, 26, 273 P.2d 29 (1954); *Holmes v. Holmes*, 27 Cal.App. 546, 150 P. 793 (1915).

[43] This court anticipated the survival of the rationale of the married woman's presumption even if it were repealed when it applied the presumption (then Civil Code section 164) in *Fanning v. Green*, 156 Cal.279, 283 104 P. 308 (1909):

> We may freely concede... that where there is nothing shown but the direction of a husband that a deed from the vendor shall be made to the wife, even where the purchase is made with community funds, a *prima facie* presumption exists, regardless of the amendment to section 164 of the Civil Code [enacting the married woman's presumption], that a gift to the wife was intended,.... [However,] [t]here is nothing in the nature of such a fact ["that, in the case of the purchase of real property with community funds, the husband has directed that the deed shall run to his wife as grantee"] that renders it consistent only with the theory of gift, and other facts and circumstances may so tend to show another reason than the desire and intent to make a gift as to furnish ample warrant for a conclusion that no gift was intended....

as per the married woman's presumption. Thus, a spouse named solely in title acquired by the other spouse, or a spouse who took title in her name alone with the consent of the other spouse, may seek to overcome the community property presumption by demonstrating that the form of title and the circumstances surrounding the transaction evidence a gift, that is, a relinquishment of all ownership interest by the other spouse. Absent further evidence, the titled spouse may overcome the presumption that the asset is community property, regardless of the source of the purchase funds. The purchase of the Mini-Motorhome in *Lucas* is illustrative.[44]

On the other hand, the spouse having the benefit of the community property presumption may demonstrate that he did not intend to make a gift. On the evidence sufficient to overcome a presumption of gift, the married woman's presumption cases are instructive. In the case of *In re Baer's Estate*, 81 Cal.App.2d 830, 834, 185 P.2d 412 (1947), when, under exclusive male management, a

---

[44] Assuming arguendo that the purchase of the Lucas Mini-Motorhome was a transmutive purchase and that the transmutation statutes do not apply to transmutive purchases, Gerald's silence when Brenda demanded title in her name alone and Gerald's failure to explain that his silence was not consent to relinquish his community property interest in the purchased asset, the trial court's conclusion that the asset was Brenda's separate property would be as sustainable today as it was before the enactment of the transmutation statutes.

husband allowed his wife to hold her community property earnings in a bank account in her name alone and he later used a portion of the funds to purchase and manage securities that he titled in his wife's name alone, his credible testimony that he did not intend to relinquish his community property interest in the account or the securities was sufficient to rebut the married woman's presumption. With respect to his purpose in allowing his wife to hold the bank account in her name alone, he explained that he wished her to be able to "spend it [for personal purchases] as she saw fit." With respect to his purpose in titling the securities in her name alone, he explained: "Because I desired to have it that way so in case I should die she could dispose of the securities and would have immediate money to take care of my youngsters and herself until such time as my will could be probated." Id. at 834. *In re Baer's Estate* is one of many cases in which the married woman's presumption was successfully rebutted by the husband's testimony that he did not intend to make a gift of his community property ownership interest to his wife when he took title to property in her name alone.[45]

---

[45] See, for example, *DeBoer v. DeBoer*, 111Cal.App.2d 500, 505-506, 244 P.2d 953 (1952); *In re Estate of Wilson*, 64 Cal.App.2d 123, 148 P.2d 390, 392 (1944);*Williamson v. Kinney*, 53 Cal.App.2d 98, 102, 125 P.2d 920

Whether one applies the community property presumption or the Evidence Code section 662 presumption shifts the burden of proof and affects the quantum of proof necessary to overcome the presumption. Regardless of which presumption is applied, however, the factual issue remains the same. Did Frankie intend to presently relinquish his community property interest in the insurance policy on his life when he requested that title be put in his wife's name? Frankie testified, without contradiction or objection, that his purpose in purchasing the policy and putting it in her name was his recognition that she would have to take care of their minor children and herself should he predecease her. He did not intend to relinquish his community property ownership in the policy. Effectively, like Mr. Baer, Frankie wished to make his wife a gift of management at his death, not a gift of ownership.[46] Frankie is not required to show an

---

(1942); *Horsman v. Maden*, 48 Cal.App.2d 635, 638-640, 120 P.2d 92 (1941).

[46] Excessive readiness to assume that a spouse's consent to an ambiguous form of title represents consent to a change in the form of ownership may result from conflation of community property ownership rights and community property management rights. A spouse may wish to relinquish community property management rights to the other spouse without relinquishing community property ownership rights. A lay person may reasonably believe that titling community property in the name of one spouse alone will facilitate that spouse's management of the property, as in the instant case, or as in *Brooks*, enable the parties to secure a lower interest rate on a purchase-money loan. Courts applying the married woman's

agreement of the parties that he would retain a community property interest in the insurance policy. The question is whether, in putting the policy in his wife's name, Frankie intended to make a gift of his ownership interest to his wife. On this issue, his intent alone is determinative:

> In determining whether the transfer of separate property of the husband or community property to the wife [by means of the husband taking title to property in the wife's name] constituted a gift to the wife and changed the status of the property to that of the separate property of the wife, the intention of the husband is "the all-important and controlling question." [citing] *Horsman v. Maden*, 48 Cal.App.2d 635, 640-641.

DeBoer v. DeBoer, 111 Cal.App.2d 500, 505, 244 P.2d 953(1952) (married woman's presumption that property taken by husband in wife's name was rebutted by evidence that husband did not intend to make a gift of his ownership interest to his wife).[47] It would indeed be ironic if evidence sufficient to rebut the married woman's

---

presumption statute recognized the distinction between ownership and management rights because the purpose of that statute was to enable a married woman to manage community property. *Baer*, *supra*, is illustrative.

[47] Other language in *DeBoer* is pertinent to the instant case:

> Evidence tending to establish any facts overcoming the presumption and showing that the property is community property, is admissible in evidence.[citations omitted] The court may consider the motive for the conveyance of property by a husband to his wife and the situation of the parties at the time. [citations omitted] Id. at 504-505.

presumption were insufficient to sustain the community property presumption.

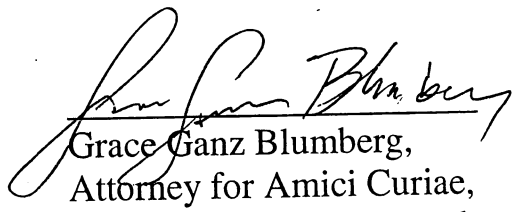
V. CONCLUSION

If the court concludes that the statutory transmutation requirements apply to transmutive purchases, those requirements were not satisfied and the trial court's determination should be sustained. If, however, the court concludes that the transmutation requirements do not apply to transmutive purchases, then further proceedings may be necessary. Frankie's testimony concerning his intentions in having title to the policy placed in his wife's name was plausible and consistent with his purpose in purchasing the insurance policy. That testimony, if credited by the trial court, was sufficient to warrant the trial court's conclusion that the policy is community property. However, it is uncertain whether the trial court made findings of fact with respect to Frankie's intention in placing title in his wife's name. Administrative convenience and the goal of assuring that spousal property entitlements are not improperly undermined would suggest that the better course would be application of transmutation requirements to transmutive purchases. Nevertheless, on the facts of

this case, the same result may ultimately be reached by proper application of the presumption that property acquired during marriage is community property.

December 19, 2011

Respectfully submitted,



Grace Ganz Blumberg,
Attorney for Amici Curiae,
Grace Ganz Blumberg and
Herma Hill Kay