Supreme Court Case No. S193990

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Marriage of FRANKIE and RANDY VALLI: FRANKIE VALLI, Petitioner and Respondent, v. RANDY VALLI, Respondent and Appellant.	Court of appeal Second Appellate District Case No.: BD 414 038

APPLICATION OF JAFFE AND CLEMENS BY WILLIAM S. RYDEN AND NANCY BRADEN-PARKER ON BEHALF OF RESPONDENT/APPELLANT RANDY VALLI TO FILE ONE CONSOLIDATED BRIEF IN RESPONSE TO THE TWO *AMICI CURIAE* BRIEFS FILED ON JANUARY 4, 2012 BY BLUMBERG AND KAY AND GOLDBERG AND KAY; AND RESPONDENT'S CONSOLIDATED BRIEF

After a Published Decision By the Court of Appeal, Second Appellate District, Division Five, Case No. B222435

Los Angeles Superior Court Case No. BD414038
The Honorable Mark Juhas
Judge of the Superior Court

JAFFE AND CLEMENS
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APPLICATION TO FILE ONE CONSOLIDATED RESPONSE TO THE TWO *AMICUS* BRIEFS FILED JANUARY 4, 2012

Respondent/Appellant Randy Valli requests permission to file one Consolidated Responsive Brief to the two *Amicus* briefs filed on January 4, 2012. The basis for this request is as follows:

a. Having read both briefs, it appears that the primary issues addressed in both briefs are essentially the same: issues pertaining to transmutations and whether the title presumption set forth in *Evidence Code* §662 applies in family law cases.

b. Respondent/Appellant Randy Valli has addressed the issues raised by the two *Amicus* briefs in one brief rather than submit what essentially would be two virtually identical briefs.

c. Respondent/Appellant Randy Valli believes that presenting one Consolidated Responsive Brief will be a more efficient way to proceed and less time consuming for the other parties and the Court, when considering Respondent's position.

Dated: February 3, 2012

Respectfully submitted,

Jaffe and Clemens by
William S. Ryden
Nancy Braden-Parker

By: _____
William S. Ryden
For Respondent/Appellate
Randy Valli

For all of these reasons, Amici's briefs do not explain or analyze the issues in a manner that can assist this Court in reaching its decision and should be ignored or stricken.

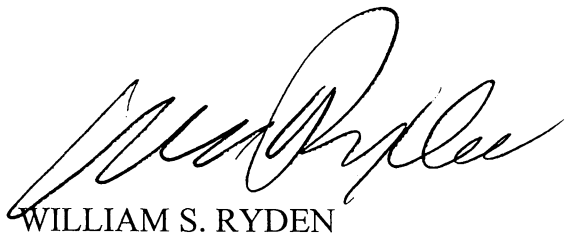
CERTIFICATION

Pursuant to *California Rules of Court*, Rule 8.204(c), I William S. Ryden, certify that WordPerfect X3, the computer program used to prepare Appellant's Brief, reflects that this Brief contains 6504 words.

Respectfully submitted,

February 3, 2012

JAFFE AND CLEMENS



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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANKIE VALLI, Petitioner and Respondent, vs. RANDY VALLI, Respondent and Appellant.	Court of Appeal Second Appellate District Case No.: B222435 Los Angeles Superior Court Case No. BD 414 038

APPELLANT'S CONSOLIDATED BRIEF IN ANSWER TO *AMICUS CURIAE* BRIEFS FILED BY GRACE GANZ BLUMBERG AND HERMA HILL KAY; CHARLOTTE K. GOLDBERG AND HERMA HILL KAY

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INTRODUCTION AND SUMMARY OF RESPONSE

Randy offers this answer to the two Amicus Curiae briefs filed on January 4, 2012, by Professors Grace Ganz Blumberg and Herma Hill Kay and by Professors Charlotte K. Goldberg and Herma Hill Kay on January 12, 2012. Many of Amici's arguments merely elaborate somewhat on Frankie's arguments and are addressed adequately in Randy's answering brief on the merits. Randy does not intend to repeat her brief on the merits here. However, this brief will generally address some glaring errors in these amicus briefs which prevent Amici from explaining or analyzing the issues in a manner that can assist this Court in reaching its decision.

First, each amicus brief begins with a fundamental misconception regarding the record in this case. Amici Blumberg and Kay start from the incorrect premise that this is a transmutation case. With no citation to the record, they state that the trial court concluded that "the character of the insurance policy is controlled by Family Code §852 transmutation requirements."[1] This is entirely unsupported by the record and is simply wrong. Amici Goldberg and Kay, also with no citation to the record, begin their brief with the flawed premise that the result of the Court of Appeal opinion is to award to Randy not only the policy itself but also the entire $365,632 cash value of the policy.[2] This mischaracterizes the Court of Appeal opinion by ignoring the fact that the Court of Appeal remanded the case for the trial court to consider "any reallocation of assets or award of reimbursement in light of our holding."[3] The Court of Appeal opinion did not deprive the community or Frankie of any right of reimbursement they may arguably claim for premium payments made thereafter to maintain the policy which resulted

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[1] Brief of Amici Curiae Professor Grace Ganz Blumberg and Professor Herma Hill Kay (Blumberg & Kay Brief), at p. 1.

[2] Brief of Amici Curiae Professor Charlotte K. Goldberg and Professor Herma Hill Kay (Goldberg & Kay Brief), at p. 1.

[3] Slip op. At p. 12.

in a cash value. The reimbursement issue is separate and apart from the characterization issue and is not addressed by either amicus brief.

The record shows a situation where one spouse, with help from his professional advisors, and without the participation of his spouse, acquires a life insurance policy in his spouses's name, also naming her as beneficiary and where he gave up all ownership and control. Frankie could have taken title in his own name or in joint names. He could have listed someone else, the parties' children for example, as beneficiary. Frankie conceded in his brief that he did it for estate purposes. His purpose was clear. Amici want to argue he did not realize what he was doing which is not a credible argument.

Both amicus briefs also suggest that this Court should extend, change, or simply ignore existing statutory law. They both argue that Family Code section 850, which is completely silent on the subject of spouses' acquisitions from third parties, should be extended to make the transmutation requirements of Family Code section 852 applicable to third-party transactions. Also, both argue that the Evidence Code section 662 title presumption and title itself have no application in marital property disputes–a modification to statutory law that was once proposed by the California Law Revision Commission but ultimately withdrawn.

Finally, each Amicus reaches conclusions that do not take into account the unique nature of the asset in question –a life insurance policy – or the unique circumstances of the Valli matter where, at acquisition, the insured Husband caused Wife to be named as both sole owner and sole beneficiary and relinquished all indicia of ownership (community or otherwise) and all control over the asset.

Rather than address each detail of Amici's arguments, Randy will broadly address these fundamental flaws.

ARGUMENT

I. THIS COURT SHOULD REJECT *AMICI*'S SUGGESTION THAT THIS COURT EXTEND AND CHANGE THE STATUTORY LAW REGARDING TRANSMUTATIONS OF MARITAL PROPERTY BETWEEN SPOUSES TO ENCOMPASS ACQUISITIONS FROM A THIRD PARTY.

Amici want the Supreme Court to do something the Legislature thus far has not chosen to do, i.e. to redefine the transmutation statutes to include all transactions that involve spouses, even those transactions between one spouse and third parties. The argument frankly makes no sense.

At the outset, Amici misrepresent the record by stating, without any citation to the record, that the trial court concluded that the character of the life insurance policy at issue is controlled by the Family Code section 852(a) transmutation requirements.[4] That is simply wrong. As the Court of Appeal noted:

> "The trial court's statement of decision provides, "Ms. Valli argues that she should be awarded the policy on Mr. Valli's life as she, not he, is the policyholder. The court made no finding of transmutation as there was no such finding requested and there was no evidence of transmutation before the court. . . "Randy did not contend in the trial court, and does not contend on appeal, that the policy is her separate property through transmutation. Instead, Randy contends that the policy is her separate property by operation of the form of title presumption."[5]

The trial court did not even address the transmutation issue. Randy did not argue that there had been a "transmutation." She argued that the policy

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[4] Goldberg & Kay Brief, at p. 1.

[5] Slip Op. at p. 11.

was acquired as her separate property. The trial court applied the general community property presumption and essentially ignored Randy's argument that because Frankie caused Randy to hold sole legal and sole beneficial title to the life insurance policy upon acquisition, that the policy is Randy's separate property.[6]

Amici elaborate on Frankie's argument that the policy could be Randy's separate property only through "transmutation" of the funds used to acquire the policy from a third party and that therefore the writing requirement prescribed in Family Code Section 852 was mandated and was not met.[7] Amici state:

> "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.'"[8]

Amici's use of the terms "transmutive purchases" and "transformative purchases" assume implicitly that purchasing property from a third party means that the character of the funds is changed, i.e. "transmuted" to the character of the purchased property. Amici are wrong. Nothing in the statute makes it applicable to spouses transacting with a third party. Funds are not "transmuted" merely by being applied to acquire and maintain property of a character different from the funds.

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[6] [2 RT 450:22-28 to 451:8]

[7] Blumberg & Kay Brief, at pp. 2-23; Goldberg & Kay Brief, at pp. 14-24.

[8] Blumberg & Kay Brief, at p. 8.

A. Amici's Definition of "Transmutive Purchases" Begs the Question and Does Not Accord with the Statute Itself.

Family Code Section 850 establishes that married persons may change the character of their property. The statute provides in pertinent part:

> "Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:
>
> "(a) Transmute community property to separate property of either spouse.
>
> "(b) Transmute separate property of either spouse to community property.
>
> "(c) Transmute separate property of one spouse to separate property of the other spouse." [Emphasis supplied]

The statute uses the term "married persons," not "a married person." The use of the term "married persons" suggests that the Legislature had in mind transactions – either agreements or transfers – between the two spouses. The statute plainly describes what the spouses may do, as between themselves, to change the character of property already owned by one spouse or by the community. It makes no mention of characterization of property upon acquisition.

B. The Sections of the Family Code Cited by Amici Do Not Support Amici's Assertion That Section 852 Should Apply to Purchases of Titled Property from a Third Party.

Amici assert that the use of the term "transmutation" in various Family Code provisions supports applying the writing requirements of section 852 to "transmutive purchases." They first look to the language of section 852 (c) which reads: "This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made

and that is not substantial in value taking into account the circumstances of the marriage." Blumberg and Kay assert that "[t]he 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.[9] That may or may not be the case, but the suggestion is not worthy of further analysis here because it is not relevant to the issue at hand. Randy did not argue, and the Court of Appeal did not find, that Randy acquired title to the policy by gift.

The concept of gift, like the concept of transmutation, implies that Frankie or the community owned the policy at some point or that Frankie or the community made a gift to Randy of the funds used to pay the policy premiums. The character of the policy was determined at acquisition. Section 852 (c) doesn't deal with characterization at acquisition. Frankie arranged for Randy to be the sole owner and sole beneficiary from the inception of title.[10] The Court of Appeal also did not find that community funds applied to acquire and maintain the policy were a gift to Randy. The Court remanded the case for determination by the trial court whether Frankie or the community has a reimbursement right for the resulting cash value that arose from payment of the premiums with community funds.[11] A possible right of reimbursement to give credit to the community for premium payments is a totally separate issue, an issue never mentioned by the Amici. Randy would argue that the community's reimbursement right is a trial issue. The idea that the appellate decision resulted in the community automatically losing a right to seek reimbursement for premium payments is not correct.

Amici also argue that Family Code section 2640 (c) and its legislative history indicate that "the legislature must have meant to include transmutive

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[9] Blumberg & Kay Brief at p. 13

[10] [2 RT 247:28 to 248:1].

[11] Slip. Op. at p. 12

purchases within the term *transmutation."*[12] Subsection (c) of Family Code section 2640 provides in pertinent part: "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 (commencing with Section 850) of Part 2 of Division 4, or a written waiver of the right to reimbursement." The plain language of the statute contradicts Amici's claim that the transmutation statutes apply whenever property of one character is applied to acquire property of a different character. There need not be a transmutation in order for the acquired property to retain its character distinct from that of the funds or other property contributed to the acquisition. The contributions retain their original character and are thus reimbursable "unless" there has been a transmutation–i.e. a separate, properly evidenced agreement between spouses–or a written waiver of the reimbursement right.

C. Amici Cite No Cases That Support the Assertion That Acquisitions from a Third Party Constitute a Transmutation.

No case cited by Amici stand for the proposition that section 852 applies to acquisitions from third parties or that funds contributed at acquisition are transmuted to the character of the acquired property. Amici cite examples of cases where, when property purchased with community funds was claimed to be separate property, courts applied the Family Code section 852 requirements to determine if there had been a successful transmutation.[13] The cases are inapposite.

In *In re Marriage of Steinberger,*[14] the property at issue was a diamond ring. A diamond ring is not titled property. Therefore the community character of the funds alone would have determined the character of the

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[12] Blumberg & Kay Brief, at p.15.

[13] Blumberg & Kay Brief, at pp. 6, 13.

[14] *In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449

property at acquisition and a section 852 writing would have been required to prove a transmutation to separate property.

In *In re Marriage of Buie and Neighbors*,[15] wife gave husband a blank check on her separate account with which he purchased the Porsche at issue. At trial, questions of title apparently were not at issue. Although the Porsche itself may have been titled in husband's name at the time of dissolution, the issue was whether the wife had a right to reimbursement under Family Code section 2640 for the separate funds that were used to acquire the automobile.

The cited cases do not stand for the proposition that a section 852 writing is required in order to find that property titled in one spouse's name at acquisition is that spouse's separate property. In some cases, a section 852-type writing, though not required, may be useful to prove that an untitled spouse intended to relinquish beneficial ownership. However, because of the unique nature of an insurance policy, there is no need to seek further proof of Frankie's intention. The contract of insurance names Randy both sole owner and sole beneficiary.

II. AMICI ADVOCATE THAT THIS COURT IGNORE CURRENT STATUTORY AND CASE LAW PROVIDING THAT EVIDENCE CODE SECTION 662 AND QUESTIONS OF TITLE APPLY IN CHARACTERIZING MARITAL PROPERTY.

Both Amicus briefs insist that for various historical reasons, the Evidence Code section 662 presumption of title does not apply in marital actions.[16] For example, Goldberg and Kay assert that Evidence Code section 662 does not apply in characterizing property acquired during marriage because the general community property presumption derives from Spanish civil law and the Evidence Code presumption derives from common law.[17] This is another

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[15] *In re Marriage of Buie and Neighbors* (2009) 179 Cal.App. 4th 1170

[16] Blumberg & Kay Brief, at p. 26; Goldberg & Kay Brief, at p. 11.

[17] Goldberg & Kay Brief at p. 12

attempt to lead this Court to a decision that is contrary to statutory law. Family Code section 210 provides: "Except to the extent that any other statute or rules adopted by the Judicial Council provide applicable rules, the rules of practice and procedure applicable to civil actions generally, including the provisions of Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice and procedure in, proceedings under this code."

Citing section 210, this Court recently held: "Although some informality and flexibility have been accepted in marital dissolution proceedings, such proceedings are governed by the same statutory rules of evidence and procedure that apply in other civil actions." *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354. The Court went on to say: "[I]t is well settled that the ordinary rules of evidence apply in marital dissolution trials." *Id.* at p. 1362.

The presumption of title, a rule of evidence, applies in marital dissolution actions. This is confirmed by case law. See e.g. *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291 ("Generally, factors determinative of whether property is separate or community are the time of the property's acquisition; operation of various presumptions, particularly those concerning the form of title; and whether the spouses have transmuted or converted the property from separate to community or vice versa.")

A. In 1983 a New Code Section to Eliminate the Form of Title Presumption in Marital Actions Was Proposed by the Law Revision Commission but Never Passed.

As Amici acknowledge,[18] in 1983 the California Law Revision Commission proposed that a new code section be enacted to eliminate the form of title presumption with regard to property acquired by a married person during marriage. The Court of Appeal in *In re Marriage of* Brooks & Robinson (2008) 169 Cal.App. 4th 176, reviewed the legislative history regarding that recommendation.

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[18] Goldberg & Kay Brief at p. 10.

"The Estate Planning, Trust and Probate Law Section of the State Bar of California opposed the proposed elimination of the form of title presumption, stating 'the form of title should create a presumption as to the character of the property. When property, for example, is taken in the name of a wife as her sole and separate property, it is the intent for the parties that it be so treated.' (Estate Planning, Trust and Probate Law Section, State Bar of Cal., letter to Assemblyman Alister McAlister, Feb. 28, 1984, p. 4.) Citing this opposition and other comments to the proposed statute, the Law Revision Commission requested that the bill be amended to omit section 5110.630. (Cal. Law Revision Com., letter to Assemblyman Alister McAlister, Mar. 22, 1984.) The legislation was so amended, leaving only the proposed statutes concerning transmutation, and became law without affecting the form of title presumption or superseding the aspect of upon which we rely. (See Amend. to Assem. Bill No. 2274 (1983-1984 Reg. Sess.) Apr. 3, 1984.)"

Id. at p. 189 (Emphasis added).

The Legislative Commission suggested legislation that would "overrule the title inferences of separate property." Amici concede that the legislation was withdrawn, not revisited by the Law Revision Commission or the legislature. To date, the Legislature has left Evidence Code section 662 in place in Family Law cases.

The decision Amici are asking this Court to make is one for the Legislature–a rule the Legislature to date has not chosen to make. This Court should decline Amici's invitation to ignore current statutory law.

B. Assuming Arguendo That, as Amici Blumberg and Kay Suggest, the Rationale of the Married Woman's Presumption May Prescribe the Evidentiary Burden That Frankie Would Have to Meet to

Sustain the Community Property Presumption, Frankie Failed to Meet That Burden.

Amici Blumberg and Kay devote a large section of their brief to a discussion of the married woman's presumption which presumed a gift to Wife when property was acquired by husband and titled in her name.[19] The presumption was repealed in 1975, but Amici suggest that its rationale may have survived and that evidence of husband's intent not to make a gift, which was sufficient to rebut the married woman's presumption, should be sufficient to sustain the community property presumption. Frankie's evidentiary burden would be to establish that by directing that the property be titled in wife's name, he did not intend to make a gift. Amici suggests that Frankie's stated purpose in placing the policy in Randy's name was his recognition that she would have to take care of their minor children and herself should he predecease her. Amici argues that this testimony belies Frankie's intent to make a gift.[20]

Assuming *arguendo* that Frankie's intention is relevant, Amici's argument actually helps Randy. First, the stated intention is not inconsistent with an intention to make a gift. Second, he did not need to put the policy in Randy's name to accomplish that purpose. Simply making her beneficiary would have accomplished the same purpose. Finally, by making Randy both owner and beneficiary of the policy, Frankie relinquished any conceivable interest he might have had–community or otherwise. In this unique circumstance, where the uninsured spouse is both the owner and beneficiary of a life insurance policy, it may be presumed that Frankie's intention, in addition to protecting Randy and the children, was to acquire no incidents of ownership so that the proceeds of the policy would not be subject to estate taxation at his death. Neither amicus brief addresses the actual nature of the asset, i.e. a life insurance policy, or the very fact specific circumstances that occurred in *Valli*.

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[19] Blumberg & Kay Brief, at pp. 33-40.

[20] *Id.* at p. 36-39.

Amici Goldberg and Kay actually make the preposterous argument that "both the *Brooks* and *Valli* courts used [the married woman's] presumption to 'create the inference of a gift' when property is titled in the wife's name. Randy does not see the need to address that argument except to say that unlike Amici, the Court in *Valli* considered the unique asset and circumstances of this particular case and applied the appropriate law and presumptions to reach its conclusion. Nothing in the record suggests that Randy or the appellate court was trying to resurrect a repealed presumption. Unlike Amici, Randy's argument and all briefs cited to the actual record and the opinion.

C. Amici's Argument That Only the Family Code Section 2581 Title Presumption Applicable to Property Taken in Joint Form Applies in Marital Actions Makes No Sense.

Perhaps conceding that the Legislature did not adopt the proposal to eliminate the form of title in marital actions, Amici argue that the only title presumption that applies in marital actions is the Family Code section 2581 title presumption applicable to property taken in joint form. This makes no sense. Amici are suggesting that no matter what the circumstances are, how title is taken is not to be considered when a trial court is considering whether a general presumption of community property is rebutted.

Frankie argues that section 2581 supports the general community property presumption. Amici argue that section 2581 rebuts the general presumption. Randy would argue that 2581 is an exception to Evidence Code section 662 and has no application when title is taken in one spouse's name. Family Code section 2581 deals with joint title, not title/ownership in one spouse's name and certainly not a situation where one spouse purposely titles the asset in the other spouse's name , gives up all beneficial interest and expects nothing in return as happened in the *Valli* case with the life insurance policy.

D. *In re Marriage of Haines*, Cited by Amici, Does Not Support Amici's Claim That Evidence Code 662 Does Not Apply When it Conflicts with the General Presumption of Community Property

Amici claim that the general community property presumption applies when it conflicts with the Evidence Code section 662 presumption of title. [21] This adds nothing to Frankie's arguments and is addressed at length in Randy's answering brief.[22] Randy will not repeat her argument here except to point out that Amici's reliance on *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, is misplaced. *Haines* clearly says that the section 662 presumption of title applies in marital property disputes.

> "Where property status cannot otherwise be proved, characterization is determined by applicable presumptions. One category of presumptions includes those presumptions arising from the form of title, such as the joint title form presumption codified in former Civil Code section 4800.1 (Fam.Code, Â§ 2581), and the general common law presumption in favor of title, codified in section 662. Therefore, absent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization. (In re Marriage of Lucas (1980) 27 Cal.3d 808, 813, 166 Cal.Rptr. 853, 614 P.2d 285.) ¶ Here, by virtue of the 1987 quitclaim deed, Clarence acquired the residence in his sole title. This of course raised the common law presumption that title to property reflects its actual ownership." *Id.* at pp. 291-92.

III. *AMICI* IGNORE THE UNIQUE NATURE OF THE ASSET IN QUESTION–A LIFE INSURANCE POLICY ACQUIRED BY THE INSURED IN A TRANSACTION WITH A THIRD PARTY AND TO WHICH THE INSURED, FRANKIE, RETAINED NO INDICIA OF OWNERSHIP, EQUITY OR CONTROL.

Yet another flaw in Amici's argument is that Amici ignore the unique characteristics of the asset in question in this matter, a life insurance policy. They also ignore the special circumstance of this case where the insured

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[21] Blumberg & Kay Brief, at p.32.

[22] Appellant's Answer to Respondent's Opening Brief on the Merits at

spouse unilaterally relinquishes both ownership and beneficial interest and all indicia of ownership and control to the uninsured spouse for specific reasons at time of acquisition, and does exactly what he intended.

For example, Amici cite *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, for the proposition that title in Randy's name is not enough to prove her separate property claim unless accompanied by a writing meeting the transmutation requirements of section 852.[23] The apparent similarity of *Barneson* to the instant case is that Wife in *Barneson* acquired her purported separate interest in the stock by Husband's direction to a third party. The similarity ends there, however. As Amici acknowledge, *Barneson* involves property that already was owned by the parties before the purported transfer to the wife. The case is therefore inapposite. Also, the passage from *Barneson* quoted by Amici demonstrates that, even by analogy, *Barneson* does not support Amici's position that title in Randy's name is insufficient to make the policy her separate property. The stock transfer in *Barneson* was held to be an ineffective transmutation because "Barneson only directed 'transfer' of the stock without specifying what interest was to be transferred." *Id.* at p. 590. The court found the transmutation requirements were not satisfied because "the direction to 'transfer' an asset into a different name does not necessarily connote an intention to change beneficial ownership." *Id.* at p. 593 (emphasis added).

No such ambiguity exists here. The unique nature of a life insurance policy removes any such uncertainty. Frankie's direction upon acquisition that Randy be made sole owner and sole beneficiary clearly vests both legal and beneficial ownership in Randy at acquisition. Frankie undisputably caused Randy to obtain both legal and beneficial ownership of the policy. He intended to relinquish all ownership and control.

Amici Goldberg and Kay further argue (again, without citation) that Randy's position at trial was that "Frankie intended to make a gift." Again,

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[23] Goldberg & Kay Brief, at p. 19.

there is no citation to the record and the statement misrepresents Randy's position which Amici apparently did not read or understand. Randy did not contend in the trial court, and does not contend on appeal, that the policy is her separate property through transmutation or gift. Instead, Randy contends that the policy is her separate property by operation of the form of title presumption."[24]

The record suggests that Frankie avoided acquiring any indicia of ownership in order avoid estate taxation of the proceeds upon his death. Whatever his reason, record evidence establishes that he accomplished exactly what he intended to do and the result was that Frankie caused the policy to be acquired in Randy's name as Randy's separate property.

Under the particular circumstances of this case, the life insurance policy never was community property. There is no reason to inquire into Frankie's intention because the contract of insurance names Randy both sole owner and sole beneficiary. Frankie gave her ownership and control and gave up all interest that he might claim.

A life insurance policy is unlike a car, furniture, shares of stock, etc. A life insurance policy is a legal contract between the policy owner and the insurance company. If the policy is owned by and payable to a named beneficiary other than the estate of the insured, the proceeds are not considered to be a part of the estate of the insured.[25] Frankie gave up all rights to the policy, effectively removing it from his estate–and thus from the community estate-- and making it Randy's separate property. Randy's rights in the policy do not arise from her marriage, but solely from the terms of the policy itself in which she has been named the sole owner and sole beneficiary.

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[24] Slip Op. at p. 11.

[25] For purposes of federal estate taxes, "incidents of ownership" are determined by reference to policy and state law. 26 U.S.C.A. Â§ 2042(2).

IV. THE COURT OF APPEAL OPINION DOES NOT DEPRIVE THE COMMUNITY OR FRANKIE OF ANY RIGHT THEY MAY RETAIN IN FUNDS INVESTED IN THE POLICY.

Yet another flaw in Amici's reasoning is that Amici do not separate ownership issues from possible reimbursement issues or even acknowledge that there is a difference. They base much of their argument on their flawed premise that the result of the Court of Appeal opinion is to award to Randy not only the policy itself but also the entire $365,632 cash value of the policy that accumulated by premium payments made by Frankie to maintain the policy.[26] Amici Goldberg and Kay state:

> "If the character of the funds used to purchase the policy control, the cash value of $365,032 is community property and would be divided equally at divorce. If the title in Randy's name controls, or if Frankie intended to transmute the community property funds to Randy's separate property, the cash value would be her separate property and it would belong to her upon divorce."[27]

Again, with no actual citation to the record, Amici demonstrate that they have not read the appellate opinion and its ramifications correctly. The Court of Appeal did not find that the cash value would automatically be Randy's separate property. Amici ignore the fact that the Court of Appeal remanded the case for the trial court to consider "any reallocation of assets or award of reimbursement in light of our holding."[28] The Court of Appeal opinion does not deprive the community or Frankie of any right they may retain in funds invested in the policy.

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[26] Brief of Amici Curiae Professor Charlotte K. Goldberg and Professor Herma Hill Kay (Goldberg & Kay Brief), at p. 1.

[27] Goldberg & Kay Brief, at p. 1.

[28] Slip op. At p. 12.

Again, Amici fail to acknowledge the unique nature of this asset. The life insurance policy was not worth $365,000 when purchased. After the policy was acquired, Frankie continued to maintain the policy by making premium payments with community property funds. These funds added a savings component that may be reimbursable. Randy did not argue, and the Court of Appeal did not hold, that the funds used to maintain the policy were transmuted. The Court of Appeal remanded the case back to the trial court for consideration of reimbursement issues. One question on remand will be whether the community, from the character of the funds used to make premium payments, has a reimbursement right for the resulting accumulated cash value. Characterization of the policy was determined at acquisition. The policy itself remains Randy's separate property. Nevertheless, the community funds used to maintain the policy may be reimbursable. That would be a trial court decision based on the facts.

CONCLUSION

Amici argue from fundamental misconceptions regarding the record in this case. The record shows that, with help from his professional advisors, concedly for estate planning purposes and without Randy's participation, Frankie acquired a life insurance policy in his Randy's name, also naming her as beneficiary for estate purposes. Amici argue that Frankie did not know what he was doing. Both briefs also ignore the fact that the Court of Appeal remanded the case for the trial court to consider "any reallocation of assets or award of reimbursement in light of our holding."

Both amicus briefs also suggest that this Court should extend, change, or simply ignore existing statutory law by modifying, extending or ignoring . Family Code section 850 and Evidence Code section 662 .

Finally, each Amicus reaches conclusions that do not take into account the unique nature of the asset in question–a life insurance policy .

For all of these reasons, Amici's briefs do not explain or analyze the issues in a manner that can assist this Court in reaching its decision and should be ignored or stricken.

CERTIFICATION

Pursuant to *California Rules of Court*, Rule 8.204(c), I William S. Ryden, certify that WordPerfect X3, the computer program used to prepare Appellant's Brief, reflects that this Brief contains _____ words.

Respectfully submitted,

February 3, 2012

JAFFE AND CLEMENS

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 433 North Camden Drive, Suite 1000, Beverly Hills, California 90210.

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Executed on February 3, 2012, at Beverly Hills, California.

COLLEEN LEMOINE