CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of FRANKIE and RANDY VALLI.	B222435 (Los Angeles County Super. Ct. No. BD414038)
FRANKIE VALLI, Petitioner and Respondent, v. RANDY VALLI, Respondent and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Juhas, Judge. Reversed and remanded.

Jaffe and Clemens, William S. Ryden, Nancy Braden-Parker for Respondent and Appellant.

Walzer & Melcher, Christopher C. Melcher; Garrett C. Dailey for Petitioner and Respondent.

INTRODUCTION

Respondent and appellant Randy Valli (Randy) appeals from the trial court's order in the parties' martial dissolution proceeding awarding petitioner and respondent Frankie Valli (Frankie)[1] a $3.75 million insurance policy on Frankie's life issued by Manulife during their marriage,[2] with Randy as the owner and beneficiary. We hold that under the circumstances of this case, the policy listing Randy as the policy owner when taken out by Frankie and Randy is Randy's separate property under the "form of title"[3] presumption.

BACKGROUND

In 1984, Frankie and Randy were married. Frankie and Randy separated some 20 years later on September 23, 2004, and Frankie filed a petition for dissolution of marriage the next day. At the time Frankie filed the petition for dissolution of marriage, he and Randy had three minor children together.[4]

In March 2003, Frankie acquired a $3.75 million insurance policy on his life (the policy).[5] Randy testified that she and Frankie had discussed acquiring such life insurance when Frankie was in the hospital with "heart problems." The purpose of the policy was "[t]o prepare for [Randy's] future in case something did happen to Frankie." Frankie testified that he obtained the policy because he had been experiencing medical problems and wanted to make sure that he took care of his family. Frankie desired that his children

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1 "As is customary in family law cases, we refer to the parties by their first names for purposes of clarity and not out of disrespect." (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 828, fn. 2.)

2 The John Hancock Life Insurance Company subsequently took over Manulife.

3 *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344.

4 One child is now an adult, and the two remaining children will reach adulthood in June 2012.

5 The policy is referred to as a "blended universal life contract."

DISCUSSION

The Trial Court Erred When It Determined That The Policy Is Community Property

Randy contends that the trial court erred in finding that the policy is community property and not her separate property. Randy contends that the policy is her separate property under the form of title presumption because she was listed as the policy's owner when the policy was taken out.

A. Standard of Review

Generally, we review for substantial evidence the factual findings that underpin a trial court's determination of whether property is community or separate property. (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 734.) When, however, the determination "'requires a critical consideration, in a factual context, of legal principles and their underlying values,' the determination in question amounts to the resolution of a mixed question of law and fact that is predominantly one of law. [Citations.] As such, it is examined de novo. [Citation.]" (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 184.)

B. Application of Relevant Principles

Absent an agreement by the parties, Family Code section 2550[7] imposes on the trial court in marital dissolution proceedings a mandatory, nondelegable duty to value and divide equally the parties' community property estate.[8] (See *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 89; *In re Marriage of Knickerbocker* (1974) 43 Cal.App.3d 1039, 1044; see also *In re Marriage of Walrath* (1998) 17 Cal.4th 907, 924.) To do so,

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[7] All statutory citations are to Family Code unless otherwise noted.

[8] Section 2550 provides in relevant part, "Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall . . . divide the community estate of the parties equally."

the trial court must first determine which property owned by the parties is part of the community property estate—that is, the trial court must "characterize" the property. "Characterization of property, for the purpose of community property law, refers to the process of classifying property as separate, community, or quasi-community. Characterization must take place in order to determine the rights and liabilities of the parties with respect to a particular asset or obligation and is an integral part of the division of property on marital dissolution. [¶] 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 . . . ." (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291; see generally, Hogoboom, et al., California Practice Guide: Family Law (The Rutter Group 2010) ¶ 8:30, p. 8-9 (rev. # 1, 2010) (Family Law).)

In general, a spouse maintains as his or her separate property all property acquired prior to marriage; property acquired during the marriage that can be traced to a separate property source; and property acquired during the marriage by gift, bequest, devise or descent. (§ 770, subd. (a)[9]; see *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 484.) "[E]arnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse." (§ 771, subd. (a).) Other property acquired by a married person during the marriage presumptively is community property. (§ 760[10]; *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 12; see generally Family Law, *supra,* ¶ 8:77, p. 8-19.) The party claiming such property acquired during

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[9] Section 770, subdivision (a) provides, "Separate property of a married person includes all of the following: [¶] (1) All property owned by the person before marriage. [¶] (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. [¶] (3) The rents, issues, and profits of the property described in this section."

[10] Section 760 provides, "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

the marriage as his or her separate property has the burden of overcoming this presumption by a preponderance of the evidence. (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1585, 1591.)

Randy contends that the form of title presumption in Evidence Code section 662[11] establishes the policy as her separate property. "The presumption arising from the form of title is to be distinguished from the general presumption set forth in [Family Code section 760] that property acquired during marriage is community property. It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption." (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 814-815, superseded by statute on other grounds as stated in *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 187-189; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 186.) "Thus, the mere fact that property was acquired during marriage does not . . . rebut the form of title presumption; to the contrary, the act of taking title to property in the name of one spouse during marriage with the consent of the other spouse effectively removes that property from the general community property presumption. In that situation, the property is presumably the separate property of the spouse in whose name title is taken. [Citations.]" (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 186-187; Family Law, *supra*, ¶ 8:33.5, p. 8-10.) A party can overcome the form of title presumption "only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended." (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 189-190; see *In re Marriage of Fossum, supra,* 192 Cal.App.4th at p. 344.) "'This presumption may be rebutted only by clear and convincing proof.' The presumption is based on the promotion of a public policy that favors the stability of titles to property." (*In re Marriage of Fossum, supra,* 192 Cal.App.4th at p. 344.) The form of

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[11] Evidence Code section 662 provides, "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

title presumption does not apply if the spouse who does not hold record title was unaware that title was taken solely in the other spouse's name. (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 186, fn. 6.)

"'Property' includes real and personal property and any interest therein." (§ 113.) "An insurance policy is property. It can be sold, assigned or bequeathed by the owner. Its pecuniary value is the same as though the owner held a promissory note of the insurance company payable on condition." (*Estate of Mendenhall* (1960) 182 Cal.App.2d 441, 444.) A spouse's insurable interest in his or her spouse's life at the inception of a life insurance policy is not extinguished by the dissolution of the spouses' marriage. (See *In re Marriage of Bratton* (1994) 28 Cal.App.4th 791, 794.)

The property at issue in this matter—the policy—was acquired during marriage with community property funds. Thus, if the general presumption that property acquired during marriage is community property applies, then the policy properly would be characterized as community property. (§ 760; *In re Marriage of Bonds, supra,* 24 Cal.4th at p. 12; see generally Family Law, *supra,* ¶ 8:77, p. 8-19.) Notwithstanding the general community property presumption, however, based on the evidence adduced at trial, the form of title presumption applies, and the policy properly is characterized as Randy's separate property.

The evidence at trial established that Randy is the owner of the policy. Randy testified that the policy was taken out to prepare for her future in case something happened to Frankie and that Frankie and Siegel told her that "they were going to make [her] the owner" of the policy. Frankie did not introduce contrary evidence. Indeed Frankie's own testimony and the testimony from his witness, Gilbert, support Randy's position that she is the owner of the policy. Frankie testified that he "caused" the policy to be purchased from Gilbert's company. Gilbert testified that Randy is the owner of the policy. Frankie testified that he did not intend to separate from Randy when he obtained the policy and that he "put everything in Randy's name, figuring she would take care and give to the kids what they might have coming." Frankie's attorney's argument to the trial

court supports Randy's position. Frankie's attorney stated, "The policy was issued in Randy's name as the owner during marriage . . . ."

Frankie contends that Randy failed to prove that she holds legal title to the policy because the policy was not introduced into evidence, no evidence was adduced as to the specific form of title that she took, and her claim of title rests solely on Gilbert's testimony. Frankie cites no authority for the proposition that "title" for purposes of the form of title presumption must be established through documentary evidence. That the policy was taken solely in Randy's name is established not just through Gilbert's testimony, but also through testimony of Randy and Frankie. Because title to the policy was taken solely in Randy's name during marriage with Frankie's consent, the form of title presumption and not the community property presumption applies. (*In re Marriage of Lucas, supra,* 27 Cal.3d at pp. 814-815; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 186-187.)

Frankie failed to overcome the form of title presumption. Frankie did not present evidence of an agreement or understanding with Randy that when the policy was placed solely in Randy's name as owner, they intended title to the policy to be other than Randy's separate property. (*In re Marriage of Brooks, supra,* 169 Cal.App.4th at p. 189.) Likewise, Frankie did not present evidence that he was unaware that title to the policy was taken solely in Randy's name. (*Id.* at p. 186, fn. 6.) That Frankie knew the policy was taken solely in Randy's name is supported by substantial evidence. Frankie testified that he "put everything in Randy's name," and Randy testified that Frankie and Siegel told her that "they were going to make [her] the owner" of the policy.

Frankie contends that the form of title presumption in Evidence Code section 662 does not arise because of the presumption of undue influence emanating from a fiduciary duty Randy owed Frankie under section 721[12] in connection with the acquisition of the

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[12] Section 721 provides, "(a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried. [¶] (b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband

policy and the advantage she obtained over Frankie. The "'confidential spousal relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.'" (*In re Marriage of Haines, supra,* 33 Cal.App.4th at pp. 295-296, citing § 721, subd. (b).) "'The marriage relationship alone will not support a presumption of undue influence by one spouse over the other where the transaction between them is shown to be fair. But, where one spouse admittedly secures an advantage over the other, the confidential relationship will bring into operation a presumption of the use and abuse of that relationship by the spouse obtaining the advantage.'" (*In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 296, citing *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 88.)

The parties disagree about the reach of the fiduciary duties codified in section 721. Randy argues that the fiduciary duties in section 721 apply only to transactions between spouses and not to transactions between one spouse and a third party. Accordingly, Randy argues, because the policy was not the result of a transaction between spouses, but between a spouse—Frankie—and a third party insurance company, the fiduciary duties in section 721 do not apply. Frankie argues that the fiduciary duties in section 721 apply not only to transactions between spouses but also to transactions between a spouse and a third party. Neither party cites any authority interpreting section 721 with regard to such

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and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following: [¶] (1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying. [¶] (2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions. [¶] (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

third party transactions. We need not resolve this issue, however, because Randy prevails under either theory.

If Randy's theory is correct, she prevails because the acquisition of the policy resulted from a third party transaction and not from a transaction between spouses. If Frankie's theory is correct, Randy still prevails because the third party transaction at issue was between Frankie and a third party and not between Randy and a third party. Randy could not have owed a fiduciary duty to Frankie in a transaction in which she did not participate. Under the theory that the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the fiduciary duty would apply only when the transacting spouse gains an advantage over the spouse who is not a party to the transaction. (See *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 296.) No such advantage was obtained here. Frankie expressed his desire that the policy be acquired for the benefit of his family. There is no indication the acquisition of the policy was to be an allocation of assets or a savings device.

Frankie argues that Randy participated in the acquisition of the policy because she discussed the acquisition of insurance on Frankie's life in connection with Frankie's hospitalization. Randy's discussion does not establish that she participated in the purchase of the policy or in the decision to name her as the owner of the policy.

Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial. Although Randy and Frankie first discussed purchasing life insurance on Frankie when Frankie was in the hospital, Frankie, and not Randy, arranged for the purchase of the policy from Gilbert's company. Frankie testified that he obtained the policy because he wanted to make sure that he took care of his family—he wanted his children to be able to go to college and that "there would be money for everybody." Frankie and the business manager, Siegel, informed Randy that she would be made the owner of the policy. No evidence was presented that Randy played any role in being named the owner of the policy. There is not substantial evidence of undue influence.

Frankie argues that the presumption of title for property obtained during marriage with community funds should not apply absent evidence that he and Randy "intended that title control ownership." This argument seems to be a combination of his contentions discussed above. There is substantial evidence that the parties intended Randy own the policy, and there is not any significant evidence of undue influence, or that would otherwise rebut the presumption of title. Randy is the beneficiary of the policy. The policy was intended to be for the protection of Randy and the children in the event Frankie died. There was no indication it was intended to be a savings device. Thus, there is no evidence that anyone other than Randy was intended to "control" the policy. (See *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 190 ["Nor can the presumption be rebutted by evidence that title was taken in a particular manner merely to obtain a loan"].)

Frankie contends that there was no *valid* transmutation of the policy. 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." "'A "transmutation" is an *interspousal* transaction or agreement that works to change the character of property the parties' *already own.* By contrast, the *initial acquisition* of property from a third person does *not* constitute a transmutation and thus is not subject to the [Family Code section 852, subdivision (a)] transmutation requirements [citation].' (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 8:471.1, p. 8–129 (rev. # 1, 2008).)" (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 191; *In re Summers* (2003) 332 F.3d 1240, 1244-1245 [the funds used to acquire property from a third party are not subject to the section 852 transmutation guidelines when the funds themselves are not transferred from one spouse to the other].) Because the property in this case—the policy—was acquired from a third party and not through an interspousal transaction, section 852 and the authorities concerning transmutation are not relevant to this case. (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at p. 191.) Moreover, 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. Frankie's attempt to recast Randy's theory as "transmutation by conduct" is to no avail because the form of title presumption applies, and therefore a transmutation theory is not involved.

Accordingly, the trial court erred in finding that the policy is community property and the judgment is reversed. Because we hold that the trial court erred in finding that the policy is community property, we do not need to reach Randy's contentions that the trial court erred in awarding ownership solely to Frankie at the policy's cash value and that it abused its discretion in failing to maintain Randy as a beneficiary on the policy as spousal support. Upon remand, we leave to the trial court any reallocation of assets or award of reimbursement in light of our holding.

DISPOSITION

The judgment is reversed, and the matter is remanded. Randy Valli is awarded her costs on appeal.

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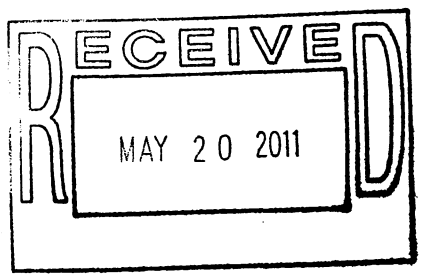
MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KUMAR, J.*



* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.