

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

RANDY VALLI  
Appellant

vs.

FRANKIE VALLI  
Respondent

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PETITION FOR REVIEW

After a Unanimous Published Decision By The  
Second Appellate District, Division Five<sup>1</sup>

ISSUES PRESENTED AND EXPLANATION OF NEED FOR REVIEW

- Does the record title presumption apply to property acquired by spouses during marriage with community funds in the absence of any independent evidence that they intended that said property be characterized as the titled-spouse's separate property?
- Does Fam. Code §852's requirement of a writing to change character apply to property acquired during marriage?
- If the asset was acquired from a third party, is the spouse who benefitted from the transaction subject to the interspousal fiduciary duty?

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<sup>1</sup> *In re Marriage of Valli* (2011) 195 Cal.App.4th 776 [“the Opinion”], attached hereto.

- What showing is required to overcome the presumption of undue influence when one spouse benefits from a transaction during marriage?

The Los Angeles County Superior Court determined that a \$3.75 million life insurance policy with a cash value of \$365,032 was community property because it was acquired during marriage and the premiums were paid with community property. Randy (the wife) appealed, arguing that the policy was her separate property because she had been named the policy's owner.

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

The Court of Appeal reversed the Superior Court on a straight presumption-of-title rationale. It held:

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

This opinion resulted from confusion as to the relationship between the Evidence Code section 662 title presumption and the common law presumption of undue influence that arises whenever one spouse gains an advantage over the other spouse in a transaction involving community property. The opinion undermines the fiduciary duty between spouses by relying on record title rather than the

community property presumption and putting the burden on the disadvantaged spouse to prove undue influence rather than on the benefitting spouse to rebut it.

## INTRODUCTION

Review is important to secure uniformity of decision and to settle an important question of law that can adversely impact spouses who do not have control over the family finances. (Calif. Rules of Ct., rule 8.500(b)(1). ) As will be discussed in more detail below, the appellate courts disagree as to the effect to give title when characterizing property between spouses in marital dissolution actions. Although the trial court properly found that the life insurance policy was community property because it was acquired during marriage with community funds, the Second District panel reversed on a straight presumption-of-title rationale. It held that regardless of the lack of any writing transmuting the property from community into Randy's separate property, the mere act of taking title in her name removed it from the community property presumption and the protections of Family Code section 852, resulting in an unintended gift from Frankie to Randy of \$365,032 in cash value, plus \$3.75 million dollars in death benefit proceeds that Frankie intended would be used for his children's support and protection.

All whole life insurance policies are acquired with one party or the other as the named owner. Dozens of published opinions have characterized such policies as community property based upon the acquisition of the policy during marriage or the use of community funds to pay the premiums. This is the first published opinion to hold that, regardless of the policy's community attributes *and the application of the community property presumption*, such a policy is the separate property of the spouse designated as its owner.

If this case stands, hundreds of thousands of California spouses will get a nasty surprise when they learn that that the policies on which community property has been paying the premiums for years are, in fact, the named owner's separate property. This opinion affects far more than life insurance policies. Pension plans and other retirement accounts are always held in the name of the employee spouse. Under this opinion, such assets are now the separate property of the employee spouse, even if all of the benefits were earned during marriage. Houses and cars may be held in the name of one spouse because the other spouse has poor credit and the parties could not qualify for a loan to acquire the asset if they bought it jointly. Those houses and cars are now separate property if this opinion is allowed to stand.

The opinion also takes away the interspousal fiduciary duty in any marital transaction that is between one spouse and a third party. Since property purchased during marriage is almost always acquired from a third party, this case carves a huge hole in marital fiduciary obligations by exempting all property originally acquired by one spouse from a third party during marriage with community funds.

Case law has been consistent that, under Family Code section 852, a writing which expresses a clear intent to transmute is required to change the character of property. (See, e.g., *Estate of MacDonald* (1990) 51 Cal.3d 262, *In re Marriage of Benson* (2005) 36 Cal.4th 1096, *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583.) By holding that section 852's writing requirement does not apply to assets acquired from third parties, community funds used to acquire a new asset are suddenly transmuted into separate property (a new asset titled in one spouse's name). This creates a major exception in the otherwise strict requirements for a writing "in which the adversely affected spouse expresses a clear understanding that the document changes the character or ownership of specific property." (*In re Marriage of Benson, supra*, 36 Cal.4th at pp. 1106-1107.) Pursuant to this opinion, a self-serving spouse can create separate property out of community funds by arranging for newly acquired property to be titled in his or her name. This cannot be what this Court intended.

## SUMMARY OF THE FACTS

Eighteen months prior to separation, Frankie acquired the \$3.75 million life insurance policy insuring his life. (RT 181:15-20; RT 244:15-17 & 293:4-11; JA 20-24 & 56:7-10.) Randy testified that they talked about it while Frankie was in the hospital with heart problems and agreed to obtain a life insurance policy “to protect [her] future.” (RT 728:18-22 & 729:4-9.) She testified that Frankie told her that he was “going to make [her] the owner.” (RT 728:23-28.)

When Frankie obtained the policy, he had no plans to separate from Randy. (RT 181:21-23.) He had medical problems and wanted to be certain that his family would be taken care of and his children could go to college. (RT 181:24-182:2.) The purpose of the policy was to provide financial security for them when he died. (JA 56:9-10.) As Randy put it: “[The purpose was] to prepare for my future in case something did happen to Frankie.” (RT 729:4-9.) There was no evidence of any agreement or understanding as to the policy’s character. Its cash value of the policy as of September 12, 2008, was \$365,032. (RT 245:12-18.) It named Randy as “the owner.” (RT 247:24-248:1.)

Barry Siegel had been the business manager for Frankie Valli and The Four Seasons since 1994. (RT 289:10-25.) His office made the premium payments on the policy. Between March 7, 2003, when the first premium payment was made and December 3, 2008, \$512,675.75 in payments were made on it. (RT 291:5-

292:5 & 293:9-12; Trial Exhibit 52 [JA 155-158].) Randy never offered to contribute to the cost of the premiums on the policy. Frankie paid them all. (RT 188:13-20.)

The parties offered little testimony about the policy. Frankie testified that he did not want Randy to be the beneficiary of a policy on his life after separation because he wanted the death benefits to go to his children. (RT 188:3-12.) He testified that he had established a child support trust to secure his child support obligation. (RT 866.) He was concerned about the estate taxes his children will have to pay upon his death. He would like them to be able to keep the Four Seasons music catalog intact as it would be a source of income for them. The insurance that he obtained was part of the plan to help keep the catalog in the family after his death. (RT 184:28-185:11.) Randy admitted that she had paid Frankie nothing to be listed as the owner of the policy. (RT 450.)

At one point, the Court assumed that because Frankie purchased the policy during marriage, it was community property and asked if everyone agreed. (RT 450:22-451:3.) Randy's attorney replied: "depending on how the evidence goes, it may be separate property, depending on the reasons why – that he acquired the policy and put her name on it." (RT 451:4-8.)

Randy offered no evidence as to why she was listed as the owner rather than just the beneficiary. She offered no testimony of any substance as to their



discussions, her actions, or anything related to the acquisition beyond that it was a joint decision and that: “[The purpose for obtaining the policy was] to [protect/prepare for] my future in case something did happen to Frankie.” (RT 728:5-729:9.) She also presented no evidence that Frankie understood that by naming her the policy owner, he was making a gift to her of policy’s substantial cash value that rapidly accumulated and its death benefits.

The Trial Court applied the community property presumption and held that the policy was a community asset, awarded it to Frankie and ordered him to reimburse Randy for half of its cash value. The Court of Appeal reversed in a published opinion. No request for rehearing was made in the Court of Appeal.

## I.

### LIFE INSURANCE POLICIES ACQUIRED DURING MARRIAGE WITH COMMUNITY PROPERTY FUNDS ARE COMMUNITY PROPERTY

The Court of Appeal held that the character of an insurance policy acquired and paid for during marriage with community funds is determined by the act of designating one of the spouses as the “owner.” The first and most obvious problem with this holding is that it is simply incorrect as a matter of black letter law; this issue has been settled in California for probably a hundred years. As stated in *Mundt v. Connecticut General Life Ins. Co.* (1939) 35 Cal.App.2d 416, 421:

“From the leading case of *New York Life Ins. Co. v. Bank of Italy*, 60 Cal.App. 602, 214 P. 61, through the many intervening cases, down to *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.2d 482, the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset....”

Witkin succinctly states:

[§ 47] Whole Life Insurance.

(1) *General Rule*. Where the premiums on a spouse's life insurance policy are paid with community funds, the chose in action represented by the policy is community property. (See *Blethen v. Pacific Mut. Life Ins. Co. of Calif.* (1926) 198 C. 91, 99, 243 P. 431; *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 402, 6 C.R. 13, 353 P.2d 725, *infra*, §141; *New York Life Ins. Co. v. Bank of Italy* (1923) 60 C.A. 602, 605, 214 P. 61; *Mundt v. Connecticut General Life Ins. Co.* (1939) 35 C.A.2d 416, 421, 95 P.2d 966; *Bazzell v. Endriss* (1940) 41 C.A.2d 463, 465, 107 P.2d 49; *Estate of Wedemeyer* (1952) 109 C.A.2d 67, 71, 240 P.2d 8; *Fidelity & Cas. Co. of New York v. Mahoney* (1945) 71 C.A.2d 65, 69, 161 P.2d 944, *infra*, §113 [must show that premium was paid with community funds]; *O'Connor v. Travelers Ins. Co.* (1959) 169 C.A.2d 763, 765, 337 P.2d 893 [same]; *Estate of Mendenhall* (1960) 182 C.A.2d 441, 444, 6 C.R. 45; *Polk v. Polk* (1964) 228 C.A.2d 763, 781, 39 C.R. 824; *Patillo v. Norris* (1976) 65 C.A.3d 209, 217, 135 C.R. 210; 18 Pacific L. J. 969; 54 A.L.R.4th 1203 [valuation]; Rutter Group, 2 Family Law §8:331.)

(2) *Distinction: Spouse as Beneficiary*. If the spouse is the beneficiary of the insured spouse's policy, this is a gift of community property to the beneficiary spouse. At the death of the insured

spouse, the proceeds vest in the beneficiary spouse as his or her separate property. (*Estate of Miller* (1937) 23 C.A.2d 16, 18, 71 P.2d 1117; *Shaw v. Board of Administration, State Employees' Retirement System* (1952) 109 C.A.2d 770, 774, 241 P.2d 635.)<sup>2</sup>

(11 Witkin, *Summary* 10th (2005) Comm.Prop, §47, p.578 (emphasis added).)

Cal.Jur.3d concurs: “A policy of insurance on a spouse's life is community property where the premiums have been paid with community funds.” (39A Cal. Jur. 3d Insurance Contracts (2010) §367.)

Bassett, California Community Property Law §5:44 (2010 ed.) states: “Under California community property law a life insurance policy purchased with community funds is an asset of the community. Life insurance paid for by an employer as a benefit of employment is community property.”

Literally dozens of published opinions have flatly held that “(a) policy of insurance on the husband's life is community property when the premiums have been paid with community funds.” (*Tyre v. Aetna Life Ins. Co, supra*, 54 Cal.2d at p. 402; see also, *In re Marriage of Elfmont* (1995) 9 Cal.4th 1026, 1039 (J. George concurring and dissenting), *Life Ins. Co. of North America v. Cassidy* (1984) 35 Cal.3d 599, 605; *McBride v. McBride* (1936) 11 Cal.App.2d 521, 523-524; *Estate of Foy* (1952) 109 Cal.App.2d 329, 333; *In re Sears' Estate* (1960) 182 Cal.App.2d

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<sup>2</sup> This is actually an important, albeit unrelated point, namely that the gift of policy benefits, if any, takes place upon the death of the insured, not upon the acquisition of the policy.

525, 530-531; *Dixon Lumber Co. v. Peacock* (1933) 217 Cal. 415, 418; *Estate of Foy*, (1952) 109 Cal.App.2d 329, 333; *Estate of Sears* (1960) 182 Cal.App.2d 525, 530; *Field v. Bank of America* (1950) 100 Cal.App.2d 311, 314-315; *Johnston v. Johnston* (1951) 106 Cal.App.2d 775, 779; *Polk v. Polk* (1964) 228 Cal.App.2d 763, 781; and *Estate of Baratta-Lorton v. C.I.R.* (1985) T.C. Memo. 1985-72, 1985 WL 14707.)

In each of these cases, one spouse or the other was the named owner of the policy; however, that did not control its character. Rather, the factors that determined character were: 1) when was the policy acquired, and 2) who made the premium payments. In other words, if the policy was acquired during marriage and the community made the payments, then the policy was community property – period. Notwithstanding this unbroken line of cases, the Court of Appeal held that it does not matter that the community acquired and made the payments on the policy – all that matters is who was designated its “owner.”

All will agree that spouses designate a policy owner for many reasons, probably none of which relate to its character in the event of a divorce. At page 18 of her opening brief, Randy stated:

“It can be inferred that [designating Randy as the owner] was also done for estate planning purposes as is often the case when one spouse is made the owner of an insurance policy as part of the estate plan of the other spouse.”

In spite of one spouse's being named as owner for a totally unrelated purpose *or for no particular reason at all*, the Opinion held that whichever spouse happens to be so named is also the policy's absolute owner for all purposes, *including characterization upon divorce*. That will be an unpleasant surprise to half of the California spouses who believe that such policies are community property and represents a dramatic 180-degree departure from a hundred years of California law.

## II.

### THE OPINION ERODES THE COMMUNITY PROPERTY PRESUMPTION

“When life insurance premiums are paid with community property funds, the resulting policy is an asset of the community. [Citations.]” (*Life Ins. Co. of North America v. Cassidy, supra*, 35 Cal.3d 599, 605.) Community property is defined as “all property” which is acquired by “a married person” during marriage, “[e]xcept as otherwise provided by statute.” (Fam. Code §760.) The definition includes property acquired during marriage by one spouse acting alone and in one spouse's sole name, unless another statute characterizes it as separate property.

In dissolution actions, the party claiming that the property is separate always bears the burden of proof to overcome the community property presumption and establish by a preponderance of evidence that an asset acquired during marriage is

not community property. (*Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1584.) Because Frankie acquired the policy during marriage with community funds, it falls within the definition of community property. (Fam. Code §760.) Nevertheless, the trial court held that it was Randy's separate property simply because he designated her as its owner. How did this happen?

Relying on *Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 186-187 [*Brooks*], the Opinion held “ ‘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.]’ ” (Opinion, p.783.) And, that presumption can only be rebutted by clear and convincing proof. (*Ibid.*)<sup>3</sup>

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<sup>3</sup> *Brooks* is a model for the axiom that bad facts make bad law. The trial court in *Brooks* was addressing the issue of whether a third party (a business that purchased distressed properties) which bought a residence titled in the name of one of the spouses was a bona fide purchaser for value. The case did not deal with whether the title property presumption trumps the fiduciary duties between spouses and the marital presumptions. The *Brooks* court acknowledged that the form of title presumption does not apply in a dispute between spouses regarding the character to property where one has received an unfair advantage over the other. The husband, who was *in pro per*, never argued that wife's acquisition of title in her name was due to any undue influence. (*Id.*, 169 Cal.App.4th at p.190, fn.8. ) But *Brooks* is now being cited for the unfortunate proposition that the title presumption will prevail over the laws relating to transmutation and fiduciary duty.

Suddenly, instead of the presumption being that property acquired during marriage is community as provided by Family Code section 760, if the property is acquired in one spouse's name, as insurance policies usually are, the presumption is flipped and the asset is presumed to be separate property, requiring the non-titled spouse to present clear and convincing evidence to the contrary to bring it back into the community property fold. This conflicts with virtually all published marital property cases in the last 150 years of California history and is simply wrong.

The community property presumption applies to all property acquired during marriage and shifts the burden to the party claiming it separate to prove it by a preponderance of evidence. That is its purpose. (Fam. Code §760; *Meyer v. Kinzer and Wife* (1859) 12 Cal. 247; *In re Marriage of Baragry* (1977) 73 Cal.App.3d 444, 448 [“Property acquired during a legal marriage is strongly presumed to be community property. [Citations.] That presumption is fundamental to the community property system...”].) Yet, the Opinion established a major exception, holding that the community property presumption does not apply to assets acquired in one spouse's name during marriage. That cannot stand.

III.  
THE FORM OF TITLE PRESUMPTION SHOULD  
NOT APPLY IN MARITAL CASES

The Opinion relied on the form of title presumption in Evidence Code section 662 to hold that the policy was Randy's separate property. Evidence Code section 662 states:

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.

In marital situations, that presumption will invariably conflict with the presumption of undue influence because the spouse in whose name the property is taken will usually have benefited in comparison to the other spouse. "Generally, a fiduciary obtains an advantage if his position is improved, he obtains a favorable opportunity, or he otherwise gains, benefits, or profits." (*In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364 [*"Lange"*].)

There is no doubt that Randy benefited from the acquisition of this policy. Per the Opinion, she receives \$365,032 in cash value plus \$3.75 million in death benefit proceeds *despite having almost no insurable interest on Frankie*. The presumption of undue influence arises without any showing of "actual fraud, deceit or coercion" (*In re Marriage of Mathews* (2005) 133 Cal.App.4<sup>th</sup> at pp. 629-630.);



thus, in this case it was presumed by operation of law and Frankie should not have had to prove undue influence.

It is well established that the form of title presumption is inapplicable in a dispute between spouses when the application of that presumption conflicts with the more specific presumption of undue influence. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296 [*“Haines”*]; *Marriage of Delaney* (2003) 111 Cal.App.4th 991, 997-998.) *Haines* found that the form of title presumption and the presumption of undue influence “are in irreconcilable conflict” (*Haines*, at p.296) and that the undue influence trumps the title presumption based on strong policy considerations of preventing overreaching by spouses. Thus, Randy “properly should have borne the burden of rebutting the presumption of undue influence... (t)o demonstrate the advantage was not gained in violation of the confidential relation between marital partners...” (*Ibid.*)

Evidence Code section 662 places the burden of proof on the party disputing record title to show by clear and convincing evidence that the holder of legal title is not the owner of full beneficial title. Until that showing is made, a court is required to assume that the record owner is the full beneficial owner. Like all presumptions, once proof of the basic fact is made, a court is required “to assume the existence of the presumed fact ‘unless and until evidence is introduced which would support a

finding of its nonexistence. . . .” (*Haines*, at pp.296-297, quoting Evid. Code §604.)

The undue influence presumption, on the other hand, places the burden of proof on a spouse who receives an unfair advantage over the other spouse in a transaction to show that there was no breach of fiduciary duty. (*Haines*, at p.296.)

“The presumption that the advantage was gained by the exercise of undue influence continues until it is dispelled.” (*Ibid.*) The two presumptions conflict.

The same set of facts cannot lead to dueling presumptions. Both parties cannot have the burden of proof on a single issue. A court cannot be required to assume the existence of two presumed facts which are mutually exclusive of the other. In resolving the conflict, *Haines* noted “that where two presumptions are in conflict, the more specific presumption will control over the more general one. [Citation.]”

(*Id.* at p.301.) The Court concluded that:

[A]pplication of section 662 is improper when it is in conflict with the presumption of undue influence that emanates from former section 5103, subdivision (b) (Fam. Code §721(b)). Any other result would abrogate the protections afforded to married persons and denigrate the public policy of the state that seeks to promote and protect the vital institution of marriage. (*Id.* at p.302.)

This was reiterated in *Marriage of Fossum, supra*, 192 Cal.App.4<sup>th</sup> at p.345:

“[T]he form of title presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other.”

*Haines* noted that the form of title presumption is “concerned primarily with the stability of titles, which obviously is an important legal concept that protects parties to a real property transaction, as well as creditors.” (*Id. at p.294.*) The stability of title is less of a concern when the issue is how to characterize property in a marital dissolution action between spouses, where the rights of a third party *bona fide* purchaser or creditor is not involved. (*Id.*, 294-295.)

The recent case of *Starr v. Starr* (2010) 189 Cal. App. 4th 277, carefully analyzed these competing presumptions, as follows:

The *Haines* court quoted *Brison v. Brison* (1888) 75 Cal. 525, 529 (*Brison I*) for the proposition that when a spouse gained an advantage from a transaction with the other spouse, “[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.” (*Haines, supra*, 33 Cal.App.4th at p. 293.) *When that presumption arose, it trumped the competing presumption created by Evidence Code section 662. (Id.*, at pp. 297, 299-301.) Therefore, the husband had to show that the deed “was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.” (*Id.* at p. 282. Emphasis added.)

The Opinion acknowledged this general rule, but then proceeded to carve out an enormous exception by holding that because the policy was acquired from a

broker, “Randy could not have owed a fiduciary duty to Frankie in a transaction in which she did not participate.” (Opinion, p.786.)<sup>4</sup>

The problem with this logic is that almost any time an asset is purchased during marriage, it is from a third party. Also, Frankie did not suddenly decide to purchase a life insurance policy -- Randy requested that he acquire one. (RT 728:5-22.) He acquired it as a result of her request. Yet, somehow, because he purchased it from a third party, Randy is completely exempted from fiduciary duty and the resulting presumption of undue influence.

The Opinion held that because Randy did not participate in the final stage of acquiring the policy fiduciary duty was not implicated. That is simply wrong. The acquisition was the result of one continuous transaction that started with her request. She benefited from the transaction. That triggered the presumption of undue influence that trumped the presumption-of-title. Evidence Code section 662 did not control the outcome, and should have had no role in the process. The Opinion creates confusion by suggesting that it should control.

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<sup>4</sup> The Opinion also left open the very real question of whether Family Code section 721 applies to transactions during marriage with third parties. By suggesting that this is a viable argument, the Opinion invites others to argue that somehow marital transactions are exempt from fiduciary duty if they involve third parties. (See discussion in section IV. C., below.)

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

Frankie raised the breach of fiduciary duty argument at trial in response to Randy's form of title argument. He argued that a presumption of undue influence would arise if the policy were characterized as Randy's separate property because she did not pay any consideration for her sole ownership of the policy, which had been purchased with community funds. Frankie argued that the form of title presumption was trumped by the undue influence presumption. (RT 961:2-11.) The Trial Court agreed, but the Court of Appeal did not.

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

The "confidential relationship [between spouses] imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (Fam. Code §721(b).)

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

a species of unfair advantage. (*Marriage of Burkle (Burkle II)* (2006) 139 Cal.App.4th 712, 731 (emphasis added) [*“Burkle”*].)

*Lange, supra*, 102 Cal.App.4<sup>th</sup> at p.364, broadly defined the type of benefit that triggers the presumption of undue influence:

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

Randy was definitely advantaged to Frankie’s detriment.

- She requested that he buy the policy. (RT 728:5-22.)
- He purchased it with community funds. (JA 875; RT351:12-15)
- The premiums were paid on the policy with community funds through the date of separation. (JA155; RT 291:9-26.)
- Between March 7, 2003, when the first premium payment was made and December 3, 2008, *\$512,675.75 in payments were made on it.* (RT 291:5-292:5, 293:9-12; Trial Exhibit 52 [JA155-158].)
- The policy had a cash value of \$365,032. (JA 875.)
- Randy gave Frankie no consideration for the policy to be characterized as her separate property. (RT 450:10-15.)
- Randy will receive \$3.75 million in death benefits on Frankie’s life with virtually no insurable interest.<sup>5</sup>

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<sup>5</sup> Frankie has provided a child support trust and Randy’s spousal support is only \$5,000 per month.

Despite this, the Opinion states: “No such advantage was obtained here.” (Opinion, p.786.) In other words, the Opinion found that Randy did not benefit and thus the presumption of undue influence was not triggered. This is contrary to *Lange* and other cases which have defined “unfair advantage” broadly.

Since, under the Opinion, Randy receives an unfair advantage by having the policy deemed to be her separate property even though it was acquired with community funds, the presumption of undue influence arose. She had to rebut that presumption or see the policy characterized as community. Once the undue influence presumption arose, the case should have been analyzed solely under the undue influence presumption. The form of title presumption should have been disregarded.

B. Randy Failed to Rebut the Presumption of Undue Influence:

“When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action ‘was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of’ the transaction.” (*Burkle, supra*, 139 Cal.App.4th at p. 738-739.)

This is important. Since Randy was the advantaged spouse, to overcome the presumption of undue influence *it was her burden* to establish:

- 1) The transaction was freely and voluntarily made;

- 2) With a full knowledge of all the facts; and
- 3) With a complete understanding of the effect of the transfer.

She arguably proved that the transaction was free and voluntary. However, she offered no evidence to establish that Frankie had “full knowledge of the facts” and a “complete understanding” that by naming her the owner he was making a gift to her for all purposes of 100% of the premiums, the cash value, and death benefits. (See *Burkle, supra*, 139 Cal.App.4th at p. 738-739; *Marriage of Lund* (2009) 174 Cal.App.4th 40, 55; *Marriage of Fossum, supra*, 192 Cal.App.4<sup>th</sup> at p.344; etc.)

There is absolutely no evidence in the record that Randy or anyone else explained to Frankie the significance of naming Randy as the owner of the policy. There is absolutely no evidence that he (or anyone else) understood that naming Randy as the “owner” was effectuating a transmutation of the policy from community property (as provided for in an unbroken line of cases going back almost 100 years) to her separate property, along with 100% of all premium payments thereafter made with community property.

Since Randy benefited, it was her burden to overcome the presumption of undue influence which arose as a matter of law. The Opinion, however, put the burden on Frankie to prove undue influence. It held: “There is not substantial evidence of undue influence.” (Opinion, pp.786, 786-787.) In other words, *Frankie*



*had to prove it. That is not the test. Undue influence was presumed.* It was Randy's burden to rebut that presumption and she did not do so. The Opinion places the burden on the wrong party. It is contrary to every published opinion discussing the presumption of undue influence. Since Randy offered no evidence as to points (2) and (3), how could she overcome the presumption? She couldn't – and didn't. The Opinion has greatly muddied the law.

C. Fiduciary Duty Applies to All Transactions During Marriage:

Randy argued that the presumption of undue influence could not have arisen because she owed no fiduciary duty to Frankie in taking ownership of the policy. Citing Family Code section 721, Randy claimed that the fiduciary duty which spouses owe each other only applies “in transactions between themselves.” (AOB 13.) Randy stated: “This was not a transaction ‘between’ Frankie and Randy. It was a transaction with a third party. . . .” (*Id.*) Accordingly, she argued, the undue influence never came into play, so the form of title presumption should be allowed to operate. (AOB13-14.)

The Opinion did not resolve whether the duty applied, finding instead that Randy prevailed whether it did or not. (Opinion, p.786.) This is unfortunate because by leaving this question unresolved, the Opinion invites more litigation over the question.

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

(a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

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

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

Randy is incorrect in asserting that the fiduciary duty only applies to contractual agreements between spouses. If her position were correct, there would be no breach of fiduciary duty if a spouse sold a community asset to a third party without the consent of the other spouse, since it was not a “transaction between

spouses.” (See, *contra*, Fam. Code §1102(a) – requiring joinder of both spouses in the sale of community real estate).

The last sentence of Fam. Code §721(b) “is clear, prohibiting either spouse from taking ‘any unfair advantage of the other.’” (*Burkle, supra*, 139 Cal.App.4<sup>th</sup> at p. 730.) The fiduciary duty applies not only to interspousal transactions, but any time a spouse deals with community property, even if he or she acts alone. For example, Family Code section 721, subdivision (b)(3) provides that a spouse may not profit from “any transaction by one spouse without the consent of the other spouse” concerning community property. If the fiduciary duty were limited to contracts between spouses, there would be no need for a spouse to disgorge profits made in a “transaction by one spouse.” The fiduciary duty also extends to a spouse’s management and control of community property, even if that spouse acts alone. (Fam. Code §1100(e).)

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

Dictionary defines a ‘transaction’ as an ‘act,’ and a ‘fact’ as ‘a thing done.’

(*Nelson v. Municipal Court* (1972) 28 Cal.App.3d 889, 892, fn.4 (dealing with transactional immunity).)

The word “transaction” as used in Family Code section 721 is not limited to contracts between spouses. It includes any fact or dealing between spouses, or any conduct by either of them, concerning their property. The acquisition of the insurance policy in this case qualifies as a transaction between spouses. Randy asked Frankie to take out the policy and she participated in the acquisition of the policy by discussing it with Frankie and their business manager. (RT 728:5-22.)

Frankie did not obtain the policy unilaterally without Randy’s knowledge or participation. The policy was her idea and she participated in the process of obtaining it. Her conversations with Frankie about the policy, when Frankie was in the hospital, obviously worried, under stress and very vulnerable, were dealings between spouses regarding the acquisition of property. Randy was the one who stood to gain from the policy. Had she not asked Frankie to take out the policy, it might never have been obtained. Frankie’s testimony that he put the policy in Randy’s name, trusting that she would use the proceeds of the policy for the support of their children, demonstrates that he was relying on their confidential relationship in obtaining the policy.

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

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

V.  
ACQUIRING AN ASSET DURING MARRIAGE WITH COMMUNITY  
PROPERTY IN ONE SPOUSE'S NAME IS A TRANSMUTATION  
TRIGGERING FAM. CODE §852

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

"A "transmutation" is an *interspousal* transaction or agreement that works to change the character of property the parties' *already own*. By contrast, the *initial acquisition* of property from a third person does *not* constitute a transmutation and thus is not subject to the [Family Code section 852, subdivision (a)] transmutation requirements [citation]." (Opinion, at p.783.)

Thus, both *Brooks* and *Valli* hold that the writing requirement in Family Code section 852 for interspousal transactions which change the character of property does not apply to initial acquisitions. (Opinion, p.787; *Brooks, supra*, 169 Cal.App.4th at p.191.)

The *Brooks* decision has been criticized by several legal commentators. (See, e.g., Gray & Wagner, *Complex Issues in California Family Law* (2009 ed.), §J6.11, pp.J6-68 to J6-75; *Attorney's BriefCase California Family Law*, FL2010.1, card CmPr 929).) It is respectfully submitted that the *Brooks* decision is incorrect in excluding assets acquired from third parties during marriage in one spouse's name from the definition of transmutation.

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

[A] life insurance policy is not the same as a house, a business, or other traditional assets. Unlike those assets, which are meant to be utilized during life, a life insurance policy is meant to be utilized after the insured's death. Consistent with this purpose, the owners of a life insurance policy deliberately designate the individual who stands to obtain the benefits of the policy when the insured dies.... (JA 51:3-9.)

She is correct. Life insurance policies are different. They are acquired for different reasons than a house or car. The designation of the policy owner is made for tax or

estate planning reasons, or simply because that is the way the agent completed the application. People are not characterizing it as “community property” or “separate property.” Moreover, it would be a surprise to most to even know that they have the option of taking ownership of a life insurance policy jointly.

If it stands, the Opinion will affect far more than just insurance policies. It applies to any asset acquired in one spouse’s name alone during marriage. As demonstrated in *Marriage of Barneson* (1999) 69 Cal.App.4th 583, “you don't just slip into a transmutation by accident.”<sup>6</sup> That is precisely what Randy asks this Court to decree. While Randy argues that what happened here was not technically a “transmutation,” her argument gives it precisely the same effect – a community asset became separate.

A transmutation is an ““agreement or common understanding between the spouses”” to change character to property. (See *Marriage of Weaver* (1990) 224 Cal.App.3d 478, 484-485, quoting *Estate of Levine* (1981) 125 Cal.App.3d 701, 705.) It has also been defined as “an interspousal transaction or agreement which works a change in the character of the property.” (*Haines, supra*, 33 Cal.App.4th 277, 293; *Marriage of Cross* (2001) 94 Cal.App.4th 1143,1147 (same).) Or, as “a transfer of property rights between spouses which results in a change of legal or beneficial ownership of the property, either expressly or by operation of law.”

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<sup>6</sup> As quoted in *Marriage of Campbell* (1999) 74 Cal.App.4th 1058, 1065.



(Gray & Wagner, *Complex Issues in California Family Law* (2009 ed.), §C3.01[1], p.C3-2.)

Prior to January 1, 1985, the law recognized transmutations involving oral or written agreements, or understandings inferred from conduct or statements which evidenced an intention to change the character of property. (*Weaver, supra*, 224 Cal.App.3d at pp.484-485.) This led to lengthy trials involving dubious testimony as parties attempted to establish an agreement or understanding to overcome record title. The Opinion invited that exact sort of testimony in this case. (Opinion, p.784.)

To remedy the problems which arose from transmutations based on unreliable evidence, the Legislature enacted Civil Code section 5110.730 (now Fam. Code §852) on January 1, 1985, invalidating any transmutation which is not in writing. (*Estate of MacDonald* (1990) 51 Cal.3d 262, 269.) Fam. Code §852 states: “*A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.*” (Fam. Code §852(a).) (Fam. Code §852(a) (emphasis added).) To satisfy the express declaration requirement, the “writing signed by the adversely affected spouse [is not valid unless it contains] language which expressly states that the

characterization or ownership of the property is being changed.” (*MacDonald, supra*, 51 Cal.3d at p.272.)

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

In enacting section 852 . . . , the Legislature made a policy decision balancing competing concerns. When the rule now codified in section 852 was being considered, the Law Revision Commission stated as follows: ‘California law permits an oral transmutation or transfer of property between the spouses notwithstanding the statute of frauds. This rule recognizes the convenience and practical informality of interspousal transfers. However, the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an ‘agreement’ or even to commit perjury by manufacturing an oral or implied transmutation. [¶] The convenience and practice of informality recognized by the rule permitting oral transmutations must be balanced against the danger of fraud and increased litigation caused by it. The public expects there to be formality and written documentation of real property transactions, just as it expects there to be formality in dealings with personal property involving documentary evidence of title, such as automobiles, bank accounts, and shares of stock. Most people would find an oral transfer of such property, even between spouses, to be suspect and probably fraudulent, either as to creditors or between each other. [¶]

(Recommendation Relating to Marital Property Presumptions and Transmutations (Sept. 1983) 17 Cal. Law Revision Com. Rep. (1984) 205, 213-214, footnotes omitted.)

Application of Family Code section 852 to the facts of this case serve the policy goals of this state. Randy, in essence, is claiming that there was an implied understanding with Frankie to make the insurance policy her separate property. (See RT 728:5-22.) Randy also argues that the act of naming her as policy owner is evidence of Frankie's intention to make the policy her separate property. (AOB 17.) The Opinion invites parties to litigate their intentions a trial. This is exactly the type of dispute that the Legislature sought to avoid by enacting Family Code section 852. Randy relied on conduct or oral statements by Frankie as evidence that he intended to make the insurance policy her separate property. *No written evidence documenting the transmutation was introduced, not even the policy itself or the application.* Her theory is nothing more than transmutation by conduct. The Opinion dealt with this obvious point succinctly as follows:

“Frankie's attempt to recast Randy's theory as ‘transmutation by conduct’ is to no avail because the form of title presumption applies, and therefore a transmutation theory is not involved.” (Opinion, p. 787.)

A valuable community property insurance policy became Randy's separate property – yet no transmutation occurred. The Opinion holds that the presumption-of-title trumps transmutation and the body of the law that has built up over the last

25 years. Despite \$365,032 of community property suddenly becoming separate property, the Opinion, and also *Brooks*, cleaves to the fiction that there was no transmutation. This reasoning is erroneous and brings California law right back to the pre-1985 era of proving “agreements or understandings.”

The Supreme Court in *MacDonald, supra*, noted that Fam. Code section 852 was intended to remedy the problems created under prior law, which allowed transmutations to be founded upon oral agreements or implications from spousal conduct. (*MacDonald, supra*, 51 Cal.3d at p.269.) The *Brooks* decision, and now *Valli*, conflicts with earlier cases which define transmutation. The narrow definition of transmutation adopted by the *Brooks* and *Valli* encourages expensive or perjured testimony by spouses attempting to transform comments or conduct by one spouse into an agreement to change the character to property acquired during marriage, the very problem which Fam. Code section 852 addresses.

Both *Brooks* and the Opinion recognize that record title can be overcome by clear and convincing evidence of an “oral agreement or understanding.” In other words, “pillow talk.” Isn’t this exactly what Fam. Code section 852 was designed to avoid? According to *Brooks* and *Valli*, any time an asset is acquired during marriage in the name of one spouse, we need to litigate the existence of whether there was an “agreement,” “understanding,” or perhaps an “inference of an

understanding” (*In re Marriage of Mahone* (1981) 123 Cal.App.3d 17, 23) to avoid the presumption-of-title. We are back to pre-1985 law.

### CONCLUSION

*Brooks* and now *Valli* have greatly muddied the law with regard to the effect of the presumption-of- title and role of fiduciary duty involving assets acquired during marriage. Frankie asks that this Court grant review and clarify the law with regard to the complex and pervasive issues raised by this Opinion.

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CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Respondent Frankie Valli, hereby certify that, pursuant to Cal. Rules of Court, rule 8.504(d)(1), this brief contains approximately 8,208 words, including footnotes, as computed by the Microsoft Word 2007 word counter.

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