Case No. S193990

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RANDY VALLI

Appellant

vs.

FRANKIE VALLI

Respondent

Court of Appeal
Second Appellate District
Case No.: B222435

Superior Court
County of Los Angeles
Case No.: BD 414038

REPLY TO ANSWER TO PETITION FOR REVIEW

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_____/

REPLY TO ANSWER TO PETITION FOR REVIEW

After a Unanimous Published Decision By The
Second Appellate District, Division Five[1]

THIS IS NOT A NARROW QUESTION LIMITED TO THE RICH

Contrary to Randy's assertion, this is not "a narrow and very unique set of facts and circumstances." What is unique about it? The holdings in this case apply to every transaction by which an asset is acquired during marriage from a third

[1] *In re Marriage of Valli* (2011) 195 Cal. App. 4th 776 ["the Opinion"].

party in the name of one spouse alone. Like a car or a security, someone had to be named the owner of the policy.

Let's reverse the facts: Had Frankie informed Randy that he was going to be the owner, would Randy have objected? Of course not – she was going to be the beneficiary of a $3.75 million policy. Since she would have been "aware" that title had been taken in Frankie's name and presumably would not have objected, would she have relinquished her community property interest in the policy and the $365,000 in cash value it accumulated? The answer is no – because it is a community property asset subject to Frankie's rebutting the presumption and there is nothing about these facts to suggest an intent by her to relinquish her community property right and certainly no Family Code §852 writing. But, that is not where *Valli* leaves us. Instead, under this alternative scenario, Randy would have to prove by clear and convincing evidence that the policy was community property.

Now let's see how Randy applies it. She argues in her Answer at p. 1:

> "Frankie, who was the transacting spouse, unilaterally and with the assistance of his insurance agent and business manager, intentionally divested himself of all indicia of ownership and made Randy the legal and beneficial owner of the policy from the inception of title."

The problem with this argument is that Randy introduced absolutely no evidence of any intent beyond establishing that she was named the owner of the policy with Frankie's assent. She did not prove that it was Frankie's intent to divest himself of "all indicia of ownership" and to make "Randy the legal and beneficial owner." Presumably, his insurance agent simply inserted her name in the blank on the policy application. Why? Who knows? Neither party offered any evidence on this point. With no evidence, the community property presumption should control. However, based upon form of title, it never got to bat.

The same rationale would apply to annuities, vehicles, investments, businesses, almost anything with a title. To suggest that it applies only to high net worth individuals is silly. It applies to any asset acquired during marriage with a title. This is an opinion with long legs.

VALLI AND *BROOKS* CREATE GREAT UNCERTAINTY IN THE LAW

This opinion, and *In re Marriage of Brooks and Robinson* (2008) 169 Cal.App.4th 176 ["*Brooks*"] which it follows, run contrary to every published opinion in the last 25 years which have discussed the interplay of the record title presumption and the community property and undue influence presumptions. The reason is that it starts from the wrong perspective. Rather than starting with the

record title presumption, it should have started with the community property presumption. Family Code §760 states:

> "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*."

"*All property*... acquired by *a married person* ... *is community property*" Section 760 doesn't make an exception for property acquired in one spouse's name. That is where the analysis in *Valli* and *Brooks* should have started, not with Evid. Code §662. Separate property is defined by Family Code sections 770-772. None of them say they that property titled in the name of one spouse is his or her separate property. Evid. Code §662 is a general civil presumption that has little applicability in the Family Law context due to the constraints put on spouses by our view of marriage a as confidential relationship in which neither party may take any unfair advantage of the other. (Fam. Code §721 (b).) When these principles are applied to the facts of this case and others like it, the results should be clear.

Life Insurance Cases: Randy alleges that every opinion cited in Frankie's Petition for Review in which California courts have stated that when life insurance premiums are paid with community property funds, the resulting policy is an asset of the community are cases in which the "spouse is both the policyholder and the

insured." (Answer, p. 3.) Notice that she does not cite to a single case to support that assertion. But, it doesn't matter. *Valli* holds that if the nonowner was "aware" of the designation, it controls characterization. Since, by definition, life insurance policies are always acquired from third parties, under *Valli* the community property presumption does not control and the burden is on the nonowner (assuming s/he was "aware" of the ownership designation) to overcome record title presumption by clear and convincing evidence.

Randy denies, without any logical explanation, that this opinion will not apply to the millions of Californians who own life insurance policies. She does explain why. Someone had to be named the owner of those policies. This Opinion states that unless the nonowner spouse was "unaware" of how title was taken, it controls, absent clear and convincing evidence to the contrary. "Unaware" does not mean to have agreed or consented. It only means to have knowledge of. Pursuant to this Opinion, that is sufficient to trigger the record title presumption. Frankie reasserts what he stated in the Petition for Review: This is going to be a nasty surprise to half of the spouses who own life insurance policies – large or small – in the event of a divorce.

To support her argument, Randy refers to what she calls the "well established" rule about the preeminence of title. One question: If this were true,

then why did every one of the thirty (30) cases cited in the Petition for Review hold basically: "When life insurance premiums are paid with community property funds, the resulting policy is an asset of the community. [Citations.]" (See, e.g., *Life Ins. Co. of North America v. Cassidy, supra,* 35 Cal.3d 599, 605.) Not one relied on the record title to determine characterization. All relied on the community property presumption, as did the trial court below – correctly.

Undue Influence Cases: Here the Court of Appeal really confused the law when it placed the burden on Frankie to establish undue influence, rather than on Randy to rebut it. The Opinion stated that despite Randy's requesting that Frankie obtain the policy while he was in the hospital suffering from heart problems and worried about the welfare of his family: "Randy could not have owed a fiduciary duty to Frankie in a transaction in which she did not participate." (Opinion, p.786.) The policy was acquired at her request – that is where the process started. Of course she "participated" in its acquisition. The Opinion suggests that Randy did not gain an advantage over Frankie in the transaction. Given that she is now the sole owner of a $3.75 million life insurance policy on her much-older husband

with a cash value of over $365,000 and paid nothing for it, one wonders what is required to show an advantage?[2]

Both of these holdings flatly conflict every published opinion discussing fiduciary duty which presume undue influence and require the benefiting spouse to establish that the transaction was "freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of a transfer from his unencumbered separate property interest to a joint interest as Husband and Wife." (*In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 1000; *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 628-629; *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296; etc.) This is a three-prong test that results from our view of marriage as a confidential relationship. There was no evidence introduced to establish that Frankie had full knowledge of the facts and an understanding of the legal effect of naming Randy owner – how could he?

Evid. Code §662 Has Little Relevance in Family Law Settings: Numerous appellate opinions have discussed the interplay between the general record title

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[2] Twice the Opinion states that there was no evidence that the policy was intended as a "savings device." (Id. at pp. 786, 787.) How about the fact that it accumulated $365,000 in cash value in just four years? If all Frankie wanted was death benefit coverage, it would have been a lot cheaper to buy a term policy. As this is an inference that would have supported the judgment, it should have been drawn.

presumption and the more specific Family Law presumptions. All, except *Brooks* and *Valli* have held that Evid. Code §662 must give way to the Family Law presumptions. For example:

- *In re Marriage of Haines, supra,* 33 Cal.App.4th 277 held that whenever it conflicted with the presumption of undue influence, record title did not apply:

  "Where one spouse has taken advantage of another in an interspousal transaction, a presumption of undue influence arises.... However, this presumption, which the law provides to protect married persons, cannot come into play if [Evid. Code §662] is applied because of the higher evidentiary standard of section 662. Therefore, application of section 662 in such situations can significantly weaken protections the Legislature intended to provide for spouses who are taken advantage of in interspousal transactions. This cannot be in keeping with the intent of the Legislature, which conditioned the power of spouses to transact with each other on their compliance with the fiduciary standard. (See former Civ. Code, sec. 5103 [now Fam. Code §721].) As amicus curiae points out, "[w]henever an interspousal transaction is challenged, it should be analyzed under the same statute which gives spouses the conditional authority to transact with each other . . . ." [Citation.] Application of section 662 would preclude this; in effect it would abrogate the protections afforded to married persons under former Civil Code sec. 5103 (b) [now Fam. Code §721 (b)]." (Id. at p. 301.)

- *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583 held that record title could not be used to overcome Fam. Code §852:

MacDonald's interpretation of the "express declaration" language in section 852, subdivision (a), can be viewed as effectively creating a "presumption" that transactions between spouses are not "transmutations," rebuttable by evidence the transaction was documented with a writing containing the requisite language. Like *Haines*, *MacDonald* was based in part on a policy of "assuring that a spouse's community property entitlements are not improperly undermined." [Citation.] By analogy to *Haines*, the Evidence Code section 662 presumption of ownership should not be used to defeat the purposes of section 852, subdivision (a). As we have discussed, the direction to "transfer" an asset into a different name does not necessarily connote an intention to change beneficial ownership. In our view, the more specific rules governing transmutations of property in transactions between spouses should control over the more general presumption of ownership from title created by Evidence Code section 662. [Citation.] Where the transaction purportedly resulting in a transmutation of property falls short of the *MacDonald* test, the section 662 presumption should not be applied. (Id. at p. 593.)

- *In re Marriage of Delaney*, *supra*, 111 Cal.App.4th 991, held that Fam. Code §721's fiduciary obligations trumped record title:

The ... presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title. The *Haines* court based its holding on the unique protected status of marriage, and the fact that applying the presumption of Evidence Code section 662, with its higher evidentiary standard, would in every case inevitably defeat the spousal protection intended by the Legislature in enacting section 721. [Citation.] In addition, the court cited the principle that where two presumptions are in conflict, the more specific presumption applicable in particular cases must control

over the more general presumption arising under ordinary circumstances. (Id. at p. 998.)

Likewise, the concept of being "advantaged" has been broadly defined in previous cases, such as *In re Marriage of Lange* (2002) 102 Cal.App.4th 360 to mean that a fiduciary obtains an advantage if her position is improved, she obtains a favorable opportunity, or otherwise gains, benefits, or profits. The finding that Randy did not benefit from this transaction is indefensible.

Once it was shown that Randy benefited from the transaction, the presumption of undue influence arose as a matter of law and Randy then had to meet the three-pronged undue influence test. When the Court of Appeal twice stated: "There is not substantial evidence of undue influence" (Opinion, p. 786), it utterly confused the law.[3] Undue influence was *presumed* from the transaction. It was not Frankie's burden to prove it. It was Randy's burden to rebut all three prongs of the test and she offered no evidence beyond title. That is not enough.

The Opinion went on to hold that the "presumption of undue influence was rebutted by the evidence at trial." (Id. at p. 786.) But, we know that Randy

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[3] Randy makes this same argument in her Answer at pp. 4-5, where she states: "Frankie offered no evidence [to support] the *alleged* fiduciary duty issue." (Emphasis added." She too argues that it was Frankie's burden to prove undue influence -- no it wasn't.

introduced no evidence on the second and third prongs of the undue influence test. So to what evidence was the Opinion referring?

In a very strange holding, the Opinion stated that the presumption of undue influence was not triggered because Frankie did not benefit. (Opinion, p. 786) Of course he didn't benefit – he was the disadvantaged spouse! He was the one who lost his community share of $365,000 and the $3.75 million policy on his life. Now, we are really confused. The Opinion required that before the presumption of undue influence can be triggered, the spouse who was disadvantaged has to show that he benefited.

So, we have an opinion that holds:

- The burden is on the disadvantaged spouse to prove undue influence, despite evidence that the other spouse benefited from the transaction;
- The presumption of undue influence can be rebutted without any evidence that the disadvantaged spouse had "knowledge of all the facts", or "a complete understanding of the effect of a transfer;" and
- The burden is on the *disadvantaged* spouse to show that he *benefited* in order to trigger the presumption of undue influence so he can set aside the transaction.

Estate Planning Cases: Randy relies on cases such as *In re Marriage of Lund* (2009) 174 Cal.App.4th 40 and *In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166 to argue that "once the character of property is deliberately established for one purpose, it is established for all purposes. (Answer, p. 3.) It is interesting that she would choose to rely on transmutation cases when she is arguing that the rules of transmutation do not apply. These are good cases from which to get a balanced perspective in that there the husbands were making intentional decisions to transmute property as part of their estate plans with the advice of attorneys in an attempt to minimize their estate taxes. In *Lund*, there was significant expert testimony at trial as to the tax benefits that could inure to the husband from the agreement. In other words – the tax benefits were a primary motivating factor for the agreement.

Here, the only evidence was that Frankie's motivation was to protect his children and wife. There was absolutely no evidence as to why Randy was designated the owner. There was no evidence that he intended to relinquish all community property rights. Although Randy asserts that it was done for estate planning purposes, what evidence supports that conclusion? It could also have been inadvertent by the agent. Who knows? Is this enough to rebut the community property presumption?

One thing we do know is that under traditional undue influence analysis, the burden is on the spouse who benefits from and interspousal transaction to show that the other spouse acted with full "knowledge of all the facts, and with a complete understanding of the effect of a transfer." Since there was no evidence on either of these points below, the presumption of title should not have been applied and the decision of the trial court to characterize it as community property was correct. At least it was before *Valli*. Now, who knows?

IS *LUCAS* STILL GOOD LAW? CAN WE REBUT TITLE WITH ORAL AGREEMENTS AND UNDERSTANDINGS?

One key issue that absolutely must be resolved is the residual effect of *In re Marriage of Lucas* (1980) 27 Cal.3d 808. Randy's answer, parroting *Brooks*, asserts that *Lucas* is alive and well and busy controlling the character of all assets acquired from third parties during marriage in one spouse's name alone. She stated that *Valli* "correctly applied [this] well-established law" and held that the presumption of title trumped the community property presumption. Query: If this is true, why is *Brooks & Robinson* the only post-852 opinion until *Valli* to do so? Why has every case since the statute was enacted held that in a marital context the record title presumption must always yield to the presumptions of undue influence

and community property? (See, e.g., *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 301; *In re Marriage of Delaney, supra,* 111 Cal.App.4th at p.998, *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842,848,fn.8 "[Section 662 is a codified common law title presumption, whose application under these facts is curious. Since Barbara acquired the stock during marriage while domiciled in California, it seems the court erred by not applying the rebuttable presumption of community property. (Civ. Code, § 5110.) "]; etc.)

Prior to the enactment of former Civ. Code section 5110.730, the law permitted property to be characterized or transmuted by "oral agreements or understandings." This led to all sorts of tortured opinions wherein the character of property was found to be different from record title based upon interpretations of the intentions of the parties. By definition oral agreements were unwritten, as were the vague term "understandings." One opinion went so far as rebut record title based upon "an inference of an understanding." (*In re Marriage of Mahone* (1981) 123 Cal.App.3d 17.)

As explained in *Estate of MacDonald* (1990) 51 Cal.3d 262, 269 the Legislative finally stepped in and put an end to this by enacting section 5110.730, now Fam. Code §852:

> In its discussion of the law then governing transmutations [citation] the [California Law Revision Commission] observed that "[u]nder California law it is quite easy for spouses to transmute both real and personal property; a transmutation can be found based on oral statements or implications from the conduct of the spouses." [Citation.] [¶] The Commission further observed that "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." [Citation.] The Commission concluded its discussion of transmutation law by saying that "California law should continue to recognize informal transmutations for certain personal property gifts between the spouses, but should require a writing for a transmutation of real property or other personal property." (Ibid.) ...[¶] It thus appears from an examination of the Commission report that section 5110.730(a) was intended to remedy problems which arose when courts found transmutations on the basis of evidence the Legislature considered unreliable. To remedy these problems the Legislature decided that proof of transmutation should henceforth be in writing, and therefore enacted the writing requirement of section 5110.730(a).

We all thought that the problems of listening to vague testimony of "oral agreements or understandings" was behind us – until the concept was revived by *Brooks* and *Valli*. Since, according to these cases, the only way to rebut record title is to prove an "agreement or understanding" we are right back where we were in 1980. The Opinion noted that Frankie offered no evidence of an "understanding" that the policy acquired during marriage with community funds was to be community property. (Opinion, p. 784.)Who knew he had to? So instead of merely presuming that it was community property, now courts must listen to the parties

each give their versions of their discussions and "understanding" of character to determine whether the record title is overcome. This is precisely the type of "unreliable evidence" that "generated extensive litigation in dissolution proceedings [by encouraging] 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" that section 5110.730 was enacted to eliminate. Yet, after *Brooks* and *Valli*, we are right back where we started.

THE WHOLE IDEA OF TRANSMUTATION HAS BEEN THROWN INTO CHAOS BY THESE TWO OPINIONS

Brooks frankly admitted the Legislature hadn't defined "transmutation", so it did so in a manner which eliminates virtually anything that is acquired during marriage. While we all understand that section 852 applies to transfer of assets between spouses, that is not how most assets are acquired. Assets are "acquired" or "purchased" during most marriages by using community funds to obtain an asset from a third party. The idea that turning community funds into a separate asset (because title was taken in one spouse's name alone) is not a "transmutation" is a shocking one. Nevertheless, that is precisely what these two cases hold:. Quoting from *Valli*:

> 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. (Opinion, at p.787.)

Suddenly, the body of law that has grown up around section 852 in the last 35 years is irrelevant to most assets acquired during marriage. While spouses cannot transmute a used Chevy without a writing, they can make over $365,000 in cash value disappear from the community simply by who they designate as the owner of an insurance policy?

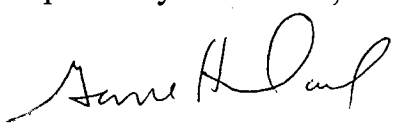
The argument that stability of title is the basis for this rule was debunked in *Haines* when it stated: "concerns of stability of title are lessened in characterization problems arising from transmutations that do not involve third parties or the rights of creditors." (*In re Marriage of Haines, supra*, 33 Cal.App.4th at p.294.)

CONCLUSION

Frankie asks that this Court grant review and clarify the law with regard to the complex and pervasive issues raised by this Opinion.

Dated: July 22, 2011

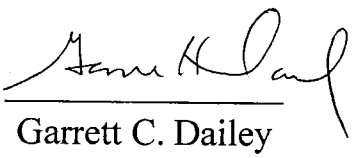
Respectfully submitted,



Garrett C. Dailey
Attorney for Respondent
Frankie Valli

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 3,798 words, including footnotes, as computed by the Microsoft Word2007 word counter.



Garrett C. Dailey

PROOF OF SERVICE

I, BRENDA K. BUTLER, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 2915 McClure Street, Oakland, California 94609; I am employed in Alameda County, California. I am familiar with my employer's practices for the collection and processing of materials for mailing with the United States Postal Service, and that practice is that materials are deposited with the United States Postal Service the same day of office collection in the ordinary course of business.

On July 22, 2011, I served a copy of the following document(s): **REPLY TO ANSWER TO PETITION FOR REVIEW**

On the addressee(s):

__X__ **BY MAIL --** by placing a true copy of the above-referenced document(s) enclosed in a sealed envelope, with postage fully prepaid, in the United States mail at Oakland, California, addressed as set forth below, on the date set forth above.

____ **BY FACSIMILE --** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, on the date set forth above, before 5:00 p.m.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 22, 2011, at Oakland, California.

Brenda K. Butler