Case No. S252473

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

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In re: CLIFFORD ALLEN BRACE, JR.

9th Cir. Case No. 17-60032

CLIFFORD BRACE, JR. AND ANH BRACE,

Appellants.

v.

STEVEN SPEIER, CHAPTER 7 TRUSTEE,

Respondent,

ANSWER BRIEF ON THE MERITS

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Respondent, Steven Speier in his capacity as Chapter 7 Trustee for the Bankruptcy Estate of Clifford Brace, Jr., submits his response to Appellants' Opening Brief as follows:

1. Question Presented

On November 8, 2018, the Ninth Circuit Court of Appeals entered a decision certifying the following question to the Supreme Court of California:

> "Does the form of title presumption set forth in section 662 of the California Evidence Code overcome the community property presumption set forth in section 760 of the California Family Code in Chapter 7 bankruptcy cases where: (1) the debtor husband and non-debtor wife acquire property from a third party as joint tenants; (2) the deed to that property conveys the property at issue to the debtor husband and non-debtor wife as joint tenants; and (3) the interests of the debtor and non-debtor spouse are aligned against the trustee of the bankruptcy estate?"

Brace v. Speier (In re Brace), 908 F.3d 531 (9th Cir. 2018).

On January 16, 2019, the California Supreme Court granted the Ninth Circuit's request to decide the question presented.

2. Summary of Argument

During marriage, Mr. and Mrs. Brace purchased three parcels of real property, two of which are subject to this appeal.[1] Vesting to the properties was taken in joint tenancy. Subsequently, while litigation was pending against Mr. Brace, he transferred his joint tenancy interests in two of the properties and attempted to transfer his joint tenancy interest in the third property to Mrs. Brace for no consideration.

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[1] On appeal, Appellants challenge the characterization of only two of the three properties.

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After Mr. Brace filed bankruptcy in an attempt to discharge his liabilities, his bankruptcy trustee filed actions to avoid and recover the transfers as fraudulent. The bankruptcy court entered judgment avoiding the transfers (which issue is final and not subject to this appeal).

Under 11 U.S.C. § 541(a), the filing of a bankruptcy petition creates an estate that includes all of a debtor's interest in property (including community property) and all fraudulently transferred property recovered by the bankruptcy trustee. Property of a bankruptcy estate does not include the separate property of a non-debtor spouse.

To determine the extent of the bankruptcy estate's interest in the properties, the trial court had to determine their character as community or separate. If the properties constituted community property, then they would be owned in their entirety by the bankruptcy estate. On the other hand, if the act of taking title to the properties as joint tenants transmuted each spouse's joint tenancy interest into their separate property, then the bankruptcy estate's interest in the properties would be limited to the debtor's one-half separate property interests that were fraudulently transferred but recovered by the trustee.

Relying on this Court's decision in *Valli*, the bankruptcy court determined that the three properties constituted community property because they were acquired during marriage and Appellants failed to prove any valid transmutation. The Bankruptcy Appellate Panel of the Ninth Circuit affirmed in a published decision. On further appeal, the Ninth Circuit Court of Appeals certified the question to this Court.

Appellants' primary argument on appeal is that the Family Code (including this Court's decision in *Valli*) is limited to marital dissolution proceedings and does not apply to determine the character of property subject to the payment of creditor claims. Instead, Appellants contend that Evidence Code § 662 applies to non-dissolution cases and that its form of

title presumption should have resulted in each spouse holding a one-half separate property interest notwithstanding the absence of a transmutation. Appellants' position, however, is refuted by the plain meaning of statutes in the Civil Code (defining what constitutes property) and the Code of Civil Procedure (defining what property is subject to the enforcement of a judgment).

- "Community property is property that is community property under Part 2 (commencing with Section 760) of Division 4 of the Family Code."

See, Civil Code § 687; and

- "Community property is subject to enforcement of a money judgment as provided in the Family Code."

See, Code of Civil Procedure § 695.020.

Because California's laws defining property and its liability for payment of creditor claims specifically provide that the Family Code governs the characterization of property as community or separate, this Court should answer the certified question by holding that the Family Code and cases interpreting the Family Code apply outside of dissolution proceedings including to bankruptcy cases where all of a debtor's interest in property become property of the bankruptcy estate.

3. Statement of Facts and Procedural History

The facts underlying this appeal are not in dispute.[2] Appellants' arguments regarding the application of the facts to the law, however, have

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[2] A brief summary of the facts is provided in this Section. A complete statement of the facts can be found in the two decisions reached by the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals —one published (*In re Brace*, 566 B.R. 13 (B.A.P. 9th Cir. 2017)) and one unpublished (*In re Brace*, 2017 WL 1025215 (B.A.P. 9th Cir. 2017)), which together resolved Appellant's initial appeal. Supplemental Excerpts of Record ("SER") KK, pgs. 1059-71; SER LL, pgs. 1072-80.

evolved at each level of the appeals process to address the shortcomings of their arguments as determined by each subsequent ruling in favor of Respondent.

Prior to filing bankruptcy, Appellant Clifford Brace ("Mr. Brace") formed a living trust, named his spouse, Appellant Anh Brace ("Mrs. Brace"), as its sole beneficiary, transferred his interest in two properties to the trust ("Transfers"), and attempted to transfer a third property to the trust. Appellants' Excerpts of Record ("AER") D, pgs. 42-47; AER E, pgs. 63-64. Prior to the Transfers, Debtor and Mrs. Brace held all three properties ("Properties") as joint tenants. AER D, pgs. 42- 47. Debtor was a defendant in state court litigation at the time of the Transfers, and a default judgement was entered against Debtor shortly after the Transfers. AER D, pg. 47; AER E, pgs. 63-64. Despite the Transfers, Debtor and Mrs. Brace continued to treat the Properties as they had prior to their transfer.

On May 16, 2011, Debtor filed a voluntary petition under Chapter 7 of Title 11 of the United States Code, Bankruptcy Case No. 6:11-bk-26154-SY. AER D, pg. 40; AER E, pgs. 63 - 64.

On December 15, 2011, Trustee filed an adversary proceeding against, among others, Mr. and Mrs. Brace, seeking to avoid the Transfers under the California Uniform Fraudulent Transfer Act ("CUFTA") and other theories, and to revoke Debtor's discharge ("Complaint"). AER A, pgs. 2-20, AER JJ, pgs. 1021-1022.

A. In the Bankruptcy Court, Appellants Acknowledged that the Community Property Presumption Applied

At trial, Appellants did not dispute that the community property presumption applied to this case. [3] Instead, they made legal and factual

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[3] Family Code § 760 defines community property as follows: "Except as otherwise provided by statute, all property, real or personal, wherever

arguments in a failed attempt to overcome the presumption that the three properties constituted community property. First, they proffered testimony that, notwithstanding the manner in which title was held, Mrs. Brace was the owner of the Properties as the result of an alleged oral post-nuptial agreement (i.e. a transmutation agreement) dating back to the 1970s. Second, relying on *In re Summers*, 332 F.3d 1240 (9th Cir. 2003), Appellants argued that because they had taken title as joint tenants, the community property presumption was overcome by the form of title.

After trial, the Bankruptcy Court entered judgment in Respondent's favor finding that *Summers* was no longer good law in light of this Court's decision in *Valli*. AER DD, pgs. 751-756. The Bankruptcy Court further found Appellants to be unreliable witnesses that lacked credibility. AER GG, pgs. 914- 917. As a result, The Bankruptcy Court found that Appellants failed to meet their evidentiary burden to rebut the community property presumption.[4] AER DD, pgs. 751-756.

B. In their Motion for Reconsideration, Appellants Argued that Respondent's Recovery of Mr. Brace's Fraudulent Transfers Resulted in the Properties Becoming Tenancies in Common with Mrs. Brace

In a motion for reconsideration, Appellants argued that, because Respondent prevailed on his fraudulent transfer claims, the Properties were

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situated, acquired by a married person during the marriage while domiciled in this state is community property." Family Code § 802 provides a "presumption that property acquired during marriage is community property." As held by this Court in *Valli*, "In combination, these statutes provide a presumption that property acquired during the marriage is community property. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1103 [32 Cal. Rptr. 3d 471, 116 P.3d 1152].)" *In re Marriage of Valli*, 58 Cal. 4th 1396, 1407, 171 Cal. Rptr. 3d 454, 463, 324 P.3d 274, 281 (2014).

[4] As the parties challenging the presumption in Family Code §760, Appellants bore the burden of proof to show that the Properties were not community property. *See, e.g., In re Marriage of Knickerbocker*, 43 Cal.App.3d 1039, 1042 (1974).

owned by the Estate and Mrs. Brace as tenants in common (and therefore were not community property). AER AA, pgs. 665 – 667. To make the argument, Appellants relied on *Summers*, claiming that it stood for the proposition that "the community property presumption is overcome" when spouses take title to real property as joint tenants. AER AA, pg. 665.

The Bankruptcy Court disagreed holding that *Valli* (which rejected the reasoning in *Summers*) stood for the proposition that the community property presumption could not be overcome simply by spouses acquiring property as joint tenants. Thereafter, the Bankruptcy Court entered an Amended Judgment ("Judgment")[5]. AER DD, pg. 754, docket no. 172; AER JJ, pg. 1053.

C. Before the Bankruptcy Appellate Panel, Appellants Argued that *Summers* and *Valli* Were Irrelevant and that Evidence Code § 662 was Dispositive regarding the Characterization of the Properties

On appeal, and in response to the Bankruptcy Court's reliance on *Valli*'s rejection of *Summers*, Appellants claimed that *Valli* and *Summers* were both irrelevant. SER KK, pgs. *Brace,* 566 B.R. at 23. According to Appellants, *Valli* and *Summers* were focused on transmutation issues between divorcing spouses. Appellants acknowledged that a transmutation had not occurred in this case. SER KK, pgs. 1065; 1067; *Brace,* 566 B.R. at 23. Therefore, according to Appellants, the outcome of the case turned solely on the interplay between Evidence Code § 662[6] and Family Code §§ 760, 852,[7] and 2581.[8] SER KK, pg. 1067, *Brace,* 566 B.R. at 23.

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[5] Because the Amended Judgment did not dispose of all the claims in the adversary proceeding, the parties obtained a second amended judgment from the bankruptcy court that contained a certification pursuant to Rule F.R.C.P. 54(b). The Judgment and Amended Judgments are collectively referred to as the "Judgement."

[6] Cal. Evid. Code §662 provides: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may

Appellants argued that, taken together, these code sections mandated a determination that the Properties were held by Respondent and Mrs. Brace in joint tenancy because the general record title presumption of Evidence Code § 662 prevails over the more specific community property presumption of Family Code § 760 when a bankruptcy trustee or creditors are involved. The Bankruptcy Appellate Panel disagreed. *Brace*, 566 B.R. at 28.

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be rebutted only by clear and convincing proof."

[7] Cal. Family Code §852 provides:

(a) 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.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.

[8] Cal. Family Code §2581 provides:

For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property.

D. Before the Ninth Circuit Court of Appeals, Appellants Argued that Evidence Code § 662 Controlled Because the Form of Title Presumption Survived *Valli* when it came to the rights of creditors.

Before the Ninth Circuit Court of Appeals, Appellants recast their arguments again. There, Appellants contended that *Valli* did not completely overturn *Summers*. Not surprisingly, Appellants claimed that the surviving portion of *Summers* mandated that the title presumption of Evidence Code § 662 controls. In other words, Appellants argued that the Properties were owned by the Estate and Mrs. Brace with each party having a separate property interest. Regardless of how Appellants present the argument, the question remains the same: whether property acquired during marriage in joint tenancy is separate property pursuant to Evidence Code § 662 even though the transmutation requirements in Family Code § 852 have not been satisfied. In *Valli*, this Court made it clear that it does not.

After *Valli,* every court to consider the issue has held that Evidence Code § 662 cannot transmute property acquired during marriage into separate property without the spouses also complying with Family Code § 852. *Brace*, 566 B.R. at 17; *In re Obedian*, 546 B.R. 409, 421 (Bankr. C.D. Cal. 2016); *In re Collins*, 2016 WL 4570413, at *5 (Bankr. S.D. Cal. 2016) (community property presumption of Family Code § 760 applied over the form of title presumption of Evidence Code § 662); *affirmed, Collins v. Wolf*, 591 B.R. 752 (S.D. Cal. 2018).

The question of whether Family Code § 760 is applicable outside of marital dissolution proceedings between spouses was answered by the Bankruptcy Appellate Panel in *Brace*. The Bankruptcy Appellate Panel, relying on *Valli*, was unpersuaded by Appellants' arguments that statutory construction and prior case law compelled a finding that Family Code § 760 was restricted to the context of marital dissolution proceedings and did not apply outside of the Family Code. In a well-reasoned and comprehensive

opinion, the Bankruptcy Appellate Panel held that Family Code § 760 is applicable to disputes regarding marital property, regardless of whether the parties are spouses or if the dispute is in the context of a dissolution proceeding.

E. In their Opening Brief, Appellants Continue to Ignore *Valli* and Contend that the Family Code Only Applies in the Context of a Marital Dissolution

Appellants now contend that the community property presumption applies only in a marital dissolution. They assert that the Bankruptcy Court erred in applying the community property presumption of Family Code § 760 instead of the record title presumption of Evidence Code § 662. They contend that Mr. and Mrs. Brace's interests in the Properties constituted equal, separate property interests. Therefore, when Respondent avoided Mr. Brace's fraudulent transfers, only his separate property interest constituted estate property.

Appellants' brief focuses primarily on cases involving the community property presumption that were decided prior to *Valli.* They contort the application of statutory construction, and essentially argue that Family Code § 760 should yield to Evidence Code § 662 simply because some pre-*Valli* cases reached that result. Their arguments, however, ignore this Court's holding in *Valli* and ignore the Legislature's specific application of the Family Code to the Civil Code and Code of Civil Procedure's definitions of property and creditor rights.

4. Legal Argument

In bankruptcy cases, all of a debtor's interests in property, including community property, become property of the bankruptcy estate. 11 U.S.C.

§ 541(a).[9] The nature of a debtor's interest in property is determined by state law. *Butner v. United States*, 440 U.S. 48 (1979).

In *Valli*, this Court held that all property acquired during marriage is community property unless there is a valid transmutation. In reaching this result, this Court rejected the Ninth Circuit's reasoning in *Summers* that the form of title presumption set forth in Evidence Code § 662 could overcome the community property presumption.

In this case, the Bankruptcy Court and the Bankruptcy Appellate Panel followed *Valli* and held that the community property presumption of Family Code § 760 controls in determining the character of a debtor's interest in property. As a result, they determined that the Properties were owned by Mr. and Mrs. Brace were community property. To escape this result, Appellants ask this Court to restrict its holding in *Valli* to marital dissolution proceedings and follow *Summers* with respect to creditor rights.

Appellants offer various unavailing arguments in support of their position. First, they argue that the Bankruptcy Court and the Bankruptcy

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[9] 11 U.S.C. § 541 provides in relevant part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

11 U.S.C. §541.

Appellate Panel read *Valli* too broadly. They contend that, "A holding that CFC 760 with its presumption that all property acquired during marriage is community property, would destroy the historic protection of a non-debtor's spouse in joint tenancy property to the detriment of the non-debtor 'innocent spouse.'" AOB, Pg. 38.

Next, Appellants assert that the community property presumption only applies to disputes in marital dissolution proceedings and does not apply in any context outside of family court. To make the argument, Appellants ignore California statutory law that explicitly makes Family Code 760 applicable to areas of law beyond family law, including interests in property under the Civil Code[10] and laws governing the enforcement of money judgments under the Code of Civil Procedure.[11]

Appellants also ignore certain fundamentals of bankruptcy law, including that the trustee stands in the debtor's shoes and has all rights of the debtor in property. Notably, courts have repeatedly rejected the

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[10]CCC §687 provides: Community property
Community property is property that is community property under Part 2 (commencing with Section 760) of Division 4 of the Family Code. Cal. Civ. Code §687 (Deering, Lexis Advance through Chapter 4 of the 2019 Regular Session).
[11] CCP §695.020 provides: Community property

(a) Community property is subject to enforcement of a money judgment as provided in the Family Code.

(b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:

(1) Any provision of this division that applies to the property of the judgment debtor or to obligations owed to the judgment debtor also applies to the community property interest of the spouse of the judgment debtor and to obligations owed to the other spouse that are community property.

(2) Any provision of this division that applies to property in the possession or under the control of the judgment debtor also applies to community property in the possession or under the control of the spouse of the judgment debtor. Cal. Civ. Proc. Code §695.020 (Deering, Lexis Advance through Chapter 4 of the 2019 Regular Session).

argument asserted by Appellants. *Brace*, 566 B.R. at 17; *Obedian*, 546 B.R. at 414-21; *Collins,* 2016 WL 4570413, at *5.

Appellants argue that *Summers* and *Valli* can be reconciled even though *Valli* rejected the reasoning in *Summers*. To make the argument, Appellants incorrectly contend that the Trustee is a third party. To the contrary, all of a debtor's rights in property become property of the bankruptcy estate and the bankruptcy trustee is the sole representative of the estate. In other words, a bankruptcy trustee stands in a debtor's shoes, and the bankruptcy estate's property rights are derivative of a debtor's rights.

Appellants express grave concern over the effect of a decision applying the community property presumption of Family Code 760 in probate proceedings, asserting that probate courts will be forced "to undertake the type of analysis predicated by Family Code § 760 and § 2581." As evident by the number of probate cases cited in Appellants' brief, the probate courts are already dealing with issues of the characterization of property, and a decision affirming the Bankruptcy Appellate Panel's decision will provide necessary clarification regarding the characterization of property rights in such cases.[12]

Appellants also incorrectly assert that affirming the Judgment would "obviate a body of law which, until now has been settled and subject the interest of innocent spouses to the debts of their spouses, and in the case of bankruptcy subject their one-half interest to administration by the bankruptcy court" As set forth below, the rights of debtor and non-debtor spouses in community and separate property would be unchanged.

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[12] See, e.g., *In re Luke*, 194 Cal.App.3d 1006, 240 Cal.Rptr. 84 (1987) [property held in joint tenancy determined to be community property by probate court with decedent's interest passing to heirs pursuant intestate succession and not to surviving spouse pursuant to right of survivorship].

Community property is subject to payment of community claims and always has been. The only issue being decided is whether the Family Code governs determinations regarding the character of property acquired during marriage in the absence of a valid transmutation.

A. The Bankruptcy Appellate Panel and the Bankruptcy Court Correctly Concluded that Family Code § 760 Controls over Evidence Code § 662

Relying on Family Code § 760 and *Valli*, the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's determination that the Properties constitute community property. Appellants claim that the Bankruptcy Appellate Panel erred. According to Appellants, because they acquired title to the Properties in joint tenancy, each spouse's joint tenancy interest constituted their separate property even though there was no valid transmutation. To reach this erroneous conclusion, Appellants ignore the teachings of *Valli*.

i. The Community Property Presumption

Under Family Code § 760, all property acquired during marriage is presumptively community property. To rebut this "strong presumption," a party must demonstrate "that another statute makes the property something other than community property." *In re Lewis*, 515 B.R. 591, 598 (B.A.P. 9th Cir. 2014) (*citing Valli*). The Law Revision Commission Comments regarding Family Code § 760 provide examples of the major exceptions to the general community property rule, stating in part:

> **Section 760 states the basic rule that all property acquired during marriage is community property unless it comes within a specified exception**. The major exceptions to the basic community property rule are those relating to separate property. See, e.g., Sections 130 ("separate property" defined in Section 760 *et seq.*), 770 (separate property of married person), 771 (earnings and accumulations while living separate and apart), 772 (earnings and accumulations after judgment of legal separation), 781 (cases where damages for

> personal injury are separate property). Section 760 is not an exclusive statement of property classified as community. See, e.g., Sections 761 (property in certain revocable trusts as community property), 780 (damages for personal injury to married person as community property). See also Sections 65 ("community property" defined in Section 760 et seq.), 802–803 (presumptions concerning nature of property), 850–853 (transmutation of property), 1500–1620 (marital property agreements).

Family Code § 760. (emphasis added).

In this case, it is undisputed that the Properties were acquired by Appellants during marriage while they were living in California. AER D, pgs 42- 47; AER E, pgs. 63-64. Therefore, the Properties are presumptively community property. Cal. Family Code § 760. It was also undisputed that Appellants failed to adduce persuasive evidence that the Properties were anything other than community property. AER DD, pg. 754; GG, pgs. 914-917.

a. *Valli* Applies Outside of Dissolution Proceedings

As recognized by the Bankruptcy Appellate Panel, "Thus, after *Valli*, there is no doubt that the community property presumption controls in marital dissolution or separation proceedings." *Brace v. Speier (In re Brace)*, 566 B.R. 13, 19 (B.A.P. 9th Cir. 2017).

In its decision, the Bankruptcy Appellate Panel determined that California case law, principles of statutory construction, and public policy all support the conclusion that the community property presumption set forth in Family Code § 760 also applies to cases outside of marital dissolution proceedings.

b. California Law Explicitly Makes Family Code § 760 Applicable to the Laws Governing Creditors' Rights

The plain meaning of numerous statutes reflect the Legislature's intent to make the community presumption of Family Code § 760 applicable outside of marital dissolution proceedings. The Civil Code specifically provides that Family Code § 760 applies to defining general property rights under California law.

> **Community property is property that is community property under Part 2 (commencing with Section 760) of Division 4 of the Family Code.**

Civil Code § 687 (Deering, Lexis Advance through Chapter 4 of the 2019 Regular Session) (Emphasis added).

Further, the Enforcement of Judgments Law specifically provides that the Family Code applies to determinations regarding what constitutes community property and the liability of such property for debts arising during marriage.

> **(a) Community property is subject to enforcement of a money judgment as provided in the Family Code.**
> (b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:
>
> (1) Any provision of this division that applies to the property of the judgment debtor or to obligations owed to the judgment debtor also applies to the community property interest of the spouse of the judgment debtor and to obligations owed to the other spouse that are community property.
>
> (2) Any provision of this division that applies to property in the possession or under the control of the judgment debtor also applies to community property in the possession or under the control of the spouse of the judgment debtor.

Code of Civil Procedure § 695.020 (Deering, Lexis Advance through Chapter 4 of the 2019 Regular Session) (Emphasis added).[13]

Additionally, as discussed in *Brace,* Family Code §§ 851 and 852 demonstrate the Legislature's intent to make the community property presumption apply in disputes involving third parties with regard to fraudulent transfers (Family Code § 851) and notice requirements to third parties affecting the effectiveness of transmutations (Family Code § 852). Specifically, the Bankruptcy Appellate Panel stated:

> "Moreover, two other provisions of the Family Code bolster the conclusion that the Legislature intended the community property presumption to apply in disputes with parties outside the marital couple: first, CFC §852 provides that a transmutation of real property is not effective as to third parties without notice unless it is recorded; and second, CFC §851 provides that "[a] transmutation is subject to the laws governing fraudulent transfers." **These provisions presuppose that, as a general rule, third parties are entitled to rely on the community property presumption in transactions involving marital property.**

Brace v. Speier (In re Brace), 566 B.R. 13, 24 (B.A.P. 9th Cir. 2017) (Emphasis added).

The Bankruptcy Appellate Panel then noted that Appellants' assertion that the community presumption applies only in the dissolution context is contradicted by the Law Revision Commission Comments to Family Code § 760:

> "Comments to Family Code § 760, which reveal that the phrase "except as otherwise provided by statute" replaced specific statutory provisions enumerated in former Cal. Civ. Code § 5110, and that the "major exceptions to the basic community property rule are those relating to separate property" such as Family Code §§ 130 ("separate property" defined in Section 760 et seq.), 770 (separate property of married person), 771 (earnings and

[13] Family Code § 910 provides that community property is liable for all debts that arose before or during marriage.

accumulations while living separate and apart), 772 (earnings and accumulations after judgment of legal separation), and 781 (cases where damages for personal injury are separate property). CFC § 760, L. Revision Comm'n Cmt. Notably, there is no mention of CFC § 2581 as a limitation on the community property presumption."

Brace v. Speier (In re Brace), 566 B.R. 13, 24-25 (B.A.P. 9th Cir. 2017)

The statutes referenced above and the Law Revision Commission Comments to Family Code § 760 reflect that the Legislature definitively intended for the community property presumption of Family Code § 760 to apply outside of divorces.

ii. Statutory Construction Supports the Application of Family Code § 760 Outside of Disputes between Spouses

The Bankruptcy Appellate Panel also specifically rejected Appellants' argument that statutory construction mandated that Family Code § 760 yield to Evidence Code § 662.

> "A specific statutory provision does prevail over a general one relating to the same subject. Pac. Lumber Co. v. State Water Res. Control Bd., 37 Cal. 4th 921, 942, 38 Cal. Rptr. 3d 220, 126 P.3d 1040 (2006). **However, this canon of statutory construction actually supports the conclusion that the community property presumption prevails over the title presumption**. See Valli, 58 Cal. 4th at 1412-13 (Chin, J., concurring) ("[T]he [community property] presumption is a specific statutory presumption found within California's community property law, not the more general presumption found in section 662."). The concurrence also noted that CFC §§760 and 2581 are not in conflict: CFC §760 is the "familiar presumption that property acquired during marriage is community property," while CFC § 2581 "is a presumption, found in a statute within the community property law and fully consistent with the general presumption, that specifically governs real property designated as joint tenancy. . . . Both of these presumptions favor a finding of community property, and thus they are compatible." Id. at 1412. Moreover, if the community

property presumption applied only for purposes of property division in a dissolution or legal separation, CFC §760 would be unnecessary; and we do not construe statutory provisions so as to render them superfluous. Shoemaker v. Myers, 52 Cal. 3d 1, 22, 276 Cal. Rptr. 303, 801 P.2d 1054 (1990).

Brace v. Speier (In re Brace), 566 B.R. 13, 24 (B.A.P. 9th Cir. 2017).

iii. Prior Case Law Does Not Compel a Determination that Evidence Code § 662 Prevails over Family Code § 760

The majority of Appellants' Opening Brief is dedicated to examining pre-*Valli* cases involving Evidence Code § 662 and Family Code § 760. Appellants do not, however, explain how such prior cases remain good law in light of this Court's ruling in *Valli.*

To the extent that Appellants' rely on *Hansford v. Lassar*, 53 Cal. App. 3d 364, 125 Cal. Rptr. 804 (1975), overturned on other grounds due to legislative action, and *Fadel v. DCB United LLC (In re Fadel)*, 492 B.R. 1 (9th Cir. BAP 2013), the Bankruptcy Appellate Panel noted that these cases were inapposite because both had involved valid transmutations under the Family Code, and therefore application of the record title presumption was appropriate. The Bankruptcy Appellate Panel then stated:

"Moreover, *Hansford*, and the authorities cited therein, have largely been superceded [sic] by subsequent statutes and case law; to the extent they conflict with *Valli*, they are no longer good law."

Brace v. Speier (In re Brace), 566 B.R. 13, 25 (B.A.P. 9th Cir. 2017).

Appellants also rely on *Summers* and the line of cases cited by *Summers* for the proposition that the title presumption of Evidence Code § 662 controls over the community property presumption of Family Code § 760. *Summers*, and the cases it relied on, however, relied on former Civil

Code § 5110 (currently located in Family Code §§ 760 and 2581). *Summers* did not cite to or rely on Evidence Code § 662.

iv. Subsequent Bankruptcy Cases Interpreting the interplay of Evidence Code § 662 and Family Code § 852 have Uniformly Followed *Valli* to Determine that Property is Community Property Absent a Valid Transmutation Agreement

Since *Valli,* courts have consistently recognized that when analyzing whether real property is a community property asset, there is more to the calculus than Evidence Code § 662 and its form of title presumption. For example, in *Obedian*, the debtor and her non-debtor spouse ("Mr. Obedian") purchased real property with community property funds and took title as joint tenants. 546 B.R. at 411. Subsequently, a judgment was entered in favor of the California Department of Health Care Services ("DHCS") and against Mr. Obedian in the amount of $729,890.29. DHCS recorded an abstract of judgment to create a real property judgment lien. *Id.*

After filing a Chapter 7 bankruptcy, the debtor filed a motion to avoid the lien as impairing her homestead exemption. Because the judgment was against Mr. Obedian, and not the debtor in the bankruptcy case, the question arose as to whether the DHCS judgment lien attached to debtor's interest in the property. If Debtor's interest in the property was community property, then the judgment lien recorded against Mr. Obedian attached to both spouses' community interests. 546 B.R. at 412. But, if debtor's interest in the property was her separate property because title was acquired in joint tenancy, then the judgment lien against Mr. Obedian would only attach to his one-half, separate property joint tenancy interest. 546 B.R. at 412.

Following *Valli,* the bankruptcy court determined that the property was community property under Family Code § 760 absent evidence of a

transmutation that satisfied the requirements of Family Code § 852(a). 546 B.R. 420-423.

Similarly, in *Collins*, 2016 WL 4570413, the debtors owned a home acquired during marriage as "joint tenants." The bankruptcy trustee contended that it was a community property asset. The debtors argued that *Valli* only applied in a marital dissolution proceeding and that it did not apply "when the rights of the third parties are at issue." Id. at *3.

The bankruptcy court rejected that argument and held that the home was a community property asset and reasoned that, in light of *Valli*, a valid transmutation was required for the character of the property to be anything other than a community property. The bankruptcy court determined that the grant deed showing title as "joint tenants" was insufficient to comply with Family Code § 852.

v. Public Policy Supports Consistency in the Laws Governing Characterization of Property Acquired During Marriage

California law is clear that property rights and the rights of creditors to enforce claims against community property are determined by reference to the provisions of the Family Code. See, Code of Civil Procedure § 687; Code of Civil Procedure § 695.020.

In *Valli*, this Court noted that the purpose behind the community property presumption is to create a uniform and reliable guideline for the application of Family Code § 760 that will serve "to reduce excessive litigation, introduction of unreliable evidence, and incentives for perjury in marital dissolution proceedings involving disputes regarding the characterization of property." *In re Marriage of Valli*, 58 Cal. 4th 1396, 1405, 171 Cal. Rptr. 3d 454, 461, 324 P.3d 274, 280 (2014).

Applying the holding in Valli to disputes between debtors and creditors furthers the policy of having uniformity in the law. It would be

absurd for a property to constitute community property between spouses and creditors who can join in a dissolution proceeding but something other than community property when it comes to the rights of creditors outside of divorce cases.[14] Furthermore, the spouses are in the best position to produce evidence to overcome the presumption that marital property is not community property.

B. Appellants' argument regarding Evidence Code § 662 runs afoul of *Valli*

Despite *Valli*'s clear teachings, Appellants continue to assert that Evidence Code § 662's record title presumption governs the nature of their interest in the Properties. In essence, Appellants continue to espouse a *Summers* rubric. The argument, however, conflicts with *Valli's* holding which begins with the presumption that all property is community property **unless there is a valid transmutation.**[15]

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[14] Family Code § 2021 authorizes the court to join a creditor to a dissolution proceeding where such creditor claims an interest in community property and to prevent inconsistent rulings. Once community property is divided, a creditor can no longer seek to enforce its judgment against the non-debtor's now separate property. *Litke O'Farrell, LLC v. Tipton*, 204 Cal. App. 4th 1178, 139 Cal. Rptr. 3d 548 (2012) [property awarded to non-debtor spouse no longer subject to community claim that arose during marriage]. See also, *Glade v. Glade*, 38 Cal. App. 4th 1441, 45 Cal. Rptr. 2d 695 (1995) and *Askew v. Askew*, 22 Cal. App. 4th 942, 28 Cal. Rptr. 2d 284 (1994) [court in civil action could not adjudicate character of joint tenancy property while dissolution proceeding pending in which such property could be determined to be community property].

[15] In this case, the requirement that a transmutation be in writing may not apply because Family Code § 852 became effective in 1985 and Appellants attempted but failed to prove that there was an oral transmutation prior to this date. The Bankruptcy Appellate Panel stated: "We note that ***Valli*** interpreted the community property presumption in light of Family Code § 852's requirement of a written express declaration to prove a transmutation, finding that in light of that requirement, the manner in which a married couple takes title is insufficient by itself to rebut the presumption and that the record title presumption should not be applied

First, the requirements of the transmutation statutes must be met for the character of the subject properties, purchased with community funds, to become the separate property of Mr. Brace and Mrs. Brace. The act of acquiring title in joint tenancy, by itself, does not overcome the community property presumption. *Valli,* 58 Cal.4th at 1413–14; *In re Marriage of Bonvino* 241 Cal.App.4th 1411, 1430 ("Because the presumption based on the form of title conflicts with the transmutation requirements in this case, the form of title presumption does not apply"); Bassett, California Community Property Law §4:71 (2017 ed.).

The fact that Appellants took title to the Properties as joint tenants is insufficient by itself to overcome the community property presumption. *Collins*, 2016 WL 4570413, at *3. At trial, the Bankruptcy Court found that Appellants' testimony that they intended to hold their interests in the Properties separately was not credible and found that Appellants failed to overcome the community property presumption. AER GG, pgs. 914 -917; AER DD, pg. 754. Appellants did not appeal this finding.

Appellants' admission that they did not have a valid interspousal agreement to transmute the Properties into separate property (and thus could not have complied with the transmutation statutes) conclusively confirms the characterization of the subject properties as community property.

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when it conflicts with the transmutation statutes. Here, the writing requirement may not apply because Family Code § 852 became effective in 1985. However, even if Family Code § 852 does not apply, this does not mean that ***Valli*** is inapplicable: the only impact of the codification of the writing requirement was to modify the manner in which a party may rebut the community property presumption." *Brace* 566 B.R. at 28.

C. Appellants' Claim that the Respondent is a Third-Party Demonstrates a Fundamental Misunderstanding of Bankruptcy Law

Appellants' take a statement in *Valli*'s concurring opinion out of context to support their argument that Evidence Code § 662, and not Family Code § 760, should apply in a bankruptcy context. The concurring opinion in *Valli* states:

> "Significantly, the statutory presumption regarding property in the form of joint tenancy applies, '[f]or the purposes of division of property on dissolution of marriage' (Citations) This language suggests that rules that apply to an action between the spouses to characterize property acquired during the marriage do not necessarily apply to a dispute between a spouse and a third party."

Valli at 1409.

Appellants' attempts to categorize the Trustee as a "third-party" demonstrates a fundamental misunderstanding of bankruptcy law. This misunderstanding was highlighted by the Bankruptcy Appellate Panel:

> "Appellants' implied reliance on a distinction that they contend the court in *Valli* drew between the presumptions that should govern in a marital dissolution and those that should pertain to a dispute involving either or both members of the community and third-party creditors misconceives the issues that arise when one or both members of a community files a bankruptcy."

Brace 566 B.R. at 27.

Immediately upon the filing of a bankruptcy, an estate is created and is comprised of assets of the debtor, wherever located. 11 U.S.C. § 541. The debtor's property rights are determined by state law. *Butner v. United States*, 440 U.S. 48 (1979); *U.S. v. Whiting Pools, Inc.* (1983) 462 U.S. 198, 204 [103 S.Ct. 2309, 2313, 76 L.Ed.2d 515]. It is the trustee's duty to promptly marshal the assets and to maximize their value for the benefit of

the debtor's creditors. 11 U.S.C. § 704 (a)(1); *U.S. Tr. v. Joseph (In re Joseph)*, 208 B.R. 55, 60 (9th Cir. B.A.P. 1997); *In re Ice Management Systems, Inc.* (B.A.P. 9th Cir., Dec. 8, 2014, No. Bankruptcy Appellate Panel CC-14-1046) 2014 WL 6892739, at *5.

The inquiry under 11 U.S.C. § 541 regarding whether property is community property focuses solely on the rights of the spouses with regard to marital property. A bankruptcy trustee is not a third-party in such a dispute because he or she is the representative of a bankruptcy estate that succeeded to the debtor's property rights. The "trustee succeeds to the married debtor's interests **and thus also to any dispute over the characterization of that marital property** ...." *Brace* 566 B.R. at 28 (emphasis added).[16]

Notably, an analysis of what property is property of the estate when only one spouse is a debtor is identical to the analysis of community and separate property in a dissolution proceeding. As noted in *Valli*: "In a marital dissolution proceeding, a court's characterization of the parties' property—as community property or separate property—determines the division of the property between the spouses." *Valli,* 58 Cal.4th at 1399–400.

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[16] Admittedly, in certain situations, the trustee may act for the benefit of creditors, but that does not change the calculus. As the Bankruptcy Appellate Panel stated:

> While the trustee may act for the benefit of creditors, **he is in the first instance merely exploiting the existing property rights of the debtor. To suggest that different presumptions of marital property ownership must apply in bankruptcy is to ignore a fundamental purpose of the bankruptcy system: to permit the trustee to assert the rights of the debtor in property for the benefit of the debtor's creditors.**

Brace, 566 B.R. at 27 (emphasis added).

Similarly, whether a debtor and non-debtor spouse are aligned against the trustee or are adverse to each other will not affect the analysis to determine the character of property. The consequences that result from the form of ownership are entirely irrelevant to the determination of a property's character.

Here, because Respondent is asserting the Debtor's rights in the marital property (in the position of Debtor as a spouse), under *Valli,* the community property presumption of Family Code § 760 is applicable, and the record title presumption of Evidence Code § 662 is inapplicable.

D. Applying the Community Property Presumption of Family Code § 760 to Determine the Character of Property will not Cause Confusion in other Areas of California Law

Finally, Appellants express grave concern over the effect of a decision applying the community property presumption of Family Code § 760 in other areas of law. For example, Appellants assert that probate courts will be forced "to undertake the type of analysis predicated by Family Code § 760 and § 2581." As evident by the number of probate cases cited in Appellants' brief, the probate courts are already dealing with issues regarding the characterization of property, and a decision affirming the Bankruptcy Appellate Panel's decision will provide necessary clarification regarding the characterization of property rights.

Appellants also incorrectly assert that affirming the Judgment would "obviate a body of law which, until now has been settled and subject the interest of innocent spouses to the debts of their spouses, and in the case of bankruptcy subject their one-half interest to administration by the bankruptcy court" As set forth above, the rights of debtors and non-debtor spouses in community and separate property would be unchanged. Community property is subject to payment of community claims and always has been. The only issue being decided is whether the Family Code

governs determinations regarding the character of property acquired during marriage in the absence of a valid transmutation. Spouses that intend to hold property as something other than a community asset are easily able to rebut the community property presumptions by adherence with the "relatively light burdens imposed" by the transmutation statutes.

5. Conclusion

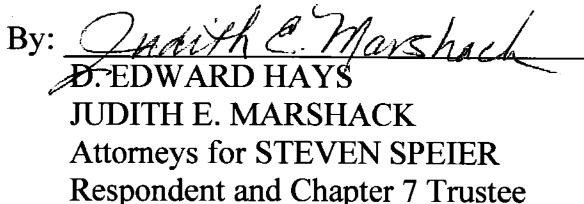
Property acquired by spouses during marriage is presumptively community unless there is a valid transmutation. When spouses acquire title to property in joint tenancy (or in the name of only one spouse), the presumption that such property is community is not rebutted.

Spouses who intend to create separate property interests may not do so solely by the manner in which they acquire title. If spouses that acquire title to real property as joint tenants intend for such interests to be separate property (vis-à-vis only creditors because such property is nevertheless community property in a divorce under Sections 760 and 2581), they must comply with the transmutation statutes.

California law makes clear that property rights and the rights of creditors outside of dissolution proceedings are governed by the Family Code. The same result applies when one spouse files bankruptcy and all of their property including community property become property of the bankruptcy estate available to pay community claims.

DATED: May 1, 2019

MARSHACK HAYS LLP



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CERTIFICATE BY APPELLATE COUNSEL OF WORD COUNT

California Appellate Rules, Rule 8.204(c)(1)

The undersigned certifies that Appellant's Opening Brief contains 6945 words. The undersigned relied on the word county of his Microsoft Word processing software in making this certification.

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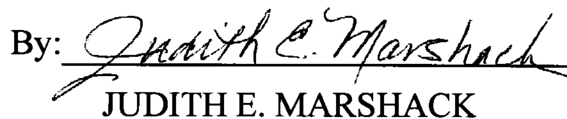
By: 
JUDITH E. MARSHACK

4818-7440-3721, v. 3

In re: Clifford Allen Brace, Jr.
Supreme Court Case No. S252473
Court of Appeals, 9th Circuit Case No. 17-60032
Bankruptcy Appellate Panel No. 16-1041

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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to this case. My business address is: 870 Roosevelt, Irvine, CA 92620.

I hereby certify that the following document: **ANSWER BRIEF ON THE MERITS** will be served or was served in the manner stated below:

On **May 1, 2019,** I caused to be deposited, a copy pursuant to my employer's business practice for collection and processing of documents for mailing with the United States Postal Service on commercial carrier for delivery within 3 calendar days to the following case participants:

See attached Service List

I hereby certify that on **May 1, 2019**, any participants identified below in this case were e-mailed.

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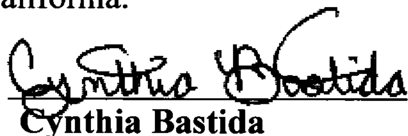
I am employed in the county where the mailing occurred. The document was mailed from Irvine, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on **May 1, 2019**, in Irvine, County of Orange, California.

Signature: 
Cynthia Bastida

In re: Clifford Allen Brace, Jr.
Supreme Court Case No. S252473
Court of Appeals, 9th Circuit Case No. 17-60032
Bankruptcy Appellate Panel No. 16-1041

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