Supreme Court No. S193990

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANKIE VALLI,
Petitioner and Respondent,
vs.
RANDY VALLI,
Respondent and Appellant.

Court of Appeal
Second Appellate District
Case No.: B222435

Los Angeles Superior Court
Case No. BD 414 038

APPELLANT'S ANSWER TO RESPONDENT'S OPENING BRIEF ON THE MERITS

JAFFE AND CLEMENS
Bruce A. Clemens (SBN 60813)
William S. Ryden (SBN 92895)
Nancy Braden-Parker (SBN 207655)
433 North Camden Drive
Suite 1000
Beverly Hills, California 90210
(310) 550-7477

Attorneys for Appellant
RANDY VALLI

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Suite 1000
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(310) 550-7477

Attorneys for Appellant
RANDY VALLI

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INTRODUCTION

Petitioner (Frankie Valli), alone, acquired a life insurance policy on his life. He named Appellant, (Randy Valli) his long time wife and the mother of their three children, as the sole titled owner and also sole beneficiary of the policy. Acquisition of the policy was made without Randy's participation, but just by Frankie, his business manager and his insurance agent. He so testified. [4 RT 776:14-21]. Undisputed evidence also showed that there was no undue influence and no unfair advantage taken. *In re Marriage of Valli* (May 13, 2011, B222435) previously published at 195 Cal.App. 4th 776 (*Valli*), Slip op. at p. 10. Title, testimony and common sense combine to confirm that the policy is Randy's separate property. Incidentally, Frankie still has the right to seek credit for any premiums paid with community or separate funds on Randy's separate property policy, but this was a remanded issue by the Court of Appeal. Slip op. at p. 12.

Frankie cannot reasonably dispute the facts. So instead, he presents a labyrinth of misinterpretation of presumptions, burdens of proof and applicable law in a misguided attempt to undo the very transaction that he alone implemented during the marriage. Bottom line, Frankie, on his own with the assistance of his professional advisors, voluntarily and without participation by Randy, accomplished exactly what he intended to do.

Every statement made above will be documented with specificity in the balance of this brief. It is not rhetoric. It is the truth.

The Court of Appeal decision was correct. It was based on the circumstances and record of this particular and very unique case. Regardless of how this Court resolves the legal questions presented by Frankie, the Court of Appeal decision confirming the life insurance policy to Randy as her separate property will still be the correct decision based upon Frankie's stated intention and unilateral actions.

Frankie has misstated and exaggerated the record and the Court of Appeal decision in order to make the result appear unreasonable when in fact

it is well reasoned and in full conformity with existing law. In his Introduction, Frankie makes seven assertions about the "holdings or implications thereof" in the Court of Appeal Opinion. Six of Frankie's assertions are false. Frankie's assertions of what the Court of Appeal said are set forth below together with the actual language of the opinion.

Frankie's First False Representation of the Court of Appeal Opinion: "Because Randy was named the owner of the policy, Frankie had the burden to prove by clear and convincing evidence that she was not the sole owner of the policy."

> **The Actual Opinion:** "There is substantial evidence that the parties intended Randy own the policy, and there is not any significant evidence of undue influence, or that would otherwise rebut the presumption of title." Slip op. at p. 11 (emphasis added)

Frankie's Second False Representation of the Court of Appeal Opinion: "Because the policy was originally acquired in Randy's name alone, the community property presumption did not apply."

> **The Actual Opinion:** "Because title to the policy was taken solely in Randy's name during marriage with Frankie's consent, the form of title presumption and not the community property presumption applies." Slip op. at p. 8 (emphasis added)

Frankie's Third False Representation of the Court of Appeal Opinion: "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."

> **The Actual Opinion:** "Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial." Slip op. at p. 10.

Frankie's True Representation of the Court of Appeal Opinion: "Because the policy was acquired from a third party, the protections of Family

Code section 852 did not apply." This is true and it undermines one of Frankie's claims.

The Actual Opinion: "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." Slip op. at pp 11-12.

Frankie's Fourth False Representation of the Court of Appeal Opinion: "The policy's substantial cash value was Randy's separate property and all of the premium payments made with community funds during marriage, after the policy had been acquired, were deemed to be gifts to her.

> **The Actual Opinion:** "Upon remand, we leave to the trial court any reallocation of assets or award of reimbursement in light of our holding." Slip op. at p. 12.

Frankie's Fifth False Representation of the Court of Appeal Opinion: "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.

> **The Actual Opinion:** "Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial." Slip op. at p. 10. (emphasis added)

Frankie's Sixth False Representation of the Court of Appeal Opinion: "Frankie had the burden of proving that Randy acquired title to the policy by undue influence.

> **The Actual Opinion:** ""Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial." Slip op. at p. 10. (emphasis added)

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Frankie and Randy were married on July 7, 1984, and separated 20 years later on September 23, 2004. [2 JA 512] The parties have one adult child and two minor children together. [1 JA 3 and 7]

In March 2003, during marriage and prior to the parties' separation, Frankie obtained a $3,750,000 policy on Frankie's life from Manulife (now John Hancock) Life Insurance Company. [2 RT 244:6-21] Randy was named by Frankie as the owner and sole beneficiary of the policy. [2 RT 247:28 to 248:1] Randy was not involved in the purchase. Frankie did this alone. Randy was not involved in naming herself as the owner. [1 RT 182:7-10] Frankie did this alone. Randy was not involved in naming herself as the beneficiary. [1 RT 182:7-10] Frankie did this alone. The premiums were paid with community funds during marriage. [2 RT 351:12-15] After the parties separated, Frankie began paying the premiums with his post-separation earnings. [5 RT 961:12-14] At the time of trial, the policy had a cash surrender value of $365,032. [2 RT 245:12-18]

There was absolutely no testimony and no implication that both parties jointly purchased this life insurance policy. Frankie did this alone. There was absolutely no testimony and no implication that Randy bought the life insurance policy. Frankie alone did what he intended to do. At trial, the following witnesses testified and the following arguments were made regarding acquisition of the insurance policy:

1. Frankie's Testimony

Frankie testified regarding acquisition of the $3.75 million dollar life insurance policy on his life as follows:

- The policy was obtained during his marriage to Randy. [1 RT 181:15-19]

- He alone caused Dennis Gilbert, an insurance agent, to be hired to obtain the $3.75 million life insurance policy. [4 RT 776:14-21]

- He alone obtained the policy because he had been going through a lot of medical problems and wanted to assure the family that they would be taken care of. [1 RT 181:25-27]

- He intentionally put the policy in Randy's name "figuring she would take care and give to the kids what they might have coming." [1 RT 182:7-10]

2. Randy's Testimony

Randy testified regarding her participation in obtaining the $3.75 million policy in question as follows:

- While Frankie was in the hospital with heart problems, Randy and Frankie discussed taking out a life insurance policy and spoke to Barry Siegel, Frankie's business manager, about taking out a policy to protect Randy's future. [4 RT 728:18-22]

- Randy was named as the owner of the policy at the suggestion of Frankie and Barry Siegel. [4 RT 728:23-28]

- Randy also understood that she would be the beneficiary. [4 RT 729:1-3]

3. Testimony of Insurance Broker

Dennis Gilbert testified as follows:

- That in March of 2003 his company sold the $3.75 million policy that was issued by Manulife (now John Hancock). [2 RT 244:6-21]

- Randy is the owner and beneficiary of the John Hancock policy. [2 RT 247:24-28 to 248:1]

- The cash value of the policy as of September 12, 2008, was $365,032. [2 RT 245:12-18]

- He recently had attempted to obtain additional life insurance for Frankie over the three months preceding trial and was unable to obtain a policy because of Frankie's health issues. [2 RT 247:3-23]

- Frankie's current life expectancy is 131 months. [2 RT 257:2-4]

4. Testimony of Business Manager

Barry Siegel testified as follows:

- That he has been Frankie's business manager since approximately 1994. [2 RT 289:7-14]

- His office facilitated payment of the premiums on the $3.75 million life insurance policy. [2 RT 291:1-8]

- The life insurance premiums were paid from the joint account. [2 RT 351:12-15]

There is no testimony of any witness stating or implying that Randy had anything to do with Frankie's decision to name Randy as the owner and beneficiary of the policy. The undisputed evidence from Frankie alone was that Frankie did this alone.

5. Randy's Arguments at Trial

In her trial brief, Randy set forth the following issues regarding the $3.75 million life insurance policy:

> "a. Randy would argue that the Court could conclude the policy is her separate property since Frankie did not intend to include the proceeds in his estate to avoid taxes upon his death.
>
> b. Even if there is an arguable community interest, it would only be a reimbursement right.
>
> c. If the policy is not confirmed/awarded to Randy, then Frankie should continue to name Randy as beneficiary to

secure his spousal and child support obligations as originally intended." [1 JA 93]

During Randy's direct examination at trial, the following colloquy occurred:

> "The Court: Time Out. Help her out a little bit on an offer-of-proof basis. They were married. They bought the policy. It's community property.
>
> Mr. Melcher: If – If– I don't know if they're claiming that he transmuted it to her. Is that being claimed?
>
> The Court: I don't think so. I think everybody agrees it's a community property policy. I don't believe that's the fight. But maybe I am missing the point.
>
> Mr. Ryden: Well, I think there is an argument on both sides. He claims separate interest. And 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." [2 RT 450:22-28 to 451:8]

During closing argument, Randy's counsel argued that the policy should be awarded to Randy, either confirmed as her separate property or awarded to her as security for her support needs in the event of Frankie's death. He argued:

> "If the court doesn't confirm that it's her separate property because of the way they [i.e. Frankie and his business manager] took it out in her name during marriage, she's the beneficiary. She – you know, it's not going to be part of his estate; if the court doesn't view that as a separate property characterization, then we have a community property asset and so we have a

question of how do we divide that asset. And I'm suggesting that the court should award it to her. And the reason I'm giving is that that is part of the security going on . . . So when I say, when I ask court on her behalf to award the policy to her, you know, I'm basically providing for the future." [5 RT 1031:24-28 to 1032:19]

6. Frankie's Arguments at Trial

In his trial brief, Frankie requested that the $3.75 million life insurance policy be apportioned as 76 percent Frankie's property and 24 percent community. [1 JA 93] (Note: this would give Randy 12% and Frankie 88%). Frankie summarized his position regarding the life insurance policy as follows:

> "The policy was acquired approximately one year before separation. The community paid the premiums on the policy for one year during marriage, and Frankie has paid the premiums for the past four years after separation with his separate property. The policy should be apportioned according to the separate and community contributions to its acquisition. Frankie should have the right to control who the beneficiaries are of the policy. Randy should receive the fair market value for her community interest in the policy." [1 JA 114]

During closing argument, Frankie's counsel argued that the policy was community property. [5 RT 960:22-28 to 962:11] He argued that, at minimum, Frankie should be reimbursed for premiums paid after separation. [5 RT 961:12-25] He repeated the argument set forth in his trial brief that the policy be apportioned according to separate and community contributions to the premiums. [5 RT 960:26-28 to 961:17] Finally, Frankie's counsel stated:

> "What we'd really like to do is to see the court divide the policy 50-50, and make Ms. Valli a half beneficiary, and make Mr. Valli's children, all of this them [sic] as the other being the

beneficiary . . . That's what we would like to see; just split it up on condition, though, that she pay her half of the premiums and he pay his half of the premiums." [5 RT 962:18-28 to 963:11]

7. The Trial Court Ruling

The trial court found that the $3.75 million life insurance policy is community property because it was acquired during the marriage with community funds. [3 JA 860]

The trial court awarded the policy to Frankie, ordering him to buy out Randy's community property interest by paying her half the cash value of the policy as of September 12, 2008 ($182,500). [4 JA 947]

The trial court's articulation of the basis for awarding the insurance policy to Frankie is found in the statement of decision rendered December 22, 2009: "'Ms. Valli argues that she should be awarded the policy on Mr. Valli's life as she, not he, is the policyholder. The court made no finding of transmutation as there was no such finding requested and there was no evidence of transmutation before the court.' ¶ . . . [T]he court awards the policy to Mr. Valli as it is a policy on his life and there was no showing of any prejudice to the respondent by such an award." [3 JA 875-876] (Note: To "transmute" an asset you have to own something to transmute. Here, this is the original purchase from the insurance company to Randy as the named owner and beneficiary. Randy did not contend in the trial court, and does not contend on appeal, that the policy is her separate property through transmutation. Slip op. at p. 11-12.)

8. The Court of Appeal Opinion

The Court of Appeal found that "the determination in question is a mixed question of law and fact that is predominantly one of law." Slip. op. at p. 4. Accordingly, the Court conducted a de novo review and held that "under the circumstances of this case, the policy listing Randy as the policy owner when taken out by Frankie and Randy is Randy's separate property under the 'form of title' presumption." *Id.* at p. 2.

In arriving at its decision, the Court of Appeal reached the following conclusions regarding the issues disputed in the appeal to this Court.

- "Because title to the policy was taken solely in Randy's name during marriage with Frankie's consent, the form of title presumption and not the community property presumption applies. (*In re Marriage of Lucas, supra,* 27 Cal.3d at pp. 814-815; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 186-187.)" Slip op. at p. 8.

- "Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial. . . . No evidence was presented that Randy played any role in being named the owner of the policy. There is not substantial evidence of undue influence." Slip op. at p. 10.

- "Because the property in this case-the policy-was acquired from a third party and not through an interspousal transaction, section 852 and the authorities concerning transmutation are not relevant to this case." (In re Marriage of Brooks & Robinson, *supra*, 169 Cal.App.4th at p. 191.) Slip op. at p. 11.

II. ISSUES PRESENTED

Although Rule 8.520 of the California Rules of Court is directed to Petitioner, for the convenience of the Court, Appellant quotes below the statement of issues in the petition for review. No issues were raised in the Answer. Appellant's brief responds to the issues as presented in Petitioner's brief on the merits also quoted below.

A. Issues Presented in Petition 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?
- What showing is required to overcome the presumption of undue influence when one spouse benefits from a transaction during marriage?"

B. Issues Presented in Answer to Petition for Review

- None

C. Issues Presented (As Argument) in Petitioner's Opening Brief on the Merits

- "Evidence Code § 662 should have no role in characterizing community property.
- *Brooks & Robinson* should be disapproved because it emphasizes the form of title over the community property presumption.
- The Opinion conflicts with existing law by putting the burden on Frankie to establish undue influence rather that rebut it.
- Acquiring an asset during marriage with community property in one spouse's name is a transmutation triggering Family Code § 852."

ARGUMENT

I. NOTWITHSTANDING THE GENERAL COMMUNITY PROPERTY PRESUMPTION, BASED ON THE EVIDENCE ADDUCED AT TRIAL, I.E. THAT THE LIFE INSURANCE POLICY WAS TAKEN SOLELY IN RANDY'S NAME DURING MARRIAGE WITH FRANKIE'S CONSENT, THE FORM OF TITLE PRESUMPTION APPLIES, AND THE POLICY PROPERLY IS CHARACTERIZED AS RANDY'S SEPARATE PROPERTY.

A. Both the Courts and The Legislature Have Determined That Title Presumptions, Including Evidence Code Section 662 and Family Code Section 2581, Apply in Characterizing Property in Marital Dissolutions.

In a unanimous decision, the *Valli* Court of Appeal said: "The property at issue in this matter—the policy—was acquired during marriage with community property funds. Thus, if the general presumption that property acquired during marriage is community property applies, then the policy properly would be characterized as community property. (§ 760; In re Marriage of Bonds, *supra*, 24 Cal.4th at p. 12; see generally Family Law, *supra*, ¶ 8:77, p. 8-19.) Notwithstanding the general community property presumption, however, based on the evidence adduced at trial, the form of title presumption applies, and the policy properly is characterized as Randy's separate property." Slip op. at p. 7.

Frankie contends that the presumption based on form of title should not assist in characterizing disputed marital property. However, whatever Frankie's preferences may be, the current state of the law is that the presumptions of title do apply.

As recognized in *In re Marriage of Brooks* (2008) 169 Cal.App.4th 176 (*Brooks),* in 1983 the California Law Revision Commission recommended

passage of a statute that provided that the form of title would not create a presumption or inference as to the character of property acquired during marriage by a married person. The Estate Planning, Trust and Probate Section of the Bar objected, and the statute, proposed as prospective Civil Code section 5110.630, was omitted from the proposed legislation. [Assem Bill No. 2274 (1983-1984) Reg. Sess.]; *Brooks, supra,* 169 Cal.App.4th at p. 189.

Applicable legal precedents have recognized that title presumptions, including Evidence Code Section 662 and Family Code Section 2581, apply to title acquired by a married person during marriage. The form of title in which property is held is rebuttably presumed to reflect the actual ownership interests in the property. *Brooks, supra,* at p. 185. "[A]bsent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization." *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291. This common law presumption is codified in Evidence Code §662. *Id.* When a title presumption applies, it can be overcome only by clear and convincing evidence that the title reflected in the documentary evidence of ownership is not what the parties intended. See e.g., *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336 (*Fossum*); *Brooks, supra,* 169 Cal.App.4th at p. 186; *Haines, supra,* 33 Cal.App.4th at p. 277 (*Haines*). As discussed later in this brief, this is not the situation where one spouse purchased a titled asset in his or her own name. Here, one spouse solely and intentionally purchased an asset and titled it in the name of the other spouse.

Frankie cites *Meyer v. Kinzer and Wife* (1859) 12 Cal.247, 251 (*Meyer*), for the proposition that no form of transfer or mere intent of parties can overcome the rule that all acquisitions made jointly or separately by either spouse while married are community property. *Meyer v. Kinzer* establishes only that in 1859 when the case was decided, the presumption of title did not apply to a married woman. At that time the rule that all property acquired during the marriage belonged to the "community" essentially meant it belonged to the husband. The "community" was virtually synonymous with the husband who had absolute control over the disposition of community property.

In *Meyer*, a wife was attempting to assert a claim to proceeds of a note and mortgage transferred by the husband. Wife claimed one half interest in the mortgage debt arguing that since the mortgage was in her name as well as her husband's that half of it was her separate property and therefore husband could not transfer the right to the proceeds without her signature. The Supreme Court held that placing title in the wife's name was a mere change in the form of the common property. It could not affect the control of the husband over the note and mortgage which remained "subject to the disposition of the husband as fully and absolutely as if made to him individually." *Meyer*, 12 Cal. At p. 255. That situation was remedied by statute in 1872 when the legislature enacted a statutory presumption that property titled in a married woman's name was her separate property. *See* Fam Code § 803 (former Civil Code § 5110.) With the advent of equal management and control more than 100 years later, the presumption was abolished as unnecessary in 1994. 23 Cal.l.Rev.Comm. Reports 1 (1993.)

The holding in *Meyer* does not support Frankie's request for a new rule that title presumptions are irrelevant in characterizing marital property. The community is no longer synonymous with one spouse. Both spouses have equal right of management and control over the marital property. Under current law, the voluntary act of one spouse placing sole legal and beneficial title in the other spouse can create separate property.

Both the courts and the legislature have declined to establish a rule that the parties cannot voluntarily alter the effect of the community property presumption. Regardless of what Frankie would like it to be, it is the current state of the law that the form of title presumption applies to characterization of property in marital dissolution actions.

If the rule is to be different, that is a job for the Legislature and not the province of this Court.

B. There Are No "Dueling Presumptions" in this Case Because Randy Twice Overcame the General Community Property Presumption With Substantial Evidence that Frankie Intended That She Be Made

Owner and Beneficiary of the Insurance Policy. First, With Title: Second, With Testimony.

1. <u>Presumptions of title are more specific than, and prevail over, the general community property presumption</u>.

Frankie argues that the Court of Appeal opinion resulted from "confusion" as to the relationship between the Evidence Code section 662 title presumption and the Family Code section 760 presumption which provides that all property acquired during marriage is community property. There is nothing in the Opinion to indicate that the Court of Appeal was confused.

The general title presumption recognized in California cases was codified in 1967 by the California Legislature with the enactment of section 662 of the Evidence Code which provides: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

Family Code section 760 provides that absent a statute providing otherwise, "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

Contrary to Frankie's protestations, the presumption of title doesn't "trump" the general community property presumption. The presumption of community property is "trumped" by the <u>evidence</u> of the facts necessary to establish the presumption of title–documentary title and consent untainted by breach of fiduciary duty. The presumption of title does not arise until long after the community property presumption has been dispelled by a preponderance of the evidence. The form of title presumption, by its express terms, does not apply until "undisputed legal title" has been established. *Murray v. Murray* (1994) 26 Cal.App. 4th 1062, 1067 (*Murray*).

Frankie insists that the community property presumption is the more specific presumption and that therefore it should prevail when in conflict with a title presumption. Frankie cites no direct authority to support that assertion.

Frankie's argument is contrary to existing precedent and is simply wrong. "Where property status cannot otherwise be proved, characterization is determined by applicable presumptions. One category of presumptions includes those presumptions arising from the form of title, such as the joint title form presumption codified in former Civil Code section 4800.1 (Fam.Code, § 2581), and the general common law presumption in favor of title, codified in section 662. Therefore, absent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization." *Haines*, *supra*, 33 Cal.App.4th at p. 291, citing (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 813.

Frankie argues that because "all property" includes titled and untitled property, both kinds of property are presumed to be community property. Randy does not disagree with this analysis so far as it goes. It is upon Frankie's assertion that "title in either party's name is irrelevant" that Randy and Frankie part company.

"The general presumption of community property can be altered by agreement of the spouses. For example, spouses can indicate their intent with respect to the character of the property initially by specifying the form of title in which it is held, or spouses can later transmute the character of the property as between each other." *Haines, supra,* 33 Cal.App.4th at p. 291. "[A]bsent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization." *Id.* This common law presumption is codified in Evidence Code §662. *Id.*

When a spouse has met the burden of proof necessary to raise the presumption of title, the form of title prevails over the general community property presumption. Here taking title in Randy's name was done solely by Frankie to accomplish what he alone intended to do.

2. Both Family Code section 2581 and Evidence Code 662 apply in marital property disputes.

Family Code section 2581 declares that property held in any joint form

of title is presumed to be community property. Frankie argues that this statute was enacted in support of the community property presumption. He seems to argue that because there is no similarly specific statute for separately-titled property, no presumption applies when marital property is titled in the name of one spouse.

A close reading of the *Lucas* opinion proves Frankie's analysis to be incorrect. Section 2581 was not enacted in support of the community property presumption except insofar as it defaults to a finding of community property when title is jointly held. It was enacted to assist in application of Evidence Code section 662.

The presumption arising from the form of title created problems upon divorce or separation when title to the parties' residence was held in common law forms of joint title having both separate and community components. *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 813 (*Lucas*). Courts were finding that the interests were as evidenced by the form of title. When there were both separate and community contributions to acquiring the property, the decisions were inconsistent regarding how to determine the proportionate interests. *Id.*

The Supreme Court in *Lucas* observed that Civil Code section 5110, the precursor to section 2581 was enacted to "change the presumptive form of ownership to that more closely matching the intent and assumptions of most spouses who acquire and hold their [property] in joint tenancy." *Lucas, supra*, 27 Cal.3d at p. 813. "There is no indication that the Legislature intended in any way to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title." *Id.*

Both the both Family Code section 2581 and Evidence Code 662 apply to characterize property in marital property disputes.

3. The *Valli* Court of Appeal properly applied a title analysis in finding that the life insurance policy is Randy's separate property.

Frankie argues that *Valli* should be reversed and *Brooks* should be

disapproved because the decisions were based on a "straight presumption of title analysis." If there is confusion here, it is Frankie's confusion brought on by Frankie's distorted perception of what a "straight presumption of title analysis" is under the rationale of *Lucas* as applied in *Brooks* and now in *Valli*.

The Court of Appeal in *Valli* properly began with the presumption that the policy was owned by the community but ultimately determined that, based on all of the evidence at trial, both testimony and title, Randy had met her burden to show that the presumption of title should apply and that Frankie had not met his burden to rebut it.

Both the general community property presumption of Family Code section 760 and the form of title presumption of Evidence Code section 662 are presumptions affecting the burden of proof. Evid Code § 662; *Haines, supra,* 33 Cal.App.4th at p. 290. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. Evid. Code section 606. Evidence Code section 550 and the comments thereto explain how the burden of proof affects the burden of producing evidence. Section 550: provides: "(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. ¶ (b) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."

At the outset of the case, the burden of producing evidence typically will coincide with the burden of proof. [7 Cal.L.Rev.Comm. Reports 1 (1965)]. However, during the course of the trial, the burden may shift from one party to another, irrespective of the incidence of the burden of proof. *Id.*

The burden of proof of a separate property interest remains the same throughout the proceeding. It is on the challenger to community property characterization, in this case Randy. *In Re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578 (*Ettefagh*). However, the burden of producing evidence can shift back and forth between the parties. Introduction of bare documentary evidence of separate title might not alone be enough to rebut the community

property presumption. Historical precedents establish that evidence of the form of title is not conclusive in a marital property dispute. *Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 212; *In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 446, 454-455. Here, Randy went far beyond the evidence of separate title. She presented evidence that Frankie, after consulting with two advisors, decided to purchase a life insurance policy for Randy. The fact that Frankie alone caused both legal and beneficial title to be placed in Randy's name alone, and the fact that Frankie relinquished all indicia of an ownership interest at inception, confirmed his decision and intention. Randy did not participate in the purchase, the title decision, the beneficiary designation, or the consultation with Frankie's advisors.

To raise at least an inference that the property is not community property, the proponent of separate title must also introduce some evidence that the other spouse knew how title was being taken and acquiesced. *Lucas*, 27 Cal.3d at pp 814-815; *Brooks*, *supra*, 169 Cal.App.4th at p. 86. "The affirmative act [by the parties] of specifying a form of ownership in the conveyance removes property acquired during marriage from the general presumption. *Brooks, supra,* at p. 86. Agreement is not presumed merely from proof of title. It must be proved by a preponderance of the evidence. The evidence in *Valli* not only showed Frankie's agreement to Randy being made sole owner and beneficiary of the policy, Frankie testified that he "caused" the policy to be purchased and put it in Randy's name. Slip op. at p. 7.

If an agreement is proved, however, it does not necessarily raise the presumption from the form of title. Evidence of the parties' agreement merely dispels the community property presumption and shifts the burden of producing evidence. The proponent of separate title still has the burden of proof. Evid. Code § 500. At this point the party claiming community property can no longer rely on the general presumption but must produce further evidence to raise an issue of fact regarding the validity of the legal title. Such evidence might be that the proffered title may be void or voidable because his or her agreement to the form of title was obtained by fraud or undue influence.

See e.g., *Haines, supra*, 33 Cal.App.4th 277. Here Frankie testified that he did what he intended. No fraud. No undue influence.

If evidence is introduced tending to support a finding of the predicate fact of "unfairness" of an advantage gained by the titled spouse in an interspousal transaction, a presumption of undue influence arises because of the fiduciary duties between spouses. Fam. Code § 721; *Haines, supra,* 33 Cal. App. 4th at p. 296. The evidentiary burden once again rests with the proponent of separate title who must prove the absence of undue influence. *Id.* However, Frankie introduced no evidence of unfairness. Frankie relied on a presumption of undue influence based on his theory that somehow Frankie's acquisition of the policy was an "interspousal" transaction or that the fiduciary duties raise the presumption when one spouse is transacting with a third party. Randy wasn't even involved. The Court of Appeal held:

> "Under the theory that the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the fiduciary duty would apply only when the transacting spouse gains an advantage over the spouse who is not a party to the transaction. (See *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 296.) No such advantage was obtained here. Frankie expressed his desire that the policy be acquired for the benefit of his family. There is no indication the acquisition of the policy was to be an allocation of assets or a savings device." Slip op. at p. 10.

If there is no *prima facie* evidence of unfairness–as the Court of Appeal found to be the case in *Valli*–the opponent of separate property characterization must prove any claimed breach of fiduciary duty in connection with the transaction without the aid of the presumption. Introduction of any evidence that title was acquired through fraud or undue influence, for example, or even that title was taken in a particular form by one spouse without the knowledge or agreement of the other, raises a question of fact and prevents the presumption based on form of title from arising unless and until that fact is resolved in favor of the proponent of separate title. See e.g. *In re Marriage of*

Fossum (2011) 192 Cal.App.4th 336; *Brooks*, *supra,* 169 Cal.App.4th at p. 637, n. 6 citing (See In re Marriage of Rives (1982) 130 Cal.App.3d 138, 162 (When the spouse who is not the record title holder was unaware that title was taken solely in the name of the other spouse, the form of title presumption does not apply.) If undue influence is established, then the separate title is void or voidable and the presumption based on the form of title never arises.

Frankie, relying on a presumption that did not arise, introduced no evidence to raise an issue of fact regarding undue influence. Randy produced evidence that Frankie was under no pressure and, to the contrary, wanted to financially protect his family. The Court of Appeal held that the evidence of record established the absence of undue influence. The Court said:

> "Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial. Although Randy and Frankie first discussed purchasing life insurance on Frankie when Frankie was in the hospital, Frankie, and not Randy, arranged for the purchase of the policy from Gilbert's company. Frankie testified that he obtained the policy because he wanted to make sure that he took care of his family—he wanted his children to be able to go to college and that "there would be money for everybody." Frankie and the business manager, Siegel, informed Randy that she would be made the owner of the policy. No evidence was presented that Randy played any role in being named the owner of the policy. There is not substantial evidence of undue influence." Slip op. at p. 10.

4. <u>The evidence adduced by Randy at trial established the predicate facts to overcome the general presumption and raise the presumption of title, and Frankie did not introduce any evidence that the parties intended that he would retain a beneficial interest in the policy</u>.

All of the preliminary issues discussed above are subject to the normal

burden of proof by preponderance of the evidence. Evid. Code § 115. It is not until the evidence (or lack thereof) establishes the predicate fact of "undisputed legal title" in the proponent of separate property characterization that the presumption of title finally arises. That was the case in *Valli*. The burden of proof still resided with Randy, but the community property presumption was long gone and she was now aided in meeting her burden by the presumption arising from the form of title. At that point, in order to rebut the presumption, Frankie's burden was to introduce clear and convincing evidence that the he or the community retained some form of beneficial interest in the insurance policy. Frankie did not meet that burden. To the contrary, he testified that he intended this for Randy and caused her to be named as the owner. The Court of Appeal found:

> "Frankie failed to overcome the form of title presumption. Frankie did not present evidence of an agreement or understanding with Randy that when the policy was placed solely in Randy's name as owner, they intended title to the policy to be other than Randy's separate property. (*In re Marriage of Brooks, supra,* 169 Cal.App.4th at p. 189.) Likewise, Frankie did not present evidence that he was unaware that title to the policy was taken solely in Randy's name. (*Id.* at p. 186, fn. 6.) That Frankie knew the policy was taken solely in Randy's name is supported by substantial evidence. Frankie testified that he "put everything in Randy's name," and Randy testified that Frankie and Siegel told her that "they were going to make [her] the owner" of the policy.." Slip op. at p. 8.

Accordingly, the Court of Appeal found that "the trial court erred in finding that the policy is community property" and reversed the judgment. Slip op. At p. 12.

The *Valli* Court did conduct a presumption of title analysis, but its decision was based on all of the facts and circumstances of the case, not bare legal title as Frankie wrongfully seems to suggest. The Court of Appeal

declared: "We hold that *under the circumstances of this case*, the policy listing Randy as the policy owner when taken out by Frankie and Randy is Randy's separate property under the "form of title" presumption." Slip op. at p. 2 (emphasis added). The Court's opinion was well-reasoned and should be affirmed.

II. THE COURT OF APPEAL DID NOT MAKE AN AUTOMATIC GIFT TO RANDY OF THE PREMIUMS OR CASH VALUE OF THE POLICY. THE COURT REMANDED THAT ISSUE BACK TO THE TRIAL COURT TO DETERMINE WHETHER FRANKIE AND/OR THE COMMUNITY HAVE A REIMBURSEMENT CLAIM.

The gravamen of Frankie's arguments taken together as a whole seems to be that the premium payments made by Frankie to maintain the policy after it was acquired, somehow caused the policy to become community property. Frankie complains that a finding that the policy is Randy's separate property results in an unintended "gift" to Randy of the premiums and the cash value of the policy. It is true that once the presumption of title is raised, it cannot be rebutted by tracing the funds used to maintain the policy to a community source. When the presumption of title applies, the character of funds used to acquire the property is irrelevant to determine ownership. *Lucas, supra,* 27 Cal.3d at p. 818; *Brooks, supra,* 169 Cal.App.4th at p. 184.

In the *Valli* case, ownership and characterization occurred at the inception of title. Now Frankie tries to bootstrap his community property claim by stating that the premium payments paid voluntarily by Frankie to maintain the policy--after it was acquired and after ownership was determined--came from community property funds. He asserts that this effectively converts the separately titled property to community property. This is not the case. It is simply a wrong conclusion by Frankie. The fact that Frankie elected thereafter, voluntarily and on his own, to pay premiums with community funds raises a different issue, a reimbursement question. Is the community entitled to reimbursement when Frankie voluntarily used

community property funds to pay premiums to maintain Randy's life insurance policy? This is not an issue in this appeal.

This did not mean that payment of the policy premiums automatically resulted in a gift to Randy, and the Court of Appeal did not so hold:. In reversing and remanding to the trial court, the Court of Appeal said: "Upon remand, we leave to the trial court any reallocation of assets or award of reimbursement in light of our holding.".

The fact that community funds may have been expended at acquisition of the policy is irrelevant to the question of ownership of the policy, as is the fact that Frankie continued to pay premiums from separate property after separation. The policy was issued in Randy's name as owner and beneficiary. Frankie caused this to happen. Frankie retained no indicia of ownership or beneficial interest and therefore did not have an interest in the property as a matter of law. *Brooks, supra,* 169 Cal.App.4th at p. 184. It is clear Frankie never had an expectation of retaining an interest in the life insurance policy on his life since, because of its very nature, Frankie could not share in the death benefits. It is for the trial court to determine on remand whether Frankie and/or the community has a valid claim for reimbursement..

III. ASSUMING THAT THE PRESUMPTION OF UNDUE INFLUENCE EMANATING FROM THE FIDUCIARY DUTIES IN SECTION 721 APPLY IN TRANSACTIONS BETWEEN A SPOUSE AND A THIRD PARTY, RANDY STILL PREVAILS BECAUSE THE TRANSACTION AT ISSUE WAS BETWEEN FRANKIE AND A THIRD PARTY ALONE AND THE FIDUCIARY DUTY WOULD APPLY ONLY WHEN THE TRANSACTING SPOUSE GAINS AN ADVANTAGE OVER THE SPOUSE WHO IS NOT A PARTY TO THE TRANSACTION

A. The Presumption of Undue Influence Never Arose Because Frankie Did Not Introduce Any Evidence to Establish the Predicate Fact of *Unfair* Advantage.

Interspousal transactions are expressly governed by Family Code section 721, which prohibits a spouse from taking "any unfair advantage of the other," and treats the fiduciary duties of spouses like those of business partners. Fam. Code section 721(b); *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle).* Whenever [spouses] enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence...." *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27 (*Bonds*); *Haines, supra,* 33 Cal.App.4th at p. 293.

From these principles, Frankie argues that, as a matter of law, acquisition of the policy in Randy's name was subject to the presumption of undue influence arising under Family Code section 721 because Randy obtained a benefit from having the policy titled in her name. He complains that the burden to prove undue influence was shifted to him when it should have been Randy's burden to prove its absence. Frankie's argument is inconsistent with the language of Family Code section 721 and with the applicable case law.

Randy argues that spouses are subject to the general rules governing fiduciary relationships only "in transactions between themselves." Family Code §721(b). This was not a transaction "between" Frankie and Randy. It was a transaction with a third party facilitated by Frankie and his business manager. [4 RT 728:21-28] Consequently, the issue of undue influence never arose. Furthermore, it cannot reasonably be contended that a wife obtaining the protection of life insurance is *per se* obtaining an <u>unfair</u> advantage. She didn't buy the policy for herself. Frankie bought it for her in order to meet what he decided was his moral obligation as her husband and sole provider. Randy did not cause or decide to make herself the titled owner. Frankie did, and so testified.

Randy's position is supported by Supreme Court precedent. In *Marriage of Benson* (2005) 36 Cal.4th 1096, the Supreme Court held that the fiduciary duties in section 721 apply only when a valid "transmutation" has

occurred. "[A]bsent a transmutation that otherwise satisfies section 852(a), there is no basis for applying the presumption of undue influence under section 721(b)." *Id* at page 1112. As set forth more fully at section IV herein, Randy correctly argues that a transmutation is a transaction between spouses, not between a spouse and a third party. Because there was no "transmutation" in this case, the presumption of undue influence never arose. Frankie would not have been precluded from attempting to prove undue influence, but he had the burden unassisted by any presumption.

The Court of Appeal declined to decide whether a presumption of undue influence arises in transactions between a spouse and a third party. However, the Court of Appeal also declined to apply a presumption of undue influence to the acquisition of the life insurance policy, finding that Randy did not participate in the transaction beyond discussing acquisition of a policy as a concept. The Court said: "Randy's discussion does not establish that she participated in the purchase of the policy or in the decision to name her as the owner of the policy." Slip op. at p. 10. The Court found nothing unfair about the transaction. The Court held:

> "Under the theory that the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the fiduciary duty would apply only when the transacting spouse gains an advantage over the spouse who is not a party to the transaction. (See *In re Marriage of Haines, supra,* 33 Cal.App.4th at p. 296.) No such advantage was obtained here. Frankie expressed his desire that the policy be acquired for the benefit of his family. There is no indication the acquisition of the policy was to be an allocation of assets or a savings device." Slip op. at p. 10.

The Court of Appeal is correct because even if, *arguendo*, the transaction at issue can be considered a "transmutation" to which the presumption of section 721 would apply, Frankie still had the initial burden to produce evidence of the predicate fact of *unfair* advantage in order to raise the

presumption. He did not meet that burden. To the contrary, Randy produced evidence showing no undue influence even though this was not her burden.

It is settled that the predicate for applying a presumption of undue influence in an interspousal transaction is that one spouse has obtained an advantage over the other in the transaction. *Haines, supra,* 33 Cal.App.4th at p. 297; see *Bonds, supra,* 24 Cal.4th at p. 27, 99.

Recently, in *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle*), the Court of Appeal reviewed the governing statute, Family Code section 721, and one hundred years of applicable precedents decided both before and after that statute was passed and concluded that the advantage triggering a presumption of undue influence in interspousal transactions must be an "unfair" advantage. The Court observed:

"As long ago as 1894, the Supreme Court stated that:

> 'The moment it appears ... that 'an unfair advantage' has been obtained, the presumption that it was procured by undue influence arises out of the existence of the confidential relation of husband and wife....' (*Dimond v. Sanderson* (1894) 103 Cal. 97, 102, 37 P. 189 (*Dimond*).)

Almost a century later, the principle of unfair advantage was codified by the predecessor to Family Code section 721 (former Civil Code section 5103), which expressly defines the fiduciary duties of spouses in transactions with each other." *Burkle, supra*, 139 Cal.App.4th at p. 730.

The Court concluded: 'In short, both Family Code section 721 and case precedents support the conclusion that in a contractual exchange between spouses, a presumption of undue influence arises only if one of the spouses has obtained an *unfair* advantage over the other. *Id.* at p. 732.

There is nothing about the life insurance policy transaction on its face to raise an inference of unfairness. Frankie argues that the transaction was "unfair" because Randy did not "pay" any consideration for her sole ownership of the policy. All of the evidence of record supports the finding that Frankie's making Randy owner and beneficiary of the policy was voluntary on his part. A voluntary transfer without consideration, absent evidence of facts that would show that the transfer was procured by fraud or undue influence, does not raise a presumption of undue influence. No consideration was required. *Graner v. Hogsett* (1948) 84 Cal.App.2d 657 (Allegation that there was no consideration for deed, without stating any facts which would show that deed was procured by fraud or undue influence or which would show its invalidity, was insufficient to state a cause of action to set aside deed; a consideration not being necessary to the validity thereof.)

Even if *arguendo*, consideration were required, the fact that Randy didn't "pay" anything for being named owner of the policy does not establish lack of consideration. Consideration need not be money, but may be its equivalent or any valuable consideration. *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 615; *H.S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal.App.2d 639. 644–645. Good consideration for a promise is any benefit conferred or any prejudice suffered. Civ. Code, § 1605. Consideration need not flow to or from either contracting party. Civil Code § 1605; *Brody v. Gabriel*, (1961)193 Cal.App.2d 644 (collecting cases). Consideration is equally good if it flows to benefit a third party. See e.g. *Garratt v. Baker* (1936) 5 Cal.2d 745, 748.

Frankie cannot seriously contend that California law should be changed by appellate decision to establish a new rule that prohibits a spouse like Frankie, acting alone like Frankie, from providing financial security with life insurance for a spouse like Randy, even after naming her as the policy owner and beneficiary and testifying in court that this was his individual intentional act and decision. Absurd and bad policy!

Randy obtained a potential benefit, assuming she outlives Frankie, but she did not obtain an "advantage" over Frankie. Frankie testified that he put the policy in Randy's name "figuring she would take care and give to the kids what they might have coming." [1 RT 182:7-10] It can also be inferred that he intentionally gave up all incidents of ownership (legal and beneficial) with a specific purpose, i.e. to avoid estate tax on the proceeds as would have been the case if Frankie also was an owner of the insurance policy. This is further confirmed by the fact that after separation, Frankie established a life insurance trust for the benefit of his children in order for them to have money to pay estate taxes associated with his music catalogue. [4 RT 866] Frankie essentially is asking this Court to create a special tax fraud rule, namely, "If I die, I never owned the policy so no estate tax; but if I divorce, it always was my policy, some or all." This would be wrong and also contrary to *Holtemann* and *Lund* discussed next.

The presumption of undue influence never arose because Frankie did not establish that the transaction at issue was unfair at the time it occurred. It is only now, after the fact, that he wishes to rescind the transaction as "unfair." The appellate opinion established that Frankie's intended purpose was achieved.

Two recent cases establish that regret in hindsight does not establish unfair advantage. Once the character of property is established for one purpose, it is established for all purposes.

In *In re Marriage of Holtemann* (2008) 166 Cal.App.4th 1166 (*Holtemann*), the Court of Appeal affirmed the trial court's finding that trust documents effected a transmutation of husband's separate property into community property. Husband argued that the transfer was made solely for estate planning purposes and not for the purpose of a separation or marital dissolution. *Id.* at p. 1172. The Court of Appeal quoted with approval the trial judge's statement that the husband wished "'to have his cake and eat it too . . . when it would benefit either [husband] or his estate, [husband] wishes to characterize the property as community. However, when it would be

detrimental to [husband], he wishes to ignore the transmutation and call the property separate.'" *Id.* at p. 1174. The Court held that the transfer was effective "notwithstanding language in the transmutation agreement and trust that purports to qualify, limit or condition the transfer upon the death of either spouse." *Id.* at p. 1169

In *In re Marriage of Lund* (2009) 174 Cal.App.4th 40 (*Lund*), the Court of Appeal in a reversal, concluded that a written agreement, executed during marriage for estate planning purposes, transmuted husband's separate property to community property for characterization at dissolution of marriage as well. Citing *Holtemann* with approval, the *Lund* Court noted that it would not interpret the contract as a mere tax strategy and not an effective transfer. The Court said: "We will not assume the parties intended to execute the agreement for the sole purpose of providing documentary support to a future materially false representation to the IRS."

In *Lund* and *Holtemann* community property was acquired by transmutation. In the instant case Randy acquired separate property when the policy was acquired by Frankie in her name as owner and beneficiary. The same logic explained above applies here. The cited cases establish that once the character of property is established for one purpose, it is established for all purposes. Frankie's regret at choosing to have the policy owned by Randy rather than by Frankie is irrelevant. He made what he thought was the right decision for estate planning purposes. Randy is the titled owner. Frankie made her the titled owner on his own. Frankie cannot have his cake and eat it too.

B. If the Presumption of Undue Influence Arose, Randy Rebutted it by Producing Evidence That the Transaction Was Fair.

When a disadvantaged spouse contests a transaction, "the advantaged spouse has the initial burden of producing evidence that the transaction was not consummated in violation of his or her fiduciary duties but was freely and voluntarily consummated, with full knowledge of all the facts and a complete

understanding of the effect of the transaction." *Haines, supra*, 33 Cal.App.4th at pp. 296.

A recent example of a spouse's successful rebuttal of the presumption of undue influence, can be found in *In re Marriage of Mathews* (2005) 133 Cal.App. 624 (*Mathews*). Wife, a Japanese immigrant, quitclaimed her interest in the family residence to Husband in order to secure a more favorable interest rate. At trial, she raised the presumption of undue influence by testifying that her poor command of English rendered the deed unintelligible to her. *Id.* at p. 627. The court found that the deed had been obtained in good faith and refused to apply the presumption of undue influence where the record clearly demonstrated that the wife was well versed in economic matters, had above-average command of English and had voluntarily executed the deed to obtain a favorable interest rate. *Id.* The Court of Appeal held that the trial court erred in refusing to apply the presumption. The Court of Appeal affirmed on another basis, stating: "Substantial evidence supports the trial court's conclusion that the quitclaim was the voluntary and deliberate act of Wife, taken with full knowledge of its legal effect and Husband did not unduly influence Wife to acquire title to the residence in his name alone. *Id.* at p. 632.

The *Valli* Court of Appeal reviewed the record also evidencing a voluntary and deliberate act on the part of Frankie. The Court concluded that, even if the presumption of undue influence should apply, Randy had produced substantial evidence to rebut it. There was no other way to apply the evidence. The appellate court in *Valli* made the following findings which are amply supported by the record:

"Even if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial. Although Randy and Frankie first discussed purchasing life insurance on Frankie when Frankie was in the hospital, Frankie, and not Randy, arranged for the purchase of the policy from Gilbert's company. Frankie testified that he obtained the policy because he wanted to make sure that he took care of his family—he wanted his children to be able to go to

college and that "there would be money for everybody." Frankie and the business manager, Siegel, informed Randy that she would be made the owner of the policy. No evidence was presented that Randy played any role in being named the owner of the policy. There is not substantial evidence of undue influence." Slip op. at p. 10.

That testimony was uncontroverted and rebuts the presumption of undue influence. Frankie did not proffer any evidence that the policy was placed in Randy's name due to undue influence exerted by Randy.

This is not a case of unfair advantage, where "one spouse has taken advantage of another in an interspousal transaction...." *Haines, supra,* 33 Cal.App.4th at p. 301. The transaction was not unfair on its face, and Frankie introduced no evidence of unfairness because there was none. A finding of undue influence cannot logically be made in this case where the transaction was for the benefit of his wife and children and where the transacting spouse had advice from his business manager and the opportunity to obtain any information he needed to evaluate the consequences of placing the policy in Randy's name and making her the beneficiary. There is no evidence that he relied on Randy's knowledge or experience in insurance matters or that he requested or relied on any advice or information from Randy before making her both owner and beneficiary of the policy. The only evidence of record establishes that while Randy arguably participated in a general conversation about acquiring a policy, she did not participate in any way in the decision to make her the sole owner and beneficiary, how much insurance to buy or who to buy it from. Only Frankie did this. One has to remember that Frankie relinquished all indicia of ownership and surely must have realized that he would be getting nothing from the policy upon his death.

The Court of Appeal did not err in concluding that no presumption of undue influence arose, and that Frankie therefore had the burden of proving, by a preponderance of the evidence, that the contract making Randy the owner and beneficiary of the policy was invalid. The presumption of undue influence does not prevent application of the form of title presumption in this case.

IV. BECAUSE THE PROPERTY IN THIS CASE – A LIFE INSURANCE POLICY – WAS ACQUIRED FROM A THIRD PARTY AND NOT THROUGH AN INTERSPOUSAL TRANSACTION, SECTION 852 AND THE AUTHORITIES CONCERNING TRANSMUTATION DO NOT APPLY TO THE HOLDING IN THIS CASE.

The form of title presumption cannot be applied to effect a transmutation of property in derogation of the Family Code §852 requirements. *Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593; *Estate of Bibb* (2001) 87 Cal.App.4th 461, 469-470. Here, however, the section 852 requirements do not apply because there are no facts suggesting a transmutation. The policy was acquired in Randy's name in a transaction with a third person, not through an interspousal transaction.

In *Brooks*, after the parties married, wife took title to certain residential property solely in her name. The down payment was made with community funds. Husband agreed that title would be held in wife's name. Shortly after the parties separated, wife sold the property. Husband then joined the transferee alleging that the property was community property and requesting that the transaction be set aside because he had not joined in the conveyance. *Brooks, supra,* 169 Cal.App.4th at pp. 179-180. The trial court found that the property was wife's separate property and the Court of Appeal affirmed. Husband argued, *inter alia*, that the finding of separate property was based upon a transmutation of community property to wife's separate property for which there was no supporting evidence. Husband relied upon Family Code §852, subdivision (a), which provides: "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." *Brooks, supra,* 169 Cal.App.4th at p. 191. In holding that the law concerning transmutation had no relevance to the case, the Court of Appeal said:

"The argument is misplaced because there are no facts suggesting a transmutation, valid or otherwise, and our holding is not based upon, and does not imply, 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.) Here the Property was acquired in [Wife's] name in a transaction with a third person, not through an interspousal transaction. There is nothing in the record to suggest that Husband and Wife ever made any agreement to thereafter change the character of the Property. Therefore, the character of the Property when it was sold to [Buyer] is the same as when it was first acquired in Robinson's name. Family Code section 852 and case law concerning transmutation simply have no relevance to this case." *Brooks, supra,* 169 Cal.App.4th at pp.191-192 (emphasis in original).

V. EVEN WITHOUT THE BENEFIT OF THE PRESUMPTION OF TITLE, RANDY STILL PREVAILS BECAUSE SHE ADDUCED UNCONTROVERTED EVIDENCE THAT SHE IS BOTH THE LEGAL AND BENEFICIAL OWNER OF THE POLICY. THIS IS EXACTLY WHAT FRANKIE INTENDED TO ACCOMPLISH AND DID ACCOMPLISH.

The title presumption at issue in this case is set forth in California Evidence Code § 662 which reads: "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." As discussed above, Frankie argues that title presumptions never should apply in characterizing marital property. Even if the title presumption is ignored, however, Randy has proved with undisputed evidence that she is the owner of the legal title as well as the full beneficial title to the property at issue here–a life insurance policy.

A life insurance policy is somewhat unique in that the owners of both legal and beneficial titles are easily ascertainable. The undisputed evidence established that Randy is the policyholder and sole beneficiary. Frankie's own testimony established that on his own and in consultation with his business manager and insurance agent, he deliberately caused the policy to be acquired with Randy as the sole owner and sole beneficiary. Frankie testified that he caused Dennis Gilbert to be hired to acquire the policy. [4 RT 776:14-21] He testified that he intentionally put the policy in Randy's name "figuring she would take care and give to the kids what they might have coming." [1 RT 182:7-10] There is nothing about a husband's acquisition of an insurance policy for his wife of 20 years, with the advice and counsel of his business manager and insurance agent, that remotely suggests "unfairness," and Frankie introduced no evidence of unfairness. This is alone enough to support a finding that the policy is Randy's separate property. At the very least, it is enough evidence to establish Randy's undisputed legal title to the policy.

Randy's next challenge is to establish undisputed beneficial title. The title presumption arises when legal title is undisputed. Randy argues that the title presumption arose at this point and shifted the burden to Frankie to prove retention of a beneficial interest–a burden which he did not meet. If, as Frankie argues, the presumption did not arise, Randy had the burden to establish the absence of a beneficial interest in Frankie. Randy satisfied that burden without the need to rely on the presumption.

She introduced substantial evidence that she not only is the legal owner, she is also the sole beneficiary of the policy. [2 RT 247:24-28 to 248:1] That evidence was uncontradicted. Randy produced substantial evidence of the parties' intention that she would become the sole legal and beneficial owner of the policy. [1 RT 182:7-10];[4 RT 776:14-21]; [1 RT 181:25-27] That evidence also is uncontradicted. In the face of such substantial evidence, the general community property presumption was rebutted. Whether to dispel the presumption arising from the form of title or to respond to Randy's undisputed evidence that she is the owner of both sole legal and sole beneficial title, Frankie now had the burden to prove his beneficial interest by a preponderance

of the evidence. Frankie's arguments rely entirely on presumptions. The presumptions either never arose or were rebutted by Randy's evidence. Frankie introduced no evidence of the parties' contrary intention. Knowingly and deliberately placing both legal and beneficial ownership of the policy in Randy at the time of its acquisition is inconsistent with any intent on Frankie's part to retain a community property interest. Presumptions are not evidence. Frankie could not continue to rely on the general presumption. He was now required to introduce some evidence in support of his claims. He did not do so. The Court of Appeal found: "Frankie failed to overcome the form of title presumption. Frankie did not present evidence of an agreement or understanding with Randy that when the policy was placed solely in Randy's name as owner, they intended title to the policy to be other than Randy's separate property."

Randy did not need to rely on the presumption of title because, by the undisputed evidence, she holds both sole legal and sole beneficial to the life insurance policy.

VI. FRANKIE IS TRYING TO OVERTURN THE DECISION AGAINST HIM BY COLLATERALLY ATTACKING THE OPINION ARTICULATED IN THE *BROOKS AND ROBINSON* DECISION. THE CIRCUMSTANCES OF *IN RE MARRIAGE OF VALLI* ARE VERY DIFFERENT.

Frankie spends considerable space in his brief complaining about the result in *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176 (*Brooks*), which was decided using an analysis similar to that set forth in *Valli* and upon which the *Valli* court relied to some extent. Randy does not believe that a collateral attack by Frankie against the holding of that case is properly before this Court. Randy is not here to defend *Brooks*. More important, as set forth in this brief, Randy's argument does not stand or fall on *Brooks*. The facts in *Brooks* are entirely different from Randy's case. *Brooks* merely gives a clear, useful exposition of the existing law as set forth in *Lucas, supra,* 207 Cal.3d 808. The result for the hapless husband in *Brooks* may have been

unfortunate, but the result there appears to be from bad facts, and unsophisticated self-representation, not bad law.

Brooks was an action against the third-party transferee to set aside Wife's sale of a home that was in foreclosure. The home was acquired in Wife's name during marriage. *Brooks*, *supra*, 169 Cal.App.4th at p. 176. Michael Brooks (Husband) was in pro per. *Id.* The action was bifurcated from the marital proceeding. *Id* at p. 182. The complaint against the third party buyer also named Wife, and the pleading included a sixth cause of action for "breach of fiduciary duty" against Wife only. *Id.* at p. 192, n. 4. However, Husband dismissed Wife from the action on the first day of trial. *Id.* So, apparently issues of fiduciary duty never were before the trial court. Husband agreed that title was to be taken solely in wife's name to make it easier to obtain financing. So, there was no issue as to Husband's knowledge and intent that title was to be taken in Wife's name. The money for the down payment came from Husband's earnings. Wife did not contribute any money. *Id.* at p. 180. The Court of Appeal found that there was no evidence of an agreement that Husband was to retain a community property beneficial interest in the house.

Based on those facts, the appellate court held that under the "form of title" presumption, the home was presumed to be wife's separate property, and husband did not rebut the presumption. *Id.*

The Court in *Brooks*, incidentally, also did not make a gift of community funds to the titled owner of the separate property home. The issue of reimbursement was not before the Court in this action against a third party. The *Brooks* Court commented: "[T]his bifurcated case does not involve a division of the community estate between Brooks and Robinson. Whether Robinson might be obligated to reimburse Brooks for his contributions to the Property was not before the trial court and is not an issue on appeal." *Brooks*, 169 Cal.App.4th at p. 188.

CONCLUSION

In the instant case, the insurance policy was first acquired by Frankie and placed solely in Randy's name in a transaction between Frankie and a third person third person and not through an interspousal transaction. Frankie testified that he alone caused Dennis Gilbert to be hired to acquire the policy. It is undisputed that both legal and beneficial ownership of the policy were unambiguously acquired in a transaction with a third party in Randy's name alone. Frankie testified that he alone caused this. Randy was not involved. There is no evidence of Frankie's lack of knowledge or consent. To the contrary, he alone orchestrated this acquisition of life insurance with his two representatives helping him. Randy has dispelled any presumption of undue influence and there are no facts suggesting a transmutation.

As demonstrated by this brief, Randy overcame the general presumption set forth in Family Code section 760. As a result, the presumption of title applies and the insurance policy is presumptively Randy's separate property. The presumption is rebuttable only by clear and convincing evidence. To the contrary, Frankie's own testimony independently supports the fact that he intended to make Randy the sole titled owner and the sole beneficiary. The decision of the Court of Appeal was supported by both the law and the evidence and should be affirmed.

Respectfully submitted,

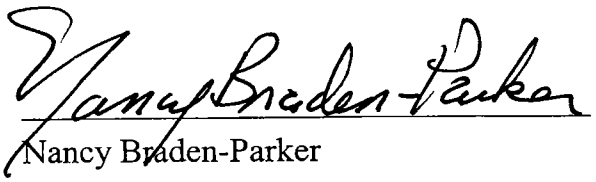
November 18, 2011

JAFFE AND CLEMENS

BRUCE A. CLEMENS
WILLIAM S. RYDEN
NANCY BRADEN-PARKER
Attorneys for Appellant

CERTIFICATION

Pursuant to *California Rules of Court*, Rule 8.204(c), I Nancy Braden-Parker, certify that WordPerfect X3, the computer program used to prepare Appellant's Brief, reflects that this Brief contains 12535 words, including footnotes but excluding tables.



Nancy Braden-Parker

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

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

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APPELLANT'S ANSWER TO RESPONDENT'S OPENING BRIEF ON THE MERITS

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300 So. Spring Street, 2nd Floor
North Tower
Los Angeles, CA 90013-1230

Honorable Mark Juhas (Via U.S. Mail)
Los Angeles County Superior Court
111 North Hill Street, Department 67
Los Angeles, California 90012
[LASC Case BD 414 038]

Christopher C. Melcher, Esq. (Via U.S. Mail)
Walzer & Melcher, LLP
21700 Oxnard Street, Suite 2080
Woodland Hills, CA 91367
(Attorneys for Petitioner/Respondent, Frankie Valli)

Garrett C. Dailey, Esq. (Via U.S. Mail)
2915 McClure Street
Oakland, California 94609
(Attorneys for Petitioner/Respondent, Frankie Valli)

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Executed on November 18, 2011, at Beverly Hills, California.

COLLEEN LEMOINE