Case No. S193990

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RANDY VALLI

Appellant

vs.

FRANKIE VALLI

Respondent

Court of Appeal
Second Appellate District
Case No.: B222435

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

RESPONDENT'S REPLY BRIEF

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In the Supreme Court of the State of California

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RESPONDENT'S REPLY BRIEF

This is not a unique case nor an unusual set of facts. On the contrary, the ownership of countless life insurance policies,[1] as well as automobiles, residences, banking accounts, securities accounts, in fact any asset titled in one spouse's name alone with the knowledge of the other spouse, will be determined by it. It is fair to say that it will come as a huge shock when one spouse learns that, because an asset was acquired in one spouse's name, an unintentional gift was made. Yet, that is precisely the outcome that Randy advocates.

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1 Over $14 billion in premiums were collected in the State of California in 2010, according to the California Life & Annuity Insurance Industry 2010 Market Share Report by the California Department of Insurance (May 2011).

I.
RANDY'S REASONING IS CIRCULAR: SHE ADMITS THAT TITLE DOESN'T CONTROL UNTIL THE COMMUNITY PROPERTY PRESUMPTION IS DISPELLED, BUT THEN RELIES ON TITLE TO DISPEL IT

Randy reaches her conclusion that title dictates the characterization of marital property through one basic leap of reasoning – that knowledge that title is being taken in the other spouse's name equates to an agreement to make a gift, which dispels the community property presumption.[2] Her reasoning is circular – title does not matter unless there is evidence of an agreement to make a gift, yet that agreement is shown by title.

She admits that Evidence Code section 662 does not come into play until "the evidence adduced at trial" dispels the community property presumption.[3] She further admits that "[i]ntroduction of bare documentary evidence of separate title might not alone be enough to rebut the community property presumption."[4] Thus, the question is what evidence is necessary? We know that it is more than bare title.

At page 16 of her brief, Randy states:

> "[T]he presumption of title doesn't 'trump' the general community property presumption. The presumption of community property is 'trumped' by the evidence 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."

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2 See, e.g., Randy's Brief, pp.17, 19, 20, 23, etc.
[3] Randy's Brief, pp.13&16.
4 Randy's Brief, pp.19-20, 23.

Thus, she concedes that title is not enough. There must first be evidence of intent to dispel the community property presumption. So, what is required to do so?

First, both parties would agree that no agreement is binding unless it is voluntary. But merely showing that a marital transaction was "voluntary" is not enough.[5] To dispel the community property presumption, there must also be evidence of "a clear understanding that ... changes the character or ownership of specific property." [6]

Throughout Randy's brief, she repeatedly states that "the evidence adduced at trial"[7] showed Frankie's agreement to change what would have otherwise been a community property asset into her separate property. However, the evidence only showed Frankie knew that the policy was taken in her name. The "evidence" to which Randy cites is set forth on pages 5–7 of her brief:

- The policy was purchased during marriage;
- Frankie obtained the policy because he was hospitalized with heart problems and wanted to assure the family that they would be taken care of;[8]
- He caused Dennis Gilbert, an insurance agent, to obtain the $3.75 million life insurance policy;
- The life insurance premiums were paid from the joint account;
- Randy was named as the owner of the policy; and

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5 *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593.
6 *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1106.
7 See, e.g., pp.3, 4, 11, 13, 14, 16, 19, 20, 22, 29, 32, 33, 37 & 39, all referring to how "the evidence" at trial showed Frankie's agreement to divest himself of all right, title and interest (i.e., "to transmute") the policy and/or how it rebutted the presumption of undue influence.
8 Randy characterizes this as Frankie being "under no pressure." (Randy's Brief, p.22.)

- Randy understood that she would be the beneficiary.[9]

What is missing is any evidence, except the act of titling the property in her name, that Frankie intended to divest himself of his community property interest. Randy admits that title is insufficient; you must first dispel the community property presumption. So how does she "dispel" the community property presumption – by title.

She argues that one can infer Frankie's intent to waive his community property interest from his conduct, i.e., by listing her as the owner. But, here again you have tautological reasoning – title equals agreement and agreement is proved by title. Her only evidence of his intent was that the policy was titled in her name with his consent – in other words, the act was voluntary. Is this enough to waive his community property interest? As discussed below, waiver requires far more. This is why we have Family Code §852 – to eliminate disputes by requiring explicit writings changing character before a transfer of community property to separate property will be recognized.

There was absolutely no evidence that Frankie intended to divest himself of his community property interest in the policy, any more than Randy would have would have lost her interest in the policy had it been titled in his name with her knowledge. All the evidence showed was that she was named the owner with Frankie's consent. From this Randy infers an intention to divest himself of all right, title and interest in the policy, i.e., to make an unconditional gift.

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9 In her recitation of facts, Randy fails to include that while Frankie was in the hospital being treated for heart problems, *she suggested* that he obtain the policy and that she took part in the discussions with Frankie's business manager to obtain it. (RT,pp.728:5-22.) As discussed below, these are serious omissions which supported an implied finding of undue influence.

So, the question is whether proof that title was taken in the name of one spouse with knowledge and/or consent of the other spouse is enough to dispel the community property presumption. Does knowledge of title:

- Establish the requisite intent to waive all community property interest in the asset acquired?
- Shift the burden of proof to the non-titled spouse to prove undue influence, rather than leave it with the benefitting spouse to rebut it?

Since Randy agrees that there must be evidence of intent to make a gift to rebut the community property presumption before title controls, there must be evidence of something more than knowledge of title to show intent to make a gift. Otherwise we are just saying title proves agreement and agreement is proved by title.

II.
RANDY'S ARGUMENT THAT CONSENT TO TITLING AN ASSET IN ONE PARTY'S NAME RESULTS IN A WAIVER OF THE COMMUNITY'S INTEREST VIOLATES THE LAW OF WAIVER

The lynchpin of Randy's argument is that Frankie's consent to title being taken in Randy's name resulted in Frankie waiving his interest in the policy. However, waiver requires both knowledge of the right and the express intent to relinquish it.[10]

> "Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. There must be actual or constructive knowledge of the existence of the right to which the person is entitled. The burden is on the party claiming a waiver

10 See discussion in Gray & Wagner, Complex Issues in California Family Law (2011) Equitable Remedies §4.05.

> to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. This rule particularly applies to cases involving a right favored in law...."[11]

Community property is a right favored in law, certainly more so than the divestment of that right by naked title. Thus, to prove a waiver, Randy needs to show more than simply that an asset was titled in her name. That act alone is insufficient to show a knowing waiver of a valuable community property right. When those elements are missing, the court should decide against waiver:

> "Waiver requires the intentional relinquishment of a known right upon knowledge of the facts. The burden is on the party claiming a waiver of right to prove it by clear and convincing evidence that does not leave the matter to speculation. As a general rule, doubtful cases will be decided against the existence of a waiver."[12]

Thus, it was Randy who properly bore the burden of showing that Frankie understood that, by naming her as the owner, he was waiving his valuable community property rights in the policy. To meet this burden, she had to show more than just knowledge of title, or the proof is tautological and meaningless.

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11 *In re Marriage of Moore* (1980) 113 Cal.App.3d 22, 27; see also *In re Marriage of Perkal* (1988) 203 Cal.App.3d 1198 [Written waiver must show knowledge of existence of right of reimbursement and intention to relinquish it.]

12 *Ringler Associates Inc. v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1188.

III.
WHILE TITLE IS RELEVANT IN DETERMINING CHARACTER IN A MARITAL DISSOLUTION CASE, IT IS SUBSERVIENT TO FAM. CODE §760

Randy seems to agree that Evidence Code section 662 (the record title presumption) is subservient to Family Code section 760 (the community property presumption) when characterizing property in a marital dissolution, and that the presumption of title does not come into play until after the community property presumption has been dispelled.[13] She also seems to agree with the well-recognized rule of statutory interpretation that the more specific statute prevails over the general. But, she then states "[p]resumptions of title are more specific than, and prevail over, the general community property presumption."[14]

Thus, it is unclear what position she advocates, except that she is relying heavily on "the evidence adduced at trial" to support her position that the community property presumption had been dispelled and the only remaining presumption was that of title.

However, since the only evidence "dispelling" the community property presumption was that title was taken voluntarily, she is arguing that the presumption of title trumps Family Code §760. As explained in the Opening Brief on the Merits, pages 12 to 13, the presumption applies to "all property, real or personal, wherever situated, acquired by a married person during the marriage." "All property" includes titled

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13 Randy's Brief, pp.16-20.
14 Randy's Brief, p.16.

property. It is a narrow and specific presumption that applies only in cases of marital property.

Evidence Code §662, on the other hand, is a general non-family law presumption applicable to a broad range of situations. As between the two, the former is the more specific. When there is a conflict between the two statutes, the presumption of community property should prevail. It should also prevail because it honors the public policy favoring community property.

Randy is on the right track when she states that the presumption of title does not come into play until after the community property presumption has been dispelled. However, as discussed below, the way that the community property presumption is dispelled should not be by naked title, but by an 852 writing that specifies that the parties intend that ownership be reflected by record title. Then, the burden would properly be on the party contesting title to overcome it by clear and convincing evidence. If it were as Randy advocates, naked title alone would be sufficient to shift the burden to the community to establish its interest in property acquired during marriage with community funds by the heightened standard of proof. Obviously, that runs counter to California public policy favoring community property.

IV.
FAMILY CODE §852 APPLIES TO NEWLY-ACQUIRED ASSETS AS WELL AS TO TRANSFERS BETWEEN THE PARTIES

Randy defends the Court of Appeal's opinion, relying on *Marriage of Brooks & Robinson's*[15] holding, that section 852 has no applicability to newly-acquired marital assets. She fogets that all assets "acquired during marriage" are acquired from third parties. Frankie does not believe that this insulates those transactions from the reach of fiduciary duty.

In arguing that such transactions are not subject to fiduciary duty, Randy focuses on the phrase "in transactions between themselves" in section 721. What she forgets is that earlier she argued that the "agreement" between the parties, as evidenced by taking title in her name alone, dispelled the community property presumption such that title prevailed. It is the "agreement" that title be taken in one party's name that is the "transaction" that is subject to scrutiny under the fiduciary standard. When property is acquired from a third party and titled in one spouse's name with the other's knowledge or consent, the implied gift which Randy says results is a "transaction between spouses". If Frankie made a gift of the policy to Randy, then there was a transaction between Frankie, as donor, and Randy, as donee.

The fact that the property was first acquired from a third party is irrelevant. When community funds are used to acquire an asset of a non-personal nature during marriage,

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15 *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176.

and that asset is then allegedly gifted by one spouse to the other, fiduciary duty is implicated. A spouse who claims that there was an agreement to make a gift in such instances must show an express written declaration which satisfies the requirements of section 852[16] and overcome the presumption of undue influence.

Randy also needs to show that the "confidence which [Frankie] reposed in her was not misplaced" when this "agreement" was reached.[17] As stated in *Estate of Caswell*:[18]

> "Confidential relations are presumed to exist between husband and wife, and, in [her] dealings with [her husband, the wife, if she] obtains any advantage over [him], must stand unimpeached of any abuse of the confidence presumptively reposed in [her by her husband] and resulting from the marital relation, and failing in this [she] must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained."[19]

For this reason, both *Brooks & Robinson* and the appellate court below were incorrect when they held that acquiring an asset in the name of one party is not a "transmutation."

> "Consent, agreeing, or acquiescing to the taking of title in one spouse's name, which vitiates the presumption of community and creates a presumption of separate, is an *agreement or transaction which changes*

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[16] All gifts between spouses are transmutations. To be valid, the gift must either be evidenced by an 852 writing or be property of a personal nature which is not substantial in light of the circumstances of the marriage (in which case no writing is required to effect a transmutation of that property). The clear implication of subdivision (c) is that all gifts of a non-personal nature are transmutations which must meet the writing requirement. By arguing that Frankie made a gift, Randy squarely places that alleged transaction within the ambit of section 852. The policy is not an asset of a "personal nature," so the exception in subdivision (c) does not apply. A writing is required.

17 *Brison v. Brison* (1891) 90 Cal. 323; Civ. Code §1575.

18 *Estate of Caswell* (1930) 105 Cal.App.475, 484.

19 Genders switched to avoid confusion.

> character from community to separate. Thus, the transaction/consent/agreement/acquiescence *is a transmutation*, by definition, which must comply with the rules relating to a transmutation."[20]

Given that, by definition, all newly-acquired marital assets are from third parties, exempting them from the protections of section 852 would undermine the goal of increasing certainty as to whether a transmutation had occurred and limit case law requiring a transmutation to be both written and express.[21] If the parties are going to acquire an asset that is presumptively community property in the name of one of them and intend that it be that person's separate property, that is a "transmutation" and a writing memorializing that decision should be required. [22]

This is equally as important in newly acquired assets as in transmutations of separate assets. Otherwise, we find ourselves precisely in the situation before us where the benefiting party is arguing "an agreement" to rebut the community property presumption based upon conduct and inferred intent. That is precisely what 852 was designed to prevent.[23]

Does anyone believe that if Frankie had told Randy that he was acquiring the policy with himself as owner and her as beneficiary, she would have objected? Regardless, that act should not define the character of a valuable asset such as this—or any other asset for that matter. This would encourage sharp practice and unequal divisions of community property. As stated in *Marriage of Bonds*:

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20 Wagner, 2011-7 Cal. Family Law Monthly 6 (LexisNexis, 2011).
21 *In re Marriage of Benson, supra,* 36 Cal.4th at p.1100.
22 *Id.* at pp.1106-1107.
23 *Estate of MacDonald, supra,* 51 Cal.3d 262.

> "[C]ommunity property law expresses a strong state interest in the equal division of property obtained during a marriage, so that any agreement in derogation of equal distribution should be subject to searching scrutiny for fairness...."[24]

Is there anything "fair" about permitting the act of taking title to determine how that asset is characterized in a marital dissolution?[25] It is for this reason that the 852 protections should apply to newly-acquired assets. If the parties want a presumptively community property asset to be the separate property, there needs to be a writing that provides the adversely affected spouse with a clear understanding that character will be other than community.[26]

V.
RANDY NEVER DISCUSSES THE REQUIREMENTS TO OVERCOME THE PRESUMPTION OF UNDUE INFLUENCE

Randy admits that, for an interspousal transaction to be valid, it must be "untainted by a breach of fiduciary duty."[27] But, she never discusses the requirements to overcome the presumption of undue influence. The reason is that they were not met. As explained in *Starr v. Starr,*[28] relying on *Marriage of Haines*:[29]

> "When that presumption [of undue influence] arose, it trumped the competing presumption created by Evidence Code section 662. Therefore,

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24 *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 29.
25 This should be distinguished from an express, unambiguous act, such as transmuting property with an 852 writing to obtain a tax benefit such as occurred in *Marriage of Holtemann* (2008) 166 Cal.App.4th 1166.
26 See *In re Marriage of Benson, supra,* 36 Cal.4th at pp.1106-1107.
27 Randy's Brief, p.16.
28 *Starr v. Starr* (2010) 189 Cal.App.4th 277, 282.
29 *In re Marriage of Haines* (1995) 33 Cal.App.4th 277 [hereafter "*Haines*"].

> the husband had to show that the deed ' "was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.""

Thus, if the presumption of undue influence arose, it was Randy's burden to show:

1) That the decision to name her as owner was freely and voluntarily made.

She met this burden, but that is where the evidence stopped. All evidence went solely to this prong. However, she still had to prove:

2) Frankie named her as the owner with a full knowledge of all the facts, and

3) With a complete understanding of the effect of the transfer.

Randy introduced no evidence on either of these prongs of the *Haines* test. Nor could she – there was none. The law in California has always been that character of life insurance policies is determined by the character of funds used to pay the premiums. (11 Witkin, *Summary* 10th ed. (2005) Comm.Prop, §47, p.578.)[30] Thus, there is no way that Frankie could have understood that by naming her as the owner he was relinquishing all interest in the policy.

Randy tries to avoid that outcome by urging that the presumption of undue influence never arose for various reasons, starting with the illusion that she did not "*unfairly benefit*". This is silly. Before the transaction, Frankie was uninsured.

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30 Each and every one of these life insurance characterization cases cited by Witkin rebuts Randy's argument at p.24 of her Brief where she states: "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." See, e.g., *Life Ins. Co. of North America v. Cassidy* (1984) 35 Cal.3d 599, 605-606 ["When life insurance premiums are paid with community property funds, the resulting policy is an asset of the community."]

Afterwards, Randy owned a life insurance policy with a cash value of $346,000 and a death benefit of $3.75 million. She paid no consideration for this. Yet, she did not unfairly benefit? The argument strains credibility.

The Court of Appeal explained that there was no unfair advantage because Frankie "acquired the policy for the benefit of his family. There is no indication the acquisition of the policy was intended to be an allocation of assets or a savings device." (Slip.Op., p.10.) This conclusion is inconsistent with the holding that Frankie *did* intend a reallocation of the community funds to Randy's separate property. The decision also overlooks the savings device which is a part of a universal life insurance policy, which accumulates cash value based on the premiums paid (here, $346,000 in a short period).

What is required to show an "unfair benefit"? Randy relies on *Marriage of Burkle*[31], yet it does not help because Mrs. Burkle received $1 million per year in a bargained-for-exchange. What did Frankie receive?

Of course Randy benefited from the transaction. As stated in *Marriage of Lange*:

> "Generally, a fiduciary obtains an advantage if his position is improved, he obtains a favorable opportunity, or he otherwise gains, benefits, or profits." [32]

Randy admits that she paid nothing for the assignment, yet argues that consideration is not required for an interspousal transaction.[33] True, but that doesn't diminish that fact that the lack of consideration is one of the hallmarks of an unfair advantage:

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31 *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712.
32 *In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364.
33 Randy's Brief, p.29.

> "The word 'advantage,' in this context, plainly does not mean merely that a gain or benefit has been obtained. Taking 'advantage of another' necessarily connotes an unfair advantage, not merely a gain or benefit obtained in a mutual exchange. * * * *Cases . . . involving property transfers without consideration, necessarily raise a presumption of undue influence,* because one spouse obtains a benefit at the expense of the other, who receives nothing in return. The advantage obtained in these cases, too, may be reasonably characterized as a species of unfair advantage."[34]

Likewise, *Burkle* held:

> "A presumption of undue influence does not arise in an interspousal transaction unless one spouse obtains an unfair advantage or *obtains property for which no or clearly inadequate consideration has been given.*"[35]

That Randy obtained highly valuable property for no consideration necessarily raised the presumption of undue influence, which triggered her burden to rebut it. Nevertheless, the Court of Appeal found that "*the evidence,*" which showed nothing more than that the titling decision was voluntary, was enough to overcome the presumption and shift the burden to Frankie to prove undue influence. But that turns the presumption of undue influence on its head. If adopted, the *Haines* presumption is greatly weakened because all one need do is identify some nonmonetary benefit to the grantor, such as love and affection, and the presumption is dispelled and the burden is shifted to the dispossessed party to prove undue influence rather than on the benefitting spouse to rebut it.

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[34] *Burkle* at p.731, emphasis added.
[35] Id. at p.717, emphasis added.

A. Randy Introduced No Evidence to Satisfy the Second and Third Prongs of the Showing Necessary to Overcome the Presumption of Undue Influence

The second and third prongs required proof that Frankie had a full knowledge of the facts and a complete understanding of the effect of making Randy the owner of the policy. Randy failed to prove this at trial.

Randy asserts: "Undisputed evidence also showed that there was no undue influence and no unfair advantage taken."[36] In support of this bold statement she cites not to the record, but to the opinion of the Court of Appeal. Here, she makes her first mistake. No such finding was made by the trial court, whose sole province it is to make factual determinations.[37]

Likewise, she repeatedly states, or quotes the Opinion that "the presumption of undue influence was rebutted by the evidence at trial." But, as seen in Randy's Brief at pages 5-7, the only evidence showed that Frankie knew that Randy was being named both beneficiary and owner of the policy. There was no evidence as to the second and third prongs of the requirements to overcome the presumption of undue influence. In both *Starr v. Starr*[38] and *Marriage of Fossum*[39], the wives signed the quit claim deeds "voluntarily," yet the transactions were voided. Why? Because the second and third prongs of the undue influence requirements weren't met.

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[36] Randy's Brief, p.2.
[37] *In re Zeth S.* (2003) 31 Cal.4th 396, 405.
38 *Starr v. Starr, supra,* 189 Cal.App.4th 277.
39 *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336.

B. The Court of Appeal Failed to Make Inferences in Favor of the Judgment

Randy repeatedly relies on the Opinion's holding that there was no evidence of undue influence. In doing so, she ignores the rule that reviewing courts are required to draw all inferences based on substantial evidence in favor of the validity of the judgment, including implied findings that reasonably arise from the evidence.[40]

Instead of making all inferences in favor of the trial court's implied evidentiary findings, the Court of Appeal drew all inferences against the judgment. There was evidence of actual (rather than just presumed) undue influence, namely Randy's asking her husband, who was in the hospital being treated for heart problems and obviously under stress, to obtain a large life insurance policy for her benefit.[41] Randy also took part in the discussion with Frankie's business manager to obtain the policy. She testified:

> "***We*** then spoke to Barry about taking out a life insurance policy ***to protect my future***."[42]

Either of these facts alone was sufficient to sustain an implied finding of undue influence. Thus, if it were Frankie's burden – he met it.

But it wasn't his burden. This was a marital transaction that unfairly benefited Randy, triggering the presumption of undue influence. She presented no evidence to overcome two of the three requirements necessary to rebut it. The Court of Appeal flip-

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40 *In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 470; *In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.
41 RT,pp.728/18-22, 729/4-9.
42 RT,p.728/21-22, emphasis added.

flopped the burden. It was not Frankie's burden to prove undue influence – it was Randy's to rebut it. She did not do so.

VI.
WHAT RESULT FAVORS PUBLIC POLICY?

At page 29 of her brief, Randy argues that finding that the asset is community property amounts to "[a]bsurd and bad policy!" This is an argument Randy cannot win. Public policy should encourage spouses to provide life insurance for their families. Which result is likely to foster that – Randy's, i.e., you can lose your community property interest based on which name the agent inserts on the application, or Frankie's, where both parties preserve their rights absent a transmutation agreement free of undue influence? If spouses believe that by placing a policy in the name of the other they give up their community rights, they may think twice. This would adversely impact California families.

The act of naming an owner to a policy should not define the character of a valuable asset such as this—or any other asset for that matter. This would encourage sharp practice and unequal divisions of community property.

VII.
A POTENTIAL RIGHT OF REIMBURSEMENT DOES NOT MAKE THE COMMUNITY WHOLE

Randy stresses repeatedly that the issue of whether Frankie was entitled to any reimbursement for the payments made on "Randy's" insurance policy has been remanded, inferring that somehow this will make the community whole. A right of

reimbursement for premiums does not compare to the $3.75 million death benefit. What reimburses Frankie for the loss of the death benefit proceeds which he had planned to use to pay the estate taxes on his death so that his children could keep his "Four Seasons" music catalog intact?[43]

CONCLUSION

Both the opinion below and that of *Brooks & Robinson* on which it relied were incorrectly decided and result in bad policy. "All property" acquired during marriage is presumed community property. Yes, spouses can change that by express agreement. They should not, however, "slip into a transmutation by accident".[44] That is what the Court of Appeal found happened here.

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43 RT,pp.184:28-185:11.

[44] *In re Marriage of Campbell* (1999) 74 Cal.App.4th 1058, quoting *Marriage of Barneson.*

The Decision of the Court of Appeal should be reversed and the finding of the trial court that the policy was community property affirmed.

Dated: December 15, 2011

Respectfully submitted,

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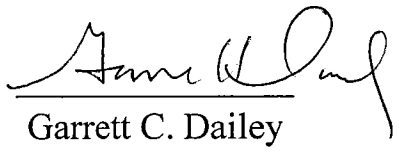
Frankie Valli

CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Respondent Frankie Valli, hereby certify that, pursuant to Cal. Rules of Court, rule 8.504(d)(1), this brief contains approximately 4,167 words, including footnotes, as computed by the Microsoft Word 2007 word counter.



Garrett C. Dailey

PROOF OF SERVICE

I, BRENDA K. BUTLER, declare as follows:

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

On December 16, 2011, I served a copy of the following document(s):

RESPONDENT'S REPLY BRIEF

On the addressee(s):

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

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

William S. Ryden, Esq.
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433 North Camden Drive, Suite 1000
Beverly Hills, California 90210

The Honorable Mark Juhas
Los Angeles County Superior Court
111 North Hill Street, Dept. 67
Los Angeles, CA 90012
[LASC Case BD 414 038]

California Court of Appeal
Second Appellate District, Division 5
350 McAllister Street
San Francisco, California 94102-4797
[2d Civil No. B 222 435]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 15, 2011, at Oakland, California.

Brenda K. Butler