FIDUCIARY DUTIES: RIGHTS AND REMEDIES OF SPOUSES AND REGISTERED DOMESTIC PARTNERS

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1. **EVERY ANALYSIS OF FIDUCIARY RIGHTS AND REMEDIES MUST COMMENCE WITH A CAREFUL READING OF THE STATUTES AND CASES**

1. 1 Family Code sections 297.5, 721, 1100, 1101,1102, 1103, 2100, 2101-2107, 2120-2126, and 2128.

1.2 Corporations Code sections 16403, 16404, and 16503.

1.3 Probate Code section 16047.

1.4 Well written Court of Appeal decisions give us guidance on the meaning of the statutes and prior decisions while poorly written decisions lead to confusion. *Harris v. Superior Court* (1992) 3 Cal.App.4th 661.

1.5 It is imperative to understand the difference between a confidential relationship based on trust and a fiduciary relationship. *Vai v. Bank of America* (1961) 56 Cal.2d 329; *In re Marriage of Bonds* (2000) 24 Cal.4th 1; *Maglica v. Maglica* (1998) 66 Cal.App.4th 442; *Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 [disparity in bargaining power is not the test of fiduciary duty].

1.6 Maxims of Jurisprudence should also be reviewed when facing issues where there is ambiguity not resolved by a Court of Appeal decision and equitable issues are involved. *Civil Code* sections 3509-3548.

1.7 Even if a statute is merely a "clarification" of the law and thus retroactive, if the effect of retroactivity is "punitive" in a particular case, or grossly unfair to a party, the Court may decline to apply it. *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408.

1.8 Generally, amendments to the Family Code are retroactive. *Family Code* section 4; *In re Marriage of Fellows* (2006) 39 Cal.4th 179.

2. **APPLICABILITY OF FIDUCIARY DUTIES TO COHABITANTS**

2.1 Registered Domestic Partners probably have all of the same rights and duties as spouses even if the Court of Appeal cases have not yet commented on this subject. *Family Code* section 297.5.

2.2 A cohabitation relationship, even a very serious long term relationship, may not be sufficient to establish a fiduciary relationship between the parties in the absence of evidence of one party entrusting the other with his/her money or property or some contractual agreement between them. *Maglica v. Maglica* (1998) 66 Cal.App.4th 442 ["...the jury found there was no contract. Claire, despite the closeness of their

relationship, never entrusted her property to Anthony; she only rendered services. And without entrustment of property, or an oral agreement to purchase property, there can be no fiduciary relationship no matter how 'confidential' a relationship between an unmarried, cohabiting couple..."]

2.3 Individuals residing together can create a "confidential" relationship which may be sufficient to shift the burden of proof in some transactions between them, but not likely in the context of a Premarital Agreement. *In re Marriage of Bonds* (2000) 24 Cal.4th 1, at 29-30 ["Although we certainly agree that persons contemplating marriage morally owe each other a duty of fair dealing and obviously are not embarking upon a purely commercial contract, we do not believe that these circumstances permit us to interpret our statute as imposing a presumption of undue influence or as requiring the kind of strict scrutiny that is conducted when a lawyer or other fiduciary engages in self-dealing."]; and *Family Code* sections 1600-1617, placing the burden on the person challenging the validity of a Premarital Agreement.

3. FIDUCIARY DUTIES UNDER FAMILY CODE SECTION 721 AND INCORPORATED CORPORATIONS CODE SECTIONS

3.1 Spouses [and probably registered domestic partners] occupy a confidential relationship which imposes upon them "the highest good faith and fair dealing...[and] neither shall take any unfair advantage of the other...[and this fiduciary relationship is] ...subject to the same rights and duties of nonmarital business partners, as provided in *Corporations Code* section 16403, 16404, and 16503. *Family Code* section 721(b).

3.2 Each shall have access to records "at all times" for inspection and copying. *Family Code* section 721(b)(1).

3.3 Upon request, parties must disclose "true and full information of all things affecting any transaction which concerns the community...[but have] no duty to keep detailed books and records of community transactions." *Family Code* section 721(b)(2).

3.4 As of January 1, 2003, no request is required for an obligation to disclose "any information" regarding community affairs. *Family Code* section 721(b); *Corporations Code* section 16403(c)(1); *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408.

3.5 Accounting to a spouse and holding as trustee any benefit or profit derived from any transaction by one spouse without the consent of the other which concerns the community property. *Family Code* section 721 (b)(3); *Monica v. Pelicas* (1955) 131 Cal.App.2d 700.

3.6 Not all rights of corporate officers or directors are incorporated in the fiduciary rights

and duties of spouses. *In re Marriage of Leni* (2006) 144 Cal.App.4th 1087.

3.7 Effective January 1, 1992, the fiduciary duty provisions of *Family Code* section 721 replaced the "good faith" language of former Civil Code section 5125(e). The increased fiduciary duty obligations do not apply retroactively. *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428.

3.8 The duty to disclose all material facts may not require the disclosure of facts which Federal Law requires officers and directors to retain as confidential. *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428. Protective orders will probably be sufficient to permit orders requiring the disclosure of other highly sensitive information such as "trade secrets" in order to permit the Court to value the community.

3.9 As of January 2003, if not before, it is clear that the "Prudent Investor Rule" is not included within the fiduciary obligations of spouses to each other. *Family Code* section 721(b); *Probate Code* sections 16406 and 16047 (Trustee excluded); and 16404(c) [partner's duty of care is to refrain from engaging in "grossly negligent or reckless conduct, intentional misconduct, or knowing violation of the law."] See *Burkle v. Burrkle* (2006) 144 Cal.App.4th 387.

3.10 The form of title presumption in Evidence Code section 662 does not apply where the presumption conflicts with the presumption that one spouse has obtained an unfair advantage over the other by undue influence. *In re Marriage of Haines* (1995) 33 Cal.App.4th 277; *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176; *Starr v. Starr* (2010) 189 Cal.App.4th 277; Cf. *In re Marriage of Matthews* (2005) 133 Cal.App.4th 624 **[NOTE: Hearing granted by Supreme Court in *In re Marriage of Valli* (2011) 195 Cal.App.4th 776, and we could have a decision within the next 6 months.]**

3.11 Before a presumption arises that an interspousal transaction was the result of "undue influence," the disadvantaged spouse must make a showing that the advantaged spouse obtained an "unfair"advantage in the transaction, not merely any advantage. *Family Code* section 721(b); *Burkle v. Burkle* (2006) 144 Cal.App.4th 387.

3.12 A breach of fiduciary duty by which a party obtains something of value from a transaction with the other party constitutes "constructive" fraud. *Civil Code* section 1573(1) ["...any breach of duty, without an actual fraudulent intent..."]; *Peskin v. Squires* (1957) 156 Cal.App.2d 240; *In re Marriage of Walter* (1976) 57 Cal.App.3d 802; *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801; *Baker v. Pratt* (1986) 176 Cal.App.3d 370.

3.13 Restitution may include the property and substantial interest. *Civil Code* section 3287(a) and 3288; *Dunkin v. Boskey* (2004) 82 Cal.App.4th 171; *Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310.

3.14 The fiduciary duties in Family Code section 721 and the Corporations Code sections incorporated therein continue after separation with regard to the particular asset or debt until the asset or debt is distributed. *Family Code* section 2102(a); Cf. *In re Marriage of Hixson* (2003) 111 Cal.App.4th 1116 [not after the asset or debt is distributed.]

3.15 A fiduciary in possession of community property at the time of separation is obligated to account for the assets at the time of settlement agreement or trial. *In re Marriage of Margulis* (2011) 198 Cal.App.4th 277; *Williams v. Williams* (1971) 14 Cal.App.3d 560; Cf. *Bono v. Clark* (2002) 103 Cal.App.4th 1409 [action against an estate].

3.16 The "community opportunity" doctrine may actually have support in the amendments to Family Code section 721 which became effective January 1, 2003. *Family Code* section 721(b); *Corporations Code* section 16404(b)(1) and (b)(3) [the duty of "loyalty"]; Cf. *Somps v. Somps* (1967) 250 Cal.App.2d 328; *MacIsaac v. Pozzo* (1947) 81 Cal.App.2d 278; *In re Marriage of Sonne* (2010) 48 Cal.4th 118.

3.17 A spouse does not have a duty to retire to maximize community retirement benefits even if retirement will permit spouse to have increased income. *In re Marriage of Kochan* (2011) 193 Cal.App.4th 420.

3.18 If any of the warranty provisions of a Marital Settlement Agreement are not merged in the Judgment, a former spouse may bring an independent civil action which may permit all of the relief otherwise obtainable in a family law action pursuant to Family Code sections 2120 et. seq. and, in addition, punitive damages. See *Civil Code* sections 1689 and 1692; *Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477.

4. FIDUCIARY DUTIES UNDER FAMILY CODE SECTION 1100 REGARDING MANAGEMENT AND CONTROL

4.1 No gifts of community or disposition of community for less than fair and reasonable value. *Family Code* section 1100(b).

4.2 Gifts between spouses covered by *Family Code* section 852.

4.3 Spouse may not sell, convey, or encumber community personal property used as family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children without written consent. *Family Code* section 1100(c).

4.4 Community real property may not be sold, conveyed, encumbered, or leased for more than 1 year without written consent of other. *Family Code* section 1102;

Droeger v. Friedman (1991) 54 Cal.3d 26; *In re Marriage of Lister* (1984) 152 Cal.App.3d 411.

4.5 Managing spouse of a business has primary management and may act alone in all transactions but shall give prior written notice of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property use in the operation of the business. *Family Code* section 1100(d).

4.6 Each spouse has a fiduciary obligation to the other as provided in Family Code section 721 until the assets and liabilities have been divided. *Family Code* sections 1100(e) and 2102(a).

4.7 Remedies for violation of 1100(d) limited to avoid unfair result to innocent third party. *Family Code* section 1100(d).

4.8 Mandatory fees are to be awarded where the court finds a breach of duty of management and control per section 1100 where the conduct does not support an award of punitive damages pursuant to *Civil Code* section 3294. *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987; *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336; Cf. *In re Marriage of Kochan* (2011) 193 Cal.App.4th 420 [failing to make mortgage payments following separation may violate fiduciary duty to preserve community assets].

4.9 Failure to comply with section 1100 can result in very significant adverse consequences. *Family Code* section 1101(h); *Civil Code* section 3294; *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34.

5. MANDATORY DISCLOSURE REQUIREMENTS POST SEPARATION

5.1 Spouses are obligated to give "full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest... regardless of the characterization as community or separate...." *Family Code* section 2100(c); *In re Marriage of Brewer and Federici* (2001) 93 Cal.App.4th 1334.

5.2 Each party has a continuing duty to "*immediately*, fully, and accurately update and augment that disclosure to the extent that there have been any material changes...." *Family Code* section 2100(c).

5.3 Spouses are *not* obligated to provide updated information regarding income after judgment for child or spousal support. *In re Marriage of Sorge* (2012) 202 Cal.App.4th 626.

5.4 Spouses are obligated to give written disclosure of any investment or business opportunity, or other income-producing opportunity, that presents itself after the

date of separation, but that resulted from activities and opportunities during marriage before separation. *Family Code* section 2102; *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278.

5.5 Post-separation disclosure requirements are the most significant obligations parties have at any time during marriage. Family Code section 2107(c) authorizes sanctions *in addition* to fees and costs actually incurred to "deter" repetition. *In re Marriage of Fong* (2011) 193 Cal.App.4th 278; see also *In re Marriage of Michaely* (2007) 150 Cal.App.4th 802 [100% of community estate, over $20 million awarded to spouse as a result of post-separation conduct of the other spouse].

5.6 Family Code section 271 limits sanctions to fees and costs incurred but not so with Family Code section 2107(c).

5.7 Post-separation conduct of party or counsel may have significant adverse financial consequences. *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090; *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470; *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507; *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278; *In re Marriage of Michaely* (2007) 150 Cal.App.4th 802 [100% of community estate, over $20 million awarded to spouse as a result of post-separation conduct of the other spouse].

6. **<u>TRIBUTE TO THE HONORABLE JUSTICE DAVID G. SILLS</u>: FEE AWARDS ARE STARTING TO SHOW THAT FAMILY LAW LAWYERS ARE BEGINNING TO GET THE RESPECT AND COMPENSATION THEY DESERVE AND JUSTICE SILLS CONTRIBUTED SIGNIFICANTLY TO OUR EDUCATION AND TO OUR STATUS AS WELL THROUGH HIS OPINIONS.**

"Family lawyers do not get the respect they deserve. In terms of the potential breadth and complexity of issues which they face, family practitioners work in one of the most, and perhaps the most, exacting and demanding areas of concentration in the law. Under California's community property laws, every item of marital property presents a host of challenging issues. Not only must the family practitioner worry about the characterization and valuation of each asset, he or she often must consider future tax consequences involved in various items of community property. On top of that, support and custody issues involve different considerations, in which a human relationship-as distinct from a discrete event-is the subject of the litigation. Manifestly, we do not need to make family practice even more perilous and expensive for divorcing couples and their lawyers by adding securities law to the already impressive range of legal considerations which must be taken into account in any dissolution." *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415 [footnote 2] The Honorable Justice David G. Sills (deceased), Court of Appeal, 4th Appellate District.

LIST OF CASES CITED[1]

Harris v. Superior Court (1992) 3 Cal.App.4th 661

Vai v. Bank of America (1961) 56 Cal.2d 329

In re Marriage of Bonds (2000) 24 Cal.4th 1

Maglica v. Maglica (1998) 66 Cal.App.4th 442

In re Marriage of Walker (2006) 138 Cal.App.4th 1408

Monica v. Pelicas (1955) 131 Cal.App.2d 700

In re Marriage of Leni (2006) 144 Cal.App.4th 1087

In re Marriage of Haines (1995) 33 Cal.App.4th 277

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

Starr v. Starr (2010) 189 Cal.App.4th 277

In re Marriage of Matthews (2005) 133 Cal.App.4th 624

Peskin v. Squires (1957) 156 Cal.App.2d 240

In re Marriage of Hixson (2003) 111 Cal.App.4th 1116

In re Marriage of Margulis (2011) 198 Cal.App.4th 277

Somps v. Somps (1967) 250 Cal.App.2d 328

MacIsaac v. Pozzo (1947) 81 Cal.App.2d 278

In re Marriage of Sonne (2010) 48 Cal.4th 118

In re Marriage of Kochan (2011) 193 Cal.App.4th 420

In re Marriage of Hokanson (1998) 68 Cal.App.4th 987

In re Marriage of Fossum (2011) 192 Cal.App.4th 336

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[1] To reduce the volume of the materials, not all statutes and cases cited have been attached and only specific portions of some of the court of appeal decisions have been attached.

In re Marriage of Rossi (2001) 90 Cal.App.4th 34

In re Marriage of Brewer and Federici (2001) 93 Cal.App.4th 1334

In re Marriage of Sorge (2012) 202 Cal.App.4th 626

In re Marriage of Michaely (2007) 150 Cal.App.4th 802

In re Marriage of McTiernan & Dubrow (2005) 133 Cal.App.4th 1090

West's Annotated California Codes
Family Code (Refs & Annos)
Division 2.5. Domestic Partner Registration (Refs & Annos)
Part 1. Definitions (Refs & Annos)

West's Ann.Cal.Fam.Code § 297.5

§ 297.5. Rights, protections and benefits; responsibilities; obligations and duties under law; date of registration as equivalent of date of marriage

Effective: January 1, 2007
Currentness

(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

(b) Former registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon former spouses.

(c) A surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower.

(d) The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

(e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

(f) Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses.

(g) No public agency in this state may discriminate against any person or couple on the ground that the person is a registered domestic partner rather than a spouse or that the couple are registered domestic partners rather than spouses, except that nothing in this section applies to modify eligibility for long-term care plans pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2 of the Government Code.

(h) This act does not preclude any state or local agency from exercising its regulatory authority to implement statutes providing rights to, or imposing responsibilities upon, domestic partners.

(i) This section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative.

(j) Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners.

(k)(1) For purposes of the statutes, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, and benefits, and the responsibilities, obligations, and duties of registered domestic partners in this state, as effectuated by this section, with respect to community property, mutual responsibility for debts to third parties, the right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership, and other rights and duties as between the partners concerning ownership of property, any reference to the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state.

(2) Notwithstanding paragraph (1), for domestic partnerships registered with the state before January 1, 2005, an agreement between the domestic partners that the partners intend to be governed by the requirements set forth in Sections 1600 to 1620, inclusive, and which complies with those sections, except for the agreement's effective date, shall be enforceable as provided by Sections 1600 to 1620, inclusive, if that agreement was fully executed and in force as of June 30, 2005.

Credits

(Added by Stats.2003, c. 421 (A.B.205), § 4, operative Jan. 1, 2005. Amended by Stats.2004, c. 947 (A.B.2580), § 2; Stats.2006, c. 802 (S.B.1827), § 2.)

Notes of Decisions (22)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 4. Rights and Obligations During Marriage (Refs & Annos)
Part 1. General Provisions
Chapter 2. Relation of Husband and Wife (Refs & Annos)

West's Ann.Cal.Fam.Code § 721

§ 721. Contracts with each other and third parties; fiduciary relationship

Effective: January 1, 2003
Currentness

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

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

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

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

Credits
(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994. Amended by Stats.2002, c. 310 (S.B.1936), § 1.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 721 continues former Civil Code Section 5103 without change, except that "one spouse" has been substituted for "him or her" in subdivision (b)(3) for clarity. See also Section 1101 (claims and remedies for breach of fiduciary duty); Code Civ. Proc. §§ 370 (right of married person to sue without spouse being joined as a party), 371 (right of married person to defend suit for spouse's right). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (295)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

West's Annotated California Codes
Family Code (Refs & Annos)
Division 4. Rights and Obligations During Marriage (Refs & Annos)
Part 4. Management and Control of Marital Property (Refs & Annos)

West's Ann.Cal.Fam.Code § 1100

§ 1100. Community personal property; management and control; restrictions on disposition

Currentness

(a) Except as provided in subdivisions (b), (c), and (d) and Sections 761 and 1103, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. This subdivision does not apply to gifts mutually given by both spouses to third parties and to gifts given by one spouse to the other spouse.

(c) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) Except as provided in subdivisions (b) and (c), and in Section 1102, a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes), whether or not title to that property is held in the name of only one spouse. Written notice is not, however, required when prohibited by the law otherwise applicable to the transaction.

Remedies for the failure by a managing spouse to give prior written notice as required by this subdivision are only as specified in Section 1101. A failure to give prior written notice shall not adversely affect the validity of a transaction nor of any interest transferred.

(e) Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.

Credits

(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994. Amended by Stats.1993, c. 219 (A.B.1500), § 100.8.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 1100 continues former Civil Code Section 5125 without change, except that section references have been adjusted. In subdivision (e), references to community "property" have been replaced by more specific references to community "assets and liabilities." These changes are technical and nonsubstantive. See also Section 700 (personal property does not include a leasehold interest in real property); Prob. Code §§ 3057 (protection of rights of spouse who lacks legal capacity), 5100-5407 (multiple-party account held by financial institution).

For background on former Civ. Code § 5125, see *Tentative Recommendation Proposing the Enforcement of Judgments Law,* 15 Cal. L. Revision Comm'n Reports 2001 (1980); 16 Cal. L. Revision Comm'n Reports 1784-85 (1982); *Recommendation Relating to Technical Revisions in the Trust Law,* 18 Cal. L. Revision Comm'n Reports 1823 (1986). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (224)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

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West's Annotated California Codes
Family Code (Refs & Annos)
Division 4. Rights and Obligations During Marriage (Refs & Annos)
Part 4. Management and Control of Marital Property (Refs & Annos)

West's Ann.Cal.Fam.Code § 1101

§ 1101. Claim for breach of fiduciary duty; court ordered accounting; addition of name of spouse to community property; limitation of action; consent of spouse not required; remedies

Effective: January 1, 2002
Currentness

(a) A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

(b) A court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage.

(c) A court may order that the name of a spouse shall be added to community property held in the name of the other spouse alone or that the title of community property held in some other title form shall be reformed to reflect its community character, except with respect to any of the following:

(1) A partnership interest held by the other spouse as a general partner.

(2) An interest in a professional corporation or professional association.

(3) An asset of an unincorporated business if the other spouse is the only spouse involved in operating and managing the business.

(4) Any other property, if the revision would adversely affect the rights of a third person.

(d)(1) Except as provided in paragraph (2), any action under subdivision (a) shall be commenced within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred.

(2) An action may be commenced under this section upon the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to the time limitations set forth in paragraph (1).

(3) The defense of laches may be raised in any action brought under this section.

(4) Except as to actions authorized by paragraph (2), remedies under subdivision (a) apply only to transactions or events occurring on or after July 1, 1987.

(e) In any transaction affecting community property in which the consent of both spouses is required, the court may, upon the motion of a spouse, dispense with the requirement of the other spouse's consent if both of the following requirements are met:

(1) The proposed transaction is in the best interest of the community.

(2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity, or prolonged absence of the nonconsenting spouse.

(f) Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with the action or upon the death of a spouse.

(g) Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court.

(h) Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.

Credits

(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994. Amended by Stats.2001, c. 703 (A.B.583), § 1.)

Editors' Notes

APPLICATION

<For application of Stats.2001, c. 703 (A.B.583), see § 8 of that act.>

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 1101 continues former Civil Code Section 5125.1 without change, except that (1) section references have been adjusted and (2) "community estate" has been substituted for "community interest" in subdivision (a) for internal consistency. These are technical, nonsubstantive changes. See Section 63 ("community estate" defined) & Comment. See also Prob. Code §§ 3057 (protection of rights of spouse who lacks legal capacity), 3101 (proceeding for court order to authorize particular transaction). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (34)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 4. Rights and Obligations During Marriage (Refs & Annos)
Part 4. Management and Control of Marital Property (Refs & Annos)

West's Ann.Cal.Fam.Code § 1102

§ 1102. Community real property; spouse's joinder in conveyances; application of section; limitation of actions

Currentness

(a) Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.

(b) Nothing in this section shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife.

(c) Notwithstanding subdivision (b):

(1) The sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975.

(2) The sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975.

(d) No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of that instrument in the recorder's office in the county in which the land is situated.

(e) Nothing in this section precludes either spouse from encumbering his or her interest in community real property, as provided in Section 2033, to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties.

Credits

(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994. Amended by Stats.1993, c. 219 (A.B.1500), § 101.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 1102 continues former Civil Code Section 5127 without substantive change. The section has been divided into subdivisions and some minor, nonsubstantive wording changes have been made, such as changing "situate" to "situated" in subdivision (d). In subdivision (e), the phrase "proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties" has been substituted for "action under this part," which referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (141)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 4. Rights and Obligations During Marriage (Refs & Annos)
Part 4. Management and Control of Marital Property (Refs & Annos)

West's Ann.Cal.Fam.Code § 1103

§ 1103. Management and control of community property; one or both spouses having conservator of estate or lacking legal capacity

Currentness

(a) Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control (which includes disposition) of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

(b) Where one or both spouses either has a conservator of the estate or lacks legal capacity to give consent to a gift of community personal property or a disposition of community personal property without a valuable consideration as required by Section 1100 or to a sale, conveyance, or encumbrance of community personal property for which a consent is required by Section 1100, the procedure for that gift, disposition, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

(c) Where one or both spouses either has a conservator of the estate or lacks legal capacity to join in executing a lease, sale, conveyance, or encumbrance of community real property or any interest therein as required by Section 1102, the procedure for that lease, sale, conveyance, or encumbrance is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code.

Credits
(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 1103 continues former Civil Code Section 5128 without change, except that section references have been adjusted and "that" has been substituted for "such" in subdivisions (b) and (c).

This section makes provisions of the Probate Code applicable in two situations:

(1) Where one or both spouses have a conservator of the estate or lack legal capacity to manage and control community property (which includes the disposition of community property). See, e.g., Prob. Code § 3051.

(2) Where one or both spouses have a conservator of the estate or lack legal capacity for a transaction requiring joinder or consent under Section 1100(b)-(c) or 1102. See, e.g., Prob. Code §§ 3012 (legal capacity), 3071 (substitute for joinder or consent). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (8)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2100

§ 2100. Legislative findings and declarations; disclosure of assets and liabilities

Effective: January 1, 2002
Currentness

The Legislature finds and declares the following:

(a) It is the policy of the State of California (1) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution, (2) to ensure fair and sufficient child and spousal support awards, and (3) to achieve a division of community and quasi-community assets and liabilities on the dissolution or nullity of marriage or legal separation of the parties as provided under California law.

(b) Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.

(c) In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 3, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.2001, c. 703 (A.B.583), § 2.)

Editors' Notes

APPLICATION

<For application of Stats.2001, c. 703 (A.B.583), see § 8 of that act.>

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2100 continues former Civil Code Section 4800.10(a) without substantive change. References to legal separation have been added in subdivisions (a) and (b) for consistency with the rules governing division of property. See, e.g., Section 2550 (equal division of community estate). See also Section 63 ("community estate" defined). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

West's Annotated California Codes
Family Code (Refs & Annos)
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Part 1. General Provisions (Refs & Annos)
Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2101

§ 2101. Definitions

Currentness

Unless the provision or context otherwise requires, the following definitions apply to this chapter:

(a) "Asset" includes, but is not limited to, any real or personal property of any nature, whether tangible or intangible, and whether currently existing or contingent.

(b) "Default judgment" does not include a stipulated judgment or any judgment pursuant to a marital settlement agreement.

(c) "Earnings and accumulations" includes income from whatever source derived, as provided in Section 4058.

(d) "Expenses" includes, but is not limited to, all personal living expenses, but does not include business related expenses.

(e) "Income and expense declaration" includes the Income and Expense Declaration forms approved for use by the Judicial Council, and any other financial statement that is approved for use by the Judicial Council in lieu of the Income and Expense Declaration, if the financial statement form satisfies all other applicable criteria.

(f) "Liability" includes, but is not limited to, any debt or obligation, whether currently existing or contingent.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 4, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.1998, c. 581 (A.B.2801), § 5.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2101 continues former Civil Code Section 4800.10(*l*) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

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West's Ann.Cal.Fam.Code § 2102

§ 2102. Fiduciary relationship; length and scope of duty; termination

Effective: January 1, 2002
Currentness

(a) From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities:

(1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.

(2) The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity. In the event of nondisclosure of an investment opportunity, the division of any gain resulting from that opportunity is governed by the standard provided in Section 2556.

(3) The operation or management of a business or an interest in a business in which the community may have an interest.

(b) From the date that a valid, enforceable, and binding resolution of the disposition of the asset or liability in question is reached, until the asset or liability has actually been distributed, each party is subject to the standards provided in Section 721 as to all activities that affect the assets or liabilities of the other party. Once a particular asset or liability has been distributed, the duties and standards set forth in Section 721 shall end as to that asset or liability.

(c) From the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees, each party is subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 5, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.2001, c. 703 (A.B.583), § 3.)

Editors' Notes

APPLICATION

<For application of Stats.2001, c. 703 (A.B.583), see § 8 of that act.>

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2102 continues former Civil Code Section 4800.10(b) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (14)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

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Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2103

§ 2103. Declarations of disclosure; requirements

Currentness

In order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest, each party to a proceeding for dissolution of the marriage or legal separation of the parties shall serve on the other party a preliminary declaration of disclosure under Section 2104 and a final declaration of disclosure under Section 2105, unless service of the final declaration of disclosure is waived pursuant to Section 2105 or 2110, and shall file proof of service of each with the court.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1998, c. 581 (A.B.2801), § 6.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2103 continues the first paragraph of former Civil Code Section 4800.10(c) without substantive change. A reference to legal separation has been added for consistency with the rules governing division of property. See, e.g., Section 2550 (equal division of community estate). Cross-references have been added for clarity. These are not substantive changes. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (4)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

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Part 1. General Provisions (Refs & Annos)
Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2104

§ 2104. Preliminary declaration of disclosure

Effective: January 1, 2010
Currentness

(a) Except by court order for good cause, as provided in Section 2107, after or concurrently with service of the petition for dissolution or nullity of marriage or legal separation of the parties, each party shall serve on the other party a preliminary declaration of disclosure, executed under penalty of perjury on a form prescribed by the Judicial Council. The commission of perjury on the preliminary declaration of disclosure may be grounds for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing with Section 2120), in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury.

(b) The preliminary declaration of disclosure shall not be filed with the court, except on court order. However, the parties shall file proof of service of the preliminary declaration of disclosure with the court.

(c) The preliminary declaration of disclosure shall set forth with sufficient particularity, that a person of reasonable and ordinary intelligence can ascertain, all of the following:

(1) The identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate.

(2) The declarant's percentage of ownership in each asset and percentage of obligation for each liability where property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the declarant's characterization of each asset or liability.

(d) A declarant may amend his or her preliminary declaration of disclosure without leave of the court. Proof of service of any amendment shall be filed with the court.

(e) Along with the preliminary declaration of disclosure, each party shall provide the other party with a completed income and expense declaration unless an income and expense declaration has already been provided and is current and valid.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 6, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.1998, c. 581 (A.B.2801), § 7; Stats.2009, c. 110 (A.B.459), § 1.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2104 continues former Civil Code Section 4800.10(c)(1) without substantive change. A reference to legal separation has been added in subdivision (a) for consistency with the rules governing division of property. See, e.g., Section 2550 (equal

division of community estate). In subdivision (a), the reference to penalties for perjury has been revised to eliminate the reference to "existing" law. This is not a substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (14)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

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Part 1. General Provisions (Refs & Annos)
Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2105

§ 2105. Final declaration of disclosure of current income and expenses; execution and service; contents; waiver; perjury or noncompliance with chapter

Effective: January 1, 2002
Currentness

(a) Except by court order for good cause, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council, unless the parties mutually waive the final declaration of disclosure. The commission of perjury on the final declaration of disclosure by a party may be grounds for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing with Section 2120), in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury.

(b) The final declaration of disclosure shall include all of the following information:

(1) All material facts and information regarding the characterization of all assets and liabilities.

(2) All material facts and information regarding the valuation of all assets that are contended to be community property or in which it is contended the community has an interest.

(3) All material facts and information regarding the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) All material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration.

(c) In making an order setting aside a judgment for failure to comply with this section, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure.

(d) The parties may stipulate to a mutual waiver of the requirements of subdivision (a) concerning the final declaration of disclosure, by execution of a waiver under penalty of perjury entered into in open court or by separate stipulation. The waiver shall include all of the following representations:

(1) Both parties have complied with Section 2104 and the preliminary declarations of disclosure have been completed and exchanged.

(2) Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses.

(3) Both parties have fully complied with Section 2102 and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation

of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties.

(5) Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 7, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.1995, c. 233 (A.B.806), § 1; Stats.1996, c. 1061 (S.B.1033), § 7; Stats.1998, c. 581 (A.B.2801), § 8; Stats.2001, c. 703 (A.B.583), § 4.)

Editors' Notes

APPLICATION

<For application of Stats.2001, c. 703 (A.B.583), see § 8 of that act.>

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2105 continues former Civil Code Section 4800.10(c)(2) without substantive change. In subdivision (a), the reference to penalties for perjury has been revised to eliminate the reference to "existing" law. This is not a substantive change. The provision concerning the filing of an income and expense declaration in subdivision (c) has been revised for consistency with the income and expense declaration provided with the preliminary declaration of disclosure. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (14)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

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Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2106

§ 2106. Entry of judgment; requirement of execution and service of declarations; exceptions; execution and filing of declaration of execution and service or of waiver

Effective: January 1, 2010
Currentness

Except as provided in subdivision (d) of Section 2105, Section 2110, or absent good cause as provided in Section 2107, no judgment shall be entered with respect to the parties' property rights without each party, or the attorney for that party in this matter, having executed and served a copy of the final declaration of disclosure and current income and expense declaration. Each party, or his or her attorney, shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party or that service of the final declaration of disclosure has been waived pursuant to subdivision (d) of Section 2105 or in Section 2110.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 8, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.1995, c. 233 (A.B.806), § 2; Stats.1996, c. 1061 (S.B.1033), § 8; Stats.1998, c. 581 (A.B.2801), § 9; Stats.2001, c. 703 (A.B.583), § 5; Stats.2002, c. 1008 (A.B.3028), § 15; Stats.2009, c. 110 (A.B.459), § 2.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2106 continues former Civil Code Section 4800.10(d) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (10)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

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Part 1. General Provisions (Refs & Annos)
Chapter 9. Disclosure of Assets and Liabilities (Refs & Annos)

West's Ann.Cal.Fam.Code § 2107

§ 2107. Noncomplying declarations; requests to comply; remedies

Effective: January 1, 2010
Currentness

(a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104 or a final declaration of disclosure under Section 2105, or fails to provide the information required in the respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

(b) If the noncomplying party fails to comply with a request under subdivision (a), the complying party may do one or more of the following:

(1) File a motion to compel a further response.

(2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(3) File a motion showing good cause for the court to grant the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure pursuant to Section 2104 or final declaration of disclosure pursuant to Section 2105. The voluntary waiver does not affect the rights enumerated in subdivision (d).

(c) If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(d) Except as otherwise provided in this subdivision, if a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error. If the court granted the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure pursuant to paragraph (3) of subdivision (b), the court shall set aside the judgment only at the request of the complying party, unless the motion to set aside the judgment is based on one of the following:

(1) Actual fraud if the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding.

(2) Perjury, as defined in Section 118 of the Penal Code, in the preliminary or final declaration of disclosure, in the waiver of the final declaration of disclosure, or in the current income and expense statement.

(e) Upon the motion to set aside judgment, the court may order the parties to provide the preliminary and final declarations of disclosure that were exchanged between them. Absent a court order to the contrary, the disclosure declarations shall not be filed with the court and shall be returned to the parties.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 107. Amended by Stats.1993, c. 1101 (A.B.1469), § 9, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.2001, c. 703 (A.B.583), § 6; Stats.2009, c. 110 (A.B.459), § 3.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2107 continues former Civil Code Section 4800.10(e)-(f) without substantive change. In subdivision (a), the word "exchange" has been omitted as surplus and the cross-references added for clarity. These are not substantive changes. Subdivision (a) has also been revised to make clear that the complying party "may" (rather than "shall") request the declaration or particularity, since the complying party is not compelled to seek compliance by the other party. However, as subdivision (b) makes clear, the request is a prerequisite to seeking a court order compelling a response from the noncomplying party. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (18)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

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Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2120

§ 2120. Legislative findings and declarations; public policy

Currentness

The Legislature finds and declares the following:

(a) The State of California has a strong policy of ensuring the division of community and quasi-community property in the dissolution of a marriage as set forth in Division 7 (commencing with Section 2500), and of providing for fair and sufficient child and spousal support awards. These policy goals can only be implemented with full disclosure of community, quasi-community, and separate assets, liabilities, income, and expenses, as provided in Chapter 9 (commencing with Section 2100), and decisions freely and knowingly made.

(b) It occasionally happens that the division of property or the award of support, whether made as a result of agreement or trial, is inequitable when made due to the nondisclosure or other misconduct of one of the parties.

(c) The public policy of assuring finality of judgments must be balanced against the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct.

(d) The law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2120 continues former Civil Code Section 4800.11(a) without substantive change. In subdivision (a), a reference to Division 7 (commencing with Section 2500) has been substituted for the narrower reference to former Civil Code Section 4800. This is not a substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (12)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2121

§ 2121. Authority of court to provide relief

Currentness

(a) In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter.

(b) In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2121 continues former Civil Code Section 4800.11(b)-(c) without substantive change. In subdivision (a), the phrase "proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties" has been substituted for the reference to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code). This is not a substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (1)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2122

§ 2122. Grounds for relief; limitation of actions

Effective: January 1, 2002
Currentness

The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:

(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury.

(c) Duress. An action or motion based upon duress shall be brought within two years after the date of entry of judgment.

(d) Mental incapacity. An action or motion based on mental incapacity shall be brought within two years after the date of entry of judgment.

(e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, mistake, either mutual or unilateral, whether mistake of law or mistake of fact. An action or motion based on mistake shall be brought within one year after the date of entry of judgment.

(f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 108. Amended by Stats.1993, c. 1101 (A.B.1469), § 15, eff. Oct. 11, 1993, operative Jan. 1, 1994; Stats.2001, c. 703 (A.B.583), § 7.)

Editors' Notes

APPLICATION

<For application of Stats.2001, c. 703 (A.B.583), see § 8 of that act.>

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2122 continues former Civil Code Section 4800.11(d) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (48)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2123

§ 2123. Restrictions on grounds for relief; inequitable judgments

Currentness

Notwithstanding any other provision of this chapter, or any other law, a judgment may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become inadequate.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2123 continues former Civil Code Section 4800.11(e) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (4)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2124

§ 2124. Attorney negligence

Currentness

The negligence of an attorney shall not be imputed to a client to bar an order setting aside a judgment, unless the court finds that the client knew, or should have known, of the attorney's negligence and unreasonably failed to protect himself or herself.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2124 continues former Civil Code Section 4800.11(f) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Notes of Decisions (2)

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2125

§ 2125. Actions or motions to set aside judgment

Currentness

When ruling on an action or motion to set aside a judgment, the court shall set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief. However, the court has discretion to set aside the entire judgment, if necessary, for equitable considerations.

Credits

(Added by Stats.1993, c. 219 (A.B.1500), § 108. Amended by Stats.1993, c. 1101 (A.B.1469), § 16, eff. Oct. 11, 1993, operative Jan. 1, 1994.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2125 continues former Civil Code Section 4800.11(g) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2126

§ 2126. Valuation date of assets or liabilities for which judgment was set aside; equal division

Currentness

As to assets or liabilities for which a judgment or part of a judgment is set aside, the date of valuation shall be subject to equitable considerations. The court shall equally divide the asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2126 continues former Civil Code Section 4800.11(h) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Family Code (Refs & Annos)
Division 6. Nullity, Dissolution, and Legal Separation (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 10. Relief from Judgment (Refs & Annos)

West's Ann.Cal.Fam.Code § 2128

§ 2128. Construction of chapter with other provisions

Currentness

(a) Nothing in this chapter prohibits a party from seeking relief under Section 2556.

(b) Nothing in this chapter changes existing law with respect to contract remedies where the contract has not been merged or incorporated into a judgment.

(c) Nothing in this chapter is intended to restrict a family law court from acting as a court of equity.

(d) Nothing in this chapter is intended to limit existing law with respect to the modification or enforcement of support orders.

(e) Nothing in this chapter affects the rights of a bona fide lessee, purchaser, or encumbrancer for value of real property.

Credits
(Added by Stats.1993, c. 219 (A.B.1500), § 108.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 2128 continues former Civil Code Section 4800.11(j)-(n) without substantive change. [23 Cal.L.Rev.Comm. Reports 1 (1993)]

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 2. Partnerships (Refs & Annos)
Chapter 5. Uniform Partnership Act of 1994 (Refs & Annos)
Article 4. Relations of Partners to Each Other and to Partnership (Refs & Annos)

West's Ann.Cal.Corp.Code § 16403

§ 16403. Books and records; right of access

Effective: January 1, 2005
Currentness

(a) A partnership shall keep its books and records, if any, in writing or in any other form capable of being converted into clearly legible tangible form, at its chief executive office.

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

(c) Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability, both of the following, which may be transmitted by electronic transmission by the partnership (subdivision (4) of Section 16101):

(1) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter; and

(2) On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

Credits
(Added by Stats.1996, c. 1003 (A.B.583), § 2. Amended by Stats.2004, c. 254 (S.B.1306), § 45.)

Notes of Decisions (10)

Current with urgency legislation through Ch. 7 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 2. Partnerships (Refs & Annos)
Chapter 5. Uniform Partnership Act of 1994 (Refs & Annos)
Article 4. Relations of Partners to Each Other and to Partnership (Refs & Annos)

West's Ann.Cal.Corp.Code § 16404

§ 16404. Fiduciary duties

Currentness

(a) The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subdivisions (b) and (c).

(b) A partner's duty of loyalty to the partnership and the other partners includes all of the following:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

Credits
(Added by Stats.1996, c. 1003 (A.B.583), § 2.)

Notes of Decisions (169)

Current with urgency legislation through Ch. 7 of 2012 Reg.Sess.

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 2. Partnerships (Refs & Annos)
Chapter 5. Uniform Partnership Act of 1994 (Refs & Annos)
Article 5. Transferees and Creditors of Partner (Refs & Annos)

West's Ann.Cal.Corp.Code § 16503

§ 16503. Transfer of transferable interest; effects

Currentness

(a) A transfer, in whole or in part, of a partner's transferable interest in the partnership is permissible. However, a transfer does not do either of the following:

(1) By itself cause the partner's dissociation or a dissolution and winding up of the partnership business.

(2) As against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning partnership transactions, or to inspect or copy the partnership books or records.

(b) A transferee of a partner's transferable interest in the partnership has a right to all of the following:

(1) To receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(2) To receive upon the dissolution and winding up of the partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor.

(3) To seek under paragraph (6) of Section 16801 a judicial determination that it is equitable to wind up the partnership business.

(c) In a dissolution and winding up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners.

(d) Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

(e) A partnership need not give effect to a transferee's rights under this section until it has notice of the transfer.

(f) A transfer of a partner's transferable interest in the partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

Credits
(Added by Stats.1996, c. 1003 (A.B.583), § 2.)

Notes of Decisions (17)

Current with urgency legislation through Ch. 7 of 2012 Reg.Sess.

End of Document

West's Annotated California Codes
Probate Code (Refs & Annos)
Division 9. Trust Law (Refs & Annos)
Part 4. Trust Administration (Refs & Annos)
Chapter 1. Duties of Trustees (Refs & Annos)
Article 2.5. Uniform Prudent Investor Act (Refs & Annos)

West's Ann.Cal.Prob.Code § 16047

§ 16047. Standard of care; investments and management; considerations

Currentness

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

(1) General economic conditions.

(2) The possible effect of inflation or deflation.

(3) The expected tax consequences of investment decisions or strategies.

(4) The role that each investment or course of action plays within the overall trust portfolio.

(5) The expected total return from income and the appreciation of capital.

(6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to ascertain facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards of this chapter.

Credits
(Added by Stats.1995, c. 63 (S.B.222), § 6.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1995 Addition

Section 16047 is generally the same in substance as Section 2(a)-(e) of the Uniform Prudent Investor Act (1994). Subdivisions (a)-(c) of Section 16047 replace the portfolio investment rule of former subdivision (b) of Section 16040. Subdivision (a) is also the same in substance as the first paragraph and subsection (a) of Section 227 of Restatement (Third) of Trusts: Prudent Investor Rule (1992).

The second sentence of subdivision (a) states the basic elements of prudence. Thus, where "prudence" is used in this article, it includes "reasonable care, skill, and caution." These elements are delineated in the Restatement:

[Care]

The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives. The trustee has a related duty of care in keeping informed of rights and opportunities associated with those investments....

[Skill]

The exercise of care alone is not sufficient, however, because a trustee is liable for losses resulting from failure to use the skill of an individual of ordinary intelligence. This is so despite the careful use of all the skill of which the particular trustee is capable.

On the other hand, if follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill....

[Caution]

In addition to the duty to use care and skill, the trustee must exercise the caution of a prudent investor managing similar funds for similar purposes. In the absence of contrary provisions in the terms of the trust, this requirement of caution requires the trustee to invest with a view both to safety of the capital and to securing a reasonable return....

Restatement (Third) of Trusts: Prudent Investor Rule § 227 comments d & e (1992). For a full discussion, see *id.* § 227, comments & Reporter's Notes (1992).

Subdivision (d) is new to the code. Subdivision (e) replaces former Section 16223 ("The trustee has the power to invest in any kind of property, whether real, personal, or mixed."). This subdivision, like its predecessor, makes clear that there are no categorical restrictions on proper investments. Any form of investment is permissible in the absence of a prohibition in the trust instrument or an overriding duty. This subdivision is intended to permit investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments. While investment in these funds is not forbidden merely because discretion over the fund is delegated to others, the trustee is ultimately subject to fiduciary standards under this chapter in making the investment. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Statutes pertaining to legal investments appear in other codes. See, e.g., Fin. Code §§ 1561.1 (funds provided services by trust company or affiliate), 1564 (common trust funds); Gov't Code §§ 971.2, 17202, 61673; Harb. & Nav. Code §§ 6331, 6931; Health and Safety Code §§ 33663, 34369, 37649, 52040, 52053.5; Pub. Res. Code § 26026; Sts. & Hy. Code §§ 8210, 25371, 30241, 30242, 31173; Water Code §§ 9526, 20064.

Section 2(f) of the Uniform Prudent Investor Act (1994) has been omitted from Section 16047 because it is unnecessary. The same general rule is provided by Section 16014 (duty to use special skills). An expert trustee is held to the standard of care of other experts. See the discussions in Estate of Collins, 72 Cal.App.3d 663, 673, 139 Cal.Rptr. 644 (1977); Coberly v. Superior Court, 231 Cal.App.2d 685, 689, 42 Cal.Rptr. 64 (1965); Estate of Beach, 15 Cal.3d 623, 635, 542 P.2d 994, 125 Cal.Rptr. 570 (1975) (bank as executor); see also Section 2401 Comment (standard of care applicable to professional guardian or conservator

of estate); Section 3912 Comment (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act). [25 Cal.L.Rev.Comm. Reports 673 (1995)].

Current with urgency legislation through Ch. 8 of 2012 Reg.Sess.

End of Document

3 Cal.App.4th 661, 4 Cal.Rptr.2d 564

BONNIE J. HARRIS, Petitioner,
v.
THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; JANICE ROSE SMETS et al., Real Parties in Interest.

No. B060023.
Court of Appeal, Second District, California.
Feb 11, 1992.

SUMMARY

A former wife seeking to increase child support subpoenaed confidential information from her former spouse's housemate. The trial court denied the housemate's motion to quash the subpoena. (Superior Court of Ventura County, No. D180756, Joe D. Hadden, Judge.)

The Court of Appeal issued a writ of mandate directing the trial court to set aside its order and to enter a new order granting the motion. The court held that the trial court erred in not quashing the subpoena, since the housemate did not waive her constitutional right of privacy merely by living in the same house with the former spouse (Cal. Const., art. I, § 1). The former wife failed to make a threshold showing that disclosure of the privileged information was directly relevant or essential to a fair resolution of the case; she could learn more of the financial arrangements between her former spouse and the housemate by directing her discovery toward the former spouse. Moreover, the court held, the housemate was presumptively entitled to a protective order limiting disclosure of financial information. Although a trial court should consider contributions made by a third party to a former spouse in determining the former spouse's ability to pay support, it does not follow that the financial records of a third person living in the same house as such former spouse are automatically discoverable. (Opinion by Gilbert, J., with Stone (S. J.), P. J., and Yegan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)
Discovery and Depositions § 34--Protections Against Improper Discovery--Privileges--Privacy--Financial Information--Spousal Support Proceedings--Housemate of Former Spouse.
In proceedings by a former wife seeking to increase child support, the trial court erred in not quashing a subpoena seeking confidential financial information from the housemate of her former husband. The housemate did not waive her constitutional right of privacy merely by living in the same house with the former husband (Cal. Const., art. I, § 1). The former wife failed to make a threshold showing that disclosure of the privileged information was directly relevant or essential to a fair resolution of the case; she could learn more of the financial arrangements between her former husband and the housemate by directing her discovery toward the husband. Moreover, the housemate was presumptively entitled to a protective order limiting disclosure of financial information. The trial court was required to limit the scope of inquiry to the extent necessary to a fair resolution of the case, and was obliged to examine the financial information in chambers and exclude from disclosure any information that did not meet the standard. Although a court should consider contributions made by a third party to a former spouse in determining the former spouse's ability to pay support, it does not follow that the financial records of a third person living in the same house as such former spouse are automatically discoverable.

[See **Cal.Jur.3d (Rev),** Discovery and Depositions, §§ 22, 42; 2 **Witkin,** Cal. Evidence (3d ed. 1986) § 1609 et seq.]

(2)
Constitutional Law § 58--Right of Privacy--Financial Information.
Personal financial information comes within the zone of privacy protected by Cal. Const., art. I, § 1. However, because the constitutional right of privacy is not absolute, on a showing of some compelling public interest, the right of privacy must give way.

(3)
Discovery and Depositions § 37--Protections Against Improper Discovery--Remedies in Trial Court.
When the right to discovery conflicts with a privileged right, the court is required to carefully balance the right of privacy with the need for discovery. The proponent of discovery of constitutionally protected material has the burden of making a threshold showing that the evidence sought is directly relevant to the claim or defense.

constitutional right of privacy is not absolute and, upon a showing of some compelling public interest, the right of privacy must give way. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525 [174 Cal.Rptr. 160]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219].)

A case involving child support necessarily involves the public interest. First, the state has a compelling interest to ensure that children receive adequate care and support. (E.g., see *Hansen v. Department of Social Services* (1987) 193 Cal.App.3d 283, 293 [238 Cal.Rptr. 232]; *Cunningham v. Superior Court* (1986) 177 Cal.App.3d 336, 339 [222 Cal.Rptr. 854].) Second, "[t]he state has a significant interest in facilitating ' "... the ascertainment of truth and the just resolution of legal claims .... " ' " (*Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 790 [254 Cal.Rptr. 24].) ***665**

([3]) When the right to discovery conflicts with a privileged right, the court is required to carefully balance the right of privacy with the need for discovery. (*Valley Bank of Nevada v. Superior Court, supra,* 15 Cal.3d at p. 657; *Scull v. Superior Court, supra,* 206 Cal.App.3d at p. 790.)

The proponent of discovery of constitutionally protected material has the burden of making a threshold showing that the evidence sought is "directly relevant" to the claim or defense. (*Britt v. Superior Court, supra,* 20 Cal.3d at pp. 859-862; Weil & Brown, Civil Procedure Before Trial (1991) Scope of Discovery, § 8:320, p. 8C-51.1.) ([1b]) Here, Ms. Smets claims that the financial information she seeks is directly relevant because she believes Ms. Harris's income is available to Mr. Smets. She argues that *In re Marriage of Tapia, supra,* 211 Cal.App.3d 628, supports her discovery request.

A short digression on the subject of what cases mean-obligations of the writer and the reader

"It should come as no surprise to the legal community that the overall quality of appellate opinions has measurably declined in the last 25 years." This gloomy appraisal was made by a Supreme Court justice in a manual on judicial opinion writing.[1] Yet, a host of distinguished commentators have written with eloquence on the subject of judicial opinions.[2] Perhaps their books have been on the shelf too long.

1 Foreward by retired Alabama Supreme Court Justice Richard L. Jones to Judicial Opinion Writing Manual, A Product of the Appellate Judges Conference, Judicial Administration Division, American Bar Association (West 1991) page v.

2 For just a few examples, see Witkin, Manual on Appellate Court Opinions (1977); Aldisert, Opinion Writing (1990) section 1.1, page 1; Mellinkoff, The Language of the Law (1963); Mikva, *For Whom Judges Write* (1988) 61 So.Cal.L.Rev. 1357; Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum* (1986) Ariz. State Bar J. 1; Leflar, *Some Observations Concerning Judicial Opinions* (1961) 61 Colum.L.Rev. 810, 817-818 (hereafter *Some Observations*).

Also unsurprising is the decline in the quality of reading and interpreting opinions. Granted, it is hard to be a good reader of a poorly written opinion; unfortunately, there are many poor readers of well-written opinions. The writer of a poorly written opinion does not deserve a good reader, and a good reader deserves more than a poorly written opinion. The matching of good writers and readers is a match in heaven. The match here may have been made elsewhere.

An opinion ought to be written so that a reasonably intelligent reader knows what it means. The opinion ought to be concise and clear, not vague and obscure. The holding of a case should state a principle of law with ***666** sufficient clarity so that persons can carry on their affairs with reasonable predictability as to the legal consequences of their actions. If, however, an opinion be reasonably susceptible to different interpretations, then the writer may have failed to meet his or her obligation.

On the other hand, if the reader lets the wish for a particular result color the meaning of an opinion, then the reader has not met his or her obligation. It is understandable that lawyers often view a case only from the perspective that favors their client. Lawyers, however, should not practice "... the art of proving by words multiplied for the purpose, that *white* is *black,* and *black* is *white,* according as they are paid." (Swift, Gulliver's Travels (1726) A Voyage to the Country of the Houyhnhnms, ch. 5.)

This approach is unproductive because " '[a] litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.' " (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614, 805 P.2d 873], quoting *Southern Cal. Enterprises v. Walter & Co.* (1947) 78 Cal.App.2d 750, 757 [178 P.2d 785].)

Even "[t]he devil can cite scripture for his purpose ...." (Shakespeare, Merchant of Venice, act I, scene 3, line 99.) Counsel must therefore not misconstrue the holding of an opinion in order to make it applicable to the facts of his or her client's cause. ([4]) " 'It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.' " (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735 [257 Cal.Rptr. 708, 771 P.2d 406], quoting *River Farms Co. v. Superior Court* (1933) 131 Cal.App. 365, 369 [21 P.2d 643].)

Even the dispassionate critic must take heed. "[S]ome misimpressions are created by the reader or critic who takes a sentence or paragraph from an opinion, sometimes out of context, and analyzes it as a Shakespeare scholar would, or as though it were a verse from Holy Writ, discovering hidden meanings, innuendoes, and subtleties never intended." (*Some Observations, supra,* 61 Columb. L.Rev. at p. 817.)

In an attempt to extract legal principles from an opinion that supports a particular point of view, we must not seize upon those facts, the pertinence of which goes only to the circumstances of the case but is not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations. ***667** (*Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339 [162 N.E. 99]; see also Aldisert, *supra,* at § 8.7, pp. 102-104.) The reader who distinguishes between facts germane to the holding, and those that are not, can assess the reasonable extensions of the holding. A reader must realistically appraise what he or she reads and resist the temptation to see a grin without a cat. (Carroll, Alice's Adventures in Wonderland, ch. 6.) Ultimately this approach is more effective to advance a client's cause and the cause of justice.

We writers and readers of opinions should heed the admonition of Voltaire. "Let all the laws be clear, uniform and precise: to interpret laws is almost always to corrupt them." (A Dict. of Legal Quotations (1987) p. 18.)

End of digression-How the preceding discussion relates to Tapia

In *Tapia,* an ex-husband, Mr. Tapia, was obligated to pay spousal support. He was living in a house with a nonmarital partner, Jane P. She testified that she and Mr. Tapia had purchased the house as joint tenants and that she paid 50 percent of all household expenses, including the mortgage.

We held in *Tapia* that the nonmarital partner's income must be considered to the degree it reduces the ex-husband's living expenses because that, in turn, affects the husband's ability to pay support. We pointed out the relevant facts that gave rise to the legal principle, and specifically emphasized that "[t]he nature of the relationship between the two people is of no importance." (*In re Marriage of Tapia, supra,* 211 Cal.App.3d at p. 631.)

In *Tapia,* we repeated the notion stated in *Fuller v. Fuller* (1979) 89 Cal.App.3d 405, 410 [152 Cal.Rptr. 467], that the relevant factor is not the source of money available to the ex-husband but the existence of that money. It could come from relatives, friends, investments, trusts, or the lottery. The holding in *Tapia* would have been no different had any of these circumstances occurred. It just so happened that Mr. Tapia was living with someone who testified that she paid half their expenses.

([1c]) As aptly pointed out by Ms. Harris, the issue in *Tapia* was not the consideration of the entire income of a nonmarital person, but the nonmarital cohabitant's contribution to Mr. Tapia's expenses. Because it is not the nature of the relationship that is important to the principle derived in *Tapia,* the case does not support the proposition that it is always appropriate to serve a subpoena duces tecum for financial records on someone living with an ex-husband who pays child support. *Tapia* does not so hold, and such an inference cannot be reasonably derived from its holding.

Ms. Harris's declaration under penalty of perjury provides much useful information to Ms. Smets. Although Ms. Smets is skeptical about the declaration, she can learn more of the financial arrangements between Ms. Harris and Mr. Smets by directing her discovery towards Mr. Smets. ***668**

It does not follow that merely because Ms. Harris lives in the same house with Mr. Smets she has waived her right of privacy. Waiver of constitutional rights must be knowing and intelligent. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 274 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; *In re Moss* (1985) 175 Cal.App.3d 913, 926 [221 Cal.Rptr. 645].) "[I]t is well established that courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.' " (*Sambo's Restaurants, Inc. v. City of Ann Arbor* (6th Cir. 1981) 663 F.2d 686, 690, quoting *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389, 393 [81 L. Ed. 1177, 1180-1181, 57 S.Ct. 809].)

Under other facts, some discovery of a third party's financial records may be appropriate. An ex-husband, for example, upon moving in with a third party, is suddenly living in sumptuous surroundings, driving luxury cars and wearing

56 Cal.2d 329
Supreme Court of California, In Bank.

Transquilla VAI, Plaintiff and Appellant,
v.
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION as Coexecutor and Trustee, etc., et al., Defendants and Respondents.

L. A. 25550. | July 26, 1961. | As Modified on Denial of Rehearing Aug. 23, 1961.

Suit by widow against executors of deceased husband's estate and others to rescind property settlement agreement on ground of fraud and for other relief. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court, White, J., held, inter alia, that failure of husband in negotiating property settlement agreement to disclose fully and fairly material facts as to value of community property, from which husband gained an advantage, constituted breach of his fiduciary duty and constructive fraud which entitled wife to rescind agreement after death of husband.

Judgment reversed.

Opinion, 8 Cal.Rptr. 233, vacated.

Traynor and Schauer, JJ., dissented.

Attorneys and Law Firms

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Appel, Liebermann & Leonard and Boekel, Moran & Morris, San Francisco, as amici curiae on behalf of plaintiff-appellant.

George M. Breslin, Michael G. Luddy, Henry & Bodkin, Jr., E. E. Hitchcock, Cosgrove, Cramer, Diether & Rindge Samuel H. Rindge, Wallace & Wallace, and W. Woodson Wallace, Los Angeles, and Alden Reid, San Bernardino, for defendants-respondents.

Opinion

WHITE, Justice.

This is an appeal by Tranquilla Vai from a judgment for defendant Bank of America as co-executor with Henry Bodkin of the estate of Giovanni Vai, deceased, in a suit brought to rescind a property settlement agreement on the ground of fraud, for recovery of part of the property received by the husband under the agreement, and for damages in the event recovery thereof cannot be had.

Plaintiff and Giovanni (John) Vai were married in Italy in 1907 and emigrated to this country and Los Angeles in 1912. John joined his brother James in operating *****74 **250** a winery. He remained in this business and related operations continuously from 1912 until his death in February 1957, and plaintiff actively assisted him until their only child Madeline was born in 1925. Their daughter is mentally arrested and has required constant care and attention. Apparently the relations between plaintiff and her husband had been something less than harmonious for several years before January 1953, ***334** when she left their home in Alta Loma and moved to another residence they owned in Parkside, where she has since resided. She consulted with counsel, Mr. Hallam Mathews, on January 7, 1953. After plaintiff gave him a list of the property in which she believed John had an interest, Mr. Mathews secured a Dun and Bradstreet report on Padre Vineyard Company owned jointly by John and his brother, and a combined report on Cucamonga Valley Wine Company and Rancho El Camino, John's individual businesses. Mr. Mathews also secured descriptions of real property in San Bernardino County and a description of the Parkside property, consisting of a 30 year old residence with 15 apartments.

On February 6, 1953, plaintiff filed a separate maintenance action, and John was served with a 'Subpoena In Re Deposition and Order to Show Cause for Support, etc. Pendente Lite.' John and his attorney represented, and the trial court so found, that John's health was such that adversary proceedings would be highly detrimental; that it would not be necessary for Mr. Mathews to pursue his legal remedies of discovery; that plaintiff would be voluntarily supplied with full and complete information; and that John would negotiate a fair and equitable property settlement agreement. No further independent investigation was made by plaintiff except for an appraisal of the Parkside property which she was to receive in the property settlement agreement. Following execution of this agreement, on March 16, 1953, the action for separate maintenance was abandoned. The present action was instituted shortly after John's death.

The property settlement agreement provided that plaintiff should have one-half of any property later discovered to have been inadvertently omitted from the list of community assets. Pursuant to this clause, the trial court awarded her

a total of $84,000 as her share of the following items of 'after-discovered' property: 95 shares of common stock of the Bank of America, together with all dividends paid thereon since March 16, 1953, amounting to $897.75; a promissory note in the principal sum of $33,640 with $1,462.55 interest; an account payable to Giovanni Vai, from Padre Vineyard Company, in the sum of $23,000; the balance owing on a promissory note of Padre Vineyard Company in favor of Giovanni Vai in the sum of $25,630.44; the balance owing on two notes of Padre Vineyard Company to Giovanni Vai, doing business as the Cucamonga Valley Wine Company in the sum of $42,315.38.

*335 The trial court found that the net worth of John and Tranquilla Vai at the time of the settlement was $1,270,000, not including one-half the shares of Padre, net book value of which was $800,000. All of the property was conceded by the parties to be community. There were debts for which the community was liable of $85,000. In the settlement, plaintiff received the Parkside property, valued at $150,000, $25,000 in cash, a Dodge automobile, $1,204 balance in an account in the Bank of America, and helf of the Italian lire on deposit in Italy (about $1,000). She was released from any obligation to support the daughter, Madeline, and from any possible liability as co-guarantor with her husband on a note securing a debt from Padre Vineyards to the Bank of America. Although she awived alimony, she was guaranteed a net income of $500 per month from Parkside, which defendant agreed to keep in repair as long as she owned it. John received the balance of the property which was, it now appears, valued at least at $1,500,000.

The complaint initiating this suit to rescind the property settlement agreement ***75 **251 charged that in the negotiation of the property settlement, John Vai was guilty of actual fraud, consisting of allegedly false representations and intentional concealment of material facts, by which the plaintiff was deceived and defrauded. It also charged constructive fraud, consisting of breach of John Vai's duty as a fiduciary to make a free and full disclosure of all important and relevant facts. The trial court ruled that John was not a fiduciary, that the parties dealt at arm's length, that there was no issue of constructive fraud and that there was no proof of actual fraud.

Plaintiff contends that although the confidential relationship between herself and her husband, based on her confidence and trust in him, may have been terminated by her filing suit for separate maintenance, her husband remained in a fiduciary position in respect to her interest in the community property. He breached his fiduciary duty, she asserts, by concealing material facts and by falsely representing others.

Defendants contend that Collins v. Collins, 48 Cal.2d 325, 309 P.2d 420, is directly applicable to the facts at bar as found by the trial court. In Collins, the wife sought rescission of a property settlement agreement on the ground that her husband had concealed community property assets from her and thus breached his duty of full disclosure arising out of the confidential relationship. Her attorney in Nevada where she *336 had gone to establish residence for divorce, requested the defendant husband to furnish them with a full and accurate list of community property. This request was never complied with. Mrs. Collins returned to California and signed an agreement prepared by defendant's attorney, and against the advice of her own counsel. Some properties standing in defendant's name were not listed in the agreement, but no attempt had been made by the defendant to conceal these properties which he claimed to be his separate property, or to hinder in any way an investigation begun by Mrs. Collins and her attorney. Manifestly, Mrs. Collins was fully aware that her husband had not disclosed any information about their community property, and expressly waived any such disclosure in writing when she executed the agreement. She knowingly chose to deal at arms length and to rely on her own investigation of community assets. Thus by her own act, Mrs. Collins terminated the fiduciary relationship in respect to her interest in the community property and the attendant duty to disclose.

Plaintiff in the instant case discontinued the adversary proceedings commenced by her at the request of the defendant who offered to supply full and complete information concerning the property all of which was conceded to be community, and who further stated that he was willing to negotiate a fair and equitable property settlement. It would seem that plaintiff chose not to terminate the fiduciary relationship nor to deal at arm's length, but instead to take the defendant's offer at face value. She signed the agreement believing that she was fully and accurately informed as to the Vai community financial position.

Manifestly, therefore, the facts in Collins, supra, are markedly dissimilar from those in the instant case except insofar as both wives were represented by counsel who commenced investigations.

Section 161a (Civ.Code) provides: 'The respective interest of the husband and wife in community property during continuance of the marriage relation are present, existing

and equal interests under the management and control of the husband as is provided in sections 172 and 172a. This section shall be construed as defining the respective interests and rights of husband and wife in the community property.' [1]

1 Civil Code, s 172: 'The husband has the management and control of the community personal property * * *.'
Civil Code, s 172a: 'The husband has the management and control of the community real property * * *.'

*337 [1] Because of his management and control over the community property, the ***76 **252 husband occupies the position of trustee for his wife in respect to her one-half interests in the community assets. Fields v. Michael, 91 Cal.App.2d 443, 447-448, 205 P.2d 402. Recognizing this principle, Justice Traynor, speaking for a unanimous court, stated in Jorgensen v. Jorgensen, 32 Cal.2d 13, 21, 193 P.2d 728, 733, 'As the manager of the community property the husband occupies a position of trust (Civ.Code. secs. 172-173, 158), which is not terminated as to assets remaining in his hands when the spouses separate. It is part of his fiduciary duties to account to the wife for the community property when the spouses are negotiating a property settlement agreement.'

'Even divorce proceedings do not, in themselves, interrupt the husband's powers with respect to the management and control of community property, as the effect of such proceedings is not to take the property into the custody of the court. The husband continues to have control of it and full power to dispose of it.' Chance v. Kobsted, 66 Cal.App. 434, 437, 226 P. 632, 633. 'When a divorce is pending the power of a husband over the community property exists until the entry of a final decree. Lord v. Hough, 43 Cal. 581; Chance v. Kobsted, 66 Cal.App. 434, 437, 226 P. 632; In Re Cummings, D.C., 84 F.Supp. 65, 69.' Harrold v. Harrold, 43 Cal.2d 77, 81, 271 P.2d 489, 492.

[2] Since the husband's control of the community property continues until there has been a division of it by agreement or by court decree, it would follow that the husband would continue to remain a fiduciary in respect to his wife's interest in the community assets until such division was made. Of course, as was the case in Collins v. Collins, 48 Cal.2d 325, 309 P.2d 420, the wife may choose not to rely on her husband and release him from the performance of his fiduciary duties

[3] This fiduciary relationship arises by virtue of the community property system which gives the husband management and control of such property in order that the assets be more efficiently handled, and exists only as to the community property over which the husband has control. It should be distinguished from the confidential relationship which is presumed to exist between spouses. 'A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist *338 although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient or priest and penitent.' Restatement of Trusts 2d s 2 Comment b.

[4] The confidential relationship and obligations arising out of it are, therefore, dependent upon the existence of confidence and trust, but the husband's fiduciary duties in respect to his wife's interest in the community property continue as long as his control of that property continues, notwithstanding the complete absence of confidence and trust, and the consequent termination of the confidential relationship. The preprequisite of a confidential relationship is the reposing of trust and confidence by one person in another who is cognizant of this fact. The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another. It is evident that while these two relationships may exist simultaneously, they do not necessarily do so. For example, in Estate of Cover, 188 Cal. 133, 204 P. 583, where all of the property under the husband's control was his separate property, only a confidential relation existed. As this court there pointed out in 188 Cal. at page 144, 204 P. at page 588, the husband in contracting with his wife concerning his separate property, may choose either to advise his wife with her welfare in mind or to 'deal with her at arm's length and as he would with a stranger all the while giving her the opportunity ***77 **253 of independent advice as to her rights in the premises.'

[5] The simultaneous existence of a confidential relationship based on trust and confidence and a fiduciary relationship arising out of control of property of another is readily apparent in many common associations principal and agent, attorney and client, business partners, to name a few. It is evidence that although the confidential relationship may be terminated by either party, if an individual continues to control property of the other he is held to the duties of a fiduciary as long as he retains such control, notwithstanding the termination of the confidential relationship.

As noted in Fields v. Michael, 91 Cal.App.2d 443, 447, 205 P.2d 402, 405, supra, 'The position of the husband, in whom the management and control of the entire community estate

is vested by statute Civ.Code secs. 161a, 172, 172a, has been frequently analogized to that of a partner, agent or fiduciary. Estate of McNutt, 36 Cal.App.2d 542, 552, 98 P.2d 253; Grolemund v. Cafferata, 17 Cal.2d 679, 684, 111 P.2d 641; *339 Lynam v. Vorwerk, 13 Cal.App. 507, 509, 110 P. 355; 1 de Funiak, Principles of Community Property, sec. 95, p. 263.'

[6] [7] [8] [9] The dissolution of a partnership and attendant agreements respecting partnership property appear to be remarkably similar to the dissolution of the conjugal relation and property settlement agreements. Briefly, 'in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse presssure of any kind (Civ.Code, secs. 2410, 2411).' Llewelyn v. Levi, 157 Cal. 31, 37, 106 P. 219, 221, quoted in Yeomans v. Lysfjord, 162 Cal.App.2d 357, 361-362, 327 P.2d 957, and Prince v. Harting, 177 Cal.App.2d 720, 727, 2 Cal.Rptr. 545. In view of the nature of the relation, the necessity of exercising the highest good faith in it is especially marked between a managing partner and his copartners, and proof that one had waived his rights against the other must be clear. Laffan v. Naglee, 9 Cal. 662, 679, Burrow v. Carley, 210 Cal. 95, 105, 290 P. 577. In the course of negotiations for dissolution, each partner must deal fairly with his copartners and not conceal from them important matters with his own knowledge touching the business and property of the partnership. Arnold v. Arnold, 137 Cal. 291, 296, 70 P. 23. Thus, one partner, in negotiating for the purchase of his copartner's interest in the partnership owes the latter the duty of fair play and full disclosure, but once the sale is consummated, the relationship between them immediately ceases and the purchaser is justified in dealing thereafter with the other at arm's length. Wise Realty Co. v. Steward, 169 Cal. 176, 146 P. 534; 120 A.L.R. 724.

[10] Manifestly, the fiduciary duties and rules governing their performance by a husband should be no fewer or less rigorous than those imposed upon business partners. To hold, as defendant urges, that if a wife employs able counsel upon whom she relies in negotiating a property settlement agreement in conjunction with her action for separate maintenance, that her husband is thereby released from any fiduciary duties in respect to her interest in the community property, would put a wife in a far less protected position than a partner whose partnership is being dissolved. It would 'permit the authority of the husband in controlling the community *340 property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing known to the law.' Provost v. Provost, 102 Cal.App. 775, 781, 283 P. 842, 844.

Plaintiff alleges that due to misrepresentations and concealments by the defendant, ***78 **254 she was not informed as to the actual value of the community property and that she would not have executed the property settlement agreement in question had she been accurately and fully informed.

Specifically, plaintiff contends that the value of Rancho El Camino was misrepresented and concealed. The following findings in respect to Rancho El Camino were made by the trial court. Mr. Mathews, plaintiff's counsel, was shown a financial statement prepared by John showing the book value of the vineyard land at Rancho El Camino to be $200 per care. Plaintiff's counsel was told of other vineyard land which sold for $400 to $450 an acre but that such land was closer to factories. He was not told of the price received by John ($566 per acre) for vineyard land immediately to the north of Rancho El Camino sold nine months previously. The trial court found that Mr. Mathews (plaintiff's attorney) was told that Rancho El Camino was of little market value as a vineyard and could hardly be sold when the wine market was depressed. However, on February 21, 1953, 23 days prior to the execution of the property settlement agreement, John Vai executed a sale deposit receipt for $25,000 with Donald Duncan, for the sale of Rancho El Camino, at a price of $525,000, or $814 an acre. Plaintiff was never informed of this fact. Escrow was opened four days after execution of the property settlement agreement with plaintiff, and the property duly sold to Duncan.

As additional breaches of John's fiduciary duty, plaintiff draws our attention to representations relating to the financial condition of Padre Vineyard which were made by John to his wife and her attorney. When consideration is given to representations found by the trial court to have been made to plaintiff and comparison is had with other findings as to the verity of such representations, it is readily apparent that many representations were either not true or at least only partically true. For instance, to cite a few: (1) Representation: *341 Little would be realized if Padre were liquidated. Finding: Padre's assets at the time of the execution of the

property settlement agreement exceeded its liabilities by approximately one million dollars; its net book value was in excess of $800,000. (2) Representation: Padre was in danger of insolvency. Finding: It was not in danger of immediate insolvency, but if its operations continued to lose money as it had in the past, a danger of insolvency existed. (3) Representation: Salaries due to John and his brother as officers of Padre had not been paid. Finding: Salaries of $300 to $500 a month had been and were currently being paid. (4) Representation: Padre owed John $80,000 to $90,000 and could not meet its obligations. Finding: Various payments, including $2,500 per month, on indebtedness owing to John had been made by Padre during the months previous to the execution of the property settlement agreement. (5) Representation: A grave danger existed that Mrs. Vai and John would be held liable on a continuing guaranty of Padre's liabilities up to $300,000 to the Bank of America. Finding: The indebtedness to the Bank was secured by the hypothecation of assets worth $1,320,729 including only a part of the wine inventory which could have been sold on the market for $435,000.

A transaction which took place in September, 1954 is indicative of the actual worth of John's one-half interest in this (Padre) company which was 'in danger of insolvency.' Padre organized a new corporation called Padre Holding Company, and later Alta Loma Development Corporation. John, in a split-off procedure, became the sole owner of this corporation in exchange for his Padre stock. At that time, the holding company had a net worth of $471,500 and no liabilities. By June 30, 1955, over $300,000 of its assets were in cash.

As heretofore stated, the trial court found that the net community worth at the time the agreement was signed was $1,270,000 exclusive of one half of the Padre stock which John and plaintiff owned. The net ***79 **255 book value was $800,000. Roma Wine had offered to buy the Padre company for $850,000 cash, assuming the liabilities, and as previously noted, John received stock valued at over $400,000 in the split-off procedure noted above. So, although the trial court felt that the stock in Padre had no determinable fair market value, a valuation of $400,000 on the community interest in Padre as of March 1953 would not be excessive. This brings the net community worth up to $1,670,000. The trial court found that the obligation *342 undertaken by John in the property settlement agreement to support Madeline for the rest of her life had a value as of March 16, 1953 of between $516,000 to $615,000. Even if this entire sum is deducted from the total community assets, there remained over $1,000,000. It is obvious that the division of the marital property under the instant agreement is an inequitable one, and one to which neither plaintiff nor her attorney would, as they contend, have agreed had they been fully informed by John Vai as to the value of the community assets.

[11] Numerous other contentions relating to the existence of actual fraud are made by plaintiff, many of which appear to have merit. It does not seem necessary to discuss them, however, in view of our holding contrary to that of the trial court that a husband is under a fiduciary duty with respect to his wife's interest in the community property under his control and management. The failure of the husband in the instant case to disclose fully and fairly material facts relating to the value of community assets from which John gained an advantage constitutes a concealment of material facts and a breach of this fiduciary duty. This is constructive fraud, whether or not such failure to disclose was accompanied by an actual intent to defraud. Civ.Code, ss 2235, 1573, subd. 1 and 2.

[12] We are persuaded that the trial court misapplied the law and erred in holding that no fiduciary relationship existed during the negotiations leading up to the execution of the property settlement agreement. The facts as found by the trial court show the existence of a fiduciary relationship and constructive fraudas a mattero f law.

As to the failure of the now decedent husband to disclose fully and fairly and the and constructive fraud as a matter of with regard to the value of assets of the community, we are satisfied from a reading of the record that this deception was not only practiced upon the plaintiff wife but upon Mr. Vai's attorney, Henry G. Bodkin, Sr., as well. At the trial of the instant proceeding, the latter testified that at the time the property settlement agreement was negotiated, his client, Mr. Vai, did not advise Attorney Bodkin, Sr., nor did the latter have any knowledge of the 'after-discovered' property hereinbefore referred to, the wife's share of which amounted to $84,000. Attorney Bodkin, Sr. further testified that at no time during the property settlement negotiations did his client, defendant husband, inform him that 23 days prior to *343 the execution of the property settlement agreement, he had executed a sale deposit receipt for the sale of Rancho El Camino, at a price of $525,000, or $814 an acre, instead of $200 per acre which Mr. Vai had represented to plaintiff wife was the book value of the vineyard land at Rancho El Camino.

Defendants contend, however, that plaintiff is barred by laches and estoppel. The complaint in the instant action was not filed until March 18, 1957, although the agreement was

24 Cal.4th 1, 5 P.3d 815, 99 Cal.Rptr.2d 252, 00 Cal. Daily Op. Serv. 6982, 2000 Daily Journal D.A.R. 9250

In re the Marriage of SUSANN MARGRETH BONDS and BARRY LAMAR BONDS.
SUSANN MARGRETH BONDS, Appellant,
v.
BARRY LAMAR BONDS, Respondent.

No. S079760.
Supreme Court of California
Aug. 21, 2000.

SUMMARY

In a dissolution of marriage action, the trial court entered a judgment upholding the validity of a premarital agreement, finding that the wife did not meet her burden of showing that the agreement, in which the wife waived her community property rights, was involuntary (Fam. Code, § 1615), even though she had not been represented by an attorney and her husband had been. (Superior Court of San Mateo County, No. F-19162, Judith W. Kozloski, Judge.) The Court of Appeal, First Dist., Div. Two, Nos. A075328 and A076586 reversed and remanded after determining that the agreement was subject to strict scrutiny because the wife had not been represented by counsel.

The Supreme Court reversed the judgment of the Court of Appeal to the extent that it reversed the judgment of the trial court on the issue of the voluntariness of the premarital agreement, and remanded to the Court of Appeal with directions. The court held that the Court of Appeal erred in holding that premarital agreements are subject to strict scrutiny where the less sophisticated party does not have independent counsel and has not waived counsel according to exacting waiver requirements. Such a holding is inconsistent with Fam. Code, § 1615, which governs the enforceability of premarital agreements. That statute provides that a premarital agreement will be enforced unless the party resisting enforcement can demonstrate either (1) that he or she did not enter into the contract voluntarily, or (2) that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets and obligations. The court also held that substantial evidence supported the trial court's finding that the wife voluntarily entered into the agreement. The court further held that considerations applicable to commercial contracts do not necessarily govern the determination whether a premarital agreement was entered into voluntarily, and that a premarital agreement is not to be interpreted and enforced under the same standards applicable to marital settlement agreements, or in pursuit of the policy favoring equal division of assets on dissolution. (Opinion by George, C. J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Dissolution of Marriage; Separation § 78--Property Rights of Parties--Premarital Agreements--Enforcement--Voluntariness--Wife Unrepresented by Counsel--Standard.
On appeal from a judgment upholding the validity of a premarital agreement, the Court of Appeal erred in holding that trial courts should subject premarital agreements to strict scrutiny where the less sophisticated party does not have independent counsel and has not waived counsel according to exacting waiver requirements. Such a holding is inconsistent with Fam. Code, § 1615, which governs the enforceability of premarital agreements. That statute provides a premarital agreement will be enforced unless the party resisting enforcement can demonstrate either (1) that he or she did not enter into the contract voluntarily, or (2) that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets and obligations. The rule created by the Court of Appeal would have the effect of shifting the burden of proof on the question of voluntariness to the party seeking enforcement of the premarital agreement, even though the statute expressly places the burden upon the party challenging the voluntariness of the agreement.

[See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1999) ¶ 9:29 et seq.]

(2)
Statutes § 31--Construction--Language--Words.
In construing a statute a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. Words used in a statute should be given the meaning they bear in ordinary use. If the language reasonably may be interpreted in more than one way, the

2 The Court of Appeal also directed that the issue of the division of property pursuant to the agreement and the issue of the duration of spousal support be retried, and affirmed the judgment regarding child support. Those issues are not before us.

The dissenting justice contended that the majority had erred in failing to apply the appropriate legal standard to determine the voluntariness of the agreement and in failing to accord appropriate deference to the factual determinations of the trial court.

We granted Barry's petition for review.

II

([1a]) We first consider whether the Court of Appeal majority applied the appropriate legal standard in resolving the question whether the premarital agreement was entered into voluntarily. We conclude it erred in holding that a premarital agreement in which one party is not represented by independent counsel should be subjected to strict scrutiny for voluntariness. Such a holding is inconsistent with Family Code section 1615, which governs the enforceability of premarital agreements.

A

From the inception of its statehood, California has retained the community property law that predated its admission to the Union and consistently has provided as a general rule that property acquired by spouses during marriage, including earnings, is community property. (See Fam. Code, § 760; see also former Civ. Code, § 5110, added by Stats. 1969, ch. 1608, § 8, p. 3339 and repealed by Stats. 1992, ch. 162, § 3, p. 464; Stats. 1850, ch. 103, § 2, p. 254; *Stewart v. Stewart* (1926) 199 Cal. 318, 321-322 [249 P. 197]; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Community Property, §§ 1-3, pp. 374-377.) ***13**

At the same time, applicable statutes recognized the power of parties contemplating a marriage to reach an agreement containing terms at variance with community property law. Thus in 1850, the Legislature provided that community property principles shall govern the rights of the parties "unless there is a marriage contract, containing stipulations contrary thereto." (Stats. 1850, ch. 103, § 14, p. 255; see also former Civ. Code, § 5133, added by Stats. 1969, ch. 1608, § 8, p. 3343 [community property law governs property of husband and wife "unless there is a marriage settlement containing stipulations contrary thereto"]; former Civ. Code, § 177 (enacted in 1872); *Barker v. Barker* (1956) 139 Cal.App.2d 206, 212 [293 P.2d 85] ["Parties contemplating marriage may validly contract as to their property rights, both as to property then owned by them and as to property, including earnings, which may be acquired by them after marriage [citations], and the codes provide for such agreements (see [former] Civ. Code, §§ 177-181 ...)"]; see also Fam. Code, § 1500 ["The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement"].)

There is nothing novel about statutory provisions recognizing the ability of parties to enter into premarital agreements regarding property, because such agreements long were common and legally enforceable under English law,[3] and have enjoyed a lengthy history in this country.[4] In California, a premarital agreement generally has been considered to be enforceable as a contract, although when there is proof of fraud, constructive fraud, duress, or undue influence, the contract is not enforceable. (See *Estate of Wamack* (1955) 137 Cal.App.2d 112, 116-117 [289 P.2d 871]; *La Liberty v. La Liberty* (1932) 127 Cal.App. 669, 672-673 [16 P.2d 681].) The rules applicable to the interpretation of contracts have been applied generally to premarital agreements. (See *Barham v. Barham* (1949) 33 Cal.2d 416, 422 [202 P.2d 289]; *In re Marriage of Garrity and Bishton* (1986) 181 Cal.App.3d 675, 683 [226 Cal.Rptr. 485].)

3 See Stone, The Family, Sex and Marriage in England 1500-1800 (Harper 1979) pages 29-31 (in earlier times, marriage was seen in England as a "private contract between two families concerning property exchange, which also provided some financial protection to the bride in case of the death of her husband or desertion ... by him"); Note, *Planning for Love: The Politics of Prenuptial Agreements* (1997) 49 Stan. L.Rev. 887, 905; Younger, *Perspectives on Antenuptial Agreements* (1988) 40 Rutgers L.Rev. 1059, 1060; Shakespeare, Taming of the Shrew, act II, scene 1, lines 135-139.

4 See *Snyder v. Webb* (1853) 3 Cal. 83, 87 (parties may enter into agreement deviating from statutory provisions regarding marital property); *In re Appleby's Estate* (1907) 100 Minn. 408 [111 N.W. 305, 307]; see also *Brooks v. Brooks* (Alaska 1987) 733 P.2d 1044, 1048-1049, footnote 4, and cases cited.

At one time, a premarital agreement that was not made in contemplation that the parties would remain married until death was considered to be ***14** against public policy in California and other jurisdictions (see *In re Marriage of Higgason* (1973) 10 Cal.3d 476, 485 [110 Cal.Rptr. 897, 516 P.2d 289]; see also *Brooks v. Brooks, supra,* 733 P.2d at pp.1048-1049, fn. 4, and cases cited), but this court concluded

applicable in commercial contexts do not necessarily govern the determination whether a premarital agreement was entered into voluntarily.

Some of the commissioners debating the Uniform Act appeared to equate a premarital agreement with a commercial contract, and one court has emphasized that both parties contemplating marriage possess freedom of contract, which should not be restricted except as it would be in the context of a commercial contract. (*Simeone v. Simeone* (1990) 525 Pa. 392 [581 A.2d 162, 165-166] [not interpreting the Uniform Act].) Even apart from the circumstance that there is no statutory requirement that commercial contracts be entered into voluntarily as that term is used in Family Code section 1615, we observe some significant distinctions between the two types of contracts. A commercial contract most frequently constitutes a private regulatory agreement intended to ensure the successful outcome of the business between the contracting parties-in essence, to guide their relationship so that ***25** the object of the contract may be achieved. Normally, the execution of the contract ushers in the applicability of the regulatory scheme contemplated by the contract and the endeavor that is the object of the contract. As for a premarital agreement (or clause of such an agreement) providing solely for the division of property upon marital dissolution, the parties generally enter into the agreement anticipating that it never will be invoked, and the agreement, far from regulating the relationship of the contracting parties and providing the method for attaining their joint objectives, exists to provide for eventualities that will arise only if the relationship founders, possibly in the distant future under greatly changed and unforeseeable circumstances.

Furthermore, marriage itself is a highly regulated institution of undisputed social value, and there are many limitations on the ability of persons to contract with respect to it, or to vary its statutory terms, that have nothing to do with maximizing the satisfaction of the parties or carrying out their intent. Such limitations are inconsistent with the freedom-of-contract analysis espoused, for example, by the Pennsylvania Supreme Court. (See *Simeone v. Simeone*, *supra*, 581 A.2d at p. 165.) We refer to rules establishing a duty of mutual financial support during the marriage (Fam. Code, § 720) and prohibiting agreements in derogation of the duty to support a child of the marriage (Fam. Code, §§ 1612, subd. (b), 3900-3901; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947 [126 Cal.Rptr. 805, 544 P.2d 941]; *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1426-1427, fn. 17 [72 Cal.Rptr.2d 280, 77 A.L.R.5th 775]); the unenforceability of a promise to marry (Civ. Code, § 43.5, subd. (d); *Askew v. Askew* (1994) 22 Cal.App.4th 942, 954-957 [28 Cal.Rptr.2d 284] [tracing the history of the rule that breach of a promise to marry does not give rise to an action in contract or tort]); the circumstance that a party may abandon the marriage unilaterally under this state's no-fault laws; and the pervasive state involvement in the dissolution of marital status, the marriage contract, and the arrangements to be made for the children of the marriage-even without consideration of the circumstance that marriage normally lacks a predominantly commercial object. We also observe that a premarital agreement to raise children in a particular religion is not enforceable. (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 113-115 [49 Cal.Rptr.2d 339].) We note, too, that there is authority-as conceded by the commissioners who considered the Uniform Act-to the effect that a contract to pay a spouse for personal services such as nursing cannot be enforced, despite the undoubted economic value of the services (see *Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651-654 [16 Cal.Rptr.2d 16]; see also Silbaugh, *Marriage Contracts and the Family Economy* (1998) 93 N.W.U. L.Rev. 65, 123 [most jurisdictions will not enforce agreements with respect to personal services rendered during marriage]; Note, ***26** *Planning for Love: The Politics of Prenuptial Agreements*, *supra*, 49 Stan. L.Rev. at p. 900 [same]). These limitations demonstrate further that freedom of contract with respect to marital arrangements is tempered with statutory requirements and case law expressing social policy with respect to marriage.

There also are obvious differences between the remedies that realistically may be awarded with respect to commercial contracts and premarital agreements. Although a party seeking rescission of a commercial contract, for example, may be required to restore the status quo ante by restoring the consideration received, and a party in breach may be required to pay damages, the status quo ante for spouses cannot be restored to either party, nor are damages contemplated for breach of the marital contract. In any event, the suggestion that commercial contracts are strictly enforced without regard to the fairness or oppressiveness of the terms or the inequality of the bargaining power of the parties is anachronistic and inaccurate, in that claims such as duress, unconscionability, and undue influence turn upon the specific context in which the contract is formed. (See Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage* (1998) 40 Wm. & Mary L.Rev. 145, 163, 182, 188, 205; see also Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act* (1993) 19 J. Legis. 127, 146.)

We also have explained generally that we believe the reference to voluntariness in the Uniform Act was intended to convey an element of knowing waiver that is not a consistent feature of commercial contract enforcement. Further, although the Uniform Act contemplated that contract defenses should apply, in the sense that an agreement should be free from fraud (including constructive fraud), duress, or undue influence, it is clear from the debate of the commissioners who adopted the Uniform Act and the cases cited in support of the enforcement provision of the Uniform Act that subtle coercion that would not be considered in challenges to ordinary commercial contracts may be considered in the context of the premarital agreement. (See, e.g., *Lutgert v. Lutgert*, *supra*, 338 So.2d at pp. 1113-1116 [agreement presented too close to the wedding, with passage booked on an expensive cruise].) The obvious distinctions between premarital agreements and ordinary commercial contracts lead us to conclude that factual circumstances relating to contract defenses (see Civ. Code, § 1567) that would not necessarily support the rescission of a commercial contract may suffice to render a premarital agreement unenforceable. The question of voluntariness must be examined in the unique context of the marital relationship. (See Brandt, *The Uniform Premarital Agreement Act and the Reality of Premarital Agreements in Idaho* (1997) 33 Idaho L.Rev. 539, 546-547, 562-564; Younger, *Perspectives on Antenuptial Agreements: An Update* (1992) 8 J. Am. Acad. Matrim. Law. 1, 19-20; Younger, *Perspectives on Antenuptial Agreements*, *supra*, ***27** 40 Rutgers L.Rev. at p. 1075; see also ALI, Principles of the Law of Family Dissolution: Analysis and Recommendations (Tent. Draft No. 4, Apr. 10, 2000) § 7.02, coms. (a), pp. 90-91, (c), pp. 92-94; *id.*, § 7.05, com. (b), pp. 100-101; *id.*, § 7.07, com. (b), pp. 132-134.)

([6]) On the other hand, we do not agree with Sun and the Court of Appeal majority that a *premarital* agreement should be interpreted and enforced under the same standards applicable to *marital* settlement agreements. First, although persons, once they are married, are in a fiduciary relationship to one another (Fam. Code, § 721, subd. (b)), so that whenever the parties 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 Haines* (1995) 33 Cal.App.4th 277, 293 [39 Cal.Rptr.2d 673]), a different burden applies under the Uniform Act in the premarital setting. Even when the premarital agreement clearly advantages one of the parties, the party challenging the agreement bears the burden of demonstrating that the agreement was not entered into voluntarily. Further, under the Uniform Act, even when there has been a failure of disclosure, the statute still places the burden upon the party challenging the agreement to prove that the terms of the agreement were unconscionable when executed, rather than placing the burden on the advantaged party to demonstrate that the agreement was not unconscionable. Thus the terms of the act itself do not support the Court of Appeal's conclusion that the Legislature intended that premarital agreements should be interpreted in the same manner as agreements entered into during marriage.

In particular, we believe that both the Court of Appeal majority and Sun err to the extent they suggest that the Uniform Act or its California analog established that persons who enter into premarital agreements must be presumed to be in a confidential relationship, a status that would give rise to the fiduciary duties between spouses expressly established by section 721 of the Family Code. California law prior to the enactment of the Uniform Act was to the contrary (see *In re Marriage of Dawley*, *supra*, 17 Cal.3d at p. 355 [persons entering into prenuptial agreement are not presumed to be in a confidential relationship]), and we discern nothing in the Uniform Act suggesting that its adoption in California was intended to overrule our earlier decision.

The primary consequences of designating a relationship as fiduciary in nature are that the parties owe a duty of full disclosure, and that a presumption arises that a party who owes a fiduciary duty, and who secures a benefit through an agreement, has done so through undue influence. (See 1 Witkin, Summary of Cal. Law (9th ed.1987) Contracts, §§ 425, 426, pp. 381-383; ***28** see also Civ. Code, § 1575.) For example, a transaction in which an attorney gains an advantage over his or her client "is presumptively invalid, and the attorney must show not only that it was fair, but that the client was fully informed of all facts necessary to enable him to deal at arm's length." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 425, pp. 381-382, italics omitted.) It long has been the rule that "[w]hen an interspousal transaction advantages one spouse, '[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.' " (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 293, quoting *Brison v. Brison* (1888) 75 Cal. 525, 529 [17 P. 689].)

California law also recognizes a lesser degree of confidential relationship that *may* arise, for example, between family members and between friends. (See 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 427, pp. 383-384.) In such

cases "mere *lack of independent advice* is not sufficient to raise a presumption of undue influence or of constructive fraud, even when the consideration appears inadequate. But when to these factors is added some other such as great age, weakness of mind, sickness or other incapacity, the presumption arises, and the burden is on the other party to show that no oppression took place." (*Ibid.*, italics in original; see also *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 550 [35 Cal.Rptr.2d 291].)[11]

11 Under California law, even in the absence of a confidential or fiduciary relationship, a contract may be void if the person seeking relief proves undue influence. (See Civ. Code, § 1575.) In such circumstances, the plaintiff must prove that the defendant took unfair advantage of the plaintiff's weakness of mind or "grossly oppressive and unfair advantage of another's necessities or distress." (*Ibid.*) The court hearing such a claim will consider matters such as the substantial weakness of the person influenced or the excessive strength of the other party, taking into account factors such as the transaction having occurred at an unusual or inappropriate time or place, an insistent demand that the business be concluded immediately without recourse to independent advisers and an extreme emphasis on the negative consequences of delay, the concurrence of several persons in influencing the weaker party, and the absence of an independent adviser for that person. (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 133 [54 Cal.Rptr. 533]; 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 428, pp. 384-385.)

In the *Dawley* case, we found substantial evidence to support an implied finding that an agreement between persons contemplating marriage was not the result of undue influence. We stated: "Parties who are not yet married are not *presumed* to share a confidential relationship [citations]; the record demonstrates that Betty did not rely on the advice and integrity of James in entering into the antenuptial agreement." (*In re Marriage of Dawley*, *supra*, 17 Cal.3d at p. 355, italics added; see also *La Liberty v. La Liberty*, *supra*, 127 Cal.App. at p. 673 ["The inferences of fraud and undue influence which require the courts to carefully examine a contract between a husband and wife, where one has gained an advantage over the other, do not necessarily apply to prenuptial contracts ...."].) ***29**

Because the Uniform Act was intended to enhance the enforceability of premarital agreements, because it expressly places the burden of proof upon the person challenging the agreement, and finally because the California statute imposing fiduciary duties in the family law setting applies only to spouses, we do not believe that the commissioners or our Legislature contemplated that the voluntariness of a premarital agreement would be examined in light of the strict fiduciary duties imposed on persons such as lawyers, or imposed expressly by statute upon persons who are married. (See Fam. Code, § 721.)[12] Nor do we find any indication that the California Legislature intended to overrule our *Dawley* decision. Although we certainly agree that persons contemplating marriage morally owe each other a duty of fair dealing and obviously are not embarking upon a purely commercial contract, we do not believe that these circumstances permit us to interpret our statute as imposing a *presumption* of undue influence or as requiring the kind of strict scrutiny that is conducted when a lawyer or other fiduciary engages in self-dealing. On the contrary, it is evident that the Uniform Act was intended to *enhance* the enforceability of premarital agreements, a goal that would be undermined by presuming the existence of a confidential or fiduciary relationship.

12 A North Dakota case decided after that state's adoption of the Uniform Act referred to the possibility that an agreement to marry may create a fiduciary relationship, but that decision did not impose any presumption of undue influence. (*Matter of Estate of Lutz*, *supra*, 563 N.W.2d at p. 98.) Another case interpreting an agreement under the Uniform Act did not discuss the confidential relationship doctrine, but clearly placed the burden of establishing *every* fact relevant to a determination of voluntariness upon the person attacking the agreement. (*Marsh v. Marsh*, *supra*, 949 S.W.2d at p. 739; see also *Penhallow v. Penhallow*, *supra*, 649 A.2d at p. 1021 [referring to the heavy burden of proof placed by the Uniform Act upon the person seeking to avoid the agreement].)

Finally, the reference by the Court of Appeal majority to the state's interest in an equal division of marital property appears misplaced in the premarital context, and its claim that the same policy interests apply to premarital agreements is flawed. We have not been directed to relevant authority establishing that the Legislature intended that premarital agreements should be examined for fairness or enforceability on the same basis as marital settlement agreements. Instead, multiple differences in the statutes regulating each type of agreement suggest that the Legislature contemplated different standards for each type of agreement. Although community 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, the substantive fairness of a premarital agreement is not open to examination unless the party objecting to enforcement meets the demands of Family Code section 1615, subdivision (a)(2). As explained above, with respect to division of ***30** property during marriage and upon dissolution of marriage, the Family Code provides that the parties stand in a confidential, fiduciary relationship to one another (Fam. Code, § 721, subd. (b)), but such a proviso does not appear in the California Uniform Act regulating premarital agreements. Marital settlement agreements must be preceded by rather elaborate disclosure of assets and liabilities, as well as income and expenses, and strict rules govern the waiver of disclosure. (Fam. Code, §§ 2100-2110; *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1064-1066 [64 Cal.Rptr.2d 522].) Such detailed requirements do not apply to premarital agreements. We are not persuaded that the policy of equal division of assets at the time of dissolution is intended to apply to premarital agreements. In sum, the Court of Appeal majority erred in suggesting that the voluntariness of a premarital agreement should be assessed on the assumption that the parties were in a confidential relationship, and in pursuit of the policy favoring equal division of assets upon dissolution.

D

The Court of Appeal majority, suggesting that counsel for the party who proposed the premarital agreement has a duty to provide a warning to the other party if he or she is unrepresented, stated: "Counsel, at a minimum, must explain to the unrepresented party (1) that the attorney's responsibility is to pursue and protect only the interests of his or her client; (2) that spousal interests are probably not identical and are likely to conflict; (3) that the spouses' interests will change over time and the attorney will not be concerned with providing for all the changed circumstances that could possibly impact the unrepresented spouse; and (4) that signing this agreement will eliminate or modify his or her statutory rights."

Both Sun and Barry contend that counsel for the represented party cannot effectively or ethically explain to the unrepresented party what rights are being waived under the agreement. Barry claims that such a warning would be unethical, because it would be inconsistent with the attorney's duty to serve only his or her own client's interest. Sun adds that such a rule would be improper because it would violate a rule of professional conduct prohibiting counsel for one party from giving legal advice to an opposing party who is unrepresented, in that such advice might cause the unrepresented party to believe counsel is serving both parties.

We do not believe that the case before us presents an appropriate occasion to delineate the duties that must guide an attorney in drafting a premarital agreement. The issue before us is the enforceability of a premarital agreement, not the extent, if any, of counsel's duty to an unrepresented party to ***31** the agreement, or the imposition of discipline upon an attorney who does not comply with that duty. ([7]) We do observe, however, that it is consistent with an attorney's duty to further the interest of his or her client for the attorney to take steps to ensure that the premarital agreement will be enforceable. After discussing the matter with his or her client, an attorney may convey such information to the other party as will assist in having the agreement upheld, as long as he or she does not violate the duty of loyalty to the client or undertake to represent both parties without an appropriate waiver of the conflict of interest. We also observe that, obviously, the best assurance of enforceability is independent representation for both parties.

III

([8a]) Finally, we conclude that the trial court's determination that Sun voluntarily entered into the premarital agreement in the present case is supported by substantial evidence.

([9]) In determining the voluntariness of a premarital agreement, a reviewing court should accept such factual determinations of the trial court as are supported by substantial evidence. (See *In re Marriage of Dawley*, *supra*, 17 Cal.3d at pp. 354-355 [undue influence is a question of fact; trial court's finding that a party entered into a prenuptial agreement "voluntarily" implied a finding that there was no undue influence, and the finding was supported by substantial evidence]; *In re Marriage of Alexander* (1989) 212 Cal.App.3d 677, 682 [261 Cal.Rptr. 9] [determination as to extrinsic fraud in connection with a marital settlement agreement is accepted on appeal if supported by substantial evidence]; *Estate of Cantor*, *supra*, 39 Cal.App.3d at p. 548 [trial court's finding that a party knowingly waived spousal rights in a premarital agreement was supported by substantial evidence]; *Barker v. Barker*, *supra*, 139 Cal.App.2d at p. 211 [in a case examining the voluntariness of a premarital agreement, trial court's determination that a party fully understood the purpose and effect of the agreement was supported by substantial evidence]; *La Liberty v. La Liberty*, *supra*, 127 Cal.App. at pp. 673-674 [finding of knowing waiver of spousal rights in premarital agreement supported by substantial evidence].) Further, under the familiar tenets of the substantial evidence rule, " 'In reviewing the evidence on ... appeal all conflicts must be resolved in favor of

the [prevailing party], and all legitimate and reasonable inferences indulged in [order] to uphold the [finding] if possible.' " (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571 [38 Cal.Rptr.2d 139, 888 P.2d 1268].)

([8b]) The Court of Appeal held the trial court erred in finding the parties' agreement to be voluntary. The appellate court stressed the absence of ***32** counsel for Sun, and, strictly examining the totality of the circumstances to determine voluntariness, pointed to Sun's limited English language skills and lack of "legal or business sophistication," and stated that she "received no explanation of the legal consequences to her ensuing from signing the contract" and "was told there would be 'no marriage' if she did not immediately sign the agreement." It also referred to typographical errors and omissions in the agreement, the imminence of the wedding and the inconvenience and embarrassment of cancelling it, and Sun's asserted lack of understanding that she was waiving her statutory right to a community property interest in Barry's earnings.

The trial court, however, determined that Sun entered into the premarital contract voluntarily, without being subject to fraud, coercion, or undue influence, and with full understanding of the terms and effect of the agreement. It determined that the parties did not stand in a confidential relationship.[13] The trial court declared that although, pursuant to a pretrial stipulation, the burden of proof rested upon Sun, even if the burden were to rest upon Barry, he had demonstrated by clear and convincing evidence that the agreement had been entered into voluntarily.

13 Sun claimed that she demonstrated that a confidential relationship actually existed, through evidence of her financial dependence on and trust in Barry and her testimony that she entered into the agreement under a misapprehension as to its meaning. The trial court's contrary finding is supported by evidence, noted below, that Sun had her own career plans, that the parties long had planned to keep their earnings and acquisitions separate, and that Sun understood the contract and entered into it because it reflected her intent.

The trial court made specific findings of fact regarding the factors we have identified as relevant to the determination of voluntariness. These findings are supported by substantial evidence and should have been accepted by the Court of Appeal majority-as they were by the dissenting justice in the Court of Appeal.

The trial court determined that there had been no coercion. It declared that Sun had not been subjected to any threats, that she had not been forced to sign the agreement, and that she never expressed any reluctance to sign the agreement. It found that the temporal proximity of the wedding to the signing of the agreement was not coercive, because under the particular circumstances of the case, including the small number of guests and the informality of the wedding arrangements, little embarrassment would have followed from postponement of the wedding. It found that the presentation of the agreement did not come as a surprise to Sun, noting that she was aware of Barry's desire to "protect his present property and future earnings," and that she had been aware for at least a week before the parties signed the formal premarital agreement that one was planned. ***33**

These findings are supported by substantial evidence. Several witnesses, including Sun herself, stated that she was not threatened. The witnesses were unanimous in observing that Sun expressed no reluctance to sign the agreement, and they observed in addition that she appeared calm, happy, and confident as she participated in discussions of the agreement. Attorney Brown testified that Sun had indicated a desire at their first meeting to enter into the agreement, and that during the discussion preceding execution of the document, she stated that she understood the agreement. As the trial court determined, although the wedding between Sun and Barry was planned for the day following the signing of the agreement, the wedding was impromptu -the parties had not secured a license or a place to be married, and the few family members and close friends who were invited could have changed their plans without difficulty. (For example, guests were not arriving from Sweden.) In view of these circumstances, the evidence supported the inference, drawn by the trial court, that the coercive force of the normal desire to avoid social embarrassment or humiliation was diminished or absent. Finally, Barry's testimony that the parties early in their relationship had discussed their desire to keep separate their property and earnings, in addition to the testimony of Barry and Brown that they had met with Sun at least one week before the document was signed to discuss the need for an agreement, and the evidence establishing that Sun understood and concurred in the agreement, constituted substantial evidence to support the trial court's conclusion that Sun was not subjected to the type of coercion that may arise from the surprise and confusion caused by a last-minute presentation of a new plan to keep earnings and property separate during marriage. In this connection, certain statements in the opinion rendered by the Court of Appeal

66 Cal.App.4th 442
Court of Appeal, Fourth District, Division 3, California.

Claire MAGLICA, Plaintiff and Respondent,
v.
Anthony MAGLICA, Defendant and Appellant.

No. G016463. | Aug. 31, 1998. | As Modified on Denial of Rehearing Sept. 28, 1998. | Review Denied Dec. 16, 1998. *

* George, C.J., did not participate therein.

Female cohabitant who worked in business solely owned by male cohabitant brought suit after termination of their relationship. Following jury trial before the Superior Court, Orange County, No. 713117, Robert J. Polis, J., judgment was entered on jury verdict for female cohabitant awarding her $84 million on quantum meruit claim. Male cohabitant appealed. The Court of Appeal, Sills, P.J., held that: (1) no fiduciary duty regarding management and control of male cohabitant's assets absent marriage or contract; (2) court erred in allowing jury to measure quantum meruit recovery on basis of impact of female cohabitant's services on business; (3) claim did not accrue until relationship ended for purposes of statute of limitations; and (4) court committed instructional error in suggesting that contract to share in equity of business could not arise from parties' relationship.

Reversed and remanded.

Attorneys and Law Firms

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Keker & Van Nest, John W. Keker, Karin Kramer, San Francisco, Wendy J. Thrum and Helene M. Linker for Plaintiff and Respondent.

Opinion

OPINION

SILLS, Presiding Justice.

I. INTRODUCTION

This case forces us to confront the legal doctrine known as "quantum meruit" in the context of a case about an unmarried couple who lived together and worked in a business solely owned by one of them. Quantum meruit is a Latin phrase, meaning "as much as he deserves," [1] and is based on *446 the idea that someone should get paid for beneficial goods or services which he or she bestows on another. [2]

1 See Black's Law Dictionary (5th ed.1979) at page 1119.

2 See, e.g., *Earhart v. William Low Co.* (1979) 25 Cal.3d 503, 518, 158 Cal.Rptr. 887, 600 P.2d 1344 ("Where one person renders services at the request of another and the latter obtains benefits from the services, the law ordinarily implies a promise to pay for the services."); *Palmer v. Gregg* (1967) 65 Cal.2d 657, 660, 56 Cal.Rptr. 97, 422 P.2d 985 ("The measure of recovery in *quantum meruit* is the reasonable value of the services rendered, provided they were of direct benefit to the defendant."); *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419, 49 Cal.Rptr.2d 191 ("A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice.... ").

The trial judge instructed the jury that the reasonable value of the plaintiff's services was either the value of what it would have cost the defendant to obtain those services from someone else or the "value by which" he had "benefitted [*sic*] as a result" of those services. The instruction allowed the jury to reach a whopping number in favor of the plaintiff—$84 million—because of the tremendous growth in the *value* of the business over the years.

As we explain later, the finding that the couple had no contract in the first place is itself somewhat suspect because certain jury instructions did not accurately convey the law concerning implied-in-fact contracts. However, assuming that there was indeed no contract, the quantum meruit award cannot stand. The legal test for recovery in quantum meruit is not the value of the benefit, but value of the services (assuming, of course, that the services were beneficial to the recipient in the first place). In this case the failure to appreciate that fine distinction meant a big difference. People who work for businesses for a period of years and then walk away with $84 million do so because they have acquired some *equity* in the business, not because $84 million dollars is the going

rate for the services of even the most workaholic manager. In substance, the court was allowing the jury to value the plaintiff's services as if she had made a sweetheart stock option deal—yet such a deal was precisely what the jury found she did not make. So the $84 million judgment cannot stand.

On the other hand, plaintiff was hindered in her ability to prove the existence of an implied-in-fact contract by a series of jury instructions which may have misled the jury about certain of the factors which bear on such contracts. The instructions were insufficiently qualified. They told the jury flat **103 out that such facts as a couple's living together or holding themselves out as husband and wife or sharing a common surname did not mean that they had any agreement to share assets. That is not *exactly* correct. Such factors can, indeed, when taken together with other facts and in context, show the existence of an implied-in-fact contract. At most the jury instructions should have said that such factors do not *by themselves necessarily* *447 show an implied-in-fact contract. Accordingly, when the case is retried, the plaintiff will have another chance to prove that she indeed had a deal for a share of equity in the defendant's business.

II. FACTS

The important facts in this case may be briefly stated. Anthony Maglica, a Croatian immigrant, founded his own machine shop business, Mag Instrument, in 1955. He got divorced in 1971 and kept the business. That year he met Claire Halasz, an interior designer. They got on famously, and lived together, holding themselves out as man and wife —hence Claire began using the name Claire Maglica—but never actually got married. And, while they worked side by side building the business, Anthony never agreed—or at least the jury found Anthony never agreed—to give Claire a share of the business. When the business was incorporated in 1974 all shares went into Anthony's name. Anthony was the president and Claire was the secretary. They were paid equal salaries from the business after incorporation. In 1978 the business began manufacturing flashlights, and, thanks in part to some great ideas and hard work on Claire's part (for example, coming out with a purse-sized flashlight in colors), the business boomed. Mag Instrument is now worth hundreds of millions of dollars.

In 1992 Claire discovered that Anthony was trying to transfer stock to his children but not her, and the couple split up in October. In June 1993 Claire sued Anthony for, among other things, breach of contract, breach of partnership agreement, fraud, breach of fiduciary duty and quantum meruit. The case came to trial in the spring of 1994. The jury awarded $84 million for the breach of fiduciary duty and quantum meruit causes of action, finding that $84 million was the reasonable value of Claire's services.

III. DISCUSSION

A. *The Jury's Finding That There Was No Agreement To Hold Property for One Another Meant There Was No Breach of Fiduciary Duty*

Preliminarily we must deal with the problem of fiduciary duty, as it was an alternative basis for the jury's award. We cannot, however, affirm the judgment on this basis because it is at odds with the jury's factual finding that Anthony never agreed to give Claire a share of his business. Having found factually that there was no contract, the jury could not legally conclude that Anthony breached a fiduciary duty.

[1] [2] The reason is that fiduciary duties are either imposed by law or are undertaken by agreement, and neither way of establishing the existence of a *448 fiduciary duty applies here. As to the former, the fact that Claire and Anthony remained unmarried during their relationship is dispositive. California specifically abolished the idea of a "common law marriage" in 1895 (see *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275, 250 Cal.Rptr. 254, 758 P.2d 582) and that, if it is not too harsh to say it, was clearly the *substance* of Claire and Anthony's relationship. They had a common law marriage.

As our Supreme Court said in *Elden*, "[f]ormally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage." (*Ibid.*) The court noted, in that context, that a variety of statutes impose rights and obligations on married people. One set of such imposed rights and obligations, for example, is Family Code sections 1100 through 1103, which both establish a fiduciary duty between spouses with regard to the management and control of community assets (Fam.Code, § 1100, subd. (e)) and provide for remedies for a breach of that duty (Fam.Code, § 1101).

**104 It would be contrary to what our Supreme Court said in *Elden* and to the evident policy of the law to promote formal (as distinct from common law) marriage to impose fiduciary duties based on a common law marriage. Indeed,

in the context of this case the potential for anomalous results is readily apparent. For example, in family law matters involving dissolution of marriage, punitive damages are not available to remedy breaches of fiduciary duty in the management and control of community property (though there are, of course, other remedies). Punitive damages, however, are sometimes available in other breach of fiduciary duty cases. (See, e.g., *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1390, 58 Cal.Rptr.2d 336.) It is unthinkable, given California's abolition of common law marriage, that an unmarried, cohabiting partner should have a more powerful remedy than a spouse.

[3] That leaves contract, and the jury found there was no contract. Claire, despite the closeness of their relationship, never entrusted her *property* to Anthony; she only rendered services. And without entrustment of property, or an oral agreement to purchase property together, there can be no fiduciary relationship no matter how "confidential" a relationship between an unmarried, cohabiting couple. (*Toney v. Nolder* (1985) 173 Cal.App.3d 791, 796, 219 Cal.Rptr. 497.) Indeed, as the *Toney* decision points out, it takes clear and convincing evidence of such entrustment or an agreement to buy property together (*ibid.*, citing Evid.Code, § 662) to overcome the presumption of title—and, as previously mentioned, there is no dispute that title to the stock of Mag Instrument was taken solely in Anthony's name. Here, ***449** because the jury affirmatively found there were no such agreements, we need not even address the question of whether the evidence was "clear and convincing."[3]

3 Claire attempts to distinguish *Toney* on the ground that the plaintiff there did not seek damages, but to establish his rights in a particular piece of real property. It is a distinction without a difference. The *Toney* court relied on section 662 of the Evidence Code, which consists of two sentences, neither of which are limited to just *real* property: "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." There is no difference, in substance, between asserting that an unmarried partner has breached a fiduciary duty to hold property—not just real property—in trust for the other and asserting direct rights in that property. In either case, the critical feature is whether the unmarried partner ever agreed to act as trustee in the first place. On that point the jury sided with Anthony, not Claire. Claire never quite explains how Anthony could breach a fiduciary duty to her without first having a contract to either hold property on her behalf or to own property jointly with her.

In *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 286 Cal.Rptr. 40, 816 P.2d 892, the Supreme Court distinguished *Toney* from a case of fraudulent concealment. (*Id.* at p. 486, 286 Cal.Rptr. 40, 816 P.2d 892.) In the case before us there is no fraudulent concealment because Anthony never agreed to hold property for Claire.

B. Quantum Meruit Allows Recovery For the Value of Beneficial Services, Not The Value By Which Someone Benefits From Those Services

[4] The absence of a contract between Claire and Anthony, however, would not preclude her recovery in quantum meruit: As every first year law student knows or should know, recovery in quantum meruit does not require a contract. (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 112, p. 137; see, e.g., *B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 Cal.App.2d 491, 499–500, 41 Cal.Rptr. 98.)[4]

4 The doctrine can become trickier when an actual contract is involved. See *Hedging Concepts, Inc. v. First Alliance Mortgage Co., supra,* 41 Cal.App.4th 1410, 1419–1420, 49 Cal.Rptr.2d 191 (quantum meruit recovery cannot conflict with terms of actual contract between parties, lest the court in effect impose its own ideas of a fair deal on the parties).

[5] The classic formulation concerning the measure of recovery in quantum meruit is found in *Palmer v. Gregg, supra,* 65 Cal.2d 657, 56 Cal.Rptr. 97, 422 P.2d 985. Justice Mosk, writing for the court, said: "The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." (*Id.* at p. 660, 56 Cal.Rptr. 97, 422 P.2d 985, emphasis added; see also *Producers Cotton Oil Co. v. Amstar Corp.* (1988) 197 Cal.App.3d 638, 659, 242 Cal.Rptr. 914.)

****105** The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should "restore the aggrieved party to his [or her] former position by return of the *thing* or its *equivalent* in money." (See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 91, p. 122.)

***450** The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery. (See *Earhart v. William Low Co., supra,*

25 Cal.3d 503, 510, 158 Cal.Rptr. 887, 600 P.2d 1344 [explaining origins of quantum meruit recovery in actions for recovery of money tortiously retained; law implied an obligation to restore " 'benefit,' unfairly retained by the defendant"].)

But the threshold requirement that there be a benefit from the services can lead to confusion, as it did in the case before us. It is one thing to require that the defendant be benefited by services,[5] it is quite another to *measure* the reasonable value of those *services* by the value by which the defendant was "benefited" as a *result* of them.[6] Contract price and the reasonable value of services rendered are two separate things; sometimes the reasonable value of services exceeds a contract price. (See *B.C. Richter Contracting Co., supra,* 230 Cal.App.2d at p. 500, 41 Cal.Rptr. 98.) And sometimes it does not.

5 Or, as the case may be, goods. However, in the present case we are only dealing with Claire's services.

6 Here is the exact language of the plaintiff's jury instruction at issue:

> "Plaintiff may be compensated for the reasonable value of services rendered to Defendant and Mag Instrument, Inc. either by awarding Plaintiff: [¶] 1. The reasonable value of what it would have cost Defendant to obtain the services Plaintiff provided from another person; or [¶] 2. The value by which Defendant has benefited as a result of the services rendered by Plaintiff."

At root, allowing quantum meruit recovery based on "resulting benefit" of services rather than the reasonable value of beneficial services affords the plaintiff the best of both contractual and quasi-contractual recovery. Resulting benefit is an open-ended standard, which, as we have mentioned earlier, can result in the plaintiff obtaining recovery amounting to de facto ownership in a business all out of reasonable relation to the value of services rendered. After all, a particular service timely rendered can have, as Androcles was once pleasantly surprised to discover in the case of a particular lion, disproportionate value to what it would cost on the open market.

The facts in this court's decision in *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, 62 Cal.Rptr.2d 298 illustrate the point nicely. In *Passante,* the attorney for a fledgling baseball card company gratuitously arranged a needed loan for $100,000 at a crucial point in the company's history; because the loan was made the company survived and a grateful board promised the attorney a three percent equity interest in the company. The company eventually became worth more than a quarter of a billion dollars, resulting in the attorney claiming *$33 million* for his efforts in arranging but ***451** a single loan. This court would later conclude, because of the attorney's duty to the company as an attorney, that the promise was unenforceable. (See *id.* at pp. 1247–1248, 62 Cal.Rptr.2d 298.) Interestingly enough, however, the one cause of action the plaintiff in *Passante* did not sue on was quantum meruit; while this court opined that the attorney should certainly get paid "something" for his efforts, a *$33 million* recovery in quantum meruit would have been too much. Had the services been bargained for, the going price would likely have been simply a reasonable finder's fee. (See *id.* at p. 1248, 62 Cal.Rptr.2d 298.)

[6] The jury instruction given here allows the value of services to depend on their *impact* on a defendant's business rather than their reasonable value. True, the services must be of benefit if there is to be any recovery at all; even so, the benefit is not necessarily related to the reasonable value of a particular set of services. Sometimes luck, sometimes the impact of others makes the ****106** difference. Some enterprises are successful; others less so. Allowing recovery based on resulting benefit would mean the law imposes an exchange of equity for services, and that can result in a windfall—as in the present case—or a serious shortfall in others. Equity-for-service compensation packages are extraordinary in the labor market, and always the result of specific bargaining. To impose such a measure of recovery would make a deal for the parties that they did not make themselves. If courts cannot use quantum meruit to change the terms of a contract which the parties did make (see *Hedging Concepts, Inc., supra,* 41 Cal.App.4th at p. 1420, 49 Cal.Rptr.2d 191), it follows that neither can they use quantum meruit to impose a highly generous and extraordinary contract that the parties did not make.

The cases relied on by Claire for an equity measure of the value of her services are inapposite. *Earhart v. William Low Co., supra,* 25 Cal.3d 503, 158 Cal.Rptr. 887, 600 P.2d 1344 concerned the nature of the benefit requirement. The court merely held, relaxing the benefit requirement as set out in a previous case (*Rotea v. Izuel* (1939) 14 Cal.2d 605, 95 P.2d 927), that where the defendant urged the plaintiff to render services to a third party (the third party owned a parcel of property which was being developed along with defendant's parcel) the plaintiff could still be compensated

in quantum meruit for those services. *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 24–25, 94 Cal.Rptr. 904 involved the reasonable value of storage costs incurred by a holdover tenant. To the degree that the court opined on the measure of value of storage costs, the *Gray* court made the unremarkable observation that a court could look to either the amount a landlord pays to have property stored offsite in a regulated warehouse, or the comparable charge he would pay if the landlord did not use a regulated warehouse. (*Id.* at p. 25, 94 Cal.Rptr. 904.)

***452** *Watson v. Wood Dimension, Inc.* (1989) 209 Cal.App.3d 1359, 257 Cal.Rptr. 816 (*Watson*) is a little closer, because it allowed a recovery based on a contemplated commission. But it is still off the mark because the commission was specifically *agreed to* by the parties.

In *Watson* a stereo speaker manufacturer hired the friend of a lost customer to wine and dine the customer's general manager. The parties orally *agreed* that the friend would be paid three percent commission, but they didn't agree on how long the commission might extend after the plaintiff was terminated from employment. As this court noted, there is no reason a court may not consider an *agreed price* when ascertaining the reasonable value of services. (*Id.* at p. 1365, 257 Cal.Rptr. 816.) Of course, in the case before us, there was no agreement and no agreed price.

The same applies to the attorney contingent fee cases, of which *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 256 Cal.Rptr. 209 features most prominently in Claire's argument. As in *Watson*, a recovery of what was a share of an enterprise passed muster because the parties had *already agreed* to such valuation. In *Cazares* it was a standard one-third contingency fee which had to be shared between the attorneys who made that deal with the client and other attorneys with whom they later associated. "Fortunately, when an attorney partially performs on a contingency fee contract," said the court, "we already have the parties' agreement as to what was a reasonable fee for the entire case." (*Cazares, supra,* 208 Cal.App.3d at p. 288, 256 Cal.Rptr. 209.)

Telling the jury that it could measure the value of Claire's services by "[t]he value by which Defendant has benefited as a result of [her] services" was error. It allowed the jury to value Claire's services as having bought her a de facto ownership interest in a business whose owner never agreed to give her an interest. On remand, that part of the jury instruction must be dropped.

C. Claire's Quantum Meruit Claim Is Not Barred by the Statute of Limitations

[7] The statute of limitations for quantum meruit claims is two years (see Code Civ. Proc., § 339 [action upon an "obligation" ... not founded upon an instrument of writing]), but Claire seeks payment for services rendered since 1971. Anthony contends that her claim for all but the last two years' worth of services must necessarily fail in light of ****107** that fact; Claire argues that the statute of limitations only began to run with the termination of her services. The problem presents the challenge of parsing the exact ***453** nature of the circumstances in a particular case (see *Robinson v. Chapman* (1929) 98 Cal.App. 278, 281, 276 P. 1081), since fine gradations can lead to wildly divergent results, as illustrated by two very similar cases to this one from a bygone era, *Mayborne v. Citizens T. & S. Bank* (1920) 46 Cal.App. 178, 188 P. 1034 and *Corato v. Estate of Corato* (1927) 201 Cal. 155, 255 P. 825. Claire is not the first person without a contract or marriage to devote his or her efforts to a fellow cohabitant and later seek compensation for them.

In *Mayborne,* the plaintiff cared for a well-to-do gentleman with the understanding that she would get paid the reasonable value of her services upon their termination and the gentleman's death. (See *Mayborne, supra,* 46 Cal.App. at p. 181, 188 P. 1034.) The statute of limitations did not restrict her claim because the parties' understanding showed an expectation of payment upon termination. (*Id.* at p. 181, 188 P. 1034.) [7] Hence she could sue for the lot.

7 One typical scenario for payment on termination is when services are rendered to an elderly person with the expectation that recompense will come from the person's estate. In such cases the statute of limitations does not begin to run until termination. (E.g., *O'Brien v. Fitzsimmons* (1960) 183 Cal.App.2d 231, 234, 6 Cal.Rptr. 627; *Robinson v. Chapman, supra,* 98 Cal.App. at pp. 280–281, 276 P. 1081.)

By contrast, the lack of an expectation of payment on termination made all the difference in *Corato,* where the plaintiff worked in her cohabitant's board and lodging house, with no expectation of payment on termination. Rather, the plaintiff regularly sought *immediate* payment for her services, but would end up going away mollified with an indication that she would get paid "sometime." (See *Corato, supra,* 201 Cal. at p. 160, 255 P. 825.) This went on for something like 20 years, until the cohabitant died. Under those circumstances,

138 Cal.App.4th 1408
Court of Appeal, First District, Division 5, California.

In re MARRIAGE OF Robert A. and Lynn A. WALKER.
Lynn A. Walker, Appellant,
v.
Robert A. Walker, Respondent.

No. A109284. | April 27, 2006. |
Certified for Partial Publication. *

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part I.

Synopsis

Background: Status dissolution was entered, but distribution of community assets, including the individual retirement account (IRA) that was in husband's name but managed by wife, was deferred pending trial. Following trial, the Superior Court, Lake County, No. FL046138, David W. Herrick, J., characterized the IRA as community property but, based on its finding that wife had breached her fiduciary duty to husband by failing to properly inform him of significant depletion of IRA account, awarded husband sum equivalent to wife's withdrawals from IRA and consequent tax penalties. Wife appealed.

Holdings: The Court of Appeal, Jones, P.J., held that:
[1] under version of statute governing intraspousal fiduciary duty prior to 2002 amendments, duty of disclosure regarding valuation of community assets turned upon request by either spouse for such disclosure;
[2] despite legislative declaration that 2002 amendments clarified existing law, amended statute imposed new intraspousal duty of disclosure, even absent request, and thus amended statute had retroactive effect; and
[3] amended statute creating new intraspousal duty that did not exist during marriage should not have been applied retroactively to impose duty of disclosure on wife, absent husband's request.

Affirmed in part and reversed in part.

Attorneys and Law Firms

****327** Don A. Anderson, for appellant.

E.H. La Velle, III, Misha D. Igra, Crump, Bruchler & La Velle, for respondent.

Opinion

JONES, P.J.

***1411** Appellant Lynn A. Walker (Wife) appeals the judgment that distributed community assets following the dissolution of her marriage to ***1412** respondent Robert A. Walker (Husband). She contends the trial court incorrectly valued the community real property and that there was insufficient evidence she breached her fiduciary duty to Husband.

BACKGROUND

The parties married on August 21, 1980. During the marriage and prior to his retirement, Husband contributed to a Keogh retirement fund he had opened approximately 20 years before the marriage. When he retired on February 28, 1989, he rolled the Keogh fund into an individual retirement account worth $105,000 at the time (the Morgan Stanley IRA [1]).

1 The IRA was set up with the Dean Witter brokerage firm, which later merged into Morgan Stanley.

In 1992 the parties bought a single family house in the Hidden Valley Lake development of Middletown, California (the Middletown house).

The parties separated on November 15, 2002, with Wife moving out of the Middletown house. When they separated the Morgan Stanley IRA was worth between $2,900 and $3,200.

On April 18, 2003, the Middletown house was appraised at $265,000.

On August 5, 2003, Husband petitioned for dissolution.

On December 30, 2003, the Middletown house was appraised at $303,000.

A judgment of dissolution as to status only dissolved the marriage effective July 30, 2004.

Following a trial that addressed issues of property distribution and allegations of Wife's breach of fiduciary duty, the court issued its statement of decision. Pertinent to this appeal, it assigned the Middletown house a value of $303,000, based on the expert's December 2003 appraisal and on Husband's opinion that corresponded with that appraisal. While the court found it likely the Middletown house had increased **328 in value between December 2003 and trial, it did not find adequate evidence to support Wife's higher valuation. And while both parties testified that the Morgan Stanley IRA was Husband's separate property, the court rejected Wife's argument that as a consequence of *1413 its status as Husband's separate property it was not subject to Wife's fiduciary duty. It found that the Morgan Stanley IRA, although in Husband's name, was community property due to a commingling of community and separate property funds and an inability to trace the separate property contributions. It found that Wife, who was the family bookkeeper, breached her fiduciary duty to Husband by failing to inform him of the significant depletion over the years of the Morgan Stanley IRA and of the consequent tax penalties. It found she had withdrawn $69,000[2] from the Morgan Stanley IRA without telling Husband, and that tax penalties of $2,066 had been incurred by these withdrawals.

2 This figure is taken from Husband's exhibit 50, the annual IRA checking account statements from 1998–2002. The sum of all distributions from the Morgan Stanley IRA to the IRA checking account for those five years equals $69,000.

The January 7, 2005 judgment on reserved issues awarded the Middletown house to Husband. Pursuant to Family Code section 1101, subdivision (g) it awarded Husband $71,066, the sum of Wife's withdrawals from the Morgan Stanley IRA and the tax penalties.[3]

3 Family Code section 1101, subdivision (g) provides that remedies for breach of fiduciary duty shall include an award to the other spouse of 50 percent of any asset transferred in breach of fiduciary duty.

[1] Wife timely appealed the judgment on the reserved issues.[4]

4 Husband moved to dismiss the appeal and for imposition of sanctions against Wife and her attorney on the grounds Wife was in contempt of the judgment when she filed her notice of appeal because she had failed to make monthly spousal support payments, to pay attorney fees, and to convey to Husband her community interest in an unimproved lot, all of which were ordered by the January 7, 2005 judgment. He also argues she waived her right to appeal when she accepted the benefit of the January 7, 2005 judgment, after she noticed her appeal. Specifically, he argues, the judgment ordered Husband to make an equalizing payment to her, he had done so, and she had cashed the check. He seeks sanctions, in the form of attorney fees, for having to respond to a warrantless appeal.

We deferred ruling on Husband's motion until we addressed the merits of the appeal. We now deny the motion. As to the contempt allegation supporting his motion, on December 23, 2005, the trial court found Wife was not in contempt for nonpayment or nonconveyance.

As to the "receiving benefits" basis of Husband's motion, the trial court calculated the equalization payment based on its valuation of the Middletown house and the sum charged to Wife as a result of breaching her fiduciary duty in depleting the Morgan Stanley IRA. As claims of error on appeal, Wife asserts the court should have assigned a greater value to the house and should not have found that she breached her fiduciary duty. Thus, should she prevail on appeal, she would be entitled to a greater equalizing payment. Should she not prevail, she remains entitled to the equalizing payment she received. When a judgment clearly establishes the appellant's right to recover, but the amount is less than she sought, she may accept the judgment and nevertheless appeal to claim the larger recovery. (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 744, 131 Cal.Rptr. 873, 552 P.2d 1169.) Because we deny the motion to dismiss, we also deny the request for sanctions as moot.

*1414 DISCUSSION

I. *Middletown House Valuation* **

** See footnote *, *ante*.

II. *Breach of Fiduciary Duty*

Wife contends the court erred in finding she breached her fiduciary duty owed to **329 Husband by not disclosing the depletion of funds in the Morgan Stanley IRA. She argues the Morgan Stanley IRA was Husband's separate property, and therefore her management and control thereof were not subject to a statutory breach of duty under Family Code sections 721 and 1100. Alternatively, she argues she had no duty to disclose to Husband the amount in the Morgan Stanley IRA absent his request.

for another "7 1/2 [sic: 8 1/2] years to his retirement on February 28, 1989." Seven and one-half (the number of years Husband's contributions to the fund came from community funds) is approximately 27 percent of 28 (the total number of years Husband contributed to the fund).

9 This step in Wife's calculation would have the Morgan Stanley IRA depleted completely. It overlooks the fact that, as Husband testified and Wife accepts on appeal, the Morgan Stanley IRA was worth $2,900 to $3,200 when the parties separated in November 2002.

[2] We reject Wife's argument that she cannot be liable for breach of fiduciary duty because the $69,000 she withdrew from the Morgan Stanley IRA without Husband's knowledge was Husband's separate property. First, the trial court found that the entire Morgan Stanley IRA was community property because of the commingling of community and separate funds and the inability to trace the separate contributions. Wife has not specifically challenged this finding on appeal. The most fundamental rule of appellate review is that a judgment is presumed correct, and the appealing party must affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) An issue not raised is deemed waived. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1, 27 Cal.Rptr.2d 249.) Wife's assertion on appeal that Family Code sections 721 and 1100 do not apply to breaches of fiduciary duty regarding separate property necessarily rests on a finding that the Morgan Stanley IRA was, at least in part, separate property. Because Wife has not affirmatively shown that the court erred in concluding the entire Morgan Stanley IRA was community property, she may be deemed to have waived the issue of whether the court's characterization was correct. Thus, any argument concerning whether there can be a breach of fiduciary duty in conjunction with separate property may be deemed moot.

[3] Second, even if we assume that Wife is impliedly arguing the trial court erred in characterizing the entire Morgan Stanley IRA as a community asset, we reject her argument. Our assumption is based on her appellate explanations of the separate and community values of the Morgan Stanley IRA at the time of Husband's retirement and that the community portion of the IRA was exhausted in satisfying community debts prior to 1998. As a rule, parties are precluded from urging on appeal any points that were not raised before the trial court. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411–412, 286 Cal.Rptr. 592.) To permit a party to raise a new theory is both unfair to the trial court and unjust to the opposing litigant. (*Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 503, 157 Cal.Rptr. 190.) Wife's newly-posited appellate theory of why the $69,000 is Husband's separate property is based on her apparently newly devised formula for calculating the separate and community values of the Morgan Stanley IRA in 1989 and her assertion that the community value was completely expended as of 1998 in paying community debts. Husband did not have an opportunity at trial to challenge the factual or legal bases for her calculations or assertions, nor did the trial court have the opportunity to evaluate those facts or apply them to the applicable rules governing characterization and division of marital property.

***1419** Finally, like the trial court, we deem Wife's assertion that a spouse cannot be subject to statutory breach of fiduciary duty for mismanagement of separate property to be contrary both to sound public policy and to the language of Family Code section 721, subdivision (b) which speaks of the confidential relationship between husband and wife imposing on them the duty of "highest good faith and fair dealing" and "not taking unfair advantage of the other." We can fathom no reason to distinguish between a spouse's duty to deal fairly and in good faith with separate property and her duty to deal fairly and in good faith with community property.

****333 E. *Duty to Disclose***

The fundamental reason the court found Wife breached her fiduciary duty was not simply that she made withdrawals from the Morgan Stanley IRA. It was her failure, as the family bookkeeper responsible for the parties' financial affairs, to inform Husband that the Morgan Stanley IRA was shrinking significantly each year as a result of these withdrawals and that the withdrawals had tax consequences. Wife contends she cannot be liable for breach of fiduciary duty for this reason because she had no duty to disclose the amount of funds in the Morgan Stanley IRA to Husband absent his request.

[4] Resolution of the question of whether Wife, under the facts of this case, can be liable for failure to disclose requires an examination of the history of Family Code sections 721 and 1100, subdivision (e).

i. *Original Family Code Section 721*

Family Code section 721 was enacted in 1992. (Stats.1992, ch. 162 (Assem. Bill No. 2650, § 10).) Family Code section 721, subdivision (b) provided that the confidential relationship of spouses is a fiduciary relationship subject to the same rights and duties of nonmarital business partners "as

provided in Sections 15019, 15020, 15021, and 15022 of the Corporations Code, including the following:

"1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying;

"2) Rendering upon request true and full information of all things affecting any transaction which affects the community property....

"3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse, which concerns the community property." (Fam.Code, § 721, subd. (b)(1), (2), & (3).)

***1420** In 1992, when Family Code section 721 was enacted, Corporations Code section 15019 stated: "The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them." This right of access to books was expressed in subdivision (b)(1) of Family Code section 721.

Corporations Code section 15020 stated: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." This right to full disclosure was expressed in subdivision (b)(2) of Family Code section 721.

Corporations Code section 15021 stated: "(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of this property. (2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the surviving partner." This section was expressed in subdivision (b)(3) of Family Code section 721.

Corporations Code section 15022 stated: "Any partner shall have the right to a formal account as to partnership affairs: (a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners; (b) if the right exists under the terms of any agreement; (c) as provided by Section 15021; (d) ****334** whenever other circumstances render it just and reasonable." Family Code section 721, subdivision (b) did not specifically enumerate a right to an accounting.

ii. Family Code section 1100, subdivision (e)

Family Code section 1100, subdivision (e) was enacted in the same statute as Family Code section 721, subdivision (b). (Stats.1992, ch. 162 (Assem. Bill No. 2650, § 10).) It states: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the ***1421** community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request."

The placement of the phrase "upon request" creates an ambiguity in the last sentence of Family Code section 1100, subdivision (e). It may reasonably be read as referring to both the requirement "to make full disclosure to the other spouse of all material facts, [etc.]" and the requirement "to provide equal access to all information, records, and books [etc.]." It may also reasonably be read as referring only to the latter requirement to provide access to books.

The court's task in construing a statute is, of course, to ascertain the Legislature's intent to effectuate the purpose of the statute. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743, 110 Cal.Rptr.2d 828, 28 P.3d 876.) To that end, the various parts of a statutory enactment must be harmonized by considering the particular clause in the context of the statutory framework as a whole. (*Ibid.*) Because Family Code section 1100, subdivision (e) specifically incorporates the scope of spousal fiduciary duty set forth in the simultaneously enacted Family Code section 721, and section 721 required a spouse to render true and full information "upon request," the phrase "upon request" in Family Code section 1100, subdivision (e) is most logically construed as applying to both articulated duties in subdivision (e): full disclosure of all material facts regarding the valuation of community assets *and* providing access to all records pertaining to those values.

[5] [6] We find further support for this construction from the punctuation in Family Code section 1100, subdivision (e). The "last antecedent rule" is a long-standing rule of statutory construction that provides that " 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*Renee J., supra,* 26 Cal.4th at p. 743, 110 Cal.Rptr.2d 828, 28 P.3d 876, quoting *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680, 183 Cal.Rptr. 520, 646 P.2d 191.) However, evidence that a qualifying phrase is intended to apply to all antecedents, not only the immediately preceding one, may be found when a comma separates the antecedents and the qualifying phrase. (*White, supra,* at p. 680, 183 Cal.Rptr. 520, 646 P.2d 191.) Here, the phrase "upon request" is set off from the preceding antecedent duties by a comma.

**335 Given these rules of statutory construction, we conclude that when the Legislature enacted Family Code sections 721 and 1100, subdivision (e) as part of the same statute, it intended that the duty to make full disclosure and the duty to provide equal access both turned on a request by the other spouse.

*1422 iii. *1996 Revision of Corporations Code*

In 1996, effective January 1, 1997, the sections of the Corporations Code that included the Uniform Partnership Act (UPA), including the four sections enumerated in Family Code section 721, subdivision (b), were repealed and replaced with the Revised Uniform Partnership Act (RUPA). (Stats.1996, ch. 1003 (Assem. Bill No. 583, § 2).) The essence of former Corporations Code sections 15019, 15020, and 15021 [10] is now in Corporations Code sections 16403 and 16404, but the language of the new sections is considerably broader.

10 Former section 15022 was not replaced in the new sections of Corporations Code.

Pertinent to this appeal, Corporations Code section 16403, entitled "Books and records; right of access" states, in relevant part:

"(a) A partnership shall keep its books and records, if any ... at its chief executive office.

"(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners....

(c) Each partner ... shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability, both of the following ...

(1) *Without demand,* any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partners' rights and duties under the partnership agreement or this chapter, and

(2) *On demand,* any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances." (Italics added.)

While former Corporations Code section 15020 only required partners to render information of all things affecting the partnership "on demand," the *1423 1996 statute now requires partners to furnish certain essential information to each other even if they do not demand it. [11]

11 Corporations Code section 16404, entitled "Fiduciary duties," states:

"(a) The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subdivisions (b) and (c).

"(b) A partner's duty of loyalty to the partnership and the other partners includes all of the following:

"(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

"(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

"(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

"(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

"(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any

> rights consistently with the obligation of good faith and fair dealing.
> "(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.
> "(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law.
> "(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner."
> Corporations Code former sections 15019, 15020, and 15121 did not specify that partners had a fiduciary duty or a duty of care, although case law had held that they were bound to act in highest good faith.

**336 Family Code section 721 was not simultaneously amended in 1996 to renumber its references to the Corporations Code sections so that they reflected these newly enacted sections of the Corporations Code.

iv. *2001: In re Marriage of Duffy*

In *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 111 Cal.Rptr.2d 160, the couple had a lengthy marriage, during which the husband made various investments and gave the wife varying levels of information regarding the investments. One investment was a brokerage IRA account containing nine stocks worth $482,925 in February 1995. (*Id.* at p. 928, 111 Cal.Rptr.2d 160.) On the suggestion of his broker, the husband invested the IRA account in a single company. (*Ibid.*) In May 1998 the value of the IRA account had fallen to $297,309. (*Ibid.*) There was some expert testimony that the IRA investments were risky, and if they had been invested in a more conservative manner, the *1424 yield would have been higher. (*Id.* at pp. 928, 929, 111 Cal.Rptr.2d 160.) The trial court found the husband breached his fiduciary duty of full disclosure and awarded the wife damages of $400,684. (*Id.* at pp. 926, 929, 111 Cal.Rptr.2d 160.)

The appellate court reversed. It first concluded there was no evidence that the wife sought, and the husband failed or refused to provide, information about the IRA account. (*Duffy, supra,* 91 Cal.App.4th at pp. 933, 934, 111 Cal.Rptr.2d 160.) Therefore, *Duffy* concluded there was no support for the trial court's finding that the husband breached his fiduciary duty of full disclosure upon request, as set forth in Family Code sections 721, subdivision (b)(2) and 1100, subdivision (e). (*Id.* at pp. 930, 933, 934, 111 Cal.Rptr.2d 160.)

Duffy then discussed whether the finding of breach could be upheld on the ground the husband breached some fiduciary duty other than the specified statutory duty of full disclosure upon request. (*Duffy, supra,* 91 Cal.App.4th at p. 934, 111 Cal.Rptr.2d 160.) It examined the legislative history of Family Code section 721, and concluded that by narrowing the scope of the fiduciary duty to the three rights/duties specifically enumerated in Family Code section 721, subdivision (b)(1), (2) and (3), the Legislature removed a "duty of care." *Duffy* based this conclusion on the fact the Legislature used only the word "including" before subdivisions (b)(1), (2), and (3), instead of the phrase "including, but not limited to" those three enumerated rights/duties. (*Duffy, supra,* at pp. 939, 940, 111 Cal.Rptr.2d 160.) "By limiting the rights to those enumerated, and echoed by specific Corporations Code provisions, the Legislature eliminated the possibility that [Family Code section 721] subdivision (b) could be interpreted expansively to include the duty of care a nonmarital partner owes another nonmarital **337 partner, as set forth in Corporations Code section 16404. In other words, by including certain Corporations Code provisions while eliminating the expansive words, 'but not limited to,' the Legislature necessarily excluded all other provisions" of the specified Corporations Code sections. (*Duffy, supra,* at p. 940, 111 Cal.Rptr.2d 160.)

Duffy's reference to Corporations Code section "16404" in conjunction with its discussion of Family Code section 721, subdivision (b) is, strictly speaking, inexact. When Family Code section 721, subdivision (b) was enacted in 1992, Corporations Code section 16404 did not yet exist. *Duffy's* reference to Corporations Code section 16404 reasonably assumed that the Legislature would be amending Family Code section 721, subdivision (b) to substitute Corporations Code sections 16403 and 16404, enacted in 1996, for the simultaneously repealed Corporations Code sections 15019, 15020, and 15021 that were enumerated in Family Code section 721, subdivision (b). However, *Duffy* did not compare the changes in language between the repealed Corporations Code sections and their replacement sections.

1425 v. *2002 Amendments to Family Code Section 721

In 2002, effective January 1, 2003, Family Code section 721 was amended with "the intent of the Legislature in enacting

this act to clarify that Section 721 of the Family Code provides that the fiduciary relationship between spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, and to abrogate the ruling in *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923 [111 Cal.Rptr.2d 160], to the extent [the *Duffy* ruling] conflict[s] with this clarification." (Stats.2002, ch. 310 (Sen. Bill No.1936, § 2).)

As amended, Family Code section 721 states, in pertinent part:

"(b) ... This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections *16403, 16404, and 16503* [12] of the Corporations Code, including, *but not limited to,* the following:

12 Corporations Code section 16503, included in the amended Family Code section 721, subdivision (b) authorizes and governs the effect of the transfer of a partner's transferable interest. The former Corporations Code sections enumerated in Family Code section 721, subdivision (b) did not pertain to transfers.

"(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

"(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property...."

Family Code section 1100, subdivision (e) has not been amended since its enactment in 1992. Because it adopts from Family Code section 721 the scope of spousal fiduciary duty vis a vis community personal property, as of January 1, 2003, it necessarily adopts the amended section 721.

vi. *Retroactive Effect of Amended Family Code Section 721*

[7] Critical to the resolution of this case is whether amended Family Code section 721, is retroactive, insofar as the parties separated in November 2002, before the amended statute took effect on January 1, 2003.

**338 [8] [9] [10] "A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events. [Citations.]" (*1426 *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1439, 28 Cal.Rptr.2d 726.) There is a strong presumption that statutes are to operate prospectively, absent evidence the Legislature intended them to be applied retroactively. (*Ibid.; Kizer v. Hanna* (1989) 48 Cal.3d 1, 7, 255 Cal.Rptr. 412, 767 P.2d 679.) "This long-established presumption applies particularly to laws creating new obligations, imposing new duties, or exacting new penalties because of past transactions. [Citations.]" (*Reuling, supra,* at p. 1439, 28 Cal.Rptr.2d 726.)

[11] [12] By contrast, a statute that merely clarifies, rather than changes, existing law does not operate retrospectively, even if applied to transactions predating its enactment, because the true meaning of the statute remains the same. (*In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 255, 30 Cal.Rptr.3d 5.) A clarified law is simply a statement of what the law has always been. (*Ibid.*) However, while the court may give due consideration to the Legislature's views, a legislative declaration of an existing statute's meaning is neither binding nor conclusive on the courts in construing the statute. (*Ibid.*) A court cannot accept the Legislature's statement that an unmistakable change in the statute is nothing more than a clarification and restatement of the statute's original terms. (*Id.* at p. 256, 30 Cal.Rptr.3d 5.) Legislative history may be used to assist the court's inquiry, but ultimately the court must determine whether an amendment changed or merely clarified existing law. (*Ibid.*)

The final legislative bill analysis to Senate Bill No.1936, the bill enacted as chapter 310 to amend Family Code section 721 effective January 1, 2003, states: "The effect of this bill hinges on just four little words: 'but not limited to.' The *Duffy* court found that the Legislature's failure to include these words in Family Code Section 721 meant that a spouse's duties were in fact limited to those enumerated in that Section [i.e., subdivision (b)(1), (2) & (3)]. This bill adds 'but not limited to' to clarify what the sponsor believes was the original intent of Family Code Section 721: to apply to spouses all fiduciary duties existing between nonmarital business partners under Corporations Code Sections 16403, 16404, and 16503. [13] These are duties such as to access to books and records; fiduciary duties including the duty of loyalty, the duty of care, and an obligation of good faith and fair dealing; and requirements to the transfer of a partner's transferable interest in a partnership. Applying all such duties appears to be in line both with the true intent of the Legislature in enacting Family Code Section 721...." (Sen. Com. on Judiciary, 3d reading

analysis of Sen. Bill No. 1936 (2001–2002 Reg. Sess.) as amended July 2, 2002, p. 4.)

13 The analyst overlooks that it would have been impossible for the sponsor of the original Family Code section 721 to intend in 1992, when section 721 was enacted, that it apply to "Corporations Code Sections 16403, 16404, and 16503" because those sections were not enacted for another four years.

***1427** As to the renumbered sections of the Corporations Code incorporated into the amended Family Code section 721, subdivision (b), the final analysis and the several preceding analyses state only that Corporations Code sections 15019, 15021, and 15022 have been repealed and that Senate Bill No. 1936 updates the references to refer to Corporations Code Sections 16403, ****339** 16404 and 16503, "the comparable sections included in the current, renumbered version of the Uniform Partnership Act." (Sen. Com. on Judiciary, 3d reading analysis of Sen. Bill No.1936 (2001–2002 Reg. Sess.) as amended July 2, 2002, p. 4.) None of the legislative analyses of the bill to amend Family Code 721, subdivision (b) contains any discussion of the differences in language between the repealed Corporations Code sections and the replacement sections that took effect January 1, 1997, six years before the amended Family Code section 721 took effect.

Given the comments in the legislative analyses, the specifically stated intent included in the statute itself (Stats.2002, ch. 310), and the Legislature's swift reaction to *Duffy* (see *In re Marriage of McClellan, supra,* 130 Cal.App.4th at p. 257, 30 Cal.Rptr.3d 5), we conclude the Legislature perceived the amendments to Family Code section 721, subdivision (b) as only a clarification of the law.

However, a close reading of the now-repealed Corporations Code sections enumerated in the originally enacted Family Code section 721 and the different Corporations Code sections enumerated in the amended Family Code section 721 demonstrate that the Legislature, notwithstanding its stated intention to clarify, was doing more than simply reiterating the existing state of the law. The now-repealed Corporations Code sections that the original Family Code section 721 incorporated to define the rights and duties of the spousal fiduciary relationship required only that partners provide each other *on demand* "all information of all things affecting the partnership." (Former Corp.Code, § 15020.) By contrast, the Corporations Code sections enacted in 1996, which the 2002 amendment to Family Code section 721 employs to define these rights and duties, impose a duty on partners to furnish each other *without demand* "any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties...." (Corp.Code, § 16403, subd. (c)(1).)

A statute that creates a new obligation by imposing, for the first time, a specific requirement that a spouse convey certain information about the partnership's, i.e., community's affairs, even if the other spouse has not requested this information, constitutes more than a simple clarification of existing law. It provides an "unavoidable implication that the Legislature intended" to change it. (Cf. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844, 123 Cal.Rptr.2d 40, 50 P.3d 751.) We conclude therefore ***1428** that the 2002 amendment to Family Code section 721, which based the scope of spousal fiduciary duty on duties that did not exist prior to the 2002 amendment, makes Family Code section 721 retroactive, to the extent that Corporations Code sections 16403, 16404, and 16503 impose greater duties on partners than did former Corporations Code sections 15019, 15020, 15021, and 15022.

vii. *Punitive Effect of Retroactive Application to the Present Case*

[13] It is particularly compelling to the facts of this case that amended Family Code section 721, subdivision (b) and, by extension, section 1100, subdivision (e) which applies the broad spousal fiduciary duty of section 721 specifically to the fiduciary duty regarding community personal property, should not be applied retroactively.

It is undisputed that at all times during their marriage Husband had access to the Morgan Stanley IRA statements and the IRA checking account. Wife did not hide these documents. There is no evidence ****340** that Husband ever asked Wife for information regarding the Morgan Stanley IRA, or that he did so inquire and she misrepresented its financial status, or that she used the Morgan Stanley IRA funds only to her advantage and patently to Husband's disadvantage. Indeed, the evidence is that Wife used the funds for community purposes, such as trips, taxes, and household expenses. There is no evidence that she used them, for example, to support any clandestine self-indulgent behavior. There is no evidence Husband was prevented from inquiring about the IRA documents due to a mental or physical disability. Nor can Husband be deemed naïve about financial matters generally. He had owned an insurance agency, had a brokerage account for 40 years before he retired, was familiar with the concept that mutual funds

allow for diversification so as to reduce investment risk, and had purchased, sold, and refinanced real property.

As a recognized authority on the subject of retroactive and prospective application of statutes has stated: "[R]etroactive laws are characterized by want of notice and lack of knowledge of past conditions and [they] disturb feelings of security in past transactions." (2 Sutherland (5th ed. 1993) Statutory Construction, § 41.04, p. 350.) To penalize Wife now for breach of a statutory spousal duty that did not exist during the parties' marriage would disrupt the repose that should follow the actions she undertook in accordance with the established customs and practices of their marriage and which were intended to serve their marital community, not her personally.

***1429 DISPOSITION**

The judgment is reversed to the extent it awards Husband $71,066, representing withdrawals from the Morgan Stanley IRA from 1998 to 2002 and attendant tax penalties. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

We concur: SIMONS and GEMELLO, JJ.

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131 Cal.App.2d 700
District Court of Appeal, First
District, Division 1, California.

John Maria MONICA, Plaintiff and Respondent,
v.
Manuel PELICAS, Defendant, and
Arminda Pelicas, also known as Irma Pelicas and
Mrs. Irma Pelicas, Defendant and Appellant.

No. 16205. | March 22, 1955. |
Rehearing Denied April 21, 1955.

Action seeking to have the plaintiff declared an equitable owner of an undivided fractional interest in a house and lot which defendants acquired as joint tenants. From a judgment for plaintiff in the Superior court, County of Alameda, Ralph E. Hoyt, J., the defendant appeals. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported judgment for the plaintiff, and that where defendant obtained money from joint bank account of plaintiff without consideration and applied it to an unauthorized use in violation of trust which plaintiff had reposed in them, defendants were involuntary trustees of the house and lot for the benefit of plaintiff, and that plaintiff's interest therein was determined by the ratio which amount of his money used bore to amount of entire purchase price.

Judgment affirmed.

Attorneys and Law Firms

****270** ***701** Standley Walter, san Francisco, for appellant.

Wagener & Brailsford, Oakland, for respondents.

Opinion

FRED B. WOOD, Justice.

The judgment declares that plaintiff is and ever since February 27, 1948, has been the equitable owner of an undivided fractional interest in a house and lot which defendants Manuel and Arminda Pelicas as joint tenants acquired on that date.

Defendant-appellant Arminda Pelicas claims the evidence does not support the findings of fact and conclusions of law upon which the judgment is based.

The principal findings are these: Plaintiff can neither read nor write. He speaks English only slightly and with considerable difficulty. He and Arminda opened a savings account in joint tenancy. At all times the money deposited was the sole money of plaintiff. The account stood in their names for purposes of convenience only, without intention at any time of passing ownership or title thereto to Arminda. Plaintiff at no time gave Arminda permission to use the funds on deposit in the account for the purpose of purchasing a house and lot in the name of herself and her former husband, defendant Manuel Pelicas; nor to take title in her name alone. On February 24, 1948, the sum of $6,448 was withdrawn from the account, without plaintiff's knowledge or consent, and immediately applied by Manuel and Arminda to the $15,125 purchase price of a house and lot, Manuel and Arminda taking title as grantees in joint tenancy. Later, Manuel and Arminda were divorced and the divorce decree awarded the house and lot to Arminda as her sole and separate property, whereupon Arminda filed a declaration of homestead upon the property. On July 9, 1948, Manuel and Arminda executed and delivered to plaintiff a promissory note in the principal sum of $6,000 with interest at one percent per annum. The note was made at the suggestion of the defendants in order that plaintiff might have some written evidence of their obligation to him. It is not true that the parties reached an agreement whereby it was determined that the defendants owed plaintiff the sum of $6,000 evidenced by said promissory note.

The trial court concluded that plaintiff was entitled to a judgment declaring that he is equitable owner of an undivided 6448/15125ths interest in the house and lot.

***702** **[1]** Defendant Arminda Pelicas [1] challenges (1) the finding that plaintiff at no time gave her permission to use the funds in the bank account for the purpose of purchasing a house and lot in her name alone or in her name and that of her former husband Manuel, (2) the finding that the money was withdrawn from the account without plaintiff's knowledge and consent; and (3) the finding concerning the $6,000 note. [2]

1 Defendant Manuel Pelicas filed a general denial. He did not testify, nor did he appeal.

2 Upon oral argument defendant's counsel advanced the view that plaintiff had not adequately pleaded a constructive trust. That point is not well taken. The facts pleaded in the second count of the amended complaint clearly support a constructive trust as proved by the evidence and found by the trial court.

**271 [2] We have examined the record and are convinced that all of the findings, including the challenged findings, are amply supported by the evidence. A summary of some of the significant portions of the supporting testimony follows. Plaintiff testified that he told Manuel that Manuel could use the money to buy a house; that if Manuel ever saw a house that he liked and wanted Manuel could use the money in this account. Asked if he had not told Arminda's father that Arminda could use the money in the savings account whenever she needed it, plaintiff said: 'No, sir, Manuel Pelicas is all' and 'I said I told Manuel Pelicas that he could use my money to buy a house whenever he saw fit, but no one else.' Asked if he ever told Arminda Pelicas she could withdraw $6,448 on February 24, 1948, plaintiff replied: 'To her, no * * * I never gave her the authority to take the money, but I did tell her husband he could take the money.' Asked if Arminda was to use the money in this account to buy a house in plaintiff's name, plaintiff replied: 'I did not say my name, just to help him buy a hosue.' Arminda's mother said plaintiff discussed this savings account with her many times. Asked why plaintiff would speak about his account, the mother said: 'I told you he got so much money in the bank, to help Manuel Pelicas.' Asked what plaintiff said, she replied: 'Mr. Monica say he like to help Mr. Pelicas to boy the home for himself.'

Arminda testified that her husband told her to withdraw the money and that the whole $6,448 went into the house.

The $6,448 was withdrawn February 24, 1948, while plaintiff was at sea. He went to sea January 26 and returned June 27, 1948.

*703 When plaintiff returned from sea, Manuel informed him they had taken the money from the bank to buy a house. Asked if there was any conversation between plaintiff and Manuel as to how Manuel was to withdraw the money, plaintiff said: 'No. All he said to me was that he went and got the money to buy the house.'

Manuel told plaintiff he was going to make out a paper to show that he owed plaintiff the money; in case Manuel ever had an accident he wanted plaintiff to know that his money was secure; plaintiff did not ask Manuel for the note; it was Manuel's idea. Arminda also testified the giving of the note was Manuel's wish.

[3] [4] It is true that plaintiff seemed a little uncertain whether, upon his return from the sea, Manuel told plaintiff that 'I' (Manuel) or 'we' (Manuel and Arminda) had used the money to buy a home, but, whichever way Manuel said it, plaintiff was not thereby informed that title was taken as joint tenants instead of solely in the name of Manuel. Accordingly, plaintiff's acquiescence in the transaction at that time (he had said it was all right, he had no objection to it) did not necessarily amount to ratification of the transaction, nor did it necessarily indicate that he had previously authorized such a transaction. That, doubtless, is the way the trial judge viewed it, considered in the light of the findings which he made. As held in Stromerson v. Averill, 22 Cal.2d 808, 814–815, 141 P.2d 732, 736: 'Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony and it was for the trier of the fact to weigh the evidence and determine his credibility. 10 Cal.Jur. p. 1146, § 364. Furthermore, it is the duty of the court in support of a judgment on appeal to harmonize apparent inconsistencies wherever possible. 2 Cal.Jur. p. 938, § 551.'

Thus it is clear that the evidence supports the findings of fact.

The legal conclusions which the trial court drew seem logically to follow.

[5] [6] Plaintiff's money was taken and used for a purpose different from that which he authorized. He authorized its use to buy a home for Manuel, not for Arminda, not for Manuel and Arminda. Arminda testified that the money in the bank belonged to plaintiff. She and Manuel obtained the money from plaintiff without consideration and applied it to a use unauthorized by the plaintiff and in violation of *704 the trust and confidence which he had reposed in them. This, if not actually fraud, was at least a 'mistake, * * * the violation of a trust, or other wrongful act' within the meaning of those terms as used in **272 section 2224 of the Civil Code and thus constituted Manuel and Arminda 'involuntary trustee[s] of the thing gained [the house and lot purchased], for the benefit of the person [plaintiff] who would otherwise have had it.' The amount of plaintiff's fractional interest thus created in the property is determined by the ratio which the amount of his money thus used, $6,448, bears to the amount of the entire purchase price, $15,125. See Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 490–491, 111 P. 360.

[7] [8] 'The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. The person holding the property may have acquired it through fraud, undue influence, breach of trust, or in any other improper manner and he is usually personally liable in damages for his acts. But the one whose property has been taken from his is not relegated to a personal claim against the wrongdoer,

which might have to be shared with other creditors; he is given the right to a restoration of the property itself. The title holder is, therefore, said to be a constructive trustee holding title to the property for the benefit of the rightful owner, but he is not charged with responsibility based upon either the actual or presumed intention of the parties. (Sec. 2224, Civ.Code; Burns v. Ross, 190 Cal. 269, 212 P. 17; Restatement Resitution, sec. 160.)' Bainbridge v. Stoner, 16 Cal.2d 423, 428–429, 106 P.2d 423, 427. 'A constructive trust is imposed not because of the intention of the parties but because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.' Sampson v. Bruder, 47 Cal.App.2d 431, 435, 118 P.2d 28, 30. 'A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship.' Mazzera v. Wolf, 30 Cal.2d 531, 535, 183 P.2d 649, 651. See also Heinrich v. Heinrich, 2 Cal.App. 479, 482–484, 84 P. 326; 25 Cal.Jur. 145–148, Trusts § 19.

[9] The evidence concerning the making of the note and the purpose of the note was competent and relevant. It did not vary the terms of the writing. It showed that the writing *705 never took effect as the embodiment of an obligation, upon the familiar principle that evidence is admissible to show that the parties never intended a writing to constitute a contract. See Spade v. Cossett, 110 Cal.App.2d 782, 784, 243 P.2d 799, and authorities there cited; also, Foster v. Keating, 120 Cal.App.2d 435, 453, 261 P.2d 529. Accordingly, the trial court correctly awarded plaintiff no monetary recovery except his costs of suit.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Parallel Citations

281 P.2d 269

End of Document

144 Cal.App.4th 1087
Court of Appeal, Third District, California.

In re the MARRIAGE OF
Constance P. and Charles A. LENI.
Constance P. Leni, Respondent,
v.
Charles A. Leni, Appellant.

No. C047305. | Nov. 15, 2006.

Synopsis

Background: Wife filed for dissolution. The Superior Court, Placer County, Colleen M. Nichols, Court Judge, determined the character of the marital residence, and ordered husband to make an equalizing payment. Husband appealed.

Holdings: The Court of Appeal, Raye, J., held that:
[1] wife did not have fiduciary duty to sell family residence to husband at price she had set for third party;
[2] escrow instructions providing that proceeds from sale of parties' previous house would be "split 50/50" did not suffice to transmute community to separate property; but
[3] husband was not obliged to reimburse community for funds he used to care for his infirm mother.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

**887 Herman Franck, Sacramento, for Appellant.

Franklin W. King, Orangevale, for Respondent.

Opinion

RAYE, J.

*1090 During the 17 years it took the Lenis to end their 25–year marriage, they sold one house, split the proceeds, and bought another one. Charles A. Leni (Husband) appeals the judgments, contending that Constance P. Leni (Wife) breached a fiduciary duty by refusing to sell him the second house in 1996. [1] He also argues the trial court erred by characterizing *1091 the proceeds of the sale of the first house as community property and, as a result, compelling him to reimburse the community for the proceeds he used to take care of his mother. We reverse in part.

[1] Some of the issues were tried and the initial judgment was entered May 11, 2004. Following a second trial, another judgment was entered December 13, 2004. We granted Husband's motion to consolidate the appeals of both judgments.

FACTS

The parties were married in 1977. Eight years later they separated, and Wife filed her first petition for dissolution of the marriage. During the separation, they sold their house and the escrow instructions provided, "proceeds to be split 50/50." Prior to the close of escrow, however, the parties reconciled and dismissed the petition. Nevertheless, the escrow instructions were never amended, and therefore the sales proceeds were disbursed following their reconciliation in equal shares to each of them.

In 1992 Wife again filed for divorce. In December Husband agreed to vacate the house, and they both agreed the monthly fair market rental value of the house was $1,050. Three years later they decided to sell the house. Wife agreed to a purchase offer of $147,500, but Husband refused to accept the offer. Later that year he told Wife he wanted to purchase the house. He documented that desire as a notation on many of his support checks. At the time of the eventual trial of the dissolution in 2003, Wife continued to reside in the house.

The trial court ruled that Wife did not have a fiduciary duty to sell the house to Husband in 1996 even though she was willing to sell it to a third party. The court also ruled that the notation in the escrow instructions to split the proceeds of the sale did not constitute a valid written transmutation of community property to Husband's separate property. Because he spent community funds to satisfy his personal obligation to care for his mother, the court ordered Husband to make an equalizing payment to Wife of $12,000. Husband appeals.

DISCUSSION

I

[1] No one disputes that in managing community property, spouses have fiduciary **888 duties to each other. (Fam.Code, §§ 721, 1100; *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992, 80 Cal.Rptr.2d 699.) Family Code section 721, subdivision (b) [2] provides, in pertinent part, that "a husband *1092 and wife are subject to the general rules

governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code...."

2 All further statutory references are to the Family Code unless otherwise indicated.

Husband asserts the far-fetched notion that the incorporation of these sections of the Corporations Code imposes on a spouse all the duties and obligations of an officer or director of a corporation. Husband conceded at trial that he had no cases to support his novel construction of the statute. The court rejected his expansive definition of a fiduciary duty to compel a spouse, after separation and in the absence of a contract, to give the other spouse a right to first refusal on the sale of a community asset.

Although Husband's precise legal theory is hard to identify, we reject an expansion of a spouse's fiduciary duties beyond the Family Code and, in particular, to encompass the entire Corporations Code. Neither the statute nor the case upon which Husband now relies supports an implied-in-law right of first refusal to a community asset.

Husband fails to notice the express language of Family Code section 721, subdivision (b), wherein the Legislature explicitly defines the rights and duties of spouses that are analogous to those of nonmarital business partners. Each subsection parallels the section of the Corporations Code with a comparable duty. For example, Family Code section 721, subdivision (b)(1) requires each spouse to provide access "at all times to any books kept regarding a transaction for the purposes of inspection and copying" just as Corporations Code section 16403 gives a partner the right to have access to, inspect, and copy books of the account. Similarly, Family Code section 721, subdivision (b)(2) provides that each spouse must render, upon request, "true and full information of all things affecting any transaction which concerns the community property" in the same way Corporations Code section 16403, subdivision (c)(1) confers the right of disclosure, on demand, of information regarding the partnership business. And finally, Family Code section 721, subdivision (b)(3) mimics Corporations Code section 16404 by requiring an "[a]ccounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property." Similarly, Corporations Code section 16404 requires accounting for the benefits or profits derived from a partnership or benefits derived by a partner's use of partnership property. Thus, the reference to these discrete sections in the Corporations ***1093** Code by no means broadens a spouse's duties and obligations to include those of officers and directors of a corporation beyond providing access, information, and an accounting.

Husband does not accuse Wife of failing to provide him access to any books and records, to provide him information upon request, or to provide him an accounting. Since Wife never sold the house, there ****889** simply was nothing to account. But extrapolating far beyond the words of the statute, Husband insists that once Wife evidenced a willingness to sell the house in 1996 to a third party, she had a fiduciary obligation under the Corporations Code to sell it to him for the same price. As the court pointed out, however, he failed to assert his claim in any family law proceeding at the time and waited until 2003 to argue that he was entitled to the house at the price Wife had been willing to sell it in 1996 before he refused to complete the sale.

Husband argues that he did not forfeit his right to the house by failing to assert it more forcefully. His behavior, one way or the other, begs the threshold question whether Wife had a fiduciary duty to give Husband a right of first refusal on the house in the absence of a contract to do so. Although Husband conceded at trial the parties had not entered into a contract according him any right of first refusal, he argues on appeal that the trial court precluded him from putting on evidence to demonstrate that Wife had breached a fiduciary duty. It is not clear that he was precluded from introducing evidence during the trial. In any event, the evidence is irrelevant because, as he seems to appreciate, the existence of the kind of fiduciary duty he proposes is a question of law. He had ample opportunity to make an offer of proof, and based on that offer, the court properly ruled Wife had no fiduciary duty as a matter of law. We review the court's ruling de novo. Husband's obstacle is not the scope of appellate review or the quality or quantum of evidence, but the absence of legal grounds to support his contention.

Relying on *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 111 Cal.Rptr.2d 160 (*Duffy*), Husband claims, "Family law proceedings look to California Corporate law for the substantive rules of fiduciary duties." (*Id.* at p. 930, 111 Cal.Rptr.2d 160.) With corporate law as his platform, he

leaps to the conclusion that the sale of the house constituted a "corporate opportunity," and pursuant to the corporate opportunity doctrine, Wife was obligated to give him the right of first refusal on the house. Wife points out that even if the corporate opportunity doctrine applied, her duty would have been to the corporation or, by analogy, to the community and not to Husband personally. Since she retained the house, she did nothing in derogation of the rights of the ***1094** community. Rather, as Wife argues, she merely preserved it for the benefit of the community.

Duffy, supra, 91 Cal.App.4th 923, 111 Cal.Rptr.2d 160, does not stand for the wholesale proposition suggested by Husband that the fiduciary duties of spouses are defined in the Corporations Code.[3] The court in *Duffy* discussed the sections of the Corporations Code expressly identified in Family Code section 721, subdivision (b). We reject Husband's attempt to read far more into the case and the statute than either the court or the Legislature could have possibly intended.

[3] Indeed, the court in *Duffy* declined to expand the scope of the fiduciary duty set forth in Family Code section 721 beyond the specifically enumerated sections of the Corporations Code. While the Legislature later amended section 721 with the intent of abrogating portions of the *Duffy* decision, the amendments do not assist Husband. (See *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1425, 42 Cal.Rptr.3d 325.)

The Family Code itself describes the duty of a spouse during separation to give notice of a business or investment opportunity arising as a result of community investments. "The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents ****890** itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity. In the event of nondisclosure of an investment opportunity, the division of any gain resulting from that opportunity is governed by the standard provided in Section 2556." (§ 2102, subd. (a)(2).)

In re Marriage of Hixson (2003) 111 Cal.App.4th 1116, 4 Cal.Rptr.3d 483 (*Hixson*) does not allow a spouse to recover on a corporate opportunity theory as Husband asserts. In fact, the court rejected the wife's argument that her estranged husband had the duty to share an investment opportunity after the community's investments had been distributed. The court wrote, "We have not been directed to any authority, and have found none, which creates any duty of disclosure with respect to property which has been distributed as separate property." (*Id.* at p. 1125, 4 Cal.Rptr.3d 483.) Citing section 2102, the court explained that "[a] duty to share business opportunities following separation is only imposed with respect to property which has not been distributed as separate property or otherwise adjudicated." (*Hixson, supra,* 111 Cal.App.4th at p. 1125, 4 Cal.Rptr.3d 483.)

***1095** Husband did not argue at trial that Wife violated section 2102, but he quotes the statute in his reply brief without explaining how its terms apply here. They do not. Wife did not fail to disclose or hide an investment opportunity from Husband to share. Indeed, she kept the house on behalf of the community and he ultimately shared in the appreciation of its value. Since the Family Code ensures that spouses cannot be excluded from opportunities arising out of community investments, there is no need or room for husband's corporate opportunity theory imported from the Corporations Code.

In *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 68 Cal.Rptr.2d 324 (*d'Elia*), the Fourth District Court of Appeal rejected a similar attempt to sidestep the Family Code by applying securities fraud laws to marital settlement agreements. The court concluded: "Here the defendant spouse's duties of disclosure on which the plaintiff predicated her securities fraud case arose out of the *family* law, not the securities law, and it is therefore unfair to allow the plaintiff to assert a *securities* claim based on family-law-imposed duties of disclosure." (*Id.* at p. 419, 68 Cal.Rptr.2d 324.) Similarly, Wife's fiduciary duties to Husband arose under the family law, and were described and defined in the Family Code. As the court explained in *d'Elia,* it would be both inappropriate and unwise to enlarge a family law claim under the Family Code to include business rights and responsibilities of an entirely different nature.

II

[2] Husband next insists that the proceeds from the sale of the parties' house in 1986 were transmuted from community

33 Cal.App.4th 277
Court of Appeal, Fourth District, Division 1, California.

In re the Marriage of Judy and Clarence HAINES.
Judy A. HAINES, Appellant,
v.
Clarence HAINES, Respondent.

No. D016555. | March 21, 1995.
| Rehearing Denied April 6, 1995.

Wife filed for dissolution of marriage. The Superior Court, San Diego County, No. D280870, Alan B. Clements, Commissioner, dissolved the marriage and awarded husband reimbursement of his separate property contribution to acquisition of couple's residence. Wife appealed. The Court of Appeal, Haller, J., held that: (1) husband's acquisition of wife's interest in marital residence by quitclaim deed raised presumption of title in conflict with community property presumption; (2) presumption of undue influence, rather than presumption of title, applied to transaction; and (3) wife successfully proved her contract defenses to quitclaim deed by a preponderance of the evidence and was thus entitled to have quitclaim deed set aside and marital residence allocated to both spouses as community property.

Reversed.

Attorneys and Law Firms

**676 *282 Sharron Voorhees, San Diego, for appellant.

Kim W. Cheatum, San Diego, as amicus curiae, on behalf of appellant.

Stephen E. Hartwell, San Diego, for respondent.

Opinion

HALLER, Associate Justice.

This case presents the issue of whether Evidence Code [1] section 662, the common law presumption in favor of title, and its concomitant requirement of clear and convincing evidence to rebut the presumption, properly apply in family law proceedings when there is a conflict with the presumption that a husband and wife occupy a confidential relationship in their transactions with each other.

1 All subsequent statutory references are to the Evidence Code unless otherwise specified.

Judy A. Haines appeals a portion of a judgment of dissolution entered November 1, 1990, granting Clarence Haines reimbursement for his separate property contribution to the acquisition of the couple's residence.

Judy's major assignment of error is the trial court improperly applied section 662, holding her to the burden of clear and convincing evidence in her attempts to void a 1987 quitclaim deed in which she deeded her interests in the residence to Clarence. Clarence later conveyed the residence to *283 himself and Judy as joint tenants, thereby restoring the status of the residence to community property, which was the status of the property at the time of the dissolution. In the dissolution proceeding, the trial court awarded Clarence reimbursement for this separate property contribution. Among other things, Judy argues preponderance of the evidence, a burden she successfully met below, is the appropriate burden of proof in proceedings under the former Family Law Act. [2]

2 The former Family Law Act (former Civ.Code, § 4000 et seq.) was enacted in 1969, operative January 1, 1970. (Stats.1969, ch. 1608, § 8, p. 3314.) Effective January 1, 1994, the Civil Code provisions were repealed and reenacted in various sections in the new Family Code. (Stats.1992, ch. 162, § 10; Stats.1993, chs. 219, 876.)
Since the parties briefed this case in 1993 with references to then-existing Civil Code sections, we shall quote the former Civil Code sections as well, with references, where it is applicable, to the Family Code [in brackets], where it is applicable.

**677 Amicus curiae presents two arguments. First, it questions whether section 662 ever applies in marital disputes. Alternatively, it argues that if section 662 does apply, it conflicts with—and must yield to—the presumption arising from the requirement that a husband and wife occupy a confidential relationship in their transactions with each other (see former Civ.Code, § 5103 [Fam.Code, § 721]). Finding merit in this latter argument, we conclude section 662 should not apply in marital proceedings when such a conflict appears.

FACTS

Judy and Clarence married on November 13, 1981. They had been married seven years and four months when they separated on March 6, 1989. During the marriage, the family residence was at 7613 Teebird Lane in San Diego.

Clarence purchased the Teebird Lane residence in May 1978, while married to his previous wife, Elsa. Elsa's mother

are conveyed between spouses by quitclaim deed, title is presumptively held as shown in the deed. (*Id.* at pp. 496–497, 257 Cal.Rptr. 397.) *Broderick*, however, is not controlling here, for Mrs. Broderick's attempt to set aside the quitclaim deed on the basis of duress was not supported by substantial evidence; indeed the case does not even address the issue of the evidentiary standard. (*Id.* at p. 499, 257 Cal.Rptr. 397.) Here, the trial court found Judy proved by a preponderance of the evidence her claim of duress and other contract defenses to the deed; she lost because she did not prove them by clear and convincing evidence.

293 D. *Transmutation Rules

[18] **[19]** The manner in which Clarence acquired the residence in 1987 also is significant because it was a transmutation—an interspousal transaction or agreement which works a change in the character of the property —and special rules govern transmutations. (See generally, Fam.Code, § 850 et seq.)

The validity of a transmutation is dependent on a number of factors. Among these are (1) transmutations made on or after January 1, 1985, [8] must be in writing and contain an "express declaration" by the spouse whose interest in the property is adversely affected (former Civ.Code, § 5110.730, subd. (a) [Fam.Code, § 852, subd. (a)]); see also *Estate of MacDonald* (1990) 51 Cal.3d 262, 272–273, 272 Cal.Rptr. 153, 794 P.2d 911) and (2) spouses are subject to special standards of disclosure towards each other with respect to property, based on their confidential and fiduciary relationship (former Civ.Code, §§ 5103, 5125 [Fam.Code, §§ 721, 1100]).

8 Transmutations of property made before January 1, 1985, are still governed by the law that existed before that date. (See Fam.Code, § 852, subd. (e).) Under the former law, a transmutation could be made by written or oral agreement. No particular formalities were required for an effective transmutation except that the agreement be fair and based on full disclosure of relevant facts. (*Estate of Wilson* (1976) 64 Cal.App.3d 786, 798, 134 Cal.Rptr. 749.) The mutual consent of the spouses constituted sufficient consideration to support the transmutation. (*Ibid.*)

[20] Statutorily, spouses have the right to enter into transactions with each other as well as other persons. (Former Civ.Code, § 5103, subd. (a) [Fam.Code, § 721, subd. (a)].) However, that same statute also states that interspousal transactions must comport with the rules controlling the actions of persons occupying confidential relations with each other. (Former Civ.Code, § 5103, subd. (b) [Fam.Code, § 721, subd. (b)].) Thus, the competence of spouses to engage in transactions with each other is subject to the circumstances being pleasing to the fiduciary standard. (*Locke Paddon v. Locke Paddon* (1924) 194 Cal. 73, 80, 227 P. 715; see also Recommendation Relating to Marital Property Presumptions and Transmutations (1983) 17 Cal.Law Revision Com.Rep. 205, 224 [Spouses who transmute property "are subject to ... the special rules that control the actions of persons occupying confidential relations with each other. See [Civil Code] Section 5103."].)

[21] When an interspousal transaction advantages one spouse, "[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence." (*Brison v. Brison* (1888) 75 Cal. 525, 529, 17 P. 689.) "Courts of equity ... view gifts and contracts which are made or ***294** take place between parties occupying confidential relations with a jealous eye." (*Payne v. Payne* (1909) 12 Cal.App. 251, 254, 107 P. 148 [setting aside of deed from enfeebled, elderly woman to daughter-in-law upheld on grounds of undue influence even though no proof of fraud or deceit].)

[22] Because transmutations must conform to the legal standard codified in former Civil Code section 5103, subdivision (b) (Fam.Code, § 721, subd. (b)), where the transmutation is evidenced by a deed as is the case here, the presumption of undue influence ****684** arising from advantage necessarily conflicts with the common law presumption of title, codified in section 662.

IV. *Conflicting Presumptions*

A. *Section 662—Promoting Stability of Title*

Section 662 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."

[23] The Comment of the Law Revision Commission states: "Section 662 codifies a common law presumption recognized in the California cases. The presumption may be overcome only by clear and convincing proof. [Citing *Olson v. Olson* (1935) 4 Cal.2d 434, 437, 49 P.2d 827; *Rench v. McMullen* (1947) 82 Cal.App.2d 872, 187 P.2d 111.]" (7 Cal.Law

Revision Com.Rep. (1965) pp. 111–112.) The presumption is based on promoting the public "policy ... in favor of the stability of titles to property." (See § 605.) "Allegations ... that legal title does not represent beneficial ownership have ... been historically disfavored because society and the courts have a reluctance to tamper with duly executed instruments and documents of legal title." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 489, 286 Cal.Rptr. 40, 816 P.2d 892.)[9]

9 We note there is only a limited range of issues for which a party is held to the high evidentiary standard of clear and convincing evidence. (2 Strong, McCormick on Evidence (4th ed. 1992) § 340, p. 441; see also 1 Witkin, Cal.Evidence (3d ed. 1986) § 161, pp. 138–139.) Included in this limited range are claims to change the ostensible character of a duly executed deed that purports to convey property. (See *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, 58 P. 543 [citing " 'the security of titles and sound public policy' " as among the reasons for the high evidentiary standard]; *Spaulding v. Jones* (1953) 117 Cal.App.2d 541, 545, 256 P.2d 637.)

Section 662 is concerned primarily with the stability of titles, which obviously is an important legal concept that protects parties to a real property transaction, as well as creditors. Here, however, our focus is on characterization of marital property as affected by a transmutation by quitclaim deed. The issue is how property should be divided between spouses ***295** upon dissolution. This case does not involve third parties nor does it place at risk the rights of a creditor. In any event, we note the law regarding transmutations makes reference to third party rights and affords protections against fraud in transmutations as follows: (1) a transmutation is subject to the laws governing fraudulent transfers (former Civ.Code, § 5110.720 [Fam.Code, § 851]); and (2) a transmutation of real property is not effective with respect to third parties that do not have notice of the transmutation unless it is recorded (former Civ.Code, § 5110.730, subd. (b) [Fam.Code, § 852, subd. (b)]). Thus, concerns of stability of title are lessened in characterization problems arising from transmutations that do not involve third parties or the rights of creditors.

B. *Former Civil Code section 5103—Mutual Accountability for Spouses*

At the time of trial, former Civil Code section 5103, subdivision (b), provided in pertinent part that "in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons occupying confidential relations with each other."[10] As clarified by later ****685** legislation (see fn. 10, *ante*), this confidential spousal relationship imposes a duty of the highest good faith and fair dealing on each spouse, and ***296** neither shall take any unfair advantage of the other." (See now Fam.Code, § 721, subd. (b).)

10 The original version of former Civil Code section 5103 was contained in Civil Code section 158, which was enacted in 1872. Civil Code section 158 was repealed in 1969 and replaced by Civil Code section 5103. (Stats.1969, ch. 1608, § 3, p. 3313 & § 8, p. 3338.) Civil Code section 5103 was amended in 1984 (Stats.1984, ch. 892, § 2, p. 2986), in 1986 (Stats.1986, ch. 820, § 13, p. 2735) and in 1991 (Stats.1991, ch. 1026, § 2, pp. 4139–4140) before it was repealed in 1992 and replaced with Family Code section 721, effective January 1, 1994 (Stats.1992, ch. 162, § 10, operative Jan. 1, 1994).

The version of former Civil Code section 5103, subdivision (b), in effect at the time of trial read as follows: "(b) Except as provided in Sections 143, 144, and 146 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons occupying confidential relations with each other." (Stats.1986, ch. 820, § 13, p. 2735.)

As a result of the 1991 amendment, subdivision (b) of former Civil Code section 5103 read as follows: "(b) Except as provided in Sections 143, 144, 146, and 16040 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 15019, 15020, 15021, and 15022 of the Corporations Code, including the following: ...." (Stats.1991, ch. 1026, § 3, pp. 4139–4140.)

In an uncodified section of the 1991 legislation, the Legislature expressed the following intent: "The Legislature finds and declares that it is the public policy of this state that marriage is an equal partnership and that spouses occupy a confidential and fiduciary relationship with each other, whereby each spouse places trust and confidence in the integrity, honesty and fairness of the other spouse. Therefore by this act, the Legislature intends to *clarify* the management standards controlling Sections 5103 and 5125 of the

> Civil Code." (Stats.1991, ch. 1026, § 1, p. 4139, italics added.)

In *Estate of Cover, supra,* 188 Cal. at pages 143 to 144, 204 P. 583, the Supreme Court observed:

> "It is the rule in this state that transactions between husband and wife shall be subjected to the general rule which controls the actions of persons occupying confidential relations with each other, ... which, when applied to the relation of husband and wife, has been interpreted to mean that 'in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites and of thereby overcoming the presumption.' [Citations.]"

In *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 88, 260 Cal.Rptr. 403, the Court of Appeal observed:

> "The marriage relationship alone will not support a presumption of undue influence by one spouse over the other where the transaction between them is shown to be fair. But, where one spouse admittedly secures an advantage over the other, the confidential relationship will bring into operation a presumption of the use and abuse of that relationship by the spouse obtaining the advantage."

Here, where Judy transferred her interest in real property to Clarence for his co-signature on an automobile loan—clearly inadequate consideration for execution of the quitclaim deed—Clarence properly should have borne the burden of rebutting the presumption of undue influence before the 1987 quitclaim deed can be confirmed. (*Estate of Cover, supra,* 188 Cal. at p. 143, 204 P. 583; *Barney v. Fye* (1957) 156 Cal.App.2d 103, 107, 319 P.2d 29.) To demonstrate the advantage was not gained in violation of the confidential relation between marital partners, Clarence's burden properly should have been to prove the quitclaim 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." (*Brown v. Canadian Indus. Alcohol Co.* (1930) 209 Cal. 596, 598, 289 P. 613; *In re Marriage of Baltins, supra,* 212 Cal.App.3d at p. 88. 260 Cal.Rptr. 403.)

The concerns of former Civil Code section 5103 (Fam.Code, § 721) are with relational issues such as unfairness and advantage. In a sense, the statute is one of mutual accountability, requiring each spouse to show his or her conduct in connection with an interspousal transaction conformed to the legal standard codified in former Civil Code section 5103, subdivision (b) (Fam.Code, § 721, subd. (b)).

C. *The Conflict Between Presumptions in this Case*

We are dealing here with two rebuttable presumptions that under the facts of this case are in irreconcilable conflict. "A presumption is an ***297** assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." (§ 600, subd. (a).) The trier of fact is required to assume the existence of the presumed fact "unless and until evidence is introduced which would support a finding ****686** of its nonexistence, in which case the trier of fact shall determine the existence of nonexistence of the presumed fact from the evidence and without regard to the presumption." (§ 604.)

Section 662 establishes a rebuttable presumption in favor of title. As applied here, it placed the burden on Judy to prove by clear and convincing evidence [11] that her contract defenses (see Civ.Code, § 1567) are valid and the 1987 quitclaim deed should be set aside.

11 In addition to being a presumption affecting the burden of producing evidence, section 662 is a presumption affecting the burden of proof. (§§ 601, 606.)

[24] Under former Civil Code section 5103, subdivision (b), and related case law governing the duties of trustees, [12] a rebuttable presumption of undue influence arises when one spouse obtains an advantage over another in a community property transaction. Had the presumption been applied here, it would have placed the burden on Clarence to show the 1987 quitclaim transaction was *not* consummated in violation of his fiduciary duties. The presumption that the advantage was gained by the exercise of undue influence continues until it is dispelled. (*Matassa v. Matassa* (1948) 87 Cal.App.2d 206, 215, 196 P.2d 599.) The burden of dispelling the presumption rests on the spouse advantaged by the transaction. (*Estate of Cover, supra,* 188 Cal. at p. 143, 204 P. 583.)

12 See, e.g., *Rader v. Thrasher* (1962) 57 Cal.2d 244, 18 Cal.Rptr. 736, 368 P.2d 360.

Here, the outcome of the case was determined by the party who had the initial burden of producing evidence. Since the trial court applied section 662, Judy was given the initial burden to rebut the presumption of title. She lost

because she did not meet the clear and convincing burden of proof standard, although she met the lesser evidentiary standard of preponderance of the evidence in her attempts to show the deed was procured through duress, constructive fraud, breach of fiduciary duty and other contract defenses. However, if Clarence had been given the initial burden to rebut the presumption that he gained an advantage in violation of the confidential relationship, he could not have met his burden of producing evidence—given the trial court's factual findings that Judy had established the contract defenses by a preponderance of evidence. [13] Hence, there would have been a different result had the presumption of former Civil Code section 5103 been applied.

13 We have reviewed Clarence's argument that the record is not clear that the trial court found Judy had proven undue influence and her related claims by a preponderance of the evidence. We reject this argument. The trial court stated on the record that if "the test were a preponderance of the evidence, ... that burden had been carried by Mrs. Haines." The trial court's comments in this regard resolve any confusion on the issue.

***298** Because the trial court applied section 662, Clarence won; relational issues such as unfairness and advantage were not considered as they would have been under former Civil Code section 5103.

V. *Application of Section 662 in Confidential Relations Cases*

Here, the trial court expressly followed the mandate of section 662, finding no reason why the statute should not apply to a family law proceeding. At the time of the trial, there were no published cases on whether section 662 applied to family law disputes. [14]

14 With the publication of *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 273 Cal.Rptr. 696, in which the Court of Appeal (Second Dist., Div. Three) held section 662 applies to marital actions, there no longer is a vacuum of legal authority on this issue. We shall discuss *Weaver* in Part VI., *post.*

However, there were analogous published cases dealing with the application of the statute to cases involving parties sharing a confidential relationship. (See *Tannehill v. Finch* (1986) 188 Cal.App.3d 224, 232 Cal.Rptr. 749 (*Tannehill*); *Toney v. Nolder* (1985) 173 Cal.App.3d 791, 219 Cal.Rptr. 497 (*Toney*).) Here, the trial court stated it was relying on *Toney, supra,* 173 Cal.App.3d 791, 219 Cal.Rptr. 497. In *Toney,* the Court of Appeal held section 662 properly applied to an alleged oral partnership agreement for the purchase of certain property; the fact the parties-shared a confidential relationship created no exception to the statute's mandatory ****687** language. (*Id.* at pp. 794–796, 219 Cal.Rptr. 497.)

Toney also was relied upon in *Tannehill, supra,* 188 Cal.App.3d 224, 232 Cal.Rptr. 749, where the Court of Appeal held section 662 should apply to a property dispute involving a man and woman who had lived together for six years. (See *Marvin v. Marvin, supra,* 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106.) During this period, the man had acquired title to property in his own name; the woman claimed an interest in the property and had sued for breach of contract under *Marvin* when the man refused to divide the property with her. Relying on the *Toney* holding that there is no confidential relationship exception to section 662, the *Tannehill* court stated:

> "There is no significant difference between *Toney* and the case now before us: Plaintiff in *Toney* sought to establish a 50 percent interest in the property pursuant to an oral partnership agreement; Tannehill sought to establish a 50 percent interest in the property based on an implied *Marvin* agreement. In both actions, plaintiffs sought to establish a contractual agreement which, if proven, would rebut the presumption that the defendants, as owners of legal title, were also the full beneficial owners." (*Tannehill, supra,* 188 Cal.App.3d at p. 228, 232 Cal.Rptr. 749.)

***299** However, what the plaintiffs in *Toney* and *Tannehill* "sought to establish" (*ibid.*) would have been presumed as a matter of law under principles of community property if the plaintiffs and defendants in those cases had been married. All property acquired by a married person during marriage is presumed to be community property. (See former Civ.Code, § 5110 [Fam.Code, § 760].)

[25] Moreover, where between unmarried persons, the party claiming a confidential relation exists has the burden of proving it (*Buchmayer v. Buchmayer* (1945) 68 Cal.App.2d 462, 467, 157 P.2d 9), under former Civil Code section 5103, subdivision (b) (Fam.Code, § 721, subd. (b)), marital partners are parties to a confidential relation as a matter of law. Further, while marriage includes a confidential relationship, it encompasses much more. The trial court in essence equated Judy's and Clarence's relationship to that of the unmarried disputants in *Toney* who shared a confidential relationship based on their partnership status. In so relying on *Toney* to

apply section 662, the trial court ignored the unique status of marriage and the unique nature of the marriage contract.

VI. *Is "In re Marriage of Weaver" Controlling Here?*

[26] As pointed out in footnote 14, *ante,* there is now direct legal authority for application of section 662 in marital proceedings. (See *In re Marriage of Weaver, supra,* 224 Cal.App.3d 478, 273 Cal.Rptr. 696.) The question for us is whether it is controlling authority here.

In *Weaver,* the parties lived in a house that the wife and her parents had acquired in joint tenancy before she married. When her parents died during the marriage, the wife, as the surviving joint tenant, became the sole legal and record owner of the property. Subsequently, the wife and husband borrowed $12,000 secured by a trust deed on the house. They both signed the note and the trust deed. At all times title rested solely in the wife's name. The husband contended the wife had transmuted her separate property interest to community property. By a preponderance of the evidence, the trial court found there had been an oral transmutation. The wife appealed, contending the presumption of section 662 applied and required the court to find clear and convincing evidence to rebut the title presumption in her favor. The husband argued section 662 had no application in marital disputes. The Court of Appeal disagreed with the husband, holding:

> "In a case such as this, where one spouse has acquired legal title to a parcel of real property under circumstances which make such acquisition separate property, we see no reason not to apply the higher evidentiary standard set out in Evidence Code section 662. There is nothing in that statutory mandate which ***300** excludes marital actions from those cases involving a claimed dichotomy between the legal and beneficial interests to property." ****688** (*In re Marriage of Weaver, supra,* 224 Cal.App.3d at pp. 486-487, 273 Cal.Rptr. 696, fn. omitted.)

Relying on *Tannehill, supra,* 188 Cal.App.3d 224, 232 Cal.Rptr. 749, and *Toney, supra,* 173 Cal.App.3d 791, 219 Cal.Rptr. 497, which approved the use of section 662 in nonmarital cases involving a confidential relationship, the *Weaver* court noted the parties in those cases "shared a confidential relationship, not unlike that shared by marital partners. (See Civ.Code, § 5103, subd. (b).)" (*In re Marriage of Weaver, supra,* 224 Cal.App.3d at p. 486, 273 Cal.Rptr. 696, fn. omitted.) The *Weaver* court also noted there is nothing in the language of section 662 excluding "marital actions from those cases involving a claimed dichotomy between the legal and beneficial interests to property." (*Id.* at pp. 486–487, 273 Cal.Rptr. 696.)

While we have no quarrel with the result in *Weaver,* we do not agree with the implied holding that section 662 is applicable to marital proceedings regardless of any conflict with former Civil Code section 5103, subdivision (b) [Fam.Code, § 721, subd. (b)]. To that extent, we decline to follow *Weaver,* as we shall explain below.

First, we note *Weaver* is distinguishable. The *Weaver* court used section 662 to protect the original character of the property from change rather than defend the character of the property after change. Also, the *Weaver* court did not rely on both sentences of section 662, but rather only the second sentence concerning the elevated standard of proof. The *Weaver* court did not use the rebuttable presumption contained in section 662 to establish the wife's property was her separate property, but rather ruled it was her separate property because she owned it before marriage. (See former Civ.Code, § 5107 [Fam.Code, § 770, subd. (a)(1)].) The *Weaver* court ruled the husband's alleged oral agreement transmuting wife's separate property to community property should be tested by the clear and convincing standard of proof of section 662. In so doing, it placed the higher burden of proof on the marital party that sought to gain an advantage.

Second, we do not believe that the *Weaver* court thoroughly explored the ramifications of former Civil Code section 5103, subdivision (b)—perhaps because that case did not involve the overbearing allegations of undue influence, duress and constructive fraud present here. In effect, on the basis of the holdings in *Toney* and *Tannehill* that section 662 applies to confidential relationships, the *Weaver* court held section 662 should apply to marital actions because former Civil Code section 5103, subdivision (b), provided at the time: " 'in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons ***301** occupying confidential relations with each other.' " (*In re Marriage of Weaver, supra,* 224 Cal.App.3d at p. 486, fn. 6, 273 Cal.Rptr. 696.) However, as we have emphasized above, the marital relation is much more than a confidential relation between two unmarried partners.

VII. *Conclusion*

Where one spouse has taken advantage of another in an interspousal transaction, a presumption of undue influence arises under former Civil Code section 5103, subdivision (b)

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

[27] Finally, we note that where two presumptions are in conflict, the more specific presumption will control over the more general ****689** one. (See *Rader v. Thrasher, supra,* 57 Cal.2d at p. 252, 18 Cal.Rptr. 736, 368 P.2d 360.) In *McKay v. McKay* (1921) 184 Cal. 742, 746–747, 195 P. 385, the Supreme Court held the specific presumption that any advantage obtained by a husband from a wife was without consideration and under undue influence "must, in the absence of any rebutting evidence, prevail over" the more general presumption that money paid by one to another was due to the latter. Aside from the prevailing presumption being "the less general of the two," the Supreme Court noted that the undue influence presumption should also prevail because

> "the very reason for the existence of this particular presumption is to afford relief in just such contingencies as the present, namely, when there has been a transfer of money from the wife to the husband. The result is that the fact of the relationship of the parties creates a presumption of lack of consideration and undue influence which, until it is overcome by other evidence, is paramount to the general presumption, which would arise under ordinary circumstances upon mere proof of payment, to the effect that money is due to the person to whom it is paid." (*Id.* at p. 747, 195 P. 385.)

***302** **[28]** We conclude that application of section 662 is improper when it is in conflict with the presumption of undue influence that emanates from former section 5103, subdivision (b) (Fam.Code, § 721, subd. (b)). Any other result would abrogate the protections afforded to married persons and denigrate the public policy of the state that seeks to promote and protect the vital institution of marriage. Because Judy successfully proved a number of her defenses to the 1987 quitclaim deed by a preponderance of the evidence, the deed should have been set aside. In light of this conclusion, it is unnecessary for us to address the other arguments raised by the parties and amicus curiae.

DISPOSITION

The portion of the judgment awarding Clarence reimbursement under former Civil Code section 4800.2 is reversed. The trial court is ordered to amend the judgment to reflect the setting aside of the quitclaim deed and the proper allocation to the parties of the Teebird Lane residence as community property in accordance with the views expressed above.

FROEHLICH, Acting P.J., and NARES, J., concur.

Parallel Citations

33 Cal.App.4th 277

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169 Cal.App.4th 176
Court of Appeal, Fourth District, Division 2, California.

In re the MARRIAGE OF Michael W. BROOKS and Annikkawa A. Robinson.
Michael W. Brooks, Appellant,
v.
Annikkawa A. Robinson, Respondent;
Executive Capital Group, Inc., Respondent.

No. E043770. | Dec. 16, 2008.
| Rehearing Denied Jan. 9, 2009.
| Review Denied March 25, 2009.

Synopsis

Background: After husband petitioned for marriage dissolution, husband filed "complaint for joinder" against transferee of home acquired in wife's name during the marriage, seeking declaration that the home was community property and seeking to set aside wife's sale of the home to transferee. After bifurcation for trial to the court, the Superior Court, San Bernardino County, No. SBFSS85992, Duke D. Rouse, Retired Judge, sitting by assignment, rejected husband's claims with respect to the home. Husband appealed.

Holdings: The Court of Appeal, King, J., held that:
[1] under the "form of title" presumption, the home was presumed to be wife's separate property, and
[2] husband did not rebut the "form of title" presumption.

Affirmed.

Attorneys and Law Firms

**626 Michael Books, in pro. per., for Appellant.

Somers & Somers and Richard B. Somers for Respondent Executive Capital Group, Inc.

No appearance for Respondent Annikkawa A. Robinson.

Opinion

*179 **OPINION**

KING, J.

I. INTRODUCTION

After Michael Brooks and Annikkawa Robinson were married, Robinson took title to certain residential property solely in her name without reference to the marital relation. Brooks agreed that title would be held in *180 Robinson's name. When they separated, Robinson moved out and **627 Brooks remained in the house. Shortly before Brooks filed a petition for dissolution of their marriage, Robinson sold the property to Executive Capital Group, Inc. (ECG). Brooks then filed a "Complaint for Joinder" against ECG for a declaration that the property was community property and requesting that the transaction be set aside because he had not joined in the conveyance. The issues raised by the complaint for joinder were bifurcated from the family law proceedings and tried to the court. The court rejected Brooks's claims and entered judgment for ECG. We affirm.

II. SUMMARY OF FACTS [1]

[1] Brooks's opening brief on appeal includes a statement of facts without any citation to the record. In the argument portion of the brief, references to facts are occasionally, but not consistently, supported by citations to the record. ECG's respondent's brief, which relies extensively upon facts developed at trial, does not include a single citation to the record. The failure to include citations to the record violates rule 8.204(a)(1)(C) of the California Rules of Court: Briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Although these failures subject the briefs to being stricken, we have elected to disregard the noncompliance. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

Brooks and Robinson were married in 1997. In October 2000, they purchased a home in San Bernardino (the Property). The money for the down payment was paid from Brooks's earnings; Robinson did not contribute any money. Their real estate agent recommended that title be taken solely in Robinson's name because it would be easier to obtain financing for the purchase. Brooks agreed.

The grant deed to the Property recites that title is held by "ANNIKKAWA A. ROBINSON, a Single Woman." The deed was recorded with the San Bernardino County Recorder in November 2000. Although Brooks knew that title was being taken in Robinson's name only, he did not know that the deed included the phrase, "a Single Woman."

Two deeds of trust against the Property recite that the trustor is "ANNIKKAWA A. ROBINSON, A SINGLE WOMAN," and are executed solely by her. Brooks testified that he made the payments on the loans secured by the two deeds of trust.

In February 2005, Brooks and Robinson separated. Robinson moved out and Brooks continued to live on the Property with their seven-year-old son. Initially, Brooks testified that he did not have "a clue" as to where Robinson went. Later, he testified that she had moved in with a friend named "Geneva."

Around the time they separated, the Property was, according to Brooks, "in foreclosure." Robinson contacted Brandon Floyd, an employee of ECG. ECG ***181** is in the business of purchasing distressed properties; that is, properties that are the subject of foreclosure proceedings. In late March 2005, Floyd and his supervisor, Rene Garcia, met with Robinson at the Property.

Brooks, on the one hand, and Garcia and Floyd on the other, presented conflicting testimony of what happened at the March meeting. Brooks testified as follows. He participated in the meeting along with Robinson, Floyd, and Garcia. Robinson introduced him to Floyd and Garcia *as her husband.* He told Garcia that he "wanted to refinance." Garcia said that "they didn't do refinances," they "purchased houses," and offered to purchase the property for $48,000. Brooks told Garcia that he "wouldn't go for that." He also told them that the Property was community property and that he refused to sell. Nevertheless, ****628** Garcia asked Brooks to take him through the house to look at it, and Brooks did so. Robinson stayed in the living room. After showing the house to Garcia, Garcia ignored Brooks and talked only to Robinson. Eventually, Brooks became angry and "called him some words. Called him a snake." Brooks remained with the others during the entire meeting, which lasted more than one hour.

Garcia testified about the March meeting as follows. He and Floyd met with Robinson at the Property. He was not introduced to Brooks, and Brooks did not speak to him. Brooks was in the living room, away from the others, just "standing there and mumbling in the background." He talked with Robinson about the house and "did a walkthrough" with her. This meeting lasted approximately 15 or 20 minutes.

Garcia further testified that he dealt exclusively with Robinson because he only deals with the owner of the property. He believed that she was the sole owner of the property based upon his search of the record title and the language in the grant deed and deeds of trust. When he asked Robinson about the man he saw in the house during the meeting, Robinson told him he was "just a tenant."[2] Robinson never gave him any indication that she was married.

2 At a pretrial hearing in this matter, Garcia (who does not appear to have been under oath at the time) told the court that when he asked Robinson "who that guy was," Robinson told Garcia that the man was "her boyfriend." At trial, Garcia testified that the "boyfriend" statement was incorrect.

Floyd's testimony regarding the March meeting was consistent with Garcia's testimony. According to Floyd, Robinson contacted him. He and Garcia then met with her at the Property. Brooks was "somewhere standing around the house. Just hanging out." He was not introduced to Brooks and did not talk with him. He talked with Robinson about comparable sales in the area. No one at the meeting said anything to indicate that the Property was community property or that Brooks was Robinson's husband.

***182** Garcia and Floyd met with Robinson a second time on April 7, 2005. This meeting took place at Geneva's home, where Robinson was staying. During this meeting, Robinson signed a "Home Equity Sales Contract" to sell the Property to ECG for $121,520. She also filled out and signed a "Statement of Information" form. In a space on this form for listing the name of a husband, Robinson wrote, "N/A." Regarding former marriages, she wrote, "None." During this meeting, Robinson told Floyd that the "tenant" was supposed to be out of the house by a certain date in April 2005.

On April 14, 2005, Robinson and ECG entered into an amendment to the home equity sales contract by which the sales price was increased to $142,000. On the same day, Robinson executed a grant deed to the Property to ECG. After deducting for the payoff of loans and other expenses, Robinson received $41,851.03. The deed was recorded on April 19, 2005.

On April 21, 2005, Brooks filed a petition for dissolution of the marriage.

On May 1, 2005, Floyd and Garcia went to the Property to see if the "tenant" had moved out and to inspect for repairs. There, they met Brooks and told him that Robinson sold the Property to them. Brooks told them that he was Robinson's husband and had a community property interest in the Property. Garcia testified that this was the first time he had any knowledge that Brooks was Robinson's husband.

**629 ECG commenced an unlawful detainer action against "Annikkawa Robinson and Mike Robinson." In that proceeding, ECG was awarded possession of the property. [3]

3 No one has asserted that the judgment in the unlawful detainer case has any effect on the issues in this appeal.

In January 2006, Brooks filed a "Complaint for Joinder" in his marital dissolution case alleging five causes of action against ECG, styled as "Declaration of Community Property," "Injunctive Relief," "Setting Aside the Sale," "Cancellation of Deed," and "Constructive Trust." [4] As is relevant here, Brooks alleges, in essence, that he holds a community property interest in the Property and that the deed from Robinson to ECG is invalid. In addition to other relief, Brooks sought an order setting aside the sale of the property to ECG and cancelling the deed from Robinson to ECG.

4 The complaint named Robinson, as well as ECG, as a defendant as to each cause of action except for the cause of action for "Cancellation of Deed." The pleading included a sixth cause of action for "Breach of Fiduciary Duty" against Robinson only. Brooks dismissed Robinson from the action on the first day of trial.

A bench trial on the issues raised by the complaint for joinder was bifurcated from the family law proceedings. The court did not expressly *183 determine whether the Property was a community property asset. The court found that "ECG is a [bona fide purchaser] with respect to purchase of the Property and takes it[s] title free of any unknown community property claim Brooks may have with respect to the Property."

III. ANALYSIS

[1] [2] [3] Title to community real property cannot be conveyed by one spouse to a third party unless the other spouse joins in the execution of the deed. (See Fam.Code, § 1102, subd. (a).) [5] A conveyance in violation of this rule is generally voidable by the spouse who did not join in the conveyance. (*Andrade Development Co. v. Martin* (1982) 138 Cal.App.3d 330, 335–336, 187 Cal.Rptr. 863.) However, a deed to community real property given to a third party purchaser is presumed valid if the purchaser received the deed "in good faith without knowledge of the marriage relation." (Fam.Code, § 1102, subd. (c)(2).) Moreover, " 'a bona fide purchaser for value who acquires his interest in real property without notice of another's asserted rights in the property takes the property free of such unknown rights. [Citations.]' [Citations.]" (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1251, 26 Cal.Rptr.3d 413.)

5 Family Code section 1102, subdivision (a), provides that, except as provided in certain statutes not applicable here, "either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."

Here, the court found that ECG was a bona fide purchaser of the Property and that it therefore held title free of Brooks's claim. Brooks challenges this finding. He argues that, even if his testimony is rejected and we accept the testimony of Garcia and Floyd, ECG knew, at a minimum, that Robinson was an absentee owner and that Brooks was in possession of the Property. Because they knew that he held possession, Brooks contends that ECG had a duty to inquire of him as to his interest in the Property and is charged with knowledge **630 of his rights in the property. The applicable rule, he explains, is stated in *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 Cal.App.2d 698, 252 P.2d 642: " 'Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting all persons on inquiry as to the nature of the occupant's claims.' [Citation.] 'Except in so far as the rule has been varied by statute, actual possession of land is such notice to all the world, or to anyone having knowledge of such possession, as will put on inquiry those acquiring title or a lien on the land to ascertain the nature of the right that the occupant has in the premises. The presumption is that inquiry of the possessor will disclose how and under what right he holds *184 possession, and, in the absence of such inquiry, the presumption is that, had such inquiry been made, the right, title, or interest under which the possessor held would have been discovered. The notice which the law presumes has been held to be actual, and not merely constructive, notice. Possession is notice not only of whatever title the occupant has but also of whatever right he may have in the property, *and the knowledge chargeable to a person after he is put on inquiry by possession of land is not limited to such knowledge as would be gained by examination of the public records.*' [Citations.]" (*Id.* at pp. 705–706, 252 P.2d 642; see also *Sheerer v. Cuddy* (1890) 85 Cal. 270, 273, 24 P. 713, *Claremont Terrace Homeowners' Assn. v. United States* (1983) 146 Cal.App.3d 398, 408, 194 Cal.Rptr. 216.)

ECG argues it is a bona fide purchaser who took the Property in good faith without knowledge of the marital relation or of Brooks's purported interest in the Property. ECG does not, however, address Brooks's argument that even if ECG did not have actual knowledge of his interest in the property, they were told that Brooks was a tenant and aware that he held possession, and that ECG is therefore charged with the knowledge that would have been disclosed upon inquiry to Brooks.

[4] [5] ECG also relies heavily upon Evidence Code section 622, which provides that "facts recited in a written instrument are conclusively presumed to be true as between the parties thereto...." This section is based upon the doctrine of estoppel by contract; i.e., a party to a contract is generally estopped to deny essential facts recited therein. (*Estate of Wilson* (1976) 64 Cal.App.3d 786, 801, 134 Cal.Rptr. 749; *Gas App. S. Co. v. W.B. Bastian Mfg. Co.* (1927) 87 Cal.App. 301, 306, 262 P. 452.) ECG's reliance on this presumption is misplaced because it applies "as between the parties" to written instruments. (Evid.Code, § 622.) It does not apply to persons who are not parties to the instrument. (*Henneberry v. Henneberry* (1958) 164 Cal.App.2d 125, 132, 330 P.2d 250; *Franklin v. Dorland* (1865) 28 Cal. 175, 178.) Brooks is not a party to any of the written instruments involved in this case. Thus, Evidence Code section 622 has no application here.

Based upon the arguments and authorities presented in the parties' briefs, there appears to be merit to Brooks's contention that ECG is charged with whatever knowledge it would have acquired from inquiry made to Brooks. If Brooks does have an interest in the property, it would thus further appear that ECG's title is subject to whatever interest Brooks has in the property and that such title is voidable by Brooks. However, we do not need to reach these issues because, as we explain below, Brooks did not have an interest in the property as a matter of law.

[6] [7] There is a presumption regarding the characterization of property that ****631** was not addressed in the parties' initial briefs. According to the "form of ***185** title" presumption, the description in a deed as to how title is held is presumed to reflect the actual ownership interests in the property. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 292, 39 Cal.Rptr.2d 673 (*Haines*); *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 496, 257 Cal.Rptr. 397.) This common law presumption is codified in Evidence Code section 662, 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.' " (See *Haines, supra,* at p. 294, 39 Cal.Rptr.2d 673.) The presumption is based "on promoting the public 'policy ... in favor of the stability of titles to property.' [Citation.] 'Allegations ... that legal title does not represent beneficial ownership have ... been historically disfavored because society and the courts have a reluctance to tamper with duly executed instruments and documents of legal title.' [Citation.]" (*Ibid.*) Thus, "in the absence of any showing to the contrary, the status declared by the instrument through which [the parties] acquired title is controlling." (*Knego v. Grover* (1962) 208 Cal.App.2d 134, 141, 25 Cal.Rptr. 158; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 8:32, p. 8–8.1.)

The applicability or inapplicability of the form of title presumption is essential to resolving the threshold issue of whether the Property is community property or Robinson's separate property. (See, e.g., *MacKay v. Darusmont* (1941) 46 Cal.App.2d 21, 26, 115 P.2d 221 [to set aside a conveyance of property on the ground that it was made in violation of the right to join in the conveyance, spouse "must establish that it was community property"].) If this presumption applies and there is insufficient evidence in the record to rebut the presumption, then title to the Property at the time of the sale to ECG was held solely by Robinson as a matter of law, and Brooks's claims necessarily fail.

Pursuant to Government Code section 68081, we requested supplemental briefing on two questions relating to this presumption. First, whether the subject property is presumed to be the separate property of Robinson because title is held in her name without reference to the marital relationship or to Brooks. For this question, we referred the parties to Evidence Code section 662 and to a section of Miller and Starr's treatise on California real estate that states: "Where one spouse takes title to property in his or her name, without reference to the marital relationship or the other spouse, it is presumed that the property is the separate property of the spouse who holds title." (5 Miller & Starr, Cal. Real Estate (3d ed.2006) § 12:41, p. 12–110, fn. omitted.) Second, if such presumption arose in this case, whether there is evidence in the record to rebut the presumption.

ECG filed a supplemental brief, which essentially reproduced and expanded upon its discussion of Evidence Code section 622, but offered no ***186** discussion of Evidence Code section 662. As explained above, Evidence Code section 622 does not apply to this case.

In his supplemental brief, Brooks concedes that when Robinson took title to the property solely in her name, a presumption arose that the property was Robinson's separate property. (He also acknowledges that ECG had raised in the trial court the issue of whether the Property was Robinson's separate property.) Regarding the question of whether there is evidence in the record to rebut this presumption, he points to evidence that he and Robinson were married in 1997, prior ****632** to the time Robinson took title to the property. Evidence of their marriage, he asserts, "effectively rebutted the separate property presumption and created the presumption that the property is and was community property at the time of purchase in the absence of any evidence to the contrary." (See Fam.Code, § 760.) Brooks argues, in essence, that the general community property presumption that arises when property is acquired during marriage negates the presumption arising from the form of title.

[8] **[9]** The relationship between the general community property presumption and the form of title presumption was discussed in *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 285 (*Lucas*). The *Lucas* court stated: "The presumption arising from the form of title is to be distinguished from the general presumption set forth in [Family Code section 760] that property acquired during marriage is community property. *It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption.*" (*Id.* at pp. 814–815, 166 Cal.Rptr. 853, 614 P.2d 285, italics added; see also *Siberell v. Siberell* (1932) 214 Cal. 767, 773, 7 P.2d 1003 [community property presumption "has no application to a case where 'a different intention is expressed in the instrument' "].) In *Lucas,* a motor home was paid for with both community funds and the wife's separate funds. (*Lucas, supra,* at p. 817, 166 Cal.Rptr. 853, 614 P.2d 285.) The wife "wished to have title in her name alone, and [the husband] did not object. The motor home was purchased for family use and was referred to and used by the parties as a 'family vehicle.' " (*Id.* at pp. 817–818, 166 Cal.Rptr. 853, 614 P.2d 285.) The Supreme Court upheld the trial court's determination that the motor home was the wife's separate property because "[t]itle was taken in [the wife's] name alone. [The husband] was aware of this and did not object." (*Id.* at p. 818, 166 Cal.Rptr. 853, 614 P.2d 285.)[6] Thus, the mere fact that property was acquired during marriage does not, as Brooks argues, rebut the form of title presumption; to the contrary, the act of taking title to property in the name of one spouse during marriage with the consent of the other spouse effectively removes that property from the general community property ***187** presumption. In that situation, the property is presumably the separate property of the spouse in whose name title is taken. (See generally 5 Miller & Starr, Cal. Real Estate, *supra,* § 12:41, p. 12–110; Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 8:33, p. 8–9.)

6 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. (See *In re Marriage of Rives* (1982) 130 Cal.App.3d 138, 162, 181 Cal.Rptr. 572.)

Brooks contends that *Lucas* is not valid authority because it has been superseded by statutes. Indeed, the Legislature enacted several statutes in response to *Lucas,* including what is now codified as Family Code sections 2581 and 2640 (former Civ.Code, §§ 4800.1, 4800.2, respectively).[7] (See ****633** *In re Marriage of Kahan* (1985) 174 Cal.App.3d 63, 71–72, 219 Cal.Rptr. 700; Recommendation Relating to Civil Code Sections 4800.1 and 4800.2 (Dec. 1985) 18 Cal. Law Revision Com. Rep. (1986) pp. 387–388.) As we explain below, however, these statutes supersede aspects of *Lucas* that are unrelated to the analysis and holding we rely upon.

7 In its current form, Family Code section 2581 provides: "For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following: [¶] (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property. [¶] (b) Proof that the parties have made a written agreement that the property is separate property."

Family Code section 2640, subdivision (b), currently provides: "In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and may not exceed the net value of the property at the time of the division."

In addition to the characterization of the motor home in *Lucas,* the parties disputed the character of a residence. The residence had been purchased in part with the wife's separate property and in part with community funds. (*Lucas, supra,* 27 Cal.3d at pp. 811–812, 166 Cal.Rptr. 853, 614 P.2d 285.) Title to the residence was taken in the names of both spouses, "Husband and Wife as Joint Tenants." (*Id.* at p. 811, 166 Cal.Rptr. 853, 614 P.2d 285.) At the time *Lucas* was decided, Civil Code section 164 provided: " '[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.' " (*Lucas, supra,* at p. 814, 166 Cal.Rptr. 853, 614 P.2d 285.) Based upon this statute, the court held that in the absence of an agreement that the wife was to retain a separate property interest in the residence, her separate property contributions were to be treated as a gift to the community for which she was not entitled to a credit or reimbursement when the property is divided in dissolution. ***188** (*Id.* at pp. 816–817, 166 Cal.Rptr. 853, 614 P.2d 285.) This aspect of *Lucas* was "widely perceived as unfair by the public as well as by family law professionals." (Recommendation Relating to Civil Code Sections 4800.1 and 4800.2, *supra,* 18 Cal. Law Revision Com. Rep. (1986) p. 387.)

In response to this holding, former Civil Code sections 4800.1 and 4800.2 were enacted "to provide that (1) all property held in joint tenancy form by the spouses is presumed community absent a written agreement otherwise and (2) all community property is divided subject to a right of reimbursement for separate property contributions absent an express agreement otherwise." (Recommendation Relating to Civil Code Sections 4800.1 and 4800.2, *supra,* 18 Cal. Law Revision Com. Rep. (1986) p. 388.) These statutes thus superseded the *Lucas* decision to the extent *Lucas* held that, for purposes of division of property at dissolution, separate property contributions to the community were treated as gifts and were not reimbursable. The analysis and holding of *Lucas* that we rely upon was unaffected by these statutes, and the case remains, for our purposes, good law.

Moreover, the new statutes clearly have no application to this case. Family Code section 2581 (the recodification of former Civ.Code, § 4800.1) applies only to the "division of property on dissolution of marriage or legal separation of the parties." (Fam.Code, § 2581.) This case concerns a ****634** dispute between Brooks and ECG, and does not involve the division of property on dissolution. Even if this case did concern such a division of property, the section creates a presumption of community property for property that is "acquired by the parties during marriage *in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property.*" (*Ibid.,* italics added.) Thus, property taken in the form of joint tenancy, for example, is presumed to be community property for purposes of the division of property. Here, the subject property was not acquired in any style of joint form. It was unambiguously acquired by Robinson in her name only.

Family Code section 2640 (the recodification of former Civ.Code, § 4800.2) also applies only to "the division of the community estate," and creates a right to reimbursement for a spouse who made separate property contributions to the community. (Fam.Code, § 2640, subd. (b); see *In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 867–868, 26 Cal.Rptr.3d 121.) Again, this 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. The statute has no application here.

***189** Significantly, the Legislature rejected a recommendation by the California Law Revision Commission to supersede the aspect of *Lucas* upon which we do rely and to eliminate the form of title presumption. In 1983, the commission recommended that a new Civil Code section 5110.630 (section 5110.630) be enacted to provide: "Except as otherwise provided by statute, the form of title to property acquired by a married person during marriage does not create a presumption or inference as to the character of the property, and is not in itself evidence sufficient to rebut the presumptions established by this article." (Recommendation Relating to Family Law (Nov. 1983) 17 Cal. Law Revision Com. Rep. (1984) p. 221.) In its recommendation, the Law Revision Commission specifically criticized the *Lucas* court's conclusion that the parties' motor home was the wife's separate property. (*Id.* at p. 211.) According to the Law Revision Commission, the law should "be revised not only to eliminate the title presumptions but also to overrule the title inferences of separate property." (*Id.* at p. 212.) In 1984, legislation was introduced to enact section 5110.630 as proposed by the Law Revision Commission, along with other recommended statutes regarding transmutation of marital property. (Assem. Bill No. 2274 (1983–1984 Reg. Sess.) § 6.) The Estate Planning, Trust and Probate Law Section of the State Bar of California opposed the proposed elimination

of the form of title presumption, stating "the form of title should create a presumption as to the character of the property. When property, for example, is taken in the name of a wife as her sole and separate property, it is the intent for the parties that it be so treated." (Estate Planning, Trust and Probate Law Section, State Bar of Cal., letter to Assemblyman Alister McAlister, Feb. 28, 1984, p. 4.) Citing this opposition and other comments to the proposed statute, the Law Revision Commission requested that the bill be amended to omit section 5110.630. (Cal. Law Revision Com., letter to Assemblyman Alister McAlister, Mar. 22, 1984.) The legislation was so amended, leaving only the proposed statutes concerning transmutation, and became law without affecting the form of title presumption or superseding the aspect of *Lucas* upon which we rely. (See Amend. ****635** to Assem. Bill No. 2274 (1983–1984 Reg. Sess.) Apr. 3, 1984.)

[10] **[11]** **[12]** The form of title presumption affects the burden of proof. (*Haines, supra,* 33 Cal.App.4th at p. 297 & fn. 11, 39 Cal.Rptr.2d 673; cf. *In re Marriage of Ashodian* (1979) 96 Cal.App.3d 43, 47, 157 Cal.Rptr. 555.) That is, the party asserting that title is other than as stated in the deed (here, Brooks) has the burden of proving that fact by clear and convincing evidence. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 486–487, 273 Cal.Rptr. 696; *Haines, supra,* at p. 297, 39 Cal.Rptr.2d 673; Evid.Code, § 662.) The presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended. (*Lucas, supra,* 27 Cal.3d at p. 813, 166 Cal.Rptr. 853, 614 P.2d 285; ***190** *In re Marriage of Munguia* (1983) 146 Cal.App.3d 853, 860, 195 Cal.Rptr. 199.) Significantly, "the presumption cannot be overcome solely by tracing the funds used to purchase the property, nor by testimony of an intention not disclosed to the grantee at the time of the execution of the conveyance." (*In re Marriage of Broderick, supra,* 209 Cal.App.3d at p. 496, 257 Cal.Rptr. 397; see also *Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 212, 259 P.2d 656, *Lucas, supra,* at p. 813, 166 Cal.Rptr. 853, 614 P.2d 285.) Nor can the presumption be rebutted by evidence that title was taken in a particular manner merely to obtain a loan. (Cf. *In re Marriage of Kahan, supra,* 174 Cal.App.3d at p. 69, 219 Cal.Rptr. 700 [when title was taken by spouses as joint tenants to obtain loan, property was presumptively held in joint tenancy].)

[13] **[14]** To overcome the form of title presumption, the evidence of a contrary agreement or understanding must be "clear and convincing." (Evid.Code, § 662; cf. *In re Marriage of Weaver, supra,* 224 Cal.App.3d at p. 486, 273 Cal.Rptr. 696.) This standard requires evidence that is " ' " 'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind.' "' " (*In re Marriage of Weaver, supra,* at p. 487, 273 Cal.Rptr. 696.) [8]

8 The form of title presumption does not apply when it conflicts with the presumption of undue influence by one spouse over the other. (*Haines, supra,* 33 Cal.App.4th at pp. 301–302, 39 Cal.Rptr.2d 673.) Here, there is no contention that title to the Property in Robinson's name was due to any undue influence exerted by Robinson.

[15] **[16]** We now apply these principles here. With Brooks's knowledge and agreement, title to the Property was taken solely in Robinson's name. The affirmative act of specifying that title be held in that manner removed the property from the general presumption of community property and made the Property presumptively Robinson's separate property. Brooks could rebut this presumption by clear and convincing evidence of an agreement or understanding between him and Robinson that the Property was to be held as community property (or as his separate property). He presented no such evidence. In his supplemental brief addressing this question, he points only to the fact that the parties were married at the time Robinson acquired the Property. This fact, however, has no bearing on whether the two agreed or understood that they would hold the Property as community property.

Nor does other evidence in the record support the existence of the requisite understanding or agreement. Brooks testified that the money used for the down payment toward the purchase price came from his employment earnings and that Robinson did not contribute money toward ****636** the purchase. As stated above, however, the form of title presumption cannot be overcome by simply tracing the source of the funds used to purchase the property. He further testified that he believed the Property belonged to him and Robinson. Such a unilateral belief, however, is likewise insufficient to establish the existence of an agreement or understanding between the spouses as to ownership of the Property. There is no evidence in the record that Robinson held a similar ***191** understanding regarding ownership of the property. Indeed, Robinson's subsequent sale of the Property to ECG without seeking Brooks's consent indicates that she understood that the Property was her separate property.

Brooks is not helped by his testimony that the purpose of taking title in Robinson's name was to facilitate financing for the Property. This merely explains why Brooks was willing to allow Robinson to have sole title to the Property. Having

a reason for allowing title to be taken solely in Robinson's name does not diminish the inference that the parties intended the Property to be Robinson's separate property. Indeed, it supports the conclusion that the form of title was not inadvertent, but rather that the parties expressly intended such a result. Most significantly, the proffered reason does not constitute evidence of an agreement between the spouses that the Property be community property.

Brooks further contends that our conclusion is based upon a transmutation of community property to Robinson's separate property for which there is no supporting evidence. He relies upon Family Code section 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." The Law Revision Commission recommended this statute (originally codified as Civ.Code, § 5110.730, subd. (a)) to impose " 'formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred.' " (*Estate of MacDonald* (1990) 51 Cal.3d 262, 268, 272 Cal.Rptr. 153, 794 P.2d 911, quoting Recommendation Relating to Marital Property Presumptions and Transmutations, 17 Cal. Law Revision Com. Rep. (1984), pp. 224–225.)

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]." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 8:471.1, p. 8–129.) Here, the Property was acquired in Robinson's name in a transaction with a third person, not through an interspousal transaction. There is nothing in the record to suggest that Brooks and Robinson ever made any agreement to thereafter change the character of the Property. Therefore, the character of the Property when it was sold to ***192** ECG 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's acquiescence in allowing Robinson to take title to the Property solely in her name triggered the presumption that the Property was Robinson's separate ****637** property. There is no testimony or other evidence from which a court could infer that Brooks and Robinson had an agreement or understanding that the Property would be other than as stated in the deed. Because there is no evidence in the record to rebut the form of title presumption, the Property was Robinson's separate property as a matter of law. Because each of Brooks's claims are based upon his unsupported assertion that the Property was community property, the claims necessarily fail.

IV. DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

We concur: RAMIREZ, P.J., and RICHLI, J.

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189 Cal.App.4th 277
Court of Appeal, Second District,
Division 8.

Ron STARR, Plaintiff and Appellant,
v.
Martha STARR, Defendant and Respondent.

No. B219539. | Sept. 30, 2010.

Synopsis

Background: In divorce proceeding, the Superior Court, Los Angeles County, No. KD060847, H. Don Christian, Temporary Judge, found that house was community property, found that husband was entitled to reimbursement for down payment paid from his separate property funds, and denied husband's request to refund overpayment of child support. Husband appealed.

Holdings: The Court of Appeal, Rubin, Acting P.J., held that:
[1] house was community property based on husband's violation of his fiduciary duties in failing to add wife to title;
[2] reimbursement for husband's separate property down payment for house was proper; and
[3] declining to reimburse husband for overpayments under stipulated child support payment was proper.

Affirmed.

Attorneys and Law Firms

****815** Law Offices of Gary W. Kearney and Gary W. Kearney, Pasadena, for Plaintiff and Appellant.

Daniel G. McMeekin, Covina, for Defendant and Respondent.

Opinion

RUBIN, Acting P.J.

***279** Ron Starr appeals from the judgment entered after the family law court found that the house he bought in his name only while married to former wife Martha Starr was community property and ordered him to convey the property to them both as tenants in common. The evidence shows that Martha quitclaimed her interest in the house based on Ron's promise to put her on title after the purchase was completed, but that Ron failed to do so. As a result, the evidence supports a finding that the house was community property based on Ron's violation of his fiduciary duties to Martha. We also conclude that the trial court properly valued the community and separate property interests in the house, and did not err in denying Ron's request to refund his overpayment of child support credits. We therefore affirm the judgment.

***280 FACTS AND PROCEDURAL HISTORY**

In late 1996, Ron Starr bought a house in Glendora, taking title in his name only as his separate property even though he was then married to Martha Starr. [1] Ron filed for divorce in April 2004. In his petition, signed under penalty of perjury, he listed the house as community property, but sought the return of his separate property contributions to the property. By the time of trial, however, Ron contended the house was his separate property. [2]

1 We will refer to Martha Starr and Ron Starr by their first names.

2 Ron was represented by counsel when he filed his divorce petition. At trial, he had a new lawyer, who asked the court to let Ron amend the petition to reflect his new contention. The court denied the request, but later said the pleadings were not conclusive and the issue was a matter of proof during the trial.

Ron testified that the house was bought in his name only because the $50,000 down payment came from his separate property funds, and he and Martha intended all along that the house would be his separate property. In accord with that plan, Martha quitclaimed her interest in the house before escrow closed. Property taxes and ****816** mortgage payments came from community property earnings, Ron testified.

Under Family Code section 721, Ron had the burden of proving that the quitclaim transaction satisfied his fiduciary duties to Martha. She testified that because of her poor credit history, the lender recommended she agree to the quitclaim so she and Ron could qualify for a better interest rate. The loan broker told Martha and Ron they could add Martha back onto the title by way of a quitclaim deed within 45 days of the close of escrow. Martha had a discussion with Ron about adding her onto the title, and he said he would do that. Martha said she and Ron jointly offered to buy the house, and that the deed to Ron was mailed to them both after it had been recorded. Although Ron never added Martha onto the title, she never worried about it because "He's my husband. I just don't ...

mistrust him. You know, it was our house." She signed the quitclaim deed freely and voluntarily.

Ron was impeached with his deposition testimony, where he said title was taken in his name in order to facilitate the financing. When asked on cross-examination about the statement on his divorce petition that the house was community property, Ron said he could not recall whether his former lawyer went over his assets with him before signing the petition, and that he probably did not read it before signing.

The trial court found that the house was community property, but that Ron was entitled to reimbursement of the $50,000 down payment from his separate property funds. Ron was ordered to convey the house to himself and Martha ***281** as tenants in common. In its statement of decision, the court said the "controlling cases on the issue" were *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 32 Cal.Rptr.3d 471, 116 P.3d 1152 (*Benson*), *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 35 Cal.Rptr.3d 1 (*Mathews*), *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 4 Cal.Rptr.3d 378 (*Delaney*), and *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 39 Cal.Rptr.2d 673 (*Haines*). In a separate paragraph, the trial court found that Ron did not meet his burden of proof that Martha's quitclaim deed was signed "freely and voluntarily. The reason [Martha] did not sign the quitclaim deed freely and voluntarily was because the intent of the lender controlled title to the [house] when the lender suggested that [Martha's] name be left off of the mortgage for the purposes of financing, and [Martha] agreed to execute the quitclaim deed based on the lender's suggestion."

Ron contends the trial court erred because it relied on the "lender's intent" theory, which is applicable only to determining whether loan proceeds obtained during marriage are community or separate property. Instead, according to Ron, the court should have applied the reasoning of the factually similar *Mathews, supra,* 133 Cal.App.4th 624, 35 Cal.Rptr.3d 1, and found that he satisfied his fiduciary obligations to Martha based on her testimony that she signed the quitclaim deed freely and voluntarily.

DISCUSSION

1. *Family Code Section 721*

Although spouses may enter transactions with each other (Fam.Code, § 721, subd. (a)), such transactions "are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject ****817** to the same rights and duties of" unmarried business partners, including the right of access to records and information concerning their transactions. (Fam.Code, § 721, subd. (b).)[3]

3 We will refer to Family Code section 721 as section 721.

Because of this, our courts have long held that when an interspousal transaction advantages one spouse, public policy considerations create a presumption that the transaction was the result of undue influence. (*Haines, supra,* 33 Cal.App.4th at pp. 293–294, 39 Cal.Rptr.2d 673.) A spouse who gained an advantage from a transaction with the other spouse can overcome that presumption by a preponderance of the evidence. (*Mathews, supra,* 133 Cal.App.4th at pp. 631–632, 35 Cal.Rptr.3d 1.)

***282** 2. *The Haines Decision*

In *Haines,* a wife who quitclaimed her interest in the house she jointly owned with her husband sought to invalidate the deed during their divorce proceedings because she was coerced into signing it. The wife testified that she and her husband had several arguments about signing the deed as their marriage deteriorated. She claimed the husband ranted and raved, pulled her hair, and threw water in her face during one of these arguments. Later, the husband agreed to cosign a loan for the wife so she could buy herself a car that she would need once she was on her own. While the husband was driving the wife to her credit union to cosign the loan, he told her he would not do so unless she agreed to the quitclaim deed. She signed the deed because she felt she had no alternative.

Evidence Code section 662 creates a presumption that title is actually held as described in a deed. The trial court found that the wife failed to meet her burden of rebutting that presumption by clear and convincing evidence, as required by that provision, but found she would have satisfied it if the preponderance of the evidence standard of proof had applied. The *Haines* court quoted *Brison v. Brison* (1888) 75 Cal. 525, 529, 17 P. 689 (*Brison I*) for the proposition that when a spouse gained an advantage from a transaction with the other spouse, " '[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.' " (*Haines, supra,* 33 Cal.App.4th at

p. 293, 39 Cal.Rptr.2d 673.) When that presumption arose, it trumped the competing presumption created by Evidence Code section 662. (*Id.*, at pp. 297, 299–301, 39 Cal.Rptr.2d 673.) Therefore, the husband had to show that the deed " 'was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.' " (*Id.* at p. 296, 39 Cal.Rptr.2d 673, quoting *Brown v. Canadian Indus. Alcohol Co.*(1930) 209 Cal. 596, 598, 289 P. 613.) Because the trial court found the wife met the lesser standard of proof applicable to the section 721 presumption, it reversed the judgment and held that the quitclaim deed was invalid. (*Haines,* at p. 302, 39 Cal.Rptr.2d 673.)

3. *The* Mathews *Decision*

The facts in *Mathews* are similar to this case. While a husband and wife were in the process of buying a house, the wife quitclaimed her interest in the house to the husband in order to obtain a better interest rate. Title to the house was taken in the husband's name alone. The wife knew title was taken in that manner, but believed she would be added to the title later on. The wife contested the validity of the quitclaim deed, primarily on the basis that she was a Japanese native and ****818** did not speak English well enough to fully understand what she was doing. The trial court refused to apply section 721's presumption of undue influence and awarded the house to the husband as his ***283** separate property. The Court of Appeal held that the trial court erred by refusing to apply the presumption, because the husband clearly gained an advantage when the wife quitclaimed her interest to him. (*Mathews, supra,* 133 Cal.App.4th at p. 630, 35 Cal.Rptr.3d 1.)

Citing to *Haines, supra,* 33 Cal.App.4th at page 296, 39 Cal.Rptr.2d 673, the *Mathews* court held that the husband had to prove the quitclaim deed was freely and voluntarily made, with full knowledge of all the facts and a complete understanding of its effects. (*Mathews, supra,* 133 Cal.App.4th at p. 631, 35 Cal.Rptr.3d 1.) The trial court's error was harmless, the *Mathews* court held, because the evidence supported the trial court's finding that the wife freely and voluntarily quitclaimed her interest in the house with full knowledge of the facts. This included evidence that: the wife asked questions when she did not understand something, but asked none when she signed the quitclaim deed; husband put no pressure on her to sign; and she did so in order to get better financing, and completion of the purchase did not depend on her signing the quitclaim deed. Although the wife was a native of Japan, evidence that she was fully fluent in English, handled her own separate finances as well as their joint finances, and admitted knowing her name was not on title but "assumed it would be added later," led the court to conclude the quitclaim deed was "valid and executed freely and voluntarily in good faith." As a result, the husband "rebutted the presumption of undue influence by a preponderance of the evidence." (*Mathews, supra,* 133 Cal.App.4th at pp. 631–632, 35 Cal.Rptr.3d 1.)

4. Mathews *Is Not Applicable; Instead Ron's Failure to Add Martha Onto the Title Was a Breach of His Fiduciary Duty*

It is easy to see why Ron relies on *Mathews.* The factual setting seems virtually identical to this case, with the added bonus of Martha's testimony that she signed the quitclaim deed freely and voluntarily. There is a critical—and we believe fatal—distinction, however. In *Mathews,* the wife said she merely assumed she would be added onto the title after escrow closed, while Martha testified that Ron told her he would do so. The importance of this distinction is tied up in both section 721 and its statutory predecessor, and the sometimes confusing use of the term "undue influence" by decisions interpreting those provisions.

Section 721 never mentions undue influence. Instead, it states that spouses are in a confidential and fiduciary relationship and have a duty to each other of the highest good faith and fair dealing. Its predecessor, former ***284** Civil Code section 158 (Cal. Law Revision Com. com., 29C West's Ann. Fam.Code (2004) foll. § 721, p. 267) was substantially similar. [4]

4 Former Civil Code section 158 provided that while spouses could transact with each other, those transactions were "subject ... to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

Despite that omission, the court in *Haines, supra,* 33 Cal.App.4th 277, 39 Cal.Rptr.2d 673, relying on *Brison I, supra,* 75 Cal. at page 529, 17 P. 689, noted that an interspousal transaction that benefits one of the spouses creates a presumption of undue influence, requiring the husband who obtained his wife's quitclaim deed to the family home to show that the deed was freely and voluntarily made. *Mathews,* ****819** *supra,* 133 Cal.App.4th at page 630, 35 Cal.Rptr.3d 1, cited *Haines* for the same proposition. The trial court's statement of decision in this case made findings concerning whether Martha's quitclaim deed was freely and voluntarily made, and Ron has understandably focused his

appellate arguments on the concept of undue influence as expressed in *Mathews*.

[1] [2] Undue influence is a contract defense based on the notion of coercive persuasion. Its hallmark is high pressure that works on mental, moral, or emotional weakness, and it is sometimes referred to as overpersuasion. (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 130, 54 Cal.Rptr. 533.) Undue influence is statutorily defined as taking unfair advantage of another's weakness of mind (Civ.Code, § 1575, ¶ 2), or taking a grossly oppressive or unfair advantage of another's necessity or distress (Civ.Code, § 1575, ¶ 3). *Haines* and *Mathews* appear to fall into these categories. (*Mathews, supra,* 133 Cal.App.4th at pp. 631–632, 35 Cal.Rptr.3d 1 [husband overcame presumption of undue influence because the evidence showed he did not pressure wife, who understood what she was signing]; *Haines, supra,* 33 Cal.App.4th at pp. 283–284, 39 Cal.Rptr.2d 673 [husband berated and assaulted wife, and refused to cosign a car loan unless she agreed to quitclaim her interest in their house].)

However, there is another type of conduct that amounts to undue influence: the use of confidence or authority to obtain an unfair advantage. (Civ.Code, § 1575, ¶ 1.) This is triggered by one party's breach of a confidential relationship. (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 152–153, 119 Cal.Rptr. 245.) It is also the type of conduct at issue in *Brison I, supra,* 75 Cal. 525, 17 P. 689, which, as we next discuss, explains not only how "undue influence" became shorthand for conduct that violates section 721, but why the evidence in this case supports the judgment. [5]

5 We asked for, and received, supplemental briefing on these issues.

In *Brison I,* a husband was about to embark on a long and potentially perilous business trip. Based on the wife's promise that she would reconvey ***285** to him upon request, the husband deeded real property to her so she could avoid going through probate if he died. When he returned and the wife refused to deed back the property, he sued to compel a reconveyance. The Supreme Court reversed the trial court's order sustaining a demurrer to the complaint. The complaint alleged that under former Civil Code section 158, the parties were in a confidential relationship, and the husband was induced to make the deed based on his confidence in her and her promise to reconvey. "The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud. [Citation.] The law, from considerations of public policy, presumes such transactions to have been induced by undue influence. [Citations]." (*Brison I, supra,* 75 Cal. at p. 529, 17 P. 689.)

Upon remand from *Brison I,* the case went to trial, resulting in a judgment for the husband, and another appeal. (*Brison v. Brison* (1891) 90 Cal. 323, 27 P. 186 (*Brison II*).) The wife appealed from an order denying her motion for a new trial, and the Supreme Court affirmed, holding that the evidence justified that order. In accord with his complaint, the husband testified that he deeded the property to his wife based on her promise to reconvey, and that he intended her to have the property only if he died. The Supreme Court held that the evidence of the wife's "subsequent refusal to reconvey was not merely the breach of an agreement, but was the ****820** betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy.[ ] The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused." (*Brison II, supra,* at p. 336, 27 P. 186, citing to Civ.Code, § 1575, ¶ 1.)

Brison I and *II* are significant for three reasons. First, they announced the overarching principle that constructive fraud due to breach of a confidential relationship amounts to undue influence, terminology that was adopted by other courts. Second, they differentiated such constructive fraud from the other forms of undue influence based on acts of coercion or overpersuasion. Third, they established a paradigm fact pattern of constructive fraud arising from one spouse's conveyance of property to the other spouse based on an unfulfilled promise by the other spouse to reconvey. This fact pattern has been applied by our courts many times in cases involving spouses and other persons in confidential relationships. (See, e.g., *Alaniz v. Casenave* (1891) 91 Cal. 41, 46, 27 P. 521 [in action to reconvey deeds conveyed to trusted family member, court held that if a deed is obtained without consideration by way of an oral promise to reconvey in a transaction between those in a ***286** confidential relationship, the breach of promise is constructive fraud]; *Sparks v. Sparks* (1950) 101 Cal.App.2d 129, 135, 225 P.2d 238 [in action to quiet title and void deed from father and one son to other son based on breach of fiduciary duties, judgment

affirmed; undue influence is a species of constructive fraud and depends on the facts and circumstances of each case]; *Holmes v. Holmes* (1950) 98 Cal.App.2d 536, 538, 220 P.2d 603 [affirming judgment for woman who sued man with whom she lived as husband and wife when man obtained deed to plaintiff's restaurant on promise to invest his own funds and work at the restaurant; because they behaved as a married couple, the same confidential relationship arose, and the man's breaches of promise were constructive fraud]; *Hilton v. Hilton* (1921) 54 Cal.App. 142, 155, 201 P. 337 [invalidating deed by wife to husband as part of divorce settlement on ground of undue influence; equating undue influence with lack of free will in entering transaction].)

Perhaps most notable of these for our purposes is *Jones v. Jones* (1903) 140 Cal. 587, 74 P. 143 (*Jones*), where a wife conveyed land to her husband on the advice of a lawyer who told them the transfer was required in order to bring an action to eject a tenant in possession of the land. Instead, the husband conveyed the land to a third party so the third party could bring the action, and the third party then claimed he was the true owner. The wife sued her husband and the third party. The trial court found those facts were true, but found that the husband had not acted fraudulently, but instead intended to carry out the plan to eject the tenant. The trial court entered judgment for the wife and enjoined the husband and the third party from making any claims to the property.

The Supreme Court affirmed, partly in reliance on *Brison I, supra,* 75 Cal. 525, 17 P. 689. (*Jones, supra,* 140 Cal. at p. 590, 74 P. 143.) Even if the attorney who advised the wife had been employed by her, the husband was not exonerated because, "by accepting the deed upon the statement made in his presence of the **821 purposes for which he was to hold the land, [he] became a party to the transaction, and by implication promised to fulfill the purpose of the trust." (*Id.* at p. 591, 74 P. 143.) As a result, the failure to fulfill this agreement was constructive fraud, allowing the wife to have the deed declared void. (*Id.* at p. 590, 74 P. 143.) In short, even when the suggestion to convey came from a third party adviser and no express promises were made by the husband, he impliedly promised to fulfill the conditions of the transfer, and the failure to do so was constructive fraud.

[3] By substituting the Starrs' loan broker for the lawyer in *Jones,* and adding in an express promise to essentially reconvey Martha's quitclaimed interest by Ron in place of an implied promise, we believe *Jones* is applicable here. Viewing the evidence most favorably to the judgment, Martha and Ron were told by the lender they should have Ron take title in his name only, with Martha quitclaiming her interest in the house, so they could get a better *287 interest rate. The lender said Ron could add Martha back onto the title after escrow closed, and Ron told Martha he would do that. Martha never questioned what happened because Ron was her husband and she trusted him. Ron declared under penalty of perjury in his divorce petition that the house was community property, but claimed he probably never read the declaration before signing it. This evidence falls squarely within the *Brison–Jones* paradigm and supports a finding that Ron's failure to add Martha onto the title as promised was constructive fraud and undue influence, thereby breaching his fiduciary duty to Martha.

For the same reason, we hold that *Mathews* is not applicable here. While the *Mathews* court mentioned in passing that the wife "assumed" or "believed" she would be added onto the title, there is no indication that her husband ever promised that would happen. The *Mathews* court did not develop the point, and it played no part in that court's analysis. Because the *Brison–Jones* fact pattern was not present in *Mathews,* and was not part of its decision, we hold that *Mathews* is not applicable here. We next consider whether the trial court's statement of decision allows us to affirm based on such a finding.

5. *The Statement of Decision Was Ambiguous*

[4] [5] In nonjury trials, unless a statement of decision has been requested and rendered, we will presume that the trial court made all the factual findings necessary to support the judgment, so long as those implied findings are supported by substantial evidence. If a statement of decision is given, it provides us with the trial court's reasoning on disputed issues and "is our touchstone to determine whether or not the trial court's decision is supported by the facts and the law." (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718, 30 Cal.Rptr.2d 745.) Ron contends the trial court's statement of decision shows that the trial court's reasoning was flawed and that we should reverse the judgment because: (1) of the four decisions listed in the trial court's statement of decision, only one—*Mathews*—is legally and factually applicable; and (2) the trial court's finding that the quitclaim deed was not signed freely and voluntarily is based on the lender's intent doctrine, which is also inapplicable.

[6] Implicit in Ron's contentions is the notion that the statement of decision clearly and unambiguously shows the trial court erred. We disagree. Instead, we conclude that the statement of decision is ambiguous. Because the record does

133 Cal.App.4th 624
Court of Appeal, Fourth District, Division 1, California.

In re the MARRIAGE OF Todd and Yatsuko A. MATHEWS.
Todd C. Mathews, Respondent,
v.
Yatsuko A. Mathews, Appellant.

No. D045372. | June 30, 2005.

Synopsis

Background: In dissolution proceeding, spouses disagreed as to whether residence, which wife had quitclaimed to husband, was properly characterized as community or separate property. The Superior Court, San Diego County, No. D479425, William J. Howatt, Jr., J., entered judgment awarding husband residence as his separate property. Wife appealed.

Holdings: The Court of Appeal, McDonald, J., held that:
[1] husband had burden of rebutting presumption of undue influence by preponderance of evidence, and
[2] husband rebutted presumption.

Affirmed.

Attorneys and Law Firms

**2 No Appearance for Respondent.

Edward Castro for Appellant.

Opinion

McDONALD, J.

*626 Yatsuko Mathews (Wife) appeals a judgment in favor of Todd Mathews (Husband) in a marriage dissolution proceeding awarding Husband their residence as his separate property. This action arose when the parties could not agree on the characterization of the residence, which Wife had quitclaimed to Husband. Wife contends: (1) the trial court erred by placing the burden of proof on her to establish the quitclaim deed was the result of husband's undue influence; (2) Husband had the burden of proof to rebut a presumption of undue influence over Wife; and (3) Husband did not rebut the presumption of undue influence by clear and convincing evidence. She argues the residence should be characterized as community property. We conclude the trial court erred in not applying the proper burden of proof standard; however, substantial evidence supports the court's findings that no undue influence existed and the residence is Husband's separate property. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We note that Husband has been served with the notice required by California Rules of Court, rule 17(a)(2). Husband did not file a respondent's brief. Accordingly, the case has been submitted on the record, Wife's opening brief and on oral argument presented by Wife.

*627 A. *Facts Surrounding Residence and Quitclaim Deed*

Wife, then a resident of Japan, met Husband in 1990 during his deployment with the United States Navy. They married in Japan in 1995. In 1997 Husband was transferred and the couple moved to the United States.

In 2002 the couple purchased the residence at issue for $156,655 in El Cajon, California. To obtain a more favorable interest rate on a mortgage Wife quitclaimed her interest in the residence to Husband, and the residence was acquired in his name alone. The quitclaim deed was validly executed and recorded. Wife acknowledged the residence was acquired solely in Husband's name but believed her name would be added to the title at a later date. Throughout the marriage, Wife and Husband both believed the residence was community property and after the separation discovered title to the residence was in his name alone.

B. *Wife's Language Comprehension, Work Experience and Education*

Wife asserts difficulty understanding the complicated terms, contract language and legal effect of the quitclaim deed. Although Japanese is her first language, she attended English classes in Japan Since their first meeting in 1990, all conversations **3 between Husband and Wife have been conducted in English.

In 1995 Wife accepted a job at an international company in Japan as an operator taking calls from Japanese- and English-speaking customers. Additionally, her first job in the United States required her to speak English about half of the time. In 2003 she began working as a translator of written and oral communications for a United States-based Japanese company.

After moving to the United States, Wife completed an entrance exam for college and received a 98 percent grade in English proficiency. In 2001, one year prior to signing the quitclaim deed, Wife completed an eight-month certificate program taught only in English at a college in California and finished in the top 10 percent of her class.

In addition to Wife's proficiency in English, she managed the marital household finances. She maintained a bank account in her name alone in Japan, maintained separate United States accounts in her name, and maintained a joint account with Husband.

C. *Lower Court Action and Findings*

The couple separated in 2003 and the residence at issue was sold. Husband and Wife agreed on the division of all community and separate property ***628** except the residence. In July 2004 a court trial was held on the issue of whether the residence was Husband's separate property or community property. Wife contended there was a presumption Husband exerted undue influence to obtain her signature on the quitclaim deed, he did not rebut that presumption and the quitclaim deed was therefore ineffective to relinquish her community property interest in the residence.

The trial court declined to apply a presumption of undue influence on Husband and determined Wife entered into the transaction freely, voluntarily and with a full understanding of the quitclaim deed. The court concluded the quitclaim deed was executed in good faith and characterized the residence as Husband's separate property. Wife requests de novo review of the trial court's decision.

DISCUSSION

[1] Wife argues the trial court erred by refusing to apply *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 39 Cal.Rptr.2d 673 (*Haines*) and Family Code section 721 [1] to a determination that the residence was Husband's separate property. Wife further argues, applying *Haines* and section 721, [2] Husband has the burden of proof to rebut a presumption of undue influence over Wife in signing the quitclaim deed. Additionally, Wife contends that clear and convincing evidence is required to overcome this presumption and Husband did not meet this evidentiary standard.

1 All statutory references are to the Family Code unless otherwise specified.

2 Although the trial court refused to apply *Haines* and made no mention of section 721, *Haines* is an interpretation of section 721 and they are both equally applicable to the present case.

A. *Application of Haines and Section 721*

Statutorily, spouses have the right to enter into transactions with each other as well as other persons. (§ 721, subd. (a).) However, interspousal transactions must comport with the rules controlling the actions of persons occupying confidential roles with each other. (§ 721, subd. (b).) Section 721, subdivision (b) provides: "[I]n ****4** transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." Section 721, subdivision (b) requires interspousal transactions to be "pleasing to the fiduciary standard." (*Haines, supra,* 33 Cal.App.4th at p. 293, 39 Cal.Rptr.2d 673.) If one spouse secures an advantage from the ***629** transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside. (*Haines,* at pp. 293–294, 39 Cal.Rptr.2d 673.)

The prerequisite elements for the statutory presumption under section 721 to apply are: (1) there exists an interspousal transaction; and (2) one spouse has obtained an advantage over the other. (*Haines, supra,* 33 Cal.App.4th at p. 301, 39 Cal.Rptr.2d 673.) Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits. (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 152, 272 P.2d 11.) In the present case, Husband and Wife entered into an interspousal transaction by signing a quitclaim deed permitting the residence to be acquired in Husband's name only. Through this transaction, the residence was acquired as Husband's separate property. Husband received an advantage or benefit from Wife's execution of the quitclaim deed when the residence became his separate property. Because the prerequisite elements are met, the statutory presumption of section 721 and *Haines* apply to the instant case.

The trial court declined to apply *Haines* and section 721 in this case based solely on a determination that the

cases were factually distinguishable. In *Haines,* the wife executed a quitclaim deed conveying her joint interest in the property to the husband, making it his separate property. The wife testified she did so under considerable emotional and physical duress; the husband disputed this, characterizing the transaction as "calm and businesslike." (*Haines, supra,* 33 Cal.App.4th at pp. 283–285, 39 Cal.Rptr.2d 673.) During a period of reconciliation, the husband reconveyed his separate property interest in the property to himself and his wife as joint tenants. After the parties later separated, the wife filed for dissolution. (*Id.* at p. 285, 39 Cal.Rptr.2d 673.)

In the division of property, the trial court awarded the husband reimbursement for the full value of the property at the time of the second transfer to joint property as his separate property contribution to the community. (*Haines, supra,* 33 Cal.App.4th at pp. 285–286, 39 Cal.Rptr.2d 673.) Concluding the presumption of undue influence trumped the conflicting presumption of record title and the husband had not rebutted the wife's claim of duress in the transaction, this court reversed the trial court's reimbursement of the husband's separate property interest. (*Id.* at pp. 301–302, 39 Cal.Rptr.2d 673.)

Although the facts of *Haines* differ from those here, the reasoning and analysis supporting the applicability of section 721 is the same in both cases. The rationale of *Haines* applies to *any* interspousal property transaction in which the evidence shows one spouse obtained an advantage over the other. (***630** *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 999, 4 Cal.Rptr.3d 378 (*Delaney*).) Nothing in *Haines* confines its holding to situations in which the interspousal property conveyance was ****5** the result of actual fraud, deceit or coercion.

B. *The Burden of Proof and Presumption under Haines and Section 721*

[2] **[3]** A rebuttable presumption of undue influence arises when one spouse obtains an advantage over another in an interspousal property transaction. (*Haines, supra,* 33 Cal.App.4th at p. 297, 39 Cal.Rptr.2d 673.) The burden of rebutting the presumption of undue influence is on the spouse who acquired an advantage or benefit from the transaction. (*Ibid.*) In every transaction between a husband and wife in which one party obtains a possible benefit, equity raises a presumption against its validity and "casts upon that party the burden" of proving compliance and overcoming the presumption. (*Estate of Cover* (1922) 188 Cal. 133, 143–144, 204 P. 583; *Delaney, supra,* 111 Cal.App.4th at pp. 996–997, 4 Cal.Rptr.3d 378; *In re Marriage of Lange* (2002) 102 Cal.App.4th 360, 364, 125 Cal.Rptr.2d 379.)

The trial court here improperly refused to apply the section 721 presumption of undue influence that places the burden of proof on Husband. As the party asserting the residence acquired during the marriage is separate rather than community property, Husband bore the burden of overcoming the presumption against that assertion. Consequently, it was Husband's burden to establish Wife's signing of the quitclaim deed was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the residence Husband's separate property. (*Haines, supra,* 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.)

C. *Evidentiary Standard to Rebut a Presumption of Undue Influence*

Wife contends Husband presented insufficient evidence to rebut the presumption of undue influence. *Haines* and section 721 do not specifically delineate an evidentiary standard for overcoming the presumption of undue influence; however, *Haines* does specify several factors that rebut the presumption of undue influence. These factors include evidence the quitclaim deed was freely and voluntarily made, with a full knowledge of all the facts and with a complete understanding of the effect of the quitclaim deed. (*Haines, supra,* 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.)

Wife contends Husband must overcome the presumption of undue influence by clear and convincing evidence. Wife points out that although *Haines* does not articulate a specific standard of proof to rebut the presumption of undue influence, it does offer authority for applying a clear and convincing ***631** evidentiary standard. However, Wife's contention that a presumption is rebuttable only by clear and convincing evidence is not generally accepted. [3]

3 *Haines* notes there is a limited range of issues for which a party will be held to the higher evidentiary standard of clear and convincing evidence, suggesting the need to apply a lower standard in most situations. (*Haines, supra,* 33 Cal.App.4th at p. 294, fn. 9, 39 Cal.Rptr.2d 673.)

Although Wife agrees section 721 applies, nothing in the statute requires the presumption of undue influence be overcome by clear and convincing evidence. Because statutory law does not provide the answer, we look to case law to determine the degree of proof required to rebut undue influence in the marital confidential fiduciary relationship.

Although some authority requires clear and convincing evidence to rebut the presumption (*Bank of America v. Crawford* (1945) 69 Cal.App.2d 697, 701, 160 P.2d 169), the weight of authority concludes the burden of rebutting **6 the presumption of undue influence is by a preponderance of the evidence. (See *Estate of Stephens* (2002) 28 Cal.4th 665, 677, 122 Cal.Rptr.2d 358, 49 P.3d 1093; *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863, 111 Cal.Rptr. 833.) Moreover, Evidence Code section 115 defines burden of proof and states, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Because section 721 does not specify a greater burden, Husband may overcome the presumption of undue influence by a preponderance of the evidence.

[4] The trial court concluded that Wife did not establish Husband used undue influence to obtain the quitclaim deed. However, it was Husband's burden to establish the quitclaim deed was freely and voluntarily made, with a full knowledge of all the facts and with a complete understanding of the transfer. (*Haines, supra,* 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.) Substantial evidence in the record supports the conclusion that Husband satisfied his burden of proof by a preponderance of the evidence and rebutted the presumption of undue influence. The record shows Husband and Wife agreed that she sign the quitclaim deed as the only way to obtain a lower interest rate on the mortgage. Wife freely and voluntarily executed the quitclaim deed to help with the purchase of the residence and acknowledged title to the residence would be taken in Husband's name alone. Wife had full knowledge of all of the facts surrounding the execution of the quitclaim deed and the reasons for it were clear to her. Wife further admitted to asking questions when she was unclear but asked none when she signed the quitclaim deed. Husband placed no pressure on Wife to sign and, by both of their admissions, the quitclaim deed allowed a lower interest rate on the mortgage. The purchase of the residence was not dependant on Wife signing the quitclaim deed.

Husband's most difficult factor in overcoming the presumption of undue influence was showing Wife had a complete understanding of the effect *632 of the quitclaim deed. Wife contends that language barriers limited her comprehension of the purchase of the residence. However, the record shows Wife was above average in her English skills and competent to complete a college certification course taught in English. She spoke English from the time she met Husband and eventually worked as a translator, suggesting a more than adequate command of the English language. Further, Husband entrusted almost all financial matters to wife, relying on her judgment and management. Wife had separate investment accounts and made her own investment decisions with those accounts. She controlled both her income and Husband's, and paid all of the household bills. Wife acknowledged her bad credit rating prevented her and Husband from receiving a lower interest rate if they both acquired title to the residence, and made a conscious decision to sign the quitclaim deed. Wife further admitted to knowing her name was not on the title and assumed it would be added later. On this record, there is no basis for overturning the trial court's decision that the quitclaim deed was valid and executed freely and voluntarily in good faith. Husband rebutted the presumption of undue influence by a preponderance of the evidence.

[5] The trial court should have applied the standard set out in *Haines, supra,* 33 Cal.App.4th 277, 39 Cal.Rptr.2d 673 and section 721; however, "If the *decision* of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the grounds [on] which the lower court reached its conclusion. The rationale for this principle is twofold: (a) an appellate court reviews the *action* of the lower court and not the reasons given **7 for its action; and (b) there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct." (*In re Estate of Beard* (1999) 71 Cal.App.4th 753, 776, 84 Cal.Rptr.2d 276.) See also *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329, 48 P. 117["[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason."].)

[6] Substantial evidence supports the trial court's conclusion that the quitclaim deed 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. It is correct, as Wife contends, that when a husband secures a property advantage from his wife, the burden is on him to show that there has been no undue influence. (*Haines, supra,* 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.) It is also correct, however, that whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence. (*Weil v. Weil* (1951) 37 Cal.2d 770, 788, 236 P.2d 159.) Substantial evidence supports the conclusion that Husband rebutted the presumption of undue influence over Wife's signing the quitclaim deed by a preponderance of the evidence. The court correctly determined the residence was the separate property of Husband.

***633 DISPOSITION**

The judgment is affirmed. Husband is entitled to costs on appeal.

WE CONCUR: BENKE, Acting P.J., and NARES, J.

Parallel Citations

133 Cal.App.4th 624, 2005 Daily Journal D.A.R. 12,507

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156 Cal.App.2d 240, 319 P.2d 405

JOSEPH PESKIN, Appellant,
v.
ARLO D. SQUIRES, Respondent.

Civ. No. 22474.
District Court of Appeal, Second District, Division 2, California.
Dec. 18, 1957.

HEADNOTES

(1)
Trial § 125--Questions of Law and Fact.
Unless it can be said as a matter of law that only one reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it or the trial court to set it aside as a matter of law, the trial court is not justified in taking a case from the jury.

(2)
Fraud § 19--Intent.
In a case of wilful suppression of a material fact, the intention existing at the time of suppression need be, under Civ. Code, § 1709, only one of inducing action; subsequent insistence on existence of the concealed fact to plaintiff's damage completes the actual fraud.

See **Cal.Jur.2d,** Fraud and Deceit, § 26; **Am.Jur.,** Fraud and Deceit, § 116 et seq.

(3)
Assignments § 60--Rights and Liabilities of Parties.
A debtor normally need say or do nothing affirmative when he receives notice of assignment of his debt, but it is fair to assume that a person who owes nothing and receives a notice of assignment of an alleged debt owing from him will forthwith notify the assignee that there is no such outstanding obligation.

(4a, 4b)
Fraud § 92--Nonsuit.
It was reversible error to grant defendant customer's motion for nonsuit in a fraud action brought by the purchaser of a lumber company's accounts receivable, where it appeared that defendant and the company conspired in misrepresenting the status of defendant's debt to the company and that defendant, in response to plaintiff's inquiry, failed to disclose that a certain invoice was without consideration and did not, in fact, represent a real sale of lumber.

(5)
Conspiracy § 28--Civil--Definition and Elements.
A conspiracy is a combination of two or more persons to accomplish, by concerted action, a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means.

See **Cal.Jur.2d,** Conspiracy, § 47; **Am.Jur.,** Conspiracy, § 45 et seq.

(6)
Conspiracy § 30--Civil--Liability of Parties.
Each party to a conspiracy is liable for all acts done in pursuance thereof, and lack of knowledge of details or absence of personal commission of overt acts is immaterial.

(7)
Conspiracy § 33--Civil--Parties.
A conspirator may be sued without joinder of his coconspirator.

(8)
Evidence § 249--Hearsay--Exceptions.
In an action against a lumber company's customer brought by the purchaser of the company's accounts receivable to recover for fraud in misrepresenting the status of defendant's debt to the company, the hearsay rule did not exclude evidence of an agreement between defendant and the company made before plaintiff's purchase, concerning the handling of defendant's account with the company, where such evidence established a course of dealing pursued by defendant and the company as conspirators in sale of the receivables to plaintiff.

(9a, 9b)
Usages and Customs § 16--Evidence.
In a fraud action involving parties engaged in the lumber business, it was error to exclude evidence of the meaning of 'invoice,' as used in that business.

(10)
Words and Phrases--'Invoice.'

and 29, 1954. It thus appears that defendant was guilty of a willful concealment of material facts as to plaintiff's purchase of the last three or four receivables involved in this action, and a nonsuit as to those items was manifestly improper. The judgment of nonsuit must be reversed.

In view of the necessity of a new trial certain of the many claims of error in ruling upon evidence and other questions of law will be passed upon.

([7]) The court held that one conspirator cannot be sued without joinder of his coconspirator. This was error, as was held in *Sayadoff v. Warda,* 125 Cal.App.2d 626, 629 [271 P.2d 140].

([8]) The court initially excluded or later struck most of the evidence of the agreement made between Wright Company and defendant concerning the handling of invoices in cases ***248** of no delivery of lumber, this because it preceded plaintiff's contract and occurred between other parties. The rejected evidence established a course of dealing which the parties pursued in selling receivables to plaintiff. It was not hearsay within the exclusionary rules, but embraced verbal acts of the parties, independently relative evidence of what was done by the conspirators in dealing with plaintiff. (See 19 Cal.Jur.2d § 378, p. 109; 31 C.J.S. § 239, p. 988.)

([9a]) Plaintiff's efforts to show the customary meaning of the word 'invoice' as used in the lumber industry were thwarted by adverse rulings of the trial judge. The following offer of proof was rejected: 'What we would like to establish by the witness's testimony is that it is generally and customarily understood in the lumber industry in this area that an invoice represents merchandise actually shipped or stored for the purchaser's account, and to which title has been transferred, and that this is the general understanding of the lumber industry; that accordingly, Mr. Squires would have knowledge that anyone dealing with the invoice would assume that the invoice did represent what invoices customarily represent in the lumber industry, namely, merchandise shipped or merchandise to which title has been transferred in the seller's yard.' ([10]) The term 'invoice' is not a technical one and does not have a single settled connotation (48 C.J.S. p. 764). ([11]) The rule is well established that a custom prevailing in a given industry is binding upon those engaged therein though there be no specific proof of knowledge on the part of the particular party to the litigation. *Body-Steffner Co. v. Flotill Products, Inc.,* 63 Cal.App.2d 555, 558 [147 P.2d 84]: 'It is a rule of practically universal acceptation in common law jurisdictions that however clear and unambiguous the words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense.' At page 560: 'Where two parties engaged in the canned goods trade in the same locality, as here, enter into a contract they are bound by a generally accepted usage of the trade in that locality giving to the terms and language actually used in their contract a particular meaning and legal significance, even though that meaning may be at variance with the normal meaning and interpretation which would be given to that language in the ***249** absence of proof of the usage of the trade.' (See also *Covely v. C.A.B. Construction Co.,* 110 Cal.App.2d 30, 33 [242 P.2d 87]; *Correa v. Quality Motor Co.,* 118 Cal.App.2d 246, 251 [257 P.2d 738]; *California Lettuce Growers v. Union Sugar Co.,* 45 Cal.2d 474, 482 [289 P.2d 785, 49 A.L.R.2d 496].) ([9b]) The rulings on this subject were erroneous.

Plaintiff was precluded from testifying that he relied upon the confirmation of March 25, 1954 (Exhibit 33), which was sent to his accountants and by them relayed to him, as was manifestly intended by defendant. ([12]) In a fraud action plaintiff is not confined to circumstantial proof or presumption of reliance; he is entitled to testify as to whether he relied upon the false representation or concealment of defendant. (See *Fagan v. Lentz,* 156 Cal. 681, 688-689 [105 P. 951, 20 Ann.Cas. 221]; *Luitweiler etc. Co. v. Ukiah etc. Co.,* 16 Cal.App. 198, 210 [116 P. 707, 712]; *Harned v. Watson,* 17 Cal.2d 396, 403 [110 P.2d 431]; *Southern Pac. Co. v. Libbey* (CA 9 Cir.), 199 F.2d 341, 348-349; 37 C.J.S. § 109b, p. 421). ([13]) This is true because a witness may always testify to the state of his own mind when it becomes a material fact in the case. (See 18 Cal.Jur.2d § 151, p. 602; *Starck v. Pacific Electric Ry. Co.,* 172 Cal. 277, 285 [156 P. 51, L.R.A. 1916E 58]; *Kyle v. Craig,* 125 Cal. 107, 114 [57 P. 791].)

Fraud assumes as many and complex forms as the ingenuity of man is able to devise. Rarely can it be proved by direct evidence; usually, as here, the plaintiff must establish his cause of action by circumstantial evidence, if at all. ([14]) Trial judges should be sensitive to the fact that a trial is a search for the truth and because of the nature of a fraud action liberality in the receipt of evidence should be indulged to a degree commensurate with the difficulties of the proof. (*Butler-Veitch, Inc. v. Barnard,* 77 Cal.App. 709, 714-715 [247 P. 597]; *Bradley v. Osborn,* 86 Cal.App.2d 18, 22 [194 P.2d 53]; *Dyke v. Zaiser,* 80 Cal.App.2d 639, 654 [182

P.2d 344]; 37 C.J.S. § 104, p. 410.) Volume 24, American Jurisprudence, section 281, p. 126: 'A court in looking for proof of fraud is not confined to 'wide open spaces' or to detailed proof of fixed and definite overt acts or conduct. Facts of trifling importance when considered separately, or slight circumstances trivial and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, ***250** many of which in themselves amount to very little but in connection with others make a strong case.'

The judgment is reversed.

Fox, Acting P. J., and Richards, J. pro tem., * concurred.

* Assigned by Chairman of Judicial Council.

A petition for a rehearing was denied January 14, 1958, and respondent's petition for a hearing by the Supreme Court was denied February 11, 1958.

End of Document

111 Cal.App.4th 1116
Court of Appeal, Fourth District, Division 1, California.

In re the Marriage of Georgiana and Harry Franklin HIXSON, Jr.
Georgiana Breeden Hixson, Appellant,
v.
Harry Franklin Hixson, Jr., Respondent.

No. D039697. | Sept. 5, 2003. | As Modified on Denial of Rehearing Sept. 24, 2003. | Review Denied Jan. 22, 2004.

Synopsis

Background: Former wife filed order to show cause with respect to stock and investment she alleged had not been adjudicated during division and distribution of marital assets. The Superior Court, San Diego County, No. D409138, Joan M. Lewis, J., granted former husband's motion to preclude discovery and denied former wife relief. Former wife appealed.

Holdings: The Court of Appeal, Benke, Acting P.J., held that:
[1] statute providing for continuing jurisdiction did not prohibit family court from precluding discovery;
[2] former wife was not entitled to discovery as to allegation that certain stock had not been adjudicated; and
[3] former husband had no duty to share investment opportunity that postdated distribution of marital assets.

Affirmed.

Attorneys and Law Firms

****485 *1119** Haight, Brown & Bonesteel, L.L.P., John W. Sheller, Rita Gunasekaran and Jennifer K. Saunders; Gary S. Wolfe, Beverly Hills, for Appellant.

Ault, Jones & Robinson, Rex L. Jones and Julie R. Barnes; Cooley Godward, L.L.P., Anthony M. Stiegler, Christopher R.J. Pace, San Diego, and Andrea S. Hoffman; Luce, Forward, Hamilton & Scripps and Mary F. Gillick, San Diego, for Respondent.

Opinion

BENKE, Acting P.J.

In 1997 appellant, petitioner Georgiana Breeden Hixson (Breeden), and respondent, Harry Franklin Hixson, Jr., entered into a series of stipulated judgments dividing and distributing their marital assets. In 2001 Breeden filed an order to show cause with respect to community property which she alleged had not been previously adjudicated. Breeden propounded discovery with respect to the factual allegations set forth in her order to show cause and the family court granted Hixson's motion to prevent the discovery from taking place. Thereafter the family court denied Breeden any relief on the order to show cause.

We affirm. The evidence in the record is not sufficient to establish the existence of an unadjudicated community asset as to which discovery is necessary or as the basis for granting relief on Breeden's order to show cause. Thus the family court acted properly in denying Breeden any relief on the order to show cause.

SUMMARY

After 32 years of marriage, Breeden and Hixson separated in 1995. During the course of the marriage Hixson was the president and chief executive ***1120** officer of a large publicly-traded biotechnology company, ****486** Amgen, Inc. (Amgen). The bulk of the parties' marital assets, consisting of Amgen stock and their interests in limited partnerships, were held in a revocable family trust. Following initiation of dissolution proceedings, Hixson provided Breeden and her counsel with an extensive declaration setting forth the trust's assets. In addition, Hixson participated in two days of depositions and provided Breeden with all the financial records requested by her counsel.

In 1997, by way of a series of stipulated judgments, most of the assets held in the trust were distributed to Breeden and Hixson as separate property. However, because of restrictions on their right to transfer their limited partnership interests, those interests were held in the trust even after dissolution of the marriage.

In 2001 Breeden filed a probate petition in which she alleged that $34 million in stock transactions had not been accounted for, that without her knowledge or consent, a substantial number of Amgen shares had been withdrawn or distributed from the trust, and that Hixson had exploited for himself an investment opportunity which should have been shared with the marital community.

On Hixson's motion, the probate petition was transferred to the family court, where Breeden recast it as an order to show cause. Prior to the hearing on the order to show cause, Breeden propounded discovery on Hixson. Hixson moved to quash the discovery. The family court initially stayed the discovery pending a hearing on whether it would permit the discovery to take place.

On December 13, 2001, after considering declarations submitted by the parties, the existing record and argument of counsel, the trial court refused to permit Breeden to go forward with the discovery she proposed. Thereafter, the family court entered an order denying Breeden any relief on her order to show cause.

Breeden filed a timely notice of appeal.

DISCUSSION

In her principal argument on appeal Breeden contends Family Code[1] section 2556 gave her the absolute right to conduct discovery with respect to the allegations set forth in her OSC. Hixson on the other hand contends Breeden had no right to any discovery. We conclude *1121 the family court, like any other court presiding over a civil proceeding, had discretion to limit discovery. That discretion required that it consider the nature of the proceeding before it and the issues in controversy. Here we find that under all the circumstances set forth in the record, the family court did not abuse its discretion in limiting Breeden's discovery and did not err in denying her relief on her OSC.

1 All further statutory references are to the Family Code unless otherwise indicated.

I

[1] We begin our analysis with section 2556, which states: "In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community estate asset or liability, unless the court finds upon **487 good cause shown that the interests of justice require an unequal division of the asset or liability."

Section 2556 was derived from the substantively identical provisions of former Civil Code section 4353. Prior to enactment of former Civil Code section 4353, a spouse who believed that community property had not been adjudicated in a prior dissolution proceeding was required to bring a separate civil action. (*Henn v. Henn* (1980) 26 Cal.3d 323, 330–332, 161 Cal.Rptr. 502, 605 P.2d 10.) "There are no reported decisions that have held that a community property claim to an asset left unmentioned in a prior judicial division of community property may be adjudicated in a motion to modify the prior decree. The only reported decisions that address this issue correctly conclude that such claims may only be adjudicated in a separate action. [Citations.]" (*Id.* at p. 332, 161 Cal.Rptr. 502, 605 P.2d 10.)

The legislative history of former Civil Code section 4353 indicates that it was sponsored by the author of a noted treatise on family law, Justice Donald King. Justice King believed that permitting litigation of unadjudicated community property claims by way of orders to show cause in the prior family law matter "would be considerably less expensive, less burdensome on the court, save a great deal of judicial time, permit resolution of the dispute within a very short period of time, and permit the aggrieved party to obtain attorney fees and costs which would not otherwise be available." (Senate Judiciary Committee Report, AB 1905 (1989–1990 Reg. Sess., July 18, 1989).)

*1122 Contrary to Hixson's argument on appeal, nothing on the face of the statute or its history suggests that discovery on an order to show cause under section 2556 should be treated differently than discovery permitted in any other proceeding under the family law. The terms of the statute contain no express restriction on, or reference to, discovery. Given the statute's origins in the prior practice of requiring a separate civil action be initiated, where fairly unrestricted discovery would have been available, we would expect that had the Legislature intended to impose strict limits on discovery, those limits would have been set forth on the face of statute or in some other manner expressed in the legislative history. Although there is reference in the history to convenience and efficiency, those general references, in light of the prior practice, do not persuade us that the Legislature intended that a section 2556 proceeding be treated any differently than other family law matters.

Our conclusion that any limitation on discovery in section 2556 proceedings would have been expressed rather than left implied is consistent with our Supreme Court's recognition that family law litigants are entitled to all the discovery provided by the Civil Discovery Act, Code of Civil Procedure section 2016 et seq. and that the right to discover community assets is of particular importance. (See e.g. *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 711, 21 Cal.Rptr.2d 200, 854 P.2d 1117.) " 'Under the discovery statutes, information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence.' [Citations.] At the outset, we note that information about the value of community assets and the parties' financial status is clearly relevant to the spouse's interests in obtaining a fair division of those assets and fair attorney fee and spousal support (and, in other cases, child support) awards. Moreover, at least as to a division of assets and child and spousal support awards, those interests are strongly protected by California law." (*Ibid.*)

**488 [2] However, contrary to Breeden's contention on appeal, the right to discovery in civil proceedings is not absolute. "Section 2019, subdivision (b), provides generally that any discovery method, including depositions, may be restricted in the frequency or extent of its use if the trial court determines either that '(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive' or '(2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.' " (*People v. Superior Court* (*Cheek*) (2001) 94 Cal.App.4th 980, 992, 114 Cal.Rptr.2d 760 (*Cheek*).)

In *Cheek* the court found that while the subject of a petition under the Sexually Violent Predators Act (SVPA), *1123 Welfare and Institutions Code section 6600 et seq., was entitled to discovery under the Civil Discovery Act, the scope of permissible discovery was limited by the narrow issues considered in an SVPA proceeding and the need for expeditious adjudication. (94 Cal.App.4th at pp. 990–991, 114 Cal.Rptr.2d 760.) The court also emphasized a trial court's power to manage discovery in an SVPA proceeding must be considered "on a case-by-case basis. For example, the trial court may take into account that in some cases expert witness testimony will have been elicited before trial, because the SVPA provides pretrial opportunities to call and cross-examine experts and other witnesses at the probable cause hearing [citations] and at the annual show cause hearing to review the mental status of committed persons. [Citations.]" (*Id.* at p. 994, 114 Cal.Rptr.2d 760.)

[3] There are obvious and dramatic differences between an SVPA proceeding and an order to show cause under the provisions of section 2556. However, *Cheek* is nonetheless helpful in recognizing that a trial court has the power to confine discovery to the issues raised in particular proceedings and that a trial court must exercise its management authority on a case-by-case basis. Thus, in a proceeding under section 2556 a party, such as Hixson, may obtain an order limiting or even preventing discovery if the proposed discovery exceeds the scope of the statute or is unnecessary under all the circumstances presented. Such a restriction on discovery, like other discovery orders, is subject to review for abuse of discretion. (See *Cheek, supra,* 94 Cal.App.4th at p. 987, 114 Cal.Rptr.2d 760.)[2]

2 "Thus, where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]" (*Cheek, supra,* 94 Cal.App.4th at p. 987, 114 Cal.Rptr.2d 760.)

II

[4] [5] The clearest limitation on the scope of any discovery under section 2556 is the nature of the assets over which the family court may exercise jurisdiction. Not only by its express terms, but also by virtue of the doctrines of res judicata and collateral estoppel, the family court's power under section 2556 is limited to assets which have not been previously adjudicated. The family court's power is also limited to community property and community liabilities; the statute gives the court no power to make an award with respect to a party's separate property or separate liabilities. Thus a family court can prevent discovery which is directed solely toward assets or liabilities which have already been adjudicated or are clearly the separate **489 property or liability of one of the parties.

In addition to the substantive limitations on the kinds of property and liability that may be considered under section 2556, there are obvious practical considerations which will govern the manner in which a *1124 section 2556 claim is litigated. Because section 2556 provides a postjudgment remedy, there will always be an existing record of prior dissolution proceedings. Sometimes, as is the case here, that record will be fairly exhaustive; in other instances the record

may be somewhat limited. Plainly, where a thorough record exists, extensive new discovery on many issues may not be necessary.

[6] In considering any objection to discovery, the family court must also, of course, consider the nature of a moving party's allegations and any defenses which have been asserted. Where the principal controversy between the parties is whether the subject assets or liability have been previously adjudicated, the need to manage discovery to avoid unnecessary duplication may be more pronounced. On the other hand where the parties' principal dispute is whether the subject property is community property or there is a community liability, more discovery might be needed with respect to the circumstances under which the subject asset or liability was acquired.

The foregoing considerations are by no means exhaustive and in particular cases additional circumstances will bear upon the family court's control over discovery. Nonetheless with these considerations in mind, we turn to the family court's order in this case.

III

A. *Amgen Stock*

[7] Although neither party presented any evidence from a representative of the securities broker which maintained the trust's stock portfolio, the record at the hearing (principally Hixson's declaration) supports the trial court's determination that no further discovery with respect to the trust's stock transactions was necessary.

In seeking to prevent further discovery, Hixson argued that all of the marital community's stock and Amgen shares had been adjudicated. In support of his argument, Hixson relied on the exhaustive record which had been developed prior to entry of the stipulated judgments. The record in particular included exhibits A and B to the stipulated judgment entered on January 27, 1997. On their face exhibits A and B account in some detail for the community's securities, including its stock holdings, including its Amgen shares. Because exhibits A and B were developed after Breeden conducted extensive discovery with respect to the marital community's assets, and because Breeden was represented by counsel at the time the stipulated judgment was entered into, the family court acted well within its discretion in requiring that Breeden made some showing which would impeach them.

[8] *1125 Although section 2556 permits a spouse to seek a division of unadjudicated community assets, it does not, as Breeden seems to suggest, permit the family court to simply ignore the previously developed record and the inferences which can be reasonably be drawn from that record. In managing discovery under section 2556, considerations of simple fairness to the responding spouse, as well as obvious judicial economy, permit a court to rely on the prior record until the moving party has made some showing which either undermines that record or demonstrates that the record does not resolve the claim being asserted.

**490 Breeden failed to present any evidence or even any argument which would undermine exhibit A as a division of the party's substantial securities, including its Amgen shares. As Hixson pointed out, in relying on records from the parties' brokerage account, which records were available and examined by Breeden's counsel at the time exhibits A and B were developed, Breeden failed to recognize that with respect to each share "delivered" to the parties' brokerage account there was a corresponding share "received" and also failed to deduct the cost the marital community incurred in exercising Amgen stock options. In short in light of the record presented, the family court did not abuse its discretion in preventing unnecessary discovery with respect the parties' Amgen stock.

B. Limited Partnership

[9] As indicated, while they were married Hixson and Breeden invested in limited partnerships offered by a venture capital firm, Kleiner Perkins Caufield & Byer (KPCB) and held those investments in the family trust. The January 27, 1997, stipulated judgment distributed to each party one-half of the trust's interest in those investments as well as one-half of any future distributions made by the limited partnerships to the trust.

[10] By July 1997 Hixson had remarried and at that time KPCB offered him the opportunity to invest in a new limited partnership. In her order to show cause Breeden alleged that, in light of the community's prior investments in KPCB, Hixson should have shared the July 1997 opportunity with her. However, as Hixson points out, Hixson's duty to share KPCB investment opportunities expired when the community's KPCB investments were distributed. (§ 2102, subd. (a); see also *Brown v. Brown* (1915) 170 Cal. 1, 7, 147 P. 1168.) We have not been directed to any authority, and have found none, which creates any duty of disclosure with respect to property which has been distributed as separate property. A duty to share business opportunities following separation

is only imposed with respect to property which has not been distributed as separate property or otherwise adjudicated. (See § 2102, subd. (a); ***1126** *Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851, 144 Cal.Rptr. 1 [unadjudicated assets subject to jurisdiction of court].) Thus, there was no basis upon which Breeden could assert any interest in the new partnership and no need to subject Hixson or the venture capital firm to discovery with respect to it.

IV

Because Breeden failed to demonstrate that there were any unadjudicated assets or opportunities, the trial court did not err in denying her relief on her order to show cause.

Orders affirmed. This court's order staying proceedings in the trial court is vacated.

WE CONCUR: McINTYRE and AARON, JJ.

Parallel Citations

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End of Document

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and 8.1110, 8.1115, 8.1120 and 8.1125)
Court of Appeal, Fourth District, Division 3, California.

In re MARRIAGE OF Elaine
and Alan D. MARGULIS.
Elaine Prentis–Margulis, Appellant,
v.
Alan D. Margulis, Appellant.

No. G041948. | Aug. 11, 2011. | As Modified Aug. 26 and Sept. 9, 2011.

Synopsis

Background: In marital dissolution action, the Superior Court, Orange County, No. 02D005672, Robert H. Gallivan, Temporary Judge, entered order dividing community property, found that husband breached fiduciary duty, and awarded sanctions and attorney fees to wife. Husband and wife appealed.

Holdings: The Court of Appeal, Aronson, J., held that:
[1] list of assets triggered presumption of their value and that husband misappropriated or wrongfully transferred them, and
[2] forensic accounting expert's testimony that husband was entitled to reimbursement for postseparation payments was unfounded.

Reversed.

Attorneys and Law Firms

**329 Law Offices of Steven E. Briggs and Luis A. McKissick for Appellant Elaine Prentis–Margulis.

Law Offices of Burch, Coulston & Buncher and Todd P. Coulston, Irvine, for Appellant Alan D. Margulis.

Stephen Temko, San Diego, and Dawn Gray, Grass Valley, for the Association of Certified Family Law Specialists and the Southern California Chapter of the American Academy of Matrimonial Lawyers as Amici Curiae, upon the request of the Court of Appeal.

Opinion

***1257 OPINION**

ARONSON, J.

In a marital dissolution proceeding to divide the community property, where the nonmanaging spouse has prima facie evidence that community assets of a certain value have disappeared while in the control **330 of the managing spouse post-separation, [1] should the managing spouse have the burden of proof to account for the missing assets? The answer is yes.

1 As used here, "postseparation" means after the spouses have begun "living separate and apart," as that expression is used in Family Code section 771, subdivision (a).

Husband and wife separated after a 33–year marriage and, for 12–postseparation years, continued to handle their joint finances as before: Husband had complete control of substantial community investment accounts and paid all the bills; wife trusted him to manage their finances for their mutual benefit. Just before trial, however, husband disclosed for the first time that the once-brimming investment accounts were virtually empty. Without any corroborating evidence, he attributed the dissipation of account values to proper expenditures and stock market losses.

At trial, wife argued the court should charge husband with the missing funds unless he proved he did not misappropriate the money. Her only evidence of missing funds was a financial statement husband prepared three years after separation and nine years before trial. The trial court concluded the document was insufficient evidence the accounts had contained the stated amounts postseparation, and declined to charge husband with the missing funds. The ensuing property division required wife to make a large equalizing payment to husband.

Based on relevant Family Code provisions, equitable principles, and case law, we conclude the trial court erred in failing to shift to the managing **1258 spouse the burden of proof concerning the missing community assets. Once a nonmanaging spouse makes a prima facie showing of the existence and value of community assets in the other spouse's control postseparation, the burden of proof shifts to the managing spouse to prove the proper disposition or lesser value of those assets. Failing such proof, the court should

and $30,000 as "a contributed share of [Elaine's] attorney fees and costs...."

The Property Division

The trial court awarded the Sycamore house to Elaine, but ordered her to make an equalizing payment to Alan of $189,736, after subtracting the $50,000 he owed her for the sanctions and attorney fees. The court furthered ordered Elaine to sell the house if she could not make the equalizing payment in 45 days.

Elaine appealed from the judgment ordering her to make the equalizing payment or sell the house. Alan filed a cross-appeal from the finding he breached his fiduciary duty and from the resulting award to Elaine of sanctions and attorney fees.

II

DISCUSSION

A. *Elaine's Appeal*

Elaine argues the trial court erred in its community property division, both undervaluing the community assets chargeable to Alan and over-crediting him for payments purportedly made for the community's and Elaine's benefit. She is correct on both counts.

1. The Trial Court Erred in Tallying the Community Assets Chargeable to Alan

Elaine contends the trial court erred when it excluded from the community property chargeable to Alan the investment account funds he controlled ***1266** postseparation but which were unaccountably missing at time of trial. We agree the trial court erred in refusing to "count" these missing assets, and, more fundamentally, in refusing to shift the burden of proof to *Alan* to show the disposition and valuation of community assets in his control postseparation.

Though Alan never stated a value for the community investment accounts at separation or otherwise (except the Charles Schwab IRA's), the tax records he offered into evidence suggest that in 1996 these accounts likely held more than $1 million dollars, and approximately $1.5 million in 1999.[8] Exhibit 18, which Alan prepared in early 1999, acknowledged a total value in just three of the couple's accounts (Sutro & Company, Charles Schwab, and Merrill Lynch) stood at $787,000. Collectively, the brokerage and checking accounts were the most valuable community assets the couple owned. By the time of trial, however, Alan claimed that all that was left of this community property was a mere $20,000 in the Charles Schwab IRA's.

8 The Margulis's 1996 Schedule D, the statement of their capital gains and losses, reported that between January and July 1996, they sold $1,142,111 worth of short- and long-term stock holdings, and two other long-term investments that generated another $68,091. Their 1999 Schedule D reported sales of short- and long-term stock holdings totaling $1,570,150.

While the judgment did charge Alan with a portion of the IRA funds he had controlled—the $164,000 he admittedly removed and the $20,000 that remained—it made no provision for the rest of the community funds Alan had managed postseparation. The trial court was explicit about ****337** its reason for refusing to charge Alan with any of these other missing funds: Elaine's only proof that money was missing was exhibit 18, and the court considered the exhibit insufficient to establish the account values. The court stated: "I don't believe [exhibit 18] supports, standing alone, [that] your assets listed did, in fact, exist." The judgment further noted: "The court finds there was no showing as to the total amounts of funds available to [Alan] and it has not heard any evidence to support argument on [Elaine's] part that [Alan] should be charged with the receipt of" the community assets listed on exhibit 18.

In other words, the trial court concluded that Elaine, the nonmanaging spouse who lacked both personal knowledge and records concerning the assets listed on exhibit 18, failed to meet the difficult burden of proving these now missing assets had existed (i.e., there had been $424,000 in Sutro & Company, $133,000 in Merrill Lynch, $230,000 in Charles Schwab IRA's in 1999).

The trial court's failure to place the burden of proof on Alan relieved him of the duty to account for his postseparation management of these assets. Thus, Alan did not have to prove the *amounts* that had been in these accounts ***1267** or that he had properly disposed of those sums. This lack of accountability poses a risk of abuse and runs afoul of the statutory scheme imposing broad fiduciary duties of disclosure and accounting on a managing spouse.

[1] We thus adopt a rule advocated by amici curiae,[9] but not fully articulated in any published case to date. We conclude that once a nonmanaging spouse makes a prima facie showing

concerning the existence and value of community assets in the control of the other spouse postseparation, the burden of proof shifts to the managing spouse to rebut the showing or prove the proper disposition or lesser value of these assets. If the managing spouse fails to meet this burden, the court should charge the managing spouse with the assets according to the prima facie showing. As we explain in detail below, we find support for this rule in general case law explaining the circumstances and equitable principles that justify shifting the burden of proof, Family Code provisions that impose fiduciary duties of disclosure and accounting on spouses, and family law cases addressing the problem of missing community assets.

9 In response to an invitation from this court, the Association of Certified Family Law Specialists and the Southern California Chapter of the American Academy of Matrimonial Lawyers have filed a joint amicus curiae brief. Amici indicate in their brief that they do not write in support of any party in this case, but only to address an issue of concern to family law practitioners.

a. Principles Governing the Decision Whether to Shift the Burden of Proof

[2] We begin by reviewing the principles relevant to deciding whether to shift the burden of proof on a particular issue. Ordinarily, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid.Code, § 500.) This general rule applies "[e]xcept as otherwise provided by law." (*Ibid.*) "[C]ourts may alter the normal allocation of the burden of proof" based on considerations of fairness and policy. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188, 78 Cal.Rptr.3d 572 (*Amaral*).)

Indeed, California courts consistently approve shifting the burden of proof where circumstances make it impossible for a plaintiff to prove his or her case as, for ****338** example, in the wage-and-hour context when employers' "inadequate records prevent employees from proving their claims for unpaid overtime hours [citation] and unpaid meal and rest breaks [citation]." (*Amaral, supra,* 163 Cal.App.4th at p. 1189, 78 Cal.Rptr.3d 572; see also *Fowler v. Seaton* (1964) 61 Cal.2d 681, 687, 39 Cal.Rptr. 881, 394 P.2d 697 [applying res ipsa loquitur in case of small child injured at preschool].)

***1268** These burden-shifting decisions recognize that " 'determining the incidence of the burden of proof ... "is merely a question of policy and fairness based on experience in the different situations." ' [Citations.]" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 120, 284 Cal.Rptr. 318, 813 P.2d 1348, original italics (*Adams*).) In deciding the issue, "Fundamental fairness must be the lodestar for our analysis." (*Id.* at p. 119, 284 Cal.Rptr. 318, 813 P.2d 1348.)

[3] The factors relevant to the burden-shifting analysis are well established: " 'In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.' [Citations.]" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660–661, 25 Cal.Rptr.2d 109, 863 P.2d 179.)

[4] Given that "bedrock concerns" of "policy and fairness" drive the analysis (*Adams, supra,* 54 Cal.3d at p. 120, 284 Cal.Rptr. 318, 813 P.2d 1348), it is not surprising that a common trigger for burden-shifting is "when the parties have unequal access to evidence necessary to prove a disputed issue. ' "Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim." [Citations.]' [Citation.]" (*Amaral, supra,* 163 Cal.App.4th at p. 1189, 78 Cal.Rptr.3d 572; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35, 130 Cal.Rptr.2d 860 ["where essential financial records are in the exclusive control of the defendant who would benefit from any incompleteness, public policy is best served by shifting the burden of proof to the defendant, thereby imposing the risk of any incompleteness in the records on the party obligated to maintain them"].)

Concerns over "unequal access to evidence" (*Amaral, supra,* 163 Cal.App.4th at p. 1189, 78 Cal.Rptr.3d 572) are particularly pressing in the context of a marital dissolution where financial records can be crucial to ensuring the equal division of property required by Family Code section 2550. (All further statutory references are to the Family Code unless otherwise indicated.) Undoubtedly, in marriages and separations like the Margulis's where one spouse exercised exclusive control over community property, the parties will have vastly *unequal* access to evidence concerning the disposition of that property. When this occurs, fairness requires shifting to the managing spouse the burden of proof on missing assets. Moreover, as explained in the next section,

the statutory fiduciary duties of disclosure and accounting owed between spouses further justify that result.

*1269 b. Fiduciary Duties of Disclosure and Accounting Under the Family Code

Family Code provisions detailing the fiduciary obligations between spouses provide **339 strong support for shifting the burden of proof to the managing spouse when determining the value and disposition of missing assets. The starting point is section 721, which provides that accountability for the management of community assets is a fundamental aspect of the fiduciary duties owed between spouses.

Section 721, subdivision (b), states, in relevant part: "[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following: [¶] (1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying. [¶] (2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions. [¶] (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

[5] Section 721's specific incorporation of "the same rights and duties of nonmarital business partners, as provided in" section 16403 of the Corporations Code, makes clear that the duty to disclose relevant information concerning transactions affecting the community property is an affirmative and broad obligation. Corporations Code section 16403 requires each partner to "furnish to a partner ... [¶] (1) *Without demand,* any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter...." (Corp.Code, § 16403, subd. (c), italics added.)

Section 1100 further delineates the scope of a managing spouse's accountability. That statute not only prohibits a spouse from engaging in certain conduct, such as making a unilateral gift of community personal property or disposing of it "for less than fair and reasonable value, without the written *1270 consent of the other spouse" (§ 1100, subd. (b)), but it also requires each spouse to act as a fiduciary toward the other in the management of community assets "in accordance with the general rules governing fiduciary relationships ... as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest ...." (§ 1100, subd. (e).)

Importantly, section 1101 creates a right of action and specific remedies for the breach of fiduciary duty between spouses. Subdivision (a) of section 1101 gives each spouse "a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate...." The statutory remedies for a breach of fiduciary duty, specifically including a breach of "those [duties] set out in Sections 721 and **340 1100," include a mandatory award of 50 percent "of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs ...." (§ 1101, subd. (g).) If the nondisclosure or wrongful disposition of community property "falls within the ambit" of Civil Code section 3294 (punitive damages upon clear and convincing evidence of oppression, fraud or malice), the court must award to injured spouse the entire value of the asset (§ 1101, subd. (h)).

[6] Finally, section 2100 makes clear that these fiduciary obligations of disclosure and accounting continue to bind spouses after separation until final distribution of assets. Section 2100 states: "[A] full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties.... Moreover, each party has a continuing duty to immediately, fully, and accurately *update* and *augment* that disclosure to the extent there have been *any material changes* so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts." (§

2100, subd. (c), italics added; see also § 2102, subd. (a)(1) [from date of separation to date community assets are distributed, spouses are subject to § 721's fiduciary duty to disclose assets and update material changes].) Section 2107, subdivision (c), mandates an award of sanctions, including reasonable attorney fees, against a spouse who fails to comply with these fiduciary duties of disclosure and accounting. (§ 2107, subd. (c); *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1477, 64 Cal.Rptr.3d 29 (*Feldman*).)

[7] Taken together, these Family Code provisions impose on a managing spouse affirmative, wide-ranging duties to disclose and account for the ***1271** *existence, valuation,* and *disposition* of all community assets from the date of separation through final property division. These statutes obligate a managing spouse to disclose soon after separation all the property that belongs or might belong to the community and its value, and then to account for the management of that property, revealing any material changes in the community estate, such as the transfer or loss of assets. This strict transparency both discourages unfair dealing and empowers the nonmanaging spouse to remedy any breach of fiduciary duty by giving that spouse the " information concerning the [community's] business" needed for the exercise of his or her rights (Corp.Code, § 16403, subd. (c)(1); § 721, subd. (b)), including the right to pursue a claim for "impairment to" his or her interest in the community estate (§ 1101, subds.(a), (g) & (h)). And most importantly for present purposes, in a trial where community assets are missing, these statutory duties of disclosure and accounting serve to shift the burden of proof on missing assets to the managing spouse.

We find support for this crucial shift of the burden of proof in the recurring mandate, running throughout the statutory scheme, that the managing spouse must furnish information to the other spouse concerning the community property. For example, various statutes require the managing spouse to make "full and accurate disclosure of all [community] assets" (§ 2100, subd. (c)) and "of all material facts ... regarding the existence, characterization, and valuation" of those assets (§ 1100, subd. (e)), and to "immediately, fully and accurately update and augment" that disclosure (§ 2100, subd. (c)). Collectively, these provisions impose a sua ****341** sponte duty on the managing spouse to advise the nonmanaging spouse of the *existence* and *value* of the community property. (See *Feldman, supra,* 153 Cal.App.4th at p. 1488, 64 Cal.Rptr.3d 29 ["Aaron had a fiduciary duty to disclose the existence of the 401(k) account ... in the first place without prodding from Elena"]; *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1347–1348, 113 Cal.Rptr.2d 849 [managing spouse had affirmative duty to acquire and disclose information concerning value of community pension plan].)

These Family Code statutes impose a similar sua sponte duty on the managing spouse to furnish information concerning the *disposition* of community assets. For example, section 721 requires a spouse to produce "full information of all things affecting any transaction which concerns the community property" (§ 721, subd. (b)(2)), to "[a]ccount[ ] to the [other] spouse, and hold [ ] as a trustee, any benefit or profit derived from any transaction ... which concerns the community property" (§ 721, subd. (b)(3)), and to furnish "*[w]ithout demand,* any information concerning the [community's] business" that the other spouse requires for the exercise of his or her rights (Corp.Code, § 16403, subd. (c)(1), italics added; § 721, subd. (b)). (See *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296, 39 Cal.Rptr.2d 673 (*Haines*) [§ 721 is a statute "of mutual accountability, requiring each ***1272** spouse to show his or her conduct in connection with an interspousal transaction conformed to the legal standard" applicable to fiduciaries].) [10]

10 *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 42 Cal.Rptr.3d 325 (*Walker*), explains that although certain language in section 721, subdivision (b), suggests the spousal duty of disclosure depends upon a "request" for information, the legislative history of the statute compels a contrary conclusion. (See *Walker,* at pp. 1419–1428, 42 Cal.Rptr.3d 325.) *Walker* cites the ambiguity created by subpart (2) of subdivision (b) of the statute, which lists as one of the fiduciary duties of a spouse "*[r]endering upon request,* true and full information of all things affecting any transaction which concerns the community property ...." (§ 721, subd. (b)(2), italics added.) The "upon request" language in that subpart conflicts with subdivision (b)'s broader requirement that spouses act in conformity with the fiduciary duties of nonmarital business partners "as provided in [Corporations Code] Sections 16403, 16404, 16503," including the duty to furnish "*[w]ithout demand,* any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter...." (Corp.Code, § 16403, subd. (c)(1), italics added.)

Walker reviewed the legislative history of section 721 and, specifically, the 2002 amendment of the statute which "define[d]" the rights and duties of spouses by incorporating "the Corporations Code sections enacted in 1996," i.e., Corporations Code sections 16403, 16404, 16503. (*Walker, supra,* 138

> Cal.App.4th at p. 1427, 42 Cal.Rptr.3d 325.) The court reasoned that because these Corporations Code sections "impose a duty on partners to furnish each other *without demand* 'any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties ....' [citation]," the Legislature intended by this amendment to create "a new obligation ... imposing, for the first time, a specific requirement that a spouse convey certain information about the partnership's, i.e., community's affairs, even if the other spouse has not requested this information...." (*Walker, supra,* at pp. 1427–1428, 42 Cal.Rptr.3d 325, original italics.) Consequently, the *Walker* court concluded section 721, subdivision (b), imposes a sua sponte duty of disclosure on the managing spouse, but declined to apply the statute retroactively in that particular case because it would be unfair. (*Walker, supra,* at p. 1428, 42 Cal.Rptr.3d 325 [though wife failed to advise husband of depletion of funds in community IRA account, it was undisputed she used the funds for community purposes; moreover, all undisclosed withdrawals occurred before the effective date of the amendment to § 721, subd. (b)]; see also *Feldman, supra,* 153 Cal.App.4th at p. 1488, 64 Cal.Rptr.3d 29 [managing spouse had duty under §§ 721, subd. (b), and 1101, subd. (e), to disclose assets "without prodding"].)

**342 These substantial sua sponte duties of disclosure and accounting bind the managing spouse until the community property is divided. (§ 2100, subd. (c); § 2102, subd. (a)(1).) It follows, then, that these statutory duties can play a significant role at a trial to divide the property. In a situation like the present case, where the nonmanaging spouse makes a prima facie showing that community assets are missing, that showing implicates the managing spouse's duty to "update and augment" disclosure as to "any material changes" in the community property. (§ 2100, subd. (c).) In fact, section 2100 states that the purpose of this continuing disclosure requirement is "so that ... at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts." (§ 2100, subd. (c).) That statutory purpose is served, and the duty to account enforced, by placing the burden of proof to account for missing assets on the managing spouse.

[8] *1273 This discussion brings us back to the evidentiary problem at the heart of this case. The evidence at trial showed that Elaine, as the nonmanaging spouse, had no personal knowledge of the extent of the community assets at separation; nor had she personal knowledge of how Alan handled those assets in the ensuing years. Elaine offered exhibit 18 to show that substantial community assets under Alan's control had disappeared between separation and trial. Although the trial court found Elaine had satisfied the requisite foundation to admit the exhibit, which Alan conceded he prepared, the court accorded the document little or no weight because Elaine had no evidence to support it. Consequently, the trial court concluded Elaine failed to carry her burden of proving the accounts itemized in exhibit 18 ever had the *values* listed in that document. Having rejected Elaine's proof of the *values* of these investment accounts, the trial court excused Alan from his duty to account for those sums. Alan instead painted a generic picture of legitimate expenditures and losses that wiped out all of the couple's investment money, leaving no "missing" funds chargeable to Alan (except for the funds in the Charles Schwab IRA's). But, as discussed above, the trial court misapplied the burden of proof.

[9] [10] Elaine's introduction of exhibit 18 satisfied her initial burden to show that Alan controlled community assets of a certain value postseparation. The statutory fiduciary duties of disclosure and accounting then effectively shifted the burden to Alan to rebut the presumption charging him with the assets listed on exhibit 18, a document that constituted prima facie evidence of the account values it stated. [11] The trial court erred in failing to shift this burden of proof to Alan.

11 Another way to state this evidentiary burden is that Elaine's prima facie evidence that Alan controlled $787,000 worth of community funds in 1999 created a rebuttable presumption of the value of those funds and that Alan misappropriated or wrongfully transferred the now-missing funds. " 'A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.' [Citation.] The trier of fact is required to assume the existence of the presumed fact 'unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' [Citation.]" (*Haines, supra,* 33 Cal.App.4th at pp. 296–297, 39 Cal.Rptr.2d 673.)

This error significantly harmed Elaine's case. The court's failure to shift the burden **343 may have excluded from the property division a substantial pool of community assets. [12] It also improperly curtailed the trial court's analysis *1274 of Alan's alleged breach of his fiduciary duties. As mentioned above, the trial court did not hold Alan to account

for the investment sums listed in exhibit 18 because Elaine failed to prove the accuracy of the asset values stated in the exhibit. The court therefore failed to require Alan to trace the missing money to proper expenditures to determine whether he had "take[n] any unfair advantage of" Elaine. (§ 721, subd. (b).) Nor did the trial court hold Alan to his duty to "update" Elaine as to the "material changes" in the community estate that occurred between the date Alan prepared exhibit 18 in 1999 and the date of trial. (§ 2100, subd. (c).)

12 The trial court's rejection of the exhibit 18 asset values effectively deleted $602,610 from the property division. According to exhibit 18, in 1999 the couple had $133,000 in the Merrill Lynch account, $424,000 in the Sutro & Company account, and $45,610 more in the Charles Schwab IRA's than the trial court charged to Alan (exh. 18 stated a Charles Schwab account value of $230,000, but the court charged Alan with only $184,390 of that sum), for a total of $602,610 excluded from the property division.

Instead, the trial court found a single, narrow breach of duty by Alan: a breach of the duty "to maintain proper records of all community assets" within his exclusive control. Though the evidence supports this finding, the trial court's failure to consider whether Alan also breached additional fiduciary duties of disclosure and accounting was an error tied to its erroneous decision on the burden of proof. And in failing to consider other possible breaches of fiduciary duty, the trial court may have deprived Elaine of her right to recover damages under section 1101, subdivisions (g) and (h) for "any asset undisclosed or transferred in breach of the fiduciary duty...."

Thus, this case illustrates the importance of shifting to the managing spouse the burden of proof on missing assets. It also illustrates how shifting this burden of proof furthers the statutory purposes of requiring complete transparency and accountability in the management of community assets and of providing a remedy to the nonmanaging spouse when a breach of that fiduciary duty occurs.

c. Cases Addressing the Problem of Missing Community Assets

Although there is a lack of case law addressing the specific problem of proof this case presents, three cases lend support to our conclusion that the managing spouse should bear the burden of proving the proper disposition of missing assets if the nonmanaging spouse makes the requisite prima facie showing. Of these three opinions, two reversed trial court judgments which failed to take into account missing assets in the division of marital property, thereby clarifying the trial court's duty to make findings on all community assets under a spouse's control postseparation. (See *Williams v. Williams* (1971) 14 Cal.App.3d 560, 92 Cal.Rptr. 385 (*Williams*); *In re Marriage of Ames* (1976) 59 Cal.App.3d 234, 130 Cal.Rptr. 435 (*Ames*).) The third opinion, *In re Marriage of Valle* (1975) 53 Cal.App.3d 837, 126 Cal.Rptr. 38 (*Valle*), affirmed a judgment that charged the managing spouse with missing property because he failed to prove its proper disposition. In other words, *Valle* shifted the burden of proof to the managing spouse to show the proper disposition of community property —a key aspect of the approach we adopt ***1275** here. While none of these three cases addresses the added problem of proving the *value* of missing assets, they provide ****344** support for the burden-shifting approach we adopt.

The rationale for shifting the evidentiary burden concerning missing assets to the managing spouse arises from the simple fact that an accounting of all community property is required so the court may divide it equally. In *Williams, supra,* 14 Cal.App.3d 560, 92 Cal.Rptr. 385, the appellate court reversed an interlocutory judgment dividing the community property because the trial court failed to include missing assets in the property division, the same failure that occurred here when the court erroneously rejected Elaine's prima facie showing and required no rebuttal by Alan.

The husband and wife in *Williams* were married almost 13 years when, with divorce imminent, husband withdrew $110,489.26 from community accounts ($39,251.50 from savings and $73,237.76 from a stock fund). (*Williams, supra,* 14 Cal.App.3d at p. 563, 92 Cal.Rptr. 385.) An accountant appointed to audit the couple's financial records was unable to trace $49,363 of the withdrawn funds, and the accountant could not determine whether the husband spent the balance on community or separate debts. The trial court made no findings concerning the $110,489.26, and disregarded it in dividing the community estate. The appellate court reversed, agreeing that in failing to require the husband to account for the missing funds, the trial court failed to perform its duty "to equally divide the community property." (*Id.* at p. 564, 92 Cal.Rptr. 385.)

The court noted, "The $110,489.26 in dispute here was intact immediately prior to the filing of the action. Under these circumstances, the husband would obtain 'an unfair advantage' over his wife if he is not required to account for that portion of the money which was community property and to reimburse the wife for her share of any of the community

property not shown to have been used for community purposes." (*Williams, supra,* 14 Cal.App.3d at p. 567, 92 Cal.Rptr. 385.) The court remanded for a "retrial of the issue of community property ... includ[ing] all sums of money received and disposed of by the husband ... when the divorce action was imminent." (*Id.* at p. 568, 92 Cal.Rptr. 385.)

Ames, supra, 59 Cal.App.3d 234, 130 Cal.Rptr. 435 is the second case where the court reversed a partial judgment dividing community property because the trial court failed to award the nonmanaging spouse her share of missing community funds. *Ames* concluded the trial court abused its discretion in finding husband "had properly accounted for $24,655 of community property." (*Id.* at p. 237, 130 Cal.Rptr. 435.) The appellate court found, through its own "most benign reading of an incredibly vague record," that husband "failed to sustain his burden [to account for community funds] by a very large amount." (*Ibid.,* fn. 4.) Specifically, the court concluded "about $9,000 [remains] unexplained by ***1276** George." (*Id.* at p. 237, 130 Cal.Rptr. 435.) Though the discussion in *Ames* is relatively cryptic, the lesson is clear: A judgment for marital dissolution must take into account all community property in a spouse's management and control postseparation, and the property's "disappearance" at time of trial does not excuse the court from making the necessary findings on its disposition.

Significantly, Justice Thompson's concurrence in the *Williams* case sought to provide the trial court with additional guidance rather than merely remanding the matter with instructions to make findings on the missing funds. Unlike the majority, Justice Thompson viewed "the question" in *Williams* as "one of burden of ****345** proof and of producing evidence." (*Williams, supra,* 14 Cal.App.3d at p. 568, 92 Cal.Rptr. 385 (conc. opn. of Thompson, J.).) He explained his reasoning as follows: "In a dispute over disposition of property in a divorce action, the wife has the burden of proof of establishing the existence of community property, and except as she may be aided by presumptions must produce evidence which carries that burden. [Citations.] [¶] Where, as here, the wife has concededly established the existence of community assets, has established that certain of those assets are missing, and has presented evidence from which it may be inferred that the husband wrongfully disposed of them, she has, in my opinion, met her burden of proof. The issue then shifts to the validity of dispositions of community property by the husband. On that issue, whether dispositions of community property by the husband are proper on the one hand or fraudulent or illegal on the other, I think the better rule would place the burden of producing evidence of the nature of the dispositions upon the husband." (*Id.* at pp. 568–569, 92 Cal.Rptr. 385.)

Justice Thompson cited the equitable "principle of burden based upon superior knowledge of the facts" as justification for shifting to the managing spouse the burden of proof on the "unexplained disappearance of community funds...." (*Williams, supra,* 14 Cal.App.3d at p. 569, 92 Cal.Rptr. 385 (conc. opn. of Thompson, J.), citing *See v. See* (1966) 64 Cal.2d 778, 784, 51 Cal.Rptr. 888, 415 P.2d 776.) Justice Thompson explained: "It is appropriate to place the burden of producing evidence upon the party who has access to the facts where those facts are inaccessible to the other party to the litigation. [Citation.] ... [T]he husband, as manager and controller of the community property, has access to the facts from which it may be determined whether a disposition of community assets by him was proper or improper. Conversely, the wife, as the [nonmanaging spouse] has little if any access to those facts." (*Williams,* at p. 569, 92 Cal.Rptr. 385.)

Although no published case has adopted the concurring view in *Williams,* the opinion in *Valle, supra,* 53 Cal.App.3d 837, 126 Cal.Rptr. 38 implicitly endorsed the burden-shifting approach Justice Thompson advocated. In *Valle, supra,* 53 Cal.App.3d 837, 126 Cal.Rptr. 38, the husband appealed the community property division, ***1277** arguing the trial court improperly charged to him the value of an automobile and Mexican realty that he lost in satisfaction of community debts. (*Id.* at p. 844, 126 Cal.Rptr. 38.) In affirming the judgment, the appellate court approved the trial court's decision to place upon the husband the burden of proving the proper disposition of these two community assets.

The *Valle* court explained its reasoning as follows: "The uncontroverted evidence discloses that these items were community property and were in Manuel's possession [at] the time of separation. Under these circumstances it was incumbent upon Manuel to persuade the trial court that the assets in dispute had been lost by reason of discharging community debts [citation]. The record, however, is consistent with the conclusion, implicit in the court's ruling, that Manuel fell short of sustaining the burden of proof. Although he testified at the trial that the Pontiac automobile had been given to his brother in return for a loan ... and that the real property had been lost due to default in making the monthly payments thereon, he failed to substantiate these allegations in any manner.... In this situation, the trial court was fully justified in disregarding Manuel's uncorroborated testimony and in including the

assets in question in the community **346 property." (*Valle, supra,* 53 Cal.App.3d at p. 844, 126 Cal.Rptr. 38.)

Although *Valle* provides support for placing the burden of proof on the managing spouse to show the disposition of missing community assets, it is Justice Thompson's concurrence in *Williams* that best articulates the equitable basis for shifting the burden of proof, namely, the "principle of burden based on superior knowledge of the facts...." (*Williams, supra,* 14 Cal.App.3d at p. 569, 92 Cal.Rptr. 385 (conc. opn. of Thompson, J.).) Here, Alan, as managing spouse, had full access to the facts concerning the disposition of funds in the community accounts, both as to his own withdrawals and expenditures and the purported losses from stock market downturns. Elaine had neither personal knowledge nor access to records establishing those facts. Alan's superior knowledge of the disposition and value of the accounts in his control require that he bear the burden of proof on both issues.

Alan objects to this burden-shifting approach, arguing that it erroneously presumes the managing spouse breached a fiduciary duty from the "mere" fact that assets are missing at time of trial. Alan argues a managing spouse should not be charged with missing assets unless there is evidence of mismanagement or misappropriation. But there is no statutory or equitable basis for imposing such a prerequisite on the nonmanaging spouse before shifting the burden of proof to the managing spouse. As a practical matter, Alan's proposal increases the risk of an unfair property division because a nonmanaging spouse who lacks personal knowledge and records of the disposition of missing community assets would find it extremely difficult *1278 to make the initial showing of mismanagement or fraud to shift the burden of proof. No sound policy reason supports the adoption of Alan's proposed rule; indeed, the rule would contradict a managing spouse's obligation to provide the full disclosure and accounting owed to a nonmanaging spouse.

As authority for requiring a predicate showing of fraud or mismanagement before shifting the burden of proof, Alan cites *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 128 Cal.Rptr.2d 31 (*Bono*). The case does not persuade us to adopt the rule he proposes.

In *Bono, supra,* 103 Cal.App.4th 1409, 128 Cal.Rptr.2d 31, the husband and wife separated in 1994 and their dissolution action was still pending in 1998, when the husband died. The wife sued her husband's estate for declaratory relief, asserting she was entitled to her one-half share of certain personal property assets of the community that the husband controlled at separation, but were missing from the estate inventory list. The assets consisted of approximately $25,000 worth of "livestock (11 or 12 cows and four horses)" and a few vehicles. (*Id.* at p. 1429, 128 Cal.Rptr.2d 31.) At trial, the wife argued her husband must have disposed of the assets in violation of his fiduciary duties under the Family Code. The trial court rejected the wife's claim for half of the missing assets, finding she "failed to carry her burden of proving decedent's breach of fiduciary duty." (*Id.* at pp. 1429–1430, 128 Cal.Rptr.2d 31.)

The Court of Appeal affirmed on the ground that the wife "offered no evidence" showing her husband "had disposed of the items in contravention of his fiduciary duties" and "[t]he mere absence of the assets four years after separation is insufficient to raise an inference that decedent disposed of them inappropriately. With respect to the cows and horses, for example, it might be equally reasonable to infer that they had died in the intervening years." (*Bono, supra,* 103 Cal.App.4th at p. 1430, 128 Cal.Rptr.2d 31.)

**347 We believe *Bono* has limited applicability here, given its unusual circumstances involving an action against an *estate* for missing livestock and farm vehicles. The equitable principle of burden based on superior knowledge did not apply because the managing spouse had died, leaving the estate at a disadvantage in explaining what had happened to the livestock and vehicles. Thus, *Bono* does not support Alan's argument that proof of mismanagement or fraud should be a prerequisite to shifting the burden of proof on missing community assets to the managing spouse.

Alan's other arguments similarly lack merit. First, he argues that allowing Elaine to use exhibit 18 as prima facie evidence of the value of the assets that should be charged to him violates the rule that, for purposes of marital property division, assets should be valued as near as practicable to *1279 time of trial, citing section 2552, subdivision (a). Alan's argument ignores subdivision (b) of that statute, which allows the trial court to use an alternate valuation date where fairness requires. (See *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625, 108 Cal.Rptr.2d 833 [court has broad discretion to determine valuation date to accomplish equitable division]; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1435, 28 Cal.Rptr.2d 726 [same].)

Alan's argument also ignores the statutory remedies for breach of fiduciary duty in the management of community property set forth in section 1101. That statute mandates that,

for purposes of awarding the injured spouse 50 percent of the value of an undisclosed or wrongfully transferred asset (or 100 percent, in the event of oppression, fraud, or malice), the trial court must value the assets at the *highest* of three possible dates: "The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court." (§ 1101, subd. (g).) These statutes clearly authorize a trial court to use valuation date that best provides adequate compensation to the injured spouse.

Alan's reliance on *In re Marriage of Priddis* (1982) 132 Cal.App.3d 349, 183 Cal.Rptr. 37 is likewise fruitless. Alan cites *Priddis* for the proposition that "the mere passage of time alone between the dates of separation and trial is an insufficient basis for setting the valuation date at a time other than 'as near as practicable to the time of trial.' " (*Id.* at p. 358, 183 Cal.Rptr. 37.) The present case, however, involves more than simply "the mere passage of time," as was the case in *Priddis.* Instead, Elaine points to the unexplained postseparation disappearance of substantial community funds as apt justification for an alternate valuation date.

Finally, Alan argues that shifting to the managing spouse the burden of proof on the disposition of missing assets is overly burdensome in the circumstances of a long separation, such as the 12–year separation involved here, and it conflicts with section 721's admonition that "[n]othing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions." (§ 721, subd. (b)(2).) The argument lacks merit.

[11] Requiring a managing spouse to account for the disposition of missing assets does not entail a "detailed" accounting. To the contrary, the managing spouse simply must show by competent evidence management of assets in his or her control in accord with the fiduciary obligations set forth in sections 721 and 1100. The trial court undoubtedly will take into account the length of the separation and the attendant difficulties of proof ****348** in determining whether the account made is satisfactory.

[12] ***1280** Nevertheless, it remains clear that the duty to account for the disposition of community property exists from separation to final distribution of assets. (§§ 1100, subd. (e), 2100, subd. (c), 2102, subd. (a)(1).) The duty to account does not dissipate over the course of an unusually long separation. Weighing equities, the property in issue belongs to both spouses and the nonmanaging spouse's right to an accounting outweighs the burden on the managing spouse to account.

We do not address Elaine's specific challenges to the trial court's finding that Alan should not be charged with possession of two other community assets, a payment of $46,500 for unused vacation and $100,000 proceeds from a Bank of America line of credit. We need not discuss these issues because the trial court's erroneous placement of the burden of proof as to the disposition of assets necessitates a complete retrial of the community property issues.

2. The Trial Court Erred in Reimbursing Alan from the Community Property for Postseparation Payments

[13] Elaine contends the trial court erred in ordering that Alan be reimbursed from community property a total of $580,986 for payments he made for the benefit of the community and Elaine after separation. She contends the trial court improperly relied on opinion testimony from Alan's expert, Jack White, which she moved to strike as lacking a proper basis. (See Evid.Code, § 803.) Elaine's argument has merit.

In the seminal case of *In re Marriage of Epstein* (1979) 24 Cal.3d 76, 154 Cal.Rptr. 413, 592 P.2d 1165 (*Epstein*), superseded by statute on other grounds, the California Supreme Court recognized a spouse's right to reimbursement from community property for payment of postseparation community expenses from the spouse's *separate* funds. The high court adopted the view expressed in *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 145 Cal.Rptr. 205 (*Smith*), as follows: " '[A]s a general rule, a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution....' " (*Epstein,* at p. 84, 154 Cal.Rptr. 413, 592 P.2d 1165, quoting *Smith,* at p. 747, 145 Cal.Rptr. 205.) Conversely, if the managing spouse uses community money to pay a community obligation, there is no basis for reimbursing the spouse for that payment. (See *Smith,* at p. 744, 145 Cal.Rptr. 205 [judgment reimbursing husband for postseparation payments on community debts reversed because "there is no showing these payments by husband were made with his separate funds"; court ordered retrial rather than entry of judgment for wife because evidence suggested "some of the funds came from husband's ... separate property"].)

***1281** White's opinion lacks a proper basis because White testified that Alan was entitled to reimbursement from the community property for postseparation payments without knowing whether Alan used his *separate* funds to make the

payments in issue. In fact, Alan himself admitted it would be impossible to trace his payments to either a community or separate property source because after the separation he freely commingled community property with separate property in his various checking accounts.

[14] Consequently, in his testimony and report, White did not trace individual payments to separate property sources. Rather he simply concluded Alan was entitled ****349** to reimbursement for particular payments based on the nature and *purpose* of the payment. In other words, if White determined a payment was for the benefit of either the community or Elaine, based on the corresponding check register entry and Alan's explanation, then he concluded Alan should be reimbursed. But the *purpose* of a payment is only part of the equation. As *Epstein* and *Smith* make clear, the *source* of the postseparation payment is crucial. A spouse is entitled to reimbursement for payment of community obligations only if those payments are made from the spouse's separate property.

Because there is no evidence Alan's postseparation payments for the community or for Elaine came from separate funds, we must reverse the judgment giving Alan a substantial credit for those payments in the community property division. (*Smith, supra,* 79 Cal.App.3d at p. 744, 145 Cal.Rptr. 205.) On remand, the trial court must limit any reimbursement to payments that Alan proves came from separate property.

[15] We note that Alan's evidentiary burden on retrial will be difficult because he commingled community and separate property funds. Commingling creates a rebuttable presumption that all the funds in the account are community property. "[T]he mere commingling of separate property and community property funds does not alter the status of the respective property interests, provided that the components of the commingled mass can be adequately traced to their separate property and community property sources. [Citation.] But if the separate property and community property interests have been commingled in such a manner that the respective contributions cannot be traced and identified, the entire commingled fund will be deemed community property pursuant to the general community property presumption of section 760. [Citation.]" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822–823, 53 Cal.Rptr.2d 179.)

[16] Of course, a spouse who has commingled community and separate funds can defeat the presumption with evidence, employing traditional family law tracing methods, such as direct tracing or the family expense method of ***1282** tracing. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 612, 122 Cal.Rptr. 79, 536 P.2d 479; *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1058–1059, 104 Cal.Rptr.2d 920.) Thus, to obtain reimbursement for any postseparation payments made from his commingled accounts, Alan should employ one of these tracing methods.

Tracing undoubtedly will raise additional questions concerning whether Alan owed the community reimbursement for his apparent use of community funds for separate purposes. (See *Epstein, supra,* 24 Cal.3d at p. 89, 154 Cal.Rptr. 413, 592 P.2d 1165 ["trial court erred in failing to charge husband's share of the community property for" funds withdrawn to pay his separate expenses].) For example, the Merrill Lynch check registers indicate Alan transferred approximately $37,000 of community funds from that account into either his separate accounts or unidentified accounts. On remand, the trial court can deal with all such reimbursement issues. [13]

13 Of course, careful tracing may also reveal additional community property subject to division. For example, the Merrill Lynch check registers reflect Alan transferred $25,000 of community funds into the "LFG trading account," and used another $4,000 of these community funds for "MP Stock purchase." White's report identified both expenditures as Alan's separate expenses, based on Alan's explanation. Other documentary evidence suggests Alan's separate Raymond James brokerage account may include funds from various community accounts; in fact, Alan's trial brief refers to the Raymond James account as a community property account.

****350** Elaine raises another challenge to the trial court's order granting Alan credits for postseparation payments. She contends the court failed to make the necessary finding under *Epstein* on whether Alan made any part of the payments in "in discharge of his support obligation...." (*Epstein, supra,* 24 Cal.3d at p. 86, 154 Cal.Rptr. 413, 592 P.2d 1165.) *Epstein* held that otherwise reimbursable postseparation payments made from separate property may not be reimbursed if "such sums were paid to fulfill [the spouse's] support obligations." (*Id.* at p. 82, 154 Cal.Rptr. 413, 592 P.2d 1165.)

Alan argues Elaine waived the issue of "*Epstein* credits" by failing to raise it in the trial court. We need not resolve the issue of waiver, however, because reversal is required for insufficiency of the evidence, as discussed above. On remand, the trial court must make the necessary findings identified in *Epstein,* including whether the parties "entered into an

'agreement' for support ... and whether husband should be estopped ... from denying that his payments were in discharge of his duty to support." (*Epstein, supra,* 24 Cal.3d at p. 86, 154 Cal.Rptr. 413, 592 P.2d 1165, fn omitted.)

B. *Alan's Cross–Appeal*

In his cross-appeal, Alan challenges the trial court's finding that he breached his fiduciary duty "to maintain proper records of all community ***1283** assets" within his exclusive control, and the award to Elaine of sanctions and attorney fees for that breach. The cross-appeal is moot, however. The trial court's error in failing to shift the burden of proof on missing assets to Alan affected not only the court's division of community property, but also its analysis of the scope of Alan's alleged breach of his fiduciary duties under the Family Code. (See *ante,* pt. IIA.1.b.) Upon remand, the trial court will necessarily retry the issue of Alan's alleged breach of fiduciary duties and revisit the question of the appropriate statutory remedies for any breach of duty it finds.

III

DISPOSITION

The judgment is reversed. Elaine is entitled to her costs on appeal.

WE CONCUR: BEDSWORTH, Acting P.J., and O'LEARY, J.

Parallel Citations

, 198 Cal.App.4th 1252, 11 Cal. Daily Op. Serv. 10,311, 2011 Daily Journal D.A.R. 12,241

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250 Cal.App.2d 328
Court of Appeal, First District, Division 3, California.

Judy Collins SOMPS, Plaintiff,
Cross-Defendant, Appellant,
v.
George Edward SOMPS, Defendant,
Cross-Complainant, Respondent.

Civ. 23216. | April 24, 1967. | Rehearing Denied May 24, 1967. | Hearing Denied June 21, 1967.

Divorce action by wife. The Superior Court, County of Santa Clara, Albert F. DeMarco, J., granted both parties a divorce on ground of extreme cruelty and awarded subiness and certain other assets to husband as his separate property, declared an indebtedness to a bank to be a community obligation, and allocated accumulation of cash from husband's earnings from the business as 60% His separate property and 40% Community property, and the wife appealed. The Court of Appeal, Harold C. Brown, J., held that superior court's holding that community had been adequately compensated for husband's contribution to successive business by reason of community's reception of his salary withdrawals and other emoluments was inconsistent with that court's holding that balance of his salary on hand at time of divorce should be 60% His separate property and 40% Community property, and that husband, who repaid outstanding obligation to business which was his separate property and who paid another sum to himself out of loan which he treated as a community obligation, was chargeable at time of divorce with personally receiving the total of those two amounts.

Affirmed in part; reversed in part.

Attorneys and Law Firms

**306 *330 Walter T. Winter, San Francisco, for appellant.

*331 J. A. London, Mountain View, William G. Filice, San Jose, for respondent.

Opinion

HAROLD C. BROWN, Associate Justice. Justice.

The plaintiff Judy Somps appeals from certain portions of an interlocutory judgment of divorce which awards the stock in MacKay & Somps, a corporation, and other assets, to defendant George Somps as his separate property.

Judy Somps (hereinafter referred to as wife) and George Somps (hereinafter referred to as husband) were married on April 28, 1954, and lived together until April of 1963, the date of commencement of this divorce proceeding. Wife had three children by a prior marriage who were subsequently adopted by husband. The parties had three children by this marriage. Prior to marriage wife had no financial assets. Husband had a 50% Partnership interest with one Donald MacKay in an engineering business which had been in existence of a period of one year. Husband also had some cash and stocks.

On November 13, 1964, an interlocutory judgment of divorce was entered granting both parties a divorce on the grounds of extreme cruelty. The decree awarded the business and certain other assets to husband as his separate property. It declared a $15,000 indebtedness to First Valley Bank to be a community indebtedness. An accumulation of cash from husband's earnings from the business was allocated as 60% Separate property of husband and 40%Community property.

Other joint tenancy and community assets possessed by husband and wife at the time of divorce consisted of two residences, household furniture, real property, cash in bank, and automobile, all of which were evaluated at approximately $463,000. This property was awarded one-half to husband and one-half to wife. Wife's total award amounted to approximately $250,000.

Husband and wife were awarded the joint custody of the minor children with physical custody to the wife. Husband was ordered to pay $750 per month for the support of the minor children, and alimony for 36 months at $750 per month. Husband was further ordered to pay wife's attorney the sum of $7,500.

Husband also appealed from those portions of the judgment that awarded alimony of wife and the award to wife of a one-half interest of the proceeds of the **307 parcel of real property *332 known as the Pleasanton property. Husband has abandoned his appeal. The wife has, in her opening brief, abandoned those portions of the appeal referring to the Volk property, failure to grant a divorce on the ground of adultery, that she pay her own court costs and that her alimony terminate after 36 months.

Wife claims that the trial court erred in holding (1) that the business (MacKay & Somps) was the separate property of husband; (2) that the Binkley property was purchased with

Cal.App.2d 424, 426, 220 P.2d 576; Mears v. Mears, 180 Cal.App.2d 484, 498, 4 Cal.Rptr. 618, overruled on other grounds; See v. See, 64 Cal.2d 778, 785—786, 51 Cal.Rptr. 888, 415 P.2d 776.

(2) Did the trial court err in holding the Binkley property was purchased with husband's separate assets and that the profits realized from the sale were his separate estate?

Husband, with MacKay and a Mr. Rodrigues, purchased and sold a parcel of property known as the Binkley property. When acquired, title to husband's interest was conveyed in husband's name alone. Husband in purchasing the property used $5,000 received from the sale of stock which was **310 his separate property and $8,000 which he borrowed from a bank on his note. Wife was not a co-signer on the note. The banker who made the loan to husband testified that he did so on the basis of husband's credit and the credit of the business of MacKay & Somps. Husband testified that the loan was personal and was granted on the basis that the Binkley venture was sound. Wife contends that the bank in extending this credit relied on the financial statement given by husband to the bank which listed husband's and wife's community and joint tenancy properties as assets in addition to husband's separate property.

[9] [10] 'There is a rebuttable presumption that property *337 acquired on credit during marriage is community property. Civ.Code, s 164; Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 193—194, 138 P.2d 693. But 'funds procured by the hypothecation of separate property of a spouse are separate property of that spouse'. In re Estate of Abdale, 28 Cal.2d 587, 592, 170 P.2d 918, 922. The proceeds of a loan made on the credit of separate property are governed by the same rule. In re Estate of Ellis, 203 Cal. 414, 416—417, 264 P. 743. In accordance with this general principle, the character of the property acquired by a sale upon credit is determined according to the intent of the seller to rely upon the separate property of the purchaser or upon a community asset. In re Estate of Ellis, supra, 203 Cal. 414, 416, 264 P. 743; Hogevoll v. Hogevoll, supra, 59 Cal.App.2d 188, 193, 194, 138 P.2d 693; and see Schuyler v. Broughton, 70 Cal. 272, 285, 11 P. 719; Vandervort v. Godfrey, 58 Cal.App. 578, 208 P. 1017.' (Gudelj v. Gudelj, 41 Cal.2d 202, 210, 259 P.2d 656, 661.)

[11] [12] 'The burden rests on the party asserting that property acquired after marriage is separate to establish that fact. (Wilson v. Wilson, supra, 76 Cal.App.2d (119) at page 126, 172 P.2d (568) at page 572). There are expressions in the decisions to the effect that the separate character of property acquired after marriage is to be established by 'clear and convincing evidence,' 'clear and decisive proof,' 'clear and satisfactory proof.' (Citations.) These expressions state a rule of evidence directed to the trial court; and if that court finds that the evidence meets the rule, a reviewing court must accept that determination as conclusive if there is substantial evidence to support it.' (Thomasset v. Thomasset, 122 Cal.App.2d 116, 123, 264 P.2d 626, 630, overruled on other grounds; also see See v. See, supra.)

[13] Here the presumption that property purchased after marriage is community property was rebutted. The trial court was justified in accepting the testimony of the banker and in finding that the property was purchased with husband's separate estate.

When husband sold the Binkley property the buyers required that wife join in the execution of the deed probably to avoid a possible claim of a community interest by wife. Wife did sign the deed but claims her signature was obtained by husband's fraud. Husband testified he told wife she was signing a deed and explained the transaction to her after she had signed.

*338 [14] Wife argues that all transactions between persons in confidential relationship, and particularly between husband and wife, by which one obtains an advantage from the other are presumed to be entered into without consideration and without undue influence. (Barney v. Fye, 156 Cal.App.2d 103, 319 P.2d 29.) She further contends that husband breached a fiduciary relationship between husband and wife in that he should have purchased the property with community funds which were available. The fact that husband purchased the Binkley property with his separate funds, as the trial court found, is not evidence of taking any undue advantage nor is it a breach of a fiduciary relationship which would invoke a presumption of fraud or undue influence. There is no reason why husband should be compelled to keep his separate funds idle. Husband apparently had made many investments benefitting the **311 community during the marriage which resulted in the substantial estate owned by the parties at the time of divorce.

[15] [16] [17] [18] Wife further introduced evidence that husband used $6,450 of salary checks to improve the Binkley property and that by reason thereof she should have an interest in the entire Binkley profits. A husband may improve his separate property and if he uses community funds the wife is entitled to compensation to the extent that her share of the community funds increased its value. (In re

81 Cal.App.2d 278, 183 P.2d 910

DONALD MacISAAC et al., Appellants,
v.
EMILE A. POZZO et al., Respondents.

Civ. No. 15673.
District Court of Appeal, Second District, Division 3, California.
Aug. 18, 1947.

HEADNOTES

(1a, 1b)
Joint Adventurers § 6(1)--Mutual Obligations--Good Faith.
Where a coadventurer had a fiduciary duty to make full disclosure of his use of the joint adventurers' combined business standing to procure a second joint venture construction contract, his misrepresentation and concealment of such use, to induce his coadventurer to agree to accept substantially less than an equal division of the second contract profits, was a fraud entitling the defrauded coadventurer to relief through annulment of the unequal division agreement.

Actions at law between partners and partnerships, note 168 A.L.R. 1088; see, also, 14 **Cal.Jur.** 763; 30 **Am.Jur.** 695.

(2)
Trusts § 14--Transactions Between Persons in Trust Relations.
The so-called doctrine of "corporate opportunity," applied in corporation litigation, demands complete loyalty from a fiduciary in that he may not use a trust opportunity for personal advantage; the doctrine stems from demands for loyalty in all business situations in which trust is reposed.

(3a, 3b)
Joint Adventurers § 10(6)--Judgment.
In an action between joint adventurers one of whom was found guilty of fraud in procuring an agreement for an unequal division of profits from a second contract, judgment was properly rendered for the amount by which he profited through his breach of duty, whether it be regarded as damages suffered through deprivation of a business opportunity or as profits unjustly received. An equal division of the profits was proper.

(4)
Joint Adventurers § 18(5)--Findings.
In an action between joint adventurers involving fraud in procuring an agreement for an unequal division of the profits of a contract made by one of them, a finding that the other sustained damage implied the existence of facts material to a recovery or the deprivation of a business opportunity.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Caryl M. Sheldon, Judge. Affirmed.

Action for declaratory relief with respect to profits derived from a joint venture contract. Judgment for defendants affirmed.

COUNSEL

A. L. Abrahams and H. B. Cornell for Appellants.

H. G. Redwine and Gwyn S. Redwine for Respondents.

SHINN, Acting P. J.

The parties hereto are construction contractors. Plaintiffs are copartners doing business as MacIsaac and Menke, and defendants are copartners doing business as Pozzo and Pozzo. In August, 1942, the parties entered into a joint venture agreement for the submission of a joint proposal to the United States for the construction of civilian housing at Ogden, Utah, known as the Hill Field project or job, and for the construction of the work if their proposal should be accepted. They secured the contract for general construction to an amount of some $1,500,000, set up an organization in Utah under the name of MacIsaac, Menke and Pozzo (hereinafter referred to as the Utah firm), and proceeded with the work. Their agreement related solely to this specific contract and they were to share equally the gains and losses thereunder.

The agreement provided (1) that neither party should incur liabilities for the joint association without the consent of the other, (2) the agreement was to become null and void if either party withdrew from it before a bid was submitted or if the contract was not secured, and (3) no agreement on behalf of the firm would be valid unless signed by MacIsaac or Menke for plaintiff and Emile A. Pozzo or Louis J. Pozzo for defendant. It contained another provision reading as follows: "The following additional jobs are added to above agreement: Only such contracts as are named above are to come under the terms of this joint venture agreement."

We should, therefore, look to the relations of the parties, and their responsibilities, as of the time when they first learned of the Sunnyvale job, in order to determine whether plaintiff *284 was guilty of a breach of duty which justified the judgment. Notwithstanding that the joint venture agreement related only to the Hill Field job, the Utah firm had been brought into existence, and had acquired certain intangible assets consisting of business reputation, standing and credit. It was in a favorable position to have presented to it business opportunities in the contracting field. It was within the contemplation of the parties that such opportunities might be presented to the firm. Paragraph 16 of the agreement, which we have quoted, indicates that other jobs might be added to the contract by mutual consent. The Utah firm did subsequently bid upon some eight other jobs and obtained two small contracts. However, this could only have been done with the specific consent of plaintiff and defendant. Neither was authorized to represent the other in negotiating new contracts, nor was any agent so authorized. The negotiations that were carried on amounted only to the development of a business opportunity for the firm. The Sunnyvale job was essentially a business opportunity which was offered to the Utah firm within the field where the parties expected the firm to operate. The opportunity belonged to the firm and when the negotiations had been carried to the point where it was possible to take the contract for the firm, it was the duty of each of the parties to conclude those negotiations for the benefit of the firm and without seeking any advantage for itself to the detriment of the other. The duty existed from the time the negotiations began, and the rights of the parties after the contract was executed related back to the commencement of the negotiations.

Upon the facts as established by the findings it is clear that the principle which governs and which justifies the judgment is that stated in *Guth v. Loft, Inc.*, 23 Del.Ch. 255 [5 A.2d 503, 511], as follows: "On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the *285 law will impress a trust in favor of the corporation upon the property, interests and profits so acquired." (*Beaudette v. Graham*, 267 Mass. 7 [165 N.E. 671]; *Michigan Crown Fender Co. v. Welch*, 211 Mich. 148 [178 N.W. 684, 13 A.L.R. 896]; *Bailey v. Jacobs*, 325 Pa. 187 [189 A. 320]; *Nebraska Power Co. v. Koenig*, 93 Neb. 68 [139 N.W. 839]; *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 [122 N.E. 378]; cf., Rest., Agency, §§ 387, 403.)

The facts bring the case within the stated rule. ([2]) While it has been applied so generally in corporation cases as to have become known as the doctrine of corporate opportunity it is founded in the doctrine of loyalty in business which applies in all situations in which trust is reposed. (Cf. *Meinhard v. Salmon*, 249 N.Y. 458 [164 N.E. 545, 62 A.L.R. 1]; Rest., Restitution, § 190.) The fiduciary is held to the utmost measure of loyalty and accordingly he may not use a trust opportunity for personal advantage. (Rest., Trusts, § 170.) As stated in *Hoyt v. Hampe*, 206 Iowa 206 [214 N.W. 718, 724, 220 N.W. 45], "The policy of the law is to put fiduciaries beyond the reach of temptation by making it unprofitable for them to yield to it."

([1b]) The primary duty of the parties was to take no advantage of each other within their fiduciary relationship by means of the slightest concealment, misrepresentation or adverse pressure. Defendant was entitled to a complete disclosure as to the negotiations with Utah Fuel Company and an equal opportunity to take advantage of them. Plaintiff contrived to appropriate to itself the major share of the profits with the result that the firm, when it took the contract and assumed the responsibility stood committed to the unequal division. Defendant could not be deprived of its rights in this manner.

([3a]) The judgment properly awarded defendant the amount by which plaintiff profited through its breach of duty. Whether it be regarded as damages presumed to have been suffered through deprivation of a business opportunity or as profits unjustly received by plaintiff is immaterial. ([4]) The finding that defendant sustained damage was proper. It implies the existence of facts which were material to a recovery for the deprivation of a business opportunity.

([3b]) In fixing the amount of the recovery plaintiff was allowed $12,000 and defendant $1,000 for personal services of members of the two firms, as items of expense, before computation *286 of profits. The October 5, 1942, agreement did not provide for such allowances. Plaintiff argues that if the agreement was not to be followed the profits should have been divided 12/13 to plaintiff and 1/13 to

defendant, or upon a strictly quantum meruit basis. What we have already said answers this contention; the equal division was proper. Other points raised by plaintiff were urged and were disposed of adversely to its contentions upon the former appeal.

The judgment is affirmed.

Wood, J., and Kincaid, J. pro tem., concurred.

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48 Cal.4th 118
Supreme Court of California

In re the MARRIAGE OF Gordon Albert SONNE and Theressa Lynn Sonne.
Gordon Albert Sonne, Appellant,
v.
Theressa Lynn Sonne, Respondent.

No. S166221. | Feb. 22, 2010.

Synopsis

Background: Husband filed for dissolution of marriage. Wife filed motion seeking spousal support, and Public Employees' Retirement System (PERS) was joined in the action at wife's request. The Superior Court, Monterey County, No. DR41290, Robert O'Farrell, J., entered judgment ordering spousal support and ordered husband to pay wife's attorney fees. Husband appealed, and wife cross-appealed. The Court of Appeal reversed and remanded with directions. Husband petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

[Holding:] The Supreme Court, Baxter, J., held that only the annuity portion of husband's retirement allowance became community property when the community redeposited contributions in husband's PERS account.

Affirmed in part, reversed in part, and remanded.

Opinion, 80 Cal.Rptr.3d 453, superseded.

Attorneys and Law Firms

***416** Tarkington, O'Neill, Barrack & Chong and Robert A. Roth, San Francisco, for Appellant Gordon Albert Sonne.

Barbara A. DiFranza as Amicus Curiae on behalf of Appellant Gordon Albert Sonne.

Law Offices of Bernard N. Wolf, Bernard N. Wolf; Law Office of Billie C. French and Billie C. French for Appellant Theressa Lynn Sonne.

Opinion

BAXTER, J.

***121** ****548** Gordon Albert Sonne (Husband), the former Sheriff–Coroner–Public Administrator of Monterey County, is a member of the California Public Employees' Retirement System (CalPERS). Members of *****417** CalPERS, once vested, participate in a defined benefit retirement plan, which supplies a monthly retirement allowance under a formula comprising factors such as final compensation, service credit (i.e., the credited years of employment), and a per-service-year multiplier. The retirement allowance consists of an *annuity* (which is funded by member contributions deducted from the member's paycheck and interest thereon) and a *pension* (which is funded by employer contributions and which must be sufficient, when added to the annuity, to satisfy the amount specified in the benefit formula). (Gov.Code, §§ 21350, 21362.2, subd. (a), 21363.1, subd. (a).)

In 1995, Husband transferred to his former wife, Dalia, 8.677 years of service credit, which represented her one-half interest in the service credit Husband had earned during their marriage. Dalia subsequently exercised her right to a refund of the accumulated contributions in the account, thereby permanently waiving her rights to any further claim on Husband's retirement benefits, including any service credit. (Gov.Code, § 21292, subds.(a), (d).) Husband, who was then married to Theressa Lynn Sonne (Wife), exercised his right to redeposit the contributions (*id.*, § 20751) and paid for it with community funds through monthly deductions from his salary. By the time Husband and Wife had separated, the community had redeposited 70.83 percent of the scheduled payments, and the question arose: What was the community's share of the service ****549** credit from the Husband–Dalia marriage?

The trial court and the Court of Appeal agreed with Wife that the community was entitled to 70.83 percent of the service credit because the community had redeposited 70.83 percent of the member contributions for that period of service. Husband contends that such an apportionment vastly overstated the community's interest, in that it accorded no weight or value to Husband's service as a deputy sheriff during that earlier period, which had supplied the consideration for the service credit. Amicus curiae Barbara A. DiFranza, Certified Family Law Specialist, contends further that since community funds contributed only to the annuity component of the retirement allowance, the community was entitled only to a pro tanto share of the annuity—and not to a share of the much larger pension component, which was funded by employer contributions.

18 Cal.4th at pp. 182–183, 74 Cal.Rptr.2d 825, 955 P.2d 451; *In re Marriage of Lucero* (1981) 118 Cal.App.3d 836, 841, 173 Cal.Rptr. 680 (*Lucero*).)

Lucero, which involved almost the mirror image of the present case, is instructive. There, the husband redeposited his federal employee retirement contributions after he and his wife had separated, using his own separate funds. Part of the redeposited contributions related to service years during the marriage. (*Lucero, supra,* 118 Cal.App.3d at p. 839, 173 Cal.Rptr. 680.) In rejecting the husband's claim that the increase in his retirement benefit due to the redeposit was entirely his separate property, the Court of Appeal recognized that the substantial increase in the husband's retirement benefit "was possible only as consideration for husband's service" during the marriage (*id.* at p. 841, 173 Cal.Rptr. 680) and that " 'the community owns *all* pension rights attributable to employment during the marriage.' " (*Id.* at p. 842, 173 Cal.Rptr. 680.) Accordingly, the court concluded that the wife had a right "to share in the increased retirement benefits upon payment of her pro rata share of the redeposit." (*Ibid.*)

***126** The service credit at issue here, by contrast, was not attributable to employment during the Husband–Wife marriage. Rather, it was earned during the Husband–Dalia marriage and was originally an asset of that community. In the divorce proceeding in 1991, Husband and Dalia entered into a stipulated judgment that awarded the entirety of the community's CalPERS pension and retirement rights to Husband. These rights remained Husband's separate property at the time of Husband's marriage to Wife in ****552** 1994. (*in Re marriage Of stenquist* (1978) 21 cal.3d 779, 788, 148 cAl.rptr. 9, 582 P.2d 96 ["that portion of the husband's pension attributable to employment before marriage" is "correctly" classified "as separate property"]; Fam.Code, § 770, subd. *****421** (a)(1).) In May 1995, Husband transferred one-half of the accumulated member contributions and service credit attributable to the Husband–Dalia marriage to Dalia to satisfy an outstanding obligation to Dalia. Dalia's share was placed in a separate nonmember account (Gov.Code, § 21290), and it entitled her to receive "a retirement allowance based on the service retirement formula applicable to the service credited to the nonmember," which would "consist of a *pension* and an *annuity,* the latter of which shall be derived from the nonmember's accumulated contributions." (Gov.Code former § 21215.8, added by Stats.1988, ch. 542, § 6, p.1999, and repealed by Stats.1995, ch. 379, § 1, p.1955, italics added; see now § 21298, subd. (b).)

[7] Husband retained, as his separate property, a right to recoup that service credit in the event Dalia were to withdraw the assets in her nonmember account. (See *In re Marriage of Brown* (1976) 15 Cal.3d 838, 846, 126 Cal.Rptr. 633, 544 P.2d 561, fn. 8 ["The law has long recognized that a contingent future interest is property [citation] no matter how improbable the contingency"]; *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1533, 239 Cal.Rptr. 175 [" 'property to which one spouse has acquired an equitable right before marriage is separate property, though such right is not perfected until after marriage' "].) Dalia did just that (see Gov.Code, § 21292), and Husband elected to exercise his right to redeposit his member contributions plus interest. (See *id.,* §§ 20750, 20751.) Had he made that redeposit with separate property funds, the recouped service credit would unquestionably have been his separate property. (Cf. *In re Marriage of Shea* (1980) 111 Cal.App.3d 713, 717, 169 Cal.Rptr. 490 ["where a fringe benefit is earned entirely by employment before marriage, it is the separate property of the employee even if received after marriage"].) Wife errs in characterizing Husband's right to redeposit his member contributions as an investment opportunity governed by the interspousal fiduciary duty (see Fam.Code, § 1100, subd. (e)), inasmuch as the right to recover the prior service credit was Husband's separate property.

***127** We therefore agree with the Court of Appeal that the service credit earned during the Husband–Dalia marriage was Husband's separate property at the time Husband invoked his right to redeposit his member contributions plus interest. The rest of the Court of Appeal's analysis, however, is problematic. The appellate court devised a new theory to uphold the trial court's apportionment of the Husband–Dalia service credit—i.e., that Husband had used community funds to make the redeposit, thus commingling community property with his separate property, yet had failed to discharge his burden of demonstrating "what proportion of the value of the repurchased service credits was attributable to his separate property as opposed to the community's funds." (See *See v. See* (1966) 64 Cal.2d 778, 783, 51 Cal.Rptr. 888, 415 P.2d 776.) Where separate and community funds are commingled in such a manner that it is impossible to trace the source, the Court of Appeal continued, " ' "the whole will be treated as community property...." ' " (Quoting *In re Marriage of Mix* (1975) 14 Cal.3d 604, 611, 122 Cal.Rptr. 79, 536 P.2d 479.)

The Court of Appeal's commingling analysis rests on the erroneous legal assumption that Husband's retirement benefit was a unitary and indivisible asset. It is not. As amicus

curiae Barbara A. DiFranza, a certified family law specialist, points out, Husband's retirement allowance under the Public Employees' Retirement Law (Gov.Code, § 20000 et seq.) consists of two distinct components: an ***422** annuity and a pension. (Gov.Code, § 21350.) "[C]ontributions made by a member" are converted on retirement to an " '[a]nnuity,' " which makes "payments for life" and is equal in value to the accumulated normal contributions and interest in the member's individual account. (*Id.*, § 20018; see *id.*, §§ 20012, 21351.) "[C]ontributions made from employer controlled funds," in turn, form a " '[p]ension,' " which also makes "payments for life." (*Id.*, § 20054.) The retirement allowance thus consists of "a *pension* derived from the contributions of the **553** employer sufficient when added to the service retirement *annuity* that is derived from the accumulated normal contributions of the member at the date of his or her retirement to equal 3 percent of his or her final compensation at retirement, multiplied by the number of years of ... local safety service subject to this section with which he or she is credited at retirement." (*Id.*, § 21362.2, subd. (a), italics added; see § 20576, subd. (a).)

In this case, the community made a redeposit of a portion of Husband's accumulated contributions (*id.*, § 20012) for the period of the Husband–Dalia marriage. Those contributions were converted into an annuity upon Husband's retirement. The obligation of the employer to contribute to the pension component, on the other hand, derived from Husband's service during the Husband–Dalia marriage. Accordingly, the community had a claim only on the annuity component relating to the time period of the Husband–Dalia marriage, and was entitled only to a pro tanto share of *that portion* of *128 Husband's retirement allowance. (Cf. 26 U.S.C. § 414(k)(2) ["A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall [¶] ... [¶] be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan"].)

[8] Wife contends that Husband forfeited his right to seek apportionment on this basis by failing to present evidence at trial concerning the appropriate apportionment of the annuity portion of the retirement allowance. However, Wife presented no evidence at trial concerning apportionment, either. As the Court of Appeal remarked, "Wife's expert did not address the issue of the repurchased service credits in his trial testimony." Indeed, the issue was not even joined until Husband's expert addressed the issue in his posttrial letter and Wife's expert submitted a responsive letter. Notably, neither the trial court nor the Court of Appeal ever asserted that Husband had forfeited his right to contest the apportionment of the service credit, and we decline to interpose a procedural bar for the first time here.

Instead, the Court of Appeal concluded that the trial court had chosen not to credit the evidence that Husband had presented —and that the trial court was within its discretion to do so. But both the trial court and the Court of Appeal made an error of law in assuming that Husband's redeposit of member contributions with community funds entitled the community to a corresponding fraction of the entire retirement allowance attributable to the years of the Husband–Dalia marriage. In their view, since the community had redeposited 70.83 percent of the member contributions from the Husband–Dalia marriage, the community was entitled to 70.83 percent of the service credit earned during the Husband–Dalia marriage. But, as demonstrated above, the redeposit was of member contributions, and member contributions are used to purchase the service ***423** retirement annuity, which is only one component of the retirement allowance. (Gov.Code, §§ 20018, 21362.2, subd. (a).) The remainder of the retirement allowance is supplied by the pension, which derives from the contributions of the *employer* and which, the record shows, is several orders of magnitude larger than the accumulated member contributions. The Husband–Wife community did not contribute to that larger component of the retirement allowance, and it was therefore an abuse of discretion to award any share of it to the community. (Cf. *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1427, 128 Cal.Rptr.2d 31 ["there may be reason to consider the value of the acreage separately from that of the home, if the improvements enhanced only the residence"].)

[9] *129 Accordingly, the trial court was correct in its general statement that "Wife is entitled to a *pro tanto* share of the appreciation of the [retirement benefit] in proportion to her community share of its purchase." But the trial court abused its discretion in assuming that the community, by redepositing member contributions under Government Code section 20751, had any entitlement at all to the pension component of Husband's **554 retirement benefit arising from the Husband–Dalia service years. The trial court should instead have apportioned to the community only a pro tanto share of the annuity. [1] (See Gov.Code, § 20576, subd. (a)(2).)

[1] Wife seems to suggest that the trial court's apportionment was nonetheless fairly representative of the relative contributions of the community and separate estates, in that Husband's salary and the value of his retirement

> benefit increased substantially because of his tenure as Sheriff–Coroner–Public Administrator of Monterey County during their marriage. Nothing in the record, however, indicates that the trial court apportioned Husband's retirement benefit on this basis. Moreover, a trial court has discretion to accord equal weight to each year of service in calculating the community interest in retirement rights, even though the employee's salary may be much higher in the later years than the early years. (*In re Marriage of Gowan* (1997) 54 Cal.App.4th 80, 90–91, 62 Cal.Rptr.2d 453.)

Husband asserts that his expert already performed this calculation in his posttrial letter. In that letter, Reddall derived the community's share of the service years arising from the Husband–Dalia marriage by dividing the community's redeposit of member contributions by the total actuarial present value of the service credit for that period. Amicus curiae proposes a somewhat different calculation; she derives the community's share of the retirement allowance by dividing the community's redeposit of member contributions by the actuarial present value of the total retirement allowance.

[10] As we stated above, a trial court in general has discretion in selecting its method of apportionment, so long as the result "is 'reasonable and fairly representative of the relative contributions of the community and separate estates.' " (*In re Marriage of Lehman, supra,* 18 Cal.4th at p. 187, 74 Cal.Rptr.2d 825, 955 P.2d 451.) Tracing the community's contributions (and accumulated interest thereon) in the annuity component of Husband's retirement allowance would satisfy that standard. We believe, though, that it is most prudent to grant the trial court the opportunity to exercise its discretion as to apportionment of the annuity component in the first instance, especially since the court did not take evidence at trial concerning the apportionment issue, the experts' posttrial letters on the issue were unsworn, and neither expert was available for cross-examination about their findings and opinions on the issue. We therefore remand the matter to the Court of Appeal for ***424** remand to the trial court so it may take evidence and select and apply the appropriate method of apportionment. (*In re Marriage of Skaden, supra,* 19 Cal.3d at p. 689, 139 Cal.Rptr. 615, 566 P.2d 249; *Bono v. Clark, supra,* 103 Cal.App.4th at pp. 1424–1425, 128 Cal.Rptr.2d 31.)

*130 DISPOSITION

The judgment of the Court of Appeal is reversed to the extent it affirmed the trial court's apportionment of the service credit arising from the Husband–Dalia marriage and is otherwise affirmed. The matter is remanded to the Court of Appeal for further proceedings consistent with our opinion.

We concur: GEORGE, C.J., KENNARD, WERDEGAR, CHIN, MORENO and CORRIGAN, JJ.

Parallel Citations

48 Cal.4th 118, 225 P.3d 546, 10 Cal. Daily Op. Serv. 2135, 2010 Daily Journal D.A.R. 2577

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193 Cal.App.4th 420
Court of Appeal, Second District,
Division 8.

In re MARRIAGE OF Janice and Roman KOCHAN.
Janice K. Kochan, Respondent,
v.
Roman V. Kochan, Appellant.

No. B215355. | March 9, 2011.

Synopsis

Background: In dissolution proceeding, spousal support obligee filed order to show cause to modify the support obligation. Obligor filed notice of automatic stay in his bankruptcy action. The Superior Court, Los Angeles County, No. BD460830, Donna Fields Goldstein, J., increased the spousal support obligation after bench trial, and awarded attorney fees. Obligor appealed.

Holdings: The Court of Appeal, Bigelow, P.J., held that:
[1] obligor's hypothetical retirement income was not proper basis for increasing spousal support obligation; but
[2] any loss from nonsale of family residence was attributable to obligor; and
[3] obligor did not act reasonably to preserve whatever value could be salvaged from the family residence.

Reversed and remanded with directions.

Attorneys and Law Firms

**63 Law Offices of Brian G. Saylin and Brian G. Saylin, Orange, for Appellant.

Rehm & Rogari and Joanna Rehm, Los Angeles, for Respondent.

Opinion

BIGELOW, P.J.

*422 Family Code section 4320 provides that the family law court "shall consider" the "earning capacity of each party" in ordering spousal support, but the decision whether to order support based on a party's earning capacity rather than actual earnings is a matter within the court's discretion. (See, e.g., *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 825, 130 Cal.Rptr.2d 1.) In the case before us today, the family law court entered a spousal support order based in part upon a finding that a spouse with a 40–year employment history with the California State University could earn more income by taking his retirement from the California Public Employees' Retirement System (CalPERS), and returning to work with the University under its Faculty Early Retirement Program (FERP). In other words, the family law court ruled that the spouse's support obligation would take into account his earning capacity imputed from a CalPERS/FERP retirement scenario, rather than on his actual income from long-held employment. We reverse.

FACTS

Background

Roman and Janice Kochan married in **64 July 1982. [1] In November 2006, Janice left the family residence, and moved into her mother's home. Roman was 65 years old when the parties separated; Janice was 50 years old. In February 2007, Janice filed a petition to dissolve the parties' marriage. [2]

1 As is common in family law proceedings, we use the parties' first names for purposes of clarity. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475–476, fn. 1, 274 Cal.Rptr. 911.)

2 By the time the family law court entered judgment of dissolution, the Kochan's children were adults. There are no child-related matters material to the issues on appeal. As a result, we omit such elements of the proceedings below.

Roman started working at California State University Long Beach (CSULB) in 1969, and continued working at CSULB throughout the parties' marriage. At the time of trial and judgment, he remained employed at CSULB. His current position is Dean of Library Services at CSULB. Janice *423 earned a bachelor's degree shortly after she married Roman, but primarily worked in the family home during the marriage. She began working part-time in one of CSULB's academic advising departments after the parties' youngest child started elementary school.

The Family Law Proceedings

In June 2007, the family law court issued pendent lite support orders. The court found that Roman had a gross monthly income of $12,190, while Janice anticipated a gross monthly income of $3,833. The court ordered Roman to pay spousal support to Janice in the amount of $2,261, retroactive to

that a party was "*intentionally depressing* his [or her] income to an artificial low...." (*Ibid.*, italics added.) Under today's family law statutes and jurisprudence, a deliberate attempt to depress income remains the "usual" factual circumstance in which the family law court will base support on earning capacity, but bad faith is not a required factor. (See, e.g., *In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1634–1638, 16 Cal.Rptr.2d 345 (*Ilas*).) Instead, support must be based on an assessment and balancing of the enumerated statutory criteria regardless of evidence showing a deliberate attempt to avoid a support obligation. (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 74, 79–80, 46 Cal.Rptr.2d 8; *In re Marriage of Simpson* (1992) 4 Cal.4th 225, 230–233, 14 Cal.Rptr.2d 411, 841 P.2d 931.) The final decision on a spousal support order is a matter to be determined in the court's discretion. (*In re Marriage of Rosen, supra,* 105 Cal.App.4th at p. 825, 130 Cal.Rptr.2d 1.)

None of the authorities cited in the parties' briefs on appeal directly addresses the issue presented in this case. That is, may the family law trial court, in fixing the level of spousal support, consider the added income a party would earn by taking retirement and then returning to work. Roman cites ****69** *In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 74 Cal.Rptr.2d 636 (*Reynolds*) in support of an argument that "no one may be compelled to work after the usual retirement age of 65" in order to pay spousal support. (*Id.* at p. 1378, 74 Cal.Rptr.2d 636.) He contends that by implication that means that no party may be required to retire at ***429** the usual age of 65 in order to pay support. For her part, Janice cites *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 45 Cal.Rptr.2d 555 (*Padilla*), and *Ilas, supra,* 12 Cal.App.4th 1630, 16 Cal.Rptr.2d 345 in support of her argument that the published cases reject the proposition that a spouse's "employment decisions for reasons personal to [him or her]" may trump the spouse's support obligation when those decisions are "harmful to those to whom [he or she] owed a duty of support."

As we have noted, these case do not directly address the issue of the propriety of a spousal support order which may effectively require a party to elect between taking a retirement to pay a spousal support order, or risking a failure to pay the support order. In *Reynolds,* a 66–year–old physician spouse suffered a leg injury, lost his job, realized it was "finally time to retire," and sought a reduction in his spousal support obligation. The family law court partially reduced support, but largely "refused to recognize the effect" of the retirement in making its order, imputing income based on the physician spouse's ability to work. The Court of Appeal reversed, concluding that the family law court's order effectively required the retirement-age physician spouse to continue working. (*Reynolds, supra,* 63 Cal.App.4th at pp. 1375–1380, 74 Cal.Rptr.2d 636.) The Court of Appeal determined: "Just as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires." (*Id.* at p. 1379, 74 Cal.Rptr.2d 636.)

In *Padilla,* a father left his job in good faith to start a new business, and sought modification of child support payments. The family law court imputed income of nearly $6,000 per month, notwithstanding that the evidence showed his actual earnings were in the range of $1,500 per month. The Court of Appeal affirmed, finding there had been no abuse of discretion. (*Padilla, supra,* 38 Cal.App.4th at pp. 1214–1216, 45 Cal.Rptr.2d 555.) As the Court of Appeal explained, the predominant guiding factor in the *child support* context is the best interests of the child. In *Ilas,* a 39–year–old pharmacist sought to obtain a reduction in child and spousal support because he had decided to resign his job and attend medical school. The family law court said no, even if he was acting in good faith. Again, the Court of Appeal affirmed. (*Ilas, supra,* 12 Cal.App.4th at pp. 1637–1639, 16 Cal.Rptr.2d 345.)

[5] **[6]** We believe that *Reynolds* offers the more analogous reasoning in considering how to evaluate the retirement factor on a spousal support order and where child support is not a concern. We hold that the family law court abuses its discretion when it bases an order for spousal support on a finding that a spouse's present earnings from long-term employment can be *increased* by taking a retirement, and returning to work in an available, but different, position. In our view, the family law court should no more enter an order that ***430** will effectively require a spouse to take a retirement than it should enter a support order that effectively requires a spouse to forego retirement. (*Reynolds, supra,* 63 Cal.App.4th at pp. 1375–1380, 74 Cal.Rptr.2d 636.) We are also concerned that a rule allowing consideration of increased income from a retirement/re-employment scenario may be troublesome in other situations. ****70** For example, in the event a long-seated judicial officer were to divorce, may the family law court consider the likelihood that he or she would earn significantly greater income in private practice or by becoming a private judge? If a long-employed physician at a public health clinic divorces, may the family law court consider the likelihood that he or she would earn significantly greater income by taking employment with an HMO or private hospital? Should a long-term science or math teacher's support obligation to be measured by the income earnable in a

68 Cal.App.4th 987
Court of Appeal, Second
District, Division 4, California.

In re the MARRIAGE OF Mary L. and Jon E. HOKANSON.
Mary L. PALMER, Appellant,
v.
Jon E. HOKANSON, Appellant.

No. B120052. | Dec. 22, 1998.

The Superior Court, Los Angeles County, No. BD130875, H. Ronald Hauptman, Temporary Judge, issued decree dissolving marriage, and both former spouses appealed. The Court of Appeal, Curry, J., held that: (1) award of attorney fees was mandatory following determination that former wife breached fiduciary duties to former husband by being dilatory in sale of marital home; (2) substantial evidence supported court's determination that home would have sold for $460,000 but for dilatory conduct of former wife; (3) same adjustments were required to be made to final sales price of home as were made in determining what price would have been if sale was timely; and (4) trial court did not abuse discretion by allowing testimony of real estate agent as to what sales price would have been if sale was timely.

Affirmed in part, reversed and remanded in part.

Attorneys and Law Firms

****700** ***989** Schenck & Edelman and Emily Shappell Edelman, Los Angeles, for Appellant Husband.

O'Connor & O'Connor, Timothy M. O'Connor, Colin O'Connor and Erin O'Connor, Redondo Beach, for Appellant Wife.

Opinion

CURRY, J.

Appellant Jon E. Hokanson and cross-appellant Mary L. Palmer challenge an order of the family court distributing the assets from the sale of the family house. We reverse in part, affirm in part, and remand.

***990 RELEVANT FACTUAL AND PROCEDURAL BACKGROUND** [1]

1 Following established principles of appellate review, the facts are recited here in the light most favorable to the judgment. (*Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1531, fn. 1, 41 Cal.Rptr.2d 104.)

Jon and Mary were married on November 12, 1983.[2] They separated in October 1993, and Mary petitioned for dissolution of marriage.

2 We refer to the parties by their first names "to humanize a decision resolving personal legal issues which seriously affect their lives," and to make our opinion easier to understand. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475–476, fn. 1, 274 Cal.Rptr. 911.)

In March 1994, Mary contacted RE/MAX Palos Verdes Realty, a real estate broker, and obtained a marketing analysis of the family house located in the Palos Verdes area from agent Lynne Droubay. Droubay recommended listing the house at $525,000. In October and December 1994, Jon's attorney wrote to Mary's attorney, noting that Mary had indicated her willingness to sell the house, and asking that the house be listed for sale in January 1995.

Judgment of dissolution was filed on December 20, 1994. The judgment, inter alia, directed Jon to pay Mary $90,000 to equalize the division of community property, awarded Mary a separate property interest of $122,000 in the family house, ordered the house "to be sold as expeditiously as possible for the best price reasonably obtainable," and acknowledged Mary's occupancy of the house pending the sale.

In January 1995, Droubay told Mary that the market had weakened since she had given Mary the marketing analysis, and she recommended a listing price of $499,000. Shortly thereafter, Droubay, Mary, and Jon inspected the house, and Droubay advised them to make some minor repairs.

In June 1995, Mary asked Droubay to list the house at $529,000, despite Droubay's advice that this price was too high. No offers were received, and Droubay again recommended reducing the listing price. Mary instructed her to leave the price unchanged.

In August 1995, Mary wrote to Jon, telling him that she was taking the house off the market because she was undergoing treatment for breast cancer. She stated that she hoped to place the house on the market again "around the holidays."

In January 1996, Mary called Droubay and instructed her to list the house at $529,000. Droubay again told Mary that this

price was too high. After Droubay communicated with Jon, Mary agreed to reduce the listing price to *991 $499,000 in February 1996. In March 1996, Mary directed Droubay to remove the realtor's lock-box from the house, but permitted Droubay to continue showing the house.

On April 16, 1996, Jon filed an ex parte application for an order to show cause, seeking an order directing Mary to list the house for $454,000 and to maintain a lock-box on the house. On May 14, 1996, the house was listed by real estate agents Janet Earl and Gunilla Windon of Coldwell Banker at a court-ordered price of $465,000.

**701 In June 1996, Mary and Jon received an offer of $400,000 on the house. This was the first offer they had ever received. The house was sold for $430,000 on June 19, 1996.

On July 24, 1996, Mary filed an application for an order to show cause, seeking an order distributing proceeds from the sale. Jon opposed Mary's application and sought an order granting him relief for Mary's alleged breach of fiduciary duty under Family Code section 1101, including damages for losses due to the delayed sale and attorney fees.

Following hearings in March and April 1997, the family court found that Mary had breached her fiduciary duties by dilatory conduct, but declined to find she had acted in a manner that fell within the punitive damages provisions of Civil Code section 3294. The family court concluded: (1) had the house been listed for sale in January 1995, it would have sold within 60 days for the "reasonable net selling price" of $460,000; (2) as a result, the community had suffered a loss of $30,000, half of which was to be credited as an offset against Jon's equalization payment of $90,000; and (3) each party was to bear his or her own attorney fees.

The family court filed its statement of decision on December 31, 1997, and modified the statement of decision on February 26, 1998. This appeal and cross-appeal followed.

DISCUSSION

A. *Appeal*

Jon contends that (1) the family court erred in denying Jon's request for attorney fees, (2) insufficient evidence supports the family court's determination of the house's net sale price, and (3) the family court incorrectly calculated the credit due to Jon.

*992 1. *Attorney Fees*

Jon contends that the family court improperly denied Jon an award of attorney fees to which he was entitled under Family Code section 1101, subdivision (g). We agree.

Under Family Code sections 721 and 1100, spouses have fiduciary duties to each another with respect to the management and control of community property. (Fam.Code, §§ 721, subd. (b), 1100, subd. (e).) When, as here, a spouse has breached her fiduciary duty, but not in a manner displaying fraud, malice, or oppression within the meaning of Civil Code section 3294, Family Code section 1101, subdivision (g), governs the applicable remedies. (Fam.Code, § 1101, subds. (g), (h).) Subdivision (g) provides that these remedies "*shall* include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty *plus* attorney's fees and court costs." (Emphasis added.)

Because the family court found that Mary had breached her fiduciary duty but not in a manner bringing her conduct within the ambit of Civil Code section 3294, the key issue here is whether the family court properly interpreted subdivision (g) to give it the discretion to deny Jon's fee request. [3] We review this issue of statutory interpretation de novo. (See *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195, 30 Cal.Rptr.2d 357.)

3 In conclusory terms, Mary, as respondent, argues that subdivision (g) is inapplicable to Jon's fee request on two grounds. Neither has merit.

First, Mary argues that subdivision (g) is inapplicable because Jon had no equity interest in the house. However, Mary did not raise this theory before the family court. We decline to consider a theory unsupported by authority and raised in a manner that prevents Jon from developing the underlying facts. (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1403, fn. 1, 74 Cal.Rptr.2d 712.)

Second, Mary argues that substantial evidence does not support the family court's determination that she breached her fiduciary duty because there is no evidence that Mary instructed Droubay not to communicate with Jon. However, Family Code sections 721 and 1100 impose a fiduciary duty to Jon directly *on Mary,* and there is ample evidence in the record that she delayed the sale and failed to communicate information to Jon.

[1] "The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are clear, we may not alter them to accomplish a purpose that does not **702 appear on the face of the statute or from its legislative history. [Citation.] Whenever possible, we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless. [Citations.]" (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437, 35 Cal.Rptr.2d 155.)

[2] *993 Here, the language of subdivision (g) is unambiguous and mandatory. " 'It is a well established rule of statutory construction that the word "shall" connotes mandatory action and "may" connotes discretionary action.' [Citation.]" (*In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1039, 31 Cal.Rptr.2d 749.) Accordingly, the family court lacked discretion to deny Jon's fee request. (*Ibid.*)

This conclusion receives additional support from subdivision (h) of section 1101, which provides that when the pertinent breach of fiduciary duty falls within the ambit of Civil Code section 3294, the "[r]emedies ... shall include, *but not be limited to,* an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty." (Emphasis added.) The clear import of the language in subdivision (h) is that an award of attorney fees is discretionary, over and above the mandatory award of the entire asset at issue. Accordingly, had the Legislature intended to consign an award of attorney fees to the family court's discretion under subdivision (g), it could have done so in plain terms. (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1082, 62 Cal.Rptr.2d 178.)

Mary contends that the word "shall" in subdivision (g) should not be understood as mandatory language because other Family Code provisions concerning attorney fees consign fee awards to the family court's discretion. However, we decline to depart from clear statutory language that neither produces an absurdity nor defeats the goals of section 1100 et seq. (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1700, 8 Cal.Rptr.2d 614["[E]xcept in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature."].)

Mary also suggests that the legislative history of section 1101 supports her interpretation of subdivision (g), and she requests that we take judicial notice of this history.[4] We decline to rewrite section 1101 on the basis of this history. When the language of a statute is clear and unambiguous, we do not resort to extrinsic indicia of the Legislature's intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299; *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 794, 27 Cal.Rptr.2d 545.)

4 We hereby grant the parties' joint request for judicial notice of this history. (Evid.Code, §§ 452, 459.)

In sum, the family court erred in denying Jon's attorney fee request under section 1101, subdivision (g).

*994 **2. *Net Sale Price***

Jon contends that substantial evidence does not support the family court's finding that the "reasonable net selling price" of the house in early 1995 would have been $460,000. We disagree.

[3] On review for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. (*In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 548, 251 Cal.Rptr. 370.) We accept all evidence favorable to the prevailing party as true and discard contrary evidence. (*Ibid.*)

[4] At trial, Droubay testified that she calculated the "adjusted average sales price" of the house to be $485,866 in January 1995. Windon testified that the fair market value of the house at that time was between $475,000 to $480,000. Jon testified that Droubay's initial commission was to be 6 percent of the sales price, and that this was later reduced to **703 5 percent before June 1995. Finally, admitted into evidence was an accounting for the June 1996 sale which discloses that, aside from commissions, the sale involved title and escrow charges of approximately $3,000. The family court concluded that Droubay's testimony about the "adjusted average sales price" concerned the house's fair market value, and it found that the net sales price of the house in early 1995 would have been $460,000, explaining that this was a "netted-out" figure adjusted for "cost of sale," especially the broker's commission.

In our view, a trier of fact could have reasonably inferred that the house's net or adjusted sales price fell within a price range

192 Cal.App.4th 336
Court of Appeal, Second District, Division 1, California.

In re MARRIAGE OF Sandra and Edward FOSSUM.
Sandra Fossum, Respondent,
v.
Edward Fossum, Appellant.

No. B214824. | Jan. 28, 2011. | Rehearing Denied Feb. 10, 2011. | As Modified Feb. 10 and 24, 2011. | Review Denied Apr. 27, 2011.

Synopsis

Background: Wife filed petition for dissolution of marriage. The Superior Court, Los Angeles County, No. BD382683, Scott M. Gordon, J., entered judgment and related orders, and husband appealed.

Holdings: The Court of Appeal, Johnson, J., held that:
[1] evidence was sufficient to support finding that marital home was community property when acquired;
[2] husband failed to rebut the presumption of undue influence in connection with quitclaim deed transferring title to his name only;
[3] record on appeal did not support contention that court failed to make any determination about separate property contributions to down payment for marital home; and
[4] court lacked discretion to deny husband's attorney's fee request after finding that wife breached her fiduciary duty.

Reversed and remanded in part, otherwise affirmed.

Rothschild, Acting P.J., concurred in part and dissented in part with opinion.

Attorneys and Law Firms

**197 Law Offices of Richard A. Marcus and Richard A. Marcus, Los Angeles, for Appellant.

Law Offices of Martin S. Bakst and Martin S. Bakst for Respondent.

Opinion

JOHNSON, J.

*338 Appellant Edward Fossum and his ex-wife, respondent Sandra Fossum purchased a house in 1994. To obtain the best interest rate, the property was purchased in Edward's [1] name alone, but later title was placed in both spouses' names. In 1998, the parties agreed to enter into the *339 same arrangement in order to obtain a good interest rate on a loan to refinance their home. Sandra quitclaimed her interest in the property to Edward, but he never restored Sandra's name to title. **198 Following trial in this action, the trial court determined the house was community property. Edward contends that ruling was in error. We affirm.

1 We refer to the parties by their first names for the sake of clarity and ease of reference. We intend no disrespect.

Prior to the parties' separation, Sandra took a cash advance on a credit card of $24,000, but never disclosed the transaction to Edward. The trial court found Sandra had breached her statutory fiduciary duty to her spouse. (Fam.Code, § 721, subd. (b).) [2] Edward contends the trial court erred when it refused to award him attorney fees, which are mandated under section 1101, subdivision (g), for Sandra's fiduciary violation. On this point, we conclude Edward is correct.

2 Unless stated otherwise, all statutory references are to the Family Code.

FACTUAL AND PROCEDURAL BACKGROUND

Edward and Sandra Fossum were married in September 1994, after having lived together since 1992. They separated in November 2002. [3] The parties had no children together, although Sandra had a minor child from a prior relationship. Sandra filed a petition for dissolution in January 2003. Trial was conducted on various dates during February, March, June and October 2007. The primary dispute at trial, and on appeal, involves the characterization of real property located at 21557 Placerita Canyon Road, Santa Clarita (the "property," or "house"). Escrow on the property closed in October 1994. The down payment on the property was between $30,000–$38,000. The funds for the down payment came from the Fossums's joint savings account.

3 The once-disputed date of separation, among other issues, having been determined by the trial court and not raised on appeal, is no longer at issue.

The first quitclaim deed

Sandra's testimony

At trial, Sandra testified that the source of the down-payment funds was money she and Edward earned together working in

his bank informed him it kept such records for 10 years. Although the time frame between the home purchase and this dissolution action was within that time frame, Edward failed to obtain bank records or to produce evidence to rebut Sandra's testimony. The trial court did not find Edward credible. The record supports that conclusion. The house was community property when acquired.

b. The effect of the 1998 transaction

[3] Neither party disputes the validity of the 1995 interspousal transaction in which Edward executed the second quitclaim deed placing title in his name and Sandra's, as joint tenants. At this point, the house was clearly community property. Thus, the next issue is the effect of Sandra's execution of the third quitclaim deed placing title to the property in Edward's name, as his "sole and separate property."

[4] [5] Spouses have the right to enter into property-related transactions with each other. (§ 721, subd. (a).) However, spouses occupy a confidential and ***344** fiduciary relationship with each other. (§ 721, subd. (b).) The nature of this relationship "imposes a duty of the highest good faith and fair dealing" on each spouse as to any interspousal transaction. (*Ibid.*) "If one spouse secures an advantage from the transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside." (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 628–629, 35 Cal.Rptr.3d 1 (*Mathews*); *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293–294, 39 Cal.Rptr.2d 673 (*Haines*).) Generally speaking, if an interspousal transaction results in one spouse obtaining an advantage over the other, a rebuttable presumption of undue influence will attach to the transaction. (*Bonds, supra,* 24 Cal.4th at pp. 27–28, 99 Cal.Rptr.2d 252, 5 P.3d 815; *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996, 4 Cal.Rptr.3d 378.)

[6] [7] [8] " 'When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action "was freely and voluntarily made, with a full knowledge of all the facts, and with a complete understanding of the effect of" the transaction.' [Citation.]" ****202** (*In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 55, 94 Cal.Rptr.3d 84.) The advantaged spouse must show, by a preponderance of evidence, that his or her advantage was not gained in violation of the fiduciary relationship. (*Haines, supra,* 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.) " 'The question "whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence." ' [Citation.]" (*Lund,* at p. 55, 94 Cal.Rptr.3d 84.)

Here, the trial court found Edward failed to rebut the presumption of undue influence. Edward contends that the trial court erred by failing to adhere to the rule that the "form of title" in the third quitclaim deed must control over Sandra's claim of the existence of an oral agreement contradicting that instrument.

[9] [10] [11] [12] Under the "form of title" presumption, the description in a deed as to how title is held presumptively reflects the actual ownership status of the property. (*In re Marriage of Brooks and Robinson* (2008) 169 Cal.App.4th 176, 184–185, 86 Cal.Rptr.3d 624 (*Brooks*); *Haines, supra,* 33 Cal.App.4th at p. 292, 39 Cal.Rptr.2d 673.) This common law presumption is codified in Evidence Code section 662, which states, " ' "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." ' " The presumption is based the promotion of a public policy that favors the stability of titles to property. (*Brooks,* at p. 185, 86 Cal.Rptr.3d 624.) Accordingly, absent a showing to the contrary, the status declared by the instrument through which a party acquired title will control. (*Ibid.*; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter ***345** Group 2010) ¶ 8:32, p. 8–9.) As the court in *Brooks* observed, "[t]he presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the Deed is not what the parties intended." (*Brooks,* at p. 189, 86 Cal.Rptr.3d 624.)[5]

5 Significantly, when it applies, the form of title presumption may not be "rebutted by evidence that title was taken in a particular manner merely to obtain a loan." (*Brooks, supra,* 169 Cal.App.4th at p. 190, 86 Cal.Rptr.3d 624; cf. *In re Marriage of Kahan* (1985) 174 Cal.App.3d 63, 69, 219 Cal.Rptr. 700 [when title was taken by spouses as joint tenants to obtain loan, property was presumptively held in joint tenancy].)

[13] The problem with Edward's argument is that it essentially ignores the rule that the form of title presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other. (*Brooks, supra,* 169 Cal.App.4th at p. 190, fn. 8, 86 Cal.Rptr.3d 624; *Haines, supra,* 33 Cal.App.4th at pp. 301–302, 39 Cal.Rptr.2d 673.) That is the factual

scenario addressed in the trial court, and the record we review. Although Edward contends there is insufficient evidence that he exerted any undue evidence over Sandra, the trial court found otherwise. We resolve the action in light of that factual finding.

[14] The statutory presumption of undue influence applies if (1) there is an interspousal transaction by which (2) one spouse gains an advantage over the other. (§ 721; *Mathews, supra,* 133 Cal.App.4th at p. 629, 35 Cal.Rptr.3d 1.) Those prerequisite elements are satisfied here with regard to the 1998 quitclaim deed. Thus, Edward bore the burden to establish, by a preponderance of evidence, that Sandra's signing of the third quitclaim deed was freely and voluntarily made with full knowledge of all the facts and with a complete ****203** understanding of its effect of making the house Edward's separate property. (*Id.* at pp. 630–631, 35 Cal.Rptr.3d 1.) Substantial evidence supports the trial court's finding that Edward failed to carry this burden.

Sandra did testify she executed the 1998 deed freely and voluntarily, and that she understood the legal import of a quitclaim deed. However, when Sandra agreed to deed her interest in the property to Edward, she did so based on his promise to restore her name to the title once the refinance was complete. She now claims the transaction was predicated on a false promise, that Edward never intended to fulfill. Edward maintains Sandra never raised this argument below and that, to date, she has argued only that he reneged on a promise to put her name back on title. There is a semantic distinction. But here it is a distinction without a difference. The pivotal point is that Sandra consistently believed she jointly owned the property with her husband, and would never have agreed to sign the quitclaim deed had she known Edward either believed otherwise, or that he never intended to fulfill his promise and employ the same procedure the couple ***346** used when they acquired the property in order to keep it for himself. Undue influence consists, among other things " [i]n the use, by one in whom a confidence is reposed by another ..., of such confidence ... for the purpose of obtaining an unfair advantage over him." (Civ.Code, § 1575.) Contrary to Edward's assertions, Sandra was not required to show fraud, or deceit or that he overtly or implicitly threatened her to get her to sign the deed. The spouses jointly wished to refinance their mortgage to obtain a fixed rate at the best possible interest rate. To do so, they agreed it benefit them to obtain the loan in Edward's name. Accordingly, they agreed to engage in a repeat performance of the identical interspousal transaction once before completed without negative incident. However, the second time around, Edward either never intended to restore Sandra's name to title, or refused to do so after she failed to comport herself in the way he believed his wife should "behave." Whatever the reason, the record contains sufficient evidence in the record to support the trial court's finding that Edward abused his position as Sandra's fiduciary and confidant, and failed to deal with his spouse in the highest good faith. Hence, he failed to rebut section 721's presumption of undue influence. The house is community property.

2. No separate property reimbursement for downpayment

[15] Edward takes issue with the trial court's failure to "make any determination about the separate property contributions to the down payment." We reject Edward's argument because the record shows he did not specifically object to the proposed statement of decision on the basis that the trial court did not apportion his alleged separate property contribution to the down payment. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134, 275 Cal.Rptr. 797, 800 P.2d 1227; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380, 25 Cal.Rptr.2d 242 ["any defects in the trial court's statement of decision must be brought to the court's attention through specific objections to the statement itself"].) Because he did not raise the issue in the trial court, Edward forfeited his right to complain on appeal about the trial court's lack of specificity.

[16] In any event, even if the objection was not forfeited, the record supports a contrary conclusion. The trial court specifically noted it had considered all the evidence. That evidence includes conflicting ****204** testimony as to whether the source of the funds drawn on the parties' joint bank account came from their joint earnings working in Edward's construction business in 1994, or was solely the fruit of Edward's efforts and savings. The trial court found Sandra credible, and determined that Edward was not entitled to any separate property contribution for the down payment.

***347** *3. Attorney fees for violation of fiduciary duty*

[17] Edward contends the trial court improperly denied him an award of attorney fees to which he was entitled under section 1101, subdivision (g). We agree. [6]

6 Edward does not dispute the court's power to award Sandra attorney fees under section 2030. Sandra's appellate brief focuses only on the needs-based attorney fee award, and fails to address the issue of whether Edward is entitled to attorney fees under section 1101 at all.

Under sections 721 and 1100, spouses have fiduciary duties to each other as to the management and control of community property. (§§ 721, subd. (b), 1100, subd. (e).) When, as here, the trial court finds a spouse has breached her fiduciary duty, but not in a manner rising to the level of sanctionable conduct under section 271, nor by conduct rising to the level of fraud, malice, or oppression, section 1101, subdivision (g), governs the applicable remedies. (§ 1101, subds. (g), (h).) That subdivision states that its remedies "*shall include,* but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty *plus* attorney's fees and court costs." (§ 1101, subd. (g), italics added.)

Before the parties' separation, Sandra charged $24,000 to a credit card without disclosing the charge to her husband. Although the parties disputed the use to which those funds were put, it was undisputed that Sandra incurred the debt without disclosure to Edward, in violation of her fiduciary obligations to her spouse and the provisions of section 721. The trial court ordered Sandra to reimburse half the charged amount ($12,000) to Edward, but did not award Edward any attorney fees. Edward filed an objection to this order. In its statement of decision, the court rejected Edward's objection, observing that, while it was aware more severe remedies were available, in its view the remedy was in accord with section 1101, subdivision (g). The court was mistaken.

Because the family court found that Sandra breached her fiduciary duty, but that her conduct did not rise to the level warranting an award of attorney fees as sanctions under section 271, the key question is whether the trial court properly interpreted subdivision (g) as vesting it with the discretion to deny an award of fees to Edward. This issue, which is one of statutory interpretation, is reviewed de novo. (See *Eidsmore v. RBB, Inc.* (1994) 25 Cal.App.4th 189, 195, 30 Cal.Rptr.2d 357.)

"The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are ***348** clear, we may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.] Whenever possible, we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless. [Citations.]" (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437, 35 Cal.Rptr.2d 155.)

****205** The language of section 1101, subdivision (g) is unambiguous and mandatory. " ' "It is a well established rule of statutory construction that the word 'shall' connotes mandatory action and 'may' connotes discretionary action." [Citations.]' " (*In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 993, 80 Cal.Rptr.2d 699 (*Hokanson*).) Once a breach is shown, the trial court lacks discretion to deny an aggrieved spouse's request for attorney fees. (See *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1344, 113 Cal.Rptr.2d 849 [a spouse's statutory fiduciary duty of care arises "without reference to any wrongdoing"].) Accordingly, the trial court lacked discretion to deny Edward's fee request. (*Ibid.*)[7] The trial court erred when it denied any award to Edward for attorney fees attributable to Sandra's violation of section 721.[8] The matter must be remanded to permit the trial court to determine the amount of attorney's fee to which Edward is entitled, under section 1101, subdivision (g), due to Sandra's violation of section 721.

7 "This conclusion receives additional support from subdivision (h) of Family Code section 1101, which provides that when the pertinent breach of fiduciary duty falls within the ambit of Civil Code section 3294, the '[r]emedies ... shall include, *but not be limited to,* an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.' (Italics added.) The clear import of the language in subdivision (h) is that an award of attorney fees is discretionary, over and above the mandatory award of the entire asset at issue. Accordingly, had the Legislature intended to consign an award of attorney fees to the family court's discretion under subdivision (g), it could have done so in plain terms. [Citation.]" (*Hokanson, supra,* 68 Cal.App.4th at p. 993, 80 Cal.Rptr.2d 699.)

8 We are aware that, although both parties sought attorney fees in this action, Edward never specifically requested an award of attorney fees for Sandra's violation of section 721. Following trial, in October 2007, the court ordered the parties to submit their respective closing arguments, and agreed to set up a conference call to determine if either party wanted additional time for his or her closing argument. The court also ordered that "the issue on attorney fees [would] be bifurcated after that." In his closing argument, filed December 10, 2007, Edward noted the court had reserved the issue of attorney fees for a later date. Notwithstanding this reservation, the trial court proceeded to address the question of attorney fees in its tentative decision in March 2008, and invited the

parties to file objections. On April 9, 2008 Edward filed written objections to the trial court's tentative decision. He noted he had objections to the court's ruling as to attorney fees, but did "not brief the issue ... as [the court] intended to have a hearing over this issue." Edward requested that a hearing be conducted so that he could "expand upon [his] objection." The court apparently conducted a further hearing on the parties' objections in July 2008, after which it issued a final ruling rejecting Edward's assertions. The record does not contain a transcript of the July 2008 hearing. Neither the final ruling nor the judgment address the court's resolution of the issue of Edward's entitlement to attorney fees under section 1101, subdivision (g).

*349 DISPOSITION

The matter is remanded to the trial court to conduct a hearing to determine the amount of attorney's fees to which Edward is entitled, under Family Code section 1101, subdivision (g), due to Sandra's violation of Family Code section 721, subdivision (b). In all other respects, the judgment is affirmed. Each party shall bear his or her own costs of appeal.

I concur: CHANEY, J.

ROTHSCHILD, Acting P.J., Concurring and Dissenting.

I concur in the majority opinion except for Part 3 of the Discussion, from which I respectfully dissent.

**206 Assuming that Family Code section 1101, subdivision (g), does provide for a mandatory award of attorney fees, the statute is not self-executing (and the majority does not hold that it is self-executing). [9] If Edward did not ask the trial court for an award of attorney fees pursuant to that statute, then he cannot complain on appeal of the trial court's failure to give him one. (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 826, 79 Cal.Rptr.3d 588; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002, 64 Cal.Rptr.2d 383.) It is Edward's burden, as appellant, to provide us with a record sufficient to demonstrate his entitlement to relief. (*Rancho Santa Fe Assn. v. Dolan–King* (2004) 115 Cal.App.4th 28, 46, 8 Cal.Rptr.3d 614.) Nothing in the record on appeal shows that Edward ever asked the trial court for an award of attorney fees pursuant to section 1101, subdivision (g). It is possible that he requested such an award orally at the hearing in July 2008, but he did not provide us with a transcript of that hearing. As appellant, Edward must bear the consequences of that failure. I therefore disagree with the majority's decision not to treat the issue as forfeited. We should affirm the trial court's decision not to award attorney fees in connection with Sandra's breach of fiduciary duty.

9 All subsequent statutory references are to the Family Code.

I note in addition that section 1101, subdivision (g), is anomalous in several respects. First, I know of no other Family Code provision calling for a mandatory award of attorney fees. In general, attorney fee awards in marital dissolution actions are discretionary and based on need and ability to pay. (See §§ 2030–2032; *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629–630, 108 Cal.Rptr.2d 833.) Even fee awards imposed as sanctions are discretionary. (See § 271.) Second, as interpreted in the case law, subdivision (h) of section 1101 provides for a *discretionary* award of attorney fees based on conduct amounting to fraud, oppression, or malice, while *350 subdivision (g) of section 1101 provides for a *mandatory* award of attorney fees based on conduct that might be wholly innocent. (See *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 43, 108 Cal.Rptr.2d 270; *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 993, 80 Cal.Rptr.2d 699.) Third, as a leading treatise observes, the statutorily imposed fiduciary duties in marital dissolution actions are extremely strict, making innocent violations easy to commit. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2010) ¶ 8:618.) A mandatory award of attorney fees, imposed regardless of the value of the asset at issue, is a harsh remedy for a violation that is merely technical and wholly innocent, as might often be the case, so it is unlikely the Legislature intended such a result. [10]

10 I note, however, that before imposing a mandatory attorney fees award under subdivision (g) of section 1101, the trial court must "determine that the party has or is reasonably likely to have the ability to pay." (§ 270.)

Because I conclude that Edward has forfeited the issue, in this case we need not decide whether, contrary to *In re Marriage of Hokanson* and *In re Marriage of Rossi*, subdivision (g) of section 1101 should be interpreted as providing for a discretionary rather than a mandatory award of attorney fees. But regardless of whether the statute as it stands is susceptible of such an interpretation, the Legislature might wish to consider amending the statute to make it unambiguously clear that the attorney fee award is discretionary, in conformity with the remainder of **207 the Family Code and with what was likely the intent of the Legislature when it enacted the statute.

Parallel Citations

192 Cal.App.4th 336, 11 Cal. Daily Op. Serv. 1468, 11 Cal. Daily Op. Serv. 1942, 2011 Daily Journal D.A.R. 1692, 2011 Daily Journal D.A.R. 2331

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90 Cal.App.4th 34
Court of Appeal, Second
District, Division 4, California.

In re MARRIAGE OF Denise and Thomas ROSSI.
Denise Rossi, Appellant,
v.
Thomas Rossi, Respondent.

No. B141041. | June 22, 2001.

Following dissolution of the parties' marriage, former husband filed motion to set aside dissolution based on fraud, breach of fiduciary duty, and failure to disclose lottery winnings. The Superior Court, Los Angeles County, No. BD250668, Richard E. Denner, J., entered judgment granting former husband entire lottery proceeds and denying former husband attorney fees award. Former wife appealed. The Court of Appeal, Epstein, J., held that: (1) substantial evidence supported finding that former wife intentionally concealed lottery proceeds, which were community property, and thus former husband was entitled to award of entire amount, and (2) family court was within its discretion in not imposing attorney fees on former wife as additional penalty.

Affirmed.

Attorneys and Law Firms

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Claudia Ribet; Phillips, Lerner & Lauzon and Marc Lerner, Los Angeles, for Respondent.

Opinion

EPSTEIN, J.

Denise Rossi appeals from a postjudgment order in this dissolution case, awarding all the lottery winnings concealed by Denise *36 during the dissolution **272 proceedings to her ex-husband, Thomas Rossi.[1] Her argument is two-fold: that Thomas had unclean hands and therefore was not entitled to a share of the lottery prize, and that her conduct did not meet the statutory definition for the penalty because she believed the prize to be her separate property.

1 "We refer to the parties by their first names 'to humanize a decision resolving personal legal issues which seriously affect their lives,' and to make our opinion easier to understand. [Citation.]" (*In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 990, fn. 2, 80 Cal.Rptr.2d 699.) The record is inconsistent as to the parties' last names, reflecting either "Rossi" or "De Rossi." We use "Rossi" which is the name on the caption of the order from which the appeal is taken.

We conclude that the family court's findings that Denise intentionally concealed the lottery winnings from Thomas and that her conduct constituted fraud within the meaning of Civil Code section 3294 are supported by substantial evidence and that there was no abuse of the court's discretion.

FACTUAL AND PROCEDURAL SUMMARY

Denise and Thomas were married in 1971. In early November 1996, Bernadette Quercio formed a lottery pool with a group of her co-workers, including Denise. Each member of the pool contributed $5 per week. Denise contributed her $5 for a short time—three weeks—but, according to her papers, on December 1, 1996 or about that date, she withdrew from the pool.

In late December 1996, Ms. Quercio called Denise to say that their group had won the lottery jackpot. The jackpot prize was $6,680,000 and Denise's share was $1,336,000, to be paid in 20 equal annual installments of $66,800 less taxes, from 1996 through 2015. According to declarations by Denise and by Ms. Quercio, Ms. Quercio told her that she wanted to give Denise a share in the jackpot as a gift. Denise explained: "I was afraid to tell [Thomas] because I knew he would try to take the money away from me. I went to the Lottery Commission office and told them I was married but contemplating divorce. They told me to file before I got my first check, which I did. I believed that the lottery winnings were my separate property because they were a gift." In early January 1997, Denise filed a petition for dissolution of marriage in the Los Angeles Superior Court. She never told Thomas about the lottery jackpot. She used her mother's address to receive checks and other information from the California Lottery because it would be safer since Thomas would not see the lottery checks.

Thomas was served with the dissolution petition in January 1997. He and Denise talked about a settlement the same day. Thomas was not represented *37 by counsel in the dissolution proceedings. He and Denise met with Denise's attorney. According to Thomas, he was given several papers to sign to finalize the dissolution. These included a marital settlement agreement and a judgment of dissolution. There is a dispute between the parties about the actual date of

half of the full market value of such property" to the other party. Based *39 on this provision, Thomas claimed at least half of the lottery winnings. In the alternative, Thomas asked the court to set aside the dissolution based on concealment and breach of fiduciary duty. Alternatively, Thomas sought an award of 100 percent of the lottery winnings pursuant to section 1101, subdivision (h), which penalizes a breach of fiduciary duty by a spouse in dissolution proceedings. As a final alternative ground, Thomas argued the lottery proceedings should be adjudicated an omitted asset pursuant to section 2556.

Denise moved to vacate the restraining order, based on Thomas's failure to provide discovery. In a supporting declaration, she described her troubled marriage and Ms. Quercio's gift to her of a share of the lottery winnings. In the alternative, she asked the court to set aside the dissolution on the basis of Thomas's fraud regarding the condition of the family home, which Denise received in the dissolution. She claimed that Thomas had failed to disclose a $100,000 equalization payment received in the dissolution when he subsequently filed for bankruptcy. Denise asserted the lottery winnings are her separate property because the share she received was a gift, and because the parties were already separated when the group hit the jackpot. Thomas filed a response, reiterating his arguments in support of an order awarding him the lottery proceeds.

The trial court found that Denise intentionally failed to disclose her lottery winnings in the marital settlement agreement, the judgment, and her declaration of disclosure. It found that Denise breached her fiduciary duties under sections 721, 1100, 2100, and 2101 by fraudulently failing to disclose the lottery winnings and that she intentionally breached her warranties and representations set forth in paragraphs 9.1, 9.4 and 9.7 of the Marital Settlement Agreement. The court specifically found that Denise's failure to disclose the lottery winnings constituted fraud, oppression and malice within the meaning of Civil Code section 3294 and section 1101, subdivision (h). The trial court awarded Thomas 100 percent of the lottery winnings pursuant to Provision E of the Judgment of Dissolution, paragraph 9.1 of the Marital Settlement Agreement, and section 1101, subdivisions (g) and (h).

The trial court found that Denise's evidence that her share of the lottery winnings was a gift was not credible, and concluded that the lottery winnings were **275 community property. Denise's motion to vacate the restraining orders and the cross-motions to strike portions of declarations were denied. The court ordered each party to bear his or her own costs. Denise filed a timely notice of appeal.

*40 DISCUSSION

[1] [2] [3] We review factual findings of the family court for substantial evidence, examining the evidence in the light most favorable to the prevailing party. (*In re Marriage of Hokanson, supra,* 68 Cal.App.4th at p. 994, 80 Cal.Rptr.2d 699.) " ' "In reviewing the evidence on ... appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in [order] to uphold the [finding] if possible." ' [Citation.]" (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31, 99 Cal.Rptr.2d 252, 5 P.3d 815.) Because Civil Code section 3294 requires proof by "clear and convincing evidence" of fraud, oppression, or malice, we must inquire whether the record contains " 'substantial evidence to support a determination by clear and convincing evidence....' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364.)

The court found that Denise intentionally concealed her lottery winnings during the dissolution proceedings and that her conduct constituted fraud, oppression, and malice within the meaning of Civil Code section 3294 and section 1101, subdivision (h). On that basis, it awarded Thomas 100 percent of the winnings.

Section 721, subdivision (b) imposes a fiduciary duty on spouses in transactions between themselves: "This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 15019, 15020, 15021, and 15022 of the Corporations Code, ..."

Section 1101, subdivision (h) provides: "Remedies for the breach of the fiduciary duty by one spouse when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty."

Thomas argues that imposition of the 100 percent penalty under section 1101, subdivision (h) was mandatory, once the family court found that Denise acted with fraud, oppression

or malice in concealing the lottery winnings during the dissolution proceedings.

The correctness of the family court's order awarding Thomas all of the lottery winnings is based on the finding that Denise's conduct constituted *41 fraud within the meaning of Civil Code section 3294. Civil Code section 3294 provides in pertinent part: "(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. [¶] .... [¶] (c) As used in this section, the following definitions shall apply: [¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in **276 conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury...."

[4] The evidence established that Denise filed for dissolution after learning that she had won a share of a substantial lottery jackpot; that she consulted the Lottery Commission personnel about ways in which she could avoid sharing the jackpot with her husband; that she used her mother's address for all communications with the Lottery Commission to avoid notifying Thomas of her winnings; and that she failed to disclose the winnings at any time during the dissolution proceedings, despite her warranties in the marital settlement agreement and the judgment that all assets had been disclosed. The family court expressly rejected her evidence that the winnings constituted a gift and, as such, were her separate property. The record supports the family court's conclusion that Denise intentionally concealed the lottery winnings and that they were community property.

Denise argues she committed no fraud because the statutory definition of that term "denotes conduct much more malicious and vile in nature than the failure of a physically and emotionally abused woman to disclose an asset to her husband, whose gambling and money mismanagement problems detrimentally affected her life and caused her to file for bankruptcy and caused him to threaten to kill her. In not disclosing what Denise Rossi believed was her separate property, Denise Rossi did not intend to deprive Respondent of an asset that he was entitled to because she felt it belonged to her alone. Denise Rossi did not believe that she was misappropriating a community asset, and therefore did not have the requisite fraudulent intent to deprive Respondent of a community asset."

The problem with her argument is that the court expressly found her evidence was not credible. The record supports this finding. The court put it *42 in the following clear terms: "I believe the funds used to purchase the ticket were community. I don't believe the story about the gift." The court expressly found that Denise intentionally failed to disclose her lottery winnings in the marital settlement agreement, the judgment and her declaration of disclosure. This case presents precisely the circumstance that section 1101, subdivision (h) is intended to address. Here, one spouse intentionally concealed a significant community property asset. She intentionally consulted with the Lottery Commission as to how to deprive Thomas of a share of the prize; used her mother's address for all communications with the lottery; and did not disclose the winnings in the dissolution proceedings. This supports a finding of fraud within the meaning of Civil Code section 3294. The family court properly concluded that under these circumstances, Thomas was entitled to 100 percent of the lottery winnings under section 1101, subdivision (h).

[5] [6] [7] [8] As we observed in *In re Marriage of Hokanson, supra,* 68 Cal.App.4th at page 993, 80 Cal.Rptr.2d 699: "The clear import of the language in subdivision (h) is that an award of attorney fees is discretionary, over and above the mandatory award of the entire asset at issue." The strong language of section 1101, subdivision (h) serves an important purpose: full disclosure of marital assets is absolutely essential to the trial court in determining the proper dissolution of property and resolving support issues. The statutory scheme for dissolution depends on the parties' **277 full disclosure of all assets so they may be taken into account by the trial court. A failure to make such disclosure is properly subject to the severe sanction of section 1101, subdivision (h).

In light of this conclusion, we need not consider the alternative grounds that Denise's conduct constituted malice and oppression under Civil Code section 3294. This conclusion also disposes of Denise's alternative argument that Thomas should have received only 50 percent of the concealed lottery winnings pursuant to section 1101, subdivision (g), which applies when a spouse's breach of

fiduciary duty does not constitute fraud, oppression or malice under Civil Code section 3294.

We find nothing in the language of the statute to justify an exception to the penalty provision of section 1101, subdivision (h) because of the supposed unclean hands of the spouse from whom the asset was concealed. Nor are we cited to legislative history which would suggest such an exception. None of the cases cited by Denise in support of her unclean hands defense is a family law case construing section 1101. This undercuts Denise's primary argument on appeal, that she was justified in concealing the lottery winnings because of Thomas's behavior. The plain meaning of section 1101, subdivision (h) disposes of Denise's ***43** argument that there should be a "downward departure in any remedy against Denise" because, as she claims, she was battered emotionally and physically by Thomas. She cites federal law to the effect that evidence of the battered woman's syndrome is a valid basis for a discretionary downward departure of criminal penalties otherwise applicable under federal criminal sentencing guidelines, and to California criminal cases addressing this syndrome. As we have discussed, no such exception is codified into section 1101. The cases cited are off point. The statute provides that, where a spouse conceals assets under circumstances satisfying the criteria for punitive damages under Civil Code section 3294, a penalty representing 100 percent of the concealed asset is warranted. The statute is unambiguous and no exception is provided.

Denise also argues that the order must be reversed because Thomas's attorneys will receive half of the lottery proceeds. Without citation of authority, she asserts that this is counter to the purpose of section 1101. But the plain language of section 1101, subdivision (h) demonstrates legislative intent to enforce the fiduciary obligations of spouses to one another in dissolution proceedings by imposing substantial penalties for breaches of that duty. The order of the family court in this case is consistent with that intent. We find no basis to reverse the order of the family court because of Thomas's fee arrangement.

[9] The family court could have imposed attorney's fees on Denise as an additional penalty under section 1101, subdivision (h). It chose not to do so. It was within its discretion in making this order. (See *In re Marriage of Hokanson, supra,* 68 Cal.App.4th 987, 80 Cal.Rptr.2d 699 [where breach of fiduciary duty by a spouse involves conduct *not* amounting to fraud, oppression, or malice within the meaning of Civil Code section 3294, an award of fees is mandatory, in contrast with the discretionary fee provision of subdivision (h)].)[3]

3 Section 1101, subdivision (g) provides: "Remedies for breach of the fiduciary duty by one spouse as set out in Section 721 shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. However, in no event shall interest be assessed on the managing spouse."

****278** The evidence which we have summarized supports the family court's order on the alternative ground that Denise violated the terms of the judgment of dissolution and the marital settlement agreement by concealing the lottery winnings. This violation triggered Paragraph 9.1 of the marital settlement agreement: "Each party warrants to the other that prior to the effective date of this Agreement neither was possessed of any property of any kind or ***44** description whatsoever other than the property specifically mentioned in this Agreement, and that such party has not made, without the knowledge and consent of the other, any gift or transfer of any property within the last three years. *If it shall hereafter be determined by a Court of competent jurisdiction that one party is now possessed of any property not set forth herein ... such party hereby covenants and agrees to pay to the other on demand an amount equal to the full market value of such property on the date hereof or on the date of judgment in any action to enforce the provisions of this paragraph.*" (Italics added.)

DISPOSITION

The order of the family court is affirmed. Respondent is to have his costs on appeal.

CHARLES S. VOGEL, P.J., HASTINGS, J., concur.

Parallel Citations

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93 Cal.App.4th 1334
Court of Appeal, Second
District, Division 3, California.

In re the Marriage of Jenness
Brewer and Ovidio Federici.
Jenness BREWER, Appellant,
v.
Ovidio FEDERICI, Respondent.

No. B135155. | Nov. 28, 2001.

Husband and wife signed marital settlement agreement and stipulated to a divorce judgment. Husband later moved to set aside the property division and spousal support portions of the judgment as substantial assets had not been valued at the time he signed the agreement. The Superior Court, Los Angeles County, No. GD021376, Martin H. Wegman, Temporary Judge, set aside the judgment and marital settlement agreement. Wife appealed. The Court of Appeal, Aldrich, J., held that unilateral mistake as to value of community assets by husband that was material to his decision to agree to property division and spousal support was grounds for trial court to set aside marital settlement agreement and stipulated judgment of divorce.

Affirmed.

Attorneys and Law Firms

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Opinion

ALDRICH, J.

INTRODUCTION

After 17 years of marriage, appellant Jenness Brewer (Brewer) and respondent Ovidio Federici (Federici) entered into a marital settlement agreement and stipulated to a judgment of dissolution based thereon. Subsequently, based upon mistake, Federici filed a motion to set aside the judgment and a motion to set aside the marital settlement agreement. Brewer appeals from the order granting the motions. We affirm.

*1337 FACTUAL AND PROCEDURAL BACKGROUND

1. *Preliminary facts.*

Brewer and Federici were married in 1980. Brewer was a vice president at the National Broadcasting Company (NBC). [1] In 1997, Brewer earned approximately $175,000. Federici was an artist. He was not actively involved in his career. The family lived primarily on Brewer's salary. Federici managed the family household, including the family finances, the community checking account, and the bills. He had access to the parties' tax information. The parties had one daughter, born in 1981.

1 NBC is owned by General Electric (GE).

Brewer and Federici separated in 1997 after 17 years of marriage.

2. *The dissolution and settlement.*

On January 2, 1998, Brewer served Federici with a petition for dissolution of marriage and related documents.

The parties negotiated a marital settlement agreement. They agreed to a division of property as follows: Federici would receive his car, his personal property, specified furnishings, his investment accounts, his art collection, $5,000 in lieu of stock options, 20 shares of GE stock, and an equalizing payment of $149,000. He also was to receive $6,000 for relocation expenses. Brewer agreed to pay Federici $35,000 per year, for five years in tax-free, non-modifiable spousal support, and to pay Federici's health and auto insurance for that period of time. Brewer was to receive a family trust and a medical malpractice claim. Additionally, she was to receive the family home, her car, her personal property, furnishings not otherwise designated, her investment accounts, her IRA (individual retirement account), and GE stock options. She was also to receive *"[a]ny and all right, title and interest in [her] retirement and pension plan, [her] Savings and Security program with an approximately total balance of $168,561.00, though her employer, NBC [.]"* (Italics added.) Brewer assumed all marital debts. There was to be joint legal custody of the child, and Brewer was to be the custodial parent. Brewer agreed to be solely responsible for the child's support.

There is no evidence that either spouse refused to provide documentation requested by the other spouse.

During the negotiations of the marital settlement agreement, Brewer was represented by counsel and Federici consulted an attorney on two occasions.

*1338 On February 27, 1998, the parties met in Brewer's attorney's office. They signed the marital settlement agreement. At the time, the parties exchanged final declarations of disclosure, both dated January **851 17, 1998. All documents had been prepared by Brewer's attorney.

The two final declarations of disclosure were identical in content. They each included a schedule of assets and debts. The schedules had five columns, two of which were labeled "assets—description" and "current gross fair market value."[2] They provided a current gross value for the family residence at $475,000 and showed that $305,000 was owed. The following items were valued as "unknown": (1) miscellaneous household furniture, furnishings, and appliances; (2) miscellaneous jewelry, antiques, art, coin, collections; (3) a Brewer family trust; and (4) a medical malpractice action.

2 The other three columns were labeled "sep. prop.," "date acquired," and "amount of money owed or encumbrance."

The two schedules of assets and debts further reflected the following:

ASSETS—DESCRIPTION	CURRENT GROSS FAIR MARKET VALUE
12. RETIREMENT AND PENSIONS (Attach copy of latest summary plan documents and latest benefits statement.)	
NBC PENSION	UNKNOWN
13. PROFIT SHARING, ANNUITIES, IRAS, DEFERRED COMPENSATION (Attach copy of latest statement.)	
NBC SAVINGS & SECURITY PROGRAM	168,561.00
[BREWER'S] IRA	8,000.00
GE STOCK OPTIONS	UNKNOWN

A number of Federici's paintings were valued in another document at approximately $50,000.

Attached to Brewer's final declaration of disclosure were two pages of an annual statement supplied by her employer, NBC. It showed that as of December 31, 1996, the NBC Savings and Security Program had a value of $168,561.

*1339 At the time the final declarations of disclosure were signed, Federici believed Brewer had *one* pension plan and it had an approximate value of $170,000.[3]

3 As stated in footnote number one, NBC is owned by GE. Regardless of the labels used by the parties and the trial court in the proceedings below, it is clear that there were two pension plans: (1) the GE Pension plan, also referred to as the NBC Pension Plan; and (2) the Savings and Security Program, also referred to as the NBC Savings and Security Program, the GE Savings and Security Program, and the Savings and Security Plan. For ease of reference, hereinafter, we refer to these two pension plans as the "NBC Pension" and the "Savings and Security Program."

Also on February 27, 1998, the parties signed a stipulated judgment. It contained a division of property, duplicating verbatim that which had been detailed in the marital settlement agreement. The **852 stipulated judgment also had been prepared by Brewer's attorney.

On April 23, 1998, the stipulated judgment was entered.

3. *The motions to set aside.*

In December 1998, Federici moved to set aside the property division and spousal support portions of the judgment. In part, Federici contended the motion should be granted because substantial community assets were not valued, including Brewer's "NBC pension, [and] GE stock options." Federici

declared he had been under a mistaken belief regarding the amount he could earn during the next few years while he was in school. He found that while in school he could only earn $6.00 per hour working parttime. He further declared that he would not have agreed to the spousal support provisions in the judgment or waived his community interest in Brewer's retirement benefits had he understood his limited earning potential. Federici also contended that Brewer's final declaration of disclosure was inadequate because the schedule of assets and debts had not valued substantial community assets, including Brewer's NBC pension.

An expert declaration was submitted on behalf of Federici. The expert declared that Brewer's interest in the NBC Pension was worth $278,784, assuming a date of separation of August 1, 1997, and was worth $286,144, assuming a December 17, 1997, date of separation.

The parties conducted discovery.

On February 18, 1999, Federici filed supplemental points and authorities. He pointed out that the judgment awarded Brewer her "retirement and pension plan, and [her] Savings and Security program with an approximate ***1340** *total* balance of $168,561.00...." (Italics added.) Federici noted it had been learned through discovery that the value of the Savings and Security Program was not $168,561.00. That sum that had been ascertained from Brewer's December 1996 annual statement, which was more than a year before the January 1998 disclosure statements. Federici also noted that the 1996 annual statement had 13 pages, but Brewer had attached only two pages to her final declaration of disclosure. The omitted pages would have revealed other relevant information about the program, such as the amount Brewer was to receive upon retirement. Federici produced evidence revealing that Brewer's Savings and Security Program was worth $232,441 as of December 31, 1997, and $313,235 as of December 31, 1998. Additionally, Federici showed that the NBC Pension was worth at least $286,144. Federici stated that when he agreed to the property settlement, he had not understood that Brewer had *two* retirement plans through her employer. This mistake explained why he had accepted the global settlement, including the $149,000 equalization payment, and why the marriage settlement agreement and the stipulated judgment referred to a "total balance of $168,561" for the retirement plans.

On February 26, 1999, Federici filed a second motion. It was to set aside the marital settlement agreement. Federici contended, among other arguments, that there had been a mistake. Federici argued that "the parties were mistaken as to the value and possibly as to the number of [Brewer's] pension plans and that [Brewer] had failed to comply with the disclosure requirements as set forth in *Family Code § 2105* and elucidated in *Marriage of Varner* (1997) 55 Cal.App.4th 128, 63 Cal.Rptr.2d 894 ... by listing 'unknown' for the value of her [NBC] pension and GE stock options and by listing an outdated value for her ... Savings and Security [Program]."

****853** In opposing the motions, Brewer stated she did not understand how her retirement benefits worked and she had valued the NBC Pension as "unknown" because she had not known its value. Brewer also stated that she had not attempted to hide anything, as she acknowledged she had two retirement plans through her employer. Brewer admitted she had not tried to ascertain the value of the NBC Pension.

4. The order setting aside the judgment and the marital settlement agreement.

The trial court set aside the judgment and the marital settlement agreement, except as to marital status.

In its statement of decision, the trial court found the following: (1) Brewer contended the date of separation was August 1, 1997. Federici claimed the ***1341** date of separation was December 7, 1997; (2) The community interest in Brewer's NBC Pension, a defined pension plan, was worth between $286,144 and $278,784, depending upon the date of separation; and, (3) Brewer's Savings and Security Program was a defined contribution plan. As of December 31, 1996, it was worth $168,561, and was entirely community property. As of December 31, 1997, the Savings and Security Program was valued at $232,441, and as of December 31, 1998, it was valued at $313,235. The community interest in this asset after December 31, 1996, would depend upon how much was contributed by Brewer from her post-separation earnings.

In the statement of decision, the trial court further found the following:

"[ ] The Final Declarations of Disclosure of both parties, which were signed on January 17, 1998, listed the value of [Brewer's NBC] Pension Plan as 'unknown' and listed the value of [Brewer's] Savings and Security Program as $168,561.00. [Brewer] attached to her Final Declaration of Disclosure only those two pages of her 1996 annual benefits statement [showing] the value of her ... Savings and Security Program as of December 31, 1996. [Brewer] did not attach the remaining pages of the benefits statement which provided an

estimate of the monthly income [Brewer] would receive from her [NBC] Pension Plan upon retirement at a certain age, but did not include an actuarial value.

"[ ] The equalization payment awarded to [Federici] in the judgment was based upon [a] valuation of $168,561.00 [for the Savings and Security Program].

"[ ] The approximate total value of [Brewer's NBC] Pension ... and ... Savings and Security Program as of December 31, 1997, was $511,225.00 to $518,225.00, almost all of which is community property. [4]

4 $232,441 x $278,784 = $511,225.
$232,441 x $286,144 = $518,225.

"[ ] On the basis of the foregoing findings alone and without consideration of [Federici's] claims regarding the division of other community assets or the terms of the spousal support award, [Federici] has met the requirement of *Family Code § 2121(b).*

"[ ] The failure of [Brewer's] Final Declaration of Disclosure to state the value of the [NBC] Pension ... or the current value of the ... Savings & Security Program constituted a material omission. While the statement that the value of the asset was 'unknown' did not constitute perjury, the ***1342** omission of any value for the [NBC] Pension Plan constituted a breach of fiduciary duty imposed upon spouses by *Family Code [§] § 721 and 1101(e).* The omission led to a mistake of fact regarding the value of what appear[s] to be the largest and second largest community assets. ****854** The parties entered into the marital settlement agreement and the judgment without full knowledge of the facts and as a result their decision and any waivers made as part of that decision cannot be said to be 'knowing.' *Family Code § 2102* requires an accurate and complete disclosure of assets and liabilities. The parties' Final Declarations of Disclosure were neither accurate nor complete.

"[ ] ... The court ... finds that pursuant to *Family Code § 2122(e)* and *Marriage of Varner* (1997) 55 Cal.App.4th 128, 63 Cal.Rptr.2d 894[ ], the judgment must be set aside in its entirety (except for the termination of marital status.) It would be both illogical and unlawful to hold either of the parties to an agreement where there was not full and complete disclosure or to allow either party to choose which portions of an agreement to set aside."

On July 7, 1999, the trial court ordered that the judgment and the marital settlement agreement, except as to status, be set aside. Brewer appealed.

DISCUSSION

The trial court did not abuse its discretion in setting aside the judgment and the marital settlement agreement based on mistake.

Brewer contends the trial court abused its discretion in setting aside the judgment and the marital settlement agreement. This contention is unpersuasive.

1. *The lack of full and accurate disclosure may be grounds for a motion to set aside based upon mistake.*

Marriage creates a fiduciary relationship between spouses. (Fam.Code, §§ 721, subd. (b), 1100, subd. (e), 2102.) The confidential relationship between spouses "imposes a duty of the highest good faith and fair dealing on each spouse...." (Fam.Code, § 721, subd. (b).) As part of these obligations, each spouse is required to provide the other spouse with access to all books regarding transactions for purposes of inspection and copying (Fam.Code, § 721, subd. (b)(1)), and rendering upon request "true and full information of all things affecting any transaction which concerns the community property." (Fam.Code, § 721, subd. (b)(2).) Additionally, spouses must make full and accurate disclosure and account for separate and community property. (Fam.Code, § 2100, subds.(b) & (c) [sound public policy ***1343** favors reducing adversarial nature of marital dissolution and attendant costs by fostering full disclosure and cooperative discovery [5]]; Fam.Code, § 2102 [requiring accurate and complete disclosures [6]]; ****855** Fam.Code, § 2103 [requiring both preliminary and final declarations of disclosure]; Fam.Code, § 2104 [requiring preliminary declaration of disclosure]; Fam.Code, § 2105, subd. (a) [requiring final declaration of disclosure].) The duty of disclosure "includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and *valuation* of all assets in which the community has or may have an interest...." (Fam.Code, § 1100, subd. (e), italics added.) [7]

5 Family Code section 2100 reads in part:
"The Legislature finds and declares the following:
"....

"(b) Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.

"(c) In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances of the case."

6 Family Code section 2102 reads in part:

"From the date of separation to the date of the distribution of the community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the property and support rights of the other party, including, but not limited to, the following activities:

"(a) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses.

"(b) The accurate and complete written disclosure of any investment opportunity that presents itself after the date of separation....

"(c) The operation or management of a business or an interest in a business in which the community may have an interest."

7 Family Code section 1100, subdivision (e) reads: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the *general rules governing fiduciary relationships* which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. *This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets* in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request." (Italics added.)

The parties also have "a continuing duty to update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, ... each party will have as full and complete knowledge of the ***1344** relevant underlying facts as is reasonably possible...." (Fam.Code, § 2100, subd. (c).) The final declarations of disclosure must include, among other items, "[a]ll *material* facts and information regarding the *valuation* of all assets that are contended to be community property or in which it is contended the community has an interest." (Fam.Code, § 2105, subd. (b)(2), italics added.) [8]

8 Family Code section 2105, reads in part: "(a) [E]ach party ... shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury .... [¶] (b) *The final declaration of disclosure shall include all of the following information:* [¶] (1) All material facts and information regarding the characterization of all assets and liabilities. [¶] (2) *All material facts and information regarding the valuation of all assets that are contended to be community property* or in which it is contended the community has an interest. [¶] (3) ... [¶] (4) All material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration. [¶] (c) The parties may stipulate to a mutual waiver of the requirements of subdivision (a) concerning the final declaration of disclosure .... [¶] ... [¶] (e) In making an order setting aside a judgment for failure to comply with this section, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure." (Italics added.)

These duties arise without reference to any wrongdoing. (*In re Stanifer* (Bankr.9th Cir.1999) 236 B.R. 709, 716–717; Fam.Code, § 2102.)

The formulation of a marital settlement agreement is not an ordinary business transaction, resulting from an arms-length negotiation between adversaries. Rather, it is the result of negotiations between ****856** fiduciaries required to openly share information. (Fam.Code, §§ 721, subd. (b); 1100, subd. (e); 2100, subds. (b) & (c).)

"[A] trial court may not set aside a dissolution judgment on the *sole* grounds the judgment is inequitable or the support ordered is inadequate." (*In re Marriage of Rosevear* (1998) 65

Cal.App.4th 673, 684, fn. 11, 76 Cal.Rptr.2d 691; Fam.Code, § 2123.)

[1] Motions to set aside judgments are governed by Family Code section 2122.[9] Under this statute, there are five exclusive grounds to set aside a judgment. "[A]ny action or motion to set aside such a judgment must be based on actual fraud, perjury, duress, mental incapacity, or mistake." (*In re Marriage of Rosevear, supra,* 65 Cal.App.4th at p. 684, 76 Cal.Rptr.2d 691, fn. omitted.)

9 Family Code section 2122 provides in part:

> "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following: [¶] (a) Actual fraud .... [¶] (b) Perjury .... [¶] (c) Duress .... [¶] (d) Mental incapacity .... [¶] (e) As to stipulated or uncontested judgments or that part of a judgment stipulated to by the parties, *mistake, either mutual or unilateral, whether mistake of law or mistake of fact.* An action or motion based on mistake shall be brought within one year after the date of entry of judgment." (Italics added.)

***1345** To set aside a stipulated or uncontested judgment based upon mistake, the mistake may be "either mutual or unilateral, whether mistake of law or mistake of fact." (Fam.Code, § 2122, subd. (e).)

In re Marriage of Varner (1997) 55 Cal.App.4th 128, at page 144, 63 Cal.Rptr.2d 894 (*Varner*), recently discussed setting aside a stipulated judgment based upon mistake. In *Varner,* husband misrepresented the value of substantial assets. He prevented wife and her advisors from having access to the information from which the assets could be valued. The trial court refused to set aside the judgment. The appellate court reversed, concluding the failure to disclose the existence or value of a community asset constituted grounds for setting aside the judgment on the grounds of mistake. (*Ibid.*; accord, *In re Marriage of Jones* (1998) 60 Cal.App.4th 685, 693, 70 Cal.Rptr.2d 542.)

Brewer asserts *Varner's* holding should be limited to its facts, facts that would have been sufficient for findings of fraud and perjury. *Varner* should not be read so narrowly. *Varner's* decision to set aside the settlement agreement was based solely upon an extreme under-valuation of important community assets. *Varner* held, "[w]e conclude that the failure of a spouse to disclose the existence or the value of a community asset, as occurred in the present case, constitutes a basis for setting aside a judgment on the grounds of mistake under section 2122." (*Varner, supra,* 55 Cal.App.4th at p. 144, 63 Cal.Rptr.2d 894.)

[2] Thus, spouses may be relieved of a stipulated judgment based upon incomplete or inaccurate information. (*Varner, supra,* 55 Cal.App.4th at p. 144, 63 Cal.Rptr.2d 894; Fam.Code, § 1101 [claim for breach of fiduciary duty].)[10]

10 In the prior statutory scheme, there was a distinction between "extrinsic" and "intrinsic" fraud. This distinction was crucial as only extrinsic fraud warranted setting aside a judgment. Under the prior statutory scheme valuing an asset favorable to oneself was not considered extrinsic fraud. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1144, fn. 7, 97 Cal.Rptr.2d 707.) The new statutory scheme abolishes the distinction between extrinsic and intrinsic fraud. (*Ibid.*)

In reaching its conclusion, *Varner* noted that "Under the stringent 'extrinsic mistake' standard that would have applied in the absence of the recent statutory changes, the facts before us might not have been sufficient to warrant a reversal by this court on abuse of discretion grounds." (*Varner, supra,* 55 Cal.App.4th at p. 144, 63 Cal.Rptr.2d 894.)

****857** In addition to establishing mistake, the party seeking relief must also establish that "the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." (Fam.Code, § 2121, subd. (b).)

[3] Brewer and Federici seem to agree that if the facts support setting aside the judgment, the marital settlement agreement must also be set aside. There were conflicting declarations as to the circumstances leading up to the ***1346** settlement agreement and the judgment based thereon. We review the trial court's decision in ruling on the motion to set aside the judgment and the motion to set aside the marital settlement agreement to determine if the trial court abused its discretion. (*In re Marriage of Rosevear, supra,* 65 Cal.App.4th at pp. 682–683, 76 Cal.Rptr.2d 691; *Varner, supra,* 55 Cal.App.4th at p. 138, 63 Cal.Rptr.2d 894.)

2. *Here there was a unilateral mistake by Federici warranting relief.*

[4] Contrary to Brewer's contention, the trial court did not abuse its discretion in setting aside the judgment and the marital settlement agreement based upon mistake of fact. The evidence supports the trial court's determination that there was a unilateral mistake by Federici.[11] Federici did not have accurate and complete valuations of Brewer's pension plans.

Such information was essential to his agreement to resolve all financial issues, including spousal support and the division of community property.

11 Brewer states she did not mislead and she revealed all information known to her. In light of our conclusion, we need not discuss whether or not these facts could have led the trial court to conclude that there had been a mutual mistake.

According to Federici, he agreed to the equalization payment based upon his belief that there was *one* pension plan with a *total* value of $168,561. Federici's understanding of the facts was reflected in the judgment and the marital settlement agreement. Both documents recited that Brewer was to receive "[a]ny and all right, title and interest in [her] retirement and pension *plan,* [her] Savings and Security program with an approximate *total* balance of $168,561.00, through her employer, NBC[.]" (Italics added.) In fact, however, there were *two* pension plans, with a total value of more than $500,000, almost all of which was community property.

The valuation information about the Savings and Security Program was neither current nor accurate. It was not worth $168,561, as had been represented by Brewer based upon the 1996 outdated employer annual statement. Rather, it had a value of $232,441 as of December 31, 1997. Further, the NBC Pension was worth between $286,144 and $278,784, depending upon the date of separation. Brewer never provided Federici with a valuation of this asset. Brewer's pension plans were the largest community assets; their values were material to resolving the issues between the parties. Therefore, Federici agreed to a resolution of the property issues based upon incomplete, inaccurate, and omitted information. As the parties conceded, the valuation of these assets materially affected the original outcome and Federici would materially benefit from the granting of the relief. (Fam.Code, § 2121, subd. (b).)

These facts support the trial court's decision to set aside the judgment and marital ****858** settlement agreement based upon mistake.

***1347** Brewer contends there can be no mistake because she met her disclosure obligations by fully disclosing the *existence* of both pension plans, the information known to her, and information from which the assets could be valued. We disagree. First, the information provided to Federici led him to believe there was only one plan. Further, Brewer did not provide a complete and accurate valuation of the Savings and Security Program. It was undervalued by at least $63,000. She did not provide all 13 pages of the 1996 employer annual statement. [12]

12 As noted, Brewer supplied only two of the 13 pages of the 1996 employer annual statement. Federici argues this omission was purposeful and constitutes a misrepresentation. The trial court did not base its decision upon misrepresentation and we need not address the issue.

Brewer further contends she met her disclosure obligations when she valued the NBC pension as "unknown." She asserts it is unreasonable to expect spouses to value all assets, as to do so requires them to expend considerable funds on experts. Brewer additionally contends that to impose a stringent valuation requirement will discourage the amicable distribution of assets.

By these arguments, Brewer fails to address the court's ability to grant relief based upon mistake, regardless of a finding of wrongdoing. (Fam.Code, § 2122, subd. (e).) Further, the Family Code presumes spouses will have sufficient, accurate information from which informed decisions can be made. It requires disclosure of "[a]ll material facts and information regarding the *valuation* of all assets that are contended to be community property...." (Fam.Code, § 2105, subd. (a)(2), italics added.) Here, the parties are not dealing with items that have intangible or sentimental value. They are not dealing with items that spouses frequently divide without regard to value, such as household furniture. They are not dealing with items the valuation of which are immaterial to a distribution agreement. They are not dealing with items where the expense of valuation is unwarranted or valuation will discourage the amicable distribution of assets. Rather, the NBC Pension is one of the largest community assets, an asset which is financial in nature and whose monetary value is easily ascertainable. Thus, when Brewer stated the value of the NBC Pension was "unknown," she did not make sufficient disclosure.

Brewer asserts there was no "mistake" because Federici neglected *his* legal duty to value the pension plans. In making this assertion, Brewer relies upon the Civil Code that states that a mistake of fact cannot be "caused by the neglect of a legal duty on the part of the person making the mistake...." (Civ.Code, § 1577; see also, Civ.Code, §§ 1567, 1576, 1578; ***1348** *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1813, fn. 18, 34 Cal.Rptr.2d 732.) According to Brewer, she never refused to provide documentation requested by Federici,

but rather provided the information known to her, i.e. that one plan had an "unknown" value and the other was worth $168,561. Brewer argues that once she came forward with information, Federici had an obligation to search for additional information. In making this argument, Brewer notes that had Federici been dissatisfied with the disclosed information, he could have requested a declaration of disclosure with further particularity. (Fam.Code, § 2107.)

[5] Brewer's argument overlooks the fact that the Family Code imposes fiduciary ****859** obligations on both parties. One obligation is to make full, accurate, and complete disclosure, including the continuing duty to update and augment information. (Fam.Code, §§ 1100, subd. (e), 2100, subd. (c), 2102; *Rubenstein v. Rubenstein, supra,* 81 Cal.App.4th at pp. 1150–1151, 97 Cal.Rptr.2d 707.) It reasonably follows that a spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse. (Compare with *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1673–1674, 53 Cal.Rptr.2d 515 [discussing unilateral mistakes in arms-length transactions].)

The two pension plans were the major community assets and were grossly undervalued by Brewer. Even if Brewer did not intentionally mislead Federici, she was in a superior position to gain access to the information from which valuations for these assets could be determined. The two pension plans were financial assets whose monetary values were easily ascertainable. There was no evidence suggesting it would have been unreasonable for Brewer to obtain current and accurate valuation information about the pension plans, both of which came from her employer. Federici was entitled to rely upon the information provided to him. (*Rubenstein v. Rubenstein, supra,* at pp. 1150–1151, 97 Cal.Rptr.2d 707.)

Brewer notes that in his original motion, Federici identified the "mistake" as a misunderstanding with regard to his earning capacity. Brewer then argues that this identified "mistake" had nothing to do with the valuation of the pension plans. Brewer slices the arguments too thin and ignores Federici's pleadings, especially his supplemental pleadings and his second motion in which he clearly argued mistake based upon the valuation of Brewer's pension plans. Further, the value of the pension plans and Federici's earning potential were all part of Federici's settlement decision. As the trial court noted when this argument was raised, "The mistake is real simple. [Federici] wouldn't have given [Brewer] $130,000 of [his] money knowing that [he ***1349** had] to go to the school for the next five years, graduate college at the age of 58, and start looking for a job." The settlement agreement was global and the issues were intertwined. (*Resnik v. Superior Court* (1986) 185 Cal.App.3d 634, 637–638, 230 Cal.Rptr. 1; cf. *In re Marriage of Jones* (1987) 195 Cal.App.3d 1097, 1103, fn. 10, 241 Cal.Rptr. 231.)

By our discussion we do not mean to suggest that Federici and Brewer lacked the ability to decide upon an unequal distribution of assets. (Fam.Code, § 2550; Cal. Rules of Court, rule 1242; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81, 87, 91, 16 Cal.Rptr.2d 575.) As long as such agreement is based upon a complete and accurate understanding of the existence and value of community and separate assets that are material to the agreement, the parties are free to decide on an unequal distribution.

The trial court did not err in setting aside the judgment and the marital settlement agreement based upon mistake.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to Federici.

We concur: CROSKEY, ACTING P.J. and KITCHING, J.

Parallel Citations

93 Cal.App.4th 1334, 01 Cal. Daily Op. Serv. 9946, 2001 Daily Journal D.A.R. 12,452

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202 Cal.App.4th 626
Court of Appeal, Fourth District, Division 1, California.

In re the MARRIAGE OF Joseph and Maryanne K. SORGE.
Joseph A. Sorge, Appellant,
v.
Maryanne K. Sorge, Respondent.

Nos. D057677, D058611. | Jan. 5, 2012.

Synopsis

Background: Former wife brought post-divorce motion to modify child custody and child support, and to establish spousal support arrears. The Superior Court, San Diego County, Jeffrey S. Bostwick and Robert C. Longstreth, JJ., modified child support and awarded sanctions and attorney's fees. Husband appealed.

Holdings: The Court of Appeal, Aaron, J., held that:
[1] court could consider husband's earning capacity in lieu of his actual income;
[2] husband did not have a continuing fiduciary duty to disclose all material facts regarding his income after final child support order was issued; and
[3] wife was entitled to attorney's fees.

Reversed in part and remanded with directions; otherwise affirmed.

Attorneys and Law Firms

**753 Garrett Clark Dailey, Oakland, for Appellant.

Procopio, Cory, Hargreaves & Savitch, Lionel P. Hernholm, Jr., David M. Zachry, San Diego; Stephen Temko, San Diego, for Respondent.

Opinion

AARON, J.

*632 I.

INTRODUCTION

Joseph A. Sorge appeals after the trial court modified the child support awarded to his ex-wife, Maryanne K. Sorge, and awarded Maryanne [1] sanctions and attorney fees, both related to the costs of the underlying litigation, as well as pendente lite attorney fees for defending against Joseph's appeal.

1 We will refer to the parties by their first names for the sake of clarity.

**754 On appeal, Joseph first contends that the trial court erred in calculating the child support amount. According to Joseph, the trial court ignored his bona fide business expenses in calculating his monthly income, in contravention of Family Code [2] section 4058, subdivision (a)(2).

2 Further statutory references are to the Family Code unless otherwise indicated.

Joseph also contends that the trial court erred in concluding that for purposes of section 2102, subdivision (c), the parties' duty to disclose to each other, sua sponte, all material changes in their financial status continues from the date of separation until the trial court no longer has jurisdiction to order child support. Joseph argues that the court erred in determining that the cessation of a child support obligation is the event that constitutes a "valid, enforceable, and binding resolution of all issues relating to child ... support" under section 2102, subdivision (c). According to Joseph, because the trial court's award of sanctions to Maryanne was based in part on the court's erroneous interpretation of section 2102, subdivision (c), the sanctions order must be reversed.

Finally, Joseph contends that the trial court abused its discretion in awarding Maryanne attorney fees in the amount of $200,000 for proceedings in the trial court, and $60,000 in pendente lite attorney fees for proceedings on *633 appeal [3] because Maryanne has no need for these fees, since she has a net worth of over $14 million, more than half of which is in liquid assets.

3 This contention arises from Joseph's appeal in case No. D058611, which is an appeal from a separate order of the trial court. The appeal in case No. D058611 has been consolidated with case No. D057677 for disposition.

We conclude that the trial court erred in sanctioning Joseph on the ground that he breached his fiduciary duty under section 2102, subdivision (c) to disclose to Maryanne all material changes in his income. Specifically, we conclude that any fiduciary duty that Joseph had to disclose material changes in his income to Maryanne ended upon entry of their 2002 divorce decree. We reject all of Joseph's other contentions.

himself, in whole or in part, of his earning ability at the expense of his minor child. Joseph may not *take a break from his child support obligation* in favor *648 of his business investments." (Italics added.) These statements, and particularly the court's use of the words "earning ability," **766 show that the court was focusing on the crux of subdivision (b) of section 4058—i.e., a parent's "earning capacity."

The court thus essentially gave Joseph the benefit of the doubt with respect to Joseph's new investments by not imputing to him any positive income from the capital outlays that Joseph invested in those start-up businesses—income that Joseph could have had if he had made a different decision with respect to how to invest the money that he invested in these start-up companies. The trial court did not abuse the discretion granted it pursuant to subdivision (b) of section 4058 in determining that Joseph's choice to invest his considerable wealth in start-up companies that were operating at a loss should not undermine his dependent child's right to receive current support in accordance with Joseph's earning capacity.

Joseph takes issue with the trial court's reliance on *Berger, supra,* 170 Cal.App.4th 1070, 88 Cal.Rptr.3d 766, and attempts to distinguish *Berger,* pointing out that the father in *Berger* "was voluntarily deferring his own income," while Joseph's "bona fide business expenses, paid out in cash to third parties, are a strict statutory deduction from his income." (Italics omitted.) We agree that *Berger* is not precisely on point with this case, since the father in that case had been promised a salary that he chose to defer for a period of time in order to try to get his start-up landscaping company off the ground. Earning capacity thus was not at issue in *Berger.* (See *Berger, supra,* at p. 1083, 88 Cal.Rptr.3d 766.)

Berger is relevant to the present case, however, to the extent that it discusses a parent's obligation not to voluntarily act in a way that negatively impacts the support that a child is entitled to receive from that parent. This case, like *Berger,* involves an unusual situation in which considering a parent's actual monthly income would not reflect the true nature of the parties' relative lifestyles and wealth. Like the husband in *Berger,* Joseph has sufficient wealth to enable him to choose to spend some of his capital on starting up a handful of new business ventures, all of which he expects will operate at a loss in the short term, but will bring him income in the future. As the trial court noted, Joseph continues to maintain his very wealthy lifestyle, despite the "losses" from his business ventures. [7] Given the net value of Joseph's assets, it is clear that his net worth is far greater than Maryanne's. Thus, as in *Berger,* it would be ironic to allow Joseph's wealth—"wealth which gives him the freedom to make [a] decision" *649 (*Berger, supra,* 170 Cal.App.4th at p. 1085, 88 Cal.Rptr.3d 766) to invest in ventures that operate at a loss for some period of time—"to be spun into the justification for granting him a break from the obligation to support his family" (*ibid.*), irrespective of the merits of those new ventures.

7 Joseph's companies were paying for, or "lending" Joseph money for, certain of his expenses. For example, Joseph borrowed $4,000 monthly from Biosense Partners, LP, to pay support to Maryanne. In addition, the businesses paid other of Joseph's "personal expenses," including "use of the Del Mar home" and "use of Land Rovers in Las Vegas and San Diego."

B. *Because the court erroneously concluded that Joseph had a fiduciary duty to disclose to Maryanne material information about changes in his income after a final child support order had been entered and sanctioned Joseph, in part, for violating that fiduciary duty, the sanctions order must be reversed; the court must reconsider sanctions on remand*

The trial court awarded Maryanne sanctions in the amount of $75,000 pursuant to **767 sections 271 and 2107, which authorize the court to impose sanctions in family law proceedings. Joseph contends that the sanction award was based, in part, on the court's erroneous conclusion that Joseph owed Maryanne a fiduciary duty to provide her with material facts and information regarding his income after there was a final judgment of dissolution of their marriage.

1. *Additional background regarding the court's sanctions award*

The parties requested sanctions against each other, and the trial court addressed both parties' requests. However, because Joseph does not appeal the trial court's denial of his request for sanctions against Maryanne, we do not describe the court's ruling in this respect. Rather, we describe the court's ruling only with respect to Maryanne's request for sanctions against Joseph, which the trial court granted, and which Joseph challenges on appeal.

The trial court noted that Maryanne sought sanctions against Joseph under section 271 "for behavior that frustrated settlement and furthered the litigation," and also under sections 721 and 2102 "for breaches of fiduciary duties for failing to disclose material changes in his income beginning

2006, failing to disclose material facts about his income from the date of her filing in August 2007 to the date of formal discovery in March 2008, failing to produce material information and documents concerning various trusts, providing misleading financial and tax information, providing misleading information regarding BSP[8] and the use of funds from BSP to pay child support."

8 Although the trial court does not define the term "BSP" in its order, it appears from the record that the trial court was referring to Biosense Partners, LP, which Joseph owns through a trust and a limited liability corporation.

Joseph had argued that he no longer owed Maryanne any fiduciary duties, since the two were no longer married and there was a final judgment in their ***650** marital dissolution case. The court explained that despite Joseph's protestations to the contrary, the court was of the view that Joseph continued to owe Maryanne a fiduciary duty to disclose material information pertaining to his income and expenses even after the Wyoming divorce decree was entered. The court stated, "[Section] 2102[, subdivision] (c) must be interpreted to apply until the court loses jurisdiction to make a child support order because the order for child support '(1) is terminated by the court or (2) terminates by operation of law pursuant to Sections 3900, 3901, 4007, and 4013.' [Citation.] Therefore, Maryanne's interpretation of [section] 2102 [, subdivision] (c) is consistent to the statutory intent; Joseph's is not." The court concluded that "the fiduciary duties outlined in [section] 2101 [, subdivision] (c) continued in this case after the entry of the Wyoming decree; and, because [the parties' son] was and is at all times herein, an unemancipated minor child of the parties, the fiduciary duties have at all times herein remained in effect and are presently in effect between Maryanne and Joseph."

Based on its conclusion that the parties continued to owe each other fiduciary duties, and in particular, a fiduciary duty to disclose all material changes to their incomes and expenses, the court determined that Joseph had "breached his fiduciary duties to Maryanne." Specifically, the court found that Joseph failed to disclose various material facts and information regarding his income prior to Maryanne seeking formal discovery of those matters, and also found that Joseph had used a variety of intimidation tactics ****768** throughout the litigation. The court concluded,

> "The court therefore finds Joseph's failure to provide information to Maryanne about the Stratagene sale, the failure to provide Maryanne copies of the J.A. Sorge Trusts I–IV documents and Joseph's intimidation tactics in this matter *violated his fiduciary duties to Maryanne* and fueled the litigation in this matter. Therefore, Maryanne's motions are granted and she is awarded $75,000 in sanctions pursuant to [section] 2107 and [section] 271. The court does not find sufficient evidence to warrant sanctions on any of the other facts argued by Maryanne." (Italics added.)

2. Relevant legal standards

a. Provisions regarding fiduciary duties owed between parties in a dissolution action

Section 2100 sets out the legislative policy behind the disclosure requirements between parties to a marital dissolution action. In that section, the legislature explains that "[i]t is the policy of the State of California (1) to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution, (2) to ensure fair and sufficient child ***651** and spousal support awards, and (3) to achieve a division of community and quasi-community assets and liabilities on the dissolution or nullity of marriage or legal separation of the parties as provided under California law." (§ 2101, subd. (a).)

> "In order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties. Moreover, each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts." (§ 2101, subd. (c).)

Subdivision (c) of section 2102 provides: "*From the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees,* each party is subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party." (Italics added.)[9]

9 Section 721 provides:

> "(a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.
>
> "(b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:
>
> "(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.
>
> "(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.
>
> "(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

****769 b. *Provisions regarding sanctions***

Section 2107, subdivision (c) requires the trial court to impose monetary sanctions and to award reasonable attorney fees if a party fails to comply with any portion of the chapter of the Family Code that deals with a spouse's ***652** fiduciary duty of disclosure during dissolution proceedings. That provision provides, "If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (§ 2107, subd. (c).)

Similarly, section 271, subdivision (a) provides the trial court with authority to order the opposing party to pay attorney fees and costs in the nature of a sanction when "the conduct of each party or attorney ... frustrates the policy of the law to promote settlement of litigation...." That subdivision further provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." (*Ibid.*) Section 271 "advances the policy of the law 'to promote settlement and to encourage cooperation which will reduce the cost of litigation.' [Citation.]" (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177, 110 Cal.Rptr.2d 111.)

[11] Together, sections 271 and 2107 "give the trial court authority to order sanctions and the payment of attorney fees for breach of a party's fiduciary duty of disclosure and for conduct which frustrates the policy of promoting settlement." (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1474, 64 Cal.Rptr.3d 29 (*Feldman*).)

c. *Standards of review*

" 'A sanction order under ... section 271 is reviewed under the abuse of discretion standard. " '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably ****770** make the order.' " ' [Citation.] 'In reviewing such an award, we must indulge all reasonable inferences to uphold the court's order.' ***653** [Citation.] Although no case law discusses which standard of review we should apply to an order awarding sanctions under section 2107, subdivision (c), because the sanction is similar to that imposed under section 271 as well as similar to a sanction for civil discovery abuses

(which are reviewed for abuse of discretion), we will apply an abuse of discretion standard to an order for sanctions under section 2107, subdivision (c). [Citation.]" (*Feldman, supra,* 153 Cal.App.4th at p. 1478, 64 Cal.Rptr.3d 29, fn. omitted.)

"To the extent that we are called upon to interpret the statutes relied on by the trial court to impose sanctions, we apply a de novo standard of review." (*Feldman, supra,* 153 Cal.App.4th at p. 1479, 64 Cal.Rptr.3d 29.) "We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review. [Citation.]" (*Ibid.*)

3. *Analysis*

a. *The trial court erred in determining that Joseph owed Maryanne a continuing fiduciary duty under section 2012, subdivision (c)*

[12] Joseph contends that the trial court erred in interpreting section 2012, subdivision (c) as requiring a continuing duty between divorced parents to make "immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party," beyond the entry of a final judgment in a dissolution action, as long as there is a child for whom a support order remains in effect.

" 'Our task in construing a statute is to ascertain the legislative intent so as to effectuate the purpose of law. [Citation.] The statutory language ordinarily is the most reliable indicator of legislative intent. [Citation.] We give the words of the statute their ordinary and usual meaning and construe them in the context of the statute as a whole and the entire scheme of law of which it is a part. [Citation.] If the language is clear and a literal construction would not result in absurd consequences that the Legislature did not intend, the plain meaning governs. [Citation.] If the language is ambiguous, we may consider a variety of extrinsic aids, including the purpose of the statute, legislative history, and public policy. [Citation.]' [Citation.]" (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 288, 123 Cal.Rptr.3d 260.)

The trial court noted that section 2100 et seq. does not define the words " 'valid, enforceable, and binding resolution' of all issues relating to child or spousal support and professional fees," and, therefore, determined that it should "look[ ] elsewhere for guidance as to the objectives of the statute and ***654** the legislative intent." [10] After citing the objective of the child support disclosure statutes as being the fashioning of fair and sufficient child support awards and fostering full disclosure and cooperative discovery, the trial court noted that not all disputes concerning child support involve married (or once married) parents. ****771** The trial court proceeded to conclude that if it were to agree with Joseph's argument that the Wyoming divorce decree constituted a "valid, enforceable and binding resolution" of the child support issue, then the result would be that the fiduciary duties would be "available only to parents who are still married but not to parents who were never married or who are no longer married."

10 The parties' only contentions related to section 2102, subdivision (c) is with respect to the question of child support, and the only question at issue was whether a "valid, enforceable and binding resolution" of the child support issue had been made, not whether a similar resolution of the other possible issues raised in subdivision (c) of section 2102 (i.e., spousal support and professional fees) was made. We therefore limit our discussion to the question whether there was a valid, enforceable and binding resolution of child support in this case, after which the parties no longer had a continuing duty to disclose material information regarding their incomes to each other.

According to the trial court, Joseph's argument would result in a two-class system of parents: "One class of parents would be able to effectively obtain or modify child support orders fairly, efficiently, accurately and economically where the others would have to resort to formal discovery which can have the opposite effect." Determining that the legislature would not "create such a two-class system," the court concluded that "[t]he fiduciary duties must be available for all parents for the same duration," and "[t]o accomplish that result, [section] 2102[, subdivision] (c) must be interpreted to apply until the court loses jurisdiction to make a child support order because the order for child support '(1) is terminated by the court or (2) terminates by operation of law pursuant to Sections 3900, 3901, 4007, and 4013."

Noting that "child support remains at issue long after the entry of a judgment of dissolution," the trial court was of the view that there was no "valid, enforceable and binding resolution of all issues relating to child or spousal support and professional fees" under section 2012, subdivision (c) until all support obligations terminated. The trial court concluded that "to ensure fair support orders and foster full disclosure and cooperative discovery in all cases in which child support is pending, either before or after judgment, the fiduciary duties called for in [section] 2100 et seq[.] must continue as long as the issue of child support is pending, not final, or, in short, until the court's jurisdiction to order child support ends."

We disagree with the trial court's interpretation of section 2012, subdivision (c), and conclude that this subdivision *does not* impose on divorced ***655** parties a continuing fiduciary duty to disclose all material facts regarding a party's income after a final custody and support order has been entered.

The relevant language of section 2102, subdivision (c) states that the duty of immediate, accurate and full disclosure of material facts regarding income and expenses is owed "[f]rom the date of separation to the date of a valid, enforceable, and binding resolution of all issues relating to child or spousal support and professional fees." [11]

11 The fact that section 2102, subdivision (c) refers to the "date of separation" indicates that this provision, by its very nature, applies only to parties who have been legally married or in registered domestic partnerships and have decided to end that legal status by instituting a dissolution action. The conclusion that section 2102 is intended to apply only to those who are married or in domestic partnerships is further supported by the fact that section 2102 falls within Division 6 of the Family Code, entitled "Nullity, Dissolution, and Legal Separation." (See § 2000 ["This part applies to a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties"].)

The terms "valid," "enforceable," and "binding" all refer to the legal strength or force of the "resolution" at issue. The definition of "resolution" that seems most applicable here is "the act of determining." (See Webster's 3d New Internat. Dict. (2002) p.1933, col. 1.) Thus, the statute essentially requires that there be a final determination of all issues relating to child support before the parties' fiduciary duty to one another regarding disclosure of income will end. The most reasonable interpretation ****772** of what would constitute a legally effective determination of all the issues relating to child support is a *final,* as opposed to interim, temporary, or pendente lite, child support order. In other words, a child support order that the parties and/or the court have indicated is intended to be a final, permanent determination of child support represents a "valid, enforceable, and binding resolution of all issues relating to child ... support."

In making this determination, we take guidance from the distinction that the Supreme Court has drawn between temporary and final orders in the context of child custody. In this context, it is clear that the Supreme Court has indicated than an order may be "final" or "permanent," despite being subject to modification in the future. (See, e.g., *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289 (*Montenegro*).) We find this framework useful in considering a child support order, as well. In both the child custody and child support contexts, an order may be considered "final" or "permanent," *despite being subject to modification in the future.*

Further, interpreting the phrase "valid, enforceable, and binding resolution of all issues relating to child ... support" to refer to a final child support order, harmonizes section 2012, subdivision (c) with other statutory provisions that would be rendered superfluous under the trial court's interpretation. ***656** Specifically, section 3660 et seq. sets out a framework for the exchange of financial information between parties whose dissolution proceedings are final. "[A]fter the entry of a judgment of dissolution, a custodial parent is entitled, upon written request, to an annual declaration of income and expenses from the parent paying child support, regardless of whether a notice of motion or order to show cause has been filed. (See [§§] 3660–3668.)" (*In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1038, 106 Cal.Rptr.2d 395 (*Armato*).)

Section 3660 provides that "[t]he purpose of this article [i.e., Article 2, "Discovery Before Commencing Modification or Termination Proceeding"] is to permit inexpensive discovery of facts before the commencement of a proceeding for modification or termination of an order for child, family, or spousal support." As the *Armato* court explained, "By mandating the production of such information, the Family Code provides the parties with a means to resolve support issues without judicial intervention, *permits the parties to reassess on a periodic basis whether a modification is warranted,* discourages the filing of meritless claims for a change in support, and encourages the use of voluntary agreements to modify support payments." (*Armato, supra,* 88 Cal.App.4th at p. 1038, 106 Cal.Rptr.2d 395, italics added.)

Section 3663 indicates that a party may request discovery pursuant to "this article" no more "than once every 12 months." Section 3664 provides in pertinent part:

> "(a) At any time following a judgment of dissolution of marriage or legal separation of the parties, or a determination of paternity, that provides for payment of support, either the party ordered to pay support or the party to whom support was ordered to be paid or that party's assignee,

> without leave of court, may serve a request on the other party for the production of a completed current income and expense declaration in the form adopted by the Judicial Council."

It is apparent that pursuant to section 3664, subdivision (a), a party subject to a child support order, whether it is the party ordered to pay the support or the party entitled to receive the support, has a right to make an annual request for a declaration of income and expenses from the other ****773** party. The fact that the Legislature enacted section 3664 makes it clear that the Legislature did not intend for divorced parties to continue to owe each other the same fiduciary duty to disclose all material changes in income as married persons or those in domestic partnerships do, simply because the parties share a child together and an order for the support and maintenance of that child remains in effect.

If we were to interpret section 2102, subdivision (c) in the manner that the trial court suggests, there would be no need to have enacted a ***657** provision that would allow a parent to request income information under section 3664, since that party would already be entitled to have the other party provide all material facts and information related to his or her income throughout the year. We should avoid an interpretation of section 2102, subdivision (c) that would render the discovery procedures provided in section 3664 unnecessary. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 345, 110 Cal.Rptr.3d 628, 232 P.3d 625 ["[W]e must avoid interpretations [of statutes] that would render related provisions unnecessary or redundant."]; see also *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54 ["[A] statute should be interpreted ' "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." ' [Citation.]"].)

[13] We conclude that for purposes of section 2102, subdivision (c), a "valid, enforceable, and binding resolution of all issues relating to child ... support" means a final judicial child support determination, whether obtained pursuant to agreement of the parties or after litigation of the matter before the court. Despite the fact that a final child support determination is never truly "final" or "permanent," in the sense that it may always be modified at the request of a party who can demonstrate that changed circumstances justify a modification, for purposes of section 2102, subdivision (c), a child support order that the parties and/or the court indicate is not intended to be temporary (or interim or pendente lite) should be considered to be the final "resolution of all issues" related to child support. Thus, once a final order of child support has been entered in a dissolution case, the parties are no longer "subject to the standards provided in Section 721 as to all issues relating to the support and fees, including immediate, full, and accurate disclosure of all material facts and information regarding the income or expenses of the party." (§ 2102, subd. (c).)

b. *A final child support determination was made upon the entry of the Wyoming divorce decree*

The parties' Wyoming divorce decree states: "The parties entered into a Marital Settlement Agreement dated June 21, 2002, the purpose of which is to make a *final and complete settlement* of all rights and obligations between the parties, including those concerning their property, *the support and maintenance of* each of them and *their children,* ... and all other matters existing between the parties growing out of their marital relationship." (Italics added.)

By stating that the Wyoming divorce decree was to constitute the "final and complete settlement of ... the support and maintenance of ... their children," Joseph and Maryanne made clear their intent that this agreement, ***658** which was reduced to a judgment, be the final support order. Further, the parties' conduct after entry of this divorce decree indicates that this was their intention. (See ****774** *Montenegro, supra,* 26 Cal.4th at p. 259, 109 Cal.Rptr.2d 575, 27 P.3d 289 [evidence of parties' conduct following entry of ambiguous orders supported court's determination that the parties did not intend for the orders at issue to be final judgments as to custody].) Neither party sought to modify the child support order until Maryanne had reason to believe that Joseph's assets had increased significantly, thus indicating a change in circumstances warranting modification of the child support order. Thus, as of the time the Wyoming divorce decree was entered, the parties in this case were no longer required to disclose "all material facts and information regarding the income or expenses of the party" to the other pursuant to section 2102, subdivision (c). The court therefore erred in concluding that Joseph breached his fiduciary duty to Maryanne by failing to disclose to her material facts and information regarding his income, after entry of the Wyoming divorce decree.

c. *The trial court's sanctions order, which was based in part on the court's erroneous determination that Joseph had breached his fiduciary duty to*

150 Cal.App.4th 802
Court of Appeal, Second
District, Division 5, California.

Patti MICHAELY, Petitioner and Respondent,
v.
Joshua MICHAELY, Respondent and Appellant.

No. B186705. | April 16, 2007.
| Review Denied July 25, 2007. *

* Werdegar, J., did not participate therein.

| Certiorari Denied Jan.22, 2008. | See 128 S.Ct. 1123.

Synopsis

Background: In marital dissolution proceedings, the Superior Court, Los Angeles County, No. BD206726, John Sandoz, J., entered judgment awarding $21 million to wife, plus monthly support and attorney fees. Husband appealed.

[Holding:] The Court of Appeal, Armstrong, J., held that trial court's discovery sanctions order against husband did not constitute an abuse of discretion.

Affirmed.

Attorneys and Law Firms

**57 Law Offices of Gene W. Choe, Los Angeles, and Nicholas Tepper for Appellant.

Freid and Goldsman, APLC, Gary J. Cohen, Los Angeles, and Elizabeth Yazdany for Respondent.

Opinion

**58 ARMSTRONG, J.

*804 Joshua Michaely ("Husband") appeals from the judgment entered in the dissolution proceeding filed by his former wife, Patti Michaely ("Wife"). We affirm.

Factual and Procedural Summary [1]

1 Wife's request that we take judicial notice of the opinions of the United States District Court, District of Nevada, and the United States Court of Appeals for the Ninth Circuit, in Husband's bankruptcy, is granted. We also grant her request to substitute exhibit copies of specified trial exhibits, in place of originals.

[1] This dissolution case has an extraordinarily long history. The petition was filed on January 5, 1995, after the parties had been married for 24 years. The judgment of dissolution was in August of 1998, but the judgment that is the subject of this appeal, the Further Judgment on Reserved Issues, was not entered until August of 2005. The Reserved Issues were financial issues, and the issues on appeal concern sanctions, in the form of factual findings, which were imposed on Husband as the result of his conduct during discovery, in particular his conduct at a 1999 deposition.

These are the relevant facts:

Wife first took Husband's deposition in March of 1995. In May of 1996, she noticed another deposition. Husband objected, but the court (the case was then assigned to Judge Denner), found that Wife had "demonstrated good cause for the suspension of Code of Civil Procedure section 2025(t), the 'one deposition rule,' ... in that the issues and facts involved ... are complicated," and because "[Husband] moves monies from entity to entity and the information which [Wife] obtained from [Husband's] prior depositions does not provide [Wife] with current information ... In addition, the parties have lived an extravagant lifestyle, little or no income has been 'reported' on the parties' individual income tax returns or the income tax returns of [Husband] for the last several years. Therefore, [Wife] should be given an opportunity to complete discovery regarding the means by which [Husband] has been able sustain the marital standard of living without reporting substantial income."

The deposition never took place, delayed by discovery disputes and Wife's bankruptcy, which was filed in February 1998. The discovery disputes concerned Wife's August 1996 interrogatories, which Husband did not fully answer until March 1998, after Wife brought a motion to compel (November *805 1996), which resulted in a report (August 1997) from retired Judge Saeta, then the discovery referee, and a November 1997 court order adopting Judge Saeta's recommendation that Husband be compelled to further respond to the vast majority of Wife's 300 interrogatories and finding, inter alia, that "the volume of transactions and documents make this a complex tracing of assets case."

In March of 1999, after Wife obtained relief from the bankruptcy stay, she moved for an order re-opening discovery. Trial was then set for September 1, 1999. Judge

Lachs (the case was assigned to any number of judges over the years) granted the motion. Wife was ordered to pay Husband's air fare from Israel, where he then lived, and a $200 a day per diem. The court also ruled that a discovery referee would preside over the deposition.

As Husband repeatedly points out, Wife's earlier request for additional discovery was denied. In June 1998 Wife moved for an order to vacate the trial date and to extend discovery. Judge Denner stayed trial of economic issues until relief from the stay was granted in Wife's bankruptcy, **59 and denied the request to extend the discovery cut-off.

The deposition that Judge Lachs ordered took place in June 1999. Retired Judge Goldin presided as referee. In September, Wife moved for sanctions based on Husband's pre-deposition document production and his performance at the deposition. Hearing on the motion was before Judge Goldin. It did not take place until February 2000, apparently delayed by Husband's bankruptcy, which was filed in September 1999. (On Wife's motion, relief from the stay was granted in January 2000.)

Judge Goldin's report was signed on October 2, 2000 and filed with the court in November 9 of that year. She found that at the deposition, Husband engaged in intentional, pervasive, and egregious evasiveness, was willfully untruthful, and gave inconsistent and contradictory testimony. His conduct at the deposition was the equivalent of refusing to sit for the deposition, in violation of court order. Husband failed to produce documents in response to the request for production, did not produce documents he claimed to have produced, claimed that he could not identify documents that he did produce, and intentionally produced voluminous documentation which was not responsive. He had in the past failed to comply with other discovery. His intentionally evasive and obstreperous conduct deprived Wife of meaningful discovery.

*806 Judge Goldin recommended that various facts be established as true: Husband had management and control over the community estate during the marriage and after the separation; he owed a fiduciary duty to Wife in the management and control of community assets,[2] which he breached; and he willfully and maliciously engaged in acts to deprive Wife of her share of the community estate. Judge Goldin recommended that it be established as true that the estate had a value of $21 million on the date of separation, and additionally made a separate finding to that effect, based on the evidence.

2 Of course, this is not a factual finding, but a statement of law. (Fam.Code, §§ 721, subd. (b), 1100, subd. (e); *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992, 80 Cal.Rptr.2d 699.)

Judge Goldin also recommended that it be established as true that Wife needed at least $19,000 per month in support and that Husband could pay that amount, and that Husband be precluded from opposing many of Wife's claims, specifically the claims that he misappropriated a long list of community properties, including real properties, businesses, and insurance policies.

In November 2001, the bankruptcy court hearing Husband's bankruptcy found that his debts to Wife and her lawyers were not dischargeable. The bankruptcy court's order recites that that court reviewed Judge Goldin's report, and while it did not give evidentiary effect to the report, it did give such support to the evidence cited therein. The bankruptcy court noted that it had read Husband's deposition transcript and that of his former associate Maureen Sowell, and found "extensive and persuasive support" for Judge Goldin's findings and recommendations.

In June 2002, the court (by now, Judge Sandoz) adopted Judge Goldin's report as its own order, finding that the order was necessary to level the playing field and prevent Wife from being prejudiced by Husband's willful and egregious misuse of discovery, and that the imposition of lesser sanctions would not be a sufficient remedy. The court found: "[Husband's] consistent evasion, coupled with [his] responses which **60 were blatant untruths and not credible, amounted to an egregious abuse of the discovery process."

At trial, Husband took the position that sanctions precluded him from introducing evidence on the "vast majority" of the issues. Wife introduced evidence on income that should be imputed to Husband from the date of separation, her need for support, and fees.

*807 In the further judgment on reserved issues, the court found that Husband breached his fiduciary duty to Wife while he had control of community assets, willfully and maliciously engaged in acts to deprive her of her share of the community estate, and perpetrated fraud on her. Wife was awarded $21 million, plus interest, plus support of $35,360 per month, plus attorney fees.

Discussion

1. *The 1999 order re-opening discovery*

Husband's first argument is that Judge Lachs's 1999 order that he sit for another deposition was an abuse of discretion. Husband contends, inter alia, that under Code of Civil Procedure section 2024.020, he had a right to have discovery end 30 days before trial, that Wife failed to meet and confer, and that in any event Wife had all the information she needed. Husband does not explain why any abuse of discretion on Judge Lachs's part could lead to reversal now. We do not see that it could. Husband's conduct at the deposition and throughout discovery caused the sanctions. The deposition order itself caused him no harm. We thus need not and do not reach the substance of Husband's arguments. (Cal. Const., art. VI, § 13.)

2. *Judge Goldin's report*

[2] Husband next argues that the report was procedurally defective in two ways. First, he argues that the order appointing the referee was invalid under Code of Civil Procedure section 640, which in 1999 provided that the referee must "reside in the county in which the action or proceeding is triable...."[3] Husband points out that Judge Goldin's office was in Los Osos, in San Luis Obispo County, and argues that it is unreasonable to conclude that she lived in Los Angeles County, and that the trial court should have investigated the location of her residence. He further argues that he did not learn that Judge Goldin's office was in Los Osos until she began sending bills and other communications to the parties, citing in support his counsel's statements at oral argument on the sanctions.

3 Code of Civil Procedure section 640 provided that "A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable...."

His second procedural ground is based on Code of Civil Procedure section 643, which (then and now) provides that "[u]nless otherwise directed by the court, the ***808** referees or commissioner must report their statement of decision in writing within 20 days after the hearing...." (See former § 643, which provides substantially the same.) Husband argues that because Judge Goldin's report was not sent to the court within 20 days, it was invalid and should not have been considered. Husband did not raise either ground until his opposition to Wife's motion for sanctions, and we agree with Wife that he has waived these objections. Contrary to his argument, Husband was informed from the outset that Judge Goldin's office was in Los Osos. The minute order proposing her (along with two other candidates) as discovery referee lists a post office box in Los ****61** Osos as her address. Any violation of the 20 day rule would have been apparent when the 20 days elapsed. Husband did nothing to timely cure either of these alleged defects, and cannot seek redress now.

What is more, Husband cites no prejudice which he suffered due to Judge Goldin's (presumed) residence outside Los Angeles County. He similarly cites no prejudice from the time delay, except to suggest that the report was too detailed and too thorough, hardly a judicial error cognizable on appeal.[4] He does argue that "harm is not the standard," seeming to suggest that violation of the 20 day rule is per se reversible. He is wrong. "Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833, 16 Cal.Rptr.2d 38.) Harm *is* the standard.

4 We entirely reject Husband's unsupported contention that Judge Goldin either engaged in improper ex parte communications with Wife's counsel or "abdicated" her responsibilities by simply signing the report prepared by Wife's counsel, without exercising any oversight or discretion. We similarly reject the unsupported suggestion that Judge Goldin timed the report so that it would influence the judge in Husband's bankruptcy proceeding.

3. *The sanctions*

[3] Husband next addresses the merits, arguing that the sanctions order was an abuse of discretion. He argues that discovery sanctions can only be imposed for failure to comply with a court order, or when a pattern of discovery abuse leads to a loss of evidence. He then argues that sanctions were imposed in this case only on the finding that his performance at the deposition was the equivalent of refusing to obey the court order that he sit for his deposition, and that the finding was in error. He argues that "he came, he sat, he answered," boasting that he provided substantive answers to half the questions asked. Ignoring the fact that Judge Goldin presided over the deposition ***809** and was in an excellent position to make credibility findings, he also argues that there is no evidence to support the implied finding that when he answered "I don't know," he did so untruthfully. Without

specific citation to the record, Husband also argues that there was no history of repeated discovery abuse.

[4] [5] [6] A trial court has broad powers to enforce its discovery orders, and may impose sanctions that are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery sought. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.) "Misuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1214, 45 Cal.Rptr.3d 265.) "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." (*Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904, 190 Cal.Rptr. 593.)

We see no abuse of discretion here. In his brief, Husband recites some of the questions he did answer, leading off with two questions about a girlfriend and two questions about Maureen Sowell's signature. Judge Goldin's report puts those questions and answers in context: Husband, ****62** who admitted that Sowell acted as a notary for him, testified that he could not recognize her signature, or, indeed, his own. He knew that she continued to work for him after he moved to Israel, but not who was paying her. He testified that he did not know that his girlfriend (with whom he had lived) had purchased community real property (which he had allowed to go into foreclosure) at a foreclosure sale, or where she got the money to do so, although he did testify that they had discussed the possibility that she would buy the property.

Husband also recites his substantive, yes-or-no answers to questions about his ownership of many entities. Judge Goldin's report quotes his "I don't recall," or "I have no idea," answers to questions about his ownership interest in many more. He did not know when numerous properties went into foreclosure or were sold, whether his entities were partners in specified partnerships, or the assets which other of his entities owned. Husband argues that he testified about his ownership of an entity called JM Real Estate and the properties it owned. Judge Goldin quoted more of his testimony on that entity: he did not recall whether he had caused the entity to be formed, and did not know who was on its board or who its shareholders were or whether ***810** it had filed tax returns. He testified that he had gotten a salary from that entity, he did not remember when that was.

These are but a few examples, but they are telling. The referee's report is a long and illuminating document, and its extensive quotes from the deposition more than support the finding that Husband egregiously abused the discovery process, both in his document production and in his answers to questions.

Husband also contends that the sanctions were an abuse of discretion because Wife had all the information she needed from other sources, including the business records he produced, and that she could have gone to third parties to obtain the information she needed. When his record references are examined, Husband is relying on the fact that Wife obtained documents from his office at the inception of this action, in 1995, on the fact that he answered special interrogatories in 1998, and on a March 1995 letter from his counsel to her counsel listing twenty properties (including the family home and its contents) and several debts, putting a value on each, and suggesting a property distribution.

Husband also cites Sowell's deposition, which Wife took in late 1998 or early 1999 after bringing two motions to compel, the first to obtain the deposition, and the second after Sowell (represented by Husband's attorney) asserted rights under the Fifth Amendment to the United States Constitution and refused to answer any questions.

To state the facts is to refute them. The 1995 information was simply too old, given Husband's plethora of assets and the fact that, as Judge Denner found, Husband moved money from entity to entity, and, as Judge Saeta found, this was a complicated case involving tracing of assets. The 1998 interrogatories were prefatory to the deposition. There is no showing that the answers could replace the deposition, and no reason to assume so. We say the same about Sowell's deposition. Husband points out that in 1995, Wife declared that Sowell had access to the business and financial records at Husband's office and was authorized to sign on various bank accounts held by some of Husband's business entities, and that in her motions to compel, Wife alleged that Sowell was a critical witness. That does not mean that she could replace Husband as a witness.

****63** In this portion of his brief, Husband also cites the facts that his support obligation was reduced $21,000 per month to $1,700 per month, based on evidence that his income was $5,000. This took place in September of 1999, and we cannot see that the finding is relevant to any issue on appeal.

***811** Finally in this regard, Husband contends that the court erred by not considering the history of all discovery, arguing more specifically that the court erred in finding that Sowell's deposition was irrelevant and not to be considered in determining sanctions. The order Husband cites is the *referee's* order denying Husband's request that she consider Sowell's deposition testimony. Judge Goldin listed four grounds for her ruling: (1) the testimony is irrelevant to the motion for sanctions; (2) the Code of Civil Procedure did not authorize Husband to submit the deposition to the court on a sanctions motion (citing Code of Civil Procedure section 2025, subd. (u), since repealed); (3) the fact that Sowell sat for her deposition did not relieve Husband from his obligation to comply with discovery; (4) Husband failed to timely submit the testimony.

Husband does not cite to anything that would show that he asked the trial court to consider the testimony. The trial court thus did not err.

4. *Collateral estoppel*

When it considered Wife's motion to adopt Judge Goldin's report, the trial court found that Husband was "collaterally estopped from relitigating the issues litigated and resolved by the Bankruptcy Court," in his bankruptcy. Husband argues that "The court erred by adopting the [referee's] report based on [Wife's] collateral estoppel argument." Substantively, he argues that his due process rights were violated because Wife did not raise the issue until her reply papers in the proceedings on the motion to adopt the referee's report; and that under established law, collateral estoppel did not apply.

We need not reach the merits of Husband's arguments. Husband does not tell us which issues were "litigated and resolved by the Bankruptcy Court," so that we cannot tell what effect the collateral estoppel finding had. Moreover, even if, as he asserts, the court adopted Judge Goldin's report based on the bankruptcy court's findings, it was at most an alternate ground. A ruling on collateral estoppel could make no difference here.

5. *Other issues*

[7] At the end of Husband's brief, he seems to argue that the Final Judgment must be reversed because the court ordered support in excess of that recommended by Judge Goldin, and ordered him to pay Wife's attorney fees, even though Judge Goldin did not recommend that order. Husband offers no authority which would establish that the court was limited by the report. What is worse, he ignores the fact that Wife introduced evidence at the trial.

***812 Disposition**

The judgment is affirmed. Wife to recover costs on appeal.

We concur: TURNER, P.J., and KRIEGLER, J.

Parallel Citations

150 Cal.App.4th 802, 07 Cal. Daily Op. Serv. 5225, 2007 Daily Journal D.A.R. 6634

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133 Cal.App.4th 1090
Court of Appeal, Second District,
Division 8.

In re the MARRIAGE OF John McTIERNAN and Donna DUBROW.
John McTiernan, Appellant,
v.
Donna Dubrow, Appellant.

No. B161255. | Oct. 28, 2005.
| Review Denied Jan. 25, 2006.

Synopsis

Background: In marital dissolution proceeding, the Superior Court, Los Angeles County, No. BD263827, Richard Montes, J., assigned goodwill to husband's successful career as a motion picture director, divided community property, and ordered spousal support payments and award of attorney fees and costs to wife. Both spouses appealed.

Holdings: The Court of Appeal, Flier, J., held that:
[1] there was no goodwill in husband's career;
[2] reimbursement of wife's share of lost profits was proper restitution for husband's violating automatic temporary restraining order (ATRO) by selling community securities without her consent;
[3] portion of postseparation pendente lite spousal support payments to wife was properly characterized as community property distribution;
[4] imposing two-year limitation on spousal support, and failing to retain jurisdiction over further support, was abuse of discretion; and
[5] attorney fees and costs award was properly conditioned on amount of wife's ultimate share of community property, as determined following sale of certain community assets.

Affirmed in part, reversed in part, and modified.

Boland, J., filed concurring opinion.

Cooper, P.J., filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

****289** Kolodny & Anteau, Stephen A. Kolodny, Lauren S. Petkin and James L. Keane for Appellant John McTiernan.

Dapeer, Rosenblit & Litvak and William Litvak for Appellant Donna Dubrow.

Opinion

FLIER, J.

***1093** John McTiernan (husband) and Donna Dubrow (wife) both appeal from a judgment in the dissolution of their marriage. Their appeals raise distinct issues. Husband primarily challenges the trial court's determination that there existed goodwill in his business as a motion picture director, and that all of the $1.5 million of goodwill constituted community property. Husband also contests a ruling that he must reimburse wife's share of profits that were lost after husband sold certain community securities without her consent, and in violation of the automatic injunctive order imposed upon commencement of the proceedings. (Fam.Code, § 2040, subd. (b).)

In her appeal, wife contends that the court abused its discretion by limiting her postdissolution spousal support to two years, and by characterizing several months of pendente lite payments as community property distributions rather than temporary support. Wife also asserts that the judgment should be modified to preserve jurisdiction over support beyond the two-year period. Finally, wife contends that the court abused its discretion by reducing husband's obligation to pay wife's attorney fees, by reason of an irrelevant and inaccurate reckoning of her postdissolution estate.

We find merit in husband's contention that there is no goodwill in his career as a motion picture director. We also find merit in wife's contentions regarding the duration of spousal support and retention of jurisdiction. We reverse the judgment as to those elements, and affirm it in all other respects.

FACTS

The parties were married in November 1988. They separated in July 1997, and ****290** husband commenced this proceeding the following month. The matter was extensively litigated, including 21 days of trial, conducted between June 1999 and June 28, 2000. The court's 34–page statement of decision was filed August 23, 2000, and the judgment under review was entered on August 28, 2002. At that time, husband was 51 years old and wife was 59.

in the usual course of business or for the necessities of life ...." (§ 2040, subd. (a)(2).) In April 1998, faced with a cash shortage, husband sold certain community property stocks, the proceeds **297 of which he used in part to pay community expenses. Husband did not inform wife or seek court approval of the stock sale before conducting it.

*1103 Wife subsequently requested relief on account of the sale, the stock's market price having increased substantially between the sale and the time of trial. In its statement of decision, the court found that husband had violated the restraining order by disposing of the asset, "although the court believes he did not do so maliciously or of ill will." The court noted that husband could have consulted wife, and if she had not agreed to sell he could have sought court approval —but "he did neither." The court therefore ruled that the asset would be valued as if it had not been sold, and that the valuation date for all securities controlled by either party would be the date trial commenced. The outcome was that the judgment awarded wife "Lost appreciation on community property securities valued at $284,087 as of June 24, 1999." The court did not obligate husband for the substantial further appreciation that occurred during the extended trial, a remedy the court eschewed as "an unreasonable penalty on [husband] for his violation of the ATRO...."

Husband nonetheless contends that the award of wife's share of profits lost by his violation of the injunctive order constituted a form of punitive damages, unauthorized and inappropriate for what husband terms "a technical violation" of the order. But the violation could just as well be labeled "a square one."[9] And the remedy imposed was not a form of punitive damages, but rather restitution of the loss caused wife by husband's violation.

9 As a matter of law, we reject husband's claims that community obligations ipso facto constitute "necessities of life" under section 2040, subdivision (a)(1), or that husband's selling the stock on advice of his business managers, without more, made the sale "in the usual course of business" under that subdivision. Similarly, we cannot accept husband's contention in reply, that the "usual course" exception applied because he had always managed the community property. Such a construction would nullify the plain purpose of the statutory restraining order.

In fact, the remedy here precisely paralleled the one provided by section 1101, subdivision (f), for breach of a spouse's fiduciary duty involving asset transfer that impairs the other spouse's undivided one-half interest (see *id.*, subd. (a)). Husband argues that he did not breach such a duty, especially in light of the trial court's finding he did not act maliciously. But the statutory remedy applies to nonmalicious breaches (*In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 992, 80 Cal.Rptr.2d 699), and it was not inappropriate to treat in the same manner husband's violation of an injunctive order designed to preserve the parties' property interests from unilateral disposition.

II. WIFE'S APPEAL

A. Spousal Support and Retention of Jurisdiction

Wife raises three issues concerning spousal support: the proper characterization of stipulated payments to her by husband before interim support was *1104 ordered; the proper duration of postjudgment support, which was ordered for two years; and the proper understanding and disposition of the court's order regarding retention or relinquishment of jurisdiction. We address these questions in the order stated.

1. Initial Payments

Wife filed an order to show cause (OSC) for pendente lite spousal support in October 1997. Among other things, wife declared **298 that during the marriage, husband had provided her $27,500 per month for her personal expenses and those of her Brentwood residence, which she had acquired before the marriage. She also used credit cards, for approximately $5,000 per month, which husband paid.

Wife's OSC was originally set for December 8, 1997, but on December 5 the parties stipulated that it be continued to January 13, 1998. Approved by the court, the stipulation also provided that pending the hearing, husband would pay wife $27,500 on each of December 1 and January 1. Wife also would retain her credit cards, for which husband would pay, but husband would receive credit for expenses charged during any period for which retroactive support (if any) was later ordered. These payments were to be nontaxable to wife and nondeductible by husband. They also were to be without prejudice to the parties' positions regarding wife's needs, based on the marital standard of living and husband's ability to pay.

A similar "Stipulated Order re Interim Payments and Continuance of Hearing Date" was filed on January 13, 1998. It continued the OSC hearing to February 18 and provided, inter alia, for another $27,500 payment to wife, on February 1. This order provided that the payments to wife were not to