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# Presumption of Undue Influence Resurrected: He Said/She Said Is Back, The

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# The Presumption of Undue Influence Resurrected: He Said/She Said is Back

Christine Manolakas\*

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*“One hesitates to plead for reforms in the name of common sense . . . for we belong to a profession that prides itself on not throwing chaos lightly to the winds.”*

*—Roger Traynor<sup>1</sup>*

## I. INTRODUCTION

In California, married individuals may hold property as community property or separate property. The determination of whether property is community or

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1. Roger Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 56 (Monrad G. Paulsen ed., 1959).

separate is critical as different rules govern with respect to creditor's rights, management and control, disposition upon the death of a spouse, and division upon dissolution of the marriage. Many factors are considered in the characterization of property such as the facts and circumstances surrounding the acquisition of the property and any agreement or understanding between the spouses as to the character of the property. In the absence of such evidence, characterization may be based upon the various presumptions established by case law or statute. Since the assignment of the burden of proof often determines the outcome of a disputed issue, presumptions play an important role in the characterization of property.

In determining the character of property upon the dissolution of a marriage, a complex structure of presumptions apply, beginning with the general community property presumption. With regard to titled property, the general community property presumption is overcome by the general title presumption that, in turn, is overcome by various statutory presumptions. This hierarchy of presumptions in the classification of property is necessary in order to enforce and protect the expectations of the parties and carry out state public policy. The character of property may also be changed by spousal agreement with post-1984 transmutations valid only if memorialized by an express written declaration. The California Legislature imposed a writing requirement in order to curb the litigation and false testimony generated by the prior law that allowed for oral transmutations. This trend towards certainty, however, has been undermined by recent case law interpreting the expanded and heightened fiduciary duty provisions. In these California appellate cases, the presumption of undue influence arising from the confidential and fiduciary relationship existing between married couples overcomes both the general and statutory title presumptions and the writing by express declaration requirement necessary for a valid transmutation. As a result, the oral testimony of a disadvantaged spouse, as to lack of consideration and undue influence in an intramarital transaction, will again determine the character of property.

This Article describes the general community property presumption, the general title presumption, and the enactment and evolution of the various statutory title presumptions. The California courts and Legislature established these presumptions in order to minimize disputes and ensure the honest characterization of property. In addition, legislation imposing an express written declaration requirement for valid transmutations, and the case law interpreting this provision, will also be discussed. This requirement was enacted to provide certainty as to whether a transmutation has, in fact, occurred by reducing the impact of oral statements and implications from conduct on the determination of the character of property. The Article then reviews the enhanced fiduciary duty provisions and the presumption of undue influence that arises in interspousal transactions if either husband or wife obtains an advantage over the other. Finally, this Article examines recent California appellate court decisions holding that the presumption of undue influence is determinative if in conflict with the title presumption and the writing requirement for a valid transmutation. As a result of these judicial decisions that give renewed strength to the presumption of undue influence, the Article concludes that the trend of the law toward reliability and predictability in the characterization of property in California has been undermined.

## II. GENERAL COMMUNITY PROPERTY PRESUMPTION

In California, “characterization” refers to the process of classifying property as separate property, community property, or quasi-community property.<sup>2</sup> The California Family Code (“Family Code”) defines “separate property” as property owned before marriage or acquired during marriage by gift, bequest, devise, or descent and all income and property generated by such property.<sup>3</sup> Generally, “community property” is defined as all property acquired by a married person during marriage while domiciled in California,<sup>4</sup> and “quasi-community property” means property acquired by either spouse which would have been community property if the spouse who acquired the property had been domiciled in California at the time of the acquisition.<sup>5</sup> Characterization is necessary in order to determine the rights and liabilities of the spouses with respect to a particular asset<sup>6</sup> or obligation<sup>7</sup> and is an integral part of the division of property upon marital dissolution.<sup>8</sup> Generally, factors determinative of whether property is separate property or community property are marital status at the time of the property’s acquisition, the operation of various presumptions, and whether the spouses have transmuted the property.<sup>9</sup> The marital status of parties at the time of acquisition is a basic factor in determining the character of property<sup>10</sup> as property acquired during marriage while domiciled in California is presumed community property.<sup>11</sup>

The Family Code defines community property as all property, whether real or personal, wherever situated, acquired during marriage while domiciled in

2. Although community property interests cannot be acquired by parties to an invalid marriage, if either party has “putative spouse” status, a good faith belief in the validity of the marriage, acquisitions during the union which would have been community property or quasi-community property had the marriage been valid are “quasi-marital property.” In a nullity proceeding, quasi-marital property will be divided as if community property or quasi-community property and liable for the debts of the parties to the same extent as if the property were community property or quasi-community property. CAL. FAM. CODE §§ 2250-2252 (West 2004); *see infra* text accompanying notes 3-5 (defining separate property, community property and quasi-community property).

3. CAL. FAM. CODE § 770(a) (West 2004).

4. *Id.* § 760.

5. *Id.* § 125. For the purposes of determining the community estate in a marriage dissolution or legal separation proceeding, or for the purposes of the provisions governing the liability of property for marital debts, quasi-community property is treated as community property. *Id.* §§ 63, 2550, 910.

6. *See id.* § 63 (defining “community estate” to include both community property and quasi-community property).

7. *See id.* §§ 910, 912-914 (providing, generally, that the community estate, including quasi-community property, is liable for the debts incurred by either spouse before or during marriage; however, separate property is liable only for the debts of the other spouse if incurred for necessities of life).

8. *See id.* § 2550 (requiring the equal division of the community estate in a proceeding for dissolution of marriage or for legal separation).

9. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 682 (Cal. Ct. App. 1995).

10. CAL. FAM. CODE § 760 (West 2004); *see also In re Marriage of Buol*, 705 P.2d 354, 357 (Cal. 1985) (“The status of property as community or separate is normally determined at the time of its acquisition.”).

11. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property*, § 95 (9th ed. 1990).

California.<sup>12</sup> From this language, case law established the “general” community property presumption that property acquired by either spouse during marriage, other than by gift or inheritance, is community property.<sup>13</sup>

This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation. . . . Coupled with this presumption is the elementary but fundamental rule that the burden rests upon the person asserting that the property is separate to establish that fact.<sup>14</sup>

Further, as acquisition during marriage can be reasonably inferred, property possessed at the close of a long marital relationship is similarly presumed acquired during marriage.<sup>15</sup> However, no presumption exists as to when property was acquired,<sup>16</sup> and the presumption that property acquired after marriage is community property is given less weight if the acquisition of the property occurred shortly after marriage.<sup>17</sup> The general community property presumption is a rebuttable presumption affecting the burden of proof and, therefore, can be overcome by the party contesting community property status.<sup>18</sup> As to untitled property, the general community property presumption may be overcome by showing an agreement or clear understanding between the parties regarding ownership status<sup>19</sup> or by tracing the asset to a separate property source.<sup>20</sup> As to the quantum of proof that must be presented to overcome the community property presumption, the case law is uncertain. Dictum in an early California Supreme Court decision established the quantum of proof necessary to overcome the community property presumption as “clear and certain proof,”<sup>21</sup> but this heightened standard was later rejected by the California Supreme Court for the lesser standard of preponderance of the evidence.<sup>22</sup>

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12. CAL. FAM. CODE § 760 (West 2004).

13. *Wilson v. Wilson*, 172 P.2d 568, 572 (Cal. Dist. Ct. App. 1946); *See v. See*, 415 P.2d 776, 779-80 (Cal. 1966); *Haines*, 39 Cal. Rptr. 2d at 681; cf. CAL. FAM. CODE § 802 (West 2004) (providing that the community property presumption is inapplicable to property titled in the name of the decedent if the marriage during which the property was acquired terminated four years before death).

14. *Wilson*, 172 P.2d at 572.

15. *In re Jolly's Estate*, 238 P. 353, 356 (Cal. 1925); *Lynam v. Vorwerk*, 110 P. 355, 355-56 (Cal. Dist. Ct. App. 1910).

16. *Fidelity & Cas. Co. of N.Y. v. Mahoney*, 161 P.2d 944, 946 (Cal. Dist. Ct. App. 1945).

17. *Id.*

18. *Wilson*, 172 at 568; *Jolly's Estate*, 238 P. at 356; *Haines*, 39 Cal. Rptr. 2d at 681.

19. *Haines*, 39 Cal. Rptr. 2d at 682.

20. *Wilson*, 172 P.2d at 572. Since the general community property presumption is not a title presumption, any credible evidence may be used to overcome it, including tracing the asset to a separate property source, showing an agreement or clear understanding between parties, or establishing the item was acquired by gift. WILLIAM P. HOGOBOOM & DONALD B. KING, CAL. PRACTICE GUIDE: FAMILY LAW § 8.363 (The Rutter Group 1994).

21. *Meyer v. Kinzer*, 12 Cal. 247, 253 (1859).

22. *Freese v. Hibernia Sav. & Loan Soc.*, 73 P. 172, 173 (Cal. 1903).

Later California appellate decisions have repeated the higher clear and convincing proof standard<sup>23</sup> while others have applied the lesser preponderance of the evidence standard.<sup>24</sup>

### III. GENERAL TITLE PRESUMPTION

Although married persons in California may hold property as joint tenants, tenants in common, community property, or community property with right of survivorship,<sup>25</sup> most married persons take title to property as joint tenants.<sup>26</sup> The survivorship feature of joint tenancy allows property to pass by operation of law to the survivor without the necessity of probate<sup>27</sup> and is the primary reason this form of title is selected.<sup>28</sup> In California, courts have established the rule that a community estate and a joint tenancy estate cannot exist at the same time in the same property.<sup>29</sup> Unless modified by statute, a rebuttable "general" title presumption arises that the ownership interest in property is as stated in the title to property.<sup>30</sup> The affirmative action of specifying a form of ownership in the conveyance of title removes the property from the more general presumption that property acquired during marriage is community property.<sup>31</sup> If title was taken in joint tenancy, a prima facie case is established that the property is, in fact, held as

23. *In re Marriage of Ashodian*, 157 Cal. Rptr. 555, 558 (Cal. Ct. App. 1979); *Bank of Cal. v. Connolly*, 111 Cal. Rptr. 468, 485 (Cal. Ct. App. 1973).

24. *Haines*, 39 Cal. Rptr. 2d at 681; see *HOGOBOOM & KING*, *supra* note 20, § 8:392.1 (discussing the "mixed messages" given by cases as to the quantum of proof necessary to overcome the general community property presumption).

25. CAL. FAM. CODE § 750 (West 2004).

26. See Robert L. Mennell, *Community Property with Right of Survivorship*, 20 SAN DIEGO L. REV. 779 (1983) (examining the rule that property cannot be held both as joint tenancy and community property and advocating the addition of the right of survivorship to community property ownership). See generally Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 PAC. L.J. 927 (1983) (describing the legal and practical consequences of the different forms of title).

27. CAL. CIV. CODE § 683 (West Supp. 2005).

28. ASSEMBLY COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 2913, at 1 (Aug. 25, 2000). The two principal reasons spouses chose to place title to property in joint tenancy are probate avoidance and limitation of liability. KIRKLAND, LURVEY & RICHMOND, *CALIFORNIA FAMILY LAW: PRACTICE AND PROCEDURE* § 20.05[1][a] (2d ed. 1990). Generally, although the community estate is liable for a debt incurred by either spouse before or during marriage, the non-debtor spouse's separate property is not liable for a debt incurred by the other spouse. A spouse's one-half interest in a joint tenancy is separate property and, therefore, cannot be reached by the debtor spouse's creditors. CAL. FAM. CODE §§ 910, 913(b)(1) (West 2004).

29. *Siberell v. Siberell*, 7 P.2d 1003, 1005 (Cal. 1932); *Tomaier v. Tomaier*, 146 P.2d 905, 907 (Cal. 1944); *Gudelj v. Gudelj*, 259 P.2d 656, 662 (Cal. 1953).

30. *Tomaier*, 146 P.2d at 907. Earlier California Supreme Court decisions held that using community funds to acquire property and taking title as joint tenants constituted a binding agreement between the spouses that the property was held as joint tenancy. Parol evidence contrary to this agreement was not permissible. *Siberell*, 7 P.2d at 1005; *Watson v. Peyton*, 73 P.2d 906, 907 (Cal. 1937).

31. *In re Marriage of Lucas*, 614 P.2d 285, 288 (Cal. 1980). The rebuttable presumption that the character of property is as set forth in the deed also applies where the property was purchased with the separate funds of one spouse. *Gloden v. Gloden*, 49 Cal. Rptr. 659 (Cal. Ct. App. 1966).

joint tenants.<sup>32</sup> A spousal gift or agreement may be reasonably inferred from the form of title, thus, giving rise to a rebuttable presumption as to its character.<sup>33</sup> The presumption arising from the form of title can be rebutted by evidence of an agreement or understanding between the parties that the interests are to be otherwise than as stated.<sup>34</sup> Merely a showing that the property was acquired with funds of a different character cannot rebut the presumption arising from the form of title.<sup>35</sup> The general title presumption, however, can be rebutted by parol evidence of an oral agreement by, or intention of, the parties that the ownership of the property is not as set forth in the deed.<sup>36</sup> However, the presumption cannot be rebutted by the unilateral understanding or intent of one party not communicated to the other.<sup>37</sup>

#### IV. STATUTORY PRESUMPTIONS

##### A. Evidence Code—Presumptions

Presumptions often play an important role in determining the outcome of disputes concerning the characterization of marital property. Presumptions arise either by common law or by statute, but all presumptions must be analyzed in the context of the California Evidence Code (“Evidence Code”). Unless otherwise provided, each party has the burden of proof as to the existence or nonexistence of a fact that is essential to the claim or relief asserted.<sup>38</sup> Presumptions are not evidence but assumptions of fact that are required by law to be made from another fact or group of facts, as opposed to inferences that are deductions of fact that may be drawn, logically and reasonably, from another fact or group of facts.<sup>39</sup> The Evidence Code classifies presumptions as either conclusive pre-

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32. *King v. King*, 236 P.2d 912, 913 (Cal. Dist. Ct. App. 1951). However, in proceedings involving the death of a spouse or third party creditors, as opposed to proceedings involving dissolution of a marriage, the general community property presumption may be raised. KIRKLAND, LURVEY & RICHMOND, *supra* note 28, § 20.12[1][b].

33. *In re Marriage of Buol*, 705 P.2d 354, 359 (Cal. 1985).

34. *Lucas*, 614 P.2d at 287; *Gudelj*, 259 P.2d at 662; *Tomaier*, 146 P.2d at 906-07; *Socol v. King*, 223 P.2d 627, 629 (Cal. 1950).

35. *Lucas*, 614 P.2d at 287; *Gudelj*, 259 P.2d at 662. An acquisition by a spouse of property during marriage in sole title creates a conflict between the general title presumption and the community property presumption arising from the acquisition of property during marriage. Generally, when these two presumptions conflict, the community property presumption usually prevails in property disputes between the spouses. KIRKLAND, LURVEY & RICHMOND, *supra* note 28, § 20.12[2][a]; *see also* Mary Charles McRae, *Contributions or Transmutations? The Conflicting Provisions of Sections 852 and 2640 of the California Family Code*, 49 UCLA L. REV. 1187 (2002) (discussing the interspousal transmutation statutes).

36. *Lucas*, 614 P.2d at 289; *Tomaier*, 146 P.2d at 907; *cf. infra* text accompanying notes 117-19 (discussing anti-*Lucas* legislation which requires a writing to rebut the community property presumption arising from the acquisition of property in joint form during marriage for the purpose of the division of property upon dissolution of marriage or legal separation).

37. *Lucas*, 614 P.2d at 287; *Estate of Levine*, 178 Cal. Rptr. 275, 277 (Cal. Ct. App. 1981); *Socol*, 223 P.2d at 630.

38. CAL. EVID. CODE § 500 (West 1995).

39. *Id.* § 600.

sumptions or rebuttable presumptions.<sup>40</sup> If a presumption is a conclusive presumption, the trier of fact is required to find the existence of the presumed fact regardless of the strength of the opposing evidence.<sup>41</sup> Rebuttable presumptions are classified as either presumptions affecting the burden of producing evidence or affecting the burden of proof.<sup>42</sup>

The classification of rebuttable presumptions as presumptions affecting the burden of producing evidence or affecting the burden of proof reflects the purpose or function of the particular presumption, and takes place either by common law or by statute. The purpose or function of a presumption affecting the burden of producing evidence is to aid in the determination of a particular action.<sup>43</sup> Presumptions affecting the burden of producing evidence are not based on any extrinsic public policy, but are based on considerations of probability and access to evidence.<sup>44</sup> The effect of presumptions affecting the burden of producing evidence is to require the trier of fact to assume the existence of a presumed fact until evidence to its nonexistence is presented.<sup>45</sup> If such evidence is presented, the preliminary presumption is extinguished and the trier of fact is left to weigh the inferences arising from the facts that give rise to the presumption and the contrary evidence. For example, if evidence is given that a letter was mailed, a presumption arises affecting the burden of producing evidence that a mailed letter was received.<sup>46</sup> However, if the adverse party denies receipt, the presumption is gone and the trier of fact must weigh the inference of receipt arising from the proof of mailing against the denial of receipt.<sup>47</sup>

A presumption affecting the burden of proof implements some public policy as opposed to, or in addition to, aiding in the determination of a particular action.<sup>48</sup> Section 605 of the Evidence Code includes specific examples of public policies supported by presumptions affecting the burden of proof, including the "establishment of a parent and child relationship, the validity of marriage, the stability of titles to property . . . ."<sup>49</sup> The effect of a presumption affecting the burden of proof is to impose upon the party against whom the presumption operates the burden of proving the nonexistence of the presumed fact.<sup>50</sup> Legislative history provides that, ordinarily, the party against whom a presumption affecting the burden of proof operates will have the burden of proving the nonexistence of the presumed fact by the preponderance of the evidence; however,

40. *Id.* § 601.

41. CAL. EVID. CODE § 601, Law Revision Commission Comment (West 1995). Conclusive presumptions are rules of substantive law more than evidentiary rules. CAL. EVID. CODE § 620, Law Revision Commission Comment (West 1995).

42. CAL. EVID. CODE § 601 (West 1995).

43. *Id.* § 603.

44. CAL. EVID. CODE § 603, Law Revision Commission Comment (West 1995).

45. CAL. EVID. CODE § 604 (West 1995).

46. *Id.* § 641; CAL. EVID. CODE § 604, Law Revision Commission Comment (West 1995).

47. CAL. EVID. CODE § 604, Law Revision Commission Comment (West 1995).

48. CAL. EVID. CODE § 605 (West 1995).

49. *Id.*

50. *Id.* § 606.



certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof.<sup>51</sup>

Section 115 of the Evidence Code establishes the quantum of proof necessary to overcome a presumption affecting the burden of proof.<sup>52</sup> Generally, issues of fact are determined by a preponderance of the evidence.<sup>53</sup> Clear and convincing proof is a higher standard that requires a finding of high probability, evidence "so clear as to leave no substantial doubt."<sup>54</sup> The highest requisite degree of proof is proof beyond a reasonable doubt, applicable to criminal cases involving deprivation of important personal rights.<sup>55</sup> Exceptions to the preponderance of the evidence standard in civil cases have been developed by case law, as the degree of proof required is traditionally left to the judiciary to resolve.<sup>56</sup> The degree of proof applicable to a question of fact reflects the degree of confidence society requires in the outcome.<sup>57</sup> The burden of proof serves to allocate the risk of error between the parties and, thus, varies in proportion to the gravity of the consequences of an erroneous determination.<sup>58</sup> The preponderance of the evidence standard results in the relatively equal sharing of the risk of error,<sup>59</sup> and the imposition of any higher burden of proof demonstrates a preference for the interests of one of the parties.<sup>60</sup> Generally, facts are subject to a higher burden of proof only if particularly important individual interests are at stake.<sup>61</sup> If the economic interests are opposite but equal, the parties should share the risk of error relatively equally; therefore, the preponderance of the evidence standard is appropriate.<sup>62</sup>

## B. Evidence Code Section 662—Title Presumption

The general title presumption<sup>63</sup> recognized in California cases was codified in 1967 by the California Legislature with the enactment of section 662 of the Evidence Code.<sup>64</sup> "The owner of the legal title to property is presumed to be the

51. CAL. EVID. CODE § 606, Law Revision Commission Comment (West 1995).

52. See CAL. EVID. CODE § 502 (West 1995) (requiring the court to instruct the jury as to which party bears the burden of proof and the requisite quantum of evidence necessary to overcome the burden of proof).

53. *Id.* § 115; *In re Marriage of Peters*, 61 Cal. Rptr. 2d 493, 494 (Cal. Ct. App. 1997).

54. *Petition of Jost*, 256 P.2d 71, 74 (Cal. Dist. Ct. App. 1953); *Peters*, 61 Cal. Rptr. 2d at 495.

55. *Peters*, 61 Cal. Rptr. 2d at 495; 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *Burden of Proof and Presumptions*, § 162 (3d ed. 1986); see CAL. PENAL CODE § 1096 (West 1995) (placing upon the state the burden of proving a defendant in a criminal action guilty beyond a reasonable doubt).

56. See generally *Weiner v. Fleishman*, 816 P.2d 892 (Cal. 1991); *People v. Burnick*, 535 P.2d 352, 357 (Cal. 1975); *Peters*, 61 Cal. Rptr. 2d at 495.

57. *Weiner*, 816 P.2d at 898; *Peters*, 61 Cal. Rptr. 2d at 495.

58. *Weiner*, 816 P.2d at 898; *Burnick*, 535 P.2d at 354; *Peters*, 61 Cal. Rptr. 2d at 495.

59. *Weiner*, 816 P.2d at 898-99; *Peters*, 61 Cal. Rptr. 2d at 495.

60. *Weiner*, 816 P.2d at 899; *Peters*, 61 Cal. Rptr. 2d at 495.

61. *Weiner*, 816 P.2d at 898; *Peters*, 61 Cal. Rptr. 2d at 495.

62. See *Peters*, 61 Cal. Rptr. 2d at 495 (determining the date of separation for the purpose of property classification in a marital dissolution proceeding).

63. See *supra* text accompanying notes 25-37.

64. 7 CAL. L. REVISION COMM'N REPORTS 1 (1965).

owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."<sup>65</sup> Section 662 is a presumption affecting the burden of proof that promotes the public policy in favor of the stability of title to property.<sup>66</sup> Historically, society and the courts have been reluctant to tamper with duly executed instruments and documents of legal title.<sup>67</sup> Section 662 is concerned primarily with the stability of title, an important legal concept that protects parties to real property transactions, as well as creditors,<sup>68</sup> and the reason for the heightened evidentiary standard of clear and convincing proof.<sup>69</sup> Therefore, absent a contrary statute, record title is usually determinative as to the characterization of property unless ownership interests are otherwise determined by sufficient proof.

### C. Family Code—Title Presumptions

Under California community property law, the property of a married couple is characterized either as separate property, community property, or quasi-community property.<sup>70</sup> Separate property includes property owned before marriage, property acquired during marriage by gift or inheritance, income generated by separate property,<sup>71</sup> and post-separation earnings and accumulations.<sup>72</sup> Absent a valid agreement between the parties<sup>73</sup> or a statute providing otherwise, all property, real or personal, wherever situated, acquired during marriage by a married person while domiciled in California is community property.<sup>74</sup> During marriage, the respective interests of the husband and wife are present, existing, and equal.<sup>75</sup> Each spouse has a one-half interest in the whole of the community property with equal rights of management and control and subject to interspousal fiduciary duties.<sup>76</sup> However, neither spouse has any interest in the separate property of the other unless otherwise provided by statute.<sup>77</sup>

65. CAL. EVID. CODE § 662 (West 1995).

66. *Id.* § 605.

67. *Weiner v. Fleishman*, 816 P.2d 892, 899 (Cal. 1991).

68. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 684 (Cal. Ct. App. 1995).

69. *Spaulding v. Jones*, 256 P.2d 637, 639-40 (Cal. Dist. Ct. App. 1953).

70. *See supra* text accompanying notes 2-5.

71. CAL. FAM. CODE § 770(a) (West 2004).

72. *Id.* §§ 771(a), 772.

73. *Id.* §§ 1610-1620 (providing for premarital agreements between prospective spouses affecting the parties' present and future property rights and other matters incident to the marital relationship); *id.* §§ 850-853 (providing for the transmutation of property by married persons affecting marital rights and obligations incident to an ongoing marriage).

74. *Id.* § 760. Quasi-community property, property acquired while domiciled outside of California that would have been otherwise community property, is also included in the community estate. *Id.* §§ 125, 2550.

75. *Id.* § 751.

76. *Id.* §§ 752(b), 1100-1103.

77. *Id.* § 752.

Between husband and wife, title to co-owned property may be held as joint tenants, tenants in common, community property, or community property with right of survivorship.<sup>78</sup> To create a joint tenancy, the governing instrument must expressly declare that the owners hold in joint tenancy,<sup>79</sup> with the distinguishing incident of ownership of a joint tenancy being the right of survivorship.<sup>80</sup> Concurrent ownership in property that is not held as joint tenancy or community property, or acquired in partnership for partnership purposes, is tenancy in common.<sup>81</sup> Community property ownership cannot coexist in the same property with joint tenancy or tenancy in common forms of ownership,<sup>82</sup> and joint tenancy and tenancy in common represent forms of separate property ownership.<sup>83</sup> Applicable to instruments created after July 1, 2001, married persons may take title to property as community property with right of survivorship.<sup>84</sup> Right of survivorship must be expressly designated in the transfer documents, and both spouses must affirmatively indicate by a statement signed or initialed by each spouse an intention to take title as community property with right of survivorship.<sup>85</sup> This new form of title was enacted by the California Legislature to provide to married persons the probate avoidance benefits of joint tenancy and the tax benefits of community property.<sup>86</sup>

#### *D. Family Code—Married Woman's Special Presumption*

In certain instances, the general title presumption<sup>87</sup> is supplanted by the statutory characterization presumptions. The Married Woman's Special Presumption was first enacted in 1889<sup>88</sup> and applies to all property, real and personal, acquired by a married woman by written instrument before 1975.<sup>89</sup> If the wife is sole record title holder, a conclusive presumption arises as to a person dealing with the wife in good faith and

78. *Id.* § 750.

79. CAL. CIV. CODE § 683 (West Supp. 2005).

80. *Siberell v. Siberell*, 7 P.2d 1003, 1004 (Cal. 1932).

81. CAL. CIV. CODE § 686 (West 1984).

82. *Estate of Mitchell*, 91 Cal. Rptr. 2d 192, 196-97 (Cal. Ct. App. 1999).

83. *In re Marriage of Hilke*, 841 P.2d 891, 894 (Cal. 1992); *In re Marriage of Lucas*, 614 P.2d 285, 288 (Cal. 1980); *Socol v. King*, 223 P.2d 627, 629 (Cal. 1950).

84. CAL. CIV. CODE § 682.1(a) (West Supp. 2005).

85. *Id.*

86. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2913, at 1 (Aug. 24, 2000). If at least one-half of the whole of a community property asset is includible in determining the value of the decedent's gross estate, the entire basis of the community property asset held by the decedent and the surviving spouse receives a basis equal to the fair market value of the asset at the date of the decedent's death. As to an asset held as joint tenants with right of survivorship by husband and wife, only one-half of the basis of the asset receives a fair market value at the date of the decedent's death basis. For the year 2010, the basis of property acquired from a decedent will be the lesser of the decedent's basis or the fair market value of the asset at the date of the decedent's death. The new provision allows for basis increases, but the increases apply to the entire basis of community property rather than one-half of the surviving spouse's interest if the asset was held as joint tenancy with right of survivorship. See I.R.C. §§ 1016, 1022, 2040 (West 2005).

87. See *supra* text accompanying notes 25-37.

88. 1889 Cal. Stat. ch. 219, at 328.

89. CAL. FAM. CODE § 803 (West 2004).

for valuable consideration,<sup>90</sup> and a rebuttable presumption arises as to others,<sup>91</sup> that the property is the separate property of the wife.<sup>92</sup> Title taken by a married woman with any other person establishes a rebuttable presumption that the wife's separate property interest is held as tenancy in common, unless a different intention is expressed in the instrument.<sup>93</sup> A rebuttable presumption that the property is community property arises if a married woman and her husband take title to property by an instrument describing them as "husband and wife," unless a different intention is expressed in the instrument.<sup>94</sup> The public policy supporting the Married Woman's Special Presumption was the protection of a married woman's title to property, and the persons dealing with her, at a time, prior to 1975, when the husband had exclusive management and control of the community property.<sup>95</sup> The presumption is based on the belief that the husband having exclusive management and control intended to gift his share of the community property to his spouse by placing title in her name; therefore, evidence that the property was purchased with community funds is not sufficient to rebut the gift presumption.<sup>96</sup> The Married Woman's Special Presumption is considered a presumption affecting the burden of proof and rebuttable only by clear and convincing evidence.<sup>97</sup>

#### *E. Family Code—Concurrent Estates*

Upon dissolution of a marriage or death of a spouse, or for the purposes of the satisfaction of creditor's interests, form of title is an important consideration in the characterization of property as either separate or community. Although the general community property presumption<sup>98</sup> can be overcome by tracing to separate property funds,<sup>99</sup> tracing is not sufficient to overcome the general title presumption,<sup>100</sup> as the form of title is an affirmative act of specifying ownership interest in property.<sup>101</sup> The general title presumption as codified in section 662 of the Evidence Code promotes the stability of title to property<sup>102</sup> and can be

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90. *Id.*

91. *Id.* § 803(a).

92. *Id.* § 803.

93. *Id.* § 803(b).

94. *Id.* § 803(c).

95. *In re Marriage of Ashodian*, 157 Cal. Rptr. 555, 558 (Cal. Ct. App. 1979). See generally CAL. FAM. CODE §§ 1100-03 (West 2004) (establishing equal management and control of community property as between spouses after 1974).

96. *Holmes v. Holmes*, 150 P. 793, 794 (Cal. Dist. Ct. App. 1915).

97. *Ashodian*, 157 Cal. Rptr. at 558 (referring to the Married Woman's Special Presumption as "the separate property presumption").

98. See *supra* text accompanying notes 2-24.

99. *Wilson v. Wilson*, 172 P.2d 568, 572 (Cal. Dist. Ct. App. 1946).

100. See *supra* text accompanying notes 25-37.

101. *In re Marriage of Lucas*, 614 P.2d 285, 288 (Cal. 1980).

102. CAL. EVID. CODE § 605 (West 1995).

rebutted only by clear and convincing proof.<sup>103</sup> Because the legal incidents of the forms of title are different, California courts have held that the different forms of ownership cannot co-exist in the same item of property.<sup>104</sup> Nevertheless, without understanding the legal consequences, many spouses acquire property with separate or community funds but are encouraged to take title as joint tenants in order to avoid probate.<sup>105</sup>

The characterization of property held in joint tenancy acquired with funds of an inconsistent character has generated extensive litigation with the courts attempting to define the presumption arising from the form of title and the evidence necessary to rebut the presumption. The California Legislature addressed this uncertainty, and attempted to more closely match the intent and assumptions of spouses, by enacting, and later refining, a statutory community property presumption.<sup>106</sup> The statutory community property presumption was first enacted in 1965 and provided, for the purpose of division of the property upon divorce or legal separation only, a single family residence acquired by a husband and wife during marriage as joint tenants was community property.<sup>107</sup>

In *In re Marriage of Lucas*,<sup>108</sup> the California Supreme Court determined the separate property and community property interests in a single-family residence that was acquired during marriage with both separate property and community property with title taken in joint tenancy.<sup>109</sup> Pursuant to the statutory community property presumption, a residence held in joint tenancy was community property for the purpose of division upon dissolution of the marriage.<sup>110</sup> The California Supreme Court held that a presumption arising from the form of title can be overcome by the separate property proponent only with evidence that the spouses understood or intended that a separate property interest was being created.<sup>111</sup> Without such an understanding or agreement, either oral or written, the title presumption is not overcome, and a gift to the community is presumed.<sup>112</sup> As a result, the separate property proponent does not have either an ownership interest in the property or a right of reimbursement.<sup>113</sup> The act of taking title in joint form is inconsistent with the intent to preserve a separate property interest and presuming that the specified ownership interest is intended best protects the

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103. *Id.* § 662.

104. *Siberell v. Siberell*, 7 P.2d 1003, 1005 (Cal. 1932); *Tomaier v. Tomaier*, 146 P.2d 905, 907 (Cal. 1944); *Gudelj v. Gudelj*, 259 P.2d 656, 662 (Cal. 1953).

105. *Lucas*, 614 P.2d at 288; see FINAL REP. OF ASSEM. INTERIM COM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS (1965) pp. 121-122, 2 Appen. to Assem. J. (1965 Reg. Sess.).

106. *Lucas*, 614 P.2d at 288; see Review of Selected 1965 Code Legislation (Cont. Ed. Bar) pp. 40-41. The Legislature did not indicate an intent to change the rules regarding the strength and type of evidence necessary to overcome the general title presumption. FINAL REP. OF ASSEM. INTERIM COM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS (1965) pp. 124-25.

107. CAL. FAM. CODE §§ 2580-2581 (West 2004).

108. 614 P.2d 285 (Cal. 1980).

109. *Id.*

110. CAL. FAM. CODE §§ 2580-81 (West 2004).

111. *Lucas*, 614 P.2d at 289.

112. *Id.*

113. *Id.*

expectations of the parties.<sup>114</sup> If the separate property proponent is successful in rebutting the title presumption, the separate property proponent acquires a proportionate ownership interest in the residence.<sup>115</sup>

The California Supreme Court precluded the recognition of the separate property contribution to the acquisition of community property unless the separate property proponent could show mutual agreement that the contribution was not intended as a gift.<sup>116</sup> The California Legislature responded quickly to overrule *Lucas*. Effective after 1983, for the purpose of division of property upon marital dissolution or legal separation only, the statutory community property presumption was expanded to encompass all property acquired by spouses during marriage held in joint tenancy form.<sup>117</sup> The legislation stated that this presumption is a presumption affecting the burden of proof and could be rebutted only by either a clear statement in the deed, or a written agreement by the parties, stating the property is wholly or partially separate property.<sup>118</sup> Neither tracing, nor an oral or implied agreement, is sufficient to rebut the presumption.<sup>119</sup> In dividing the community estate, a new section was enacted giving the separate property proponent the right to reimbursement for separate property contributions toward the acquisition of community property if traceable to a separate property source unless the right to reimbursement is waived in a written waiver.<sup>120</sup> The section creates an absolute right to reimbursement,<sup>121</sup> which arises regardless of whether the property was presumed community property on the basis of the statutory community property presumption or otherwise characterized as community property.<sup>122</sup> The amount of reimbursement is limited to the amount of the separate property contributions used for a down payment, payments for improvements, and payments of principal on debt incurred to acquire or improve the community property.<sup>123</sup> However, there is no reimbursement for payments of interest on debt

114. *Id.*

115. *Id.* at 289-90. If an agreement or understanding preserving the separate property interest is evidenced, the proper method of calculating the separate property interest is the formula established in *In re Marriage of Aufmuth*, 152 Cal. Rptr. 668 (Cal. Ct. App. 1979).

116. 16 CAL. L. REVISION COMM'N REPORTS 2165 (1982); 1983-84 Sen. J. 4866.

117. CAL. CIV. CODE § 4800.1 (West 1984).

118. *Id.* § 4800.1(a)-(b).

119. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 681 (Cal. Ct. App. 1995).

120. CAL. FAM. CODE § 2640(b) (West 2004) (formerly CAL. CIV. CODE § 4800.2).

121. *In re Marriage of Carpenter*, 122 Cal. Rptr. 2d 526, 528 (Cal. Ct. App. 2002).

122. CAL. FAM. CODE § 2640(a) (West 2004) (formerly CAL. CIV. CODE § 4800.2).

123. An unresolved issue is whether the right of reimbursement under section 2640 of the Family Code is limited to cash contributions of separate property toward the acquisition of community property or includes a reimbursement for separate contributions of real property effectively transmuted during marriage, even though the result renders the community property presumption under section 2581 of the Family Code meaningless under the circumstances. See *In re Marriage of Weaver*, 26 Cal. Rptr. 3d 121, 127-30 (Cal. Ct. App. 2005) (allowing a reimbursement for the value of the separate real property at the time of the transmutation); Cf. Mary Charles McRea, *Contribution or Transmutation? The Conflicting Provisions of Sections 852 and 2640 of the California Family Code*, 49 UCLA L. Rev 1187 (2002) (allowing a reimbursement for real property validly transmuted during marriage undermines the effectiveness of a transmutation under section 852 of the Family Code).

or payments made for maintenance, insurance, or real property taxes on the community property, and the reimbursement recovery is without interest.<sup>124</sup> Recently, this section has been amended to give the separate property proponent a similar right to reimbursement for separate property contributions toward the acquisition of the other spouse's separate property during marriage unless there is a transmutation in writing or a written waiver of the right to reimbursement.<sup>125</sup> Effective after 1986, the statutory community property presumption was further extended to include all property held in joint title, including tenancy in common, joint tenancy, and community property.<sup>126</sup> The provisions containing the statutory community property presumption and the right to reimbursement are now found in sections 2580, 2581, and 2640 of the Family Code.<sup>127</sup> Although intended to apply retroactively,<sup>128</sup> the California Supreme Court has refused to apply these provisions retroactively if a vested property interest is thereby impaired.<sup>129</sup>

If property acquired before marriage is titled as separate property and during marriage community contributions are made toward the acquisition of the property, the community estate acquires a proportionate ownership interest in the property.<sup>130</sup> With a pro tanto ownership interest, the community estate can participate in any appreciation in the value of the property prior to dissolution of the marriage. In *In re Marriage of Moore*, the California Supreme Court established the formula to be used in apportioning the value of the property between the community estate and the separate estate.<sup>131</sup> The California Supreme Court also determined that only payments towards the purchase price of the property generate an ownership interest and not amounts paid for interest on acquisition debt, property taxes, or insurance.<sup>132</sup> In *Moore*, the role of the presumption that the community property contribution is a gift from one spouse to the spouse holding separate title was not resolved; however, the weight of subsequent authority holds that the gift presumption does not defeat apportionment.<sup>133</sup>

124. CAL. FAM. CODE § 2640(a) (West 2004). The amount reimbursed also will not exceed the net value of the property at the time of the division.

125. *Id.* § 2640(c). Effective January 1, 2005. Stats 2004, ch. 119 (SB 1407).

126. *Id.* § 2581 (formerly CAL. CIV. CODE § 4800.1 (West 1984)).

127. *Id.* §§ 2580, 2581, 2640.

128. *Id.* § 2580.

129. *In re Marriage of Buol*, 705 P.2d 354, 358 (Cal. 1985) (holding Family Code section 2581, formerly Civil Code section 4800.1, could not be applied retroactively); *In re Marriage of Heikes*, 899 P.2d 1349, 1358 (Cal. 1995) (holding Family Code section 2640, formerly Civil Code section 4800.2, could not be applied retroactively). *But see In re Marriage of Hilke*, 841 P.2d 891, 895-96 (Cal. 1992) (holding Family Code section 2581, formerly Civil Code section 4800.1, could be applied retroactively).

130. *In re Marriage of Moore*, 618 P.2d 208, 210 (Cal. 1980); *In re Marriage of Marsden*, 181 Cal. Rptr. 910, 915-16 (Cal. Ct. App. 1982).

131. *Moore*, 618 P.2d at 211; *Marsden*, 181 Cal. Rptr. at 915-16 (establishing the calculation method for a before marriage purchase with pre-marriage appreciation); *In re Marriage of Lucas*, 614 P.2d 285, 289-90 (Cal. 1980) (approving the calculation method established by *In re Marriage of Aufmuth* for a purchase during marriage).

132. *Moore*, 618 P.2d at 211; see William A. Reppy, Jr., *Acquisitions with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 IDAHO L. REV. 965, 998-1029 (1995).

133. HOGOBOOM & KING, *supra* note 20, § 8.311. In *Moore*, the California Supreme Court left

With regard to community funds used to improve the separate property of one spouse, courts generally have not allowed the community estate to acquire an ownership interest in the asset improved.<sup>134</sup> Courts reached this result applying the common law Doctrine of Merger, whereby improvements become part of the underlying real property.<sup>135</sup> If a husband used community funds to improve his wife's separate property, a gift to the wife of the husband's interest in the community property was presumed.<sup>136</sup> If an agreement to reimburse the community estate existed, the community was reimbursed but the recovery was limited to the amount expended.<sup>137</sup> If the husband used community funds to improve property titled in his name alone, a gift was not be presumed.<sup>138</sup> Unless the wife consented to the use of community funds to improve the husband's separate property, recoupment by the community estate was necessary in order to avoid constructive fraud by the husband.<sup>139</sup> As a result, the community was entitled to reimbursement of the amount expended or the value added, whichever was greater.<sup>140</sup> The pre-1975 cases addressing this issue were premised on the fact that the husband had exclusive management and control over the community estate.<sup>141</sup> With equal management and control,<sup>142</sup> the basic rules remain; however, both spouses are put in the position of the husband.<sup>143</sup> Recent cases have discredited the gift presumption and have allowed reimbursement for community funded improvements to one spouse's separate property. Some cases have even advocated a pro tanto interest where community funds are used to make capital improvements to a spouse's separate property to the extent the community funded improvements enhance the value of the property.<sup>144</sup> If the improvements do not enhance the value of the property, however, the community does not acquire a pro tanto interest but only a right to reimbursement.<sup>145</sup>

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unresolved the role of the gift presumption in the apportionment process. Arguably, the spouse alleging the community property interest must overcome the presumption that the community payments were a gift to the other spouse. *Id.*; see Reppy, Jr., *supra* note 132, at 979-98.

134. *In re Marriage of Warren*, 104 Cal. Rptr. 860 (Cal. Ct. App. 1972); *In re Marriage of Jafeman*, 105 Cal. Rptr. 483 (Cal. Ct. App. 1972).

135. *Warren*, 104 Cal. Rptr. at 860 n.1 (noting that the merger rule of fixtures vests title to the improvement in the landowner).

136. *Id.* at 862; *Jafeman*, 105 Cal. Rptr. at 491.

137. *Warren*, 104 Cal. Rptr. at 862.

138. *Id.* at 863; *Jafeman*, 105 Cal. Rptr. at 491.

139. *Warren*, 104 Cal. Rptr. at 863; *Jafeman*, 105 Cal. Rptr. at 491.

140. *Warren*, 104 Cal. Rptr. at 863.

141. *Id.*

142. CAL. FAM. CODE §§ 1100, 1102 (West 2004).

143. *In re Marriage of Frick*, 226 Cal. Rptr. 766, 779 (Cal. Ct. App. 1986).

144. See *Bono v. Clark*, 128 Cal. Rptr. 2d 31, 44 (Cal. Ct. App. 2002) (applying a modified version of the *Moore/Marsden* formula in determining the proportionate interests).

145. *Id.* at 45; see Reppy, Jr., *supra* note 132, at 1029-44.



## V. TRANSMUTATIONS

A. *In General*

A transmutation is an interspousal transfer or agreement that results in a change in the character of property.<sup>146</sup> An effective transmutation can be made with or without consideration and allows spouses to change the character of property from community property to separate property, separate property to community property, or separate property of one spouse to the separate property of the other spouse.<sup>147</sup> To effect a transmutation prior to 1985, the applicable statute provided simply “[e]ither husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.”<sup>148</sup> Under this provision, no particular formalities were required except that the agreement be fair and based on full disclosure of relevant facts.<sup>149</sup> A valid transmutation could be made by written or oral agreement,<sup>150</sup> with the mutual consent of the parties constituting sufficient consideration to support the transmutation,<sup>151</sup> and could be established merely by presenting substantial evidence of an implied agreement between the parties to alter the character of the property.<sup>152</sup> The acts and conduct of the parties in dealing with the property could establish an oral agreement,<sup>153</sup> and the testimony of one of the spouses constituted sufficient proof that such an oral agreement existed.<sup>154</sup> Nevertheless, the unilateral belief or understanding of one of the spouses alone did not constitute substantial evidence of an implied agreement to alter the character of property.<sup>155</sup>

In 1984, the California Legislature enacted provisions requiring post-1984 transmutations be supported in writing by the spouse whose interest in the property is adversely affected.<sup>156</sup> Section 852(a) of the Family Code states that “[a] transmutation of real or personal property is not valid unless made in writing

146. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 683 (Cal. Ct. App. 1995). Spouses’ property rights, as prescribed by statute, may be altered by a premarital agreement or marital property agreement. CAL. FAM. CODE § 1500 (West 2004).

147. CAL. FAM. CODE § 850 (West 2004).

148. CAL. CIV. CODE § 5103 (now Family Code § 721).

149. *Estate of Wilson*, 134 Cal. Rptr. 749, 755 (Cal. Ct. App. 1976).

150. *In re Wieling’s Estate*, 230 P.2d 808, 810 (Cal. 1951). Nevertheless, a writing was required to transmute separate or community property into joint tenancy. *See* CAL. CIV. CODE § 683 (West Supp. 2005) (requiring an express declaration of joint tenancy in the transfer instrument).

151. *Wilson*, 134 Cal. Rptr. at 755.

152. *In re Marriage of Jafeman*, 105 Cal. Rptr. 483, 492 (Cal. Ct. App. 1972); *Kenney v. Kenney*, 30 P.2d 398, 399 (Cal. 1934).

153. *In re Raphael’s Estate*, 206 P.2d 391, 395 (Cal. Dist. Ct. App. 1949); *Kenney*, 30 P.2d at 399.

154. *Raphael’s Estate*, 206 P.2d at 395; *Kenney*, 30 P.2d at 399.

155. *Jafeman*, 105 Cal. Rptr. at 492-93; *Gudelj v. Gudelj*, 259 P.2d 656, 662 (Cal. 1953); *In re Marriage of Weaver*, 224 Cal. App. 3d 478, 491 (Cal. Ct. App. 1990).

156. 1984 Cal. Stat., ch. 1733, *enacting* CAL. CIV. CODE §§ 5110.710-730, *recodified* as CAL. FAM. CODE §§ 850-853.

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 California Legislature enacted section 852(a) to impose formalities on interspousal transmutations in order to provide certainty in the determination of whether a transmutation has in fact occurred.<sup>157</sup> The California Law Revision Commission (Commission) observed that “the rule of easy transmutation has also generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an ‘agreement’ or even to commit perjury by manufacturing an oral or implied transmutation.”<sup>158</sup> Although the California Legislature continued to recognize informal transmutations for certain personal property gifts between spouses,<sup>159</sup> the new legislation required other transmutations to be made “in writing by an express declaration.”<sup>160</sup>

In *Estate of MacDonald*,<sup>161</sup> the California Supreme Court considered the type of writing necessary to satisfy the “by express declaration” requirement of section 852(a) of the Family Code. The property at issue in *MacDonald* was a distribution from the husband’s pension plan in which the wife had an undisputed community property interest. The husband placed the distribution in three IRA accounts held in his name alone, with the designated beneficiary of each IRA account being a revocable living trust that left the bulk of the corpus to his children from a prior marriage. The IRA account agreements contained “consent paragraphs” that a participant’s spouse must sign if the spouse is not designated as a sole primary beneficiary. The wife signed the consent paragraphs of all three IRA accounts. Following the wife’s death, the estate of the wife brought suit to establish her community property interest in the IRA accounts. The California Supreme Court found that the consent agreements did not effect a transmutation of the wife’s community property interest in the pension funds into the husband’s separate property. The California Supreme Court held that “a writing signed by the adversely affected spouse is not an ‘express declaration’ for the purposes of section [852(a)] unless it contains language which expressly states that the characterization of ownership of the property is being changed.”<sup>162</sup> The language

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157. *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM’N REPORTS 224-225 (1984). As to third parties, a transmutation of real property is not effective without notice unless recorded. CAL. FAM. CODE § 852(b) (West 2004).

158. *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM’N REPORTS 214 (1984).

159. CAL. FAM. CODE § 852(c) (formerly CAL. CIV. CODE § 5110.730). The formalities of section 852(a) of the Family Code do not apply to gifts between spouses of clothing, jewelry, or other tangible articles of a personal nature used solely or principally by the spouse to whom the gift is made unless the property is substantial in value taking into account the circumstances of the marriage. *Id.*

160. *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM’N REPORTS 214 (1984); CAL. FAM. CODE § 852(c) (formerly CAL. CIV. CODE § 5110.730).

161. 794 P.2d 911 (Cal. 1990); see Susan A. Channick, *Estate of MacDonald: A Case For Logical Over Literal Statutory Constriction*, 28 IDAHO L. REV. 919 (1991-1992) (analyzing the decision with respect to California law).

162. *MacDonald*, 794 P.2d at 913-18.

of the writing must indicate that the adversely affected spouse intended and understood the legal effect of the transmutation in altering the character of, and ownership interest in, the property.<sup>163</sup> Further, the California Supreme Court construed section 852(a) of the Family Code to preclude reference to extrinsic evidence in establishing a transmutation.<sup>164</sup> The California Supreme Court concluded that to require more than just a writing, but a writing that expressly states that the character of the property is being altered, gives significance to the words “express declaration” in section 852(a)<sup>165</sup> and is consistent with the California Supreme Court’s earlier interpretation of section 683 of the Civil Code which defines joint tenancy and the methods of creating a joint tenancy.<sup>166</sup> The California Supreme Court also based its decision on the California Legislature’s intent to create a writing requirement that enables courts to validate transmutations without resort to extrinsic evidence and, thus, discourage fraud and the proliferation of litigation.<sup>167</sup> Following *MacDonald*, California appellate courts have required a writing that contains on its face a clear and unambiguous expression of intent to transfer an interest in property, independent of extrinsic evidence, to effect a transmutation pursuant to section 852(a) of the Family Code.<sup>168</sup>

As interpreted by the California Supreme Court in *MacDonald*, the requirement of a written express declaration for a valid transmutation under section 852(a) of the Family Code has placed the evidentiary value of written title in question if property is acquired with funds of a different character. Two recent California appellate court decisions have considered the language necessary to effect a transmutation of titled property. In *In re Marriage of Barneson*, the husband directed various brokerage houses, in writing, to

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163. *Id.* at 918.

164. *Id.* at 919.

165. *Id.* at 918.

166. *Id.* To create a joint tenancy, section 683(a) of the Civil Code requires the instrument to “expressly” declare in the transfer to be in joint tenancy. *Id.*

167. *Id.* at 919; *see id.* at 911 n.6 (citing “easy transmutation” cases that the California Legislature intended to overturn). *See generally* Channick, *supra* note 161; Jerry A. Kasner, *Donative and Interspousal Transfers of Community Property in California: Where We Are (or Should Be) After MacDonald*, 23 PAC. L. J. 361 (1992); Kim M Seavy, *Formalizing Interspousal Transfers of Real and Personal Property In California*, 30 SAN DIEGO L. REV. 425 (1993).

The California Legislature responded to Estate of MacDonald with section 853 of the Family Code and sections 5002 to 5032 of the California Probate Code (“Probate Code”), 1992 Cal. Stat., ch. 51. Pursuant to these sections, a non-probate beneficiary designation that does not satisfy section 852(a) of the Family Code and, therefore, does not effect a present transmutation, nevertheless, constitutes an effective consent to a beneficiary designation that remains revocable during the life of the spouses but becomes irrevocable upon the death of either spouse. *See* CAL. FAM. CODE § 853; CAL. PROB. CODE §§ 5003-5932.

168. *In re Marriage of Barneson*, 81 Cal. Rptr. 2d 726, 730-31 (Cal. Ct. App. 1999); *In re Marriage of Campbell*, 88 Cal. Rptr. 2d 580, 583-85 (Cal. Ct. App. 1999); Estate of Bibb, 104 Cal. Rptr. 2d 415, 419 (Cal. Ct. App. 2001). By requiring an express written declaration, the weight of authority holds that section 852(a) of the Family Code makes extrinsic evidence irrelevant and inadmissible as to the intent to transmute. HOGOBOOM & KING, *supra* note 20, § 8.478.

“transfer” certain stock certificates to his wife.<sup>169</sup> The First District concluded that the husband’s written instructions did not satisfy the requirement of a writing by “express declaration” pursuant to section 852(a) because the instructions did not unambiguously indicate that the character or the ownership of the property was being changed. “The term ‘transfer’ could refer to a change in ownership, it does not necessarily do so.”<sup>170</sup> The court was not swayed by the fact that the securities transfer met the procedural requirements of the Securities and Exchange Commission.<sup>171</sup> The wife also argued that section 662 of the Evidence Code required her husband to rebut the presumption of her ownership of the stock placed in her name by clear and convincing proof.<sup>172</sup> In rejecting this argument, the court reasoned that, if accepted, evidence of a transfer of legal title would necessarily demonstrate a valid transmutation pursuant to section 852(a) of the Family Code as interpreted by *MacDonald*<sup>173</sup> as the fact of the transmutation must be evidenced without resort to extrinsic evidence.<sup>174</sup> Relying on *In re Marriage of Haines*,<sup>175</sup> in which the Fourth District resolved the conflict between section 662 of the Evidence Code and the presumption of undue influence that arises when one spouse gains advantage over the other in an interspousal transaction,<sup>176</sup> the First District concluded that if a transmutation fails the *MacDonald* test, section 662 of the Civil Code does not apply.<sup>177</sup>

Like *Haines*, *MacDonald* was based in part on a policy of “assuring that a spouse’s community property entitlements are not improperly undermined.” . . . By analogy, the Evidence Code section 662 presumption of ownership should not be used to defeat the purposes of section 852, subdivision (a). As we have discussed, the direction to “transfer” an asset into a different name does not necessarily connote an intention to change beneficial ownership. In our view, the more specific rules governing transmutations of property in transactions between spouses should control over the more general presumption of ownership from title created by Evidence Code section 662.<sup>178</sup>

The First District in *Estate of Bibb*<sup>179</sup> divided the requirements for a valid transmutation under section 852(a) of the Family Code into two basic components: (1) a writing that satisfies the statute of frauds; and (2) an intent to

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169. *Barneson*, 81 Cal. Rptr. 2d at 728.

170. *Id.* at 726, 731-33.

171. *Id.* at 728.

172. *Id.* at 732; *see supra* text accompanying notes 63-69.

173. 794 P.2d 911 (Cal. 1990); *see supra* text accompanying notes 161-68.

174. *Barneson*, 81 Cal. Rptr. 2d at 733.

175. 39 Cal. Rptr. 2d 673 (Cal. Ct. App. 1995); *see infra* text accompanying notes 320-47.

176. *See infra* text accompanying notes 320-47.

177. *Barneson*, 81 Cal. Rptr. 2d at 733-34.

178. *Id.* at 733.

179. 104 Cal. Rptr. 2d 415 (Cal. Ct. App. 2001).

transfer a property interest.<sup>180</sup> The court interpreted the California Supreme Court's holding in *MacDonald*<sup>181</sup> "to specifically require that a writing effecting a transmutation of property contain on its face a clear and unambiguous expression of intent to transfer an interest in the property, independent of extrinsic evidence."<sup>182</sup> The First District then found that a grant deed signed by the husband transferring his separate property interest in real property to himself and his wife as joint tenants was a writing satisfying the statute of frauds and, further, the use of the word "grant" showed an intent to transfer an interest in real property by the party adversely affected, thereby, satisfying the "express declaration" requirement of section 852(a).<sup>183</sup> However, a "DMV Registration Information" computer printout showing the change in registration of a Rolls Royce from the husband's name alone to the names of the husband or wife did not satisfy the "express declaration" requirement of section 852(a) of the Family Code. Although the form of the title created a presumptive joint tenancy under the California Vehicle Code,<sup>184</sup> the general title presumption created by the California Vehicle Code did not negate the requirements of section 852(a). As there was no evidence that the registration was "made, joined in, consented to, or accepted by" the husband, and the unsigned printout did not evidence a clear and unambiguous expression of the husband's intent to transfer an interest in the automobile, the Rolls Royce was not validly transmuted.<sup>185</sup>

In *In re Summers*,<sup>186</sup> the United States Ninth Circuit Bankruptcy Appellate Panel also addressed the issue of whether taking title to real property purchased with community funds as joint tenants satisfies the written express declaration requirement of section 852(a) of the Family Code.<sup>187</sup> The debtor and her husband purchased real property with community funds and community debt, and took title to the real property as joint tenants with their adult daughter.<sup>188</sup> The trustee in bankruptcy argued that the debtor and her husband had community property interests in the real property; therefore, it was included in the bankruptcy estate of the debtor.<sup>189</sup> The husband claimed that he held a joint tenancy interest in the real property with the debtor and his daughter and, as such, held a separate

180. *Bibb*, 104 Cal. Rptr. 2d at 419.

181. 794 P.2d 911 (Cal. 1990).

182. *Bibb*, 104 Cal. Rptr. 2d at 419.

183. *Id.* at 420; *see In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 683 (Cal. Ct. App. 1995) (concluding that a quitclaim deed satisfies the requirements of section 852(a) of the Family Code); *In re Marriage of Weaver*, 26 Cal. Rptr. 3d 121, 129 (Cal. Ct. App. 2005) (finding that a quitclaim deed sufficiently conveys in writing the intent to transmute separate property into community property).

184. CAL. VEH. CODE §§ 4150.0, 5600.5 (West 2000).

185. *Bibb*, 104 Cal. Rptr. 2d at 421.

186. 278 B.R. 808 (B.A.P. 9th Cir. 2002).

187. *Id.* at 812.

188. *Id.* at 810.

189. *Id.* Property of the bankruptcy estate includes all interests of the debtor and the debtor's spouse in community property as of the commencement of the case. 11 U.S.C. § 541(a)(2).

property interest not included in the debtor's bankruptcy estate.<sup>190</sup> The court noted that a transmutation has been defined as "an interspousal transaction or agreement which works a change in the character of the property"<sup>191</sup> and that no California cases address the questions of when a transmutation occurs or when the requirements of section 852(a) must be met.<sup>192</sup> Examining the legislative history of section 852(a), the court observed that the purpose of the provision was to provide certainty as to whether a transmutation has occurred but nothing in the legislative history indicates an intent to change the rule that in acquiring property during marriage spouses can show their agreement to take property as joint tenants by taking title in joint tenancy form.<sup>193</sup> Using *Barneson* and *Bibb* as examples of cases applying section 852(a) of the Family Code to interspousal transfers,<sup>194</sup> the court concluded that the formalities of section 852(a) are applicable only to interspousal transactions and not to acquisitions of property by spouses from third parties as such an acquisition does not involve a change in the character of the property.<sup>195</sup>

If the trustee's theory were correct, then nearly every property transaction involving acquisitions of property during marriage would require compliance with section 852(a) in order to give effect to an intent of the parties that the acquired property should be held in some form other than community property. Thus, whenever spouses bought an automobile, the title would have to comply with the specificity requirements of section 852(a), if the spouses intended the automobile to be held other than as community property. There is no indication in the statute or the case law for such application of section 852(a).<sup>196</sup>

### B. Standard of Proof

The standard of proof applicable to a transmutation depends on whether the property is titled property,<sup>197</sup> whether the party alleging the transmutation is defending or contesting the form of title, and whether the party seeking to impose a higher standard of proof is the spouse who benefited from the transaction.<sup>198</sup> In

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190. *Summers*, 278 B.R. at 809.

191. *Id.* at 812.

192. *Id.* at 813.

193. CAL. FAM. CODE § 852(a), Law Revision Commission Comment (West 2004).

194. See *supra* text accompanying notes 169-85.

195. *Summers*, 278 B.R. at 813.

196. *Id.* Professor Grace Ganz Blumberg agrees with the result in *Summers* but would reach that result differently. Professor Blumberg believes that section 852(a) of the Family Code encompasses both transfers between spouses and spousal purchases from third parties and that its formalities apply any time spouses transmute, by agreement or transfer, the character of property. By joining together to take title to the property in joint tenancy, however, Professor Blumberg believes that in *Summers* the "express declaration" requirement of section 852(a) of the Family Code was satisfied by the spouses. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA, TEACHERS MANUAL 21 (4th ed., Aspen 1998).

197. See *supra* text accompanying notes 17-24 (discussing the standard of proof necessary to overcome the general community property presumption applicable to untitled property).

198. Stephen James Wagner, *Transmutations of Property*, 2004 CAL. FAM. L. MONTHLY 65, 71-72 (Apr. 2004).

*In re Marriage of Weaver*,<sup>199</sup> the disputed property was a residence owned by the wife and her parents as joint tenants prior to her marriage, and with the death of her parents during her marriage, the wife became sole legal and record owner of the property. The wife and her husband lived in the residence during their thirty-nine year marriage, and upon separation, the husband claimed that his wife had orally transmuted her separate property interest in the residence to community property.<sup>200</sup> As the claimed transmutation occurred prior to 1985,<sup>201</sup> the husband had only to prove an oral or written agreement or common understanding between them in order to establish a valid transmutation.<sup>202</sup> The trial court found, by a preponderance of the evidence, an oral transmutation had occurred.<sup>203</sup> The wife appealed contending that section 662 of the Evidence Code applied requiring clear and convincing evidence to rebut the title presumption, and the husband countered arguing that section 662 did not apply to marital disputes. On appeal, the Second District held that section 662 of the Evidence Code did apply to claimed transmutations in family law actions and that the holder of legal title to real property is the presumed owner of the full beneficial title rebuttable only by clear and convincing proof.<sup>204</sup> After noting that no decision had rejected the application of section 662 to family law disputes<sup>205</sup> and discussing two decisions in which section 662 was applied to non-marital confidential relationships,<sup>206</sup> the appellate court applied the higher evidentiary standard.<sup>207</sup> The Second District concluded that the wife was entitled to the protection of the higher burden of proof and the husband was required to establish his claim by clear and convincing evidence.<sup>208</sup>

In subsequent decisions, California appellate courts have failed to apply the higher standard of proof required by section 662 of the Evidence Code in determining the validity of transmutations in dissolution of marriage proceedings. In *In re Marriage of Haines*, the spouse defending the form of title benefited from the transmutation of the marital residence from joint tenancy to separate property.<sup>209</sup> The Fourth District did not disagree with the result in *Weaver*, but disagreed with the implied holding that section 662 is applicable to marital

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199. *In re Marriage of Weaver*, 273 Cal. Rptr. 696 (Cal. Ct. App. 1990).

200. *Id.* at 697-98.

201. CAL. CIV. CODE § 5110.730(a) (West 1984) (repealed and replaced by CAL. FAM. CODE § 852).

202. *See supra* text accompanying notes 146-55.

203. *Weaver*, 273 Cal. Rptr. at 697-98.

204. *Id.* at 699-700.

205. *Id.*

206. *Id.* at 700 (citing *Tannehill v. Finch*, 232 Cal. Rptr. 749 (Cal. Ct. App. 1986), involving a claim to property by an unmarried cohabitant and *Toney v. Nolder*, 219 Cal. Rptr. 497 (Cal. Ct. App. 1985), involving an alleged oral partnership agreement for the purchase of property between parties sharing a confidential relationship).

207. *Weaver*, 273 Cal. Rptr. at 700-01.

208. *Id.* at 702.

209. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 677-78 (Cal. Ct. App. 1995).

proceedings regardless of any conflict with section 721 of the Family Code.<sup>210</sup> Section 721 subjects spouses to the rules governing fiduciary relationships in transactions between themselves and, as a consequence of this fiduciary relationship, if one spouse obtains an advantage in a transaction with the other spouse, a presumption of undue influence arises and the burden is on the advantaged spouse to rebut the presumption by a preponderance of the evidence.<sup>211</sup> The Fourth District in *Haines* distinguished *Weaver* by noting that the “court used section 662 to protect the original character of the property from change rather than defend the character of the property after change.”<sup>212</sup> The Second District in *Weaver* required the oral agreement claimed by the husband transmuting the wife’s separate property into community property be tested by the clear and convincing standard of proof.<sup>213</sup> In *In re Marriage of Barneson*, the spouse arguing for the application of the higher evidentiary standard benefited from the transfer of title to stock from the separate property of the husband to her separate property.<sup>214</sup> The First District in *Barneson* refused to apply the presumption of ownership of section 662 of the Evidence Code to defeat the purposes of section 852(a) of the Family Code and held that, if the transaction does not meet the requirements of section 852(a) as interpreted by the California Supreme Court in *MacDonald*, the presumption of ownership of section 662 of the Evidence Code and higher standard of proof do not apply.<sup>215</sup>

### C. Exceptions to the Statute of Frauds

Since 1985, a valid transmutation must satisfy the statute of frauds;<sup>216</sup> nevertheless, until the recent California Supreme Court decision of *In re Marriage of Benson*, uncertainty existed as to whether the traditional exceptions to the statute of frauds, partial performance and promissory estoppel, applied to validate oral transmutations. In *In re Marriage of Campbell*,<sup>217</sup> the wife contributed separate property funds to the remodel of the couple’s residence that was the husband’s separate property. The wife claimed that she contributed the funds in reliance on the husband’s oral promise to place her name on the title to the property.<sup>218</sup> In a dissolution action, the trial court refused to consider extrinsic evidence to establish that the residence was orally transmuted to community property.<sup>219</sup> On appeal, the First District addressed the issue of whether extrinsic

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210. *Id.* at 688.

211. *See infra* text accompanying notes 293-319.

212. *Haines*, 39 Cal. Rptr. 2d at 688.

213. *Id.*

214. *In re Marriage of Barneson*, 81 Cal. Rptr. 2d 726, 728 (Cal. Ct. App. 1999).

215. *Id.* at 733-34; *see supra* text accompanying notes 169-77.

216. CAL. FAM. CODE §§ 851, 852(a) (West 2004).

217. *In re Marriage of Campbell*, 88 Cal. Rptr. 2d 580, 581-82 (Cal. Ct. App. 1999).

218. *Id.* at 582.

219. *Id.*



evidence, under the doctrine of promissory estoppel, may be considered to prove an oral transmutation.<sup>220</sup> The appellate court held that the requirement of a writing by “express declaration” of section 852(a) of the Family Code, as interpreted by California Supreme Court in *MacDonald*,<sup>221</sup> must contain clear and unambiguous language that the writer intended to effect a change in the ownership or character of property without the resort to extrinsic evidence.<sup>222</sup> The First District concluded that section 852(a) precludes the admission of extrinsic evidence to prove an oral transmutation of property between spouses.<sup>223</sup> “While *MacDonald* addressed the potential use of external evidence to construe a *written* transmutation, its reasoning would apply with even greater force to the creation of an oral transmutation.”<sup>224</sup>

The requirement of an express declaration in writing for a valid transmutation under section 852(a) of the Family Code<sup>225</sup> was declared mandatory by the court in *In re Marriage of Benson*.<sup>226</sup> In *Benson*, the issue before the court was whether the doctrines of partial performance and promissory estoppel provide exceptions to the writing requirement of section 852(a) as interpreted by the California Supreme Court in *MacDonald*.<sup>227</sup> In *Benson*, the husband was a truck driver who also operated a gumball business that generated a nominal amount of income, and the wife was a part-time nurse. During their marriage, the couple’s residence was deeded to an irrevocable trust of which the wife was the beneficiary and the wife’s father the trustee.<sup>228</sup> At trial, the husband testified that at the time the couple signed the deed transferring their seventy-two percent ownership interest in the residence to the wife’s trust, the wife orally agreed to waive any claim in the husband’s retirement funds or the gumball business in the event of divorce. The agreement was never memorialized in writing, and the wife testified that she did not recall any such agreement. At the time of the transfer, the residence had a value of \$400,000 to \$500,000, and the husband’s retirement assets had a value of approximately \$91,000.<sup>229</sup> The trial court found the husband’s testimony credible and awarded the wife the residence and the husband his retirement benefits.<sup>230</sup> Although an agreement to transmute property is required to be in writing, the trial court reasoned that the agreement might be taken out of the statute of frauds if a spouse substantially changes position in

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220. *Id.*

221. *See supra* text accompanying notes 161-68.

222. *Campbell*, 88 Cal. Rptr. 2d at 583.

223. *Id.* at 585.

224. *Id.* at 584.

225. *See supra* text accompanying notes 156-96.

226. 7 Cal. Rptr. 3d 905 (Cal. Ct. App. 2003), *rev’ d*, 116 P.3d 1152 (Cal. 2005).

227. *Id.*

228. *Id.* at 906-07.

229. *Id.* at 907.

230. *Id.*

reliance upon the oral agreement.<sup>231</sup> Relief may be granted in equity on the ground that a spouse may induce the full or partial performance of the other spouse, and to refuse relief constitutes a fraud upon the other spouse's rights.<sup>232</sup> The trial court concluded that equitable principles of estoppel and detrimental reliance applied.<sup>233</sup>

On appeal, the wife in *Benson* contended that the trial court erred in allowing extrinsic evidence of an oral transmutation agreement.<sup>234</sup> In affirming the trial court's decision, the Second District began its analysis with a discussion of the rationale for the 1984 legislation requiring a writing by "express declaration" for a valid transmutation of property<sup>235</sup> and of the well established case law interpreting section 852(a) of the Family Code to preclude the resort to extrinsic evidence in determining whether the formalities of the section are met.<sup>236</sup> Nevertheless, the appellate court observed that section 852(a) does not expressly prohibit the application of the traditional exceptions to the statute of frauds and the legislative history of section 852(a) indicates that the ordinary rules and formalities applicable to transfers of real property remain applicable to transfers of real property between spouses.<sup>237</sup> "In the absence of a clear legislative direction to the contrary, we conclude the doctrine of partial performance may be applied in proper cases and exempt oral marital transmutation agreements from the application of section 852(a)."<sup>238</sup> In countering the wife's suggestion that the trial court's holding undermined the writing requirement of section 852(a) of the Family Code, the Second District noted that California now requires clear and convincing proof in establishing an interspousal transmutation, citing *Weaver*,<sup>239</sup> and this higher standard of proof alleviates many of the problems of perjury.<sup>240</sup> Further, section 851 of the Family Code subjects transmutions to the law governing fraudulent transfers and thereby ensures that agreements between spouses will be carefully scrutinized to protect creditor rights.<sup>241</sup> Finally, section 721 of the Family Code subjects transactions between a husband and wife to the general rules governing fiduciary relationships and imposes a duty of the highest good faith and fair dealing.<sup>242</sup> "Sections 851, 721, and 852 work together to

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 908.

235. *Id.*

236. *Id.* at 908-09.

237. *Id.* at 909-10.

238. See *id.* at 911 (relying on *Hall v. Hall*, 271 Cal. Rptr. 773 (Cal. Ct. App. 1990), seeking to enforce an oral premarital agreement and *Marvin v. Marvin*, 557 P.2d 106, 115-116 (Cal. 1976), seeking to enforce an oral agreement between unmarried cohabitants).

239. *In re Marriage of Weaver*, 273 Cal. Rptr. 696, 700-01 (Cal. Ct. App. 1990); see *supra* text accompanying notes 199-208.

240. *Benson*, 7 Cal. Rptr. 3d at 908-09.

241. *Id.* at 911.

242. *Id.*

ensure the integrity of interspousal agreements as they relate to the affected spouses, creditors and third parties.”<sup>243</sup>

The issue of whether the traditional defenses to the statute of frauds apply to transmutations was before the California Supreme Court following its grant of review of *Benson*.<sup>244</sup> On appeal to the court, the husband conceded that the transmutation of his retirement benefits was never memorialized in writing; however, he argued that the writing requirement was unnecessary because his act of deeding the house to the trust constituted partial performance.<sup>245</sup> The wife argued that the court could not find a transmutation based solely on the testimony of the husband. The wife contended that the requirement under section 852(a) of an express written transmutation is absolute and not subject to an exception for partial performance.<sup>246</sup> The court utilized both the language of the statute and the interpretation of the language of the statute by courts to hold that section 852(a) of the Family Code “cannot be satisfied where there is no writing about the subject property at all, and where a transmutation would have to be inferred from acts surrounding the contract in dispute.”<sup>247</sup>

In reaching its holding, the court in *Benson* relied heavily on its discussion in *MacDonald* of the legislative history of section 852(a) of the Family Code. The *MacDonald* court discussed the Commission’s recommendation to the California Legislature for the adoption, in 1984, of section 852(a),<sup>248</sup> and the Commission’s conclusion that the “easy transmutation” rule lead not only to extensive litigation, but also encouraged spouses to change a passing comment into a transmutation or commit perjury by claiming an oral or implied transmutation existed when in fact there was no such agreement.<sup>249</sup> The court stated that section 852(a) was meant to serve two important goals.<sup>250</sup> First, section 852(a) was intended to increase certainty as to when a transmutation had occurred, and, second, the statute was to effectively overturn previous case law that did not require an express written transmutation.<sup>251</sup> The Commission’s report led to the court’s decision in *MacDonald* that section 852(a) disallows transmutations based on evidence, whether oral, behavioral, or documentary, that is easily manipulated and unreliable.<sup>252</sup> The *Benson* court noted that court decisions subsequent to *MacDonald* have closely followed its holding and have held that section 852(a) is not satisfied solely by one spouse’s detrimental reliance on an oral promise of the

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243. *Id.* at 911-12. Section 851 of the Family Code subjects transmutations to the laws governing fraudulent transfers.

244. *Id.* at 905; *see supra* note 226.

245. *In re Marriage of Benson*, 116 P.3d 1152, 1156 (Cal. 2005).

246. *Id.*

247. *Id.* at 1158.

248. *Id.* at 1157-58; *see supra* text accompanying notes 156-60.

249. *Id.* at 1159.

250. *Id.* at 1158.

251. *Id.*

252. *Id.*; *See supra* text accompanying notes 162-67.

other spouse to transmute property.<sup>253</sup> The *Benson* court stated that a contrary view would be opposite to the intent of the Legislature and threaten to recreate the “easy transmutation” rule that was repudiated with the enactment of section 852(a).<sup>254</sup>

The court in *Benson* addressed the husband’s claim that strict enforcement of section 852(a) of the Family Code is unnecessary as the fiduciary relationship between spouses requires them to act with “the highest good faith and fair dealing” in their relationship with one another.<sup>255</sup> The *MacDonald* court did not consider the effect of such language, as it was not added to the statute until after *MacDonald* was decided. The husband asserted that a failure to recognize his oral agreement would violate section 721(b) of the Family Code<sup>256</sup> because the wife would receive an unfair advantage if she retains the benefit of sole deed to the residence while he does not receive the orally agreed upon separate interest in his retirement accounts.<sup>257</sup> The court dismissed the husband’s claim as meritless. The husband could make this argument only if he were trying to undo a transmutation that was “so grossly one-sided as to be the product of undue influence under section 721(b),” but not to establish a transmutation that fails the requirements of section 852(a) as interpreted by the court in *MacDonald*.<sup>258</sup> The husband was not attempting to undo the deed to the wife of his interest in the residence as this issue was previously settled between the parties and dismissed by the trial court but, instead, was attempting to establish that a transmutation occurred as to her interest in his retirement benefits.<sup>259</sup> However, unless a transmutation satisfies the requirements of section 852(a) of the Family Code no basis exists for applying the presumption of undue influence under section 721(b) of the Family Code.

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253. See *id.* at 1158-1159 (citing Estate of Bibb, 104 Cal.Rptr.2d 415 (Ct. App. 2001) which held that a DMV printout changed vehicle registration, not ownership. Also citing *In re Marriage of Barneson*, 81 Cal.Rptr.2d 726 which held that written brokerage instructions changed possession, not ownership, of stock).

254. *Id.* at 1159.

255. *Id.* at 1161.

256. See CAL. FAM. CODE § 721(b) (West 2003) (“[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 . . .”).

257. *Benson*, 116 P.3d at 1161.

258. *Id.* at 1162.

259. *Id.* at 1161-62.

## VI. FIDUCIARY RELATIONSHIP BETWEEN SPOUSES

### A. *In General*

The fiduciary relationship between husband and wife arises as an issue in circumstances<sup>260</sup> involving the general presumption of a confidential relationship between husband and wife,<sup>261</sup> transactions between spouses,<sup>262</sup> the management and control of community property,<sup>263</sup> and post-separation duties.<sup>264</sup> The provisions of the Family Code codifying the fiduciary relationship between spouses, and the rights and remedies upon breach of the fiduciary relationship, are sections 721(b) (transactions between spouses), 1100(e) (management and control of community property), 1101 (remedies for breach of fiduciary duty), 2100 to 2113 (disclosure of assets and liabilities), 2120 to 2129 (relief from a judgment) and 2602 (remedies for misappropriation). The California Legislature enacted or strengthened many of these provisions in 1991 and 1992,<sup>265</sup> and the fiduciary relationship between spouses now continues until the date of distribution of assets and liabilities in dissolution of a marriage.<sup>266</sup> The California Legislature's intent in enacting the 1991 legislation was expressed as follows:

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.<sup>267</sup>

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260. See Stephan James Wagner, *Point of View, The Importance of Understanding Fiduciary Duties to Family Law Practitioners*, CAL. FAM. L. MONTHLY 134, 135 (June 2004).

261. See generally *Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 364 P.2d 247 (Cal. 1961); see generally *In re Marriage of Bonds*, 5 P.3d 815 (Cal. 2000).

262. CAL. FAM. CODE § 721 (West 2004); *Bonds*, 5 P.3d at 831.

263. CAL. FAM. CODE § 1100(e) (West 2004); *Vai*, 364 P.2d at 253.

264. CAL. FAM. CODE § 2100-2110 (West 2004).

265. See Stephan James Wagner, *Point of View, The Importance of Understanding Fiduciary Duties to Family Law Practitioners*, 2004 CAL. FAM. L. MONTHLY 134, 135 (June 2004) (summarizing the 1991 and 1992 legislation).

Family law was greatly affected in 1991 with the passage of SB 716 (Roberti), which amended what is now Fam. Code sections 721(b) and 1100(e) (fiduciary duty in the management and control of community property). In 1992, the Legislature passed and the governor signed into law AB 1396 (Speier) and AB 1437 (Speier), which enacted current Fam. Code section 2120 et seq. (set-aside statutes) and Fam. Code section 2100 et seq. (disclosure statutes), respectively, effective January 1, 1993.

*Id.*

266. CAL. FAM. CODE § 2102(a)-(b) (West 2004).

267. 1991 Cal. Stat. 1026, § 1; see *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 684 n.10 (Cal. Ct. App. 1995) (tracing the history of Family Code section 721).

In marriage, a husband and wife contract toward each other mutual obligations of respect, fidelity, and support.<sup>268</sup> Regarding property transactions, a husband and wife may enter into transactions with each other, or any other person, which either might if unmarried.<sup>269</sup> Under section 721(b) of the Family Code, the duties owed by spouses in transactions between themselves are the duties owed by parties to a fiduciary relationship. Section 721(b) states:

[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 each 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 . . . .<sup>270</sup>

Section 721(b) specifically requires each spouse to provide access, for the purposes of inspection and copying, to any books kept regarding a transaction;<sup>271</sup> to render, upon request, information affecting any transaction which concerns community property;<sup>272</sup> and to account, and hold as trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other which concerns community property.<sup>273</sup> However, the section does not impose a duty on either spouse to keep detailed books and records of community property transactions.<sup>274</sup> The fiduciary relationship and standards of conduct provided in section 721 of the Family Code, applicable during marriage, now continue past the date of separation of the spouses in anticipation of dissolution of the marriage until the date of final distribution of the community assets and liabilities.<sup>275</sup>

Generally, section 721(b) of the Family Code subjects transactions between spouses to the rules governing fiduciary relationships and imposes upon this

268. CAL. FAM. CODE § 720 (West 2004).

269. *Id.* § 2102(a), (b).

270. *Id.* § 721(b). Section 721(b) of the Family Code excepts transactions as provided in sections 143, 144, 146, 16040, and 16047 of the Probate Code. Generally, sections 143, 144, and 146 relate to the waiver of specified rights of the surviving spouse in a deceased spouse's estate. Section 16040 requires the trustee to administer a trust with reasonable care, skill, and caution as a prudent person acting in a like capacity would use. Section 16047 requires a trustee to invest and manage trust assets as would a prudent investor and, in satisfying the standard, exercise reasonable care, skill, and caution.

271. *Id.* § 721(b)(1).

272. *Id.* § 721(b)(2).

273. *Id.* § 721(b)(3).

274. *Id.* § 721(b)(2).

275. *Id.* § 2102(a),(b); Marriage of Vamer, 63 Cal. Rptr. 2d 894, 902 (Cal. Ct. App. 1997). The fiduciary relationship and standards provided in section 721(b) of the Family Code continue from the date of separation of the spouses in anticipation of dissolution until the date of a final resolution of all issues relating to child or spousal support and professional fees. *Id.* § 2102(c).

relationship “a duty of the highest good faith and fair dealing on each spouse, and neither shall take unfair advantage of the other.” Further, section 721(b) provides that the confidential relationship between husband and wife 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 California Corporations Code (“Corporations Code”). The Corporations Code sections listed in section 721(b) of the Family Code establish the rights and duties that unmarried business partners owe to each other and the partnership. Section 16403 of the Corporations Code gives partners access to partnership books and records and information concerning the partnership’s business, and section 16503 regulates the transfer of partnership interests. Section 16404 of the Corporations Code sets out the fiduciary duties that a partner owes to the other partners and the partnership. Generally, the fiduciary duties a partner owes the other partners and the partnership are the duty of loyalty and the duty of care.<sup>276</sup> A partner’s duty of loyalty includes the duty to account to the partnership and hold as trustee any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership, including appropriation of a partnership opportunity;<sup>277</sup> to refrain from dealing adversely with the partnership in the conduct and winding up of the partnership;<sup>278</sup> and to refrain from competing with the partnership in the conduct of the partnership business prior to dissolution.<sup>279</sup> A partner’s duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.<sup>280</sup> The duties to the partnership and other partners must be discharged, and rights exercised, consistently by the partner with the obligation of good faith and fair dealing.<sup>281</sup>

Regarding the management and control of community property, sections 1100(a) and 1102(a) of the Family Code provide, generally, for the equal management and control of community personal property and community real property, respectively.<sup>282</sup> Nevertheless, the sections provide specific exceptions to a spouse’s ability to unilaterally manage and control community property. As to community personal property, without the written consent of the other spouse, a spouse cannot gift or dispose of community personal property for less than fair

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276. CAL. CORP. CODE § 16404(a) (West 2004).

277. *Id.* § 16404(b)(1).

278. *Id.* § 16404(b)(2).

279. *Id.* § 16404(b)(3).

280. *Id.* § 16404(c).

281. *Id.* § 16404(d). A partner does not violate a duty or obligation merely because the partner’s conduct furthers the partner’s own interest. *Id.* § 16404(e). A partner may lend money or transact business with the partnership and the rights and obligations regarding performance or enforcement are the same as with a non-partner. *Id.* § 16404(f).

282. Prior to 1975, generally, only the husband had the right to manage and control community property. CAL. CIV. CODE §§ 172-172(a) (repealed by sections 5125 and 5127 of the Civil Code, and then repealed and replaced by sections 1100 and 1102 of the Family Code, effective Jan. 1, 1994). As a result, the husband occupied a position of a trustee for his wife in respect to her one-half interest in the community assets. *Vai v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 364 P.2d 247, 251-52 (Cal. 1961).

and reasonable value<sup>283</sup> or dispose of household or other personal items.<sup>284</sup> The spouse who operates or manages a business that consists entirely or substantially of community personal property has the primary management and control of the business but cannot dispose of all or substantially all of the personal property used in the business without prior written notice to the other spouse.<sup>285</sup> Although either spouse has the management and control of community real property, both spouses must join in any instrument by which community real property is sold, conveyed, encumbered, or leased for a period longer than one year.<sup>286</sup> Section 1100(e) of the Family Code requires that each spouse act in the management and control of community assets and liabilities in accordance with the rules governing a fiduciary relationship as imposed in section 721 of the Family Code until such assets and liabilities are divided by the parties or by a court.<sup>287</sup> This duty includes full disclosure of all material facts and information regarding the existence, characterization, and valuation of all community assets and liabilities, and equal access to all information, records, and books relevant to such valuation and characterization.<sup>288</sup>

Remedies for breach of the fiduciary duty between spouses are found in section 1101 of the Family Code, and in division of the community estate, remedies for deliberate misappropriation are found in section 2602 of the Family Code. In section 1101, the remedies for breach of fiduciary duty include a claim against the other spouse for any breach of a fiduciary duty that resulted in the impairment of the claimant's present interest in community property,<sup>289</sup> an order by a court for an accounting of the married couple's property and obligations, a determination of the rights of ownership in, and access to, community property, and the classification of all property of the spouses;<sup>290</sup> and with exceptions,<sup>291</sup> a

283. CAL. FAM. CODE § 1100(b) (West 2004).

284. *Id.* § 1100(c). Further, section 1100(a) of the Family Code excepts sections 761 and 1103 of the Family Code from its application. Generally, section 761 provides for the treatment of community property transferred to a revocable trust, and section 1103 provides for the treatment of community property if one or both spouses has a conservator or lacks legal capacity to manage and control property.

285. *Id.* § 1100(d).

286. *Id.* § 1102(a).

287. Effective January 1, 1992, the "good faith" standard with respect to the management and control of community property was replaced with a "fiduciary" duty, thereby, raising the standard of care, and specific penalties for the breach of the new standard were imposed. These amendments constituted a change in the law and not a mere clarification; therefore, they do not apply retroactively. *In re Marriage of Reuling*, 28 Cal. Rptr. 2d 726, 727 (Cal. Ct. App. 1994).

288. CAL. FAM. CODE § 1100(e) (West 2004).

289. *Id.* § 1101(a). The action must be commenced within three years of the date the petitioning spouse had actual knowledge of the occurrence of the transaction or event for which the remedy is being sought, or without any time limitation upon the death of a spouse or in conjunction with an action for dissolution of marriage or legal separation. *Id.* § 1101(d)(1), (2).

290. *Id.* § 1101(b).

291. *Id.* § 1101(c) (1)-(4). The exceptions to the remedy of adding a name to the title of community property or the reformation of form of title to reflect its community character include: a partnership interest held by the other spouse as a general partner; an interest in a professional corporation or professional association; an



court order adding the name of a spouse to the title of community property or reforming the form of title to reflect its community character.<sup>292</sup> Section 1101 provides further that the remedies for the breach of fiduciary duty by one spouse will include the award to the other spouse of fifty percent, or an amount equal to fifty percent, of the value of any asset undisclosed or transferred in breach of fiduciary duty, plus attorney's fees and court costs.<sup>293</sup> This award increases to one hundred percent if the breach is the result of malice, oppression, or fraud within the ambit of section 3294 of the Civil Code.<sup>294</sup> In the division of the community estate upon dissolution of the marriage, section 2602 of the Family Code allows the court to award to a spouse, as an additional award or offset, the amount the court determines to have been deliberately misappropriated by the other spouse.

In a recent California appellate court decision, *In re Marriage of Duffy*, the Second District interpreted the nature of the fiduciary duty owed between spouses in the management and control of community assets.<sup>295</sup> In *Duffy*, upon termination of employment and as part of a severance package, the husband received cash for his interest in a profit sharing plan and shares of stock from a stock investment plan.<sup>296</sup> Ultimately, all of the cash and shares were transferred to a brokerage account, and throughout 1995, the husband invested the entire portfolio in a single technology stock.<sup>297</sup> The husband made the investments with the advice of a stockbroker but without obtaining the advice or agreement of his wife. During 1995, the account rose in value from \$482,925 to \$611,648, but by 1998, the account was worth only \$261,483.<sup>298</sup> Upon dissolution of the marriage, the wife argued, and the trial court agreed, that the husband breached his duty of full disclosure as required by sections 1100(e) and 721 of the Family Code.<sup>299</sup> Section 1100(e) provides that each spouse must act in the management and control of community assets and liabilities in accordance with rules governing a fiduciary relationship as specified in section 721, and states that this duty

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asset of an unincorporated business if the other spouse is the only spouse involved in operating and managing the business; and any other property if the revision would affect the rights of a third party adversely. *Id.*

292. *Id.* § 1101(c). Upon the death of a spouse or in conjunction with a dissolution of marriage or a legal separation, a remedy pursuant to section 1101 of the Family Code may be commenced at any time; nevertheless, the defense of laches may be brought in any action brought under section 1101. *Id.* § 1101(d) (2), (3).

293. *Id.* § 1101(g).

294. *Id.* § 1101(h). Section 3294 of the Civil Code allows for exemplary damages in an action for breach of a non-contractual obligation where it is proven by clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. Section 3294(c) defines "oppression" as despicable conduct that subjects another to cruel and unjust hardship in conscious disregard of that person's rights; "fraud" as an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving a person of property or legal right or otherwise causing injury; and "malice" as conduct intended to cause injury or despicable conduct which is carried on with the willful and conscious disregard of the rights or safety of others.

295. *In re Marriage of Duffy*, 111 Cal. Rptr. 2d 160 (Cal. Ct. App. 2001).

296. *Id.* at 163.

297. *Id.*

298. *Id.* at 164.

299. *Id.* at 165.

includes the obligation to provide equal access to all information, records, and books and, upon request, make full disclosure to the other spouse of all material facts and information regarding community property. Section 721(b) of the Family Code “imposes a duty of the highest good faith and fair dealing on each spouse,” and specifically includes “rendering upon request, true and full information of all things affecting any transaction which concerns the community property.”<sup>300</sup>

The Second District found no evidentiary support for the trial court’s finding that the husband breached his fiduciary duty of full disclosure as evidence was not presented that the wife sought information about the investments.<sup>301</sup> Although the wife testified that a request for information would have been futile based on the husband’s “historical pattern of curt and dismissive answers,” this disputed testimony did not compel the inference of futility and did not excuse the wife’s failure to inquire.<sup>302</sup> The appellate court further considered whether the fiduciary duty owed to the other spouse by the spouse managing community assets includes the duty of care.<sup>303</sup> After reviewing legislative intent and relevant case law, the appellate court concluded that a managing spouse is not bound by the Prudent Investor Rule and does not owe a duty of care.<sup>304</sup>

In direct response to *Duffy*, section 721(b) of the Family Code was amended to clarify that the fiduciary relationship between spouses includes all of the rights and duties in the management and control of community property as the rights and duties of nonmarital business partners, and further, the holding in *Duffy* was abrogated to the extent that it conflicted with this clarification.<sup>305</sup> Section 721(b) subjects the fiduciary relationship between spouses to rights and duties as provided in section 16404 of the Corporations Code that states “the fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care.”<sup>306</sup> In amending section 721(b) of the Family Code, the California Legislature expressly stated that its intention was to “clarify” the existing law, and as a clarification, rather than a substantive change in the law, the amendment should be fully retroactive to conduct and transactions occurring before the amendment.<sup>307</sup>

300. CAL. FAM. CODE § 721(b)(2) (West 2004).

301. *Duffy*, 111 Cal. Rptr. 2d at 167.

302. *Id.* Whether an act is futile is usually a question of fact and, on appeal, may be determined as a question of law only if the facts are undisputed and permit only one reasonable inference.

303. *Id.* at 168.

304. *Id.* at 172.

305. 2002 Cal. Stat. 310, § 2.

306. CAL. CORP. CODE § 16404(a) (West 2004).

307. HOGOBOOM & KING, *supra* note 20, § 8.606.2. In the investment of community property, section 721(b) of the Family Code excepts section 16047 of the Probate Code from interspousal fiduciary duties; therefore, spouses are not subject to the Prudent Investor Rule applicable to trustees with regard to trust property. Nevertheless, section 721(b) subjects the fiduciary relationship between husband and wife to the same rights and duties of nonmarital business partners. Pursuant to section 16404(c) of the Corporations Code, an improvident investment can amount to a breach of fiduciary duty if the investment rises to a level of “grossly

*B. Presumption of Undue Influence*

A confidential relationship exists between spouses, or any two persons, if one person has gained the confidence of the other and purports to act or advise with the other person's interest in mind.<sup>308</sup> The confidential relationship, and the obligations arising out of the relationship, is dependant upon the existence of confidence and trust by one person in another who is cognizant of this fact.<sup>309</sup> A confidential relationship may exist although there is no fiduciary relationship, and is particularly likely to exist where there is a relationship of family or friendship, or a relationship of confidence as arises between principal and agent, attorney and client, and business partners.<sup>310</sup>

Courts of equity not only view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye, but they go further, and forbid any persons, standing in a fiduciary position, from making any profit in any way at the expense of the party whose interest he is bound to protect without the fullest and most complete disclosure. This rule applies to all relations in which dominion may be exercised by one person over another. It applies as between parent and child, guardian and ward, husband and wife, and attorney and client. In such cases the law does not presume consent, but casts the burden upon the person receiving such deed or benefiting by such transactions to prove that a transaction was fair, free from fraud or undue influence, and made by a person in full possession of his faculties.<sup>311</sup>

The predecessor to section 721 of the Family Code was enacted in 1872 and allowed either husband or wife to enter into property transactions with the other spouse, or any other person, as if unmarried "subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."<sup>312</sup> The trust provision, also enacted in 1872, stated that in transactions between a trustee and a beneficiary "by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."<sup>313</sup> Thus, if either husband or wife obtains an advantage

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negligent or reckless conduct, intentional misconduct, or a knowing violation of the law." However, mere bad business judgment in making community property investments, amounting only to ordinary negligence, is not a breach of fiduciary duty. *Id.* at § 8:606.3.

308. *Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 364 P.2d 247, 252 (Cal. 1961). *See generally* Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315 (2000) (discussing the nature and limitations on confidential relationships and providing a categorical analysis of certain confidential relationships).

309. *Vai*, 364 P.2d at 252.

310. *Id.* at 253.

311. *Payne v. Payne*, 107 P. 148, 149 (Cal. Dist. Ct. App. 1909).

312. CAL. CIV. CODE § 158 (repealed by section 5103 of the Civil Code in 1979, and then repealed and replaced by section 721 of the Family Code).

313. CAL. CIV. CODE §2235 (West 2004) (repealed by sections 16002 and 16004 of the California Probate Code).

over the other, the transaction is presumed entered into by the disadvantaged spouse without sufficient consideration and under undue influence.<sup>314</sup> “The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. The law, from considerations of public policy, presumes such transactions to have been induced by undue influence.”<sup>315</sup> Although property may be gifted between spouses, such gifts carry the presumption of undue influence and are viewed with suspicion and only upheld upon a showing of special circumstances.<sup>316</sup> “When the defendant introduced evidence tending to show the transaction between himself and his wife to be a gift, the presumption of the law immediately arose that the gift was obtained from the wife by the exercise of undue influence.”<sup>317</sup> The burden rests upon the spouse that is advantaged by the transaction to disprove the presumption of undue influence.<sup>318</sup> To rebut the presumption, the advantaged spouse must present evidence that the advantage did not result from concealment or adverse pressure and that full and fair disclosure of all relevant facts concerning the nature and effect of the transaction was given.<sup>319</sup> Full and fair disclosure includes both the value and character of the property subject to the agreement and the specific rights the disadvantaged spouse is surrendering under the agreement.<sup>320</sup> Whether the presumption has been overcome is a question for the trier of fact and its decision will be upheld on appeal so long as supported by substantial evidence.<sup>321</sup>

As to management and control of community property, prior to 1975, the husband occupied the position of trustee for his wife in regard to her interest in the community property because of his right to exclusive management and control over the community property,<sup>322</sup> and “it would follow that the husband would continue to remain a fiduciary in respect to his wife’s interest in community assets until division was made.”<sup>323</sup> The fiduciary duties of the husband continued as long as his control over the community property continued even though the confidential relationship with his wife may have terminated due to the absence of confidence and trust.<sup>324</sup> Today, each spouse has management and control over the community estate<sup>325</sup> and each must act with respect to the

314. *White v. Warren*, 52 P. 723, 723 (Cal. 1898).

315. *Brison v. Brison*, 17 P. 689, 691 (Cal. 1888).

316. *Id.*; *Dimond v. Sanderson*, 37 P. 189, 190 (Cal. 1894).

317. *White*, 52 P. at 723.

318. *Brison*, 17 P. at 691; *Dimond*, 37 P. at 190; *White*, 52 P. at 723-24.

319. *In re Cover’s Estate*, 204 P. 583, 588 (Cal. 1922).

320. *Id.* at 589.

321. *Weil v. Weil*, 236 P.2d 159, 169-70 (Cal. 1951).

322. *Vai v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 364 P.2d 247, 251-52 (Cal. 1961). Since 1975, with narrow exception, both spouses have a joint right to manage and control community property. *See supra* text accompanying note 89.

323. *Id.* at 252.

324. *Id.*

325. CAL. FAM. CODE §§ 1100 & 1102 (West 2004); *see supra* text accompanying note 89.

other spouse in the management and control of community assets and liabilities as provided in section 721(b) of the Family Code.<sup>326</sup> Section 721(b) of the Family Code subjects spouses to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relationships and imposes a duty of the highest good faith and fair dealing on each spouse with neither spouse taking any unfair advantage of the other spouse.<sup>327</sup>

In transactions between husband and wife, the marriage relationship does not automatically give rise to the presumption that the transaction is the result of undue influence.<sup>328</sup> If full consideration is exchanged in an intramartial transaction, a presumption of undue influence does not arise as one spouse has not obtained any advantage over the other spouse.<sup>329</sup>

Of course, the mere existence of the marriage relation alone will not, in and of itself, suffice to initiate and support the presumption of undue influence where the transaction between husband and wife is *prima facie*, or, from all of the circumstances thereof, shown to be fair and free from any material advantage to the husband from and over the wife. But in those transactions between husband and wife, where admittedly the husband secures an advantage over the wife, the confidential relation existing between them may be invoked to bring into operation the presumption of the use and abuse of the relation.<sup>330</sup>

Thus, the presumption of undue influence is not invoked merely because the parties are husband and wife, but the disadvantaged spouse must show that an advantage was obtained either by direct proof or by circumstances from which it may be fairly inferred.<sup>331</sup> To raise the presumption of undue influence, the transaction on its face, or evidence presented by the disadvantaged spouse, must invoke the presumption.<sup>332</sup> "The fact that a deed is without consideration, or is as is sometimes said, voluntary, is not of itself sufficient to avoid the deed . . . . The want of consideration, however, is a fact properly to be proven in connection with and as apart of the constructive fraud . . . . Nor does the recital of a consideration stand in the way of the relief."<sup>333</sup> Parol evidence is admissible in order to establish the facts necessary to raise the presumption of undue influence even if those facts contradict the form of title to the property.<sup>334</sup>

326. *Id.* § 1100(e).

327. *Id.* § 721(b); see *supra* text accompanying notes 245-92.

328. *White v. Warren*, 52 P. 723, 724 (Cal. 1898); *Tillaux v. Tillaux*, 47 P. 691, 694 (Cal. 1897); *Dimond v. Sanderson*, 37 P. 189, 191 (Cal. 1894).

329. *White*, 52 P. at 724; *Tillaux*, 47 P. at 693; *Dimond*, 37 P. at 191.

330. *In re Cover's Estate*, 204 P. 583, 588 (Cal. 1922).

331. *Dimond*, 37 P. at 191.

332. *Id.*

333. *Brison v. Brison*, 17 P. 689, 692 (Cal. 1888).

334. *Id.* at 693.

*In re the Marriage of Haines*<sup>335</sup> addressed the question of whether section 662 of the Evidence Code, the codification of the common law presumption in favor of title,<sup>336</sup> applies in a proceeding for dissolution of marriage if in conflict with the presumption of undue influence that arises in transactions between a husband and wife.<sup>337</sup> In *Haines*, the wife appealed the portion of a judgment granting her husband reimbursement for his separate property contributions toward the acquisition of the couple's residence.<sup>338</sup> The husband acquired the residence during his prior marriage and as part of the divorce settlement with his former spouse received sole title. In 1983, after his remarriage, the husband conveyed the residence by quitclaim deed to himself and his wife as joint tenants. The conveyance was necessary to qualify for refinancing of the property and the refinancing was necessary to enable the husband to satisfy an outstanding obligation to his former mother-in-law. The wife testified that after the property was refinanced she believed that both she and her husband owned the property.<sup>339</sup>

In 1987, the marriage began to deteriorate and, during this period, the husband asked his wife to sign a quitclaim deed returning to him ownership of the residence. The wife characterized the conversations concerning the signing of the deed as "highly emotional" with her husband "ranting and raving" and, during one episode, pulling her hair and throwing water in her face. The husband, however, denied the outbursts and characterized the discussions as calm and businesslike.<sup>340</sup> That same month, the wife asked her husband to co-sign on a loan for the purchase of an automobile that she needed as transportation to work. The wife testified that, in route to the credit union, her husband made an unexpected stop at a notary and demanded that she sign the quitclaim deed conveying her interest in the residence to him as a condition to co-signing for the automobile loan. The husband testified that the couple had planned both to execute the quitclaim deed and to sign for the automobile loan on the same day, and his wife signed the quitclaim deed voluntarily and not as a condition to co-signing for the automobile loan.<sup>341</sup> Thereafter, the couple separated briefly and then reconciled. In 1988, the husband signed a grant deed conveying the residence back to himself and his wife as joint tenants because he and his wife were considering the purchase of property located in Missouri and were applying for a loan. The couple separated a year later.<sup>342</sup>

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335. 39 Cal. Rptr. 2d 673 (Ct. App. 1995).

336. See *supra* text accompanying notes 63-69.

337. *Haines*, 39 Cal. Rptr. 2d at 686.

338. *Id.* at 676.

339. *Id.* at 677.

340. *Id.*

341. *Id.* at 678.

342. *Id.*

The trial court held that the residence was community property by virtue of the 1988 conveyance to the parties as joint tenants<sup>343</sup> but the husband was entitled to reimbursement for his separate property contribution to the acquisition of the community property.<sup>344</sup> In her attempts to set aside the 1987 quitclaim deed under theories of undue influence, duress, deceit, and constructive fraud, the trial court found that the wife had not met the clear and convincing burden of proof required by section 662 of the Evidence Code; however, the trial court stated that she had met the lesser evidentiary standard of preponderance of the evidence regarding her claims.<sup>345</sup> The key question on appeal was whether the residence became the husband's separate property as a result of the quitclaim deed in 1987, thereby, justifying a reimbursement to the husband.<sup>346</sup> The court noted that the quitclaim deed raised the general title presumption and, at the same time, raised the presumption of undue influence.<sup>347</sup> As framed by the appellate court, the task was to resolve the conflict between the common law presumption of title and the community property presumption of undue influence.<sup>348</sup>

The Fourth District in *Haines* began its reasoning with a discussion of the presumption established by section 662 of the Evidence Code in favor of the stability of title to property,<sup>349</sup> protecting parties to real property transactions as well as creditors.<sup>350</sup> However, the appellate court made a distinction between transactions that affect the rights of third parties and creditors and transmutations between spouses that affect the character of marital property upon dissolution of a marriage.<sup>351</sup> Relying on the specific statutory safeguards for third parties and creditors,<sup>352</sup> the appellate court concluded that concerns of stability of title are lessened in characterization problems arising from transmutations that do not involve the rights of third parties or creditors.<sup>353</sup> In transactions between themselves, a husband and wife are subject to the rules governing fiduciary relationships imposing a duty of the highest good faith and fair dealing.<sup>354</sup> If one spouse obtains a possible benefit over the other spouse in a transaction, a presumption against the validity of the transaction arises and the burden is on the

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343. CAL. FAM. CODE § 2581 (West 2004) (formerly CAL. CIV. CODE § 4800.1); *see supra* text accompanying notes 117-19, 125.

344. *Id.* § 2640 (formerly CAL. CIV. CODE § 4800.2); *see supra* text accompanying notes 120-24.

345. *Haines*, 39 Cal. Rptr. 2d at 678.

346. *Id.* at 679.

347. *Id.*

348. *Id.*

349. *See* CAL. EVID. CODE § 605 (West 1995).

350. *Haines*, 39 Cal. Rptr. 2d at 684.

351. *Id.*

352. CAL. FAM. CODE § 851 (West 2004) (formerly CAL. CIV. CODE § 5110.720, subjecting transmutations to the laws governing fraudulent transfers); CAL. FAM. CODE § 852(b) (West 2004) (formerly CAL. CIV. CODE § 5110.730(b), limiting the effectiveness of transmutations of real property with respect to third parties without notice thereof unless the transmutation is recorded).

353. *Haines*, 39 Cal. Rptr. 2d at 684.

354. *Id.* at 684-85; CAL. FAM. CODE § 721(b) (West 2004) (formerly CAL. CIV. CODE § 5103(b)).

advantaged spouse to overcome the presumption.<sup>355</sup> To demonstrate an advantage was not gained in violation of the fiduciary relationship, the appellate court in *Haines* concluded that the husband, the advantaged spouse, had the burden to prove that 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.”<sup>356</sup> The appellate court observed that the concerns of section 721(b) of the Family Code are with relational issues such as unfairness and advantage, and the section is one of mutual accountability requiring each spouse to show that his or her conduct conformed to the legal standard as codified in section 721(b).<sup>357</sup>

In resolving the conflict between the presumptions, the Fourth District in *Haines* concluded the public policy of the state demanded that if section 662 of the Evidence Code is in conflict with the presumption that husband and wife must deal fairly with each other, the application of section 662 was improper.<sup>358</sup> If section 662 of the Evidence Code prevailed, the presumption of undue influence that emanates from section 721(b) of the Family Code could not arise because section 662 has a higher evidentiary standard.<sup>359</sup> Thus, the application of section 662 of the Evidence Code would significantly weaken the protections that the California Legislature intended to provide for spouses entering into interspousal transactions. “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.”<sup>360</sup> Further, if two presumptions are in conflict, the more specific presumption controls over the more general presumption, and the appellate court determined that the more specific presumption of undue influence prevailed over the more general title presumption.<sup>361</sup> As the wife proved a number of her defenses to the 1987 quitclaim deed by a preponderance of the evidence, the appellate court held that the deed to the residence should have been set aside.<sup>362</sup>

### C. *In re Marriage of Delaney*

*In re Marriage of Delaney* also concerned the conflict between section 662 of the Evidence Code, the statutory title presumption, and the presumption of

355. *Haines*, 39 Cal. Rptr. 2d at 685; CAL. FAM. CODE § 721(b) (West 2004) (formerly CAL. CIV. CODE § 5103(b)); *In re Cover's Estate*, 204 P. 583, 588 (Cal. 1922).

356. *Haines*, 39 Cal. Rptr. 2d at 685; *In re Marriage of Baltins*, 260 Cal. Rptr. 403, 414-15 (Cal. Ct. App. 1989).

357. *Haines*, 39 Cal. Rptr. 2d at 685; CAL. FAM. CODE § 721(b) (West 2004) (formerly CAL. CIV. CODE § 5103(b)).

358. *Haines*, 39 Cal. Rptr. 2d at 688.

359. See *supra* text accompanying notes 63-69.

360. *Haines*, 39 Cal. Rptr. 2d at 688.

361. *Id.* at 688-89.

362. *Id.* at 689.



undue influence arising from section 721(b) of the Family Code.<sup>363</sup> In *Delaney*, the property in question was a residence owned by the husband prior to marriage. In connection with obtaining a bank loan secured by the residence, the husband executed a grant deed conveying the property to his wife and himself as joint tenants.<sup>364</sup> The wife worked in law offices as a secretary and legal assistant specializing in probate matters, and in the dissolution of a prior marriage, the wife was awarded a one-half community interest in real property as a result of a joint interest she obtained from her former spouse in connection with securing a loan on the property.<sup>365</sup> The husband testified that he was diagnosed with a learning disability that severely limited his reading comprehension and, therefore, relied on his wife to handle all legal and financial matters.<sup>366</sup> The husband further testified that he did not realize he was transferring a one-half interest in his separate property to his wife until he noticed both names on the property tax bill.<sup>367</sup> The trial court determined: the wife had given insufficient consideration for the transfer of the husband's residence to joint tenancy; the wife, as a fiduciary, bore the burden of establishing that the joint tenancy grant deed was not the product of undue influence; and as she failed to sustain her burden of proof, the grant deed was void.<sup>368</sup>

On appeal, the First District commented that this case involved a conflict between legal presumptions.<sup>369</sup> The wife argued that the trial court erred in not requiring her husband to rebut by clear and convincing evidence the presumption in favor of record title codified in section 662 of the Evidence Code,<sup>370</sup> or to rebut by evidence of a written agreement or deed of title the presumption established by section 2581 of the Family Code that property acquired during marriage in joint form is community property.<sup>371</sup> The appellate court found that section 721 of the Family Code imposed upon the wife, the spouse obtaining the advantage in the transaction, the burden of establishing that she did not obtain the joint interest in the residence by means of undue influence. Citing *Haines*,<sup>372</sup> the appellate court based its holding that the presumption of undue influence preempts the statutory title presumptions on the unique and protected status of marriage and the fact that the higher evidentiary standard of section 662 of the Evidence Code would invariably defeat the spousal protection intended by the California Legislature in enacting section 721 of the Family Code.<sup>373</sup> Further, the appellate

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363. *In re Marriage of Delaney*, 4 Cal. Rptr. 3d 378 (Ct. App. 2003).

364. *Id.* at 379-80.

365. *Id.*

366. *Id.* at 380.

367. *Id.*

368. *Id.*

369. *Id.* at 381-82.

370. See *supra* text accompanying notes 63-69.

371. *Delaney*, 4 Cal. Rptr. 3d at 381.

372. 39 Cal. Rptr. 2d 673 (Cal. Ct. App. 1995); see *supra* text accompanying notes 335-62.

373. *Delaney*, 4 Cal. Rptr. 3d at 382.

court relied on the reasoning of *Haines*, in resolving the conflict between the two presumptions, that the more specific presumption, section 721 of the Family Code, controls over the more general presumption, section 662 of the Evidence Code.<sup>374</sup>

The First District then applied the *Haines* rationale to resolve the conflict between section 721 of the Family Code and section 2581 of the Family Code, the presumption that property acquired during marriage in joint form is community property for the purpose of division upon dissolution of the marriage or legal separation. The appellate court in *Delaney* first questioned the application of section 2581 to transmutations as section 2581 of the Family Code applies specifically to property acquired during marriage: "The acquisition of property during marriage by purchase or gift is clearly different from an interspousal transmutation of property *already* owned by one spouse or both spouses."<sup>375</sup> If section 2581 were construed to apply to interspousal transmutations, however, the community property presumption would be in direct conflict with section 721 of the Family Code as was the general title presumption in section 662 of the Evidence Code. Relying on *Haines*, the appellate court concluded that preferencing section 2581 over section 721 would nullify the protections given to married persons by section 721.<sup>376</sup> The fiduciary standard established in section 721 of the Family Code must govern in all interspousal transactions.<sup>377</sup>

The appellate court held that the trial court's determination that the presumption of undue influence applied to the facts of this case was proper. Therefore, the wife had the burden "to establish that Husband's transmutation of the Property to joint tenancy was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of a transfer from his unencumbered separate property interest to a joint interest as Husband and Wife."<sup>378</sup> Substantial evidence in the record supported the trial court's conclusion that the wife failed to meet her burden of proof: the husband suffered from cognitive impairments and consequently entrusted all financial and legal matters to his wife; the wife had extensive experience in legal and financial

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374. *Id.*

375. *Id.* at 383. Professor Grace Ganz Blumberg made the following comments regarding this portion of the holding:

Also, the court's dictum on Fam. Code § 2581 seems incorrect. The court suggests, in the alternative, that section 2581 has no application at all because the house was not initially acquired during marriage. However, the language and intent of section 2581 extend to all property taken in joint tenancy by the parties during marriage, whatever the original provenance of the property. The better analysis is that section 2581 is applicable to the extent that the property is determined to be joint tenancy. However, if the presumption of undue influence operates to undo joint tenancy title, section 2581 has no application.

*Legal Developments*, 2003 CAL. FAM. L. MONTHLY 251; see Stephan James Wagner, *Marriage of Delaney: Something New and Something Old*, 2003 CAL. FAM. L. MONTHLY 273.

376. *Delaney*, 4 Cal. Rptr. 3d at 383-84.

377. *Id.* at 384; *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 688 (Ct. App. 1995).

378. *Delaney*, 4 Cal. Rptr. 3d at 384.

matters and personal experience in her previous marriage with the transmutation of separate property to joint tenancy; and, finally, the husband signed the documents conveying his unencumbered separate interest in the residence into joint tenancy without questioning his wife's instruction that it was necessary.<sup>379</sup>

#### *D. In re Marriage of Lange*

*In re Marriage of Lange* involved a husband who, during marriage, was employed as a psychiatrist and a wife who, prior to marriage, was employed in the real estate business, selling, developing, and managing real property.<sup>380</sup> For payment of family expenses, the couple maintained a joint checking account in which the husband deposited his earnings and the wife deposited rental income from her separately owned rental properties. Title to the family residence was held in joint tenancy. From her separate property funds, the wife contributed \$63,500 to acquire the residence and paid \$100,000 of principal on the purchase money loan, and she later provided \$75,000 and then \$105,000 for improvements to the residence. The husband also provided \$120,000 in separate property funds to improve the residence.<sup>381</sup> The couple had "heated arguments" regarding their finances during their marriage. Ultimately, the wife presented, and her husband signed, a promissory note for \$250,000 in the wife's favor and a deed of trust on the residence to secure the obligation.<sup>382</sup> At trial, the husband testified that he signed the note and deed of trust to save his marriage and to continue living with his son. He testified that he had no idea that he owed his wife money and the documents prepared by her for his signature "came out of the blue."<sup>383</sup> The wife testified that they had agreed that he would reimburse her for her separate property contributions toward the acquisition of, and improvements to, the residence and the household expenses paid from her separate property funds. She testified that her husband stated that the amount of \$250,000 was "very fair."<sup>384</sup> The trial court found that the promissory note and deed of trust were valid documents and that the husband did not execute the note and deed of trust under duress. However, the trial court ruled that sections 721<sup>385</sup> and 2640<sup>386</sup> of the Family Code precluded enforcement as the documents provided the wife a financial advantage and, therefore, they were presumed to have been obtained through undue influence.<sup>387</sup>

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379. *Id.* at 384-85.

380. *In re Marriage of Lange*, 125 Cal. Rptr. 2d 379, 381 (Cal. Ct. App. 2002).

381. *Id.*

382. *Id.* at 381.

383. *Id.*

384. *Id.* at 382.

385. See *supra* text accompanying notes 262-87.

386. See *supra* text accompanying notes 120-24.

387. *Lange*, 125 Cal. Rptr. 2d at 382.

Relying on *Haines*,<sup>388</sup> the Second District noted that a presumption of undue influence arises when one spouse obtains an advantage over the other spouse in an interspousal transaction.<sup>389</sup> A fiduciary obtains an advantage if the fiduciary's position is improved, obtains a favorable opportunity, or otherwise gains, benefits, or profits.<sup>390</sup> The wife argued that she did not gain an advantage as she spent more than \$250,000 of her separate property funds in acquiring and improving the residence and the promissory note and deed of trust constituted waiver of, and substitute for, her right of reimbursement under section 2640 of the Family Code.<sup>391</sup> The appellate court found that the wife did receive an advantage or benefit from her husband's execution of the promissory note and deed of trust because she became a secured creditor entitled to ten percent interest on the husband's obligation. At the time of trial, the amount due on the note was approximately \$870,000. Under section 2640, the wife's statutory right of reimbursement for separate property funds contributed toward the acquisition or improvement of community property is without interest and cannot exceed the value of the property.<sup>392</sup> Additionally, the wife would not have been entitled to reimbursement for separate property funds spent on family living expenses or a deficiency judgment against her husband.<sup>393</sup> The appellate court held that the trial court was correct in finding that the wife did not overcome the presumption of undue influence.<sup>394</sup>

#### E. *In re Marriage of Matthews*

The Fourth District Court identified a circumstance under which the presumption of undue influence can be overcome when it decided *In re Marriage of Matthews*.<sup>395</sup> This recent case involved a wife who quitclaimed the family residence to her husband, during marriage, in an effort to secure a more favorable interest rate.<sup>396</sup> The home had been purchased with community funds, but was titled as the sole property of the husband in order to avoid the negative ramifications of the wife's poor credit rating.<sup>397</sup> The wife, a Japanese immigrant, claimed that language barriers rendered the deed unintelligible to her.<sup>398</sup> She further claimed that her rudimentary English comprehension made the possibility

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388. 39 Cal. Rptr. 2d 673 (Ct. App. 1995); see *supra* text accompanying notes 335-62.

389. *Lange*, 125 Cal. Rptr. 2d at 382.

390. *Id.*

391. *Id.* at 383.

392. *Id.*

393. *Id.*

394. *Id.*

395. *In re Marriage of Matthews*, 35 Cal. Rptr. 3d 1 (Cal. Ct. App. 2005).

396. *Id.* at 2.

397. *Id.*

398. *Id.* at 6.

that the transaction was entered into “freely and voluntarily” non-existent.<sup>399</sup> Evidence in the record revealed that the wife managed the entirety of the household finances.<sup>400</sup> Additionally, there was evidence that the wife had been speaking English for over twenty years prior to executing the quitclaim deed.<sup>401</sup> At the time of the dissolution of marriage, she was employed as an English translator for a Japanese company and had finished in the top ten percent of her English proficiency certificate program.<sup>402</sup> After refusing to apply the presumption of undue influence established in *Haines*, the trial court determined that the transaction had been completely voluntary and the proper characterization of the residence was as the sole and separate property of the husband.<sup>403</sup> Asserting that the court erred in refusing to apply *Haines* to establish a presumption of undue influence against the husband and that such a presumption could only be overcome by clear and convincing evidence, the wife appealed.<sup>404</sup>

Affirming the outcome of the lower court, the Fourth District clarified that the presumption of undue influence applies to the transaction in question as the presumption applies to all interspousal property transactions when one spouse obtains an advantage over the other.<sup>405</sup> As to the evidentiary standard that must be met to rebut the presumption of undue influence, the court in *Matthews* held that the presumption can be overcome by a preponderance of the evidence.<sup>406</sup> As section 721 of the Family Code does not provide an evidentiary standard, the court examined case law to determine whether a preponderance of the evidence or clear and convincing evidence was necessary to rebut the presumption of undue influence in the marital confidential fiduciary relationship.<sup>407</sup> The *Matthews* court found that the weight of authority establishes the evidentiary standard in rebutting evidence of undue influence as by a preponderance of the evidence.<sup>408</sup> Additionally, the court looked to section 115 of the Evidence Code, which defines burden of proof and states specifically, unless otherwise provided by law, the burden of proof is established by a preponderance of the evidence.<sup>409</sup> Because section 721 does not denote a greater standard, the court held that the husband could overcome the presumption of undue influence by a preponderance

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399. *Id.* at 2 (recounting the wife’s challenge that she had difficulty in understanding complicated terms, contract language and legal effect of the quitclaim deed).

400. *Id.* at 3.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 2.

405. *See id.* at 4 (applying the section 721 rebuttable presumption of undue influence to the transaction in question as was required under *Haines*).

406. *Id.* at 5-6.

407. *Id.* (citing *Estate of Stevens*, 122 Cal. Rptr. 2d 358 (2002) and *Estate of Gelonese*, 111 Cal. Rptr. 833 (1976) to show the weight of authority concludes that the burden of rebutting the presumption of undue influence is by a preponderance of the evidence).

408. *Id.*

409. *Id.* at 6; *see supra* text accompanying notes 52-62.

of the evidence.<sup>410</sup> Thus, the court required the husband to show through a preponderance of the evidence that the wife's signing of the quitclaim deed was made freely and voluntarily, with full knowledge of all facts, and with complete understanding of its effects of making the residence his separate property.<sup>411</sup> Since the record clearly demonstrated that the wife was well versed in economic matters, had above-average English proficiency, and had voluntarily executed the deed in order to obtain a favorable interest rate, the husband satisfied his burden of proof and successfully rebutted the presumption of undue influence.<sup>412</sup>

#### F. Conflict with Section 852(a) of the Family Code

Three recent cases have considered the relationship between the presumption of undue influence emanating from section 721 of the Family Code and section 852(a) of the Family Code which requires that transmutations be in writing by "express declaration" by the spouse whose interest is adversely affected. In determining the validity of a transmutation, the California Supreme Court in *MacDonald*<sup>413</sup> interpreted section 852(a) to require the writing to "contain language which expressly states that the character of ownership of the property is being changed"<sup>414</sup> and the determination of whether the transmutation is valid be made without resort to extrinsic evidence.<sup>415</sup> As the writing requirement for a valid transmutation operates as a statute of frauds, an issue in all three cases was whether the court could rely on the traditional exceptions to the statute of frauds, such as promissory estoppel and partial performance, to validate an oral transmutation. In *Barneson*,<sup>416</sup> although section 721 of the Family Code was not an issue before the court, the appellate court stated that the broad question of the validity of a transmutation of property depends not only on the satisfaction of the requirements of section 852 of the Family Code but also upon compliance with the rules governing fiduciary relationships. "Thus, the requirements of section 852 are prerequisites to a valid transmutation but do not necessarily in and of themselves determine whether a valid transmutation has occurred."<sup>417</sup> Citing *Barneson*, the appellate court in *Campbell*<sup>418</sup> stated that before the statutory presumption of undue influence pursuant to section 721 may be applied first

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410. *Id.*

411. *Id.* at 5 (emphasis added).

412. *Id.* at 6-7.

413. 794 P.2d 911 (Cal. 1990); see *supra* text accompanying notes 161-68.

414. Estate of MacDonald, 794 P.2d 911, 918-919 (Cal. 1990).

415. *Id.* at 919; see *supra* text accompanying notes 216-43.

416. *In re Marriage of Barneson*, 81 Cal. Rptr. 2d 726, 730 (Cal. Ct. App. 1999); see *supra* text accompanying notes 168-77.

417. *Barneson*, 81 Cal. Rptr. 2d at 730.

418. *In re Marriage of Campbell*, 88 Cal. Rptr. 2d 580 (Cal. Ct. App. 1999); see *supra* text accompanying notes 217-24.

there must be proof of a valid transmutation.<sup>419</sup> In *Benson*,<sup>420</sup> the appellate court stated that sections 721, 851,<sup>421</sup> and 852 of the Family Code work together to ensure the integrity of interspousal agreements.<sup>422</sup>

Most recently in *Benson*, the California Supreme Court found that unless a transmutation satisfies the requirements of section 852(a), there is no basis for applying the presumption of undue influence under section 721(b).<sup>423</sup> In *Benson*, the husband asserted that a failure to recognize his oral agreement, would violate Section 721(b)<sup>424</sup> because the wife would receive an unfair advantage when she retained the benefit of the deed he signed over to her, while he would not receive the orally agreed upon separate interest in his retirement accounts.<sup>425</sup> The court dismissed the husband's claim as meritless.<sup>426</sup> The husband could make this argument only if he was attempting to undo a transmutation that was "so grossly one-sided as to be the product of undue influence under section 721(b)", but not to establish a transmutation that fails the requirements of Section 852(a) interpreted by the *MacDonald* Court.<sup>427</sup> In *Benson*, the husband was not attempting to undo the deed of the house to the wife as this was previously settled between the parties and dismissed by the trial court. Instead, the issue in this case was the retirement benefits where the court found no transmutation occurred and therefore there was no basis for applying the presumption of undue influence under section 721(b).<sup>428</sup>

## VII. CONCLUSION

As a result of the amendments to the Family Code in the early 1990s expanding and raising the standard applicable to fiduciary relationship between spouses and the resulting resurrection and strengthening of the presumption of undue influence by the courts, the title presumption and the requirement of an express declaration in writing for a valid transmutation have been correspondingly weakened. Section 662 of the Evidence Code provides that the

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419. *Id.* at 585.

420. *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905, 911-12 (Cal. Ct. App. 2003), *rev'd*, 116 P.3d 1152 (Cal. 2005); *see supra* text accompanying note 244.

421. CAL. FAM. CODE § 851 (West 2004) (subjecting transmutations to the law governing fraudulent transfers).

422. *Campbell*, 88 Cal. Rptr. 2d 580.

423. *In re Marriage of Benson*, 116 P.3d 1152, 1161-62 (Cal. 2005).

424. *See* CAL. FAM. CODE § 721(b) (West 2004) (stating, in pertinent part, "[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...").

425. *Benson*, 116 P.3d at 1161.

426. *Id.* at 1162.

427. *Id.*

428. *Id.* at 1161-62.

owner of legal title to property is presumed to be the owner of full beneficial title and, further, the presumption in favor of title can be rebutted only by clear and convincing proof. The general title presumption codified in section 662<sup>429</sup> promotes the public policy of California in favor of the stability of title to property<sup>430</sup> that is an important legal concept protecting the parties to real property transactions, as well as creditors.<sup>431</sup> Section 852(a) of the Family Code was enacted, specifically, to impose the requirement of a writing by "express declaration" in order to provide certainty in determining the validity of a transmutation. Under prior law, the validity of a transmutation could be based upon oral statements or implications from conduct, thus, generating extensive litigation and encouraging perjury.<sup>432</sup> In order to carry out this legislative intent, section 852(a) was interpreted to require that the writing signed by the party adversely affected by the transmutation expressly state that the character of the property is being changed and to disallow extrinsic evidence in establishing the validity of the transmutation.<sup>433</sup> As a result, the law applicable to the characterization of titled property and the validity of transmutations of property moved toward stability and certainty, and away from a reliance on the oral testimony and conduct of the parties.

Since the nineteenth century, however, the law in California has provided that spouses occupy a confidential relationship in transactions between themselves,<sup>434</sup> and in any transaction by which one spouse obtains an advantage over the other spouse, the transaction is presumed to be without sufficient consideration and under undue influence.<sup>435</sup> In the 1990s, the provisions that establish the fiduciary relationship and duties owed by one spouse to the other spouse in property transactions were enhanced,<sup>436</sup> imposing a duty of the highest good faith and fair dealing on each spouse with neither spouse taking unfair advantage.<sup>437</sup> In enacting the legislation, the Legislature declared that it is the public policy of California that marriage is an equal partnership in which spouses occupy a confidential and fiduciary relationship with each other and each spouse can place trust and confidence in the integrity, honesty, and fairness of the other spouse.<sup>438</sup> As a consequence of the fiduciary relationship between husband and

429. 7 CAL. L. REVISION COMM'N REPORTS 1 (1965).

430. CAL. EVID. CODE § 605 (West 1995).

431. *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 684 (Cal. Ct. App. 1995); see *supra* text accompanying notes 63-69.

432. *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM'N REPORTS 224-25 (1984).

433. *Estate of MacDonald*, 794 P.2d 911, 918-19 (Cal. 1990); see *supra* text accompanying notes 161-68.

434. Former CAL. CIV. CODE § 158.

435. Former CAL. CIV. CODE § 2235.

436. 1991 Cal. Stat. 1026, § 1; *supra* text accompanying notes 265-74.

437. CAL. FAM. CODE § 721(b) (West 2004).

438. 1991 Cal. Stat. 1026, § 1; see also *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673, 684 n.10 (Cal. Ct. App. 1995) (tracing the history of Family Code § 721); *supra* text accompanying notes 265-74.



wife, if one spouse obtains an advantage in a transaction with the other spouse, a presumption of lack of consideration and undue influence arises, and the burden is on the advantaged spouse to show that the transaction was fair and just and not entered into under undue influence.<sup>439</sup> To overcome the presumption, the advantaged spouse must prove that the transfer “was freely and voluntarily made, and with full knowledge of all the facts, and with a complete understanding of the effect of the transfer.”<sup>440</sup> To establish the facts necessary to raise the presumption of undue influence, parol evidence is admissible regardless of whether the benefit obtained by the advantaged spouse is evidenced by legal title or a express written declaration.<sup>441</sup>

Recent case law clearly elevates the presumption of undue influence emanating from section 721(b) of the Family Code over the general title presumption under section 662 of the Evidence Code and the requirement of a writing by express declaration under section 852(a) of the Family Code. Thus, the title to property and an otherwise valid transmutation can be invalidated in a proceeding for the dissolution of marriage by oral testimony of the disadvantaged spouse raising the presumption of undue influence.<sup>442</sup> The appellate court in *Haines* stated that the concerns of stability of title are lessened in characterization problems that do not involve third parties or creditors.<sup>443</sup> Applying *Haines*, the *Matthews* court asserted that any transaction through which one spouse secures an advantage over the other is subject to the presumption of undue influence.<sup>444</sup> Nevertheless, one spouse may gift property to, or enter into a transaction with the other spouse as if unmarried.<sup>445</sup> Also, spouses may enter into an agreement to transmute property,<sup>446</sup> and the fact of a marriage relationship does not automatically raise the presumption of undue influence.<sup>447</sup> However, if the circumstances of the transaction demonstrate that one spouse has secured an advantage over the other, the 721(b) presumption will be triggered.<sup>448</sup> The law must ensure that spouses deal fairly and honestly with each other, but the importance of title to property and the ability to rely on valid transmutations during a marriage cannot be disregarded. To address both concerns, the California courts must carefully establish the type and degree of evidence

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439. *Brison v. Brison*, 17 P. 689, 691 (Cal. 1888); *Dimond v. Sanderson*, 37 P. 189, 190 (Cal. 1894); *White v. Warren*, 52 P. 723, 723 (Cal. 1898).

440. *Haines*, 39 Cal. Rptr. 2d at 685.

441. *Brison*, 17 P. at 693.

442. *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (Cal. Ct. App. 2003), *rev' d*, 116 P.3d 1152 (Cal. 2005); *In re Marriage of Campbell*, 88 Cal. Rptr. 2d 580, 584-85 (Cal. Ct. App. 1999).

443. *Haines*, 39 Cal. Rptr. 2d at 684.

444. *In re Marriage of Matthews*, 35 Cal. Rptr. 3d 1, 4 (Cal. Ct. App. 2005).

445. CAL. FAM. CODE § 721(a) (West 2004).

446. *Id.* § 850.

447. *White v. Warren*, 52 P. 723, 724 (Cal. 1898); *Tillaux v. Tillaux*, 47 P. 691, 694 (Cal. 1897); *Dimond v. Sanderson*, 37 P. 189, 191 (Cal. 1894).

448. *Matthews*, 35 Cal. Rptr. at 4.

necessary to raise the presumption of undue influence and the type and degree of evidence necessary to rebut the presumption if raised. In addition to insufficient consideration, the disadvantaged spouse should be required to produce evidence of deceit, abuse, coercion, or other misconduct by the advantaged spouse, or an impairment of the disadvantaged spouse, in order to raise the presumption of undue influence.<sup>449</sup> If insufficient consideration alone is enough to raise the presumption of undue influence, the evidence necessary to rebut the presumption cannot be unrealistic considering the sophistication, expectations, and knowledge of the facts and law of the spouses entering into the interspousal transaction.<sup>450</sup> Without clear parameters, disgruntled spouses in dissolution of marriage proceedings disadvantaged by property transactions or transmutations made voluntarily during marriage have the power to set aside the title to property or a valid transmutation of property simply by testifying as to insufficient consideration or undue influence with the ultimate result of increased litigation and potential perjury. It is precisely this danger that was implicated in *Matthews*. Although the challenge raised by the wife was ultimately defeated, the fact that courts are willing to entertain such challenges and apply the presumption of undue influence simply because the challenged transaction advantages one spouse evinces a likely return to protracted dissolution litigation. The statutes, case law, and public policy concerns surrounding the title presumptions, the validity of transmutations, and the fiduciary relationship between spouses should not act to defeat each other but should work together to increase certainty and accuracy in the characterization of property upon dissolution of a marriage. Without such cooperation, a return to the era of heated dissolution proceedings and he said, she said battles looms on the horizon.

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449. *In re Marriage of Weaver*, 26 Cal. Rptr. 3d 121, 128-29 (Cal. Ct. App. 2005) ("Here, the undue influence presumption is inapplicable. This case simply involves husband converting his separate property interest in the Thule residence to joint tenancy shared with wife, as well as mother.").

450. See *Legal Developments*, 2003 CAL. FAM. L. MONTHLY 251. In commenting on *In re Marriage of Delaney*, Professor Grace Ganz Blumberg expressed the concern as follows:

[T]he facts of the husband's conveyance of his separate property into joint tenancy pose a more general question. The parties wanted to remodel their home and, in connection with their financing application, the husband, presumably at the bank's behest, deeded his separate property home to himself and his wife as joint tenants. Assuming similar facts but no special reliance by one spouse on the other, would a presumption of undue influence by the wife arise merely because the wife gained an incidental advantage from the husband's transaction with the bank? In other words, would an ordinary wife have a duty to warn and ordinary husband about the consequences of complying with the bank's requirement of joint title? If so, many joint titles are vulnerable, because banks often require joint title for refinancing.

*Id.*

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