ACFLS

ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

August 9, 2011

Honorable Tani Cantil-Sakauye, Chief Justice, and the
Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *In re Marriage of Valli*
Court of Appeal Case No. B222435
California Supreme Court Case No. S193990
Petition for Review filed July 30, 2009

Chief Justice Cantil-Sakauye and Associate Justices:

We write pursuant to California Rule of Court 8.500(g) on behalf of the Association of Certified Family Law Specialists (ACFLS) to urge that this court grant review of the decision in *In re Marriage of Valli.*

The holding in the *Valli* decision, and that of *In re Marriage of Brooks and Robinson* (2008) 169 Cal.App.4th 176, upon which *Valli* relies, are inconsistent with longstanding precedent. The conflict between these recent decisions and the cases that precede them are creating substantial difficulties and uncertainties for courts, counsel and parties in resolving marital dissolution cases. This court should grant review to resolve conflicts between the districts and to resolve an important question of law that is creating vexing and inconsistent results in cases involving the division of marital property. Californians need greater certainty in the arrangements they make for their marital property.

The ACFLS amicus committee has reviewed the opinion, the Petition for Review, the Answer and the Reply.

ACFLS is a non-profit statewide association of approximately 590 attorneys who have been certified as Family Law Specialists by the State Bar of California, Board of Legal Specialization. The Association monitors issues of interest to Family Law Specialists, develops and promotes family law practice skills, and provides advanced educational programs for the bar and judiciary. Our members also appear in all courts throughout California and ACFLS has appeared numerous times as amicus curiae in the appellate courts. We do not advocate for a particular outcome with respect to the parties; rather, we express our members' concern about issues of importance to family law attorneys

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and litigants throughout the state. The *Valli* case has triggered considerable traffic on the ACFLS Listserv, and is analyzed on the ACFLS Blog (http://www.acfls.org/famlawblog/?p=659)

The issue in *Valli* is the character of a life insurance policy taken out by Husband (Frankie) during the parties' marriage and paid for with community funds. Husband had been hospitalized with heart problems, and the parties had discussed the advantages of a policy to protect Wife and the parties' children. Husband purchased such a policy, naming Wife (Randy) as the owner. When the parties separated and divorced, Wife claimed that she owned the policy – which by then had a cash value of $365,032 – as her separate property. The trial court held that the policy was a community asset because it was acquired during marriage with community funds and there was no evidence of a transmutation. It awarded the policy to Husband and ordered him to equalize the award by paying Wife half of its cash value.

Wife appealed, and the Second District reversed. She argued "that the form of title presumption in Evidence Code section 662 establishes the policy as her separate property." Citing *Marriage of Lucas* (1980) 27 Cal.3d 808, and *Brooks and Robinson, supra,* the panel held that "(t)he property at issue in this matter – the policy – was acquired during marriage with community property funds. Thus, if the general presumption that property acquired during marriage is community property applies, then the policy properly would be characterized as community property. Notwithstanding the general community property presumption, however, based on the evidence adduced at trial, the form of title presumption applies, and the policy properly is characterized as Randy's separate property."

In holding that the community property presumption did not arise, the Court of Appeal pointed to the fact that Wife was the policy owner and that "Frankie did not introduce contrary evidence." It also noted that Husband testified that he "caused" the policy to be purchased in her name and that "(b)ecause title to the policy was taken solely in Randy's name during marriage with Frankie's consent, the form of title presumption and not the community property presumption applies." It held that "Frankie failed to overcome the form of title presumption" because he "did not present evidence of an agreement or understanding with Randy that when the policy was placed solely in Randy's name as owner, they intended title to the policy to be other than Randy's separate property" and that he "did not present evidence that he was unaware that title to the policy was taken solely in Randy's name."

The panel also disagreed with Husband that the form of title presumption did not apply under the authority of *Marriage of Haines* (1995) 33 Cal.App.4th 277. He argued that the fiduciary duties of Family Code §721(b) applied even though the transaction was between himself and a third party and Wife argued that they did not. The Second District panel said that it didn't matter because Wife prevailed under either theory. It reasoned that "(i)f Randy's theory is correct, she prevails because the acquisition of the policy resulted from a third party transaction and not from a transaction between spouses. If Frankie's theory is correct, Randy still prevails because the third party transaction at issue was

between Frankie and a third party and not between Randy and a third party. Randy could not have owed a fiduciary duty to Frankie in a transaction in which she did not participate." It concluded that "(e)ven if the fiduciary duties in section 721 apply to transactions between a spouse and a third party, the presumption of undue influence was rebutted by the evidence at trial.… No evidence was presented that Randy played any role in being named the owner of the policy. There is not substantial evidence of undue influence."

Frankie then argued "that the presumption of title for property obtained during marriage with community funds should not apply absent evidence that he and Randy 'intended that title control ownership.'" However, the court said that "(t)his argument seems to be a combination of his contentions discussed above. There is substantial evidence that the parties intended Randy own the policy, and there is not any significant evidence of undue influence, or that would otherwise rebut the presumption of title." Husband also argued that there was no evidence of a valid transmutation, but the panel held that this was irrelevant "because the property in this case – the policy – was acquired from a third party and not through an interspousal transaction, section 852 and the authorities concerning transmutation are not relevant to this case." Moreover, said the panel, "Randy did not contend in the trial court, and does not contend on appeal, that the policy is her separate property through transmutation. Instead, Randy contends that the policy is her separate property by operation of the form of title presumption."

The panel reversed and remanded for the trial court to award the policy to Wife as her separate property.

The holdings of both this case and *Brooks and Robinson* appear to conflict with the established application of the community property presumption. They both cite the Supreme Court's statement in *Lucas* that "(i)t is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption." However, *Lucas* dealt with a situation in which parties had acquired real property during marriage in joint tenancy form. The issue was whether or not the parties had an agreement or understanding that notwithstanding the form of title, the house would be Wife's separate property because she paid the entire down payment with her separate funds. The *Lucas* panel stated that appellate courts "have taken conflicting approaches to the question of the proper method for determining the ownership interests in a residence purchased during the parties' marriage with both separate and community funds." In discussing their varied approaches, it noted that in 1965, "the Legislature added the following provision to Civil Code section 164: '(W)hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.'" In other words, *Lucas* was dealing with the family law joint title presumption, which is currently Family Code §2581. It concluded that "(i)n the present case there is no evidence of an agreement or understanding that Brenda was to retain a separate property interest in the house," and therefore the family law joint title presumption prevailed.

The *Lucas* court said that "(t)he presumption arising from the form of title is to be distinguished from the general presumption set forth in Civil Code section 5110 that property acquired during marriage is community property. *It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption.*" Emphasis added. In stating "the presumption arising from the form of title," the *Lucas* court was referring to the family law joint title presumption; however, in *Brooks and Robinson* and now *Valli,* the appellate courts quoted this language from *Lucas* as if it were referring to the general civil title presumption of Evidence Code §662, which it clearly was not. Nothing in *Lucas* supports the argument that by specifying title to be taken in one spouse's name alone, the parties *intended that it would be that spouse's separate property* as opposed to solely-titled community property.

The *Valli* court also held that transmutation law is irrelevant where the transaction was between one spouse and a third party; however, what was transmuted between the spouses was not the policy *but the community funds used to acquire it.* Existing cases hold that property does not change character when it changes form and anything acquired with community funds is a community asset. According to the *Valli* court, the funds used to pay the policy premiums were community property but they transmuted to Randy's separate property the instant they were used to pay the premiums.

Also, the *Valli* court's holding on the fiduciary duty issue appears to be contrary to existing case law. According to *Haines,* a presumption of undue influence arises when one spouse is "unfairly advantaged" by an interspousal transaction. The transaction in this case consisted of Husband directing a third party to place an asset in Wife's name; according to the *Valli* court, this resulted in the transmutation of community funds into a separate property insurance policy. Obviously, this was an "interspousal transaction," in that it affected rights as between the spouses. However, this court holds that because the transaction *involved* a third party, "(i)f Randy's theory is correct, she prevails because the acquisition of the policy resulted from a third party transaction and not from a transaction between spouses, but "(i)f Frankie's theory is correct, Randy still prevails because the third party transaction at issue was between Frankie and a third party and not between Randy and a third party." In other words, *Valli* holds that no fiduciary duty can arise if the transaction is between one spouse and a third party and even if it does, it ONLY does if the transaction was between the benefitting spouse and the third party. However, other cases hold otherwise.

For example, in *Marriage of Delaney* (2003) 111 Cal.App.4th 991, Husband signed a deed in connection with a refinance of his separate property conveying title to both parties. That was a transaction between the "harmed" spouse and a third party. The trial court held that the presumption of undue influence arose and that Wife failed to rebut it. It voided the deed for undue influence and the First District affirmed, holding that Family Code §721 "establishes that with respect to property transactions, married couples are subject to the same standards of disclosure toward each other applicable to any confidential fiduciary relationship. As a consequence, when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence."

The *Delaney* court also specifically disagreed with Wife that "the trial court should have required Husband to rebut by clear and convincing evidence the presumption under Evidence Code section 662 that record title to the Property was held by the parties in joint tenancy.…" It concluded that "(t)he rationale of *Haines* clearly applies to any interspousal property transaction where evidence is offered that one spouse has been disadvantaged by the other. Nothing in *Haines* would confine its holding to situations in which the interspousal property conveyance was from joint tenancy to separate property. Where there is undue influence, as much injustice may be effected by the reverse transaction." Under *Delaney,* the presumption of undue influence arises when the non-benefitting spouse enters into a transaction with a third party that benefits the other spouse. However, the *Valli* court completely failed to cite *Delaney* and is in obvious conflict with it.

If the presumption of undue influence does not arise at all when the transaction in question is between one spouse and a third party, then either spouse must be free to use community funds to buy property in his or her own name *as separate property* without breaching any fiduciary duty to the other spouse. That cannot be the law and conflicts with Family Code §§ 721 and 2100. Such a holding would gut interspousal fiduciary duties in the management and control of community assets.

ACFLS is concerned because the *Valli* holdings create conflicts with existing cases on important issues relating to family law cases. This court should decide which line of authority is correct. Our members deal with these issues on behalf of clients throughout California on a daily basis. They are encountering difficulties in advising clients because of the uncertainty that *Valli* creates, and this uncertainty limits members' ability to assist clients in settling cases because the inconsistencies in the law resulting from *Valli* and *Brooks and Robinson* encourage clients seeking separate property ownership of assets that would have otherwise been presumptively community property to go to trial and seek a "windfall." For these reasons, we support the Petition for Review that has been filed in this case.

Respectfully,

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Co-Chairs, ACFLS Amicus Committee

Proof of Service attached

*Certified by the State Bar of California, Board of Legal Specialization as Certified Family Law Specialists and Certified Appellate Law Specialists