No. S193990

IN THE SUPREME COURT OF CALIFORNIA

IN RE MARRIAGE OF FRANKIE AND RANDY VALLI

FRANKIE VALLI
Petitioner and Respondent

v.

RANDY VALLI
Respondent and Appellant

After a Decision by the Court of Appeal,
Second Appellate District, Division 5
(Case No. B222435)
(Los Angeles County Superior Court Case No. BD414038
Honorable Mark Juhas)

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER FRANKIE VALLI AND [PROPOSED] AMICI CURIAE BRIEF OF PROFESSOR CHARLOTTE K. GOLDBERG AND PROFESSOR HERMA HILL KAY

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APPLICATION TO FILE BRIEF AS AMICI CURIAE

Pursuant to rule 8.520(f) of the California Rules of Court, Charlotte K. Goldberg and Herma Hill Kay (together, "amici") respectfully request leave to file the attached brief, in support of Petitioner Frankie Valli, to be considered in the above-captioned case. This application is timely made pursuant to the briefing schedule set forth by the court.

A. Charlotte K. Goldberg

Amicus curiae Charlotte K. Goldberg is a tenured Professor of Law at Loyola Law School, Los Angeles, California. Professor Goldberg has been teaching and writing in the area of California Community Property Law since 1983. She has authored a book on California Community Property Law entitled *California Community Property, Examples and Explanations* (3rd ed. 2010). Her scholarship has been mainly in the area of the history of community property rights in California including "A Cauldron of Anger: The Spreckels Family and Reform of California Community Property Law," (1999) 12 Western Legal History 241 and "The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage," (2007) William & Mary Journal of Women and the Law 483. Her most recent publication is "Opting In, Opting Out: Autonomy in the Community Property States," (2011) 72 Louisiana Law Review 1.

B. Herma Hill Kay

Amicus Herma Hill Kay is the Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley, School of Law. She has been teaching and writing in the areas of California Community Property Law and Family Law since 1960, and continues to be a full-time member of the Berkeley Law Faculty. She authored the first article analyzing California's quasi-community property statute, "Quasi-Community Property" in the Conflicts of Laws, 50 Calif. L. Rev. 206 (1962). She was a member of the California Governor's Commission on the Family, which proposed the forerunner of the California No-Fault Divorce Law enacted as the Family Law Act in 1970. She later served as Co-Reporter of the Uniform Marriage and Divorce Law, which drew on the California statute to propose a similar no-fault divorce act. She has continued to publish and teach in these areas.

C. Interests of Amici Curiae

This appeal raises important issues regarding the proper interpretation and application of Community Property Law. In particular, the issue of how to characterize property acquired during marriage is often the most significant point of difference in dissolution and probate proceedings. The *Valli* case involves issues of both the proper presumption to be applied to determine the character of property and how the transmutation sections of the Family Code are to be

interpreted. Professor Goldberg and Professor Kay are interested in clarifying these issues so that practicing attorneys, law teachers, and the students preparing to practice will be able to serve their clients well in disputes over marital property.

D. Need For Further Briefing

Amici are familiar with the issues before the court and believe that further briefing will provide additional historical information on the development of the law regarding presumptions and transmutation. Specifically, amici will explain how the confusion on these issues developed and how the law should be clarified.

Dated: December 20, 2011

CHARLOTTE K. GOLDBERG
HERMA HILL KAY

By Charlotte K. Goldberg
Charlotte K. Goldberg
For Amici Curiae

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I. INTRODUCTION

The major issue in *In re Marriage of Valli* is how to characterize the life insurance policy purchased by husband Frankie Valli with community property funds and put in wife Randy's name as owner. Frankie intended that upon his death Randy would "take care and give to the kids what they might have coming." This raises a fundamental question of how to determine the character of property acquired during marriage. If the character of the funds used to purchase the policy control, the cash value of $365,032 is community property and would be divided equally at divorce. If the title in Randy's name controls or if Frankie intended to transmute the community property funds to Randy's separate property, the cash value would be her separate property and it would belong to her upon divorce. The crux of the case is which controls: the character of the purchase funds, the title on the policy, or the intent to transmute the funds if properly accomplished.

To decide such classic questions, community property law uses presumptions. The first basic principle of California community property law is that property acquired during marriage, even if titled in one spouse's name alone, is presumed to be community property. The principle is embodied in the general community property presumption. It is derived from the definition of community property found in Family Code §760. When title to property is held by both spouses in joint form, a "form of title" presumption is created by Family Code

§2581. That presumption does not apply to property acquired in one spouse's name alone. Between 1889 and 1975, another "form of title" presumption existed in California community property law. It is known as the "special married woman's presumption." Under that presumption, title in a *wife's* name alone was presumed to be *her* separate property. It was created at a time when the husband had sole management and control of community property, and it was abolished in 1975 when wives acquired equal management and control of the community property. Its only application today is to property acquired in a wife's name alone prior to 1975 and is enshrined in Family Code §803. Therefore, in this situation, the general community property presumption, not any type of "form of title" presumption applies to the acquisition of the life insurance policy.

When the general community property presumption applies, the burden of rebuttal is on the spouse claiming that the property is separate property. The usual method of rebuttal is to trace the acquisition of the property to separate property funds. Here the policy premiums were paid from community property. Tracing to the funds used to acquire the policy takes us back to the conclusion that the policy is community property. It is possible that husband Frankie intended to make a gift to Randy of the life insurance policy by designating her as "owner." However, putting the policy in her name is insufficient to constitute a transmutation of the community property funds to her separate property under the "transmutation"

statute, Family Code §852. The statutory requirement for transmutation is an "express declaration" in "writing" by "the spouse whose interest in the property is adversely affected." That would be husband Frankie. According to this Court's interpretation of §852 in *Estate of MacDonald* and *In re Marriage of Benson*, simply putting the title in her name as owner does not constitute the required express declaration.

This case demonstrates that further clarification of the scope of the transmutation statute is required from this Court. The Court of Appeal in the instant case relied on a statement in the prior case of *In re Marriage of Brooks and Robinson* that Family Code §852 is inapplicable to an "initial acquisition of property from a third party." The Court of Appeal in the *Valli* case used that language to avoid discussion of the application of §852. The rationale of §852, however, applies with equal force both to initial purchases from third parties and purely interspousal transfers. That rationale is that spouses must express in writing whether property acquired during marriage with community property funds is being changed to the separate property of one spouse. Whether the transmutation occurs at the time of the initial purchase or later should not make a difference. The *Brooks* case and the Court of Appeal in *Valli* disregard the purpose of the strict requirements of §852 by not applying it to an initial acquisition, such as the purchase of the life insurance policy here.

II. ARGUMENT

A. The General Community Property Presumption Applies To The Life Insurance Policy Acquired with Community Property Funds During The Vallis' Marriage

There is no dispute that the life insurance policy at issue in this case was acquired during the marriage of the parties. It follows from that undisputed fact that the general community property presumption applies to the characterization of the policy. The burden of overcoming the general community property presumption is on the party – here wife Randy – who asserts that the item in question is separate property. She relies on two arguments, both unavailing, to overcome the general community property presumption: first, that title was put in her name alone; and second, that husband Frankie had intended to make a gift to her of the insurance policy. Her first argument fails because holding property in the name of one spouse alone during the marriage is not inconsistent with its underlying character as community property. Her second argument fails because the transmutation statute is not satisfied on these facts.

Thus, the general community property presumption applies to the life insurance policy acquired during the marriage of the Vallis even though the wife Randy was designated as the "owner" of the policy. The general community presumption derives from the definition of community property in Family Code

§760 which states that "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." This presumption applies to untitled property and to property titled in one spouse's name, including the life insurance policy in question in this case.

The trial court in *Valli* correctly applied the general community property presumption. It found that wife Randy could not rebut that presumption by tracing the source of the policy to separate property funds because the parties agreed that the funds used to pay the premiums were community property. *In re Marriage of Valli*, (2011) 195 Cal. App. 4th 776,780 (hereafter *Valli*). Thus the trial court's determination to apply the general community property presumption and to put the burden of rebuttal on wife Randy, the separate property proponent, was a correct application of community property law. Since she failed to carry that burden because she could only trace to the community property funds used to pay the premiums, the presumption supports the conclusion that the cash value of the policy was community property to be split between Frankie and Randy at divorce.

The Court of Appeal in *Valli* was therefore incorrect in applying a "form of title" presumption instead of the general community property presumption and in holding that the title in wife Randy's name alone raised the presumption that the policy was her separate property.

1. The Presumption That Property Titled In A Wife's Name Is Presumed to be Her Separate Property Was Abolished in 1975

Prior to 1975, the special married woman's presumption was that "whenever any real or personal property. . .was acquired. . .by a married woman by an instrument in writing, the presumption is that the same is her separate property. . . ." Civil Code §5110 (now found in Family Code §803). However, that presumption was abolished for acquisitions on or after January 1, 1975.

In *In re Marriage of Mix*, (1975) 14 Cal. 3d 604, this Court examined whether property in the wife Esther's name was her separate property. The funds used to purchase that property came from a bank account in which she had commingled her community earnings and her separate property funds. At that time, although a husband had management and control over community property, the Legislature had granted a wife management and control over her earnings. The Court recognized that that special married woman's presumption would have no further effect as of January 1, 1975, the effective date of total equal management and control. Since Esther already had management and control over her earnings, the Court concluded "that the controlling presumption in this case is the one that property acquired during marriage is community property." *Id.* at p. 611. The issue in *Mix* was whether Esther, who had the burden of rebutting the general community property presumption, had adequately traced the acquisition in her

name to her separate property. She had and thus the trial court's determination was upheld on that basis, not on the fact that the property was in her name.

Confusion has resulted from the 1980 case of *In re Marriage of Lucas*, (1980) 27 Cal. 3d 808 (hereafter *Lucas*). That confusion was why the Courts of Appeal in *In re Marriage of Brooks and Robinson,* (2008) 169 Cal. 4th 176 (hereafter *Brooks*) and in *Valli* applied that wrong presumption to the characterization of the property titled in the wife's name. The *Lucas* case dealt with two items of property acquired during the Lucas's marriage: a home acquired in joint tenancy in 1968 and a motorhome in Brenda's name purchased in 1976. The bulk of the case dealt with characterization of the joint tenancy home. The quote from *Lucas* cited in *Brooks* and *Valli* applied to the joint tenancy home:

> "The presumption arising from the form of title is to be distinguished from the general presumption set forth in Civil Code section 5110 [now Family Code §760] that property acquired during marriage is community property. It is the affirmative act of specifying a form of ownership in the conveyance of title that removes such property from the more general presumption." *Lucas*, *supra,* 27 Cal. 3d at pp. 814-815, quoted in *Brooks*, *supra,* 169 Cal. 4th at p. 191 and *Valli*, *supra*, 195 Cal. App. 4th at p. 785.

At the end of the lengthy *Lucas* opinion regarding the joint tenancy home, the Court spent exactly four paragraphs discussing the trial court's determination

that the motorhome purchased in Brenda's name was her separate property. The Court upheld that determination without referring to which presumption applied: the general community property presumption, the special married woman's presumption, or the form of title presumption. The Court stated that the trial court's determination that the husband Gerald was making a "gift of his community property interest in the motorhome" was supported by substantial evidence. *Lucas, supra,* 27 Cal. 3d at p. 818.

The *Lucas* opinion's lack of clarity on this issue of the applicable presumption generated a response from the California Law Revision Commission. In particular, there was a proposal of legislation to clarify the presumption that applies when title is taken in a wife's name. The Commission's view was that the *Lucas* Court had ignored the abolition of the married woman's special presumption, which had occurred in 1975, one year before the motorhome was acquired in 1976. The Commission cited the *Lucas* case as one that despite the abolition of the special married woman's presumption, "the cases nonetheless continue the effect of the title presumptions by creating an inference of a gift as to property acquired before or after January 1, 1975." Recommendation Relating to Marital Property Presumptions and Transmutation, 17 Cal. L. Revision Comm'n Reports 205, 210-211 (1984) (hereafter Commission Report). The Commission suggested legislation that would "overrule the title inferences of separate

property." *Id.* at p. 212. The suggested legislation regarding presumptions was withdrawn by a letter from the Commission stating that "[b]ecause the presumption area is so intricate, and in light of comments we have received from the State Bar Family Law and Probate Sections and from others, we believe it would be desirable to have the Commission review this area again carefully before proceeding with legislation."[1]

Thus, the lack of clarity in *Lucas* regarding the motorhome was not resolved by the Legislature at that time and was not revisited by the Law Revision Commission. That omission left open the possibility that later courts could view the "form of title" presumption as applying to property acquired in a wife's name. Unfortunately, both the *Brooks* and *Valli* courts used that presumption to "create the inference of a gift" when property is titled in the wife's name.

2. At Divorce, A "Form of Title" Presumption Applies Only To Joint Titles Under Family Code §2581

The "form of title" community property presumption applies to joint titles at divorce. The controversial *Lucas* decision regarding joint tenancy also generated a reaction from the Legislature. Regarding the joint tenancy home acquired partially

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[1] Letter of Nathaniel Sterling, California Law Revision Commission, March 22, 1984. This did not affect the Recommendations relating to transmutations. Letter furnished by Legislative Research Inc. in The Core Legislative History of California Statutes of 1984, Chapter 1733, Assembly Bill 2274—McAlister, at p. 92.

with Brenda Lucas's separate property funds, the Court held that the statutory presumption in Civil Code §164 (later codified in Civil Code §5110) that a single family residence was community property at dissolution or legal separation could be rebutted only by an agreement. Tracing to separate property funds was insufficient to rebut the presumption. The agreement could be oral or implied as well as written. Absent the agreement, the home would be characterized as community property. Any separate property funds would be considered a gift to the community absent a reimbursement agreement. *Lucas*, *supra,* 27 Cal. 3d at pp. 815-816.

The Legislature reacted by extending the community property title presumption at dissolution and legal separation to all joint tenancy property, not just single family residences. (1984) Civil Code §4800.1 (now Family Code §2581). Subsequently, that presumption was extended to all joint titles, not just joint tenancy property. (1987) Civil Code §4800.1 (now Family Code §2581). Omitted from that legislation was any mention of applying a title presumption to property acquired in one spouse's name. To this day, the only titles or deeds that are presumed to be community property for the purpose of dissolution or legal separation are joint titles or deeds.

Joint titles differ significantly from titles in one spouse's name alone. A joint title, like joint tenancy, represents an agreement that both spouses sign that

indicates that they recognize they have joint interests in the property: "The act of taking title in a joint and equal ownership is inconsistent with an intention to preserve a separate property interest." *Lucas*, *supra,* 27 Cal. 3d at p. 857. Putting the title in one spouse's name alone does not represent that same agreement. As stated by the Law Revision Commission, "convenience, concerns with insurance, taxation or probate or chance may be more likely to determine which spouse purchases or takes title to a given item than is an independent decision of the spouses as to the ownership." Commission Report, *supra*, at p. 211.[2]

Under the canon of statutory construction, "Expressio Unius Est Exclusio Alterius," the exclusion of titles in one spouse's name in Family Code §2581 indicates that the general community property presumption, not a "form of title" presumption, applies. Thus, the *Valli* and *Brooks* courts' application of a separate property title presumption to property, such as the life insurance policy here, in the wife's name alone was incorrect.

3. Evidence Code §662 Does Not Apply When Determining The Character of Property Acquired During Marriage

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[2] Concern about estate taxes is the main reason for putting ownership of a life insurance in the name of someone other than the insured. "[L]ife insurance proceeds are subject to estate tax if the insured owns or in any way controls the life insurance policy." Joulfaian, David, U.S. Dept. of the Treasury, "To Own or not Own Your Life Insurance Policy?" (July 29, 2011). Available at SSRN: http://ssrn.com/abstract=1917735.

The general community property presumption enshrined in Family Code §760 derives from Spanish community property law, not the common law title system:

> "The Spanish law of community expressly provided that property which husband and wife had should be presumed to belong to both by halves, except that property which each one might prove to be his or hers separately. This, indeed, seems to have been the presumption of the community property system from the time the Visigoths introduced the system into the Spanish peninsula. . .The fact that the husband or wife acquired the title in his or her own name, did not alter the presumption that property acquired during marriage was community property." William Q. DeFuniak and Michael J. Vaughn, Principles of Community Property 116-117 (2d ed. 1971).

California adopted the Spanish community property system in its 1849 Constitution and in one of its first legislative enactments. Cal. Const. art. XI, §14 (1849), Act of Apr. 17, 1850, ch. 103, §9 1849-50 Cal. Stat. 254. The presumption from the Spanish community property system is the present-day general community property presumption that applies to property acquired during marriage in one spouse's name alone. The special married woman's presumption existed from the time it was inserted in the Civil Code in 1889 until it was abolished in

1975. *Marriage of Ashdodian*, (1979) 96 Cal. App. 3d 43, 48 (history and application of special married woman's presumption).

On the other hand, Evidence Code §662, which presumes that title represents ownership, derives from common-law concepts that are contrary to California system of marital property. Applying Evidence Code §662 to matrimonial disputes, as in *Brooks* and subsequently in *Valli*, contradicts the philosophy and history of the California community property system. For that reason, this Court should make clear that Evidence Code §662 does not control when title is put in one spouse's name alone during the marriage.

The proper application of the general community property presumption is found in *In re Marriage of Ettefagh*, (2007) 150 Cal. App. 4th 1578. In that case, the title of much of the couple's property was in the husband's name. The issue in the case was the standard of proof "required to overcome the rebuttable presumption contained in Family Code section 760 that property acquired by either spouse during marriage is community property." *Id.* at p. 1580. It is clear, especially in light of the abolition of the special married woman's presumption, that consistency demands that property titled in the name of a wife alone should be treated in exactly the same manner as property acquired in the name of a husband: the general community property presumption is applicable. Both the *Brooks* and *Valli* cases dealt with property titled in a wife's name. Applying Evidence Code

§662 to such property improperly revives a separate property presumption abolished in 1975.

B. Title in One Spouse's Name Will Not Rebut The General Community Property Presumption

If the general community property presumption applies to the life insurance policy acquired by the Vallis during their marriage, the burden of proof to rebut the presumption falls on the separate property proponent. That would be the wife Randy. Ordinarily, tracing to separate property funds is the method for rebutting the presumption. That method does not work here because it was agreed that community property funds were used to purchase the policy. Title put in wife Randy's name as "owner" is insufficient to show that the policy was transmuted to Randy's separate property.

The crucial issue here is whether Family Code §852's transmutation requirement applies to an initial acquisition of property from a third party. The *Valli* Court avoided the transmutation issue completely by relying on language in the *Brooks* case that stated that "the *initial acquisition* of property from a third person does not constitute a transmutation and thus is not subject to the transmutation requirements." *Valli, supra,* 195 Cal. App. 4th at p. 787. This interpretation of the transmutation statute, Family Code §852, would exempt purchases from a third party from the strict writing requirements imposed by the

Legislature. That strict writing requirement should be applied here, and its application supports husband Frankie's position that the life insurance policy is community property and was not transmuted by putting title in wife Randy's name at the time it was acquired.

1. The Transmutation Statute Requirements In Family Code §852 Apply To All Property Including Initial Purchases

The transmutation statute is silent on the issue of whether there is a distinction between initial purchases and property already owned by the spouses. Family Code §852(a)'s main requirement is that all transmutations of separate/community property between spouses be "in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." Without applying the strict writing requirements to initial purchases from third parties, a loophole is opened that allows a return to the era of "easy" transmutation. Closing the loophole of "easy" transmutation was the purpose of Family Code §852. "[S]ection 852 blocks efforts to transmute marital property based on evidence—oral, behavioral, or documentary—that is easily manipulated and unreliable." *In re Marriage of Benson*, (2005) 36 Cal. 4th 1096, 1104 (referring to *Estate of MacDonald*, (1990) 51 Cal. 3d 262, 269).

The point bears repeating that confusion about application of the transmutation requirements to initial purchases resulted from the ambiguous motorhome scenario in the *Lucas* case. The Law Reform Commission viewed the *Lucas* analysis as the improper use of the repealed presumption that title in the wife's name alone was her separate property. This Court in *Estate of MacDonald*, (1990) 51 Cal. 3d 262 mentioned the *Lucas* analysis as an example of an "objectionable transmutation" case. *Id.* at Fn. 6.

Consider the differing effect of treating the motorhome scenario under these alternative views:

In *Lucas*, the motorhome was purchased with a mixture of a small amount community funds and mostly wife Brenda's separate property funds. The purchase contract for the motorhome was made out in husband Gerald's name alone, but the title was taken in Brenda's name alone. Brenda wished to have the title in her name and Gerald did not object. The trial court confirmed the motorhome to Brenda as her separate property and stated that Gerald's de minimus community property interest was a gift to Brenda at the time of the purchase. *Lucas*, *supra,* 27 Cal. 3d at p. 818.

It is possible to view this transaction as the Law Reform Commission did: the Court in effect applied the repealed special married woman's presumption that Gerald could not rebut. See *In re Marriage of Ashdodian*, (1979) 96 Cal. App. 3d

43 (husband has the burden of proving the property is community property for property acquired prior to 1975 in wife's name). Gerald's not objecting to Brenda's wish showed that he intended a gift to her. Therefore, the motorhome was Brenda's separate property. This parallels Randy's argument that the life insurance policy is her separate property because Frankie intended a gift by putting the title in her name.

The *MacDonald* Court's view seems to be that a transmutation took place at the time of the purchase of the motorhome. This view validates applying transmutation requirements to initial purchases from third parties. Applying the general community property presumption, the purchase of the motorhome during marriage would be presumed to be community property. Brenda, the separate property proponent, could initially rebut by showing that most of the funds used were her separate property and therefore she would have a separate property interest in proportion to the amount of funds contributed. However, she also could have argued that there was a transmutation of the entire property at the time of purchase—Gerald gave up his community property interest by not objecting to taking title in her name. His non-action or acquiescence in Brenda's request resulted in one of those "objectionable" transmutations. To reverse this "objectionable" type of transmutation was the point of the Legislature's adoption of the strict writing requirement. The strict requirement was enacted to increase

certainty and to require a transmutation to be both written and express. *In re Marriage of Benson, supra*, 36 Cal. 4th at p. 1106.

Applying the *MacDonald* view to the Valli facts would demand that Randy show that the life insurance policy was transmuted at the time of purchase. Although the designation as owner was in writing, that term does not clearly indicate that Frankie was giving up a property interest by using it and thus did not constitute an "express declaration" under the strict requirements of Family Code §852(a). Therefore, putting the title in Randy's name would not rebut the community property presumption. Instead, the funds used to purchase the policy control and therefore the policy is community property.

2. Putting Title in Wife Randy's Name Does Not Meet the Requirements For a Transmutation Under Family Code §852(a)

If the former days of easy transmutation applied to the Valli facts, Randy could argue that like Gerald Lucas, Frankie's putting the title in her name at the time of the purchase was a transmutation into her separate property. If the present-day transmutation requirements of §852 applied here, she could not show a transmutation by pointing to title in her name. Under the interpretation by the *MacDonald* Court, a writing will not be an "express declaration" "*unless* it contains language which expressly states that the character of ownership of the property is being changed." *Estate of MacDonald, supra*, 51 Cal. 3d at p.

273(emphasis in original). Although the designation as "owner" could represent a change in ownership, as argued by Randy, under the "express declaration" requirement, it is insufficient. The word "owner" is insufficient to show that Frankie, the person whose interest in the property is adversely affected, consented to or accepted the transmutation of his community property interest into Randy's separate property. Therefore, if Randy is required to show a transmutation to rebut the general community property presumption, she would fail.

The case that exemplifies the stringency of the "express" declaration requirement is *In re Marriage of Barneson*, (1999) 69 Cal. App. 4th 583. Robert Barneson and Evelyn Kaiser Barneson were married in 1988. At the time Barneson was 65 years old and Kaiser was almost 36. The following year, Barneson who owned a multi-million dollar stock portfolio, suffered a stroke. The next year, he signed a typed letter that referred to certain stock. The letter stated "I would like to transfer these same stocks into the name of Evelyn J. Kaiser." He also signed an "Irrevocable Stock or Bond Power" that began with the phrase "For value received, the undersigned does (do) hereby sell, assign, and transfer unto," after which Evelyn Kaiser's name was written. *Id.* at pp. 585-586. A stock account was opened in her name and Barneson authorized in writing "transfers" of stock to her account.

In 1992, Barneson filed a petition for dissolution of marriage and sought return of the transferred stock. Although their marriage was dissolved, the property issues were not resolved before Barneson died. The question on appeal was whether Barneson's actions in transferring the stock to Kaiser constituted a valid transmutation under Family Code §852(a). Kaiser argued that "transfer" was the equivalent of "transmutation." The Court of Appeal rejected her argument because "Barneson only directed 'transfer' of the stock to Kaiser, without specifying what interest was to be transferred." *Id.* at p. 590. According to the Court, "the direction to 'transfer' an asset into a different name does not necessarily connote an intention to change beneficial ownership." *Id.* at p. 593.

Even though *Barneson* involved property already owned during marriage, it is instructive on how strict are the "express" requirements of Family Code §852(a). Applying the *Barneson* reasoning here, although designating Randy as the "owner" of the policy may look like a change in ownership, the use of the term "owner" is not the equivalent of a transmutation. Without specifying what interest is being changed, the requirements for a transmutation under Family Code §852(a) are not met. A transmutation of the life insurance policy could be accomplished only if the designation included additional language showing that Frankie knew he was giving up his community property interest. While no "magic words' are required to constitute a transmutation, there must be some written indication that a change is

being effect in the character of the property, and that the spouse whose interest is adversely affected is aware of that change. Because merely placing the title in Randy's name as "owner" does not meet not meet the "express declaration" requirement, the conclusion follows that the policy and its cash value are community property.

3. The *Valli* And *Brooks* Courts Erred In Relying On Statements In the Federal Bankruptcy Case of *In Re Summers*

If the reasoning of the *Valli* Court of Appeal is upheld, that would carve out an exception to the transmutation statute by exempting initial purchases from the strict writing requirements of Family Code §852(a). That conclusion would be derived from a quote in the *Brooks* case that can be traced to statements of the Ninth Circuit U.S. Court of Appeals in *In re Summers*, (2003) 332 F.3d 1240, 1244-1245.

The *Summers* case was a bankruptcy case. The bankruptcy court had found, based on the joint tenancy deed, that the real estate in question was held in joint tenancy. The trustee in the wife's bankruptcy case argued that it was community property and therefore property within the wife's bankruptcy estate. The property in question was purchased during the Summers' marriage with community property funds and the deed was taken in joint tenancy. The Ninth Circuit upheld the characterization of the property as joint tenancy.

The trustee had argued that purchases from third parties "must include express declarations with respect to the funds used to purchase the property." *Id.* at 1245.

The *Summers* Court defined a transmutation as an "*interspousal transaction or agreement* that works a change in the character of the property." *Id.* at 1244, quoting from *In re Marriage of Cross*, (2001) 94 Cal. App. 4th 1143, 1147. The Court then described many California cases that dealt with property already owned by the spouses that were arguably transmuted from community or separate property during the marriage. Because there was no interspousal transaction in the *Summers* case, the Court concluded that the transmutation requirements had "no relevance." *Id.* at 1245. Further, the Court rejected the argument that purchases of properties from third parties must include express declarations with respect to the funds used to purchase the property. Because the funds were never transferred from one spouse to the other, according to the Court, the transmutation statute was inapplicable. *Id.*

The discussion of whether the transmutation statute applies to purchases from third parties or that funds used to make the purchase need a transmutation was superfluous to the conclusion regarding the nature of the property in question in *Summers*. The deed stated that husband and wife held the property in joint tenancy. According to California law, a joint tenancy deed takes the property out

of the general community property presumption and raises a "form of title" presumption that cannot be rebutted by simply tracing to community funds. In *Summers*, that should have been the end of the discussion.

What actually happened in *Summers* was that there was a transmutation via the deed itself. When the husband and wife purchased the property and signed the deed, it was an "express declaration" transmuting the property from community property funds to joint tenancy. That complied with the transmutation statute itself. The *Summers* Court's statements in response to the trustee's arguments have led to the erroneous conclusion that the transmutation statute does not apply to purchases from third parties.

In the Valli scenario, Frankie and Randy purchased a life insurance policy and simultaneously designated Randy as "owner." The transmutation statute should apply. At divorce, the character of the life insurance policy must be determined. The general community property presumption applies. A transmutation will not rebut that presumption because title in one spouse's name alone does not meet the strict writing requirements in §852(a). Thus, the life insurance policy is community property.

Amici submit that this Court should clarify the interpretation of the transmutation statute to make clear that the express declaration requirements do

apply when characterizing property that is purchased from a third party as part of that same transaction is titled in one spouse's name alone.

III. CONCLUSION

The decision in this case has ramifications for the most important issue in most marital dissolution cases—how to characterize property acquired during marriage. It is important to clarify which presumption applies when property is put in one spouse's name alone. The history and philosophy of community property law dictate that the general community property presumption should apply. Also, the separate property proponent must rebut that presumption either by tracing to separate property funds used to acquire the property or by demonstrating that the strict requirements of the transmutation statute have been met. Because the wife Randy cannot rebut the presumption, the trial court's determination that the life insurance policy was community property should be affirmed.

In so holding, this Court should disapprove the case of *In re Marriage of Brooks and Robinson* to the extent that it holds otherwise regarding the applicable presumption and the applicability of the transmutation statute to initial purchases.

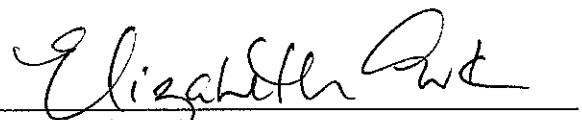
Dated: December 20, 2011

CHARLOTTE K. GOLDBERG
HERMA HILL KAY

By: Charlotte K. Goldberg
Charlotte K. Goldberg
For Amici Curaie

CERTIFICATION

Pursuant to *California Rules of Court*, Rule 8.204(c), I, Elizabeth Luk, certify that Microsoft Office Word 2007, the computer program used to prepare the Amici Curiae Brief, reflects that this Brief contains 5, 574 words, including footnotes but excluding tables.



Elizabeth Luk

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that I am employed in the county of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Loyola Law School Los Angeles, 919 Albany Street, Los Angeles, California 90015. On this day, I served the foregoing Document(s):

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER FRANKIE VALLI AND [PROPOSED] AMICI CURIAE BRIEF OF PROFESSOR CHARLOTTE K. GOLDBERG AND PROFESSOR HERMA HILL KAY

By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure § 1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Loyola Law School, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Los Angeles, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, California, on this date, December 20, 2011.

Elizabeth Luk