S193990

IN THE SUPREME COURT
OF
THE STATE OF CALIFORNIA

IN RE MARRIAGE OF

FRANKIE VALLI, PETITIONER AND RESPONDENT

AND

RANDY VALLI, RESPONDENT AND APPELLANT

AFTER A DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

NO. B222435

LOS ANGELES SUPERIOR COURT NO. BD 414 038

AMICUS CURIAE BRIEF OF KIM W. CHEATUM IN SUPPORT OF PETITIONER FRANKIE VALLI

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INTRODUCTION

This court has agreed to resolve the question whether Evidence Code section 662[1] has any role in characterizing marital property as between spouses. Two cases put this controversy into perspective: This case, *In re Marriage of Valli* (2011), where the dispute focuses at the time property is acquired; and an earlier case, *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, where the dispute focused not at the time of acquisition, but on a subsequent interspousal transaction.

In *Haines*, the parties acquired property in joint names during marriage. Husband alleged that it afterwards became his separate property when wife signed a deed transferring title to his name alone. Wife disagreed. The issue was whether husband, as the spouse who benefitted from this transaction, had the burden of rebutting the presumption of undue influence arising from Family Code section 721,[2] or whether wife, as the non-titled spouse, had the burden of rebutting the presumption of title in section 662. Section 662 lost this head-to-head conflict with section 721.[3]

In *Valli*, the dispute involves the character of property when it was first acquired during marriage in wife's name. What should be determinative in resolving this dispute – the "time" of acquisition during

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[1] Evidence Code section 662 provides: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." All references to section 662 are to Evidence Code section 662.

[2] Family Code section 721 (a) provides: "Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried."

[3] All statutory references are to the Family Code, unless otherwise noted.

marriage under section 760,[4] or the "title" in wife's name by virtue of section 662? The former promotes a community property outcome (and puts the burden on wife to "except" it) and the latter promotes a separate property outcome (and puts the burden on husband to "rebut" it). Thus, section 662's newest foe is section 760.

While it is interesting to note where *Haines* and *Valli* differ, it is essential to note where they unite. Both present the ultimate issue, namely, whether section 662 has any role in characterizing property disputes between spouses. If not, there is no issue of inconsistency or conflict with section 760 (as in *Valli*) or section 721 (as in *Haines*).

Amicus Cheatum argues that section 662 has no such role, by sovereign choice in 1850, section 760's plain words, and section 662's own admission. These three reasons can be simplified into one: The relational boundary of marriage bars section 662 from entering family court to characterize marital property as between spouses.

KEY FACTS AND PROCEDURAL HISTORY

Randi Valli ("wife") acquired a life insurance policy in her name during her marriage to Frankie Valli ("husband"). The policy was purchased and maintained with community funds.

The trial court concluded that the "time" of acquisition during marriage was controlling under section 760. Therefore, the policy was community property, unless wife proved that it was acquired with her

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[4] Section 760 provides: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

separate property. Wife did not satisfy her burden. Accordingly, the policy was community.

The Court of Appeal disagreed. It concluded that "title" in wife's name was governing under section 662. Thus, the policy was her separate property unless husband rebutted section 662's presumption by clear and convincing evidence. Husband failed in his burden. Hence, the policy was wife's separate property.

ISSUES

Did the Legislature intend for "all" to mean "all"? That is, did the Legislature hire "Part 2 (commencing with Section 760) of Division 4" of the Family Code to characterize "all" property acquired by a married person during marriage as community, except when proven separate?

Or did the same Legislature intend for "all" to mean something less than "all"? Specifically, did the Legislature intend for the Family Code's clear and historically "closed" definition of separate property to be "opened" in those cases when the non-titled spouse is unable to rebut the presumption in section 662?

Does section 662 itself admit that characterizing marital property between spouses is beyond its job description?

THIS BRIEF, IN BRIEF

Community and separate property have not been orphaned; rather, they remain part of the same family of statutes that created them more than 150 years ago:

> Section 2581 for "all" property acquired by *married persons* during marriage – that is, *jointly titled property*; and
>
> Section 760 for "all" property acquired by a *married person* during marriage – that is, *singularly titled and untitled property*.[5]

Both of these statutes occupy "all" (or the universe) of the space allocated to family court to characterize property acquired by spouses, jointly and singularly titled, and untitled. Thus, there is neither space nor need for a stranger outside of the Family Code, such as section 662.

Here, the disputed property was titled in wife's name during marriage. Accordingly, this case presents a wonderful opportunity to explore the depths of section 760 – its historical origins, what it says, and why it says it.

Fully understood, section 760 is a masterpiece of jurisprudence. It strikes a just balance between two categories of property – a clear starting

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[5] All property acquired during married – jointly and singularly titled, and untitled – is the same in terms of being characterized as community at the time of acquisition. Jointly titled property differs from singularly titled and untitled property by the higher standard of proof required to except or rebut the starting point of community as discussed, *infra*.

point of community and a fair rebuttal opportunity to separate. Section 662 is graffiti in comparison.

But section 662 resents being misused to compete with section 760 over marital property. Section 662 is designed for a purpose, like a round peg is designed for a round hole. It sets forth a process for resolving disputes between unmarried persons as to singularly titled property.

Section 760 is designed for a different purpose, akin to a square peg for a square hole. It establishes a process for resolving disputes between married persons as to singularly titled property (and untitled property).

Forcing either peg into the hole of the other causes thinking to splinter into jurisdictional error and justice to miscarry.

Hence, this case presents the simple need to remember relational boundaries: Disputes over the character of singularly titled property, as between married persons, are governed by section 760 (and not section 662), and disputes over the character of singularly titled property, but as between unmarried persons, are governed by section 662 (and not section 760). Trespasses are not permitted.

LEGAL DISCUSSION

A. INTRODUCTORILY, IT IS HELPFUL TO "UNCONFUSE" THE PRESUMPTION ARISING FROM THE FORM OF TITLE FROM THE COMMON LAW PRESUMPTION OF TITLE CODIFIED IN SECTION 662

1. Overview

In 160 years of community property jurisprudence in California, only the last 20 have witnessed confusion surrounding the "form of title" presumption in disputes between spouses involving property singularly

titled during marriage. The courts in *Valli* and *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176 [*Brooks*] use the "form of title" presumption interchangeably with the common law presumption of title codified in section 662, as though they are one and the same.[6] Indeed, in *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, the court refers to "the 'form of title' presumption" as the "common law presumption . . . codified in Evidence Code section 662 . . . ." (*Id.* at p. 344.) *Fossum* is the first case cited by *Valli*. (See *Valli*, n. 3.)

The presumption arising from the form of title is quite different from the common law presumption of title codified in section 662, however. The former governs jointly titled property and promotes an equal outcome, whereas the latter applies only to singularly titled property and promotes an unequal (separate property) outcome. Stated differently, the former focuses on whether two persons own jointly titled property as community property or as common law joint tenancy property,[7] whereas the latter focuses on whether title and beneficial ownership should be united in one person or disunited in two persons.

The presumption arising from the form of title was long recognized by family courts, until it was replaced by the community presumption of section 2581. Civil courts have long applied section 662 to disputes between unmarried persons, but no family court has applied it to a dispute between married persons over the character of property at the time of acquisition - until *Valli*.

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[6] *Brooks* and *Valli* both applied section 662 to singularly titled property in dispute between spouses. The words "form of title," or their equivalent, appear 19 times in *Brooks* and 15 times in *Valli*.

[7] The family court's jurisdiction over joint tenancy property was more limited than community property, as discussed more fully, *infra*.

2. California Community Property Law Has Long Recognized A Presumption Arising From Jointly Titled Property That Promotes An Equal Outcome

For many years, California law recognized that "a community estate and a [common law] joint tenancy cannot exist at the same time in the same property." (*Siberell v. Siberell* (1932) 214 Cal. 767, 773.) Thus, California once had "a modified form of certain estates known to the common law and . . . [had] them operating alongside of the community property system, an importation from the Spanish law." (*Id.* at p. 771.) The court used "the presumption arising from the form of title" to mediate the tension between community property and the common law estate of joint tenancy.[8]

More particularly, "[u]ntil modified by statute in 1965, there was a rebuttable *presumption that the ownership interest in property was as stated in the title to it*. [Citations.] Thus a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a half interest. [Citation.]" (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 813 [emphasis added].) "[T]he equal interest of the spouses must therefore be classed as their separate property but joint estate in the property." (*Siberell v. Siberell*, *supra*, 214 Cal. at p. 773.) This gave "the court . . . the power to

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[8] *Siberell* was arguably the first court to use the "presumption arising from the form of title," for a compelling reason, to defeat the unequal outcome in *Dunn v. Mullan* (1931) 211 Cal. 583. There, because property titled in wife's name was presumed to be her separate property (as compensation to her for husband's sole management), the court concluded that jointly titled property was owned half by wife as her separate property and half by husband as community property. Wife in *Siberell* contended the same – "joint tenancy where the wife owned three-fourths of the property and the husband the remaining one-fourth." (214 Cal. at p. 772.) The court avoided this community property outcome by characterizing the property as a common law joint tenancy. This gave the court "power to divide the property equally." (*Id.* at p. 775.)

divide the property equally." (*Id.* at p. 775.) Amicus Cheatum labels this outcome—each spouse owns one-half, as his/her separate property—as "separate but equal."

But "[*t*]*he presumption arising from the form of title* could be overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise." (*In re Marriage of Lucas*, *supra*, 27 Cal.3d at p. 813 [emphasis added].) That is, "evidence may be admitted to establish that real property is community property even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property." (*Tomaier v. Tomaier* (1944) 23 Cal.2d 754, 757.) Amicus Cheatum calls this outcome "community and equal."

The court recognized various rulings to establish community property – for example, evidence of a transmutation. (*Ibid.*) "Such rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties." (*Ibid.*)

While both classes of property were owned one-half by each spouse, the jurisdictional problem in the event of divorce was significant, particularly with respect to the family home. If "separate but equal," the court had jurisdiction only to sell the property and divide the proceeds equally. But if "community and equal," the court had expanded jurisdiction to either sell the property and equally divide the proceeds, or award the asset to one spouse in the division of community property, so long as offsetting value was awarded to the other party. (*In re Marriage of Lucas*, *supra*, 27 Cal.3d at p. 814.)

In 1965, the Legislature's first effort to remedy this jurisdictional problem was to declare that a single family residence held by husband and

wife as joint tenants is presumptively community property. (*Ibid.*) Later, the Legislature replaced "*the presumption arising from the form of title*" in its entirety with "*the community property presumption of section 4800.1* [and now section 2581]." (*In re Marriage of Hilke* (1992) 4 Cal.4th 215, 220 [emphasis added].) Thus, the "presumption arising from the form of title" no longer exists to be confused with anything.

3. California Community Property Law Has Never Recognized A Presumption Arising From Singularly Titled Property That Promotes An Unequal (Separate Property) Outcome, Except In One Instance Recognized In The Family Code That No Longer Applies

Before 1975, wife did not enjoy the same management and control as husband. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 610, n. 5.) To compensate her for this inequality, the law provided that any property acquired before 1975 "by a married woman by an instrument is writing" was presumed to be her separate property. (§ 803.) This presumption expired, however, when management and control was equalized in 1975. (*In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 610, n. 6.) This has been the only presumption in the history of family law in California that has subordinated "time" during marriage to "title" in the name of one spouse.

In contrast to section 803, "[s]ection 662 ... codifies the common law rule [Citations] that oral trusts in derogation of title are disfavored and must be proved by clear and convincing evidence. [Citations.]" (*People v. Semaan* (2007) 42 Cal.4th 79, 88.) It applies only to property titled in one party's name ("singularly titled property"). (*Olson v. Olson* (1935) 4 Cal.2d 434, 437; *G. R. Holcomb Estate Co. v. Burke* (1935) 4 Cal.2d 289, 299 ["Where the legal title rests in one person"]; *Rench v. McMullen* (1947) 82 Cal. App.2d 872, 874. Therefore, section 662, if applicable as between spouses in dissolution of marriage, promotes a new category of separate

property beyond section 803, namely, when the untitled spouse fails to rebut its (§662's) presumption. And for this reason section 662, if applicable, must be viewed as a presumption of separate property.

For 140 years after California became a state, no family court ever considered applying this presumption to resolve a property dispute between spouses – what the court in *Haines* referred to as a "vacuum of legal authority." (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 298, n. 14.) In 1990, Weaver made the first deposit to this vacuum (hereinafter the "Weaver vacuum"). (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 485.) *Haines* felt it had to respect this vacuum (33 Cal.App.4th at p. 298, n. 14) but otherwise distinguished and questioned *Weaver*. (*Id.* at p. 300.)

In *Brooks*, the court clearly affirmed the Weaver vacuum. But there the dispute was between a spouse and a third party, and not limited to the spouses themselves.

In *Valli*, however, the court put both feet into the Weaver vacuum, resulting in a double mutiny when it overruled both the ancient declaration of community property in section 760 and the stringent requirements for transmutation in sections 850-852.

Amicus Cheatum argues that the Weaver vacuum needs to be vacuumed up and section 662 needs to be forever purged from the landscape of California community property law. To this end, he dedicates this brief.

Amicus Cheatum next makes these two arguments: First, <u>choice of law</u> – Spanish civil law over English common law, which has evolved into California law. Second, <u>characteristic of law chosen</u> – "all" is community (regardless of title), except when proved separate (none of which is because of title).

B. SECTION 760'S JOB IS TO CHARACTERIZE "ALL" PROPERTY ACQUIRED BY EITHER SPOUSE DURING MARRIAGE, BY SOVEREIGN CHOICE AND ITS PLAIN WORDS

1. Summary

Section 760 is more than Spanish civil law. It is California law. Part 2 (commencing with section 760) of Division 4 of the Family Code establishes the law of this state respecting the subject to which it plainly and unambiguously relates, namely, the characterization of "all" property acquired by a married person during marriage.

2. California Generally Adopted English Common Law, From Which Section 662 Is A Descendant

"The Mexican system was superseded in this State by the adoption of the common law on the 13th of April, 1850. (Stats. 1850, p. 219.)" (*People v. Senter* (1865) 28 Cal. 502, 505.) "[T]he common law of England is, except where modified by Constitution or statute the rule of decision in this state." (*Philpott v. Superior Court* (1934) 1 Cal.2d 512, 515.) "Section 662 . . . codifies the common law rule [Citations] that oral trusts in derogation of title are disfavored and must be proved by clear and convincing evidence. [Citations.]" (*People v. Semaan*, *supra*, 42 Cal. at p. 88.)

3. For Marital Property, However, California Chose Spanish Civil Law, From Which Section 760 Is A Descendant

"From the inception of its statehood, California has retained the community property law that predated its admission to the Union, and consistently has provided as a general rule that property acquired by spouses during marriage, including earnings, is community property. (See

Fam. Code, §760; [Citations].)"[9] (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 12; accord *Packard v. Arellanes* (1861) 17 Cal. 525, 537 ["Our whole system by which the rights of property between husband and wife are regulated and determined, is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect"].) In 1850, section 2 provided that "all property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property." (*Stewart v. Stewart* (1926) 199 Cal. 318, 322; accord *Meyer v. Kinzer* (1859) 12 Cal. 274, 251.) Sections 760 and 770 provide the same today.

4. Over Time, The Focus Shifted Away From Spanish Civil Law And English Common Law To California Law, Especially When It Was Plain And Unambiguous

A maturing sovereign is like a maturing child – at some point both begin to speak for themselves. In this spirit, California in 1872 officially began the process of putting its fingerprint on its own laws – neither Spanish law nor English law, but the emergence of "California law."

That year, California enacted the Civil Code, which was organized into four divisions – persons, property, obligations, and general provisions. (Civil Code § 1.) What is now known as family law was part of the original Civil Code, where it remained until 1992, when the "family law" provisions were transferred to the Family Code.

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[9] Consequently, the common law "estates of dower and curtesy are not recognized." (Prob. Code § 6412.)

Civil Code section 4 captures this expression of a new sovereign beginning to flex its own jurisprudential muscles[10]:

> The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. *The code establishes the law of this state respecting the subjects to which it relates*, and its provisions are to be liberally construed with a view to effect its objects and to promote justice. (Emphasis added.)

Thus, the focus shifted from a lesson in history whether the law was English or Spanish to an interpretation of the California text at hand. "When the code speaks, its provisions are controlling; . . . but where the code is silent the common law governs."[11] (*Estate of Elizalde* (1920) 182 Cal. 427, 432-433, quoting *Estate of Apple* (1885) 66 Cal. 432, 434.) In short, "[i]f a provision of the code is plain and unambiguous, it is the duty of the court to enforce it as it is written." (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 815, quoting *In re Jessup* (1889) 81 Cal. 408, 419.)

5. Section 760 Continues To Speak Plainly And Unambiguously; Therefore, It Must Be Enforced As It Is Written

Section 760 restated:

> "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person

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[10] Indeed, "California law" is now quite different from its Spanish civil law parent. For example, husband's former sole management and control is now either party's (§§ 1100 (a),1102 (a)), and wife's former "mere expectancy" is now an interest "present, existing, and equal" to husband's. (§ 751.) Both of these "California laws" are discussed and supported more fully, *infra*.

[11] For this same reason, if the code was silent in the area of marital property, Spanish civil law would govern.

during the marriage while domiciled in this state is community property."

"*except*"

"Except as otherwise provided by statute" is a reference to separate property defined in the Family Code. "'Separate property' is property that is separate property under Part 2 (commencing with Section 760) of Division 4 [of the Family Code]." (§ 130.)

"*all*"

"All" means all – personal and real property, both singularly titled and untitled. And it is the same "all" as in 1850. (*Meyer v. Kinzer*, *supra*, 12 Cal. at p. 251.)

"*property*"

"'Property' includes assets and obligations." (Cal. Rules of Court, rule 5.10(3).) Otherwise, debts incurred by either spouse during marriage are characterized similar to assets acquired by either spouse. (Fam. Code, §§ 902, 910(a), 2622, and 2625.)

"*acquired*"

The timing of "acquired" goes to the heart of community property. Acquired is proven, for a titled asset, by the instrument of title to which it relates. (See *In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1533 [the "word 'acquired' contemplates the inception of title"].) Moreover, acquired is a term broader than purchased – property acquired is not necessarily purchased, but property purchased is acquired.

"married person"

Married person is in the singular. Either spouse is authorized to act alone in a representative capacity on behalf of the community partnership, such as acquire title to or manage partnership property. (§§ 1100 (a), 1102 (a).) This representative capacity applies to debts as well. (Fam. Code, §§ 902, 910(a), 2622, 2625.) Representative capacity or title is essential to a proper understanding of community property.

"during marriage"

These two words make "time" determinative, in two respects: First, there is the "time" of the partnership, beginning with date of marriage and ending with the date of separation. "Generally, all property acquired by a spouse during marriage before separation is community property. (See Fam. Code, §§ 760, 771.)" (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 177.)

Second, there is the "time" of the acquisition. "[W]hat is determinative is the single concrete fact of time." (*Id.* at p. 183; *In re Marriage of Brown* (1976) 15 Cal.3d 838, 842.) "The character of property as separate or community is determined at the time of its acquisition." (*See v. See* (1966) 64 Cal.2d 778, 783; accord *In re Marriage of Buol* (1985) 39 Cal.3d 751, 757.)

"community"

The definitions of community and separate property intersect at "Part 2 (commencing with Section 760) of Division 4." (Section 65 [community property]; section 130 [separate property].) "[T]he default classification [for all property acquired by either spouse during marriage] ...is community

property ...." (*In re Marriage of Buie & Neighbors* (2009) 179 Cal.App.4th 1170, 1173.)

The "why" behind section 760 further demonstrates its exclusivity, as discussed next.

C. SECTION 760 STRIKES A JUST BALANCE BETWEEN THE TWO CLASSES OF PROPERTY – A CLEAR STARTING POINT OF COMMUNITY AND A FAIR REBUTTAL OPPORTUNITY TO SEPARATE

1. Summary

Just as in 1850, section 760 "prescribes the effect of the acquisition of property by either spouse, and its operation cannot be defeated or evaded by the form of the conveyance, or the intention of the husband, in taking it in the name of his wife. In every form the community character of the property continues." (*Meyer v. Kinzer*, *supra*, 12 Cal. at p. 255.) Simply, community property can be defeated by proof that the acquisition was caused by separate property, but never by the form of title.

2. Marriage Is Governed By Rules Different From Other Contractual Relations

"It is fundamental that a marriage contract differs from other contractual relations . . . ." (*Borelli v. Brusseau* (1993) 12 Cal.App.4th 647, 651.) This difference is captured in two community property principles:

- Spouses are equal partners – a de facto property acquisition by one is a de jure acquisition by both.
- Spouses are free to allocate functions between themselves, such as raising children or managing property, without subtracting from this equality.

In short, the DNA of community property is "spouses are equal in value though different in function."

3. Two Persons Survive The Marriage Ceremony

"Under English common law, the wife's identity is merged into that of the husband [Citation], whereas under Spanish civil law, the husband and wife enjoy separate legal entities [Citation]."[12] (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 289; see generally *Report on Civil and Common Law* ["Report"] (1850) 1 Cal. 588, 594.)

4. Both Persons Are Equal – A Contribution By One Is A Contribution Of Both

'The law . . . recognizes a partnership between the husband and wife as to the property acquired during marriage.'" (*Packard v. Arellanes*, *supra*, 17 Cal. at p. 537.) "[M]arriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property . . . ." (*Meyer v. Kinzer*, *supra*, 12 Cal. at 251.) Bluntly, the non-titled spouse's "contribution to the

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[12] Two distinct persons in marriage make possible the two legal relationships – confidential and fiduciary. (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 337-339.) Both promote an "other mindedness." The former establishes the standard for how spouses are to treat each other when they enter into transactions between themselves (see § 721 (a)) whereas the latter defines the standard for how the managing spouse is to manage the other spouse's interest in community property. (See §§ 721 (b), 1100 (e).)

community is not one whit less" [than the titled spouse's contribution]."[13] (*In re Marriage of Brown*, *supra*, 15 Cal. 3d at p. 851.)

5. Each Partner Is Authorized To Serve In A Representative Capacity

Community property law does not require that both spouses act jointly. Rather, section 760 expressly recognizes that a "married person" can acquire community property during marriage. (See also §§ 1100 (a), 1102 (a).) A "married person" or "either spouse" can likewise singularly incur community debt. (Fam. Code, §§ 902, 910(a), 2622, 2625.) Thus, representative capacity or title is a vital feature of community property.

6. A Married Person Can Also Acquire Separate Property During Marriage

A "married person" can also acquire new separate property during marriage. (§ 770; see also § 803 as to property acquired by a "married woman" before 1975.)

7. These Principles Create The Need For A Clear Starting Point

Both spouses naturally desire to form expectations as to the character of property acquired by either during their partnership. Accordingly, the foregoing principles—two spouses, either of which can take title to two opposing classes of property—combine to demand that the

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[13] Using common law language, section 760 declares a resulting trust for marital partners as a matter of law – that is, for property titled in one spouse's name during married, both spouses are deemed to have contributed equally, to form the resulting trust (see *Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428), except only when one of the spouses proves that the acquisition was caused by his/her separate property.

law provide a clear and simple answer to this vital question: How should spouses be instructed on whether property acquired by either during marriage is community or separate? Should north on their marital property compass point to the "time" of acquisition during marriage, to form a beginning expectation of community, or to the "title" in the name of one spouse, to form a beginning expectation of separate?

8. Section 760 Declares That Community Property Is The Starting Point

"From the inception of its statehood, California . . . consistently has provided as a general rule that property acquired by spouses during marriage, including earnings, is community property. (See Fam. Code, § 760; [Citations].)"[14] (*In re Marriage of Bonds*, *supra*, 24 Cal.4th at p. 12.) The equality between spouses demands a starting point of equality. This is why law school classes and bar exam subjects are titled "Community Property," and not "Separate Property."

9. Section 751 Elevates This Starting Point To An Immediately Cognizable Interest

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests." (§ 751.) What does this mean?

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[14] It is often stated that section 760 declares a presumption of community property. If true, in what sense is it a presumption? The same as the presumption in section 662, or different? Amicus Cheatum's best answer is that they are similar only in the sense that both declare a starting point that is the ending point unless excepted (in the case of section 760) or rebutted (in the case of section 662). But beyond that, they are inconsistent with, if not repugnant to, each other, for the reasons discussed *infra*.

In the beginning, wife's equal interest in community property during marriage was not "present" or "existing", but "a mere expectancy." (*Van Maren v. Johnson* (1860) 15 Cal. 308, 311.) "She became vested with an estate only . . . upon the dissolution of the marriage or upon the death of the husband." (*Estate of Moffitt* (1908) 153 Cal. 359, 363; accord *Spreckels v. Speckels* (1897) 116 Cal. 339, 346-347.)

In 1927, however, the Legislature added Civil Code section 161a: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests, under the management and control of the husband." Thus, the wife's equal interest in community property became "present and existing," the same as her husband's, at the time of acquisition, except for his continuing management and control. When either spouse was granted management and control in 1975 (§§ 1100 (a), 1102 (a)), the statute was rewritten as it currently reads. From this, two important conclusions are merited:

First, based on its background (community property titled solely in husband) and its proximity to section 760, section 751 is intended to protect the non-titled spouse's beneficial ownership in community property. That is, it codifies a principle that the non-titled spouse's beneficial interest in community property is "present, existing, and equal" to the titled spouse's interest. For example,

> Terry is a shareholder of record . . . . Since the stock is community property, Marilyn has an equal interest in that stock. (Civ. Code, § 5105 [the predecessor to section 751].) Indeed, with specified exceptions not relevant here, the court 'may order that the name of a spouse shall be added to community property held in the name of the other spouse alone .... [Citation.]" (*Schnabel v. Superior Court* (1993) 5

> Cal.4th 704, 715; accord *D'Elia v. D'Elia* (1997) 58 Cal.App.4th 415, 423 ["When stock is community property, each spouse has an equal interest in it, regardless of who is the holder of record"].)

Second, the protection is "present and existing." That is, it begins at the time of acquisition, not later in Family Court. For instance, in *Patrick v. Alacer* (2008) 167 Cal.App.4th 995, husband founded Alacer, a vitamin supplement manufacturer. Wife was never a shareholder of record. After husband died, wife filed claims against Alacer, alleging that she had standing to do so as beneficial owner by virtue of community property laws.

> Defendant wrongly contends plaintiff lacks beneficial ownership because no court has yet adjudicated her community property claim . . . . Not so. 'The respective interests of the husband and wife in community property during continuance of the marriage relation are *present*, existing, and equal interests.' (Fam. Code, § 751, italics added; cf. *D'Elia v. D'Elia* (1997) 58 Cal.App.4th 415, 427 (*D'Elia*) [spouses had equal interest in stock by 'operation of California's community property laws'].) Plaintiff's alleged community property interest was created during their marriage. She allegedly has a present and existing interest in Alacer stock already—she does not need to do anything to trigger her interest. (*Patrick v. Alacer*, *supra*, 167 Cal. App.4th at p. 1012.)

Indeed, the court refers to wife as "beneficial" owner 22 times. Thus, the heart and soul of community property is the feature of representative title: At the time of acquisition, title and beneficial

ownership are presumptively disunited in two persons – the titled spouse and the untitled spouse, equally.

10. Community Property Cannot Be Defeated By The Form Of Title

As a new sovereign, California adopted English common law, which gives weight to "title" in characterizing disputes over singularly titled property. But for marital property, California agreed to follow Spanish civil law, which gives weight to "time" in characterizing property acquired during marriage.

Accordingly, this court was sensitive to the risk that history would be forgotten, and if so, "title" would eat up "time" in characterizing marital property. Therefore, from the beginning, this court has graciously reminded family law judges and attorneys of this key community property principle – the significance of "time" during marriage cannot be rendered insignificant by "title" in the name of one spouse.

> "These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage.... *To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer ... can overcome this positive rule of law.*" (*Meyer v. Kinzer*, *supra*, 12 Cal. at pp. 251-252, emphasis added.)
>
> "In the absence of such proof [of separate property] the presumption [of community property] was absolute and conclusive, and *it made no difference whether the conveyance was taken in the name of one or the other, or in the names of both.*" (*Id.* at p. 252, emphasis added.)
>
> "The common law authorities are entirely inapplicable under our system. The statute prescribes the effect of the acquisition of

property by either spouse, and *its operation cannot be defeated or evaded by the form of the conveyance, or the intention of the husband, in taking it in the name of his wife.* (*Id.* at p. 255 [emphasis added].)

"It is the general rule that evidence may be admitted to establish that real property is community property even though title has been acquired under a deed executed in a form that ordinarily creates n the grantee a common law property. *Thus land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple.*" (*Tomaier v. Tomaier*, *supra*, 23 Cal.2d at p. 757, emphasis added.)

"The status of property as community or separate is normally determined at the *time* of its acquisition. [Citations.] Such status is not dependent on the form in which *title* is taken. [Citation.]" (*In re Marriage of Buol*, *supra*, 39 Cal.3d at p. 757 [emphasis added]: see also *Estate of Cline* (1963) 214 Cal.App.2d 152, 154 [community property makes a "distinction between the record title and the actual ownership"].)

The Legislature likewise admits that "the record title to community real property" can be held in the name "of either spouse." (§ 1102 (c) (2).) Moreover, "[a] court may order that the name of a spouse shall be added to community property held in the name of the other spouse alone . . . ." (§ 1101 (c).) Similarly, debts incurred by "either spouse" or a "married person" during marriage are presumptively community. (§§ 902, 910(a), 2622, 2625.)

11. Community Property Can Only Be Defeated By Proof Of A Separate Property Exception Recognized By Statute

"The presumption that all property acquired by either spouse during the marriage is community property may be overcome [Citations]." (*In re Marriage of Mix*, *supra*, 14 Cal.3d at p. 611.) "[T]he burden is on the spouse asserting its separate character to overcome the presumption." (*See v. See*, *supra*, 64 Cal.2d at p. 783.) Any other rule would lead to infinite embarrassment, confusion and fraud."[15] (*Meyer v. Kinzer*, *supra*, 12 Cal. at pp. 253-254.) The standard of proof is preponderance. (*In re Marriage of Haines*, *supra*, 33 Cal. App.4th at p. 290.)

Simply stated, community property is by default, separate property is by discipline. The former is unburdened whereas the latter alone has the laboring oar.

Moreover, the work requirements for separate property are not vaguely written. Separate property continues to be defined plainly, the same as in 1850:

a. Separate property declared by section 770:
   - Property owned before marriage. (§ 770 (a) (1).)
   - Property acquired during marriage "by gift, bequest, devise, or descent." (§ 770 (a) (2).) This property is also constitutionally protected. (Cal. Const., art. I, § 21.)

[15] Section 662 is an example of "embarrassment, confusion, and fraud". It incentivizes a race to "title", which is destabilizing of marriage, contrary to the policy of this state to promote the stability of marriage.

- The "rents, issues, and profits" from separate property owned before or acquired during marriage. (§ 770 (a) (2).)

b. Separate property presumed by section 803

Section 803 presumes that property acquired during marriage in wife's name before 1975 is her separate property.

c. The Legislature's definition of separate property is "closed":

The word "including" in section 770 is a term of limitation, in contrast to the words "including but not limited to," which are terms of illustration. (*In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1424, 1426; *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 939-940.) In proof of this point, Amicus Cheatum is aware of no California authority that recognizes a definition of separate property beyond that defined in section 770 (except as provided in section 803). More specifically to this case, separate property has never been rewritten and expanded by the inability of the untitled spouse to rebut the presumption in section 662.

12. "During Marriage" Is A Well Settled Expectation Of Community

Inquiries of marital status are omnipresent – lenders, title officers, sellers, landlords, doctors, and on and on. In short, all persons, lay or otherwise, know that being married is different than being not married. Spouses take each other "'for better or worse.'" (*In re Marriage of Stitt* (1983) 147 Cal.App.3d 579, 588.) They share in the financial upsides and downsides of marriage, the assets acquired by either spouse and the debts incurred by either spouse. The legal profession's job is to clarify and

strengthen well settled expectations (§ 2580 (b); *In re Marriage of Lucas*, *supra*, 27 Cal.3d at p. 815), not to confuse or weaken them.

13. Section 760 Illustrated Further Demonstrates Its Exclusive Authority Over All Property Acquired By Either Spouse During Marriage

Hypo #1: Wife acquires the identical policy as in this case, but by way of an inheritance. Everyone would agree that it is her separate property because of section 770, and not because husband was unable to rebut the presumption under section 662.

Hypo #2: Wife acquires the identical policy in the identical manner, but before 1975. Assuming the parties were married pre-1975, everyone would again agree that the issue is whether husband could rebut the presumption inside the Family Code in section 803, not the presumption outside of it in section 662.

Hypo #3: Randy acquires the policy in her name while she is living with, but not married to, Frankie. Everyone would agree that the policy should be characterized under section 662, and not 760.

Hypo #4: The facts of this case - the policy was purchased during marriage, with community funds, and titled in wife's name. The argument that a dispute between married persons should be resolved by section 662 is as wrong headed and jurisdictionally flawed as the argument that a dispute between unmarried persons should be handled by section 760.

In short, the job of resolving a dispute over singularly titled property shifts from the Family Code to section 662, never by the presence of title, but only by the absence of a certificate of marriage.

14. The Character Of Property At The Time Of Acquisition Can Thereafter Be Changed Only By Satisfying The Strict Written Requirements For Transmutation

The actual character of property at the time of acquisition, whether community or separate, "remains so throughout the marriage unless the spouses agree to change its nature ...." (*See v. See*, *supra*, 64 Cal. 2d at p. 783.) Years later, the Legislature heightened the requirements for changing (or transmuting) the character of property. Now, the "more restrictive proof requirements" of section 852 have to be satisfied in order to assure "that a spouse's community property entitlements are not improperly undermined...." (*Estate of MacDonald* (1990) 51 Cal.3d 262, 273; see generally *In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 293 [two requirements for a transmutation: writing required by §852 and circumstances pleasing to the fiduciary standard per §721(a)); see also *In re Marriage of Buie & Neighbors*, *supra*, 179 Cal.App.4th at p. 1173 [what interspousal gifts are excluded from these "restrictive proof requirements"].)

15. Neither Spouse Can Unilaterally Defeat Community Property

Either spouse has the right to manage community property. (§1100 (a) [personal property]; §1102 (a) [real property].) Therefore, the exercise of a management right by one spouse, however consensual, cannot result in the loss of a property right by the other spouse. Otherwise, the non-managing spouse's interest in community property would not be "present, existing, and equal" to the managing spouse's interest. (§751.) More broadly, "[i]t is a 'settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.'" (*In re Marriage of Gilmore* (1981) 29 Cal.4th 418, 423, quoting *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 786.)

D. THE TRIAL COURT CORRECTLY APPLIED SECTION 760 AND ITS DECISION SHOULD BE AFFIRMED

The disputed life insurance policy was acquired during marriage. Section 760 declares it was community property at the moment of acquisition. Wife did not sustain her burden of proving that this declaration should be excused in favor of her separate property. Nor did she prove that this community asset at the time of acquisition was thereafter transmuted to her separate property. Therefore, the trial court's conclusion that it was community property should be affirmed. Section 662 has neither standing nor desire to express a dissenting opinion.

E. SECTION 662 AGREES THAT IT HAS NO STANDING TO ENTER FAMILY COURT TO SPEAK ON THE CHARACTER OF PROPERTY AS BETWEEN SPOUSES

1. Issue Restated

Jointly titled property is governed by section 2581. For singularly titled property, section 662, if applicable, presumes a separate property outcome. Therefore, the issue is whether there is anything in California community property law to remotely suggest that the statutorily "closed" definition of separate property can be "opened" when an untitled spouse is unable to rebut the common law presumption of title codified in section 662? No, for any one of the following reasons:

2. For Marital Property, California Rejected English Common Law By Intention, And Not Implication

See the argument, *supra*, pp. 11-12.

3. There Is No Silence In California Law Into Which Spanish Civil Law Or English Common Law Need To Speak

"[W]here the code is silent the common law governs." (*Estate of Apple* (1885) 66 Cal. 432, 434; accord *Cole v. Rush* (1955) 45 Cal.2d 345, 356.) It follows that where the code is silent on marital property, Spanish civil law governs. But section 760 speaks loudly and plainly.

4. There Is No Room In Family Court To Invite Section 662 To Participate In Characterizing Marital Property

Section 760 occupies "all" (or the universe) of the space in Family Court allocated to characterizing property acquired by either spouse during marriage as community or separate. Thus, there is no space remaining in which to even invite section 662 to attend.

5. Section 662, By Its Own Terms, Rejects An Invitation To Characterize Singularly Titled Property Disputed Between Spouses

Section 662 begins: "The owner of *legal title* ...." (emphasis added), but it does not answer the question of "legal title" when it is disputed.

> 'Evidence Code section 662,' the court explained, 'has application, by its express terms, when there is no dispute as to where legal title resides but there is question as to where all or part of the beneficial title should rest.' [Citation.] 'We are unaware, however, of a single reported case in which Evidence Code section 662's presumption and burden were applied when legal title itself was in dispute. Nor can we see anything in the language of section 662 requiring such application.' (*People v. Semaan*, *supra*, 42 Cal.4th at pp. 88-

89, quoting *Murray v. Murray* (1994) 26 Cal.App.4th 1062, 1067-1068.)

"Legal title," within the meaning of section 662, is disputed as a matter of law as to property acquired by either spouse during marriage. Section 760 declares that property titled in either spouse's name during marriage is held in a representative capacity, on behalf of the community partnership, "except" when proven separate.

Section 662 is designed to address neither the "legal owner" of property held in a representative capacity nor the "except" of section 760. Therefore, it declines to do so, on its own authority. Rather, it gladly yields to the legal authority governing the representative relationship at issue:

> For partners generally (when proved by evidence), this means the terms of their partnership; and
>
> For the partners of marriage (as declared by law), the terms of the partnership are memorialized in the Family Code – section 760 for all singularly titled and untitled property, and section 2581 for all jointly titled property.

6. The Common Law Presumption Of Title Codified In Section 662 Would Not Apply, Even Had California Chose English Common For Marital Relations

Under common law, wife's identity merges into husband as head of the household. (*Report*, *supra*, 1 Cal. at p. 594); *In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 289.) He alone had authority to hold title to property, akin to a sole proprietorship. Consequently, title to property and beneficial ownership of it naturally merge into one spouse, mirroring the merger of identities. Wife was compensated "by compelling the payment of her debts and vesting her with an estate and dower . . . ." (*Report*, *supra*, 1 Cal. at p. 594.)

Consequently, Amicus Cheatum suggests that the common law presumption of title codified in section 662 was never intended to apply to characterize marital property, in both civil law and common law jurisdictions. Rather, its only application is to singularly titled property disputed by unmarried persons.

7. Section 662 Is Inconsistent With, If Not Repugnant To, Community Property

a. Overview: California rejects English common law to the extent it is "repugnant to or inconsistent with the . . . laws of this State . . . ." (Civil Code §22.2.)[16] Family law more particularly rejects "provisions of law applicable to civil actions" that "conflict with" family law "statutes or rules". (California Rules of Court, Rule 5.21; see also Rule 5.140.)

"[C]ommon-law concepts ... are essentially repugnant to, and inconsistent with, basic community property principles" (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 289, quoting 1 Cal. Family Law Practice and Procedure (2d ed. 1994) § 20.02, p. 20-7), for a number of reasons, including but not limited to the following:

b. Sections 662 and 760 serve different masters: "'The laws relating to marriage ... have been enacted because of the profound concern of our organized society for the ... stability of the marriage relationship.'" (*In re Marriage of Haines*, *supra*, 33 Cal. App.4th at pp. 287-288.) Section 662 is based on the public policy of "promoting the stability of title" (Evid. Code § 605), and is arguably limited to real estate. (See *Woodside v. Hewel* (1895) 109 Cal. 481, 485.)

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[16] The "inconsistent" in Civil Code §22.2 is to be contrasted with the "conflict" (general versus specific) recognized by case authority, as discussed *infra*.

For more than 150+ years, family law judges have been characterizing property singularly titled during marriage as community and dividing it equally. Each time this happens, it is fulfilling an oath. It has never been viewed as an attempt "to tamper with title duly executed instruments and documents of legal title." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 489.)

c. Section 662 and 760 focus on different interests: Section 662 focuses on legal title versus beneficial ownership whereas section 760 focuses on community versus separate property.

d. What section 662 disfavors, section 760 favors: Section 662 disfavors a stranger to title claiming beneficial ownership. (*People v. Semaan*, *supra*, 42 Cal.4th at p. 88.) But community property law more than favors it. The non-titled spouse's beneficial interest in community property is "present, existing, and equal" to the titled spouse's interest. (§ 751.) Thus, the legal title and beneficial ownership that sections 760 and 751 combine to presumptively disunite in two married persons is precisely the opposite of what section 662 presumptively unites in one unmarried person.

e. Section 760 is excepted by statute specifically, making it "closed ended", whereas section 662 is rebutted by proof generally, making it "opened ended": Section 760 is excepted only by the "closed" (and generally understood) definition of separate property in sections 130 and 770. On the other hand, section 662 is rebutted "by clear and convincing proof." But proof of what? Few, if any, could answer this question. Presumably everything recognized by ancient common law case authority. In this sense, section 662 is "open ended," perhaps even

schizophrenic, as a guide to forming marital expectations regarding the character of property acquired by either spouse during marriage.

f. What is a right under section 662 is a duty under section 760: Under section 662, the titled party has a right to claim beneficial ownership as against an untitled claimant. But under basic community property law, the titled spouse has a duty to manage the non-titled spouse's beneficial interest in a manner pleasing to the fiduciary standard. (§ 1100 (e); *Vai v. Bank of America*, *supra*, 56 Cal.2d at pp. 337, 388; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1438.)

g. What gives life to community property under section 760 cannot be used to take it by section 662: "Acquired," for a titled asset, is proved by the title instrument to which it relates. "The word 'acquired' contemplates the inception of title [for a titled asset] ...." (*In re Marriage of Joaquin*, *supra*, 193 Cal.App.3d at p. 1533.) The "character of the title depends upon the existence or nonexistence of the marriage ...." (*Ibid.*) Thus, the very instrument that gives life to community property under section 760 cannot be used to defeat it by section 662.

h. Section 760 is linear, leading to resolution, whereas section 662 is circular, leading to nowhere: Section 662 presumes separate property in favor of the titled spouse. What rebuts the presumption of separate property is community property. What is community property is "all" property acquired by either spouse during marriage that is not proved to be separate property. Accordingly, section 662 is the presumption to "nowhere" when applied to characterize property as between spouses.

Stated differently, the certificate of marriage, alone, rebuts the presumption in section 662, thereby returning the spouses to their rightful home in "Part 2 (commencing with Section 760) of Division 4 [of the Family Code]" to determine whether disputed property, singularly titled or untitled, is community or separate.

i. What an unmarried person has to prove to rebut section 662 is declared as a matter of law for married persons:

- *Management and control* that an unmarried person has to prove to rebut the presumption in section 662 (*Toney v. Nolder* (1985) 173 Cal.App.3d 791, 796; accord *Tannehill v. Finch* (1986) 188 Cal.App.3d 224, 228) is declared as a matter of law for married persons. (§§ 1100 (a), 1102 (a).)

- *Oral partnership* that an unmarried person has to prove to rebut the presumption in section 662 (*Toney v. Nolder, supra*, 173 Cal.App.3d at p. 796; accord *Tannehill v. Finch, supra*, 188 Cal.App.3d at p. 228) is declared as a matter of law for married persons. (§ 760.)

- *Representative title* that an unmarried person has to prove to rebut the presumption of section 662[17] (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 473, 492; *In re Marriage of Reulas* (2007) 154 Cal.App.4th 339, 343-345) is declared as a matter of law for married persons. (§ 760.)

- *Resulting trust* (title taken in the name of one but when consideration contributed by another) that an unmarried person has

[17] In such circumstances, ownership of property held in a representative capacity is determined by the legal authority governing the representative relationship (which is indisputably beyond the job description of section 662).

to prove to rebut section 662 (*Marvin v. Marvin* (1976) 18 Cal.3d 660, 665, 684; *Bainbridge v. Stoner* (1940) 16 Cal.2d 423, 428; *In re Marriage of Reulas*, *supra*, 154 Cal.App.4th at pp. 343-345) is declared as a matter of law for married persons. (§ 760.)

- The foregoing examples are illustrative, but not exhaustive, of what rebuts the presumption in section 662.

In summary, "what the plaintiffs in [the foregoing non-marital cases] 'sought to establish' [Citation] would have been presumed as a matter of law under principles of community property if the plaintiffs and defendants in those cases had been married. All property acquired by a married person during marriage is presumed to be community property. (See former Civ. Code, § 5110 [Fam. Code, § 760].)" (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 299.)

j. Section 662's burden of proof is the opposite of section 760's: The untitled party (or stranger to title) has the burden to rebut section 662. But the burden for excepting section 760 is on the separate proponent, who is most frequently, if not always, the titled spouse.

k. Section 662's standard of proof is inconsistent with section 760's: The hurdle for rebutting section 662 is clear and convincing evidence whereas the burden to except section 760 is preponderance of the evidence.

l. The spouse who is unable to rebut section 662 is left in a repugnantly different position than the spouse who is unable to except section 760: When the separate property proponent does not succeed in proving an exception to section 760, any separate property contributed to the community asset is reimbursed under section 2640. (*In re Marriage of*

Buie & Neighbors, supra, 179 Cal.App.4th at p. 1175.) But when the community property proponent fails to rebut section 662, any community property contributed to the separate property asset is forfeited, per *Valli.*[18]

8. Toney And Tannehill Convincingly Demonstrate The Need To Remember Relational Boundaries

Toney v. Nolder, supra, 173 Cal.App.3d at p. 793 and *Tannehill v. Finch, supra*, 188 Cal.App.3d at p. 226, both dealt with disputes between non-marital persons regarding property singularly titled during their non-marital relationship. Both untitled parties claiming beneficial ownership were tasked with rebutting the presumption in section 662. Neither succeeded.

No one would even suggest that section 760 should have governed their controversy. Indeed, *Marvin v. Marvin, supra*, 18 Cal.3d at pp. 665, 681 expressly prohibits it. Conversely, no one can reasonably argue that

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[18] Community property that was used to acquire and maintain the life insurance cannot disappear, and then magically reappear as wife's transmuted separate property. First, "[o]nce vested, the right is protected from forfeiture." (*Saustez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784; see also *Irwin v. Irwin* (1977) 69 Cal.App.3d 317, 322 ["it is basic that the law abhors forfeitures and that statutes or rules must be strictly construed to avoid them whenever possible"].) Second, to assure "'that a "spouse's community property entitlements are not improperly undermined,' the general presumption under Evidence Code section 662 should not be used to negate the more specific [transmutation] requirements of section 852, subdivision (a)." (*Estate of Bibb* (2001) 87 Cal.App.4th 461, 469-470; accord *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593.) Third, empowering either spouse to unilaterally "'transmute community property into his [or her] own separate property' [Citation] is to negate the protective philosophy of the community property law as set out in previous decisions of this court." [Citation.]" (*In re Marriage of Gilmore, supra*, 29 Cal.3d at 423.)

their dispute would have been resolved by section 662, and not section 760, had they been married[19].

F. IF SECTION 662 HAS STANDING TO ENTER FAMILY COURT TO CHARACTERIZE MARITAL PROPERTY, IT LOSES HEAD-TO-HEAD WITH SECTION 760

Section 662 must yield to section 760, for any one or a combination of the following reasons:

1. Section 760 Is Specific Compared To Section 662, Which Is General

When statutes are in conflict, the specific prevails over the general. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.) When the dispute is between marital partners, the specific requirements of a statute inside the Family Code have every time been viewed as specific when compared to section 662:

- Section 721 is specific compared to the general title presumption in section 662 (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at pp. 301-302)

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[19] See also *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 848 n.8 ["Section 662 is a codified common law presumption, whose application under these facts is *curious*. Since Barbara acquired the stock during marriage while domiciled in California, it seems the court erred by not applying the rebuttable presumption of community property. (Civ. Code, Section 5110.) The presumption can be rebutted by tracing the funds used to acquire the property (stock) to a separate property source. The issue, however, is not before us on this appeal"] [emphasis added]. But this issue is now squarely before this court. Accordingly, what the *Dekker* court commented is curious, this court needs to confirm is error.

- Section 852 (strict transmutation requirements) is specific compared to the general title presumption in section 662 (*In re Marriage of Barneson*, *supra*, 69 Cal.App.4th at p. 593)
- Section 850 is specific compared to the general title presumption in Vehicle Code sections 4150.5 and 5600.5 (*Estate of Bibb*, *supra*, 87 Cal.App.4th at pp. 469-470)

Thus, the same is true when section 760 is contrasted with section 662 – the former is specific as to all property acquired during marriage by a married person, whereas the latter is general without respect to time or the relationship (married or unmarried).

2. The Community Wins In A Conflict With Separate

When the common law presumption of title and the general presumption of community property conflict, "the statutory community property presumption will predominate and the property will be characterized as community." (*In re Marriage of Haines*, *supra*, 33 Cal. App.4th at p. 292: see also *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, 1190 [because husband took title in his name alone to real property during marriage, "the community presumption prevails and the presumption arising from the form of title is without force"].)

3. The Family Code Expressly Prevails Over Provisions Of Law Applicable To Civil Action In Conflict With The Family Code

> Except as otherwise provided in these rules, all provisions of law applicable to civil actions generally apply to a proceeding under the Family Code if they would otherwise apply to such proceeding without reference to this rule. To the extent that these rules *conflict* with provisions in other statutes or rules,

these rules prevail. (California Rules of Court, Rule 5.21, emphasis added; see also Rule 5.140.)

G. JUSTICE WILL BE MISCARRIED IF SECTION 662'S ATTEMPTED COUP IS ALLOWED TO SUCCEED

The consequences from permitting section 662 to usurp section 760's historic job of characterizing "all" property acquired by either spouse during marriage are profoundly destructive:

- Married persons are treated the same as if married, thereby neutralizing the uniqueness of marriage;
- Settled expectations flowing from "during marriage" are destabilized for spouses, creditors, for everyone;
- Public policy to promote the stability of marriage is destabilized by incentivizing a race to title;
- Section 760 is rewritten to limit the community property from its historically maintained statutory definition;
- Section 770 is rewritten to expand separate property beyond its historically maintained statutory definition;
- Married persons are given an extra planning option to defraud creditors by hiding behind section 760 or section 662, whichever is most advantageous;
- Written transmutation statutes are defeated by oral conversations over how to title an asset;
- Unilateral authority is conferred on one spouse to defeat community property; and
- Singularly titled assets are treated differently than singularly titled debts.

The court in *Valli* was not mindful of the history behind the inherent conflict between sections 760 and 662. Worsening matters, it erroneously interprets and extends *In re Marriage of Lucas*, *supra*, and *In re Marriage of Brooks, supra*, beyond their clear boundaries to give section 662 characterizing power in divorce that was never intended.

H. THE VALLI COURT'S EXTENSION OF LUCAS TO SINGULARLY TITLED PROPERTY IS ERROR

1. The Family Law Presumption Of Title Discussed In Lucas Is Markedly Different From The Common Law Presumption Of Title Codified In Section 662

As discussed *supra*, family law has long recognized a presumption arising from the form of title – first in *Siberell v. Siberell* and continuing with all of the cases cited in *In re Marriage of Lucas*, *supra*, 27 Cal.3d at p. 813. The Legislature replaced this case law presumption in its entirety with "the community property presumption of section 4800.1 [and now § 2581]." (*In re Marriage of Hilke*, *supra*, 4 Cal.4th at p. 220.)

These cases and statutes are united by four features: (1) all involve real estate; (2) all are titled jointly; (3) all outcomes are equal ownership; and (4) all outcomes are based on "the intent and assumptions" (*Id.* at p. 814) and "the expectations of parties who take title jointly" (*Id.* at p. 815), and not the policy interest of "stability of title" promoted by section 662.[20] (Evid. Code § 605.) Hence, other than property acquired by a married

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[20] Consistently, the second issue in Lucas – the character of the motor home acquired during marriage in wife's name – was likewise resolved not by section 662 but by the long established community principle of gift (27 Cal.3d at pp. 817-818), which is an exception to community property. (§ 770.)

woman prior to 1975 (§ 803), no case has recognized a common law presumption of title arising from property acquired during marriage in one spouse's name, personal or real, that champions a separate property outcome.[21]

2. The Use Of Language By Lucas To Contrast Two Statutes Inside The Family Code, United In Presuming Community But Different In Rebuttal Standard, Cannot Be Used To Support A Statute Outside The Family Code Presuming Separate

When the court compares two statutes, it is essential to note what is being compared and for what purpose. This is the only way to assure that an apple is being compared to an apple, and not an orange.

For example, the *Lucas* court contrasted the presumption of title in then Civil Code section 5110 (now section 2581) with the general presumption then also in section 5110 (now section 760). Both presume community property, but "the affirmative act of specifying a form of ownership in the conveyance of title" (*Id.* at pp. 814-815) makes the presumption of title "special" and the other "general." For what purpose? The title presumption, because it is "special", is more difficult to rebut than the "general" presumption. (*Id.* at p. 815.) For instance, tracing is available to rebut the "general" but not the "special." (*Ibid.*)

Hence, the corollary "specific" presumption to the "general" presumption of community property is the joint title presumption of community property in section 2581 (apple to apple), not the singular title presumption of separate property in section 662 (apple to orange).

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[21] Dicta in *Haines* of such a presumption is also an erroneous interpretation and expansion of *Lucas*. (33 Cal.App.4th at p. 292.)

But the court in *Valli* obsesses with the language "specifying a form of ownership in the conveyance of title" and the word "title."[22] In the resulting confusion, it leaps to the conclusion that the *Lucas* court would have used the same language had the comparison been between section 662 and section 760 – that is, the affirmative act of specifying title in one spouse means that the common law presumption of separate property outside of the Family Code prevails over the presumption of community property inside the Family Code. This leap remains firmly planted in "mid-air." The *Valli* court errors further by stretching *Brooks* beyond its unique facts.

I. SECTION 662'S REMEDY IN BROOKS BETWEEN A SPOUSE AND A THIRD PARTY DOES NOT DEFEAT THE FAMILY CODE REMEDIES FOR DISPUTES BETWEEN SPOUSES

The court in *Brooks* applied section 662 to a dispute between two people who were not in a representative relationship – ECG, the title holder (in a purchase from wife), and husband, who claimed beneficial ownership. The court admits this: "This case concerns a dispute between Brooks and ECG, and does not involve the division of property on dissolution." (*In re Marriage of Brooks, supra,* 169 Cal.App.4th at p. 188.)[23]

Consequently, "[t]he court did not expressly determine whether the Property was a community asset." (*Id.* at pp. 182-183.) Rather, "[t]he

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[22] The word "title" appears 33 times in *Valli* and 66 times in *Brooks*. Such 'titlemindedness" appears in no other case in the history of California's administration of marital property law.

[23] Indeed, no family law attorney appeared. Wife did not appear in the appeal and husband appeared in pro. per. Rather, the only attorney that appeared was on behalf of ECG.

court found that 'ECG is a bona fide purchaser for value with respect to purchase of the Property and takes its title free of any unknown community property claim Brooks may have with respect to the Property.'" (*Ibid.*)

But if the facts are changed to confine the dispute solely to husband and wife, the analysis changes completely. (*Siberell v. Siberell, supra*, 214 Cal. at p. 772 ["It should be noted here that we are dealing strictly with the situation as between the parties to the marriage and are not dealing with the characteristics of the property as against the claims of judgment creditors or other third persons...."]; *In re Marriage of Haines, supra*, 33 Cal.App.4th at pp. 294-295 ["concerns of stability of title are lessened in characterization problems arising from transmutations that do not involve third parties or the rights of creditors"].)

For example, assume that wife did not sell the property, leaving it to be characterized between the spouses, or that husband asked the family court to characterize the cash proceeds she received from the sale to ECG as an alternative to requesting that this sale be cancelled. The dispute now is the opposite of what was present in *Brooks*: A "dispute between [husband and wife that] does ... involve the division of property on dissolution." Under such circumstances, section 662 has neither an interest nor authority to speak. Instead, section 760 governs, as it continuously has since 1850.

CONCLUSION

Clarity is a gift. The Legislature gave it in section 760. "All" means all. And it has been the same "all" for all of the years in which California has been a state. Section 662 resents being misused beyond its job description to obscure this clarity.

Californians would be best served if married persons are provided with the same clarity this court provided to unmarried persons in *Marvin v.*

Marvin, *supra*. There, this court ruled that section 760 cannot be applied to resolve disputes between unmarried persons. (18 Cal.3d at 665, 681.)

This case presents the court with the need to stamp the other side of the *Marvin* coin with these words: Section 662 cannot be applied to resolve property disputes between married persons. By sovereign choice, section 760's plain words, and section 662's own admission, resolving property disputes between married persons is the job of section 760 for "all" property acquired by either spouse (singularly titled and untitled property), and section 2581 for "all" property acquired by both spouses (jointly titled property).

Applied to the facts of this case, section 760 declares that the disputed policy was community property at the time it was acquired in wife's name during marriage. Wife did not sustain her burden of proving that this acquisition was caused by her separate property or that it was thereafter transmuted to her separate property. Accordingly, the trial court's conclusion that the policy was community property should be affirmed.

Respectfully submitted,

Dated: _____

_____
Attorney Kim W. Cheatum,
Amicus Curiae on behalf of
husband, Frankie Valli

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of California Rules of Court, I hereby certify that this brief contains 11,602 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Date: January ___, 2012

KIM W. CHEATUM

Valli v. Valli
Court of Appeal Case No. B222435

PROOF OF SERVICE
(Code Civ. Proc., 1013a(1) & (3))

I declare that: I am over 18 years of age, and not a party to this action; I am employed in the County of San Diego, California, wherein the mailing occurs; and my business address is 101 West Broadway, Suite 1700, San Diego, California 92101.

On January ___, 2012, I caused to be served both of the pleadings described as follows:

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AMICUS CURIAE BRIEF OF KIM W. CHEATUM IN SUPPORT OF PETITIONER FRANKIE VALLI.

by placing both in an envelope addressed to each addressee, respectively, as follows:

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Executed on January ___, 2012, at San Diego, California.

_____
Ashley Adams