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## Transmutations and the Presumption of Undue Influence: A Quagmire in Divorce Court

*Sara Craig\**

In the past thirty years, California's community property system has undergone a transformation driven by statutory changes, including the enactment of a statute of frauds for transactions between partners<sup>1</sup> and the imposition of heightened fiduciary duties between partners,<sup>2</sup> as well as judicial interpretation of these statutory changes.<sup>3</sup> As a result of these changes, divorcing partners now have greater opportunity to influence the outcome of the court's division of the community property by appearing as sympathetic as possible on the witness stand. In this note, I will discuss briefly the history of California's community property laws, and more particularly, the presumption of undue influence as applied to transmutations.<sup>4</sup> Section I provides background and context for the discussion, including principles of community property as they are applied in California statutes and jurisprudence. Section II describes the application of the presumption of undue influence to transmutations in the context of recent cases; explains how judicial interpretation of what constitutes an unfair advantage to one partner over the other has led to tension between the fiduciary obligations imposed by section 721(b) and the writing requirement codified at section 852(a) of the Family Code; and

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\* J.D. Candidate, 2014, University of California, Hastings College of the Law; B.S., Neurobiology, Physiology and Behavior, University of California, Davis, 2002. First, I wish to thank Professor Jo Carrillo for her unstinting and insightful guidance throughout the writing process and for her kind encouragement along the way. I also thank Adjunct Professor James B. Creighton for his generous advice on estate planning. I want to thank Adjunct Professor Kevin Romano for stimulating my interest in Community Property with his superlative teaching and for providing feedback from the perspective of a skillful divorce attorney. Finally, I am grateful to my family for teaching me that all people deserve justice and equality.

1. CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.). California also created an entirely new relationship that gives rise to community property, the registered domestic partnership. CAL. FAM. CODE §§ 297, 297.5 (West, Westlaw through 2012 Sess.). Throughout this article, I will use the term "partners" as an inclusive reference to both spouses and registered domestic partners.

2. CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

3. *See, e.g., In re Marriage of Haines*, 33 Cal. App. 4th 277, 301 (1995).

4. "Transmutation" is the term applied to a transfer between spouses or registered domestic partners that transforms property from separate property of one of the partners to community property, or community property to separate property. BLACK'S LAW DICTIONARY 1638 (9th ed. 2009).

shows how lack of precedents from the appellate courts and instructions from the Legislature creates a danger that some lower courts will apply outmoded social stereotypes and undervalue work performed in the home. Finally, Section III proposes that California's Legislature and judiciary should change the way that parties in dissolution proceedings are allowed to raise and rebut the presumption of undue influence, first by redefining "any unfair advantage" from section 721(b)<sup>5</sup> as an advantage to one partner that disadvantages or damages the community estate, which will bring the statute in line with the purpose of a community property system, and second by clarifying whether the writing requirement under section 852(a)<sup>6</sup> operates as a statute of frauds with traditional contracts law exceptions. Section III also gives some recommendations for attorneys and partners contemplating transmutation, which will be helpful in the absence of legislative or judicial action.

## I. PRINCIPLES OF COMMUNITY PROPERTY IN CALIFORNIA

The concept of community property, as it is currently practiced in California, arose among Visigothic tribes where women had to work the land alongside their husbands,<sup>7</sup> or other "migratory and nomadic peoples which led a hard and dangerous existence, [where] the wife shared with her husband its dangers and vicissitudes, [and] she was fully cognizant of the details of and shared in his daily life and labor."<sup>8</sup> One such people, the Mongols, had a law that "women should attend to the care of the property, buying and selling at their pleasure. Men should occupy themselves only with hunting and war."<sup>9</sup> By contrast, the common law system practiced elsewhere in the United States developed among the nobility in Normandy and England, where a wife had no property rights separate from those of her husband, and she was merely "a beautiful possession to adorn and grace the manor."<sup>10</sup> Ultimately, scholars theorize that the common law system survived in England because "the upper classes in turning their faces against the community system effectively strangled its development in England."<sup>11</sup> In settings where community property systems proliferated, on the other hand, spouses generally had little property before marriage so they each had an equal stake in the resulting community estate because each of their efforts created it.<sup>12</sup> Therefore, community property systems

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5. CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

6. CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.).

7. Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 32–33 (1967).

8. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 11, 20 (2d ed. 1971).

9. *Id.* at 19 (quotation omitted).

10. DE FUNIAK & VAUGHN, *supra* note 8, at 22.

11. DE FUNIAK & VAUGHN, *supra* note 8, at 21.

12. DE FUNIAK & VAUGHN, *supra* note 8, at 21.

protect investment in the family and recognize the value each partner contributes by giving each a present interest in the community estate.<sup>13</sup>

#### A. RELATIONSHIPS THAT GIVE RISE TO COMMUNITY PROPERTY

In California, two types of relationships give rise to community property: marriage and registered domestic partnership.<sup>14</sup> A valid marriage requires a license and a ceremony,<sup>15</sup> whereas a valid registered domestic partnership requires paperwork be completed and filed with the California Secretary of State.<sup>16</sup> California law holds that a marriage is void at the solemnization stage only if the marriage is incestuous<sup>17</sup> or bigamous.<sup>18</sup> The Legislature made similar provisions for valid registered domestic partnerships, codified at section 297(b) of the Family Code.<sup>19</sup>

Additionally, the California Family Code protects a putative spouse: any party who has a good faith belief that he or she has entered a valid marriage or registered domestic partnership, but who has not done so because of an unmet procedural requirement.<sup>20</sup> Because of the putative spouse doctrine, the court will determine that all property that would have been community property, had all the procedural requirements for a valid marriage or domestic partnership been met, is quasi-marital property,<sup>21</sup> thereby allowing for equitable division of the estate upon dissolution.<sup>22</sup>

Finally, California extends community property to a marriage contracted in another state that “would be valid by the laws of the

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13. Vaughn, *supra* note 7, at 40–41.

14. CAL. FAM. CODE §§ 760 & 297.5 (West, Westlaw through 2012 Sess.).

15. CAL. FAM. CODE § 300 (West, Westlaw through 2012 Sess.).

16. CAL. FAM. CODE § 297 (West, Westlaw through 2012 Sess.); *see also* Velez v. Smith, 142 Cal. App. 4th 1154, 1167 (2006) (citing *Armijo v. Miles*, 127 Cal. App. 4th 1405, 1414 (2005)); *but cf. In re Domestic Partnership of Ellis*, 162 Cal. App. 4th 1000, 1008 (2008) (extending putative spouse doctrine to domestic partners).

17. CAL. FAM. CODE § 2200 (West, Westlaw through 2012 Sess.).

18. CAL. FAM. CODE § 2201 (West, Westlaw through 2012 Sess.). A voidable marriage, on the other hand, involves fraud, force, lack of ability to consent, lack of sound mind of either partner, or physical incapacity of either partner, which occurs at the solemnization phase. CAL. FAM. CODE § 2210 (West, Westlaw through 2012 Sess.). Voidable marriages can be rendered valid if the partners “freely cohabit[ ] with the other as husband or wife.” CAL. FAM. CODE § 2210 (West, Westlaw through 2012 Sess.).

19. The requirements for a valid registered domestic partnership include that “[n]either person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity” and “[t]he two persons are not related by blood in a way that would prevent them from being married to each other in this state.” CAL. FAM. CODE § 297(b) (West, Westlaw through 2012 Sess.).

20. CAL. FAM. CODE § 2251 (West, Westlaw through 2012 Sess.); *see also In re Domestic Partnership of Ellis*, 162 Cal. App. 4th 1000, 1008 (2008) (applying the putative spouse doctrine to domestic partnerships).

21. *In re Marriage of Tejada*, 179 Cal. App. 4th 973, 977 (2009); *Ellis*, 162 Cal. App. 4th at 1008. *But see In re Marriage of Guo & Sun*, 186 Cal. App. 4th 1491, 1499 (2010) (holding that partner who does not have objectively reasonable good faith belief in validity of marriage cannot rely on putative spouse doctrine).

22. CAL. FAM. CODE § 2251 (West, Westlaw through 2012 Sess.).

jurisdiction in which the marriage was contracted.”<sup>23</sup> Originally, this statute enabled California courts to recognize common law marriages contracted in states that allow them.<sup>24</sup> In 2009, Senate Bill 54 amended the statute to extend recognition to same sex marriages contracted in states that allow them.<sup>25</sup>

#### B. CHARACTERIZATION OF PROPERTY AS SEPARATE OR COMMUNITY

Upon dissolution, the court must characterize the property as either community or separate property.<sup>26</sup> The court employs several presumptions to aid in the characterization process. First, outside the context of a dissolution proceeding for property with record titles, the court applies the general title presumption: It presumes that the property is characterized in accord with the title.<sup>27</sup> However, for dissolution purposes only, the court treats any property held in joint tenancy or tenancy in common by partners as community property, unless the partners have clearly indicated separate interests.<sup>28</sup> Second, any property obtained by the partners between the date of marriage or registration and the date of dissolution is presumed to be community property, irrespective of time, and belong to the community estate.<sup>29</sup> This presumption is known as the community property presumption.<sup>30</sup> Both partners own a present undivided one-half interest in the community estate.<sup>31</sup> This present interest separates community property jurisdictions from common law jurisdictions, even though most common law jurisdictions in the United States now practice some form of equitable division upon dissolution.<sup>32</sup> All property acquired through the partners' time, energy, and skill during the marriage or partnership is characterized as community property,<sup>33</sup> unless the partners have an agreement to the contrary.<sup>34</sup> Courts treat quasi-marital property arising from putative marriage or partnership the same as community property upon dissolution.<sup>35</sup>

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23. CAL. FAM. CODE § 308 (West, Westlaw through 2012 Sess.).

24. *People v. Badgett*, 10 Cal. 4th 330, 363 (1995).

25. 2009 Cal. Legis. Serv. Ch. 625 (West).

26. “Characterization” is the process by which the court determines whether property is separate or community to facilitate equitable distribution. BLACK'S LAW DICTIONARY 265 (9th ed. 2009).

27. CAL. EVID. CODE § 662 (West, Westlaw through 2012 Sess.). Section 662 also states that clear and convincing evidence is required to rebut the general title presumption. *Id.*

28. CAL. FAM. CODE § 2581 (West, Westlaw through 2012 Sess.).

29. CAL. FAM. CODE § 760 (West, Westlaw through 2012 Sess.); *see also* CAL. FAM. CODE § 297.5(a) (West, Westlaw through 2012 Sess.).

30. GAIL BOREMAN BIRD & JO CARRILLO, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 98 (10th ed. 2011).

31. CAL. FAM. CODE § 751 (West, Westlaw through 2012 Sess.).

32. BIRD & CARRILLO, *supra* note 30, at 11.

33. *Pereira v. Pereira*, 156 Cal. 1, 7 (1909).

34. CAL. FAM. CODE § 1612(a)(1) (West, Westlaw through 2012 Sess.).

35. CAL. FAM. CODE § 2251(a)(2) (West, Westlaw through 2012 Sess.).

Partners can rebut the community property presumption by proving that specific property was acquired before marriage, by inheritance, or by gift.<sup>36</sup> This property is then characterized as separate property.<sup>37</sup> Separate property also includes any proceeds, rents, or income earned from ownership and management of underlying separate property.<sup>38</sup> Because partners frequently commingle<sup>39</sup> their assets during their relationship, upon dissolution they frequently have to prove the character of separate property by tracing its acquisition to a separate property source.<sup>40</sup> Also, real or personal property owned or acquired by either or both of the partners in another jurisdiction, that would have been community property, had it been acquired in California, is known as quasi-community property and is treated as community property upon dissolution.<sup>41</sup>

Finally, partners can transmute property by agreement or transfer.<sup>42</sup> Before 1985, spouses in California could prove transmutation of property by resorting to oral testimony or conduct of the parties.<sup>43</sup> In its findings recommending changes to the transmutation rules, the California Law Revision Commission stated, “The rule of easy transmutation has . . . generated extensive litigation in dissolution proceedings. It encourages a spouse, after the marriage has ended, to transform a passing comment into an ‘agreement’ or even to commit perjury by manufacturing an oral or implied transmutation.”<sup>44</sup> On this recommendation, California enacted Civil Code section 5110.730, the predecessor to Family Code section 852, which held that “[a] transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.”<sup>45</sup> For a time after section 852(a) went into effect, courts strictly interpreted the statute and did not allow partners to introduce parol evidence to prove or disprove transmutions.<sup>46</sup> However, subsequent

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36. CAL. FAM. CODE § 770(a) (West, Westlaw through 2012 Sess.). *See also* CAL. CONST. art. 1, § 21.

37. CAL. FAM. CODE § 770(a) (West, Westlaw through 2012 Sess.). *See also* CAL. CONST. art. 1, § 21.

38. CAL. FAM. CODE § 770(a)(3).

39. BIRD & CARRILLO, *supra* note 30, at 338.

40. Hicks v. Hicks, 211 Cal. App. 2d 144, 157 (1962).

41. CAL. FAM. CODE § 125 (West, Westlaw through 2012 Sess.). Upon death of one of the partners, only personal property in other jurisdictions is included as part of the community estate. CAL. PROB. CODE § 66 (West, Westlaw through 2012 Sess.).

42. CAL. FAM. CODE § 850 (West, Westlaw through 2012 Sess.).

43. *See, e.g., In re Raphael’s Estate*, 91 Cal. App. 2d 931, 938–39 (1949).

44. RECOMMENDATION RELATING TO MARITAL PROPERTY PRESUMPTIONS AND TRANSMUTATIONS, 17 CAL. L. REVISION COMM’N REPORTS 205, 214 (1984).

45. CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.) (corresponds to CAL. CIV. CODE § 5110.730(a)).

46. *See* Estate of MacDonald, 51 Cal. 3d 262, 267–68 (1990).

changes to the Family Code eroded the court's strong stance in reliance on written records.<sup>47</sup>

### C. RIGHTS AND OBLIGATIONS OF PARTNERS

The community property system conceives of marriage (and registered domestic partnership, by extension) as a partnership of equals.<sup>48</sup> As it is practiced today in California, among other benefits, partners enjoy equitable division of the community estate upon death or dissolution.<sup>49</sup> Originally, even in community property jurisdictions, husbands had the responsibility to manage property, including property belonging to their wives.<sup>50</sup> Beginning in 1975, California switched to a system of equal management and control, under which "either [partner] has the management and control of the community personal property . . . with like absolute power of disposition . . . as the spouse has of the separate estate of the spouse."<sup>51</sup> Equal management and control extends to community real property, with one caveat: "[B]oth [partners] . . . must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."<sup>52</sup>

However, with these rights come responsibilities. In order to facilitate equal management and control, the partners now have fiduciary obligations to one another, codified at Family Code section 721.<sup>53</sup> Section 721(a) recognizes the freedom of contract that comes with equal management and control,<sup>54</sup> but section 721(b) curtails that freedom by holding that, "in transactions between themselves, [partners are] subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other."<sup>55</sup> Although the standard now includes "a duty of the highest good faith and fair dealing,"<sup>56</sup> it has not always held that partners are forbidden from taking "any unfair advantage" of each other.<sup>57</sup> In fact, the standard has evolved and changed as courts

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47. See Section II.C, *infra*.

48. Vaughn, *supra* note 7, at 40–41.

49. CAL. FAM. CODE § 2550 (West, Westlaw through 2012 Sess.).

50. WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 205 (2d ed. 1982).

51. CAL. FAM. CODE § 1100(a) (West, Westlaw through 2012 Sess.). Subsection (d) provides a business exception: "[A] spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest." *Id.* § 1100(d).

52. CAL. FAM. CODE § 1102(a) (West, Westlaw through 2012 Sess.).

53. CAL. FAM. CODE § 721 (West, Westlaw through 2012 Sess.).

54. *Id.* § 721(a).

55. *Id.* § 721(b).

56. *Id.*

57. See CAL. CIV. CODE § 5103(b) (Deering Supp. 1991) (amended 1992) (repealed 1994).

decided cases and the Legislature responded, and the changing nature of the obligation has often caused confusion.

## II. FIDUCIARY OBLIGATIONS AND TRANSMUTATIONS: AN UNEASY TRUCE

### A. THE ERA OF LEGISLATIVE INTERVENTION: 1975-1994

In the era of male management, the fiduciary relationship functioned to assure the wife that, where she ceded management and control of her separate property as well as her portion of the community estate to her husband, he would be required to exercise a high standard of care in managing that property.<sup>58</sup> However, when California adopted equal management and control effective January 1, 1975, amendments to sections 5125 and 5127 of the Civil Code “changed the fiduciary duty to one of good faith.”<sup>59</sup> In 1984, California enacted Civil Code section 5110.730(a), the predecessor to Family Code section 852(a), requiring any transfer between marital partners to be in writing signed by the adversely affected partner.<sup>60</sup> This change, which was recommended by the California Law Revision Commission, was made because the Commission recognized that the convenience of allowing oral transmutations had led to “extensive litigation in divorce proceedings.”<sup>61</sup> In 1986, just over one year after the writing requirement under section 5110.730(a) took effect, the Legislature again addressed the duty of care required between partners, describing the duty as a “good faith in confidential relations” standard,<sup>62</sup> rather than a fiduciary standard. This description of the duty between partners occurred in the context of enacting a bill that sought to provide additional remedies for breaches of the duty of care between partners.<sup>63</sup> Presciently, opponents to this bill raised concerns that the good faith standard, coupled with the remedies provided by the accompanying statutes, would “raise[ ] the possibility of ‘pillow talk’ discussions and other oral ‘agreements’ being dragged into a courtroom, after recent legislative changes to have it excluded.”<sup>64</sup> Regardless of these concerns raised by opponents, the bill was enacted, amending Civil Code section 5125(e) to incorporate the “good

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58. *In re Cover's Estate*, 188 Cal. 133, 143 (1922).

59. *In re Marriage of Stevenot*, 154 Cal. App. 3d 1051, 1068 (1984).

60. CAL. CIV. CODE § 5110.730(a) (Deering Supp. 1985) (repealed 1994); CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.).

61. RECOMMENDATION RELATING TO MARITAL PROPERTY PRESUMPTIONS, *supra* note 44, at 214.

62. 1986 Cal. Stat. Ch. 1091, sec. 3(c), *microformed on* Calif. Legislative Bills 1989–90, Senate Bill 1070–74 (Library Microfilms).

63. Letter from Senator Bill Lockyer to Governor George Deukmejian (Aug. 28, 1986), *microformed on* Governor's Chaptered Bill File, Reel 201 1986 (Cal. St. Archives).

64. Sen. 1071, 1985–86 Reg. Sess., Assembly Third Reading, 4 (Cal. 1986), *microformed on* Calif. Legislature 1985–86, State Assembly File Analysis, Senate Bill 1033–87 (Library Microfilms).



faith in confidential relations” standard.<sup>65</sup> Therefore, less than two years after Civil Code section 5110.730(a) went into effect, the Legislature enacted statutes that cracked open the door once again to admit parol evidence.

Three years later, Assembly Bill 2194, which would have raised the standard of care back to the fiduciary standard, passed in both houses of the California Legislature, but the governor vetoed the bill, commenting:

The finality of a judgment is a very important aspect of family law for both spouses. . . . Currently, it is fairly easy to set aside a judgment incorporating a marital settlement agreement of the parties during the first six months after issuance of that judgment, but much more difficult thereafter. This bill could severely impact the doctrine of finality by allowing either spouse, even many years later, to appeal to a court to set aside a judgment and marital settlement agreement, based upon a claimed breach of fiduciary duty.<sup>66</sup>

AB 2194, if enacted, would have amended Civil Code section 5103 to require that, “in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other.”<sup>67</sup> Notably, this version of the bill did not include the prohibition on a partner obtaining “any unfair advantage” over the other partner.<sup>68</sup>

In 1991, Senate Bill 716, which had very similar language to AB 2194, was enacted. SB 716 changed Civil Code section 5103 to state that marital partners have “the same rights and duties of nonmarital business partners”<sup>69</sup> and, notably, added that “neither shall take any unfair advantage of the other.”<sup>70</sup> The Legislative Counsel’s Digest stated that the bill would:

- (1) revise requirements with respect to the disclosure and notice that must be provided by one spouse to the other spouse,
- (2) revise provisions related to when a spouse may bring a claim against the other spouse for breach of this fiduciary duty,

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65. CAL. CIV. CODE § 5125(e) (Deering Supp. 1987) (amended 1991) (repealed 1994). See also 1986 Cal. Stat. Ch. 1091, *microformed on* Calif. Legislative Bills 1989–90, Senate Bill 1070–74 (Library Microfilms).

66. Assem. 2194, 1989–90 Reg. Sess., Governor’s Veto, 3 (Cal. 1989), *microformed on* Calif. Legislature 1989–90, State Assembly File Analysis, Assembly Bill 2156–94 (Library Microfilms).

67. Assem. 2194, 1989–90 Reg. Sess., sec. 2 (Cal. 1989), *microformed on* Calif. Legislative Bills 1989–90, Assembly Bill 2193–96 (Library Microfilms).

68. *Id.*

69. CAL. CIV. CODE § 5103(b) (Deering Supp. 1992) (repealed 1994). See also 1991 Cal. Stat. Ch. 1026, sec. 2, *microformed on* Calif. Legislative Bills 1991–92, Senate Bill 713–16 (Library Microfilms).

70. CAL. CIV. CODE § 5103(b) (Deering Supp. 1992) (repealed 1994).

- (3) recast and clarify the circumstances in which a spouse may make a gift or dispose of community personal property without the consent of the other spouse, and
- (4) provide additional remedies for breach of this fiduciary duty by a spouse to the other spouse.<sup>71</sup>

Comments from the Senate Third Reading indicate that proponents emphasized that the amendment to the standard of care was needed “to resolve the ambiguity regarding the appropriate standard of care during the marriage *and continuing until the dissolution* which has been caused by the *Alexander* and *Baltins* cases.”<sup>72</sup> In *In re Marriage of Alexander*, the First District Court of Appeal held that a spouse who signed a settlement agreement and quitclaim deed without representation of counsel had no right to set aside the marital settlement agreement fifteen months after the court rendered its dissolution judgment where the court subsequently found no evidence of extrinsic fraud.<sup>73</sup> The Court’s decision was based on the adversely affected spouse’s failure to timely challenge the marital settlement agreement,<sup>74</sup> and as a corollary, the Court held that an amendment to the statutory duty of good faith enacted by the Legislature in 1986 “[did] not change the good faith duty each spouse has to disclose the existence of community assets to the other *until the property is divided*.”<sup>75</sup>

*In re Marriage of Baltins* likewise dealt with events that occurred after the partners had separated but before their property was divided.<sup>76</sup> In *Baltins*, the court found that the advantaged partner exerted such a degree of “psychological, emotional, and financial control” over the adversely affected partner, which continued after the partners had separated and extended to execution of the marital settlement agreement, that his actions “constitute[d] constructive fraud.”<sup>77</sup> Both cases cited by the Legislature as a reason for enacting the higher standard thus focused on division of the assets pursuant to dissolution, a time when partners typically are not acting in the best interests of the community. Because of this narrow focus on a time when partners are more likely to self-deal and less likely to want to benefit the community estate, the Legislature set a very high standard to deter self-dealing. But, as the opponents pointed out, the amendment to the standard had the effect of “impos[ing] the new duty retroactively over

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71. 1991 Cal. Stat. Ch. 1026, sec. 2, *microformed on* Calif. Legislative Bills 1991–92, Senate Bill 713–16 (Library Microfilms).

72. Sen. 716, 1991–92 Reg. Sess., Senate Third Reading 3 (Cal. 1991) (emphasis added), *microformed on* Calif. Legislature 1991–92, State Assembly File Analysis, Senate Bill 672–742 (Library Microfilms).

73. *In re Marriage of Alexander*, 212 Cal. App. 3d 677, 680–82 (1989).

74. *Id.* at 684.

75. *Id.* at 683–84 (emphasis added).

76. *In re Marriage of Baltins*, 212 Cal. App. 3d 66, 89 (1989).

77. *Id.*

every transaction in every existing marriage, without any opportunity for spouses to protect themselves against past acts which were proper when carried out.”<sup>78</sup>

When the California Law Revision Commission made its recommendations for a consolidated Family Code, it recommended using nearly identical language as that contained in Civil Code section 5103(b), and this language was adopted as Family Code section 721(b).<sup>79</sup> These obligations place the partners in a relationship equivalent to that of “nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code. . . .”<sup>80</sup> Additionally, neither partner is allowed to take “any unfair advantage of the other.”<sup>81</sup> Among the duties owed by one partner to another are those of loyalty,<sup>82</sup> care,<sup>83</sup> access to books and records,<sup>84</sup> and disclosure.<sup>85</sup> The language of the statute gives color to the court’s consideration of transactions between partners by explaining that the “confidential relationship imposes a duty of the highest good faith and fair dealing on each [partner]. . . .”<sup>86</sup> Because the Legislature has imposed this high standard and forbade partners from taking “any unfair advantage,”<sup>87</sup> courts have been required to determine what exactly constitutes “any unfair advantage.” This inquiry has led to tension between the fiduciary obligations imposed by section 721(b) and the writing requirement imposed by section 852(a), causing uncertainty for partners attempting to effect transmutations.

In *In re Marriage of Haines*, the California court applied the presumption of undue influence, frequently raised in contracts law, to invalidate a transmutation that complied with the (recently enacted) writing requirement of section 852(a).<sup>88</sup> The case involved a husband who got his wife to sign a quitclaim deed to their community property by promising to cosign a car loan and then withholding his signature unless the wife

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78. Sen. 716, 1991–92 Reg. Sess., Senate Third Reading 3 (Cal. 1991), *microformed on Calif. Legislature 1991–92, State Assembly File Analysis, Senate Bill 672–742* (Library Microfilms).

79. FAMILY CODE, 22 CAL. L. REVISION COMM’N REPORTS 1, 129–30 (1992); CAL. FAM. CODE § 721(b) (amended 2002) (West, Westlaw through 2012 Sess.). The 2002 amendment did not change the fiduciary standard; instead, it merely applied it to property held in trust and corrected a few technical errors. 2002 Cal. Legis. Serv. Ch. 310 (S.B. 1936) (West). Thus, the current version of section 721(b) retains nearly the same language that was enacted in 1994. CAL. FAM. CODE § 721(b) (amended 2002) (West, Westlaw through 2012 Sess.).

80. CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

81. *Id.*

82. CAL. CORP. CODE § 16403(b) (West, Westlaw through 2012 Sess.).

83. CAL. CORP. CODE § 16404(c) (West, Westlaw through 2012 Sess.).

84. CAL. CORP. CODE § 16403 (West, Westlaw through 2012 Sess.).

85. *Id.*; CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

86. CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

87. *Id.*

88. *In re Marriage of Haines*, 33 Cal. App. 4th 277, 302 (1995).

actually signed the quitclaim deed.<sup>89</sup> The *Haines* court also established factors sufficient to rebut the presumption of undue influence: the advantaged partner must show that the transmutation “was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.”<sup>90</sup> While judges in subsequent cases have considered *Haines* as more a case of duress than undue influence,<sup>91</sup> Mrs. Haines’s attorney’s successful use of the presumption of undue influence to defeat the statute of frauds started a flood of additional litigation aimed at invalidating transmutations by resorting to parol evidence.<sup>92</sup> In 2006, Professor Christine Manolakas predicted that the conflict between Section 852(a) and Section 721(b) created by *Haines* and subsequent cases would give “disgruntled spouses in dissolution proceedings . . . the power to set aside the title to property or a valid transmutation of property simply by testifying as to insufficient consideration or undue influence with the ultimate result of increased litigation and potential perjury.”<sup>93</sup> Indeed, since 2006, the situation has become direr than even Professor Manolakas predicted.

#### B. THE ERA OF JUDICIAL INTERPRETATION: 1994 TO PRESENT

Since 1994 when Family Code section 721(b) went into effect, California appellate courts have decided over seventy cases in which one of the parties attempted either to allege or to invalidate a transmutation in circumstances that implicated the presumption of undue influence.<sup>94</sup> Only twelve of these cases have been published,<sup>95</sup> and one of these is no longer citable because review has been granted by the California Supreme Court.<sup>96</sup> This paucity of published cases provides little guidance for lower courts rendering decisions, attorneys counseling their clients, and partners planning their estates and conducting their affairs. With so few published

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89. *In re Marriage of Haines*, 33 Cal. App. 4th 277, 284 (1995).

90. *Id.* at 296 (citation omitted).

91. *See, e.g., In re Marriage of Delaney*, 111 Cal. App. 4th 991, 999 (2003).

92. *In re Marriage of Haines* is cited in 206 subsequent cases. 33 Cal. App. 4th 277 (1995) (Westlaw, Cal. Case Law).

93. Christine Manolakas, *The Presumption of Undue Influence Resurrected: He Said/She Said Is Back*, 37 MCGEORGE L. REV. 33, 81 (2006).

94. Search for “presum! /s undu! /2 influence & transmut!” after Jan. 1, 1994, Westlawnext.com (last visited Mar. 8, 2013).

95. In chronological order, they are: *In re Marriage of Haines*, 33 Cal. App. 4th 277 (1995); *In re Marriage of Barneson*, 69 Cal. App. 4th 583 (1999); *In re Marriage of Campbell*, 74 Cal. App. 4th 1058 (1999); *In re Marriage of Delaney*, 111 Cal. App. 4th 991 (2003); *In re Marriage of Benson*, 36 Cal. 4th 1096 (2005); *In re Marriage of Weaver*, 127 Cal. App. 4th 858 (2005); *In re Marriage of Mathews*, 133 Cal. App. 4th 624 (2005); *In re Marriage of Burkle*, 139 Cal. App. 4th 712 (2006); *In re Marriage of Balcof*, 141 Cal. App. 4th 1509 (2006); *In re Marriage of Lund*, 174 Cal. App. 4th 40 (2009); *Starr v. Starr*, 189 Cal. App. 4th 277 (2010); and *In re Marriage of Valli*, 195 Cal. App. 4th 776 (2011).

96. *In re Marriage of Valli*, 124 Cal. Rptr. 3d 726 (2011), *review granted*, 258 P.3d 750 (2011).

decisions, trial and appellate courts have rendered inconsistent decisions, particularly where the courts consider whether to adhere to the unambiguous language in a transmutation agreement,<sup>97</sup> whether to consider other contract law principles,<sup>98</sup> and how to weigh credibility of the partners as witnesses.<sup>99</sup> In part, these inconsistencies can be attributed to the fact-intensive inquiries required to equitably divide assets upon dissolution.<sup>100</sup> The slightest change in the facts or witness testimony presented can change the outcome completely,<sup>101</sup> thereby perpetuating *ad infinitum* the exact scenario that the Legislature intended to prevent by enacting section 852(a).<sup>102</sup>

In the cases that have reached the appellate court level since *Haines*, a few trends emerge. Partners frequently transmute property in connection with obtaining financing.<sup>103</sup> If one partner quitclaims so that they can obtain a better interest rate or pay less fees on a home loan, most courts find a valid transmutation,<sup>104</sup> as in *In re Marriage of Mathews*, where the court found that Mr. Mathews rebutted the presumption of undue influence by demonstrating that Mrs. Mathews was conversant with financial matters and spoke fluent English.<sup>105</sup> Courts also follow *Haines* by looking for evidence of fraud, deception, coercion, or duress, and where such evidence appears, courts uniformly invalidate the resulting transmutation.<sup>106</sup> If the

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97. See Section II.B.1, *infra*.

98. See Section II.B.2, *infra*.

99. See Section II.B.3, *infra*.

100. See, e.g. *In re Marriage of Walrath*, 17 Cal. 4th 907 (1998).

101. See, e.g. *In re Marriage of Mathews*, 133 Cal. App. 4th 624, 632 (2005) (finding transmutation valid where wife assumed she would be added to title later); *but cf.* *Starr v. Starr*, 189 Cal. App. 4th 277, 286–87 (2010) (finding transmutation invalid where wife testified that husband told her he would add her to title later).

102. CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.).

103. See, e.g. *In re Marriage of Mathews*, 133 Cal. App. 4th at 627.

104. See *In re Marriage of Buijnorowski*, No. D038649, 2002 WL 31684973 at \*2–3 (Cal. Ct. App. Dec. 2, 2002); *In re Marriage of Stringer*, No. A100272, 2003 WL 21457047 at \*4 (Cal. Ct. App. June 24, 2003); *In re Marriage of Melcher*, No. H022141, 2006 WL 119127 at \*15 (Cal. Ct. App. Jan. 13, 2006); *In re Marriage of Nguyen*, No. G036127, 2006 WL 2425346 at \*6 (Cal. Ct. App. Aug. 23, 2006); *In re Estate of Padilla*, No. B195940, 2008 WL 4194494 at \*7–8 (Cal. Ct. App. Sept., 15, 2008); *In re Fondario*, No. E045156, 2010 WL 1501478 at \*3 (Cal. Ct. App. Apr. 14, 2010); *In re Marriage of Santana*, No. E050070, 2011 WL 3566974 \*3–4 (Cal. Ct. App. Aug. 15, 2011); *In re Marriage of Nelipovich*, No. D058435, 2012 WL 130392 at \*7 (Cal. Ct. App. Jan. 13, 2012); *In re Marriage of Redden*, No. C060046, 2012 WL 5458558 at \*5–6 (Cal. Ct. App. Nov. 9, 2012); *Osinoff v. Huter*, No. B233539, 2013 WL 123706 at \*2–3 (Cal. Ct. App. Jan. 10, 2013). *But see In re Marriage of Sullinger*, No. G028868, 2002 WL 31794153 at \*6 (Cal. Ct. App. Dec. 13, 2002) (holding that quitclaim for financing was insufficient to effect transmutation).

105. *In re Marriage of Mathews*, 133 Cal. App. 4th at 632.

106. See *In re Marriage of Balcof*, 141 Cal. App. 4th 1509, 1522–24 (2006); *In re Soliman*, No. E030034, 2002 WL 31188703 at \*5 (Cal. Ct. App. Oct. 2, 2002); *In re Marriage of Prokuski*, No. F047224, 2006 WL 1606981 at \*4, \*22 (Cal. Ct. App. June 13, 2006); *In re Marriage of Vrcic*, No. B183910, 2007 WL 2390804 at \*5 (Cal. Ct. App. Aug. 23, 2007); *In re Marriage of Isensee*, No. G039317, 2008 WL 2222963 at \*7 (Cal. Ct. App.

court finds the writing inadequate to effect a transmutation under section 852(a), it usually will rely on this finding to hold that no transmutation occurred.<sup>107</sup> Courts found valid transmutations in many of the cases where the adversely affected partner had advice of counsel, although this factor usually was not conclusive.<sup>108</sup> Additionally, nearly every court attempts to assess the sophistication of the adversely affected partner, and if he or she is found to be a sophisticated party the court frequently finds the presumption of undue influence is rebutted.<sup>109</sup>

Still, because section 721(b) requires the court to examine every transaction between partners for “any unfair advantage”<sup>110</sup> before the court can characterize the property conclusively as separate or community, section 721(b) effectively trumps all other statutory provisions, including the writing requirement under section 852(a),<sup>111</sup> the general title presumption,<sup>112</sup> and the community property presumption.<sup>113</sup> The factors required to rebut the presumption of undue influence are so difficult to

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May 29, 2008); *In re Marriage of Fragoso*, No. A120650, 2009 WL 466078 at \*7 (Cal. Ct. App. Feb. 25, 2009).

107. See *In re Marriage of Benson*, 36 Cal. 4th 1096, 1112 (2005); *In re Marriage of Barneson*, 69 Cal. App. 4th 583, 590–92 (1999); *In re Marriage of Campbell*, 74 Cal. App. 4th 1058, 1065 (1999); *In re Marriage of McCready*, No. D050079, 2007 WL 4510154 at \*8 (Cal. Ct. App. Dec. 26, 2007); *In re Estate of Padilla*, No. B195940, 2008 WL 4194494 \*8 (Cal. Ct. App. Sept. 15, 2008); *In re Marriage of Laushine*, No. B197005, 2008 WL 239522 \*3 (Cal. Ct. App. Jan. 30, 2008); *In re Marriage of Dinh*, No. G043080, 2011 WL 4397008 at \*8–9 (Cal. Ct. App. Sept. 22, 2011); *In re Marriage of Wilson*, No. B232329, 2012 WL 1898903 at \*4 (Cal. Ct. App. May 25, 2012). But see *In re Estate of Delp*, No. G027015, 2002 WL 80639 at \*3 (Cal. Ct. App. Jan. 22, 2002) (holding that lack of valid writing complying with Section 852(a) cannot be used by former wife against widow of decedent who died intestate).

108. See *In re Marriage of Burkle*, 139 Cal. App. 4th 712, 739 (2006); *In re Marriage of Eskenazi*, No. B156379, 2003 WL 22501563 at \*3 (Cal. Ct. App. Nov 5, 2003); *In re Marriage of Hancock*, No. G037502, 2007 WL 1508717 at \*4 (Cal. Ct. App. May 24, 2007); *In re Marriage of Ling and Zee*, No. H029885, 2007 WL 1831101 at \*8 (Cal. Ct. App. June 27, 2007); *In re Marriage of Menkes*, No. G041429, 2010 WL 1620714 at \*2 (Cal. Ct. App. Apr. 22, 2010); *In re Marriage of Pitto and Behrendt*, No. A126802 and No. A127429, 2012 WL 2529300 at \*9 (Cal. Ct. App. June 29, 2012). But see *In re Marriage of Kahn*, No. A128001, 2012 WL 1079579 at \*2, \*5 (Cal. Ct. App. Apr. 2, 2012) (upholding trial court’s invalidation of transmutation agreement although partners were represented by counsel); *In re Marriage of Lico*, No. A130765, 2012 WL 1560450 at \*8 (Cal. Ct. App. May 4, 2012) (finding that, although partners were represented by counsel, there was no evidence that counsel actually informed adversely affected partner of consequences of transmutation agreement).

109. See *In re Marriage of Burkle*, 139 Cal. App. 4th at 734–36; *In re Marriage of Valli*, 124 Cal. Rptr. 4th 726, 734 (2011), review granted, 258 P.3d 750 (2011); *In re Marriage of Eskenazi*, No. B156379, 2003 WL 22501563 at \*3; *In re Marriage of Pavin*, No. D041205, 2004 WL 170442 at \*6 (Cal. Ct. App. Jan. 29, 2004); *In re Marriage of Vom Dorp*, No. B170495, 2004 WL 2651268 at \*8 (Cal. Ct. App. Nov. 22, 2004); *In re Marriage of Redden*, No. C060046, 2012 WL 5458558 at \*4 (Cal. Ct. App. Nov. 9, 2012).

110. CAL. FAM. CODE § 721(b) (West, Westlaw through 2012 Sess.).

111. CAL. FAM. CODE § 852(a) (West, Westlaw through 2012 Sess.).

112. CAL. FAM. CODE § 2581 (West, Westlaw through 2012 Sess.).

113. CAL. FAM. CODE § 760 (West, Westlaw through 2012 Sess.).

assess, since the advantaged spouse effectively must prove the adversely affected partner's state of mind at the time of the transaction,<sup>114</sup> and so easy to manipulate by the adversely affected partner, that they provide little predictability or security to either partner. Finally, courts do not assess uniformly whether the partners obtained mutual advantages, making it difficult to determine whether the presumption of undue influence should even apply to particular transmutations.

i. Unambiguous Language Cannot Uniformly Protect Partners

Section 721(b) casts a long shadow over deeds in the public record, making even presumptively valid recorded transfers suspect. In cases that do not invoke community property, but where title is disputed, the court normally applies the presumption that the record owner is the beneficial holder of title.<sup>115</sup> This presumption reflects "public 'policy . . . in favor of the stability of titles to property.'"<sup>116</sup> However, when the court also considers the presumption of undue influence raised under section 721(b) in the context of dissolutions, the *Haines* court concluded that "public policy of the state . . . demands that where there is a conflict between the common law presumption in favor of title as codified in section 662 and the presumption that a husband and wife must deal fairly with each other, application of section 662 is improper."<sup>117</sup> Therefore, in the context of dissolution proceedings, the partner defending the transmutation cannot point to the clear language in the deed to prove the transmutation if the adversely affected partner claims that the transmutation resulted from undue influence.

Even where transmutation is accomplished by agreement, rather than by deed alone, partners are not uniformly protected by the use of clear and unambiguous language. In one of the few transmutation cases selected for publication, *In re Marriage of Lund*, the mere insertion above a signature block of a clause indicating the signor read and understood the Transmutation Agreement was sufficient to overcome the presumption of undue influence.<sup>118</sup> Yet the Fourth District distinguished *Lund* on the barest of factual differences. In *In re Marriage of Lico*, the court found that the partners' Community Property Agreement was "a straightforward, comprehensible document."<sup>119</sup> The court also acknowledged that both partners were advised by an attorney who prepared, read, and reviewed the

114. *In re Marriage of Haines*, 33 Cal. App. 4th 277, 296 (1995).

115. CAL. EVID. CODE § 662 (West, Westlaw through 2012 Sess.).

116. *In re Marriage of Haines*, 33 Cal. App. 4th at 294 (citing CAL. EVID. CODE § 605 (West, Westlaw through 2012 Sess.)).

117. *Id.* at 287.

118. *In re Marriage of Lund*, 174 Cal. App. 4th 40, 56 (2009).

119. *In re Marriage of Lico*, No. A130765, 2012 WL 1560450 at \*9 (Cal. Ct. App. May 4, 2012).

documents with the partners.<sup>120</sup> Yet it declined to follow *Lund* because the court found that substantial evidence supported the trial court's finding that Mrs. Lico failed to rebut the presumption of undue influence because Mr. Lico testified that he "did not entirely appreciate the effect of the Community Property Agreement,"<sup>121</sup> and the attorney who advised the Licos represented them jointly and was not a family law specialist.<sup>122</sup>

In some cases, clearly, the court must find that the presumption of undue influence has not been rebutted because the advantaged partner has not adequately proved understanding on the part of the adversely affected partner. For example, the adversely affected partner in *In re Marriage of Delaney* had "cognitive impairments and as a consequence had entrusted all marital financial and legal matters to Wife, trusting and relying on her judgment and management in this regard."<sup>123</sup> However, allowing the adversely affected partner to merely testify that he or she did not understand a clearly written agreement, particularly when he or she had the assistance of counsel, without requiring a *reason* why he or she did not understand, effectively circumvents the *Haines* test and gives the adversely affected partner the right to "set aside the title to property or a valid transmutation of property by simply testifying. . . ."<sup>124</sup>

ii. Courts Do Not Uniformly Entertain Arguments Based on Other Areas of Contracts Law

In some transmutation cases, courts are amenable to hearing arguments applying general contracts principles to transmutations, whereas in others the courts hold that contracts principles beyond the presumption of undue influence do not apply. In *In re Marriage of Burkle*, the court held that a transmutation agreement executed as part of a negotiation while the partners were reconciling was valid because the parties had bargained for the exchange<sup>125</sup> and thereby obtained mutual advantages,<sup>126</sup> including for one partner "financial security and assurance she would be able to enjoy her present lifestyle without hindrance or risk of loss,"<sup>127</sup> and for the other "financial freedom to make investments that could yield high returns but which carried the risk of significant loss."<sup>128</sup> In another published decision, *Starr v. Starr*, the court found that because Mrs. Starr only executed a

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120. *In re Marriage of Lico*, No. A130765, 2012 WL 1560450 at \*3.

121. *Id.* at \*9.

122. *Id.* at \*8.

123. *In re Marriage of Delaney*, 111 Cal. App. 4th 991, 1000 (2003).

124. Manolakas, *supra* note 93, at 81.

125. *In re Marriage of Burkle*, 139 Cal. App. 4th 712, 727 (2006).

126. *Id.* at 735.

127. *Id.* at 721.

128. *Id.*



quitclaim deed due to her reliance on an express promise by Mr. Starr to add her back to title, the transmutation was therefore invalid.<sup>129</sup>

However, other courts have refused to entertain arguments based on contract law principles. The California Supreme Court, in *In re Marriage of Benson*, held that part performance does not apply to transmutations.<sup>130</sup> In *Benson*, the partners allegedly had an agreement that Mr. Benson would quitclaim his community interest in real property in exchange for Mrs. Benson ceding her community interest in Mr. Benson's retirement account.<sup>131</sup> Mr. Benson performed his portion of the alleged bargain, signing a quitclaim to a trust of which his wife was the beneficiary.<sup>132</sup> However, Mrs. Benson's promise to cede her claim to Mr. Benson's retirement account was not memorialized by a written agreement.<sup>133</sup> Justice Baxter writing for the Court dismissed Mr. Benson's argument that sections 721(b) and 852(a) were in conflict because Mr. Benson "[did] not seek to *undo* a transmutation that was so grossly one-sided and unfair as to be the product of undue influence under section 721(b). . . . He instead invoke[d] these principles to *establish* a transmutation that fail[ed] to comply with the terms of section 852(a). . . ."<sup>134</sup> Was the difference between *Benson* and *Starr* merely that the latter promise in *Benson* related to transmutation of a different asset, rather than a second transmutation of the same asset, as was promised in *Starr*? Justice Moreno's concurrence in *Benson* illuminates the subtle difference between the two cases:

As the majority correctly points out, husband has settled his claim with respect to the conveyance of the house he contends was quid pro quo for the alleged oral promise to transmute his retirement accounts from community property to separate property. Therefore, he cannot validly claim before this court that he was unlawfully or inequitably disadvantaged by that conveyance. His is the narrower argument that his part performance of an agreement with his wife is an adequate substitute for the express declaration of transmutation required by section 852, subdivision (a), which the majority properly rejects. We therefore have no occasion to decide what statutory or equitable remedy would be available to make whole a spouse who has been disadvantaged by an illusory oral promise to transmute property, or what sanction may be

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129. *Starr v. Starr*, 189 Cal. App. 4th 277, 287 (2010). Mrs. Starr's attorney phrased the argument in terms of constructive fraud, but this argument was disapproved by the court in *In re Marriage of Feakins*, No. A132338, 2013 WL 222444 \*3-4 (Cal. Ct. App. Jan. 22, 2013).

130. *In re Marriage of Benson*, 36 Cal. 4th 1096, 1109 (2005).

131. *Id.* at 1101-02. The case became one of dueling witnesses, where Mr. Benson gave one version of the story and Mrs. Benson gave another. *Id.*

132. *Id.*

133. *Id.* at 1102.

134. *Id.* at 1112.

employed against a spouse who has used section 852, subdivision (a) as a means of breaching his or her fiduciary duty and gaining unjust enrichment.<sup>135</sup>

Effectively, the settlement that Mr. Benson reached with the trust, of which Mrs. Benson was beneficiary, was fatal to Mr. Benson's part performance argument in the dissolution action. Yet the Family Code explicitly and strongly encourages early settlements by basing "award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement. . . ."<sup>136</sup> The fine distinctions between cases, coupled with the pressure to settle early and the threat of having to pay a partner's attorney's fees and costs, combine to create the danger that adversely affected partners like Mr. Benson may be penalized for asserting a valid claim. This danger may be heightened by Justice Baxter's strong reading of legislative intent in section 852(a), that the Court sees "no evidence the Legislature intended to incorporate traditional exceptions to the statute of frauds [such as partial performance, admission, or promissory estoppel] into section 852."<sup>137</sup>

iii. Witness Credibility Determinations by the Court Make Dissolution Proceedings a Popularity Contest

In some cases, because trial court judges are forced to make credibility determinations about witnesses, dissolution proceedings turn into popularity contests. A recent case from Alameda County demonstrates how the court can be swayed by a sympathetic witness and how quickly that sympathy can be lost. In *In re Marriage of Kahn*, the trial was divided into three stages, with the first phase to decide characterization of marital assets after two separate transmutations in 2003 and 2005, while the second phase would examine whether Mrs. Kahn unduly influenced Mr. Kahn in the transmutations, and the third phase would determine spousal support.<sup>138</sup> The first two phases of the trial went well for Mrs. Kahn, who proved to be a very sympathetic witness.<sup>139</sup> Mr. Kahn did not fare well at all, as the trial court found his testimony completely lacking in credibility, especially given that other witnesses, including Mr. Kahn's former attorney, provided testimony that directly contradicted what Mr. Kahn said.<sup>140</sup> Particularly, the trial court found it unlikely that undue influence played any part in the 2003 and 2005 transmutations, stating that Mr. Kahn "was 'indeed a master

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135. *In re Marriage of Benson*, 36 Cal. 4th at 1112–13.

136. CAL. FAM. CODE § 271(a) (West, Westlaw through 2012 Sess.).

137. *In re Marriage of Benson*, 36 Cal. 4th at 1109.

138. *In re Marriage of Kahn*, No. A128001, 2012 WL 1079579 at \*1-2 (Cal. Ct. App. Apr. 2, 2012).

139. *Id.* at \*2–3.

140. *Id.* at \*2.

of control,' and that '[g]iven his intelligence, sophistication and experience, it is inconceivable that he would sign the . . . agreement without knowing exactly what it said.'"<sup>141</sup> However, during the support phase of the trial, Mrs. Kahn testified that she had thrown out some tapes belonging to her husband when he moved out of their marital home.<sup>142</sup> Upon hearing this testimony, the trial court reversed its determination that Mrs. Kahn had rebutted the presumption of undue influence with regard to the 2005 transmutation, instead characterizing the properties as Mr. Kahn's separate property.<sup>143</sup> The Appellate Court quoted the trial court judge in its decision, stating that the court was disappointed to find both Mr. and Mrs. Kahn not to be credible witnesses.<sup>144</sup> With her admission of one ill-advised action,<sup>145</sup> Mrs. Kahn, who quit her job as a social worker in 1963 to look after the couple's children and manage Mr. Kahn's separate property (the same property covered by the 2003 and 2005 transmutation agreements),<sup>146</sup> lost all credibility and thereby lost her community property right to the two properties at issue.<sup>147</sup>

While credibility determinations in other cases have not been as dramatic as in *Kahn*, the trial court's credibility determination frequently plays a deciding role in its decision about whether the presumption of undue influence applies and whether it has been rebutted by the advantaged partner. In another recent case, *In re Marriage of Santana*, Mrs. Santana signed a quitclaim deed to her husband so that they could obtain a better interest rate on their loan to purchase their family home.<sup>148</sup> Mr. Santana paid for the mortgage and improvements with community property.<sup>149</sup> Unbeknownst to Mrs. Santana, Mr. Santana sold the home to his brother for \$170,000 in 2005, although Mr. and Mrs. Santana continued to live there.<sup>150</sup> In 2006, Mr. and Mrs. Santana separated, and Mr. Santana's brother began eviction proceedings against Mrs. Santana.<sup>151</sup> Mr. Santana's brother subsequently sold the home in 2007 for \$274,500.<sup>152</sup> Mrs. Santana argued on appeal that the evidence showed that:

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141. *In re Marriage of Kahn*, No. A128001, 2012 WL 1079579 at \*3.

142. *Id.* at \*4. This destruction of evidence was particularly important because Mr. Kahn was blind so he relied on the tapes to document conversations with his attorney. *Id.* at \*1, \*2.

143. *Id.* at \*5.

144. *Id.* at \*17–18.

145. Mrs. Kahn's impulse to throw out Mr. Kahn's things is exceedingly common, if Google.com is any indication, as there are approximately 149,000 results when searching "throwing away ex's stuff." GOOGLE, <https://www.google.com> (last visited Oct. 28, 2013).

146. *In re Marriage of Kahn*, No. A128001, 2012 WL 1079579 at \*3.

147. *Id.* at \*5, \*10, \*12.

148. *In re Marriage of Santana*, No. E050070, 2011 WL 3566974 at \*1 (Cal. Ct. App. Aug. 15, 2011).

149. *Id.* at \*1, \*3.

150. *Id.* at \*1.

151. *Id.* at \*2.

152. *Id.*

[Mrs. Santana] did not understand the legal effect of the deed she signed because, in addition to her own testimony to that effect, [Mr. Santana] admitted that she lacked competence in financial matters and lacked experience in real estate, and that she probably did not understand the effect of the deed. Indeed, [Mr. Santana] testified during his deposition that he believed the house belonged to them jointly because they were married. He testified that he took title in his name alone because of the Hispanic tradition that the man is in charge.<sup>153</sup>

She also criticized the trial court's reliance on Mr. Santana's testimony that Mrs. Santana "had said on a number of times that the house was [Mr. Santana's] and that she did not want anything to do with it,"<sup>154</sup> as well as its reliance on irrelevant evidence. In fact, the appellate court concluded that the trial court relied on incorrect reasoning that "reflects considerable hostility toward [Mrs. Santana] because of her supposed failure to contribute 'her' money to the mortgage payments while allowing [Mr. Santana] to use 'his' money for that purpose,"<sup>155</sup> when in fact the money that Mr. Santana used to pay the mortgage was his earnings,<sup>156</sup> and therefore community property.<sup>157</sup> Although the trial court relied on some incorrect reasoning, the appellate court found that substantial evidence supported the trial court's ruling because, ultimately, the trial court found Mr. Santana's testimony more credible than Mrs. Santana's.<sup>158</sup>

Many other appellate court cases explicitly refer to witness credibility as a factor in the decision-making process.<sup>159</sup> Once that determination has been made, the appellate courts cannot reweigh the evidence.<sup>160</sup> This situation creates a pressure to prepare very well for trial, and a likelihood that, where the partners have grossly unequal assets, the partner with greater financial assets will be able to spend more time with his or her lawyer preparing to testify. It also contravenes the statutory intent of

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153. *In re Marriage of Santana*, No. E050070, 2011 WL 3566974 at \*3 (Cal. Ct. App. Aug. 15, 2011).

154. *Id.* at \*3.

155. *Id.*

156. *Id.*

157. CAL. FAM. CODE § 760 (West, Westlaw through 2012 Sess.).

158. *In re Marriage of Santana*, No. E050070, 2011 WL 3566974 at \*4.

159. See *In re Marriage of Gitibin*, No. G025719, 2001 WL 1521936 at \*2 (Cal. Ct. App. Nov. 29, 2001); *In re Marriage of Friedman*, No. D038197, 2002 WL 260031 \*6 (Cal. Ct. App. Feb. 25, 2002); *In re Marriage of Tabibian*, No. H021361, 2002 WL 1004094 \*9 (Cal. Ct. App. May 16, 2002); *In re Soliman*, No. E030034, 2002 WL 31188703 at \*1, \*3, \*5, \*6 (Cal. Ct. App. Oct. 2, 2002); *In re Marriage of Pavin*, No. D041205, 2004 WL 170442 at \*1 (Cal. Ct. App. Jan. 29, 2004); *In re Marriage of Prokuski*, No. F047224, 2006 WL 1606981 at \*12, \*17, \*21 (Cal. Ct. App. June 13, 2006); *In re Marriage of Hancock*, No. G037502, 2007 WL 1508717 at \*4 (Cal. Ct. App. May 24, 2007); *In re Marriage of Campbell*, No. F052730, 2008 WL 2569179 at \*7 (Cal. Ct. App. June 30, 2008).

160. *In re Marriage of Balcof*, 141 Cal. App. 4th 1509, 1531 (2006).

section 852(a) by increasing the likelihood of perjury, which was one of the Law Revision Commission's main reasons for recommending the passage of section 852(a).<sup>161</sup> Finally, it results in increased uncertainty about outcomes because of the number of human factors involved.

### III. RECOMMENDATIONS FOR THE FUTURE OF COMMUNITY PROPERTY IN CALIFORNIA

#### A. FOR THE LEGISLATURE

The Legislature's changing position on the statute of frauds for transmutations has led to increasing litigation and uncertainty for partners transmuting property. The purpose of section 852(a) has been gravely undermined by the application of section 721(b), to the disadvantage of partners who cannot afford to hire separate attorneys to represent each partner, pay to consult with family law specialists, or predict the possibility of dissolution when they make estate plans. As discussed in Section II, many California courts, with the notable exception of the *Burkle* court,<sup>162</sup> have liberally interpreted the language "any unfair advantage" in section 721(b) to apply to situations where a mere financial advantage to one party is sufficient to raise the presumption of undue influence, leading the court down a thorny path away from the language of the partners' written agreement. This language should be amended to more accurately reflect the Legislature's intent and to provide additional guidance for courts in interpreting this standard. Particularly, the Legislature should clarify whether courts can continue to assume that mere lack of consideration on the part of the advantaged partner is sufficient to raise the presumption of undue influence. Amending the "any unfair advantage" language in section 721(b) to refer only to transactions that disadvantage the community estate would bring the statute more in line with the goals and vision of the California community property system.

#### B. FOR THE COURTS

If the Legislature declines to act, California courts must clarify the standards for assessing what constitutes "any unfair advantage" sufficient to raise the presumption of undue influence, and what constitutes effective rebuttal evidence. Because this boundary is largely judicially drawn, California courts can and should overturn prior decisions that find that the presumption can be raised merely by showing a financial advantage to one party with no (or inadequate) consideration given. The process of characterizing property is already fact-intensive, so trial courts would be in an advantageous position to assess whether the partners obtained mutual

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161. RECOMMENDATION RELATING TO MARITAL PROPERTY PRESUMPTIONS, *supra* note 44, at 214.

162. *In re Marriage of Burkle*, 139 Cal. App. 4th 712, 732–33 (2006).

advantages and should take a more holistic approach to this process, following the example of the *Burkle* court.<sup>163</sup> Additionally, courts must clarify whether language included in the written agreement can constitute effective rebuttal evidence. That is, the California Supreme Court should explicitly overrule *In re Marriage of Lico*<sup>164</sup> if it disapproves of the ruling, and give guidance as to whether to follow *In re Marriage of Lund*<sup>165</sup> in all, or only in limited, circumstances.

Parties to a dissolution are typically at their emotional worst at the end of their relationship. Courts need to provide as little leeway as possible to allow former partners to perjure themselves or otherwise use the adversary nature of court proceedings to inflict harm on each other.

### C. FOR ATTORNEYS

If clients are contemplating transmutation, the attorney ought to encourage the clients to hire independent counsel to represent each partner, following the standard used when entering into premarital agreements.<sup>166</sup> Hiring independent counsel will help protect not only the clients, but also the attorney from the possibility of having to testify in a later divorce proceeding.<sup>167</sup>

Attorneys preparing estate plans who are not divorce or family lawyers may wish to consider hiring a divorce or family law specialist to counsel clients about the ramifications of any transmutation agreement included in the trust paperwork. Given the current unpredictability about whether the trial judge at dissolution will follow *Lund*<sup>168</sup> or, like the trial judge in *Lico*, allow an adversely affected partner to testify that he or she did not understand the effect of the transmutation agreement even though a statement above the signature block attests otherwise,<sup>169</sup> drafters of transmutation or community property agreements should add recitals at the beginning of the agreements, attesting that the transmutation “was freely and voluntarily made, and with a full knowledge of all the facts, and with a complete understanding of the effect of the transfer.”<sup>170</sup> If the attorney and clients all sign an attestation that the attorney has informed the clients of

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163. *Burkle*, 139 Cal. App. 4th at 732–33.

164. *In re Marriage of Lico*, No. A130765, 2012 WL 1560450 \*9 (Cal. Ct. App. May 4, 2012) (holding that inclusion of language indicating understanding of the signor in a clearly written Community Property Agreement did not rebut the presumption of undue influence where the signor testified at trial that he did not understand what he had signed).

165. 174 Cal. App. 4th 40, 56 (2009) (holding that signature block stating that signor read and understood the Transmutation Agreement rebutted the presumption of undue influence).

166. CAL. FAM. CODE § 1615(c)(1) (West, Westlaw through 2012 Sess.).

167. At the very least, if the clients refuse to hire independent counsel, the attorney should obtain their written consent to joint representation to avoid possible discipline for violating the Rules of Professional Conduct. CAL. RULES OF PROF'L CONDUCT R. 3-310(C)(1) (West, Westlaw through Jan. 1, 2013).

168. *In re Marriage of Lund*, 174 Cal. App. 4th at 56.

169. *In re Marriage of Lico*, No. A130765, 2012 WL 1560450 at \*9.

170. *In re Marriage of Haines*, 33 Cal. App. 4th 277, 296 (1995).

these legal consequences, the trier of fact likely would find the presumption of undue influence rebutted.

Attorneys should advise clients that courts have previously held that a transmutation, even if contemplated for the purpose of estate planning, results in an immediate change in characterization of the underlying property.<sup>171</sup> Clients cannot have their cake and eat it too.

Unfortunately, in these cases, more information appears to be better than less to help the court make the right decision about whether the presumption applies. This factor weighs against judicial economy, but if the asset in dispute is large enough and the transmutation makes a big impact on what a client is likely to receive, the attorney must prepare to spend a lot of time putting forth evidence on the matter. Some trial court judges are conscious of this issue, so they will make allowances where the asset is particularly important. But if the transmutation does not matter to the overall outcome for the client, the judge will be unimpressed by the client continuing to bicker over something that can be handled with an equalization payment or increased support.<sup>172</sup>

#### D. FOR SPOUSES OR REGISTERED DOMESTIC PARTNERS

If you are contemplating an estate plan, consult with a divorce or family law practitioner to learn about consequences should your relationship end in dissolution.

Insist that your attorney carefully explain all legal consequences of any transmutation agreement with you and your partner.

Consider hiring independent counsel<sup>173</sup> for each partner if you are contemplating a transmutation. Mutually decide whether you will use community funds or separate funds to pay the attorney's fees. Lack of independent counsel, by itself, will not be enough to find that your transmutation agreement is invalid, but the court is likely to consider it as one of the factors in determining whether your agreement was voluntary, as it does in the context of premarital agreements.<sup>174</sup>

If you or your partner has to quitclaim in connection with a loan, ask your lender, your attorney, and your accountant whether you can hold title jointly later. Discuss with your partner whether you will change title to the property into both your names after the deed of trust is recorded, and, if so, how soon thereafter.

Remember, because California courts divide assets equitably, proof of transmutations is important; but in some cases, particularly where spousal support can be marshaled to compensate for a disparity in assets,

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171. *In re Marriage of Holtemann*, 166 Cal. App. 4th 1166, 1172–73 (2008).

172. *See In re Marriage of Kahn*, No. A128001, 2012 WL 1079579 at \*15 (Cal. Ct. App. Apr. 2, 2012).

173. *See* CAL. FAM. CODE § 1615(c)(1) (West, Westlaw through 2012 Sess.).

174. *In re Marriage of Bonds*, 24 Cal. 4th 1, 18 (2000).

continuing to focus on specific property could make you less sympathetic in the eyes of the judge.



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