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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of ANDREW L. WONG
and NANCY H. WONG.

ANDREW L. WONG,

Respondent,

v.

NANCY H. WONG,

Appellant.

A130843 & A134041

(Alameda County
Super. Ct. No. HF09474846)

The issues on this appeal concern an insurance policy on the life of respondent, Andrew Wong, and the proceeds paid on that policy after he died during the course of the parties' divorce proceedings. Appellant, Nancy Wong, had been the named beneficiary during the parties' marriage and for some time after their separation, until respondent changed the beneficiary designation to the parties' children. Appellant contends the trial court erred in failing to determine that the life insurance policy was a community property asset to be divided between the parties, and abused its discretion in denying her request to be reinstated as a beneficiary of the policy. We affirm.

STATEMENT OF THE CASE AND FACTS

The parties married in August 1979 and separated in 2003. After separation, appellant lived at a residence the couple owned on Bellingham Drive in Castro Valley

and respondent lived in another house they owned on Timco Court in Castro Valley. Respondent was diagnosed with acute melanoma in 2003.

Respondent filed a petition for dissolution of marriage on September 18, 2009. According to the income and expense declaration he filed in January 2010, he was 59 years old and a certified public accountant, but had not worked for several years because of his illness and side effects of his treatment; he had recently been hospitalized for radical chemotherapy which, he stated, might not prolong his life beyond a prognosis of a few weeks. Appellant was 57 years old. The parties' children were young adults: both had graduated from college, one was working as a private school teacher and the other was a graduate student at Stanford.

In the mid-1990's, during the marriage, an insurance policy on respondent's life was purchased with appellant named as beneficiary. The annual premium was \$1,300. Respondent testified that the purpose of making appellant the beneficiary was to ensure the children, who were still in school, would be able to continue their education and "livelihood." He also acknowledged that a significant part of the reason for making appellant beneficiary "[c]ould possibly be" to provide for her financial security if respondent died.

In 2005 or 2006, the parties discussed divorce, sold their former residence (the Elbridge property) and reached an agreement dividing their assets. Respondent submitted to the court an unsigned document dated February 18, 2006, and entitled "Analysis of Asset Distribution," which lists a number of bank and IRA accounts, as well as a loan repayment, with the dollar amounts of each assigned to one or the other of the parties, a total of \$617,343 to appellant and \$517,821 to respondent. Respondent now asserts this document was prepared jointly by the parties; appellant states it was prepared by respondent alone. The parties agreed that the proceeds of the Elbridge property sale were divided \$500,000 to appellant and \$250,000 to respondent but disputed the reason for the uneven division: Respondent claimed he agreed to it based upon appellant's agreement

to confirm the Timco residence to him as his separate property¹ and to cooperate in resolving the dissolution quickly, while appellant claimed the unequal division was a “gesture of good faith” by respondent after he had been unfaithful and noted that he had never tried to undo it.²

On April 22, 2010, the court granted a judgment of dissolution as to status only and reserved jurisdiction over all other issues. The judgment of dissolution was filed on April 30, 2010.

¹ Respondent maintained that his parents purchased the Timco property in 1995, with the intention of giving it to respondent and his brother, but because his parents were then living in Hong Kong, the title was held in the parties’ names, with the agreement between them that they were holding equitable title as constructive trustees for respondent’s family. All the money for the house came from respondent’s parents, including a mortgage payoff of \$50,000 in 2002. For the down payment, \$10,000 from his parents’ account in Hong Kong (which appellant doubted was really his parents’ money and not the parties’) was deposited into the parties’ joint account, with no written documentation that it came from his parents or was given to him as an individual. Until 1997, appellant made mortgage payments from an account that had her name and perhaps respondent’s sister’s name on it; after 1997, respondent’s sister made the payments. Appellant had never lived in this house, respondent’s sister may have lived there for a time, his parents lived there for some time after they immigrated to the United States, and he had lived there since the parties’ separation. According to respondent, after 2006, appellant verbally agreed to sign a deed taking her name off the property once loans the parties had made to respondent’s relatives were repaid and she received her half. Respondent viewed these as gifts rather than loans, the parties never reached agreement on this point and the sums were not repaid.

Appellant, by contrast, testified that she always believed Timco was community property. Her name was always on the title, she did not know that respondent had gone to a title company to try to get a deed for her to sign for Timco, and no such deed was ever presented to her. Asked if she had ever told respondent that she believed Timco was his separate property, appellant replied, “No . . . that never came up.”

² Appellant claimed that respondent voluntarily offered the disproportionate division of the Elbridge proceeds a couple of months after she discovered that he had been unfaithful and she thought it might have been due to his guilt feelings. Appellant testified that respondent was living with his mother at the Timco residence and “[h]e said he does not need much to live on and that that he wanted me to be well provided for after divorce and that we can still be friends, so he is offering me that two-third, one-third division with the \$750,000 out of the total proceeds of the sale of Elbridge.”

In her settlement conference statement, appellant stated that the parties had discussed a potential settlement “built around an agreement the parties reached several years ago dividing their debts and assets.” Appellant stated that the “status of this division and the details for the debts” would be explained to the court if the parties did not settle and “[s]pecifically, [appellant’s] proposal is that any financial assets in the name of either party be confirmed to them as their sole and separate property.” Appellant also proposed that she be awarded the Bellingham property as her separate property and respondent be awarded the Timco property.³ Under the heading “spousal support,” appellant stated, “[b]ased on the length of the marriage [appellant] is asking that spousal support be reserved. [Appellant] is requesting that she be designated as a beneficiary for a suitable amount on [respondent’s] existing life insurance in recognition of the length of the marriage and potential need for support in the future.”

Respondent, in his trial issue statement, stated that most of the parties’ liquid assets had been divided and he believed their existing retirement and savings accounts could be confirmed as separate property of each, except that appellant should pay him \$125,000 to equalize the division of proceeds from sale of the Elbridge property because she had repudiated the parties’ previous agreement by claiming the Timco residence as community property. Respondent claimed the Timco property had been purchased by his parents, with the parties holding equitable title as constructive trustees for his family. He also noted that there was a \$500,000 term life insurance policy on his life and that he had changed the beneficiary designation around the time the parties were dividing their assets. With respect to spousal support, respondent stated that he was gravely ill and had only limited income from investments, and that appellant had received over \$500,000 in cash in 2006, had a Hong Kong bank account of about \$200,000, was living in a

³ At trial, respondent’s attorney represented that the Timco property had been appraised at \$515,000 and the Bellingham property had been appraised at \$625,000. The parties agreed to obtain new appraisals of the two properties which would be used as the basis for deciding the amount of an equalizing payment after the court determined whether the Timco residence was community or separate property.

residence worth at least \$600,000, free of mortgage, and had substantial retirement accounts. Respondent stated that in appellant's claim on the life insurance policy as security for spousal support, she was not seeking "to maintain an existing order," but instead "wants a windfall (similar to the lottery), since [respondent's] death is likely to occur in the near future."

At the hearing on April 30, appellant's attorney stated that appellant was not seeking current spousal support but asking that respondent be ordered to maintain his life insurance policy with appellant as the sole or significant beneficiary; that the Timco property was acquired during the marriage and therefore presumptively community property; and that the 2006 division of assets was a final agreement that should not be reopened. Appellant was willing to take over the premium payments on the life insurance policy.

Respondent sought a determination that the Timco residence was always intended to be his separate residence and, if this was not so determined, wanted the prior division of proceeds from the Elbridge property to be revisited. By offer of proof and testimony, respondent told the court that at the time of separation, each of the parties had a \$500,000 life insurance policy in effect. He had maintained his and assumed appellant had maintained hers. Respondent changed the beneficiary of his policy to his two children in conjunction with the asset division in 2006. Respondent's attorney stated, "[a]nd apparently there is no argument that this is not a separate asset. I guess the argument is that [appellant] should be entitled to some portion of . . . that policy."

Respondent testified that he did not foresee being able to earn money that would be available to pay spousal support in his lifetime. He was living off his savings and income from investments and had about \$250,000 in savings and investments.⁴ Appellant testified that she had about \$25,000 in one bank account and about \$1,700 in another, a life insurance policy worth about \$50,000, and three IRA annuities totaling less

⁴ In his income and expense declaration filed on January 13, 2010, respondent stated that he had monthly investment income of \$500 and monthly expenses of \$2,340.

than \$200,000. She had not yet received distributions from the annuities because she was not yet 59 and a half years old. The court concluded that the parties would each end up with about \$800,000 in real estate and cash, noting that they each had about the same amount of cash and each would have a home worth about a half million dollars.

Referring to Family Code section 4360,⁵ which authorizes a court determining the needs of a supported spouse to “include an amount sufficient to . . . maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support,” the court focused on the phrase “on the life of the spouse required to make the payment of support” and said, “[a]nd I don’t have a spouse required to make support payments.” Respondent’s attorney agreed, stating that there was no request for ongoing support and appellant wanted “to hit the lottery.” Appellant’s attorney argued that because this was a long term marriage and respondent’s terminal illness would prevent appellant from coming to him for financial relief if she needed it in the future, appellant was simply asking to restore to her the beneficiary status that would provide for her future financial security.

After a brief recess for the court to do its own research, the court declined appellant’s request. The court explained: “I’ve read over everything that I have on that

⁵ Family Code section 4360, subdivision (a), provides: "(a) For the purpose of Section 4320 [circumstances to be considered in ordering spousal support], where it is just and reasonable in view of the circumstances of the parties, the court, in determining the needs of a supported spouse, may include an amount sufficient to purchase an annuity for the supported spouse or to maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support, or may require the spouse required to make the payment of support to establish a trust to provide for the support of the supported spouse, so that the supported spouse will not be left without means of support in the event that the spousal support is terminated by the death of the party required to make the payment of support.

“(b) Except as otherwise agreed to by the parties in writing, an order made under this section may be modified or terminated at the discretion of the court at any time before the death of the party required to make the payment of support.”

issue. And I think there are some cases where there's not—there can certainly be some cases where support is not being paid, where ordering the insurance policy would be appropriate. [¶] On these facts, where the parents are going to end up having an equal amount of property and including a home and cash and where neither party is going to be paying support at any time in the future, there is not a right or wrong answer. I don't think there is a problem with the request. And I did struggle with that decision.”

The court additionally concluded that respondent had failed to prove the Timco property was not 100 percent community property. It took the matter under submission without yet deciding on the question of an equalization payment for the Elbridge proceeds.

The trial court filed a tentative decision on July 28, 2010. After reciting that the marriage was long-term, the parties had largely divided their assets, and each was living in a home that the court determined to be community property, the court awarded each party the real property currently in his or her possession, his or her retirement or pension benefits, and each party any personal property or other assets in his or her “possession of name”; denied respondent's request for an equalizing payment from appellant to redistribute proceeds from the Elbridge sale, stating that it “decline[d] to disturb the prior division of assets undertaken by the parties”; reserved spousal support as to each party; denied appellant's request to be named a beneficiary on respondent's life insurance policy; and ordered each party to pay his or her own attorney fees and costs.

On August 11, appellant submitted objections to the trial court's denial of her request to be reinstated as beneficiary on respondent's life insurance policy, arguing that the life insurance policy was a community asset to which she was entitled a community share and that reinstating her as beneficiary was “reasonable and just” because of her eligibility for spousal support under Family Code section 4320, with the insurance proceeds an asset from which such support could be drawn. Hearing on the objections was set for January 12, 2011.

Respondent died on August 31, 2010. Thereafter, appellant sought to join her children as parties to the case on the basis that they had been named beneficiaries to respondent's life insurance policy and had received funds under the policy. This motion for joinder was subsequently granted after a hearing on January 12, 2011, and we have taken judicial notice of the order to this effect, which was filed on February 7, 2011.

On November 4, 2010, the court filed an order after hearing stating that after the April 30, 2010 hearing the court declined appellant's request to be designated beneficiary on respondent's life insurance policy; ruled the real property was entirely community property; and took the issue of division of the Elbridge proceeds under submission.

On November 19, 2010, appellant filed a motion for a new trial (on grounds of irregularity in the proceeding, newly discovered evidence, insufficiency of the evidence, and error in law (Code Civ. Proc., § 657, subds. (1), (4), (6), (7)) or to vacate the judgment (Code Civ. Proc., § 663). In essence, appellant urged that the court erred in failing to view the life insurance policy as a community property asset and should have granted her request for beneficiary status because she was entitled to spousal support.⁶ She sought a new trial "to present additional evidence and examine and re-examine factual and legal issues in this case related to the insurance proceeds, their use to satisfy [respondent's] spousal support obligation and their treatment as divisible community

⁶ Appellant described the grounds for a new trial as irregularity in the proceedings (Code Civ. Proc., § 657, subd. 1), in that the court had not addressed the spousal support issues, which were "linked" to the issue of the insurance policy, and it was "not clear" whether the court had considered "the property implications of the policy and its characterization as community property"; newly discovered evidence (Code Civ. Proc., § 657, subd. 4), regarding "the payment history on the insurance policy from community sources and its community property character and all the data related to the spousal support issue, which was not addressed"; insufficiency of the evidence (Code Civ. Proc., § 657, subd. 6), in that it was not clear when the beneficiaries were charged, "raising possible violation of standard family law restraining orders or breach of fiduciary duties, and there was insufficient evidence to support the implicit treatment of the insurance policy as respondent's separate property"; and error in law (Code Civ. Proc., § 657, subd. 7), as demonstrated in the cases cited in support of appellant's objections to the tentative decision.

property given [appellant's] uninsurable status and the use of community funds to pay for this policy during its 20-year term. [Appellant] should not be deprived of an opportunity to present and develop new and/or additional evidence on this issue.” Alternatively, appellant sought to have the judgment vacated under Code of Civil Procedure section 663 on the ground of “ ‘incorrect or erroneous legal basis of the decision not consistent with or supported by the facts.’ ”

Appellant submitted a lengthy statement of facts in support of her motion. She stated that the primary source of the family's income was a leather goods importing business she and respondent established in 1989. During the marriage, the parties lived an upper middle class lifestyle: They helped many of respondent's relatives; provided private college education for their daughter and graduate education for their son; purchased and paid off the mortgages for three pieces of real property in the Bay Area; and set aside considerable sums for retirement and investment. Appellant stopped working in the family business in 1995 in order to devote herself to domestic responsibilities, and respondent became unable to work after he was diagnosed with malignant melanoma in 2003. After separation, appellant and respondent each lived off accumulated community property savings and investments.

Appellant stated that her earning capacity was impaired by her departure from the workforce in 1995, which left her “significantly unmarketable,” especially considering the current labor market; that she did not have skills that would readily lead to employment; and that she suffered from and was under treatment for health related problems (fibromyalgia, chronic fatigue syndrome, anxiety and severe depression) that impeded her ability to work full time. She had tried to set up various home-based business ventures but none had been profitable and the business she claimed on her income tax returns showed an operating loss of \$10,000. She had not been able to achieve anything close to the marital standard of living since separation, her funds were rapidly depleting, she could not meet her current and future needs, and she expected her cash reserves to be exhausted within two to three years, before she was eligible for Social

Security and Medicare benefits. Appellant noted that she had paid \$25,000 for the parties' daughter's wedding and \$80,000 for the down payment on a house the daughter purchased. She believed that respondent had more than her in savings and investments, that due to his economics expertise his investments had been more lucrative, that he had received at least \$37,500 from his sister to repay a community loan, and that he had assumed sole control over family cemetery plots that had been purchased with community funds.

Appellant stated that she and respondent purchased the life insurance policy, with a face value of \$500,000, in 1996, that she was named as sole and primary beneficiary, and that she paid the annual premiums from community property sources both during the marriage and after separation, from 2003 to 2007. After separation, she paid the premiums from accumulated community property savings and investments, as did respondent when he began making the payments after November 2007. Respondent became uninsurable for future life insurance after his diagnosis, and since his death the insurance policy had become "a valuable community asset." According to appellant, respondent agreed the insurance policy was a community asset, as evidenced by his listing the policy as a community asset on the schedule of assets and debts he filed in January 2010.⁷ She remained the beneficiary of the policy until at least November 2007. At some unknown later point, respondent changed the beneficiary to the parties' children. Appellant suggested that respondent might have violated the standard family law restraining orders if he made this change after filing the petition for dissolution.

⁷ The schedule of assets and debts lists real estate, household items, vehicles, financial accounts, the TransAmerica insurance policy, the debt owed by respondent's sister, and two cemetery plots. The form provides a column in which to indicate if any of the items listed are separate property. Respondent placed a "P" in the separate property column next to some of the items listed—the Timco house, certain of the accounts and a sum of cash—and placed an "R" in the separate property column next to a car and certain other accounts, thus indicating that the remaining items were community property. These remaining items included the insurance policy, as well as the Bellingham property, household items, two cars, other accounts and the owed debt.

Appellant argued that giving her beneficiary status on the life insurance policy to provide her with a source of income would be fair and equitable either as a substitute for spousal support or as a form of community property to which she was entitled. She also noted as a factor favoring use of the insurance proceeds to provide her support that after the parties separation, she maintained respondent on a group health insurance policy through a home-based business she established, which had no “real earnings,” in order to guarantee he would have medical insurance when he had extraordinary medical costs for his cancer treatment and otherwise would have been uninsurable.

In response to the motion for new trial or to vacate judgment, respondent urged that the insurance policy was part of the parties’ 2006 division of property agreement, that the history of payments made on the insurance policy was always within appellant’s personal knowledge and could not be considered “newly discovered” evidence as appellant claimed, and that appellant was trying to repudiate the position she took at trial—that there was no community property interest in the insurance proceeds—by arguing evidence that was not presented at trial. Respondent asserted that the trial court addressed the issue of spousal support when it found it “did not have a spouse required to make support payments,” that the support issue was closed because a spousal support order terminates with the obligor’s death and there was no spousal support order in effect when respondent died, and that respondent never would have become able to pay support during his lifetime and an order reserving support would have terminated upon his death.

Respondent’s attorney filed a declaration stating that when he filed the petition for dissolution of marriage, it was understood between himself and appellant’s attorney that respondent was terminally ill and might not survive until the completion of the case. Counsel asserted, and appellant’s attorney later stipulated, that in discussions of the issues to be tried, appellant’s attorney told respondent’s that appellant “ ‘was not asserting a community interest in the Transamerica Term Life Insurance Policy” and was only requesting that she be named a beneficiary to the policy. These assurances were significant to respondent’s attorney because he was prepared to present evidence that all

rights to the insurance policy were transferred to respondent as part of the parties' 2006 agreement. Respondent's counsel urged that after making a tactical decision not to assert a community interest in the insurance policy or to seek a spousal support order, appellant should not be permitted to assert these interests after respondent's death.

At a hearing on January 3, 2011, the trial court denied appellant's objections to the ruling on the insurance policy on the ground that it was improper to raise new facts or authority at this stage unless it did not exist at the time of trial or was "somehow overlooked." The court declined to view the history of payment for the insurance policy as newly discovered evidence because it was in appellant's control, and stated that the issue of changing the beneficiary had already been presented to the court. Distinguishing the cases appellant relied upon, the court stated, "Just because in some cases term life-insurance policies have been awarded doesn't mean that in this case that would have been appropriate or required under the law." The court denied appellant's objections and motions for a new trial or to vacate the judgment. Its final decision denying objections, filed on January 3, 2011, denied appellant's objections and confirmed the July 28, 2010 tentative decision. The court stated that appellant produced no new facts or authority not in existence at the time of trial and, to the extent she sought to introduce new arguments or positions, they were denied as untimely. In particular, the court noted that appellant's objections requested spousal support where at trial she requested only a reservation of support. It concluded, "Where no support has been ordered in a case, each party has substantial cash and real property assets, only one life insurance policy exists on Husband's life, and the Court has previously upheld the party's pre-trial division of assets and debts, the Court will not order Husband to name Wife as a beneficiary of the only policy on his life."

On January 3, 2011, appellant filed a notice of appeal from the order after hearing entered on November 4, 2010, insofar as the court denied her request to be reinstated as

beneficiary of the life insurance policy. She filed an amended notice of appeal on January 13, adding that she was also appealing from the order of January 3, 2011.⁸

After a hearing on January 12, 2011, the court granted appellant's motion to join her children as parties to the action.

On October 19, 2011, after both appellant's opening brief and respondent's brief on appeal had been filed, the trial court filed its final order and judgment re: property issues, support and related matters. Appellant moved to augment the record to include this document, which motion we now grant.

In its final order and judgment, the trial court denied appellant's objections to the tentative decision and adopted the July 27, 2010 tentative decision as its final order with specified modifications. Respondent was awarded the community real property on Timco Court; appellant was awarded the real property on Bellingham Drive; the parties' prior division of assets, including the Elbridge sale proceeds, was not disturbed and no equalizing payment was ordered; each party was awarded his or her own retirement or pension benefits; appellant's request to be named beneficiary on the life insurance policy was denied, as were her objections to the tentative decision and motion for new trial or to vacate judgment in regard to the insurance policy; each party was awarded all personal property and assets in his or her possession or name; spousal support was reserved as to each party; and each party was ordered to pay his or her own attorney fees and costs.⁹

⁸ The amended notice of appeal states it is from the "Order of January 3, 2011, in which the Court herein denied [appellant's] motion for new trial and/or to vacate the judgment of November 4, 2010." The order filed on January 3, 2011, as indicated above, is entitled "Final Decision Denying Objections." It denied appellant's objections, confirmed the tentative decision and does not mention the motions for new trial or to vacate the judgment.

⁹ Appellant's appeal from the October 9, 2011 order (case No. A134041) was consolidated with the present appeal.

DISCUSSION

On appeal, appellant offers several grounds for finding her entitled to a portion of the proceeds from the insurance on respondent's life, the main ones being that the policy was a community asset that the court should have divided between the parties and that appellant was entitled to be reinstated as beneficiary under Family Code section 4360 because she was eligible for spousal support.

I.

As appellant recognizes, she did not assert a community property interest in the insurance policy until after the trial court announced its tentative decision; prior to the filing of her objections to the tentative decision, appellant's position was that she should be designated as a beneficiary under the policy in connection with the reservation of spousal support she requested, "in recognition of the length of the marriage and potential need for support in the future." She now argues that she properly placed her community property claims before the trial court by raising them in her objections to the tentative decision and in her motions for a new trial or to vacate the judgment. Alternatively, she urges that the characterization and division of community property is a question of law that can be raised for the first time on appeal.

Appellant relies upon the proposition that "legal challenges which may be brought by way of [Code of Civil Procedure] section 657, subdivision 6, and section 663, subdivision 1, are not limited to those raised before verdict or judgment." (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15 (*Hoffman-Haag*)). In *Hoffman-Haag*, a motion for new trial or to vacate the judgment was based on a legal ground not previously raised at trial; the court rejected the argument that a party's mistake of law cannot be the basis for granting such motions. (*Id.* at pp. 14-16.) Unlike the ground of newly discovered evidence, which is expressly limited by statute to cases in which "the evidence could not 'with reasonable diligence, have [been] discovered and produced at trial,' " a challenge based on grounds that the judgment or verdict is legally erroneous is not so limited. (*Id.* at pp. 14-15.) *Hoffman-Haag* explained that where the

original judgment is challenged as “against the law,” the decision being reviewed is not a matter of discretion but “either right or wrong”; “ ‘a decision is “against the law” where the evidence is insufficient in law and without conflict on any material point.’ (*In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728; see also *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.)” (*Hoffman-Haag*, at p. 15.) The court noted that on appeal a party may rely upon a theory not presented at trial “so long as the new theory presents a question of law to be applied to undisputed facts in the record,” and concluded the trial court should have no less power to consider new legal theories on motions for new trial. (*Id.* at pp. 15-16.)

Key to the decision in *Hoffman-Haag* was that the newly asserted theory was being applied to stipulated, not disputed, facts. (*Hoffman-Haag, supra*, 1 Cal.App.4th at p. 16.)¹⁰ As the above quotation from *Hoffman-Haag* reflects, the same is true of cases holding that an appellant may raise new legal issues on appeal: This exception to the general rule applies when the facts are undisputed. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) “The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that ‘contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at

¹⁰ The other cases appellant cites for the proposition that legal challenges raised on a motion for new trial or to vacate judgment are not limited to those raised before judgment do not in fact address it. *Conservatorship of Kayle* (2005) 134 Cal.App.4th 1, 8, found error where the trial court failed to consider a motion to vacate on the merits; the issue was not introduction of a new legal theory but failure to consider *any* theory after dismissing a complaint without notice or hearing. The discussion that appellant cites in *In re Marriage of Beilock, supra*, 81 Cal.App.3d 713, 719-721, concerned whether the trial court had jurisdiction to entertain a motion for a new trial following the granting of a motion to vacate an order quashing a writ of execution: The court rejected the argument that a new trial cannot be granted after the granting of any motion, concluding that the proceedings on the motion to quash came within a broad definition of the term “trial.” The issues raised by the new trial motion were purely legal ones, with no indication there was any dispute about the underlying facts.

the trial.’ ” (*Ibid.*, quoting *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) “ ‘ “But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.” [Citations.]’ (*Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225.)” (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920.)

Despite appellant’s assertion that it is a question of law, characterization of the insurance policy as a community or separate property asset depended on disputed facts. Appellant sought to prove it was a community asset by evidence that the premiums were paid both during the marriage and after separation from community assets, while respondent claimed it as his separate property on the basis of the parties’ 2006 agreement. The evidence appellant relied upon for her community property claim was first presented to the trial court in connection with her new trial motion. At trial, no effort was made to describe the source of payment for the insurance premiums and appellant did not characterize the policy as a community asset. Appellant made no objection when respondent’s attorney stated, “[a]nd apparently there is no argument that this is not a separate asset.” Appellant’s attorney later acknowledged that he had told respondent’s attorney before trial that appellant was not asserting a community interest in the policy. In her objections to the tentative decision, appellant stated for the first time that the insurance premiums were paid from community funds during the marriage and after separation. She elaborated the facts underlying this assertion in the facts in support of her new trial motion, which was filed after respondent’s death. Respondent’s attorney stated that he relied upon appellant’s attorney’s pretrial representations that appellant was not asserting a community interest in the policy by not presenting evidence he otherwise

could have presented that all rights to the insurance policy were transferred to respondent as part of the 2006 agreement.¹¹

Appellant asserts that the insurance policy was not part of the 2006 property division agreement, which she contends included only cash accounts, retirement accounts and “other investments that the parties had purchased after the sale of the Elbridge house

¹¹ Appellant offers *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, as support for the propriety of offering facts to the trial court in her posttrial declaration. In that case, where appeal had been taken from a judgment and from the subsequent order denying a motion to vacate the judgment, the court commented that by entertaining the appeal as taken from the latter order, it could “properly consider as part of the appellate record the declarations and memoranda filed in support of and opposition to the motion.” (*Id.* at p. 359.) The plaintiffs in *Rooney*, without notice or hearing, obtained a judgment from a court commissioner on the basis of a stipulation that permitted the plaintiffs to obtain judgment for the unpaid balance on a note if the defendants defaulted on an installment payment. (*Id.* at pp. 356-357.) The reviewing court concluded that the commissioner lacked authority to enter the judgment and, in any case, erred in deciding the matter without a hearing to consider the defendant’s arguments and evidence that they were not in default and procedures required by the stipulation had not been complied with. (*Id.* at pp. 356, 368-370, 372.) The documents the court considered in reaching its decision “illuminate[d] such matters as the manner in which the judgment was applied for and was entered and the conflicting contentions of the parties concerning the meaning of the stipulation for settlement.” (*Id.* at p. 359.) The situation in *Rooney* bears no resemblance to that in the present case. There, the judgment was obtained ex parte, the defendant having no opportunity to contest the plaintiff’s request. The new information presented on the motion to vacate was necessary to demonstrate why the procedures followed were erroneous. Here, after a full trial, appellant attempted to use the vehicle of a motion to vacate as a means to present an entirely new theory dependent upon proof of facts that respondent could no longer counter.

Similarly, the posttrial declarations considered in connection with a motion to vacate in *In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, addressed the need for a continuance of trial due to the wife’s medical condition after her request for a continuance as an accommodation under the Americans with Disabilities Act was denied. The declarations presented evidence bearing on a procedural decision that resulted in the wife not being afforded her day in court, not evidence bearing on the substantive issues to be determined by the court. (*Id.* at pp. 1270-1271.)

In re Marriage of Beilock, supra, 81 Cal.App.3d at pages 729-733, does not discuss the content of declarations submitted with the motion for new trial or whether they presented facts different from those previously before the court.

in 2005.” Her supporting citation to the record is to her testimony about her cash and investments at the time of trial, and the court’s observation that the parties were each ending up with about \$800,000 in real estate and cash; there is no reference to the 2006 agreement. Asserting that respondent did not include the insurance policy in his testimony about the 2006 asset division, she cites testimony that addresses not the asset division as a whole but whether the unequal division of proceeds from the sale of the Elbridge house was part of that division or rather was tied to the community or separate property characterization of the Timco house. Appellant correctly notes that the listing of assets offered to the court as reflecting the parties 2006 agreement does not mention either of the parties’ insurance policies, and that in his trial issue statement respondent stated that “[m]ost of the parties’ ‘liquid assets’ have been divided, and it is believed that the parties’ existing retirement and savings accounts can be confirmed as the separate property of each” without referring to the insurance policies. But her conclusion that this demonstrates the parties’ property division agreement did not include the insurance policy ignores respondent’s express offer of proof at trial that the insurance policies were part of the agreement.¹²

Nor does the record support appellant’s assertion that the court did not view the insurance policy as part of the parties’ property division agreement. Appellant first refers to the court characterizing the parties’ positions as asking it to affirm “this house sale and

¹² As indicated above, respondent’s attorney stated that “it would be [respondent’s] testimony that at the time of their separation, each party had a \$500,000 term life insurance policy, that [respondent] has kept his policy in effect, and he doesn’t know but assumes that [appellant] has done likewise. [¶] [Respondent] changed the beneficiary designation, I guess, a few years ago, naming his two children as the beneficiaries of that policy [¶] And that was done, as [respondent] would testify, in conjunction with the other assets that were divided and allocated at the time, on or about, I guess, the 2006 time frame when the parties were seriously discussing the issue of divorcing at the time, even though they had been apart for a period of time prior to that. [¶] . . . [¶] . . . [I]t was at that time that pretty much, philosophically, the parties made decisions about how they would divide the assets and what would be with each of the parties. And apparently there is no argument that this is not a separate asset.”

division of money.” Appellant quotes part of the court’s comment that with respect to the unequal division of proceeds from the Elbridge sale, appellant was claiming “that as between the parties there were financial transactions that occurred that should stay outside the equal division, and that’s *this house sale and division of money*.” This comment addresses only respondent’s claim for an equalizing payment and sheds no light on the court’s view of the insurance policy. Appellant next refers to the court characterizing respondent as asking for an equalization payment because of the “unequal division of that money.” In fact, the quote is from the court asking whether respondent’s attorney had “anything else on this question about the unequal division of that money” in reference to respondent’s argument that the Elbridge proceeds were divided unequally on the basis of appellant’s agreement to accept that Timco was respondent’s separate property. Again, the comment sheds no light on the court’s view of the insurance policy. Appellant suggests that the court made clear it did not consider the insurance policy part of the 2006 property division when it stated that the parties each had approximately \$800,000 in real property and cash: Since the evidence showed each party owning real property worth \$500,000 to \$600,000 and having \$200,000 to \$250,000 in investments, appellant urges the \$800,000 figure could not have included the life insurance policy. But any consideration of the policy as part of the court’s calculation would not have been based on the \$500,000 proceeds it would pay, as respondent was still alive. The court was simply calculating the assets presently available to each of the parties.

Appellant also urges the court’s comments at the posttrial hearing indicate it did not believe it had assigned each party his or her own insurance policy when making its orders, but rather indicate the court was not aware there was a policy on appellant’s life. The discussion appellant cites concerned a case appellant had offered, *In re Marriage of Gonzalez* (1985) 168 Cal.App.3d 319, in which there were two term policies on the husband’s life and the court awarded one to each spouse. The court in the present case commented that *Gonzalez* involved two policies and did not direct that a single policy had to be divided or the wife made a beneficiary. When appellant’s attorney responded

that there were two policies in the present case as well, the court asked, “[t]here were two on husband’s life?” Counsel clarified that there was one policy on each party and the court confirmed, “[a]nd they each took their own.” We see nothing in this exchange to suggest the trial court was unaware that each of the parties in the present case had a life insurance policy.

In our view, the court’s comments at the posttrial hearing demonstrate that the court *did* view the insurance policy as part of the property division the parties had agreed to in 2006. In response to appellant’s attorney’s reference to evidence that respondent changed the beneficiary on his life insurance policy without notice to or consent from appellant, the court stated: “That was argued previously, regarding . . . his changing of the beneficiary. This is an unusual case because the parties were separated for so long and had agreements on a number of issues, and that agreement was litigated first. So I think that her argument regarding—one of the reasons she lost about that beneficiary designation was that it was so long after separation and after the parties—husband argued that he felt everything had been resolved between them, and that was not an unreasonable argument. But it’s already—she already raised that argument. It’s not new.” At the outset of the trial, appellant asked the court to award each of the parties “any financial assets in the name of either party” as their sole and separate property; in its tentative decision, the court awarded each any personal property or other assets in his or her possession or name. Taken as a whole, the record indicates that the trial court viewed respondent’s life insurance policy as separate property on the basis of the parties’ prior agreement.

Appellant’s position at trial was straightforward: She wanted the parties’ 2006 agreement to define their respective interests in the assets accumulated during the marriage, she wanted spousal support reserved, and she wanted to be reinstated as beneficiary of respondent’s life insurance policy. It was only after the trial court’s tentative decision denied her request regarding the insurance policy that she began to characterize the policy as a community asset. Appellant claims that by raising the

community property issue in her objections and new trial motion she gave the court and respondent the opportunity to address it. This claim, however, ignores the reality that by the time appellant offered evidence to support her claim—which the trial court found was always within her personal knowledge—respondent had already died.¹³ At this point, it was too late for respondent to provide his testimony or other evidence he might have had to support his opposing claim that the insurance policy was part of the parties' agreed upon property division. Because the issue appellant sought to raise after trial, and seeks to raise on appeal, depends on disputed facts, the cases upon which she relies do not support her position.¹⁴ The trial court did not err in denying the motion for new trial or to vacate the judgment on this basis.¹⁵

¹³ Appellant raised her community property claim in her objections to the tentative decision, filed just less than three weeks before appellant's death, but the declaration that set forth the facts underlying this claim was not filed until she filed her motion for new trial more than two and a half months after his death.

Contesting respondent's characterization of her as taking tactical advantage of respondent's death by waiting to raise her community property claim until he could not respond, appellant urges that she raised this claim in her objections while respondent was still alive and could not have raised it earlier because the trial court's tentative decision was not rendered until July 28, 2010. Regardless of whether appellant acted with the purpose respondent attributes to her, there could have been no reason other than tactics for her to fail to raise her community property claim to the insurance policy during the trial. Having chosen not to do so, she cannot escape this choice by fashioning her newly raised claim as an objection to the trial court's decision on the different issue of her status as beneficiary of the policy.

¹⁴ In a petition for rehearing, appellant urges that the community property status of the insurance policy was established by undisputed facts, in that it was purchased during the marriage and premiums were paid from community property sources, and that the parties' 2006 agreement could not alter these facts because spouses cannot transmute community property into separate property absent an express written instrument (see Fam. Code, § 852). But the trial court's decision was not based on the parties' having transmuted the character of the property. Rather, it was based on the evidence that the parties had agreed to a *division* of their property, whether community or separate.

¹⁵ In view of our conclusion that appellant failed to properly raise the issue of characterizing the insurance policy as community property in the trial court, we do not consider appellant's arguments that the policy was a divisible or omitted asset, or that

II.

Appellant's alternative position is that she was entitled to be reinstated as beneficiary of the life insurance policy, and after respondent's death to a share of the proceeds of that policy, because she met the statutory criteria for spousal support. Emphasizing the remedial purposes of Family Code section 4360, appellant argues that the court based its decision on erroneous factual and legal assumptions and abused its discretion in failing to grant her request to be reinstated as beneficiary.

Family code section 4360, as mentioned above, provides that for purposes of ordering spousal support under section 4320, where it is "just and reasonable," the trial court may make certain orders to ensure the supported spouse will not be left without means of support in the event of the death of the supporting spouse. (See fn. 5, *ante*.) One means of accomplishing this end is to "include an amount sufficient to . . . maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support." (§ 4360, subd. (a).) The purpose of this statute is to remedy the financial burden that may result from the fact that spousal support orders ordinarily terminate upon the death of the supporting spouse. (*Tintocalis v. Tintocalis* (1993) 20 Cal.App.4th 1590, 1592; *In re Marriage of Ziegler* (1989) 207 Cal.App.3d 788, 793.)

This purpose is illustrated in *Ziegler*, where the court ordered the husband to pay spousal support and to maintain a survivor benefit plan earned through pre-marriage military service for the benefit of his former wife. (*In re Marriage of Ziegler, supra*, 207 Cal.App.3d at pp. 789-790) With respect to the survivor benefits, the court rejected arguments that the order amounted to an award of the husband's separate property and erroneously continued his obligation to pay support after his death. (*Id.* at pp. 791-792.) The order was within the court's discretion because of the length of the marriage and evidence that there was "a real danger" the wife would not be able to provide for herself

respondent made an unauthorized gift of community property or violated a fiduciary duty by changing the policy beneficiaries.

without assistance from the husband. (*Id.* at p. 793.) In *Tintocalis*, a husband who had violated court orders by failing to pay the premium on an existing policy of insurance on his life was ordered to pay monthly spousal support and to secure a life insurance policy of specified amount with the wife as beneficiary. The husband purchased a policy that excluded coverage in cases of suicide. After he subsequently committed suicide, the court imposed a constructive trust on the husband's estate for the benefit of the wife, concluding that the husband's actions violated the order to maintain insurance for her benefit in the event of his death. (*Tintocalis v. Tintocalis, supra*, 20 Cal.App.4th at pp. 1593-1596.) In these cases, the court acted to ensure that a current need for spousal support was not impaired by the death of the supporting spouse.

Appellant contends that the trial court erroneously believed a pre-existing support order was a prerequisite to ordering her reinstated as beneficiary of the insurance policy, assuming that the trial court failed to understand that section 4360 contemplates the court ordering life insurance as part of the process of making a spousal support order. We see no basis for appellant's assumption. In stating that it did not have a spouse required to pay support, the trial court was simply recognizing that current support was not being ordered in this case. As the cases above demonstrate, where a former spouse is determined to be in need of support, a court can proactively protect the source of support in the event of the supporting spouse's death. Appellant, as we have said, asked only for a reservation of support, not current support payments. The court expressly recognized that there could be cases where it would be appropriate to make orders regarding life insurance even where support was not currently being paid, but found that this was not such a case because the parties were in relatively equivalent financial positions. Appellant has pointed to no case suggesting that a court is *required* to order a spouse to maintain life insurance for the purpose of ensuring *future* support for a former spouse not receiving support at the time of the supporting spouse's death.

Similarly, appellant is incorrect in asserting that the court did not order spousal support because it believed it could do so only if respondent's earnings gave him the

ability to pay. Appellant assumes that the court did not know it could consider respondent's assets—such as the insurance policy—as well. (Fam. Code, § 4320, subd. (c) [in considering supporting party's ability to pay, court should take into account “earning capacity, earned and unearned income, assets, and standard of living”].) But the court made clear that it *was* considering respondent's assets, which it found to be relatively equivalent to appellant's.

Appellant's argument is that she needs protection because if she becomes unable to support herself in the future, appellant will no longer be available to provide support. Had respondent lived longer, if appellant became unable to support herself as her accumulated savings were depleted, she could have requested spousal support based on changed circumstances. But she would have been unlikely to prevail, since appellant would also have been depleting his accumulated savings as both parties were living without earned income. Her request to be made beneficiary was an attempt to take advantage of the fact that the \$500,000 life insurance proceeds were about to become payable; granting her request to be made beneficiary would have immediately given her these proceeds regardless of whether she would have come to need support in the future.

In short, the trial court concluded that the parties agreed to a property division that left them in relatively equivalent positions, and the evidence presented at trial supports that conclusion. Appellant's argument that the parties bought the insurance policy in part to provide her financial security in the event of respondent's death ignores the import of the property division. The trial court implicitly accepted respondent's contention that his life insurance policy became his as part of that division, while appellant's life insurance policy became hers. Appellant waited to assert that the insurance policy was outside the scope of the property division until it was too late for respondent to contest her position.

A trial court's decision on spousal support is a matter of discretion that “ ‘will not be disturbed on appeal unless, *as a matter of law*, an abuse of discretion is shown— i.e., —where, considering all the relevant circumstances, the court has “exceeded the bounds of reason” or it can “fairly be said” that no judge would reasonably make the same order

under the same circumstances.’ ” (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480 [citations omitted].) In the circumstances of this case, we cannot find the trial court abused its discretion in denying appellant’s request.

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.