Case No. S252473

IN THE SUPREME COURT OF CALIFORNIA

In re CLIFFORD ALLEN BRACE, JR.
9th Cir. Case No. 17-60032

STEVEN SPEIER, CHAPTER 7 TRUSTEE,
Plaintiff and Respondent,

v.

CLIFFORD BRACE, JR. AND AHN BRACE,
Defendants and Petitioners.

After a request made pursuant to California Rules of Court, Rule 8.548, for this Court to decide questions of California Law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The Petitioners in this matter are not aware of any persons or entities besides the parties in this case that have a financial or other interest in the outcome of the proceeding that the Petitioners reasonably believe the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: February 15, 2019

BY: /s/ Stephen R. Wade
Stephen R. Wade, *Attorney for Petitioners*

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I. STATEMENT OF ISSUE FOR CERTIFICATION

By Order entered by the Ninth Circuit Court of Appeal on November 8, 2008 in Case number 17-60032, (the "Ninth Circuit Appeal") and pursuant to California Rules of Court 8.548, the Ninth Circuit requested that this Court decide a certified question of law which will be dispositive of the Ninth Circuit Appeal. That question for certification is as follows:

> Does the form of title presumption set forth in Section 662 of the California Evidence Code overcome the community property presumption set forth in section 760 of the California Family Code in Chapter 7 bankruptcy cases where: (1) the debtor husband and non-debtor wife acquired property from a third party as joint tenants; (2) the deed to that property conveys the property at issue to the debtor husband and non-debtor wife as joint tenants; and (3) the interests of the debtor and non-debtor spouse are aligned against the trustee of the bankruptcy estate?

II. STATEMENT OF THE CASE

A. Bankruptcy Adversary Case

The Debtor Clifford Brace ("Appellant" or "Debtor") filed a voluntary petition under the Chapter 7 of the Bankruptcy Code on May 16, 2011 (Appellant's Appendix/Excerpts of Record ("Appx"). D, 40:11-12; Appx E, 62-64). On December 15, 2011, Robert

Goodrich, the Chapter 7 Trustee ("Trustee") filed an adversary proceeding against the Debtor and his non-debtor spouse Ahn Brace. ("Appellant" or "Mrs. Brace") (Appx D, 41:13-17; Appx E, 62-64). The Debtor and Mrs. Brace filed an answer to the adversary complaint on January 12, 2012 (Appx B, 21-34). By order entered on December 19, 2014, the adversary proceeding was bifurcated for trial (Appx C, 35-37). On February 4, 2015 the bankruptcy court entered an order approving the pre-trial stipulation of the parties (the "JPTO") (Appx E, 62-64).

On May 11, 2015, the bankruptcy court held a trial on the issues contained in the First through Seventh claims for relief in the adversary complaint (Appx C, 35-37; Appx FF, 766-902). Trial commenced on May 11, 2015 (Appx FF, 766-902). At the close of evidence on that date, the bankruptcy court continued the trial to July 23, 2015 (Appx FF, 881:21-24). The bankruptcy court directed the parties to submit written post-trial briefs in accordance with a schedule (Appx FF, 882-83). On July 23, 2015 the bankruptcy court reconvened and the court gave an oral ruling in which it recited its findings of fact and conclusions of law (Appx GG, 903-948).

The bankruptcy court found, based upon a variety of factors, that the transfers to the Crescent Trust were avoidable as fraudulent transfers pursuant to California Civil Code ("CCC") Section 3439.04(a)(1) as intentional fraudulent transfers in that they were made by the Debtor with the actual intent to hinder, delay or defraud a creditor of the debtor (Appx GG, 922:7-12).

The bankruptcy judge entered a judgment on September 25, 2015 ("Judgment") (Appx Z, 652-57). The Judgment provided, *inter alia*, that on Appellee's claim for declaratory relief, the Redlands, San Bernardino and Mohave Properties are property of the estate, and that the San Bernardino and Redlands Properties are "community property and property of the estate" (Appx Z, 654:5-17). Thereafter, on October 10, 2015 the Appellants filed a motion to reconsider and amend the judgment with regards that portion of the judgment which determined the Redlands and San Bernardino Properties to be community property and property of the estate in their entirety (Appx AA, 658-721).

At the hearing on the Appellant's motion to reconsider and amend the judgment held on December 10, 2015 the bankruptcy court

granted in part and denied in part the motion to reconsider and amend the judgment (Appx II, 1009:3-25). For reasons stated on the record on December 10, 2015, the bankruptcy court reaffirmed that portion of the judgment determining that the San Bernardino and Redlands properties, were community property and property of the estate and additionally finding that the Mohave property was also community property and property of the estate (Appx DD, 752-53).

The bankruptcy court entered an Amended Judgment on February 16, 2016 (the "Amended Judgment") in which it found that although the Redlands, San Bernardino and Mohave properties were returned to joint tenancy as a result of its rulings, such properties nonetheless presumptively constitute community property under applicable California law, and specifically the decision of this Court in the matter of *In re: Marriage of Valli* 59 Cal. 4th 1396; 171 Cal Rptr 3d 454 (2014) that Appellants had "failed to establish that [these properties] were not community in nature and, therefore, they constitute property of the estate pursuant to 11 U.S.C. Section 541 and are subject to administration by the Estate (Appx DD, 754:6-12).

B. Appeal to Ninth Circuit Bankruptcy Appellate Panel

Appellant filed an appeal of the Amended Judgment, which was referred to the Bankruptcy Appellate Panel for the Ninth Circuit. (The "BAP"). After submission of briefs and oral argument, the BAP filed its decision on March 15, 2017. That decision was certified for publication by the BAP as 566 B.R. 13 (BAP 2017).

> In its decision, the BAP framed the issue before it as follows:
> In this appeal, we are concerned with two California presumptions affecting determinations of the ownership of property. The first is Cal. Evid. Code Section 662 (the 'record title presumption') which provides generally that '[t]he owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing evidence.
> The second is CFC § 760 (the "community property presumption"), which provides, "except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property."

The court in *Brace v Speier* (*In re Brace*), *supra*, goes on to find that the general presumption of the community nature of all property acquired by spouses during marriage under CFC 760, applies in all contexts both inside of a dissolution proceeding and in actions between third parties and even overrides the specific provisions relating to joint tenancy property under CFC 2581. *Brace*, 566 B.R. at 18.

C. Appeal to the Ninth Circuit Court of Appeal

Appellants filed an appeal of the decision of the BAP to the Ninth Circuit Court of Appeal. After submission of briefs by Appellants and Appellee and after oral argument on the matter, the Ninth Circuit issued its Order of Certification requesting that this Court answer the question of California Law stated above.

III. STATEMENT OF FACTS

Appellants incorporate by reference the Statement of Undisputed Facts contained in the Joint Pretrial Stipulation approved by an order entered on February 4, 2015. (Appx D, 40-47; Appx E, 62-64)

IV. ARGUMENT

A. Bankruptcy Law

Section 541 of Title 11 of the U.S. Code provides in relevant part that:

> The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> (2) All interests of the debtor and the debtor's spouse in

> community property as of the commencement of the case that is--
>
> > (A) under the sole, equal, or joint management and control of the debtor; or
> > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

Federal Courts in the Ninth Circuit have consistently held that the determination of what property is properly classified as community property under this section is determined by state law. The proposition was stated by the BAP in the *Brace* decision as follows:

> We look to relevant non-bankruptcy law to determine the nature and extent of a debtor's interest in property. *Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979); Hanf v. Summers (In re Summers)*, 332 F.3d 1240, 1242 (9th Cir. 2003).

Brace, 566 B.R. at 18.

Thus, the Ninth Circuit has turned to this Court for its assistance in making the determination of the nature of the properties at issue in this case.

B. California Law on Joint Tenancy

California Civil Code section 683 provides in relevant part that:

(a) A joint interest is one owned by two or more persons in

> equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from spouses, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

This court has recognized that the statutory establishment of joint tenancy by express declaration,

> does not abrogate the common law rule that four unities are essential to an estate in joint tenancy: unity of interest, unity of time, unity of title and unity of possession. (Citations) (*Tenhet v. Boswell*, 18 Cal. 3d 150, 155, 554 P.2d 330, 334, 133 Cal. Rptr. 10, 14)

and further that:

> The requirement of four unities reflects the basic concept that there is but one estate which is taken jointly; if an essential unity is destroyed the joint tenancy is severed and a tenancy in common results. (*Swartzbaugh v. Sampson* (1936) 11 Cal.App.2d 451, 454 [54 P.2d 73]; 2 Am. Law of Prop. (1952) § 6.2, p. 9.) Accordingly, one of two joint tenants may unilaterally terminate the joint tenancy by conveying his interest to a third person. (*Delanoy v. Delanoy* (1932) 216 Cal. 23, 26 [13 P.2d 513]; *Green v. Skinner* (1921) 185 Cal. 435, 438 [197 P. 60].) CA(3) (3) Severance of the joint tenancy, of course, extinguishes the principal feature of that estate -- the *jus accrescendi* or right of survivorship. *Tenhet v. Boswell*, supra at p. 156

This Court has consistently recognized the right of co-owners to choose to take and hold title as joint tenants for a variety of factors besides the right of survivorship thereby avoiding probate upon the death of one joint tenant (*Estate of England* (1991) 233 Cal. App. 3d, 1,4; 284 Cal. Rptr. 361, 364), protection of separate interests from creditors of one cotenant, *Grothe v Courtlandt Corp.* (1992) 11 Cal. App. 4th 1313; 15 Cal. Rptr. 2d 1992) and taxation incidents upon the passing of one joint tenant. (*Benson v. Marin County Assessment Appeals Board.* (2013) 219 Cal App. 4th 1445; 162 Cal. Rptr. 3d 498)

C. Joint Tenancy Between Spouses

It is clear that spouses can hold property as joint tenants in California. In addition to the general principles of allowing co-owners of property to hold title in joint tenancy, California specifically allows married persons to hold title in that manner as well. California Family Code Section 750 provides that "spouses may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship."

What is less clear is the related presumptions and extent of rebuttal evidence which is required to either establish or dispute the

community nature of a spouse's interest in joint tenancy property under varying circumstances. In this Court's decision in *In re: Marriage of Heikes*, 10 Cal. 4th 1214 (1995), the Court provided a history of the development of the law in California relative to the determination of whether property taken by spouses during marriage in joint tenancy should be determined to be community property in a subsequent dissolution proceeding between the spouses. In this regard, it stated that:

> Until modified by statute in 1965, there was a rebuttable presumption that the ownership interest in property was as stated in the title to it. [Citations.] Thus a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a half interest. [Citation.] The presumption arising from the form of title could be overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise. [10 Cal. 4th 1216] [Citations.]" (*In re Marriage of Lucas*, supra, 27 Cal. 3d 808, 813 (hereafter *Lucas*).)
>
> The presumption arising from the form of title created difficulties upon divorce or separation when a court saw fit to award a house held in joint tenancy to one spouse for use as a family residence. (*Lucas*, supra, 27 Cal.3d at pp. 813-814.) Legislation intended to overcome those difficulties was added to former Civil Code section 164 in 1965 (Stats. 1965, ch. 1710, § 1, pp. 3843-3844), and its substance was moved in 1969 to former Civil Code section 5110 (hereafter section 5110) as part of the Family Law Act. (Stats. 1969, ch. 1608, § 8, p. 3339; see *In re Marriage of Hilke*, supra, 4 Cal. 4th 215, 219; *Lucas*,

> supra, 27 Cal.3d at p. 814.) Section 5110 provided in pertinent part: "[W]hen a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife." (Stats. 1969, ch. 1608, § 8, p. 3339.)
>
> The substance of section 5110's provision was again moved, in 1983, to the then new section 4800.1, where it was enlarged in two respects. First, the presumption that joint tenancy property acquired during marriage is community property was extended to all kinds of property, not just single-family residences. Second, the presumption could be rebutted only by a statement in the joint tenancy deed or a written agreement of the parties. fn. 6 The 1983 statute purported to make section 4800.1 applicable in all cases "to the extent proceedings as to the division of the property are not yet final on January 1, 1984." (Stats. 1983, ch. 342, § 4, p. 1539.)

The adoption of CFC 4800.1, which by its clear language applied only in matters of marital dissolution or legal separation, and which, *a fortiori*, does not apply to the myriad of other situations where form of title may be relevant to the rights of third parties outside of a dissolution, created a sort of "hybrid estate" where joint tenancy retains its historic character as constituting two separate estates for some purposes and a unitary estate in dissolution matters. (*Case Western Law Review,* Vol 26 [1989] No. 1, Art. 2)

Thereafter, by virtue of the Family Law Act of 1992, Section

4800.1 was, itself, divided into two new sections. CFC 760 provides that:

> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

The notes to the Law Revision Commission 1993 regarding this statute state that:

> Section 760 restates the first part of former Civil Code Section 5110, and extends the definition of community property to include real property situated outside California.

The second section, CFC 2581 provides as follows:

> For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (b) Proof that the parties have made a written agreement that the property is separate property. (Cal Fam Code § 2581)

The Comments by the Law Revision Commission to this section provide that:

> Section 2581 continues former Civil Code Section 4800.1(b) without substantive change. Section 2581 applies to all property acquired during marriage in joint form regardless of the date of acquisition. Section 2580 (legislative finding and declaration); *Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992).

A recurring circumstance in which joint tenancy property held by spouses has been examined outside the marital context is in the area of disposition on the death of one joint tenant. In its decision in *Estate of Mitchell*, 76 Cal. App. 4th 1378; 91 Cal. Rptr. 2d 192 (1999) (Petition for review denied), the Fourth Circuit Court of Appeal addressed the characterization of property held by spouses in joint tenancy upon the death of one spouse. In that case, after initiation of a dissolution, one spouse severed the joint tenancy on real property pursuant to Cal. Civil Code Section 683.2(a)(2) by unilaterally recording declarations of severance. Later, with the dissolution action pending, that spouse died. His surviving spouse claimed ownership of the properties pursuant to the right of survivorship in the joint tenancy. The court denied the respondent's claim finding that such action was not a violation of the "automatic stay" on transfer of community property and that severance did not violate the stay provisions of CFC 2040(a) or CFC 2045. It based its ruling on a

finding that such an action did not constitute a "transfer" nor a "disposition" of property.

The court in *Estate of Mitchell, supra*, noted that with respect to property held in joint tenancy between married persons:

> A husband and wife may co-own property as joint tenants, tenants in common, or community property. (Fam. Code, § 750.) Property cannot be held both as community property and in either a joint tenancy or a tenancy in common at the same time. (See *Tomaier v. Tomaier* (1944) 23 Cal. 2d 754, 758 [146 P.2d 905] [joint tenancy]; see also Civ. Code, § 682.) Accordingly, each spouse's interest in a joint tenancy or a tenancy in common is his or her own separate property. (*Estate of Murray* (1982) 133 Cal. App. 3d 601, 604, fn. 3 [183 Cal. Rptr. 924] [tenancy in common]; *Meyer v. Thomas* (1940) 37 Cal. App. 2d 720, 723-724 [100 P.2d 360] [joint tenancy].) (*Estate of Mitchell*, supra at p.1385, 91 Cal. Rptr. 2d 192, 196-197)

The Court then went on to find that the presumption of community property under CFC 2581 applied only "for purposes of the division of property in a dissolution proceeding" and that prior to the entry of the judgment of dissolution this community property presumption does not apply". (*Estate of Mitchell, supra* at p. 1385, 1386). As a result, it reasoned, the severance of the joint tenancy prior to the entry of that judgment served to defeat the claim of survivorship, since property held as tenancy in common will be

divided equally between the surviving spouse and the estate of the deceased spouse. (*Estate of Mitchell*, supra at p.1386)

In so ruling, the court relied upon the decision of the 4th District Court of Appeals, in *Estate of Blair*, 199 Cal. App. 3d 161; 224 Cal. Rptr.627 (1988). Similar to the facts in *Estate of Mitchell*, supra, the court addressed the impact of former CFC section 4800.1 [now CFC 2581) to a situation wherein a spouse died during the pendency of a dissolution and the court was called upon to determine whether property titled in joint tenancy passed, by right of survivorship, to her estranged husband and joint tenant, or, instead, whether her community property interest enured to the benefit of her estate. After determining that the presumption arising from CFC 4800.1 was inapplicable outside of a dissolution action, the court turned instead to the statutory presumption of title. It found that:

> For purposes of determining the character of real property on the death of one spouse, there is a presumption 'that the property is as described in the deed and the burden is on the party who seeks to rebut the presumption.' (*Shindler v. Schindler* (1954) 126 Cal. App. 2d 597, 602; 272 P. 2d 566).

Thus, the court ruled that:

> '[the] fact that a deed was taken in joint tenancy establishes a prima facie case that the property is in fact held in joint

> tenancy.' (Id. At p. 601) A devisee may test a surviving joint tenant's claim by showing the property held under a joint tenancy deed is in fact community property. (*Sandrini v. Amrosetti* (1952) 111 Cal. App. 2d 439, 447-451; 244 P. 2d 742). The Court in *Estate of Blair*, Id., concluded that evidence that spouses intended to hold the property as community property rather in joint tenancy was subject to the same compliance with the transmutation provisions of CFC 5110.730 and requires a separate writing between both spouses to accomplish. (*Estate of Blair*, supra at p. 167)

D. Rights of Third Parties to Joint Tenancy Property of Spouses

In addition to determination of the standard for establishing the nature of the interests of spouses in joint tenancy property in regards to probate and related proceedings, California courts have likewise analyzed the rights of third party creditors to those interests in matters outside of dissolutions. In the decision in *Hansford v. Lasser*, (1975) 53 Cal.App 3rd 364, 371 the court began by reciting established law for the proposition that for purposes of determination of the rights of creditors of one spouse against an interest in real property held in joint tenancy with another spouse, only the debtor's separate one half interest in the joint tenancy property is answerable to the debtor's debts. (*See also In re Marriage of Brooks & Robinson* 169 Cal. App 175 (2008)).

The court in *Hansford v, Lasser*, further determined that creditors of a spouse are not entitled to the presumption of CCC Section 4800.1, (now CFC Section 2581) since it does not involve a dissolution or legal separation proceeding. *Hansford* 53 Cal.App.3d at 371. Instead, citing the decision in *Machado v. Machado* (1962) 58 Cal.2d 501, 506, the court held that the presumption under California Evidence Code ("CEC") Section 662 apply, that the manner in which title is held is presumed to be binding upon third parties seeking a contrary determination.

Similarly, in the decision in *Oak Knoll Broadcasting v. Hudgings*, 275 Cal. App. 563; 80 Cal. Rptr. 175 (1969) in an action between a creditor and a surviving spouse, the presumption of joint tenancy title applied and the court required that presumption be overcome by evidence of a contrary intent of the parties.

Actions between third parties and single spouses over the effect of transfers of joint tenancy property have yielded the same results. In the case of *Lovetro v Sears*, 234 Cal. App. 2d 461; 434 Cal. Rptr.461 (1965) the court applied the presumption of record title to the rights acquired by a third party from one spouse. (*See also*, *Martinelli v.*

California Pacific Title Ins. Co., 193 Cal. App. 14 Cal. Rptr. 542,543 (1961)).

E. Tax Consequences of Spouses Holding Title As Joint Tenants

Another area in which courts in California have opined on the impact of spouses choosing to hold title a joint tenants is in the area of taxation. In its decision in *Benson v. Marin County Assessment Appeal Board*, 219 Cal. App. 4th 1445; 162 Cal. Rptr. 3d 498 (2013) the court addressed the impact of Cal. Const. Art. XIII A, (Proposition 13) and the reassessment of land transferred from joint tenancy to tenancy in common. In so doing, it noted that creation of a joint tenancy between "family members" does not trigger a reassessment of that property, however, a termination of that tenancy does. (Cal. Revenue & Taxation Code Section 62)

F. Bankruptcy Cases Characterizing Joint Tenancy Property as Community Property

The Ninth Circuit Bankruptcy Appellate Panel faced this issue in its decision in *In re Fadel* 492 B.R. 1 (2013 9th Cir BAP). There, the issue involved the rights of a third party purchaser at a foreclosure sale of property held by spouses in joint tenancy. The court, citing the

decision of the Ninth Circuit in *In re Jacobson* 676 F3d 1193 (9th Cir 2012), found that the provisions of CFC Section 760 do not apply in actions by third party creditors to override other provisions of law relative to separate property of the spouses.

In a case involving whether property titled as joint tenancy constituted property of the estate of a single spouse in bankruptcy, the court in *In re: Reed*, 89 B.R. 100 (Bankr. C.D. Ca (1988), likening the position of the trustee of the estate to the creditors to whom he owed a "fiduciary duty", relied on the ruling in *Hansford v. Lassar*, supra, to find that:

> third party creditors are not entitled to the presumption of community property set forth in the predecessor statute to CCP 4800(1). (*In re Reed*, supra at p. 105)

Finally, the 9th Circuit Court of Appeals addressed this issue in its decision in *Hanf v. Summers (In re: Summers)*, 332 F3d 1240 (9th Cir. 2002) There, a husband, wife and daughter purchased real property as joint tenants. The parties eventually filed separate bankruptcy petitions. The wife's bankruptcy trustee contended that the property was a community asset and was the property of the wife's bankruptcy estate.

After noting that it was well established that state law determines the nature and extent of a debtor's interest in property for purposes of inclusion in the bankruptcy estate, (*Abele v. Modern Fin. Plans Sycsl, Inc.* (*In re Cohen*) 300 F.Ed 1097, 1104 (9th Cir. 2002), the court cited CFC 803c for the proposition that:

> acquired by husband and wife by an instrument in which they are
> described as husband and wife, the presumption is that the property is the community property of the husband and wife, unless a different intention is expressed in the instrument." (*In re Summers*, supra at p. 1242)

The court went on to discuss the presumption of community property raised by CFC 760, which it found to be a rebuttable presumption citing *Tucker v Tucker (In re Marriage of Tucker)*, 141 Cal. App. 3d 128,132; 190 Cal. Rptr. 127 (1983), and citing the decision in *In re Marriage of Haines* 33 Cal.App. 4th 277,289-90; 39 Cal. Rptr. 2d 673 (1995) further concluded that:

> "Virtually any credible evidence may be used to overcome [the general community property presumption], including . . . showing an agreement or clear understanding between parties regarding ownership status . . ." *Haines*, 33 Cal. App. 4th at 290. (*In re Summers*), 332 F.3d 1240, 1242) (*See also, Estate of Petersen* 28 Cal. App. 4th 1742, 1747; 34 Cal. Rptr. 2d 449)

The court then noted that since California courts have

consistently ruled that property cannot be held both as community property and in either joint tenancy or a tenancy in common at the same time, (*Estate of Mitchell*, 76 Cal. App. 4th 1328 at 1385; 91 Cal. Rptr 2d 192 (1999)), the parties agreement to take title in joint tenancy is sufficient evidence to rebut the presumption of CFC 760. (See also, *Chase Manhattan Bank v. Jacobs (In re Jacobs)*, 48 B.R.570, 573 (Bankr. S.D. Ca. 1985); *Rhoads v Jordan (In re Rhoads)*, 130 B.R. 565, 567 (Bankr. C.D. Cal. 1991))

After concluding that the fact that the parties had taken title in joint tenancy served to rebut the presumption of community property under existing California law, the court in *Summers* then turned its attention to a separate issue, that of transmutation. The court cited CFC 852(a) and the decision in *In re Marriage of Haines* 33 Cal. App. 4th 277, 39 Cal. Rptr. 673 (1995) and other authority for the proposition that only interspousal transfers were subject to the requirements of transmutation to be effective between them, and concluded that:

> Our reading of California law leads to the conclusion that the transmutation requisites had no relevance to the conveyance in this case. There simply was no interspousal transaction requiring satisfaction of the statutory formalities

Summers at 1245.

The court in *Summers* concluded both inquiries with the statement:

> Applying California law, we conclude that a third party conveyed joint tenancy interests to Eugene and Ann Marie Summers, a transaction to which the transmutation statute does not apply. *See In re Cross*, 94 Cal. App. 4th at 1147. The third-party deed specifying the joint tenancy character of the property rebutted the community property presumption, and rendered California's transmutation statute inapplicable.

Id.

Notably, in the last line of the Conclusion, the court rested its ruling not on the purported "irrelevance" of the transmutation statute, CFC 852(a) but, rather, on its conclusion that in cases of title taken in joint tenancy on the face of the deed, such was sufficient to rebut the presumption of community property in CFC 760.

G. Decision in In re Valli

It was with this background that this Court addressed the issue of ownership of property acquired during marriage, using community funds. wherein title was taken by one spouse as her "sole and separate property" in its decision in *In re Marriage of Valli*, 58 Cal. 4th 1396; 171 Cal. Rptr. 3d 454 (2014). The facts in that case were that husband, during the marriage took out a $3.75 million insurance policy on his

life, designating wife as the policy's sole owner and beneficiary. The policy was purchased with community property funds from a joint bank account. During the course of a dissolution action between the spouses, husband maintained that regardless of the form in which the policy had been taken it constituted community property and should be divided equally between the spouses. Wife argued that:

> ...the policy is her separate property because the husband arranged for the policy to be put solely in her name, thereby changing the policy's character from community property to separate property.

In re: Marriage of Valli, 58 Cal. 4th at 1400.

This Court addressed the wife's argument in the context in which it was raised, to wit, did the manner of taking title as her sole and separate property comply with the requirements of CFC 850 transmute-that is, change-the character of the property from community to separate? Reviewing the requirements of that provision, this Court held that:

> A transmutation of property, however, "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." (Id., § 852, subd. (a).) To satisfy the requirement of an "express declaration," a writing signed by the adversely affected spouse must expressly state that the character or ownership of the property at issue is being

> changed. (*Estate of MacDonald* (1990) 51 Cal.3d 262, 272 [272 Cal. Rptr. 153, 794 P.2d 911].)

In re: Marriage of Valli, 58 Cal. 4th at 1400.

The Court in *Valli* rejected wife's argument that the transmutation requirements of CFC 852 applied only to interspousal transfers and not to instances wherein title had been taken from a third party stating that:

> The distinction that wife here urges us to draw between interspousal property transactions (which are subject to the transmutation statutes) and property acquisitions from third parties (which would not be subject to those statutes even when it has the claimed effect of changing community property funds to a separate property asset or vice versa) bears no relation to these legislative concerns, and it produces arbitrary and irrational results that the Legislature could not have intended.

In re: Marriage of Valli, 58 Cal. 4th at 1401.

In so holding, this Court rejected the conclusions of other courts to the contrary. It disapproved of the holding in In re *Marriage of Haines*, 33 Cal. App. 4th 277; 14 Cal. Rptr. 2d 371, which had applied the transmutation requirement only to an "interspousal transaction." *Id.* at 29.

This Court then turned to the decision of the Ninth Circuit in *In re: Summers*, supra. In this regard it stated that:

> The first decision to hold that a spousal purchase from a third party during a marriage was not subject to the statutory transmutation requirements was *In re Summers* (9th Cir. 2003) 332 F.3d 1240, which was a bankruptcy proceeding rather than a marital dissolution proceeding. There, the federal appellate court was attempting to construe and apply California law "to determine whether the requirements of California's transmutation statute ... must be met when realty is transferred from a third party to spouses as joint tenants." (Id. at p. 1242, citation omitted.) Relying on the statement by the California Court of Appeal in *Cross* that a transmutation is an "'interspousal transaction or agreement' " (*Cross*, supra, 94 Cal.App.4th at p. 1147), the federal court concluded "that the transmutation requisites had no relevance to the conveyance in this case." (*In re Summers*, at p. 1245.) (*In re Marriage of Valli*, supra, at p. 279.

This Court then found the holding in *In re Summers* and as similar holding in the case of *In re Marriage of Brooks and Robinson*, 169 Cal. App. 4th 176 to be:

> ...not persuasive insofar as they purport to exempt from the transmutation requirements purchases by one or both spouses from a third party during the marriage.

In re: Marriage of Valli, 58 Cal. 4th at 1405.

Noticeably, the majority decision in *In re Marriage of Valli*, does not mention the provisions of CFC 760 with its general presumption of the community nature of property acquired during marriage, or of the more specific presumption in CFC 2581 applicable to jointly held property. The reason is simple. The facts in *In re*

Marriage of Valli did not comport with, or require an analysis of either statute to decide the character of the insurance policy at issue there. There was a tacit admission by the wife that the life insurance policy at issue was community property absent a valid transmutation under CFC 852 and thus the presumption of CFC 760 was not addressed. Further, since the policy was taken by wife not in joint tenancy but as her sole and separate property, the provisions of CFC 2581 did not apply to the case.

In contrast, the concurring opinion in *In re Marriage of Valli*, did address those issues and is helpful in making a determination on the matter certified to this Court. In that opinion, the Court defined the issue as follows:

> I write separately to discuss a threshold question that has been the primary focus of the briefs of the parties and amici curiae: What role, if any, does a common law rule codified in Evidence Code section 662 (section 662) have in determining, in an action between the spouses, whether property acquired during a marriage is community or separate? (*In re Marriage of Valli*, supra, p. 281)

The Court then proceeds with an introduction of the effect of CFC 760 on the process stating that:

> Family Code section 760 provides: "Except as otherwise

> provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Family Code section 802 refers to the "presumption that property acquired during marriage is community property." In combination, these statutes provide a presumption that property acquired during the marriage is community property. (*In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1103 [32 Cal. Rptr. 3d 471, 116 P.3d 1152].) (I will sometimes refer to this presumption as the section 760 presumption.) It appears this presumption can be overcome by a preponderance of the evidence. (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578 [59 Cal. Rptr. 3d 419].)

The concurring opinion goes on to discuss the apparent disharmony between CFC 760 and its presumption of property acquired during marriage as community in nature and the impact of the statutory title presumptions generally applicable under CEC 662 to the resolution of title issues. It resolves what appears to be a conflict between these two provisions and reaches the following conclusion:

> In my view, as in the view of all amici curiae to appear in this case—law professors and attorneys specializing in the field—the Family Code section 760 presumption controls in characterizing property acquired **during the marriage in an action between the spouses**. Evidence Code section 662 plays no role in such an action. The detailed community property statutes found in the Family Code, including section 760, are self-contained and are not affected by a statute found in the Evidence Code. (*In re Marriage of Valli*, supra, p. 282) (Emphasis Added)

What follows is a recitation of the origin of California's community

property law from its Spanish roots with a strong desire to protect the rights of each spouse from the "presumption of undue influence arising out of the marital relationship between the parties" as opposed to the common law roots of the presumption of title under CEC 662, which was formulated to "promote the public policy in favor of 'the stability of titles to property'". The concurring opinion goes on to find of the latter policy:

> That policy is largely irrelevant to characterizing property acquired during the marriage **in an action between the spouses**". (*In re Marriage of Valli*, supra at p. 1410) (Emphasis Added)

The concurring opinion in *In re Marriage of Valli* goes on to discuss the decision of this Court in *In re Marriage of Lucas*, 27 Cal. 3d 808; 166 Cal. Rptr. 853 (1980) and particularly what it views as the potential conflict between the provisions of CFC 760 and CFC 2581 regarding the characterization of property. In this regard, it notes that:

> Although it discusses presumptions at length, *Lucas* never cites section 662 even though that section had been enacted long before the opinion. Rather, it discusses two statutory presumptions, both of which used to be found in Civil Code former section 5110 and are now found in two separate sections of the Family Code. (Fam. Code, §§ 760, 2581.) One is the familiar presumption that property acquired during marriage is

> community property. (Id., § 760.) The other is a presumption, found in a statute within the community property law and fully consistent with the general presumption, that specifically governs real property designated as a joint tenancy. (*Lucas*, at p. 814.) As quoted in *Lucas,* that statute provided: " 'When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of the husband and wife.' " (*Id.* at fn. 2, quoting Civ. Code, former § 5110 [see now Fam. Code, § 2581].)

Id. at 1412.

By using simple tools of statutory construction, this statement "squares the circle" by assigning the three purportedly "competing" presumptions to their respective spheres. CFC 760 with its general presumption of community property protects the innocent spouse from undue influence by the other spouse absent a clear and mutual intent to the contrary. CFC 2581 with its presumption with regards joint tenancy property limited for purposes of dissolution proceedings between the spouses protects both the right of spouses to hold property as joint tenants in their dealings with third parties while retaining its community nature in dissolution proceedings between the spouses. While CEC 662 respects the presumption of title under CEC 662 to maintain the stability of title outside of dissolution actions.

Thus, the statutory aims of all three sections remain intact.

To find otherwise would do harm to all three principles. If CFC 760 were to control the characterization of title in commercial transactions, it would wreak havoc on title determinations. Currently, upon the death of one joint tenant, upon recordation of a death certificate title automatically passes to the surviving joint tenant. There is no necessity for a probate proceeding to confirm title to the survivor, and title can be insured to the survivor. Conversely, should the presumption of CFC 760 apply outside dissolution proceedings, the right of survivorship could not be determined absent a judicial determination that the presumption of CFC 760 has been adequately overcome by evidence of a contrary intent.

A holding that CFC 760 with its presumption that all property acquired during marriage is community property, would destroy the historic protection of a non-debtor's spouse in joint tenancy property to the detriment of the non-debtor "innocent spouse".

Similarly, a finding that the presumption of CFC 760 applies in the context of a bankruptcy making the entirety of the property, property of the estate under 11 U.S.C. 541 would destroy the rights of

the non-debtor spouse in that property and subject it to administration for the community debts of the debtor spouse. It is not difficult to imagine a scenario wherein one estranged spouse files bankruptcy for the specific purpose of depriving his spouse of her one-half interest in the joint tenancy property without her knowledge or consent, something that would not be possible under existing law, nor mandated by the decision in *In re Marriage of Valli.*

V. CONCLUSION

The intersection between California Family Law and Bankruptcy has been described by one observer as a "train wreck". The two systems are designed to achieve different fundamental goals. In Family Law the goal is to provide fairness in relations between fiduciaries of the highest order and in situations wherein one spouse has historically held a lesser position of power than the other, and avoidance of undue influence in the relationship was paramount. In an effort to achieve those aims, the Legislature and the Courts in California have followed a path, which has resulted in numerous legislative changes and a myriad of court decisions designed to interpret and implement that legislation.

In the process, courts have uniformly interpreted laws intended to implement those concepts in the marital context, and in this case those designed to provide presumptions regarding the community nature of property acquired during marriage to promote the "fundamental goal" of an equal division of property in a dissolution. These provisions, contained in the California Family Code at sections 760, 852 and 2581, work well for that purpose. They provide a guide to the spouses and to the courts for determining the nature of property acquired during marriage by spouses and in the dissolution process for making equal divisions of that property.

In re: Marriage of Valli was another in a long line of cases designed to reach that result. The facts in that case are markedly different from those in this case. The issues related to CFC 2581 did not apply since the property at issue was not titled jointly. Moreover, the principles which underlie the Family Code's respect for the interests of both spouses in property acquired during marriage, and the resulting presumption of same as community property clearly supported the position of the spouse out of title and who would have lost his interest in the property altogether had this Court not ruled as it

did. The ruling in *In re Marriage of Valli* is unimpeachable in this regard.

However, as foreshadowed by the concurring opinion, the decision in *Valli* laid the groundwork for misinterpretation by other courts, courts whose purpose and focus is far different than those of family law and dissolution. In this case, it was the ruling of the trial court and then the BAP which grossly overstated the ruling in *Valli* finding that it applied outside the dissolution of marriage and that the general principals favoring community property determination set forth in CFC 760 were applicable to, and, in fact superceded the legislative basis for such determinations in other areas of law. While, by its holding, the BAP applied the general presumption of the community nature of all property acquired by spouses during marriage, limited only be the specific separate property exclusions contained elsewhere in the Family Code, to the determination of the nature of that property in bankruptcy under 11 U.S.C. Section 541, its ramifications, if upheld by this Court go well beyond that.

If this Court were to follow the BAP and decide that outside the context of a marital dissolution proceeding the presumption of CFC

760 reigns supreme, it would upend a century of legislation and case law wherein such distinction had been respected. In the area of probate and estate planning, failure to respect the presumption that title held of record in joint tenancy conveys a strong presumption that it is held in that manner pursuant to California Civil Code 662, serves to force probate courts to undertake the type of analysis predicated by CFC 760 and 2581. In order to determine whether property passes from one spouse to the other by operation of law, it would force the courts to take evidence to rebut the presumption under CFC 760 and 2581. Title companies could not insure title to the surviving spouse based upon a death certificate, but, instead would run the risk that a non-spousal heir might challenge title based upon allegations that the property was community in nature and not actually joint tenancy.

Moreover, if the BAP ruling extending the presumption of community property to property held by spouses in joint tenancy is accepted by this Court, it would open a decided area of law which has held that in such cases only a debtor spouse's interest in joint tenancy property is subject to his or her debts. It would obviate a body of law which, until now has been settled and subject the interests of innocent

spouses to the debts of their spouses, and in the case of bankruptcy subject their one-half interest to administration by the bankruptcy court.

If these results had been mandated by statute, or even the subject of determination by this Court in *Valli*, that would be one thing. However, to assume that this Court "backed into" this determination in deciding a case with totally different facts and by application of presumption contained only in and applicable to dissolution actions, is pure folly. This Court now has an opportunity to clarify the application of *In re Marriage of Valli* to matters outside of an action for dissolution between spouses. Appellants urge this Court to follow existing precedent in this regard and to limit the holding in *In re Valli* to its core holding and apply it to dissolution actions only, thereby allowing other existing statutes to prevail in determinations outside of that context.

Dated: 2/15/2019 Respectfully Submitted,

The Law Offices of Stephen R. Wade

By: /s/ Stephen R. Wade
Stephen R. Wade

CERTIFICATE BY APPELLATE COUNSEL

OF WORD COUNT

California Appellate Rules, Rule 8.204(c)(1)

The undersigned certifies that Appellant's Opening Brief contains 8,909 words. The undersigned relied on the word count of his WordPerfect word processing software in making this certification.

Dated: 02/20/2019 By: /s/ Stephen R. Wade

STEPHEN R. WADE

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