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IN THE SUPREME COURT OF CALIFORNIA

CLIFFORD ALLEN BRACE, JR. AND ANH BRACE,
Appellants,

vs.

STEVEN SPEIER, CHAPTER 7 TRUSTEE,
Respondent.

Question of Law by
United States Court of Appeals for the Ninth Circuit
Case No. 17-60032

APPLICATION TO FILE AMICUS CURIAE BRIEF; BRIEF OF AMICUS CURIAE, CHRISTOPHER C. MELCHER, IN SUPPORT OF RESPONDENT

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Proposed Amicus Curiae

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I, Christopher C. Melcher, request leave to file the attached brief per rule 8.520(f) of the California Rules of Court. I am a partner in Walzer Melcher LLP, a law firm that practices family law in California. My law partner, Peter M. Walzer, and I were co-counsel with Garrett C. Dailey for appellant, Frankie Valli, in the appeal of *In re Marriage of Valli* (2014) 58 Cal.4th 1396, which is cited extensively in both parties' briefs. I have been counsel on several other family law appeals.

I am interested in developing California family law. I have held leadership positions of family law organizations such as the American Academy of Matrimonial Lawyers (AAML), the Association of Certified Family Law Specialists (ACFLS), and the Family Law Section Executive Committee of the California Lawyers Association (FLEXCOM).

Neither myself nor my law firm represents a party to this action, has any financial or other stake in the outcome, or has received compensation for this brief. No party, or counsel for a party, participated in drafting this brief.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

I. INTRODUCTION

Appellants incorrectly claim that property acquired by spouses during marriage in joint tenancy converts what would otherwise be community property into equal separate property interests of each spouse. Under the community property rule in Family Code[1] section 760, all property acquired by a spouse during marriage is community property except as otherwise provided by statute. The act of taking title as joint tenants is not a statutory exception to that rule.

Appellants rely on prior common law that spouses who acquire property in joint tenancy impliedly agree to create jointly-held separate property, absent an oral promise or conduct showing they intended it to be community. The law changed on January 1, 1985, when Family Code section 852 was enacted to require an express declaration in writing to transmute property acquired during marriage from community to separate. The law no longer presumes that spouses intended to characterize joint tenancy property as their separate interests based on the form of title they selected. Property acquired during marriage is community per section 760, and any transmutation from community to separate must meet the strict requirements of section 852.

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[1] Undesignated statutory citations are to the Family Code.

On the death of a joint tenant, the survivor acquires the entire interest in the property, but that is not material to its characterization while the spouses are alive. The right of survivorship in joint tenancy property is a way to transfer a deceased spouse's interest to a surviving spouse outside of probate. It may be terminated by either joint tenant before his or her death, just as a bequest in a will or provision in a trust for a surviving spouse could be changed. Property is not transmuted from community to separate simply because revocable survivorship rights are provided in that property.

The issue presented by the 9th Circuit Court of Appeals asks this Court to resolve whether Evidence Code section 662 (which creates a presumption that the owner of legal title is the full beneficial owner of property) overcomes section 760 when spouses acquire property in joint tenancy. Appellants see a conflict between sections 662 and 760 because they use obsolete law to characterize joint tenancy property as separate. Even if section 662 applies, no conflict exists between the two statutes regarding joint tenancy property. Spouses have the same legal and beneficial ownership during their lifetime to property held in joint tenancy as spouses do with any community property—an equal, undivided interest. The underlying issue is, instead, whether the act of acquiring property in joint tenancy by spouses during marriage is a transmutation of their community interest to jointly-held separate property.

The form of title presumption has no application in a dispute over the characterization of property because it does not declare property is separate. Therefore, section 662 is not an exception to section 760. Nor does the form of title by which spouses acquire property during marriage, either in individual or joint form, operate as a transmutation unless the deed by which the property was acquired or a written agreement specifies that the character of that property has been changed.

Appellants argue that property acquired by spouses in joint tenancy must be treated as jointly-held separate property, other than in a divorce action, to avoid prejudice to third parties who purchase that property from the spouses. No risk of confusion exists as to joint tenancy property. Since both spouses are on title, each must execute and deliver a deed to convey their entire interest. No purchaser would think that property held by spouses in joint tenancy is anything other than community.

Public policy favoring the stability of titles warrants no exception to sections 760 or 852. A bona fide purchaser who acquires community property titled in the name of one spouse is protected, if the buyer acted in good faith, paid value for the property, and was unaware of the marital relationship. Family Code section 1102 presumes valid title is transferred to a bona fide purchaser, free of any claim by the spouse who did not join in the conveyance. Therefore, bona fide purchasers may rely in good faith that the form of title reflects beneficial ownership when they acquire property titled in the name of one spouse, even though it may be community, if they meet the test in section

1102. There is no need to create a judicial exemption to sections 760 and 852 to protect purchasers who acted in bad faith, knowing they were acquiring community real property without the consent of one spouse.

The solution Appellants have proposed is to restrict sections 760 and 852 to the interspousal characterization of property during an action for divorce or legal separation, and allow section 662 to govern disputes over characterization involving a third party. Their approach would defeat the community property system by creating two classes of property characterization. If Appellants were correct, then property acquired during marriage in one spouse's name with community funds would be separate under section 662 for all purposes while the parties were married (protecting it from the other spouse's creditors), but upon divorce or legal separation it would be community per section 760 (giving each an equal interest). That would be an absurd result.

Section 760 defines community property for all purposes, and any transmutation must satisfy section 852. The form of title presumption in section 662 does not characterize property acquired by spouses in joint tenancy as separate, either as a statutory exception to section 760 or an implied exemption to section 852. These rules apply whether the dispute over characterization is between spouses or involves a third party.

II. DISCUSSION

The issue presented by the 9th Circuit Court of Appeals[2] is, simply stated, whether property acquired during marriage by spouses and held in joint tenancy is community property in a dispute between a spouse and a third party. The answer is yes.

(A) All property acquired during marriage is community unless a statute provides otherwise.

"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." (§ 760.)[3] Section 760 requires a statutory exception for property acquired during marriage to be separate.

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[2] The question of California law presented is: "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 acquire 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?"

[3] Section 760 "does not apply to any property to which legal or equitable title is held by a person at the time of the person's death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years before the death." (§ 802.) Special presumptions apply to property acquired before January 1, 1975, by a married woman as to third parties dealing with the married woman or her representatives in good faith and for valuable consideration. (§ 803.)

To qualify as an exception to section 760, the statute must define the separate property of a spouse. (*In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1407 (*Valli*) (conc. op. of Chin, J.) [overcoming section 760 requires "evidence showing that another statute makes the property something other than community property"].) Separate property is defined in the Family Code as:

- Property owned before marriage, acquired after marriage by gift or inheritance, and the rents, issues, and profits of separate property. (§ 770, subd. (a).)

- Earnings and accumulations after separation of the spouses (§ 771, subd. (a)), or after entry of judgment of legal separation (*id.*, § 772).

- Personal injury damages if the cause of action arose after entry of a judgment of dissolution or legal separation, or after separation. (§ 781, subd. (a).)

Spouses have the right to opt-out of the community property system in a premarital agreement or other marital property agreement. (§§ 1500, 1612, subd. (a) [premarital agreement] & 1620 [postmarital agreement].)

Spouses may change the character of real property acquired during marriage from community to separate only by an express declaration in writing meeting the requirements of section 852. (§ 850, subd. (a).) A transmutation on or after January 1, 1985, "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." (§ 852, subds. (a) & (e) [effective date].) "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. [Citation.]" (*Valli, supra,* 58 Cal.4th at p. 1400.)

(B) Taking title to property during marriage in joint tenancy is not an express declaration changing the character of that property from community to separate.

Early case law considered the form in which spouses took title to property as evidence of an implied agreement that their beneficial ownership was as shown in the title document. (*In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411, 1424-1426 (*Bonvino*) [summarizing the development of the law].) As the Court observed in *Tomaier v. Tomaier* (1944) 23 Cal.2d 754 (*Tomaier*):

> 'The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property ... in the absence of any evidence of an intent to the contrary.' [Citation.]

(*Tomaier, supra,* 23 Cal.2d at pp. 758–759, quoting *Delanoy v. Delanoy* (1932) 216 Cal. 23, 26.)

In that era, "a residence purchased with community funds, but held by a husband and wife as joint tenants, was presumed to be separate property in which each spouse had a half interest [Citation]." (*In re Marriage of Lucas* (1980) 27 Cal.3d 808, 813

(*Lucas*).) The common law approach created problems upon divorce or separation as this Court noted in *Lucas*:

> The Legislature ... noted that 'husbands and wives take property in joint tenancy without legal counsel but primarily because deeds prepared by real estate brokers, escrow companies and by title companies are usually presented to the parties in joint tenancy form. The result is that they don't know what joint tenancy is, that they think it is community property, and then find out upon death or divorce that they didn't have what they thought they had all along....' [Citation.] ***
>
> In 1965, in an attempt to solve these problems, the Legislature added the following provision to Civil Code section 164: '(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 divorce or separate maintenance only, the presumption is that such single family residence is the community property of said husband and wife.' (Stats. 1965, ch. 1710, p. 3843; [later enacted as] Civ. Code § 5110.)

(*Lucas, supra,* 27 Cal.3d at pp. 813-814.)

In *Lucas,* the Court held that the residence acquired by the parties in joint tenancy was presumptively community. The *Lucas* court remanded to determine if the presumption was rebutted by evidence of an oral agreement or understanding that the property was separate. (*Lucas, supra,* 27 Cal.3d at pp. 816-817.) The Court observed, though, that "[t]he act of taking title in a joint and equal ownership form is inconsistent with an

intention to preserve a separate property interest." (*Id.*, at p. 815.)

After *Lucas* was decided, the law changed to require an express, written declaration requirement for transmutations. (§ 852, subd. (a).) As this Court explained in *Valli*:

> [I]n adopting the statutory transmutation requirements the Legislature intended 'to remedy problems which arose when courts found transmutations on the basis of evidence the Legislature considered unreliable.' [Citations] [the transmutation statute 'blocks efforts to transmute marital property based on evidence—oral, behavioral, or documentary—that is easily manipulated and unreliable'].)

(*Valli, supra,* 58 Cal.4th at p. 1401.)

The enactment of section 852 was a major shift in the law. Previously, courts had to search for the intent of the spouses to characterize property as community or separate, aided by various presumptions such as the form of title they selected to hold their property. (See, e.g., *In re Nelson's Estate* (1964) 224 Cal.App.2d 138, 143 [discussing prior case law allowing proof of transmutation by oral agreement, conduct of the spouses, or inferred from the circumstances, without the need for an express agreement].) That system made it too easy for spouses to change the character of their property, and caused uncertainty over the characterization of property, because a transmutation could be proved by evidence of an oral agreement or inferred from their conduct. (*Valli, supra,* 58 Cal.4th at p. 1401.)

Now, property is characterized objectively. It is community property under section 760 if it was acquired during marriage unless a statute makes it separate. No attempts are made to decipher the intentions of the spouses in characterizing property. This simplifies the characterization process and provides certainty whether property is community or separate. Any change in character must be evidenced by an express declaration in writing by the spouse adversely affected. Section 852 applies to agreements between spouses that change the character of property, and also when they acquire title from a third party. (*Valli, supra,* 58 Cal.4th at pp. 1404-1405 [rejecting purported exemption to section 852 for spousal purchases from third parties].) Therefore, the form of title selected by spouses when they acquire property from a third party no longer governs whether the property is community or separate, absent an express declaration characterizing it in the deed or a written agreement changing character.

Consistent with that approach, section 2581 was enacted after *Lucas*, creating a presumption of community property when spouses acquire property in joint form, which may be rebutted only by written evidence that the property is separate. (§ 2581.)[4]

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[4] Section 2581 states "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

Section 2581 was enacted in 1983 as Civil Code section 4800.1, which "expanded the joint title presumption of Civil Code former section 5110 for single-family residences to all property acquired during marriage in joint form. [Citation.]" (*Bonvino, supra,* (2015) 241 Cal.App.4th 1411, 1430; fmr. Civ. Code, § 4800.1 repealed and replaced by Fam. Code, § 2581 by Stats. 1992, c. 162 (A.B. 2650), § 3, operative Jan. 1, 1994.)

In enacting section 2581, the Legislature explained its reasons for creating the joint form presumption:

> (a) It is the public policy of this state to provide uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form....
>
> (b) The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses' interests in property they hold in joint title, but rather, have created confusion as to which law applies to property at a particular point in time, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property....
>
> (c) Therefore, a compelling state interest exists to provide for uniform treatment of property. Thus, ... [section 2581 applies] to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property, and [applies] in all

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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."

> proceedings commenced on or after January 1, 1984 [except for agreements or judgments made before January 1, 1987]....

(§ 2580.)

Appellants point out that section 2581 applies "[f]or the purpose of division of property on dissolution of marriage or legal separation" which has no application to them because they are not involved in such a proceeding. (Opening Brief,[5] p. 37, quoting § 2581, subd. (a).) Based on the limiting language in section 2581, Appellants conclude that joint tenancy property must be separate unless it is being divided in a divorce or legal separation action (in which case it will be community). They claim that joint tenancy creates "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. [Citation.]" (Opening Brief, p. 19.) Because section 2581's presumption of community property applies only upon division of property in a divorce or separation action, they reason that joint tenancy property must be separate for all other purposes. That is not correct. Sections 760 and 852 apply even when section 2581 does not.

In *Valli,* this Court stated the language in section 2581 "suggests that rules that apply to an action between the spouses to characterize property acquired during the marriage do not

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[5] Opening Brief refers to Petitioner's Brief filed 2/28/19.

necessarily apply to a dispute between a spouse and a third party." (*Valli, supra,* 58 Cal.4th at p. 1412, conc. op. of Chin, J.)

Just because the community property presumption in section 2581 is apparently limited to an action for marital dissolution or legal separation does not mean that property held in joint tenancy is *separate* for all other purposes, until divided in such an action. The legislative intent for section 2581 was to avoid "confusion as to which law applies to property at a particular point in time, depending on the form of title" and provide "uniform treatment of property" so spouses "have reliable expectations as to the characterization of their property...." (§ 2580, subds. (a), (b) & (c).) Treating spouse's interests in joint tenancy property as separate during their marriage, then magically converting it to community at the moment a family court divides their community estate in a divorce or separation proceeding would be contrary to the public policy statements in section 2580, ignore the community property rule in section 760, and render meaningless the transmutation requirements in section 852.

Appellants cite to *Estate of Mitchell* (1999) 76 Cal.App.4th 1378 (*Mitchell*) for the proposition that they have equal separate interests in the properties they acquired during marriage because they took title as joint tenants. (Opening Brief, pp. 28-29; see also Reply Brief, pp. 22-23 [property acquired in joint tenancy is presumed to be separate, overriding the community property rule].) *Mitchell* mistakenly relied on prior law in reaching that conclusion. The *Mitchell* court stated:

> 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* (1999) 76 Cal.App.4th 1378, 1385.)

The comments in *Mitchell* about the character of joint tenancy property should be disapproved as an incorrect statement of current law, and were also *dicta*. The question on appeal in *Mitchell* was whether a spouse's unilateral termination of the right of survivorship in a joint tenancy was effective because the severance occurred during a divorce action between the spouses. The spouses in *Mitchell* acquired properties during marriage between 1986 and 1990 in joint tenancy. While a marital dissolution proceeding was pending, the husband recorded a declaration of severance of the joint tenancies, and died thereafter. In a probate proceeding brought by the son of the deceased husband, the trial court ruled that the husband had no right to sever the joint tenancies due to the automatic temporary restraining orders (ATROs) in the divorce action. (See § 2040, subd. (a)(2) [restraining spouses from transferring or disposing of

property, etc. without consent of the other party or court order].) The Court of Appeal in *Mitchell* reversed, holding that the severance was effective and there was no violation of the ATROs because the termination of the right of survivorship did not change either party's ownership interests in the properties. That holding was correct.

But the statements in *Mitchell* about joint tenancy being separate property were erroneous and unnecessary to resolving the issue on appeal. There was no need for the *Mitchell* court to characterize the properties to decide if the severance violated the ATROs because those orders apply to "*any property* ..., whether community, quasi-community, or separate...." (§ 2040, subd. (a)(2), emphasis added.) Therefore, the comments by the *Mitchell* court that property acquired by spouses in joint tenancy results in separate property were *dicta* and have no force as precedent. (See 9 Witkin, Cal. Proc. (5th Ed. 2008) Appeal, § 509 [*dicta* is not precedent]; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 287 [a decision is authority only for issues actually involved and decided in the opinion].)

Beyond being *dicta*, the *Mitchell* court misstated the law in its opinion by relying on outdated concepts of community property and misconstruing Family Code section 750 in concluding that spouses create separate interests when they acquire property in joint tenancy. The first case *Mitchell* cited is *Tomaier, supra,* 23 Cal.2d 754, which was decided under prior law that implied the existence of an agreement between spouses to transmute their community interest in property acquired in

joint tenancy, unless there was proof of an oral agreement or understanding they intended to maintain their community interest. (*Tomaier, supra,* 23 Cal.2d at p. 757 ["evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property"]; see also *Cummins v. Cummins* (1935) 7 Cal.App.2d 294, 304 [same] and *Estate of Blair* (1988) 199 Cal.App.3d 161, 167 [same as to transmutations prior to 1985].)

The law changed after *Tomaier* was decided by enactment of section 852. Still, *Mitchell* relied on *Tomaier* in implying a transmutation when spouses acquire property in joint tenancy, contrary to section 852, which does not allow evidence of an oral agreement, understanding or conduct to prove a transmutation. (See § 852, subd. (a); *Estate of MacDonald* (1990) 51 Cal.3d 262, 272.) Also, *Mitchell's* reliance on *Tomaier* in concluding that spouses cannot hold a community interest in property titled in joint tenancy was not even a correct description of *Tomaier*. (See *Mitchell, supra,* 76 Cal.App.4th at p. 1385.) Under *Tomaier*, a spouse could rebut the common law presumption of separate property by proof of an oral agreement or understanding that the spouses intended to maintain their community interest in joint tenancy property. (*Tomaier, supra,* 23 Cal.2d at p. 757 [evidence of intent to maintain community interests admissible to rebut common law joint tenancy presumption].)

The citation in *Mitchell* to *Meyer v. Thomas* (1940) 37 Cal.App.2d 720 (*Meyer*) to characterize joint tenancy property as separate suffers the same problem because it was also decided

under prior law. (See *Meyer v. Thomas, supra,* 37 Cal.App.2d at pp. 723–724 ["holding of property in joint tenancy indicates that the property is not community property" absent evidence of a contrary intention].)

The *Mitchell* court's reliance on a footnote in *Estate of Murray* (1982) 133 Cal.App.3d 601 (*Murray*) for the same point was misplaced. *Murray* stated that the "decedent's interest in property held by the decedent and his spouse as tenants-in-common is the decedent's separate property [Citations]." (*Murray, supra,* 133 Cal.App.3d at p. 604, fn. 3.) That was true then, as it would be now, because *Murray* was describing the ownership of property after a spouse had died, not what the character was while they were living.

In *Murray*, the husband attempted to terminate a joint tenancy in the residence he owned with his wife during their divorce case. The husband then made a will leaving his entire estate to his daughter. (*Murray, supra,* 133 Cal.App.3d at p. 603.) The husband died while the divorce was pending. The wife petitioned the probate court for a probate homestead in the residence and the court found that the severance of the joint tenancy was ineffective. (*Murray, supra,* 133 Cal.App.3d at p. 604, fn. 3.) The court granted the wife an "in fee" interest in the residence. (*Id.*, at p. 603.) The issue on appeal was whether the surviving spouse's right to a probate homestead was a vested right of ownership or only gave rise to a life estate. The *Murray* court held that the trial court erred in granting a "fee interest" to the surviving spouse, and limited her to a life estate. (*Murray,*

supra, 133 Cal.App.3d at p. 605.) *Murray* noted that joint tenancy is not subject to a probate homestead because it is not part of the "estate" (*Murray, supra,* 133 Cal.App.3d at p. 604, fn. 3), but the daughter "did not quarrel with" the wife's claim for a homestead so the *Murray* court instructed the probate court to grant one to the wife (*Id.*, at p. 601). It stated: "The surviving spouse is entitled to a homestead in the community property even where the decedent disposed of his half-interest in the community property by will." (*Id.*, at p. 604.)

On characterization, the *Murray* court repeatedly refers to the joint tenancy residence as "community property." (See, e.g., *Murray, supra,* 133 Cal.App.3d at p. 602 ["In this appeal we must decide whether a probate homestead in community property set aside to the surviving spouse should have been limited to a life estate"].) The portion of the opinion that *Mitchell* relied on was taken out of context. In footnote 3 to *Murray*, the court stated "a family home taken in joint tenancy *but later converted to tenancy-in-common* is separate property.... [Citations.]" (*Murray, supra,* 133 Cal.App.3d at p. 604, fn. 3, emphasis added.) The *Mitchell* court relied on that footnote to support its conclusion that joint tenancy property is separate, even though the *Murray* court said the joint tenancy property it was dealing with was community. Therefore, *Murray* is not precedent for the proposition relied upon in *Mitchell* that joint tenancy creates separate interests.

As further justification for its holding, the *Mitchell* court cites to Family Code section 750, which allows spouses to "co-own property as joint tenants, tenants in common, or community

property. [Citation]." (*Mitchell, supra,* 76 Cal.App.4th at p. 1385.)[6] The *Mitchell* court concludes: "Property cannot be held both as community property and in either a joint tenancy or a tenancy in common at the same time"—citing *Tomaier, supra,* 23 Cal.2d at p. 758 and Civil Code section 682.[7] (*Mitchell, supra,* 76 Cal.App.4th at p. 1385.) That was a misstatement of the law.

Spouses may have a community interest in property titled in joint tenancy. As a practical matter, spouses must select how they will hold their interests when they acquire property (e.g., in joint tenancy or as tenants in common). Section 750 merely lists the ways spouses may hold property jointly.[8] Civil Code section 682 does the same, describing how property may be owned by "several persons" such as either a "joint interest" or a "community interest of spouses." (Civ. Code, § 682, subds. (a) & (d).) Neither statute characterizes property acquired by spouses jointly as separate based on the form of title, or precludes them

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[6] Section 750 states: "Spouses may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship." (§ 750.)

[7] Civil Code section 682 states: "The ownership of property by several persons is either: (a) Of joint interest. (b) Of partnership interests. (c) Of interests in common. (d) Of community interest of spouses." (Civ. Code, § 682.)

[8] Section 750 is not the exclusive means by which spouses could hold property jointly. As discussed, spouses may also hold property jointly in trust, which is not mentioned in the statute. (See § 761, sub. (b) [community property held in revocable trust remains community property].)

from having a community interest in jointly-held property. This is evident by a few sections later in the Civil Code which states:

> Community property is property that is community property under Part 2 (*commencing with Section 760*) of Division 4 of the Family Code.

(Civ. Code, § 687, emphasis added.) Had the Legislature intended its statements in Civil Code section 682 or Family Code section 750 to affect the characterization of property it would not have clarified that the test for community property is in section 760.

The citation to *Tomaier* for *Mitchell's* conclusion that property cannot be held both as community property and in joint tenancy was, again, relying on prior law. (*Mitchell, supra,* 76 Cal.App.4th at p. 1385.) In *Tomaier*, the Court stated: "If the evidence establishes that the property is held as community property ... it cannot also be held in joint tenancy, for certain incidents of the latter would be inconsistent with incidents of community property." (*Tomaier, supra,* 23 Cal.2d at p. 758.) The comment in *Tomaier* refers to the right of survivorship that exists as to joint tenancy property (see *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155), but does not exist for community property absent a will, trust, or intestate succession (see Prob. Code, §§ 100, subd. (a) [effect of death on community property] & 13500 [right of spouse to inherit].) It appears the *Tomaier* court was relying on the law in effect that spouses impliedly agree to create separate interests when they acquired property in joint tenancy.

The right of survivorship in joint tenancy property does not preclude a community interest in that property. Before the death

of a joint tenant, either of them may unilaterally terminate the joint tenancy, resulting in a tenancy in common. (*Tenhet v. Boswell, supra,* 18 Cal.3d at p. 155; Civ. Code, § 683.2 [procedure for terminating joint tenancy].) "Thus, a joint tenant's right of survivorship is an expectancy that is not irrevocably fixed upon the creation of the estate [citation]; it arises only upon success in the ultimate gamble—survival—and then only if the unity of the estate has not theretofore been destroyed...." (*Tenhet v. Boswell, supra,* 18 Cal.3d at pp. 155–156.) A spouse must die for the right of survivorship in joint tenancy property to have any effect. It is only after the death of a spouse that there is a difference between joint tenancy property and other forms of community property because the surviving spouse automatically receives the deceased spouse's one-half interest in joint tenancy property. That is similar to other ways spouses provide rights of survivorship for each other in community property. (See Prob. Code, § 13500 [right of surviving spouse to inherit community property by will or through intestate succession]; see also Civ. Code, § 682.1 [form of title for spouses to acquire real estate as "community property with right of survivorship"].)

When spouses grant each other revocable survivorship rights in community property they do not transmute that property to jointly-held separate property. The act of providing a right of survivorship is not an express declaration changing the character of the property in which the right is given, at least before a death occurs. Family Code section 761 makes this clear by allowing spouses to transfer community property to the

trustee of a revocable trust for their benefit while maintaining their community interest in that property during their lifetime. (§ 761, sub. (a) ["community property that is transferred in [a revocable] trust remains community property during the marriage..."].) Likewise, spouses can hold property in joint tenancy and retain the character of that property as community. The chance one spouse will survive the other and receive the entire interest in joint tenancy property is a consequence of the right of survivorship, not a reflection of the character of the property being separate.

Appellants have built their argument on the comments in *Mitchell*. This Court should disapprove *Mitchell* and other cases that have concluded, despite sections 760 and 852, that spouses create separate property by acquiring property during marriage as joint tenants.[9] This Court should hold that property acquired by spouses during marriage in joint tenancy is community property, except as otherwise provided by statute.

(C) Family Code sections 760 and 852 are not overridden by Evidence Code section 662.

The question presented by the 9th Circuit asks whether the form of title presumption in Evidence Code section 662[10] conflicts

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[9] See *Raney v. Cerkueira* (Cal. Ct. App., June 14, 2019, No. A152549) 2019 WL 2484007, at p. 6 [quoting *Mitchell* that joint tenancy results in separate interests] and *In re Summers* (9th Cir. 2003) 332 F.3d 1240, 1243-1245 [quoting *Mitchell* that spouses cannot hold property as community property and in joint tenancy, so taking title as joint tenants "rebutted the community property presumption"].

[10] Evidence Code section 662 provides: "The owner of the legal

with the community property rule in Family Code section 760. These statutes do not conflict even if both were applied to joint tenancy property held by spouses.

When spouses acquire property during marriage in joint tenancy, it is characterized as community under section 760, giving them an equal beneficial interest in that property, which is the same as their ownership of record as joint tenants. (*Cf.*, Civ. Code, § 683, subd. (a) [joint tenancy property is "owned by two or more persons in equal shares"] with Fam. Code, § 751 [spouses have "present, existing, and equal interests" in community property].) Because legal title represents the beneficial interests of spouses when they hold community property in joint tenancy, there is no conflict between the form of title presumption and the community property rule.

Driving this dispute is not a conflict with section 662, but Appellants' reliance on outdated law that the act of taking title in joint tenancy by spouses to property they acquire during marriage is a purported transmutation of their community interests to jointly-held separate property.[11]

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title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." (Evid. Code, § 662.)

[11] This Court may wish to restate the question by the 9th Circuit. (See Cal. Rules Ct., rule 8.548(f)(5) ["At any time, the Supreme Court may restate the question or ask the requesting court to clarify the question"].) The underlying issue is whether the acquisition of property in joint tenancy by spouses during marriage is community property in a dispute over the characterization of that property between a spouse and his or

The form of title presumption never applies in a question of characterization of property. This Court held in *Valli*, for purposes of a marital dissolution, that property is characterized according to its time of acquisition under the community property rule, not using the form of title presumption. (*Valli, supra,* 58 Cal.4th at p. 1406.) Because *Valli* involved a marital dissolution action, this Court had no occasion to decide whether the form of title presumption could apply to characterize property in a dispute between a spouse and a creditor. (*Valli, supra,* 58 Cal.4th at p. 1413, conc. op. by Chin, J.) As this Court noted, the purpose of section 662 is to promote public policy favoring "the stability of titles to property." (*Id.*, at p. 1410, quoting Evid. Code, § 605.) "That policy is largely irrelevant to characterizing property acquired during the marriage in an action between the spouses." (*Valli, supra,* 58 Cal.4th at p. 1410, conc. op. by Chin, J.)

Similarly, *In re Marriage of Haines* (1995) 33 Cal.App.4th 277 explained that concerns over the stability of titles "are lessened in characterization problems arising from transmutations that do not involve third parties or the rights of creditors." (*Haines, supra,* 33 Cal.App.4th at pp. 294–295.)

In re Marriage of Brooks & Robinson (2008) 169 Cal.App.4th 176 (*Brooks*) "concerned the rights of a third party that purchased property in good faith not knowing of any possible community property claims." (*Valli, supra,* 58 Cal.4th at p. 1413, conc. op. by Chin, J.) The property in *Brooks* was a residence

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her creditor.

acquired by the wife during marriage "solely in her name without reference to the marital relation." (*Brooks, supra,* 169 Cal.App.4th at p. 179.) After separation, the wife had sole possession of the residence and, shortly before filing for divorce, she sold it to a third party. The husband sought to join the purchaser in the divorce action for a declaration that the residence was community and to set aside the transaction because he had not joined in the conveyance. (*Brooks, supra,* 169 Cal.App.4th at p. 180.) The trial court in *Brooks* found that the purchaser was a bona fide purchaser who held title free of the husband's claims. (*Brooks, supra,* 169 Cal.App.4th at p. 183.) Under the law, community real property cannot be conveyed unless both spouses join in the execution of the deed (§ 1102, subd. (a)), but a deed from one spouse to a purchaser is presumed valid if the purchaser acted "in good faith without knowledge of the marriage relation..." (*id.*, subd. (c)(2)).

The Court of Appeal in *Brooks* affirmed, stating: "The affirmative act of specifying that title be held in [solely in the wife's name] removed the property from the general presumption of community property and made the Property presumptively [the wife's] separate property." (*Brooks, supra,* 169 Cal.App.4th at p. 190.) The *Brooks* court then applied the form of title presumption and concluded that he had failed to present clear and convincing evidence to rebut that presumption. (*Ibid.*)

It is unclear why *Brooks* characterized the property. No claim between the spouses was presented in *Brooks*. "[T]he sole dispute was between a third party, to whom the wife had sold

certain real property, and the husband, who claimed an interest in the property and sought to set aside the sale." (*Valli, supra,* 58 Cal.4th at p. 1413, conc. op. by Chin, J.) The *Brooks* court could have affirmed the denial of the husband's claims against the third party without characterizing the residence. The trial court found that the buyer was a bona fide purchaser for value who did not know of the marital relation, so valid title was transferred to the buyer even if the property was community. (*Brooks, supra,* 169 Cal.App.4th at p. 183; see § 1102, subd. (c)(2).) If the residence was the wife's separate property, she could have transferred valid title without the consent of the husband. (See § 752 ["Except as otherwise provided by statute, neither spouse has any interest in the separate property of the other"].) Therefore, the comments in Brooks about the characterization of the property appear to be *dicta.*

In *Valli,* this Court disapproved of *Brooks* and *In re Summers* (9th Cir.2003) 332 F.3d 1240 that also relied on section 662 as a purported exemption from the transmutation requirements of section 852, to the extent those cases purport to apply to the characterization of property between spouses. This Court stated:

> Neither decision attempts to reconcile such an exemption with the legislative purposes in enacting those requirements, which was to reduce excessive litigation, introduction of unreliable evidence, and incentives for perjury in marital dissolution proceedings involving disputes regarding the characterization of property. Nor does either

> decision attempt to find a basis for the purported exemption in the language of the applicable transmutation statutes.

(*Valli, supra,* 58 Cal.4th at p. 1405.)

No opinion was expressed in *Valli* whether *Brook's* application of section 662 to a dispute between a spouse and a third party was proper. (*Valli, supra,* 58 Cal.4th at p. 1413, conc. op. by Chin, J. [noting *Brooks* "might have been correct to apply section 662 to an action between one of the spouses and a third party bona fide purchaser. That question is not implicated here, and I express no opinion on it"].) Justice Chin explained: "Unlike in the case of an action between the spouses, [the policy of promoting the stability of titles underlying section 662] *does* play a role in a dispute between a spouse and an innocent third party purchaser." (*Ibid.*, emphasis in original.)

That is true, but here the spouses hold title jointly, unlike in *Brooks* where title was held solely in the name of one spouse. With joint tenancy, both spouses must execute and deliver a deed to convey their entire interest in the property; a deed by only one of them would only transfer that spouse's one-half interest in the property. (See 3 Miller & Starr, Cal. Real Estate (4th ed. May 2019) § 8:16; *Gonzales v. Gonzales* (1968) 267 Cal.App.2d 428, 437 [conveyance by one joint tenant].) There is no risk that a purchaser of property held by spouses in joint tenancy would be confused into thinking the property was anything other than community. It would be unreasonable for a purchaser to accept a deed from only one of the joint tenants, believing that spouse had

conveyed the other spouse's one-half interest in the property. Therefore, the stability of titles is not at risk by characterizing property acquired by spouses in joint tenancy as community property in a dispute involving a third party purchaser.

Even when property is held solely in the name of one spouse, a bona fide purchaser for value, who acts in good faith without knowledge of the marital relationship, acquires presumptively valid title to the property from the owner of record, despite the lack of joinder by the other spouse. (§ 1102, subd. (c)(2); see *Andrade Development Co. v. Martin* (1982) 138 Cal.App.3d 330 [conveyance may be set aside when purchaser knows of marital relationship].) Because bona fide purchasers of community property are protected under section 1102, there is no reason to limit sections 760 and 852 to interspousal disputes. The community property rule and transmutation requirements are part of the fabric of the community property system that apply in any question of characterization, whether between the spouses or as between one spouse and a creditor.

Appellants want their joint tenancy property characterized as jointly-held separate property, so a creditor of one of them cannot reach the other's half. (Cf. § 910 [community estate generally liable for debts of either spouse].) The same property cannot be both community and separate at once. It is one or the other. The result Appellants seek is what this Court said was impossible in *Valli*:

> Obviously, both presumptions [in section 760 and section 662] cannot be given effect. The life

> insurance policy cannot both be presumed to be community property (because acquired during the marriage) and to be wife's separate property (because placed in her name). One statutory presumption must yield to the other.

(*Valli, supra,* 58 Cal.4th at p. 1408, conc. op. by Chin, J.)

III. CONCLUSION

Property acquired during marriage by spouses in joint tenancy is characterized as community per section 760 unless a statute states it is separate. Section 662 does not affect characterization, so it is not an exception to section 760. No transmutation occurs under section 852 when spouses take title in joint tenancy, unless the deed itself or a written agreement provides that the property is separate. These rules apply whether the dispute is between the spouses or a spouse and a third party.

Dated: July 12, 2019

WALZER MELCHER LLP

By: _____

Christopher C. Melcher
Proposed Amicus Curiae

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Dated: July 12, 2019

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Christopher C. Melcher
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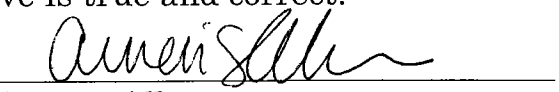

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