Supreme Court Case No. S252473

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re CLIFFORD ALLEN BRACE, JR.

9th Cir. Case No. 17-60032

STEVEN SPIER, CHAPTER 7 TRUSTEE,

Plaintiff and Respondent,

v.

CLIFFORD BRACE, JR. AND AHN BRACE

Defendants and Petitioners.

APPLICATION OF GRACE GANZ BLUMBERG FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS CLIFFORD BRACE, JR. AND AHN BRACE

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS CLIFFORD BRACE, JR. AND AHN BRACE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to rule 8.520(f) of the California Rules of Court, Grace Ganz Blumberg respectfully requests permission to file the attached brief in support of Defendants and Petitioners Clifford Brace, Jr. and Ahn Brace. This application is timely as it is filed within thirty days after the filing of the last reply brief.

IDENTITY OF AMICUS CURIAE

Amicus curiae Grace Ganz Blumberg is Distinguished Professor of Law Emerita at the UCLA School of Law. Professor Blumberg has been regularly teaching and writing in the area of California community property law since 1980. She is the author of COMMUNITY PROPERTY IN CALIFORNIA (7th ed. 2016), a case book now in its seventh edition. She is the annotator of Blumberg, CALIFORNIA FAMILY CODE ANNOTATED, published annually by West. She was a reporter for the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002). For her distinguished work on the PRINCIPLES, she was named an R. Ammi Cutter Reporter by the Institute. Professor Blumberg is the author of many law review articles in the areas of family law and community property. She has also, for many years, written bi-monthly commentary for California Family Law Monthly (LexisNexis Matthew Bender). She has previously submitted two amicus curiae briefs to the California Supreme Court: *In re Marriage of Valli*, 58 Cal.4th 1396 (2014), in support of appellant Frankie Valli; and *Ceja v. Rudolph & Sletten*, Inc., 56 Cal.4th 1113 (2013), in support of Nancy Ceja.

STATEMENT OF INTEREST

This appeal presents a fundamental issue concerning California community property law. How should property titled in joint tenancy be characterized when a married couple purchased the property with community property funds? Many, if not most, married couples take joint tenancy title to the family home even though they have purchased the home with community property funds. Whether a surviving spouse has a right of survivorship at the death of a spouse and the extent

of each spouse's exposure to claims of the other spouse's creditors depend on whether the property titled in joint tenancy is characterized as joint tenancy or community property. Amicus seeks to clarify the question so that California community property law will continue to develop in a manner that is consistent with its basic principles as well as the reasonable expectations of those many married couples.

NEED FOR FURTHER BRIEFING

Amicus is well versed in current community property law and, as a legal scholar, is also conversant with the history of California community property law and real property law. An historical examination of the issue presented by this case promises to illuminate the present controversy and furnish a solid foundation for its resolution.

AUTHOR AND MONETARY CONTRIBUTION

Pursuant to Rule 8.520(f), Amicus confirms that no other party or counsel has authored this brief in whole or in part. No party, counsel, person, or entity has made a monetary contribution to the preparation of this brief, except Amicus.

Accordingly, Amicus respectfully requests permission to file the proposed brief in support of Defendants and Petitioners Clifford Brace, Jr. and Ahn Brace.

Dated: 7/2/2019

Respectfully submitted,

Grace Ganz Blumberg

Distinguished Professor of Law Emerita

UCLA School of Law

By:

Grace Ganz Blumberg

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I. SUMMARY OF THE ARGUMENT

The Ninth Circuit Appellate Panel invited this court to reformulate its certified question. The issues can be narrowed. It is not germane that the case arises in bankruptcy court or that the spouses' interests are aligned. Bankruptcy courts are required to look to the law of California to determine the character of property.[1] Thus, the matter before this court is the content of California law. Also immaterial are California Evidence Code section 662 and California Family Code section 2581. The issue is whether the spouses' acceptance of joint tenancy deeds to the purchased realty transmuted their property from community property to joint tenancy. Because some of the realty was purchased before 1985 and some of the realty may have been purchased after 1984,[2] the issue must be resolved with reference to pre-1985 and post-1984 transmutation rules. Under either set of legal rules, the use of community property funds to purchase realty, title to which the spouses took in joint tenancy, worked a transmutation to joint tenancy.

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[1] *In Re Farmers Markets*, 792 F.2d 1400, 1402 (9th Cir. 1986).
[2] *In re Brace*, 908 F.3d 531, 534 (9th Cir. 2018).

II. FACTS AND HISTORY OF THE CASE

The facts on appeal are undisputed. A married couple purchased several parcels of realty with community property funds. They took title to each parcel in joint tenancy. The husband declared bankruptcy. The bankruptcy trustee included both spouses' one-half interests in the realty in the bankrupt's estate on the ground that it was community property despite the form of title. The couple responded that a non-debtor joint tenant's one-half separate property interest in realty is not includible in a debtor spouse's bankruptcy estate. In an unpublished opinion, the bankruptcy trial court held for the trustee. Relying on this court's recent decision in *In re Marriage of Valli*, 58 Cal.4th 1396, 324 P.2d 274, 171 Cal.Rptr.3d 454 (2014) , the Bankruptcy Appellate Panel of the Ninth Circuit concluded that, as in *Valli*, transmutation requirements had not been met.[3] The couple appealed to the Ninth Circuit Court of Appeals. Recognizing that the treatment of joint tenancy title has important ramifications for California debtor-creditor law as well as surviving-spouse law, the Ninth Circuit appellate panel certified the question to this court.[4]

[3] *In re Brace*, 566 B.R. 13, 21-28 (9th Cir. Bankr. App. Panel 2017).
[4] *In re Brace*, 908 F.3d 531 (9th Cir. 2018).

III. TRANSMUTATION LAW IN CALIFORNIA

A. California Family Code Section 760 Definition of Community Property Distinguished from the Judicial Presumption that Property Acquired During Marriage is Community Property

Family Code sections 760 and 770 are definitional statutes. Section 760 states that, *except as otherwise provided by statute*, community property is all property acquired during marriage that is not separate property, as defined in section 770. When property has been acquired during marriage and the issue is whether it is section 770 separate property, California courts apply an evidentiary presumption that the property is community property.[5] Here it is undisputed that the purchase funds were community property.

B. California Family Code Section 721 Contractual Freedom of Married Couples to Alter, or Transmute, the Character of Their Property

Section 721 provides that, subject to the fiduciary duties that spouses owe each other, "either spouse may enter into any transaction with the other...respecting property, which either might if unmarried." This provision authorizes California spouses to agree to change the character of their property from community to separate and from separate to community.[6] Section 721 is a statutory exception to the section 760 definition of community property. The issue is whether the married couple validly changed, or transmuted, the character of their property.

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[5] *Fennell v. Drinkhouse*, 131 Cal 447, 63 P. 734 (1901).

[6] That right is now specifically codified in Family Code section 850.

Invocation of the evidentiary presumption that property acquired during marriage is community property adds little to the analysis. If the transmutation was valid, the realty is held as joint tenancy. If not, it retains the community property character of the purchase funds.

C. Satisfaction of Pre-1985 Transmutation Requirements when a Married Couple Purchased Real Property with Community Property Funds and Took Title in Joint Tenancy Title

Until 1985 there was no statutory regulation of transmutation. California courts developed a liberal doctrine of transmutation. A transmutation could be oral or written. It could be express or implied. See, for example, *Estate of Raphael*, 91 Cal.App.2d 931, 206 P.2d 301 (1949) and cases discussed therein. Family Code section 750 provides that married persons may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship.[7] In 1977 or 1978, the parties took title to their residence in joint tenancy. In *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932), this court held:

> [F]rom the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. 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 but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights

[7] "Community property with a right of survivorship" was added to section 750 in response to the 2000 enactment of that new form of ownership, now codified at Civil Code section 682.1.

> of both husband and wife to have them in good faith enter into a valid engagement of this character and, following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy. Id. at 773.

Thus, under the law prevailing when the parties took title to their residence (the Redlands property), they hold a joint tenancy, each spouse having a one-half separate property interest with a right of survivorship.

D. Satisfaction of Post-1984 Transmutation Requirements When a Married Couple Purchases Real Property with Community Property Funds and Takes Title in Joint Tenancy

The bar and legislature expressed concern that "easy" transmutation encouraged fraud, resulted in unknowing relinquishment of spousal property interests, and generated undesirable and unnecessary litigation.[8] Effective January 1, 1985, transmutation of real or personal property has been subject to Family Code sections 850 to 853, which apply prospectively from that date.[9] Thus, the statute does not apply to the parties' residence (the Redlands property). Because the record does not indicate *when* the parties titled the San Bernardino or Mohave realty in joint tenancy, it is necessary to apply pre-1985 and post-1984 law to those two properties. Although case law makes it clear that both joint tenancy titles would satisfy pre-1985 transmutation law, California courts have never

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[8] *Estate of MacDonald*, 51 Cal.3d 262, 269, 794 P.2d 911, 272 Cal.Rptr. 153 (1990).
[9] Subsection (e) of section 852 states "This section to does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply."

explicitly addressed the precise question of whether spouses satisfy post-1984 transmutation requirements when they purchase realty with community property and take title in joint tenancy.[10] Nevertheless, there is one closely related case, *Estate of Bibb*, 87 Cal. App.4th 461, 468-470, 104 Cal.Rptr.2d 415 (2001), which is discussed below.

Section 850 provides that married persons may, *by agreement or transfer*, with or without consideration, transmute community property to separate property of either spouse, transmute separate property of either spouse to community property, or transmute separate property of one spouse to separate property of the other spouse. Section 852(a) provides that a transmutation of real or personal property is not valid unless it is 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." The inclusion of "or accepted by the spouse" indicates that the legislation contemplated grant deeds, which are delivered to purchasers, according to their specifications, upon tender of the purchase price. Clearly, a grant deed is in writing and is accepted by the purchaser or purchasers. The remaining issue concerns the requirement of an express declaration by the spouse

[10] In *Brace*, supra at 566 B.R. 22, the Ninth Circuit Bankruptcy Appellate Panel cited only two cases holding that *Valli* requires the conclusion that taking title in joint tenancy does not satisfy the express declaration requirement of section 852(a). Both cases were decided by federal bankruptcy trial courts. *In re Obedian*, 546 B.R. 409 (Bankr. CD Cal. 2016), and In re Collins, 2016 WL 4570413 (Bankr. S.D. Cal 2016). Only *Obedian* was published.

whose interest is adversely affected. There are two possible treatments of this requirement. The first is that the express declaration requirement has been satisfied. The second is that, in any event, neither spouse's interest is *adversely* affected when they agree to take one rather than another form of joint-and-equal title.

(i) The express declaration requirement is satisfied when a couple uses community property purchase funds and chooses to take title in joint tenancy.

In *Estate of MacDonald*, 51 Cal.3d 262, 264, 272 Cal.Rptr. 155, 794 P.2d 911 (1990), this court held that a writing is not an express declaration for purposes of section 852(a) "unless it expressly states that the characterization of ownership of the property is being changed." Id. at 264. *MacDonald* emphasized that it is not necessary that an adversely affected party understand the precise nature of what he is relinquishing, but rather simply that he is giving up some property interest.[11]

Siberell[12] anticipated and answered the question with respect to joint tenancy title: "From the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property...." The two forms of joint and equal ownership are mutually exclusive.

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[11] *MacDonald* held that a bank consent form signed by decedent wife did not satisfy the "express declaration" requirement because it did not state that she was giving anything up, noting that "the paragraph signed by decedent here would have been sufficient if it had included an additional sentence reading : "I give to the account holder any interest I have in the funds deposited in this account." *MacDonald*, supra, 51 Cal.3d at 273.

[12] *Siberell v. Siberell*, supra, 214 Cal. 767, 773.

With a joint tenancy, each spouse owns a one-half separate property ownership interest with a right of survivorship. Either spouse may alienate his one-half interest and terminate the right of survivorship. A spouse's one-half interest is not subject to the other spouse's creditors. Community property ownership is indivisible. Neither spouse alone can alienate community realty. Unlike a joint tenancy, community property title entails no right of survivorship. All the community property may be reached by a creditor of either spouse. Joint tenancy title has long been advised by realtors and preferred by married couples for its right of survivorship: upon the death of a spouse, title passes automatically to the surviving spouse. When two alternative forms of ownership are mutually exclusive, the choice of one rather than the other necessarily entails giving up the incidents of the other form of ownership. Whether spouses understand all the incidents of joint tenancy, as opposed merely to the right of survivorship, when they opt to secure that incident of a joint tenancy, they are necessarily giving up the incidents of all mutually exclusive alternative forms of co-ownership.

Valli[13] is readily distinguishable. When Mr. Valli used community property funds to purchase an insurance policy on his life, he named his wife the beneficiary and owner of the policy. At divorce, his wife claimed the policy as her separate property. The ultimate issue was whether her husband's choice to take title in her name alone satisfied section 852(a) requirements. Specifically, did the

[13] *In re Marriage of Valli*, supra, 58 Cal.4th 1396.

title expressly and unequivocally indicate that Mr. Valli intended to give up his one-half community property interest in the policy? This court properly concluded that it did not. The policy remained the community property of the Valli marriage. Community property may be held in either spouse's name alone. For many reasons, including convenience of management, a spouse may take community property in his name alone or in his spouse's name alone. When property is titled in one spouse's name alone, the true character of ownership is uncertain. It could be either community property or separate property. Title to property in one spouse's name alone does not signify that the other spouse has given up any community property interest in the property. By contrast, when spouses agree to take title in one joint-and-equal form, they are necessarily relinquishing any other joint-and-equal form of ownership. Title is entirely unambiguous.

In *Valli*, this court specifically disapproved the holding of *In re Summers*, 332 F.3d 1240 (9th Cir. 2003), a bankruptcy proceeding interpreting California community property law.[14] In *Summers*, a California couple used community property funds to purchase realty from a third party. They took title in joint tenancy. *Summers* held that California transmutation requirements did not apply when a married couple used community property funds to purchase real property from a third party. *Valli* disapproved the holding of *Summers* and held, to the

[14] *Valli*, supra, *In re Marriage of Valli*, 58 Cal.4th 1396, 1405-1406.

contrary, that transmutation requirements do apply to spousal purchases from third parties.[15] Importantly, *Valli* did not disapprove the *Summers* conclusion that the property was a joint tenancy when the parties used community property purchase funds and took title as joint tenants. *Valli* never addressed that issue. In other words, *Summers* could have reached the correct conclusion for the wrong reason. The transmutation statutes did apply, and they were satisfied.

While *Estate of Bibb*[16] is factually distinguishable, its holdings are germane. In *Bibb*, a wife claimed that her deceased husband had transferred several assets to her during his lifetime. The issue was whether those transfers satisfied section 852(a). *Bibb* held that registration of the husband's separate property automobile in the name of "husband or wife" was not a valid transmutation because the DMV printout was not signed by the adversely affected spouse and did not contain clear and unambiguous expression of intent to change the character of ownership, but that a deed granting realty from husband to husband and wife as joint tenants was a valid transmutation because it was signed by the adversely affected spouse and "grant" is the word historically used to transfer an interest in real property. In the instant case, the deed was not signed by the spouses, because grantees do not sign a deed. Instead they "accept" it if it meets their specifications, which are generally indicated in the purchase contract. In *Bibb*, relinquishment of a portion of

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[15] Id.

[16] *Estate of Bibb*, supra, 87 Cal. App.4th 461, 468-470.

husband's ownership interest appeared on the face of the deed. In the instant case, relinquishment of the incidents of community property ownership occurred when the parties accepted title in a deed specifying an alternative and mutually exclusive form of joint-and-equal ownership. Family Code section 750 provides that "married persons may hold property as joint tenants or tenants in common, or as community property, or as community property with a right of survivorship." To give effect to the statutory right of married persons to choose from an array of co-ownership titles, a couple's use of community property to purchase property to which the spouses choose to take title in an alternative form of joint-and-equal ownership should be treated as an effective transmutation satisfying the requirements of Family Code section 851. To emphasize the point, consider the effect of married persons contributing equal amounts of separate property to a purchase of realty and choosing to take title in community property form. This would certainly work an effective transmutation of their separate property contributions, and the form in which they took joint-and-equal title would control characterization of the property.[17] The spouses did not have to prove that they intended to take their realty in joint tenancy.[18] Their acceptance of joint tenancy

[17] If the separate property contributions were made after 1984, in a proceeding for dissolution or legal separation each spouse would have a right to reimbursement of his separate property contribution. Family Code section 2640. However, the realty would nevertheless be equally owned by the spouses.

[18] See the contrary assertion of the Bankruptcy Appellate Panel in *In re Brace*, supra, 66 B.R. 13, 28. The panel assigned the spouses the burden of proving that they really did intend to take joint tenancies and concluded that they failed to do so.

deeds speaks for itself. Nor was the couple required to prove that they intended to hold equal separate property, as opposed to community property, interests.[19] Moreover, neither spouse ever denied that they intended to take a joint tenancy.[20]

(ii) Alternatively, the case law requirement that the writing evidence a change in ownership is inapplicable when neither spouse's ownership interest is adversely affected.

Reading the statute literally, the case law requirement that the writing expressly declare a change in ownership can have no application when neither spouse's ownership interest is adversely affected.[21] Moreover, variations in joint and equal ownership do not implicate the concerns of section 852, which are fraud, a spouse's unknowing relinquishment of ownership of property, and unseemly litigation. When spouses use community property funds to purchase property and take title to that property in joint tenancy, their proportional ownership interests are unaffected. Each spouse gains protection from creditors. Each spouse gains a right of survivorship, an unvested interest until the death of a

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[19] Whether the spouses understood or intended that their equal joint tenancy interests would be legally classified as separate or community property is irrelevant. They wished to obtain the benefit of joint tenancy title and accepted that form of joint-and-equal ownership, including all its legal incidents. They cannot reasonably be held to the standard required of law students or attorneys. However, the Bankruptcy Appellate Panel asserted the contrary and assigned the couple the burden of proving that they intended to hold separate property, as opposed to community property, interests. *In re Brace*, supra, 566 B.R. at 28.

[20] Id.

[21] This argument could alternatively be framed as: The requirement that the writing expressly declare a *change* in ownership has no application when the spouses' ownership interests are *equally* affected, in which case neither spouse's ownership is adversely affected vis-à-vis the other spouse.

spouse, which either spouse can sever during his lifetime. Thus, when neither spouse is adversely affected, the case law requirement that writing the expressly declare a *change* in ownership[22] should be held inapplicable in accordance with the language and the purposes of the statute. That the title expressly declares the form of joint-and-equal ownership should suffice.

E. Family Code Section 852(b) Does Not Protect Third Parties When a Married Couple Uses Community Property Funds to Purchase Realty to Which They Take Title in Joint Tenancy.

Section 852(b) states that a transmutation of real property is not effective as to third parties without notice thereof unless recorded. The Bankruptcy Appellate Panel reasoned that even if the transmutation were effective as between husband and wife, it was not effective as to creditors because the transmutation was not recorded.[23] This assertion misunderstands the meaning and purpose of subsection (b). It is designed to ensure that creditors, in the exercise of due diligence, obtain record notice of the true character of ownership. If a transmutation is valid, third parties receive notice of the transmutation in the recorded title. Subsection (b) is intended to enable creditors to rely upon recorded title and not, as the bankruptcy court instead asserted, upon the general community property presumption.[24]

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[22] *Estate of MacDonald*, supra, 51 Cal.3d 262, 264.

[23] *In re Brace*, supra, 566 B.R. at 24.

[24] It would indeed be bizarre if creditors could *not* rely on a recorded joint tenancy title and would have to determine whether purchase funds of a different character were used to purchase the property and, if so, they were validly transmuted to the form in which title was taken and recorded. This absurdity would not occur when title is held in the name of one spouse alone, because property titled in the name of a married person alone puts a

Contrary to the bankruptcy court's interpretation, the provision cannot reasonably be understood to presuppose that creditors "are entitled to rely" on the general community property presumption, because they would do so at their peril. Property held in the name of a married person alone may be either separate property or community property.[25] Moreover, the provision refers only to the transmutation of *real* property. The parties transmuted the character of personal property, i.e., the purchase funds, when they took title to the real property in joint tenancy form. They never transmuted the character of the realty.[26]

IV. FAMILY CODE SECTION 2581 IS INAPPLICABLE BECAUSE IT APPLIES ONLY IN A PROCEEDING FOR DISSOLUTION OR LEGAL SEPARATION

Section 2581treats all forms of property jointly held by spouses as community property in an action for marital dissolution or legal separation. By its specific language, it applies only to such proceedings. *Dorn v. Solomon*, 57 Cal.App.4th 650, 67 Cal.Rptr.2d 311 (1997), held that section 2581 has no application when a marriage is terminated by the death of one of the spouses. In that case, property held by spouses in joint tenancy passes entirely to the surviving spouse by means of the joint tenancy

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creditor on notice that the property may be community property. For this reason, title insurance companies require that a deed describe a sole title holder as married or unmarried.

[25] See, for example, the facts of *In re Marriage of Valli*, supra, 58 Cal.4th 1396.

[26] Subsection (b) would apply, for example, when subsequent to taking title in joint tenancy, a couple validly transmuted the entire joint tenancy to one spouse's separate property. That spouse's new separate property title would be subject to the subsection (b) recording provision.

right of survivorship. Current Section 2581 is traceable to a 1965 enactment that applied only to single-family homes held by divorcing spouses in joint tenancy.[27] The purpose of the 1965 enactment was to extend divorce court jurisdiction, which was limited to community property, to family homes held in joint tenancy, a form of joint-and-equal ownership that was beyond the divorce court's jurisdiction.[28] Classified as separate property, each spouse owning a one-half separate property interest, joint tenancy property was beyond the divorce court's reach and could only be divided in a

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[27] Stats.1965, ch.170, p. 3843, codified in Civil Code section 164, later re-codified in Civil Code section 5110. In 1983, the legislature extended the provision to all property held in joint tenancy in proceedings for dissolution or legal separation. In 1986, the legislature further amended the provision to apply to all forms of jointly held property in a proceeding for dissolution or legal separation. It is now codified at Family Code section 2581.

[28] See this court's explanation of the provision's purpose in *In re Marriage of Lucas*, 27 Cal.3d 808, 813-816, 614 P.2d 285, 166 Cal.Rptr. 853 (1980). The limitation of the divorce court's jurisdiction with respect to separate property that is not jointly titled is now codified at Family Code section 2600. It should be noted that the court was not relying on Evidence Code section 662 in framing its holding in *Lucas*. The *Lucas* "title presumption" is a community property doctrine that concerns only property that spouses hold jointly and equally in any form. It reads such title as both a deed and an agreement between the parties to hold in the form in which they have taken title. For this reason, *Lucas* held that a spouse could avoid joint-and-equal ownership title only by agreement of the parties. One spouse's understanding or intentions would not suffice to vary joint-and-equal title or create a right of reimbursement. The reasoning of *Lucas* survives the enactment of the so-called "anti-*Lucas*" legislation. In dissolution proceedings Family Code section 2640 now reimburses a spouse for separate property contributions to the acquisition of jointly titled property in the absence of any agreement to reimburse. It does not, however, allow a separate property contributor to the purchase price of jointly held property to claim any ownership interest in the property other than his one-half joint interest.

partition action.[29] Reclassified as community property in dissolution proceedings, a divorce court could distribute the family home.

V. EVEN IN A PROCEEDING FOR DISSOLUTION OR LEGAL SEPARATION, SECTION 2581 MAY NOT BE INVOKED BY A CREDITOR TO GAIN ACCESS TO A NON-DEBTOR SPOUSE'S ONE-HALF SEPARATE PROPERTY INTEREST IN JOINT TENANCY PROPERTY

Although, as between husband and wife, Section 2581 treats property held in joint tenancy as community property in a proceeding for dissolution or legal separation, even in that proceeding the property remains a joint tenancy for purposes of creditor access to a non-debtor spouse's one-half interest. Thus, a creditor of the debtor spouse, who intervened in a dissolution proceeding, was denied access to the non-debtor's one-half separate property interest in the spouses' joint tenancy property. *Abbett Electrical Corp. v. Storek*, 22 Cal.App.4th 1460, 27 Cal.Rptr.2d 845 (1994). This result is consonant with the narrow purpose of Section 2581, which is to enable a divorce court to distribute all the spouses' jointly held property in a proceeding for marital dissolution or legal separation.

[29] *Johnson v. Johnson*, 214 Cal.App.2d 229, 29 Cal.Rptr. 179 (1963).

VI. EVIDENCE CODE SECTION 662 HAS NO APPLICATION IN THIS CASE

Evidence Code section 662 has no bearing on this case for several reasons. *Valli*[30] establishes that section 662 does not apply when it conflicts with the requirements of the Family Code transmutation statutes. Moreover, section 662 presumes only that the owner of legal title is also the owner of beneficial title. Here no one asserts beneficial title. Instead, the dispute concerns the character of *legal* title. That dispute can only be resolved by reference to community property transmutation law. As in *Valli*, Evidence Code Section 662 is beside the point.

VII. CONCLUSION

Despite the many legal theories that have been asserted below, this case concerns only the community property law of transmutation. When the spouses purchased their real property with community property funds and took title in joint tenancy form, did they transmute the community property character of the purchase funds? Under pre-1985 law, the answer is certain. In *Siberell*[31] this court held that they did. Thus, the family home (the Redlands property) is a joint tenancy and the wife's one-half separate property is unavailable to her husband's creditors. To the extent that any of the other realty was titled before 1985, it is also unavailable. The only remaining issue concerns realty, if any, that may have been

[30] *In re Marriage of Valli*, supra, 58 Cal.4th 1396.
[31] *Siberell v. Siberell*, supra, 214 Cal. 767.

titled after 1984. The *writing* and *acceptance* requirements of Family Code section 852 (a) were satisfied. The *express declaration* requirement is satisfied when spouses take property in a form of joint-and-equal ownership that excludes all other forms of joint-and-equal ownership or, alternatively, because neither spouse is disadvantaged or advantaged by the transmutation of community property into joint tenancy. The reasoning of *Siberell* is as persuasive now as it was when that case was decided.[32] For purposes of Family Code section 850, the joint tenancy deed *accepted* by the spouses is both a *grant* and an *agreement*, in which the parties *expressly declare* their consent to that form of ownership, to the exclusion of any other form of ownership. Thus, without regard to the dates on which title to the several properties was acquired, they are all held in joint tenancy ownership.

This result is supported by important policy considerations. To hold otherwise would upset the reasonable expectations of the millions of married couples in California who have elected to hold their realty in joint tenancy title in order to secure a spousal right of survivorship and, perhaps, to shield a non-debtor spouse's one-half interest from the debts of the other spouse. It would call into question the

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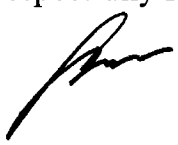
[32] Adopting the reasoning of *Siberell*, *In re Marriage of Lucas*, supra, 27 Cal.3d 808, 813-816, again expressed this court's understanding of joint-and-equal title as both a grant and an agreement of the joint owners to hold title in joint-and-equal form. This portion of *Lucas* survives the anti-*Lucas* provision now codified at Family Code section 2640. See further discussion in note 28 supra.

validity of all post-1984 recorded joint tenancy titles, necessitate inquiry into the source of the purchase funds, and generate a great deal of unjustifiable litigation.

July 3, 2019

Respectfully submitted,



Grace Ganz Blumberg,
Amicus Curiae

CERTIFICATION

Pursuant to *California Rules of Court*, Rule 8.204(c), I, Grace Ganz Blumberg, hereby certify that, as counted by Microsoft Office Word 10, the word-processing program used to prepare this brief, the text, including footnotes and tables, of this Amicus Curiae brief, to be filed on July 8, 2019, contains 5,777 words.

Grace Ganz Blumberg,
Amicus Curiae

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is UCLA School of Law, 405 Hilgard Avenue, Los Angeles, CA 90095-1476.

On July 8, 2019, I served the foregoing documents described as:

PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS AND PETITIONERS CLIFFORD BRACE, JR. AND AHN BRACE

on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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I served each document by **FEDERAL EXPRESS—OVERNIGHT DELIVERY**. I enclosed the documents in sealed envelopes provided by Federal Express, and addressed to the above-named persons at the addresses listed. I placed the envelopes for collection and overnight delivery. I am "readily familiar" with the practice of collection and processing Federal Express envelopes. Under that practice the envelopes would be placed in the regularly utilized drop box of Federal Express on the same day, at UCLA, Los Angeles, California, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 8, at Los Angeles, California.

s/ Grace Ganz Blumberg