

# TRUSTS & ESTATES

## QUARTERLY

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# UNTIL DEATH DO US PART: PART III: THE LITIGATION OF SPOUSAL FIDUCIARY BREACHES UNDER THE FAMILY CODE IN THE POST-DEATH SETTING

Written by James P. Lamping, Esq.\*

## I. SYNOPSIS

Every marriage will end. Some marriages end in divorce, while others end upon death. The property rights of the respective spouses must be determined under either scenario. Previous articles by this author have discussed the application of family law authority in the post-death setting to determine the interests of the respective spouses in comingled community and separate property.<sup>01</sup> But this is not the only area in which the legal principles commonly used in divorce proceedings also apply when a marriage instead ends upon death.

The existence of a fiduciary relationship between spouses has significant implications in determining the effect of transactions between spouses when property rights are adjudicated upon divorce. These same principles generally also apply in financial elder abuse litigation involving interspousal transactions when a marriage instead ends upon death. While the provisions of the Family Code relating to transactions between spouses can be consequential in divorce proceedings, they can be downright devastating when combined with the authority relating to financial elder abuse.

This analysis will begin with a discussion of the authority governing interspousal transactions in divorce proceedings, followed by the standards applied to scrutinize transactions in financial elder abuse matters. Next, the application of those two lines of authority in combination will be analyzed.

Finally, the authority relating to breaches of spousal fiduciary duties specifically involving community property will be analyzed.

## II. FIDUCIARY DUTIES BETWEEN SPOUSES UNDER FAMILY CODE SECTION 721

### A. Family Code Section 721 Generally

While spouses may engage in transactions with each other, they do so in the context of a fiduciary relationship. In particular, Family Code section 721 provides:

(a) Subject to subdivision (b), either spouse may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

(b) Except as provided in Sections 143, 144, 146, 16040, 16047, and 21385 of the Probate Code, in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided

in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

Rendering upon request, true and full information of all things affecting any transaction that concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse that concerns the community property.

In other words, while interspousal transactions are generally permissible, they are subject to higher standards than arm's length transactions, and, as such, heightened scrutiny.

## B. The Presumption of Undue Influence

A person who gains an unfair advantage over their spouse in a transaction that is challenged in divorce proceedings must overcome a presumption that the transaction was the product of undue influence. The authority governing the presumption of undue influence under Family Code section 721 was succinctly summarized by *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 343-344 as follows:

Spouses have the right to enter into property-related transactions with each other. ([Section] 721, subd. (a).) However, spouses occupy a confidential and fiduciary relationship with each other. ([Section] 721, subd. (b).) The nature of this relationship “imposes a duty of the highest good faith and fair dealing” on each spouse as to any interspousal transaction. (*Ibid.*) “If one spouse secures an advantage from the transaction, a statutory presumption arises under section 721 that the advantaged spouse exercised undue influence and the transaction will be set aside.” (*In re Marriage of Mathews* (2005) 133 Cal. App.4th 624, 628–629, 35 Cal.Rptr.3d 1 (Mathews); *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293–294, 39 Cal.Rptr.2d 673 (*Haines*)). Generally speaking, if an interspousal transaction results in one spouse obtaining an advantage over the other, a rebuttable presumption of undue influence will attach to the transaction. (*Bonds, supra*, 24 Cal.4th at pp. 27–28, 99 Cal.Rptr.2d 252, 5 P.3d 815; *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996, 4 Cal.Rptr.3d 378.)

“When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse’s action “was freely and voluntarily made, with a full knowledge of all the facts, and with a complete understanding of the effect of the transaction.” [Citation.]” (*In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 55, 94 Cal.Rptr.3d 84.) The advantaged spouse must show, by a preponderance of evidence, that his or her advantage was not gained in violation of the fiduciary relationship. (*Haines, supra*, 33 Cal.App.4th at p. 296, 39 Cal.Rptr.2d 673.) “The question “whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.” [Citation.]” (*Lund*, at p. 55, 94 Cal.Rptr.3d 84.)

Not surprisingly, these broad principles will apply differently under the unique facts of each case.

## C. Examples from Case Law

### 1. Introduction

Much like the case law relating to the interpretation of testamentary instruments, the question of whether an unfair advantage was obtained by one spouse over the other is fact specific. However, the applicable case law is nevertheless collectively useful to illustrate the general considerations to be analyzed.

Two contrasting examples will be provided here as examples of when the presumption applies and when it does not. These two cases are, of course, just a sampling from the wide-ranging case law relating to the presumption of undue influence under Family Code section 721. This topic is sufficiently broad that it would warrant an entire article and consequently the following examples are not intended as an exhaustive examination of this case law.

### 2. *Delaney: The Presumption of Undue Influence Applied*

In *In re Marriage of Delaney* (2003), the presumption of undue influence under Family Code section 721 was applied to invalidate an interspousal transaction. In *Delaney*, the husband owned a separate property residence prior to marriage. During the marriage, the husband executed a grant deed transferring title to himself and his wife as joint tenants, receiving nothing in return from his wife.<sup>02</sup>

The husband had previously been diagnosed with a learning disability that limited his reading comprehension.<sup>03</sup> Meanwhile, the wife had worked as a probate legal assistant,

which implies some knowledge of the legal implications of the title to real property.<sup>04</sup> Further, the wife had been awarded a one-half interest in real estate in a previous divorce under similar circumstances.<sup>05</sup> Under these facts, the trial court in *Delaney* concluded that the wife had gained an unfair advantage over the husband.<sup>06</sup> Therefore, the wife was required to overcome a presumption of undue influence.<sup>07</sup> She failed to do so.<sup>08</sup> In affirming the trial court's decision, the appellate court stated:

We conclude that the trial court properly determined that the presumption of undue influence applies to the facts of this case. Consequently, it was Wife's burden to establish that Husband's transmutation of the Property to joint tenancy was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of a transfer from his unencumbered separate property interest to a joint interest as Husband and Wife. Substantial evidence in the record supports the trial court's conclusion that Wife failed to bear her burden of establishing this. This evidence showed that Husband suffered cognitive impairments and as a consequence had entrusted all marital financial and legal matters to Wife, trusting and relying upon her judgment and management in this regard. Wife, on the other hand, had extensive experience in legal and financial matters, and had personal experience in her previous marriage with the transmutation of separate property to joint tenancy. Husband signed the documents conveying his unencumbered separate interest in the Property to himself and Wife jointly without questioning her instruction that it was necessary to do so. On this record, we have no basis for overturning the trial court's determination that Wife had failed to rebut the presumption of undue influence.<sup>09</sup>

The fact that the husband in *Delaney* suffered from cognitive impairments may give it particular significance in the context of a financial elder abuse case in which the spouse disadvantaged by the transaction is suffering from diminished capacity. Reading the *Delaney* decision in context, it appears that the husband was at least somewhat able to navigate through life notwithstanding his cognitive impairments. Nevertheless, those impairments appear to have been a factor considered in determining whether an unfair advantage was obtained. It therefore would appear that in a financial elder abuse case, more severe cognitive impairments suffered by a spouse would play an even greater factor, and accordingly, the likelihood of the presumption of undue influence applying would increase.

### 3. *Burkle: No Unfair Advantage Was Obtained*

By contrast, *In re Marriage of Burkle* presented facts in which an unfair advantage was *not* obtained and the presumption of undue influence therefore did *not* apply. In *Burkle*, the parties were initially involved in divorce proceedings, then reconciled.<sup>10</sup> Despite the reconciliation, the parties entered into a postmarital agreement establishing their respective spousal rights and obligations.<sup>11</sup> Both spouses were represented by competent independent counsel and other qualified advisors in connection with the negotiation and drafting of the postmarital agreement.<sup>12</sup> Several years later, the parties again engaged in divorce proceedings.<sup>13</sup> The wife alleged in the subsequent divorce proceedings that the postmarital agreement gave the husband an unfair advantage.<sup>14</sup>

Based upon these facts and an analysis of the postmarital agreement, the appellate court affirmed the trial court's rejection of the wife's argument:

In this case, the trial court expressly found the parties obtained mutually agreeable advantages. This is therefore not a case of unfair advantage, where "one spouse has taken advantage of another in an interspousal transaction...." <sup>14</sup> (*Haines, supra*, 33 Cal.App.4th at p. 301, 39 Cal.Rptr.2d 673.) A presumption of undue influence cannot logically be applied in a case where benefits are obtained by both spouses, where the spouses are represented by sophisticated counsel, and where the spouses expressly acknowledge that neither has obtained an unfair advantage as a result of the agreement. The trial court did not err in concluding that no presumption of undue influence arose, and that Ms. Burkle therefore had the burden of proving, by a preponderance of the evidence, that the post-marital agreement was invalid.<sup>15</sup>

As discussed further below, the fact that a court finds the presumption of undue influence under Family Code section 721 applicable may have particular significance in a financial elder abuse action. After all, its application requires that a court first determine that a person gained an unfair advantage over their spouse—a particularly unfavorable finding for the respondent spouse in a financial elder abuse case.<sup>16</sup>

### D. Probate Code Section 859 and Financial Elder Abuse

Actions for financial elder abuse are frequently brought as part of petitions under Probate Code sections 850 et seq. seeking the return of property wrongfully acquired from an elder.<sup>17</sup> In the context of post-death interspousal financial

elder abuse claims, such an action may assert either that the surviving spouse wrongfully acquired property from the deceased spouse, or vice versa.<sup>18</sup> The wrongful taking of property through the commission of financial elder abuse may result in an award of double damages and attorney's fees to the petitioner. Probate Code section 859 provides:

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

Welfare and Institutions Code section 15610.30, subdivision (a)(3), in turn, provides that a person has committed financial elder abuse when the person "(t)akes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70."

And section 15610.70 of the Welfare and Institutions Code then defines "undue influence" as "...excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity," considering the victim's vulnerability, the influencer's apparent authority, the tactics used by the influencer, and the inequity of the result. Taken together, these statutes mean that a person who has wrongfully obtained property from an elder in bad faith through the application of undue influence may be ordered to pay double damages and attorney fees in addition to returning the property.<sup>19</sup>

## E. Family Code Section 721 Presumption in Financial Elder Abuse Cases

The presumption of undue influence under Family Code section 721 may have dramatic implications when applied in the context of a financial elder abuse action.

As a preliminary matter, it bears mention that different statutory definitions of "undue influence" apply to Family Code section 721 and financial elder abuse claims,

respectively. As discussed above, the meaning of "undue influence" in financial elder abuse cases is provided in Welfare and Institutions Code section 15610.70. By contrast, for purposes of Family Code section 721, the meaning of "undue influence" is found in the definition provided in Civil Code section 1575,<sup>20</sup> which states:

Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

But, as a practical matter, the separate definitions are unlikely to have a material impact on the outcome in financial elder abuse cases when Family Code section 721 applies. In particular, the presumption of undue influence under Family Code section 721 first requires that a court determine that the respondent spouse gained an unfair advantage over the other spouse. That, by itself, may go a long way towards meeting the showing required under the Welfare and Institutions Code section 15610.70 definition of "undue influence" applicable in financial elder abuse cases.

Further, the failure to overcome the presumption of undue influence under Family Code section 721 will likely lead to a finding that the respondent spouse committed financial elder abuse. It seems improbable that a court would conclude that the respondent spouse gained an unfair advantage and then failed to rebut the resulting presumption of undue influence within the meaning Civil Code section 1575, while simultaneously finding that the same actions did not meet the definition of Welfare and Institutions Code section 15610.70.<sup>21</sup> That being said, the standards are technically different. Accordingly, both definitions should be addressed in the trial briefs and separate findings should be requested from the trial court under both statutes to ensure the result will withstand scrutiny on appeal.<sup>22</sup>

The areas in which financial elder abuse actions materially differ from divorce proceedings generally do not work in the respondent spouse's favor. For example, in divorce proceedings, the spouse who gained the unfair advantage may rebut the Family Code section 721 presumption of undue influence by showing, for example, that the transfer "was freely and voluntarily made, with a full knowledge of all the facts and with a complete understanding of the transfer."<sup>23</sup>

But financial elder abuse proceedings typically involve an elderly person who was in a weakened physical

condition, suffered from impaired capacity, or both. These circumstances may make it very difficult for the respondent spouse to make the showing required to rebut the presumption of undue influence under Family Code section 721.<sup>24</sup> Further, the fact that a court has already made the preliminary determination that one spouse gained an unfair advantage over a spouse in this condition, by itself, may be sufficient to establish a claim for financial elder abuse.

Post-death elder abuse cases involving spousal breaches may also present the respondent spouse with evidentiary challenges in overcoming the presumption of undue influence. The testimony of *both* spouses is often among the most significant evidence presented to a divorce court for the purpose of rebutting the presumption. The direct examination of the spouse who allegedly gained the unfair advantage may provide them the opportunity to defend their actions. Conversely, the allegedly disadvantaged spouse's narrative may fall apart on cross examination. However, a deceased spouse is, of course, unavailable to testify in post-death litigation. This may make it more difficult to rebut the presumption in post-death litigation, regardless of which spouse is deceased.<sup>25</sup>

Taken together, this often means that the respondent spouse who benefited from the transaction essentially faces a presumption from the outset of the case that they committed financial elder abuse. And if the respondent spouse is unable to rebut the presumption, they may be subjected to double damages and the payment of the petitioner's attorney's fees.<sup>26</sup> The specter of such catastrophic consequences may place the surviving spouse at a significant strategic disadvantage from the outset.

## F. *Lintz v. Lintz* and Family Code Section 721 in the Post-Death Setting

Family Code section 721 applies in the post-death setting. If any doubt existed on that point, it was removed by *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346. In *Lintz*, the court held that the presumption of undue influence under Family Code section 721 applied in an action brought following the decedent's death to challenge a "transmutation of decedent's separate property to community property and to the huge sums of money decedent transferred to (the surviving spouse)."<sup>27</sup> Despite the fact that Family Code section 721 is located within the code typically applied in marital dissolution cases, *Lintz* made it clear that the statute equally applied in the post-death setting to create a presumption of undue influence against a surviving spouse who gained an unfair advantage over a deceased spouse.

The *Lintz* case generated significant discussion amongst practitioners.<sup>28</sup> The portion of the *Lintz* case holding that Family Code section 721 applied in post-death proceedings to

challenge inter vivos transmutations and other transactions, while informative, seemed relatively uncontroversial. After all, the same claims could have been asserted in a financial elder abuse action or in marital dissolution proceedings while the elder was still alive. As a result, *Lintz* did not represent a sea change on that point.

By contrast, the portion of the *Lintz* decision holding that the presumption of undue influence applied to a trust leaving everything outright to the surviving spouse generated significant consternation. The amount passing free of estate taxes has increased dramatically over the past two decades. Additionally, the advent of portability has further eroded the use of the traditional credit trust in two settlor estate plans.<sup>29</sup> In this environment, it has become increasingly common for married estate planning clients to opt for the simplicity of leaving everything outright to the surviving spouse. In many instances, this is not the product of any nefarious activity by either spouse.

For example, suppose that an octogenarian couple with a harmonious marriage spanning six decades creates an estate plan leaving everything outright to the surviving spouse—despite the fact that one spouse had a disproportionate amount of separate property. The *Lintz* holding may have required the elderly surviving spouse receiving the separate property to overcome a presumption of undue influence in a contest of the testamentary instrument. To put it mildly, that seems unfair.

The Legislature responded by amending Family Code section 721 to clarify that its presumption of undue influence does not apply to contests of testamentary instruments in the post-death setting.<sup>30</sup> Of course, testamentary instruments leaving everything to a surviving spouse may still be contested when they are the product of undue influence. However, the burden now remains with the petitioner to prove the surviving spouse's wrongdoing.

The post-*Lintz* amendments to Family Code section 721 effectively serve as a confirmation that the statute's application is not limited to divorce. The Legislature was clearly aware of *Lintz* and only chose to limit the application of Family Code section 721 to a narrow range of post-death actions under the Probate Code, leaving the remaining portions of *Lintz* intact.<sup>31</sup> As a result, any doubt as to whether Family Code section 721 applies in other actions in the post-death setting following *Lintz* was likely removed following the amendments to the statute.

It has now been more than a decade since the *Lintz* decision was issued. While Family Code section 721 is now commonly applied in post-death financial elder abuse proceedings against spouses, the possible application of Family Code section 1101 is often overlooked. It shouldn't be.

### III. FAMILY CODE SECTION 1101 AND SPOUSAL BREACHES INVOLVING COMMUNITY PROPERTY

#### A. Introduction

Family Code section 1101 addresses breaches of spousal fiduciary duties involving community property. The statute provides its own set of remedies, including the possible award of the entire community property asset to the aggrieved spouse and the imposition of attorney's fees, when a spousal breach involves community property.<sup>32</sup>

The placement of the statute within the Family Code makes it clear that it applies in family law proceedings. But there is no ambiguity that Family Code section 1101 *also* applies in the post-death setting. The face of the statute says that it does.

#### B. Family Code Section 1101 Generally

The general rule of Family Code section 1101 is set forth in subdivision (a) of the statute, which provides:

A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

Subdivisions (b) and (c) of Family Code section 1101 authorize the court to adjudicate the rights of the spouses relating to community property, including ordering an accounting or adding the name of spouse to an asset. Additional remedies are provided in subdivisions (g) and (h) of Family Code section 1101, discussed below.

#### C. Statute of Limitations Under Family Code Section 1101

Family Code section 1101 provides a statute of limitations that is both unusual and powerful. Subdivision (d) of Family Code section 1101 generally provides for a three-year statute of limitations; however, as a practical matter, the exceptions swallow the general rule:

(1) Except as provided in paragraph (2), any action under subdivision (a) shall be commenced within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred.

(2) An action may be commenced under this section upon the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to the time limitations set forth in paragraph (1).

(3) The defense of laches may be raised in any action brought under this section.

(4) Except as to actions authorized by paragraph (2), remedies under subdivision (a) apply only to transactions or events occurring on or after July 1, 1987.

Subdivision (f) of Family Code section 1101 expressly authorizes the enforcement of the aggrieved spouse's rights through the filing of a standalone lawsuit or upon the death of a spouse:

Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with the action or upon the death of a spouse.<sup>33</sup>

Taken together, this means that the aggrieved spouse generally may file a standalone lawsuit to enforce their community property rights within three years of discovering the offending transaction. However, it would be rather unusual for a litigant to name their spouse as a defendant in a lawsuit in the context of a marriage that is expected to continue. Instead, litigation concerning the rights of the respective spouses would more commonly arise upon the termination of the relationship, whether in family law proceedings or following the death of a spouse.

The statutory authorization for the court to adjudicate these issues in marital status proceedings makes the statute of limitations relatively straightforward in that context. The court hearing the family law matter is expressly authorized to adjudicate the aggrieved spouse's rights under Family Code section 1101, even if the otherwise applicable three-year statute of limitations already expired.<sup>34</sup> In other words, Family Code section 1101 is clear that the *mere existence* of family law proceedings relating to marital status means that the statute of limitations remains open.

But the face of the statute is less clear regarding the statute of limitations following the death of a spouse. Judicial proceedings may not be commenced until sometime well after the date of death of the spouse—if at all. Additionally, the text of Family Code section 1101 does not explicitly address how its terms should be harmonized with other potentially applicable statutes of limitations upon death. These questions were subsequently clarified by case law.

## D. *Yeh v. Tai*: Laches is the Only Time Limitation

In *Yeh v. Tai* (2017) 18 Cal.App.5th 953, a husband and wife decided to purchase a piece of real property using community property. The mortgage company informed them that they could obtain a better interest rate if the property was financed in the husband's name alone due to the wife's poor credit rating.<sup>35</sup> As a result, the wife executed a quitclaim deed to the husband immediately upon the acquisition of the property despite the fact that it was acquired using community property.<sup>36</sup> Presumably in recognition of her community property rights, the husband promised that he would leave the property to the wife upon his death.<sup>37</sup> In fact, the husband confirmed that agreement three days before he died.<sup>38</sup>

Following the husband's death, the wife learned that the husband had actually transferred the property to a trust the husband had secretly established without her knowledge.<sup>39</sup> The husband's children by a prior relationship were its sole beneficiaries, leaving nothing to the wife.<sup>40</sup> Approximately 18 months after the husband's death, the wife filed a petition including a request to set aside the nonprobate transfer of the community property residence, as well as alleging a claim under Family Code section 1101 for the husband's breach of his spousal fiduciary duties.<sup>41</sup>

The trial court sustained the children's demurrer to the wife's petition without leave to amend, accepting the children's argument that the wife's action was time barred by a one-year statute of limitations that began to run upon husband's death under Code of Civil Procedure sections 366.2 and 366.3.<sup>42</sup> The wife appealed.

The appellate court first analyzed the statute of limitations in the text of Family Code section 1101, noting that subdivision (d) of Family Code section 1101 created an unusual statute of limitations.<sup>43</sup> While the aggrieved spouse was generally required to pursue an action within three years of learning of the offending transaction, the appellate court noted that the statute of limitations for purposes of Family Code section 1101 was effectively resurrected upon the termination of the community, whether by death or divorce.<sup>44</sup> Accordingly, the appellate court concluded that the *only* time limitation for a Family Code section 1101 claim brought upon the death of a spouse was the doctrine of laches:

In this case, plaintiff commenced this breach of fiduciary duty action under section 1101, subdivision (a), following the death of (the husband), thus rendering the three-year statute of limitations in subdivision (d)(1) inapplicable. Under subdivisions (d)(2) and (d)(3), the only time limitation on bringing this action is the equitable defense of laches. Defendants have raised no argument that plaintiff's

claim is barred by the equitable laches doctrine. We therefore hold that, based on the pleadings, plaintiff's claim pursuant to section 1101 is not barred by the statute of limitations.<sup>45</sup>

The appellate court next considered other potentially applicable statutes of limitations. Most civil actions in California are subject to statutes of limitations.<sup>46</sup> However, Code of Civil Procedure section 366.2 more specifically provides that those statutes of limitations are cut off one year from the date of a decedent's death, subject to narrow exceptions.<sup>47</sup> As a matter of statutory construction, this means the more specific statute of limitations under Code of Civil Procedure section 366.2 will override the more general statutes of limitations applicable to causes of actions that could have been brought against a decedent before death.<sup>48</sup>

But here, the Legislature had created an *even more* specific rule limited to claims brought under Family Code section 1101.<sup>49</sup> And again, the more specifically applicable statute will apply over the more general statute.<sup>50</sup> Consequently, the more specifically applicable rule under Family Code section 1101 to claims brought under that statute overrode the more general statute of limitations under Code of Civil Procedure section 366.2.<sup>51</sup>

The appellate court similarly found other statute of limitations arguments unavailing. In particular, the appellate court also held that this type of claim was factually distinguishable from an action seeking to enforce a contract to make a will that would be subject to a one-year statute of limitations under Code of Civil Procedure section 366.3.<sup>52</sup> Finally, the *Yeh* decision held that the action brought by the wife was not subject to the statute of limitations under Probate Code section 16061.8 to bring a trust contest because the nature of the action was an action to recover community property, not a trust contest.<sup>53</sup>

The net result of *Yeh* is that a Family Code section 1101 claim brought following the death of a spouse will be timely so long as it is not barred by the doctrine of laches. As noted in the portion of the *Yeh* decision quoted above, the children's demurrer did not argue that the wife's claim was time barred by laches. That is not surprising.

The purpose of a demurrer is to test the sufficiency of the pleadings, and the facts alleged in the pleadings are generally deemed to be true for that purpose.<sup>54</sup> The application of laches is highly dependent upon the facts of a particular case.<sup>55</sup> This, in turn, will almost always require a factual determination by the trial court. As a result, a demurrer is generally not the appropriate method to seek an adjudication regarding the affirmative defense of laches. That being said, it would seem advisable for the party defending a Family Code section 1101 claim to allege laches

as an affirmative defense if there is any reasonable basis for making the allegation.

## E. Remedies for Family Code Section 1101 Violations

The remedy for a violation of Family Code section 1101 depends upon the court's findings regarding the nature of the breaching spouse's actions. At a minimum, Family Code section 1101, subdivision (g) authorizes the restoration of the aggrieved spouse's one-half community property interest:

Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court.<sup>56</sup>

When the breach involves oppression, fraud or malice within the meaning of Civil Code section 3294, Family Code section 1101, subdivision (h) authorizes the court to award *both* halves of the community property asset to the aggrieved spouse:

Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.<sup>57</sup>

The boundaries of subdivisions (g) and (h) of Family Code section 1101 have been illustrated by case law.

## F. *Marriage of Rossi*: Accountability for Wrongdoing

Every so often, a case comes along that is worthy of being filed away for use as an entertaining anecdote in small talk with nonlawyers. *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34 is one of those cases. *Rossi* also serves as a memorable illustration of the circumstances warranting the imposition of the one hundred percent remedy under Family Code section 1101, subdivision (h).<sup>58</sup>

In *Rossi*, the wife won a seven-figure lottery jackpot in December 1996 after twenty-five years of marriage.<sup>59</sup> Presumably after reveling in the Yuletide spirit, the wife served her husband with a divorce petition in early January

1997.<sup>60</sup> The parties subsequently executed a marital settlement agreement and a judgment of dissolution was entered in April 1997.<sup>61</sup> However, the wife failed to list her lottery jackpot in the mandatory financial disclosures required in the family law proceedings.<sup>62</sup> The husband was left in dire financial straits and declared bankruptcy following the divorce.<sup>63</sup> Meanwhile, the wife secretly kept her lottery jackpot all to herself—or so she thought.

The husband opened a curious piece of correspondence in May 1999, more than two years after the conclusion of the divorce proceedings.<sup>64</sup> The letter, addressed to the wife, inquired whether the wife would be interested in receiving a lump sum in exchange for the annuity payments she was currently receiving from her lottery winnings.<sup>65</sup> This was the first time that the husband had learned that his now ex-wife had won the lottery.<sup>66</sup>

The wife subsequently confirmed through her attorney that she had won the lottery during the marriage; however, the wife also conveyed her refusal to share her winnings with the husband.<sup>67</sup> Not surprisingly, this caused the husband to file a motion to set aside the marital dissolution judgment based upon the wife's concealment of the community property asset.<sup>68</sup> That motion included a request for the imposition of the one hundred percent remedy under Family Code section 1101, subdivision (h).<sup>69</sup>

The trial court ruled in the husband's favor, finding that the wife had engaged in a pattern of fraudulent behavior intentionally designed to conceal the lottery winnings from her spouse.<sup>70</sup> Further, the trial court did not believe the wife's testimony that the lottery winnings were her separate property.<sup>71</sup> Taken together, the trial court found that the wife's actions met the oppression, fraud or malice standard. Accordingly, the trial court awarded *all* of the lottery winnings to the husband.<sup>72</sup> In affirming the trial court's ruling, the appellate court observed:

The strong language of section 1101, subdivision (h) serves an important purpose: full disclosure of marital assets is absolutely essential to the trial court in determining the proper dissolution of property and resolving support issues. The statutory scheme for dissolution depends on the parties' full disclosure of all assets so they may be taken into account by the trial court. A failure to make such disclosure is properly subject to the severe sanction of section 1101, subdivision (h).<sup>73</sup>

In short, the wife's efforts to cheat her husband out of his half of the community property lottery winnings, leaving him bankrupt, instead led to the imposition of karma in the form of Family Code section 1101, subdivision (h). The husband

was free to move on with his new life with *all* of the lottery winnings. And the wife would be the one left with nothing.

## G. *Wiese*: Family Code section 1101 Does Not Apply to Separate Property

While *Rossi* certainly presented a memorable fact pattern, it bears mention that Family Code section 1101 only applied in that case because the lottery winnings were community property. In the case *In re Marriage of Wiese* (2024) 102 Cal. App.5th 917, the court held that Family Code section 1101 and its associated remedies *do not* apply to breaches of spousal fiduciary duty relating to *separate* property.

In *Wiese*, the parties entered into a premarital agreement providing that income earned by either spouse during the marriage would remain that spouse's separate property.<sup>74</sup> For most of the marriage, the wife worked as an independent agent in the husband's real estate brokerage firm.<sup>75</sup> The premarital agreement provided that she would be entitled to all of her earnings, subject to deductions for business expenses and income taxes related to her earnings.<sup>76</sup>

In divorce proceedings, the trial court awarded the wife \$1.3 million, finding that the husband had withheld excessive amounts from the wife's earnings and did not share income tax refunds with her for overpayments, among other financial misdeeds, during their almost three decades of marriage.<sup>77</sup> In particular, the trial court found that the wife's claims were *not* time-barred because Family Code section 1101 authorized breach of spousal fiduciary duty claims to be asserted in marital dissolution proceedings.<sup>78</sup> The husband appealed.

The appellate court reversed the trial court's decision. In reaching this result, the appellate court acknowledged that subdivisions (g) and (h) of Family Code section 1101, establishing a special statute of limitations for breach of spousal fiduciary duty claims, do not specifically mention community property; however, the appellate court nevertheless concluded that these provisions were limited to that context:

Viewed in isolation, the language of subdivisions (g) and (h) of section 1101 does not explicitly confine their remedies to breaches involving community property—they refer to “any asset” transferred in breach of the fiduciary duty. Yet the statutory framework as a whole teaches that they are indeed meant to address only breaches involving community property.<sup>79</sup>

In particular, the appellate court noted that prior case law held that Family Code section 1101 was limited to claims involving community property; therefore, the longer statute of limitations under Family Code section 1101 was

inapplicable because the wife's claims related solely to breaches involving her *separate* property:

Section 1101, subdivision (d)(2)'s exemption from an otherwise applicable statute of limitations applies only to claims under section 1101. As described above, precedent holds that section 1101 deals “exclusively” with community property. Because Jill's fiduciary duty claims concerned separate property, this exemption did not apply to her claims.<sup>80</sup>

Consequently, the wife could only recover damages incurred within the four-year statute of limitations applicable to breach of fiduciary duty claims generally—not during the entire length of the marriage.<sup>81</sup>

There are at least two alternative scenarios in which a slight factual variation might have produced a different result in *Wiese*. First, the premarital agreement in *Wiese* meant that, by definition, there was no community property. In the absence of a premarital agreement producing such a bright line result, the community may acquire an interest in an asset that is otherwise separate property.

For example, the use of community funds to pay down the mortgage on separate property real estate may result in the community obtaining an interest in the asset.<sup>82</sup> Similarly, the use of community efforts to enhance the value of an otherwise separate property business may result in the community obtaining an interest in that business.<sup>83</sup> Notably, these rights also generally apply in the post-death setting.<sup>84</sup> To the extent that a breach involves an asset with a community property component, Family Code section 1101 might very well apply. But in *Wiese*, there was no community property. Therefore, Family Code section 1101 did not apply.

Secondly, *Wiese* did *not* involve the acquisition of a particular piece of property. Over the course of nearly three decades of marriage, the husband instead appears to have acquired cash that presumably was dissipated and not traceable to any particular asset.<sup>85</sup> By contrast, the outcome might have been different if the disputed issue involved the right to a particular asset acquired through the breach of a spousal fiduciary duty—even if it was the wife's separate property.

For example, if the husband had instead used the wife's separate property to acquire a separate property asset titled in the husband's name, the wife may have been entitled to reimbursement under Family Code section 2640, subdivision (c) for her separate property contributions. Again, there was no community property in *Wiese* due to the premarital agreement. However, if there had been, the wife still may have been entitled to reimbursement under Family Code section 2640, subdivision (b) if her misappropriated separate property had been used to acquire a community property asset. But because the wife's separate property funds

apparently were dissipated rather than used to acquire a specific asset, her remedies were limited to claims for damages subject to the statute of limitations applicable to breach of fiduciary duty claims generally.<sup>86</sup>

## IV. GENERAL OBSERVATIONS

There are at least six observations to be made about the application of Family Code sections 721 and 1101 in post-death financial elder abuse actions.

First, the question of whether one spouse gained an unfair advantage over the other, thus resulting in the application of the Family Code section 721 presumption of undue influence, is highly fact specific. For example, suppose that a husband and wife each transmute \$1 million of their respective separate property real estate to community property with right of survivorship. At first blush, it may appear that neither spouse gained an unfair advantage over the other. After all, the fair market value exchanged by each spouse was ostensibly equal.

But that is not necessarily the end of the analysis. If one spouse is 95 years old and in poor health while the other spouse is a healthy 30-year-old, the actuarial value of the exchange would dramatically favor the younger spouse. As a result, the younger spouse may have obtained an unfair advantage even though both transmuted properties had an equal fair market value. This, in turn, could trigger the presumption of undue influence under Family Code section 721.

Second, while Family Code section 1101 is limited to claims relating to spousal breaches of fiduciary duty involving community property, its application is not mutually exclusive with Family Code section 721. Quite to the contrary, Family Code section 1101 explicitly provides that malfeasance may be alleged under both statutes simultaneously.<sup>87</sup> This may be particularly useful when a community property asset is purportedly transmuted to the respondent spouse's separate property through the application of undue influence or under other circumstances in which the respondent spouse gained an unfair advantage.

Third, the rather colorful facts of *Rossi* provide a memorable example of circumstances in which the entire community property asset may be awarded to the spouse who was defrauded under Family Code section 1101, subdivision (h). But most garden variety divorce cases typically do not present facts that meet the high oppression, fraud, or malice standard required to impose that remedy. By contrast, financial elder abuse cases often involve at least the appearance of egregious facts and predatory behavior which may more easily lend themselves to such a finding, particularly when presented by skilled counsel.

A trial court that is particularly outraged by a respondent spouse's actions could then transfer the entire community property asset to the elder's side of the balance sheet. Further, the trial court could award attorney's fees under both Family Code section 1101 and Probate Code section 859, in the alternative. By finding that the petitioner made the required showings under both statutes, it may be much more difficult for the respondent spouse to successfully attack an attorney's fee award on appeal.

Fourth, following the post-*Lintz* legislative changes to Family Code section 721, a spouse who commits financial elder abuse by applying undue influence to cause the other spouse to create a trust leaving everything outright to them will not be subject to the presumption of undue influence. By contrast, financial elder abuse of a spouse committed by causing an inter vivos transfer that unfairly advantages the respondent spouse remains subject to the presumption of undue influence under Family Code section 721. Of course, a transmutation constitutes such an immediate transfer of assets.<sup>88</sup>

From a cynical viewpoint, a spouse seeking to successfully commit financial elder abuse through undue influence would be best served to have the victim spouse execute a trust leaving everything outright to the abusive spouse upon death rather than obtaining the assets through inter vivos transfers. In that manner, the spouse committing financial elder abuse through undue influence will not be subject to the presumption of undue influence. Further, the standard of capacity applicable to a transfer upon death may be lower than the standard applicable to an inter vivos transfer.<sup>89</sup>

Fifth, the transfer of an interest in one spouse's separate property asset to the other spouse may render Family Code section 1101 moot in any event. For example, the husband in *Delaney* transferred a one-half interest in his separate property residence to his wife. The court applied Family Code section 721 to set aside the transaction. The result was that the husband was the sole owner of the property, which would have rendered the one hundred percent remedy under Family Code section 1101, subdivision (h), a moot point in any event.<sup>90</sup>

Sixth, the application of Family Code or financial elder abuse remedies against the deceased spouse is one of the few areas in which punitive actions may be taken against a person who has already died. For example, punitive damages generally cannot be imposed against a person after death because their purpose—to punish a wrongdoer—cannot be accomplished when the defendant's death means that the defendant will not feel the pain associated with their imposition.<sup>91</sup> By contrast the enhanced remedies under Probate Code section 859 and Family Code section 1101 may be applied even after the spouse who engaged in the wrongdoing has died.<sup>92</sup>

## V. CONCLUSION

The litigation of spousal property rights in the post-death setting often closely resembles the litigation of those issues in family proceedings. Many authorities apply equally in both settings. Family Code sections 721 and 1101 are no exception. When alleged in the context of post-death financial elder abuse litigation, the application of the authorities relating to spousal fiduciary duties often means that a respondent spouse may have the deck stacked against them.

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- 01 Lamping, *Until Death Do Us Part: Marital Property Characterization in the Postmortem Setting* (2015) 24 Cal. Tr. & Est. Q. No. 4; Lamping, *Until Death Do Us Part: Part II: Areas of Divergence Between Marital Property Division at Death and Divorce* (2022) 28 Cal. Tr. & Est. Q. No. 4.
  - 02 *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 993-994.
  - 03 *Id.* at p. 994.
  - 04 *Ibid.*
  - 05 *Ibid.*
  - 06 *Ibid.*
  - 07 *Ibid.*
  - 08 *Ibid.*
  - 09 *Id.* at pp. 999-1000 (citations omitted).
  - 10 *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 718.
  - 11 *Id.* at p. 718.
  - 12 *Ibid.*
  - 13 *Ibid.*
  - 14 *Ibid.*
  - 15 *In re Marriage of Burkle, supra*, 139 Cal.App.4th at pp. 735-736. Incidentally, the trial court held that the presumption of undue influence would have been rebutted even if it had applied.
  - 16 The term “respondent spouse” is used in this article to refer to the spouse who allegedly breached their spousal fiduciary duty. It bears mention that the respondent spouse may be the first spouse to die, in which case the duty to defend against claims of wrongdoing may fall on the respondent spouse’s trustee or personal representative. For ease of reference, the term “respondent spouse” will nevertheless be used throughout this article.
  - 17 Prob. Code, section 855 provides: “An action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part.”
  - 18 Prob. Code, section 850, subd. (a)(2)(C) authorizes an action “(w)here the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another,” whereas Prob. Code, section 850, subd. (a)(2)(D) provides that an action may be brought “(w)here the decedent died having a claim to real or personal property, title to or possession of which is held by another.”
  - 19 This discussion is only intended as a brief summary of the statutes applicable in financial elder abuse cases, not a comprehensive analysis of the nuances of financial elder abuse matters. That topic is sufficiently broad to warrant an entire practice guide. Instead, this brief overview is only intended to provide context for the application of these statutes in conjunction with statutes in the Family Code. There are many nuances to be considered. For example, appellate courts have disagreed regarding whether bad faith must be established in a financial elder abuse case involving undue influence as a prerequisite to the imposition of double damages under Probate Code section 859. See, e.g., *Levin v. Winston-Levin* (2019) 39 Cal.App.5th 1025; *Kerley v. Weber* (2018) 27 Cal.App.5th 1187; *Keading v. Keading* (2021) 60 Cal.App.5th 1115.
  - 20 See, e.g., *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346.
  - 21 See *ante*, note 19, some appellate decisions have held that a showing of bad faith is required as a prerequisite to the imposition of double damages under Probate Code section 859. Even if that is the case, the fact that a person has gained an unfair advantage over their spouse would make it very likely that a court would make such a finding. That being said, a finding on this point should be requested in order to have a clear record on appeal.
  - 22 See, e.g., *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1355-1358.
  - 23 *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 631.
  - 24 In other words, it would be very difficult to establish that the transfer “was freely and voluntarily made, with a full knowledge of all the facts and with a complete understanding of the transfer.” (*In re Marriage of Mathews, supra*, 133 Cal. App.4th at p. 631. See also *In re Marriage of Delaney, supra*, 111 Cal.App.4th at pp. 999-1000, in which the husband’s impaired ability to read and comprehend was a factor.)
  - 25 Under the appropriate circumstances, it may be possible to argue that unreasonable delay in asserting the claim until after the most important witness has died should result in it being barred by laches. (See, e.g., *Drake v. Pinkham* (2013) 217 Cal.App.4th 400.)
  - 26 As discussed separately below, Family Code section 1101 also authorizes an award of attorney’s fees when a spousal breach involves community property.
  - 27 *Lintz, supra*, 222 Cal.App.4th at p. 1353.
  - 28 See Lamping, “*I Do ... Owe You What Now?: Spousal Fiduciary Duties and Their Impact on Trust and Estate Practitioners* (2016) 22 Cal. Tr. & Est. Q. No. 4, analyzing the *Lintz* decision in

detail. Inasmuch as this article already provides an excellent discussion of the *Lintz* case, its holding will only be briefly discussed here.

- 29 See generally, Lamping, *Busting the Bypass: Simplifying Irrevocable Trusts* (2016) 22 Cal. Tr. & Est. Q. No. 1.
- 30 Assem. Bill No. 327 (2019-2020 Reg. Sess.).
- 31 Assem. Com. on Judiciary, Rep. on Assem. Bill No. 327 (2019-2020 Reg. Sess.), p. 3 et seq., analyzing *Lintz* in detail and noting that “(t)his bill would prevent the application of the fiduciary duty between spouses to testamentary instruments, including wills and trusts.”
- 32 The term “aggrieved spouse” will be used in this article to refer to the spouse claiming to have been damaged by the transaction.
- 33 Subdivision (e) of Family Code section 1101 provides that the consent of a spouse may be dispensed with pursuant to court order under certain circumstances, such as when the nonconsenting spouse cannot provide consent due to a lack of capacity. This provision appears to have been included in Family Code section 1101 to clarify that court orders arising from petitions typically brought under Probate Code sections 3100 et seq. effectively inoculate the other spouse from liability under Family Code section 1101. Petitions under Probate Code sections 3100 et seq. were commonly used to authorize transactions for Medi-Cal planning purposes under prior law and continue to have some application. However, while the exception created under Family Code section 1100, subdivision (e) is significant when it does apply, it has a relatively limited application. Accordingly, it will not be further analyzed in this article.
- 34 Fam. Code, section 1101, subd. (d)(2).
- 35 *Yeh v. Tai* (2017) 18 Cal.App.5th 953, 958.
- 36 *Ibid.*
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.*
- 40 *Ibid.*
- 41 *Ibid.*
- 42 *Id.* at p. 959.
- 43 *Id.* at pp. 960-961.
- 44 *Ibid.*
- 45 *Id.* at p. 962.
- 46 *Id.* at pp.962-967.
- 47 *Id.* at pp. 962-965.
- 48 *Ibid.*
- 49 *Yeh v. Tai, supra*, 18 Cal.App.5th at pp. 962-965.
- 50 *Ibid.*
- 51 *Ibid.*
- 52 *Yeh v. Tai, supra*, 18 Cal.App.5th at pp. 965-967.

- 53 *Id.* at p. 967.
- 54 See generally, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2024) Para. 7:3 et seq. and authorities cited therein; *Yeh v. Tai, supra*, 18 Cal. App.5th at p. 959.
- 55 The defense of laches requires unreasonable delay by plaintiff, plus either acquiescence by plaintiff in the act complained of or prejudice to defendant caused by the lapse of time. (See, e.g., *Pacific Hills Homeowners Ass’n v. Prun* (2008) 160 Cal.App.4th 1557, 1564-1565.)
- 56 The cross reference to Family Code section 721 makes it clear that a violation of that statute would support the restoration of the aggrieved spouse’s community property interest, at a minimum.
- 57 Civ. Code, section 3294, subd. (a) provides:  
In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
- As discussed *ante*, note 19, there has been some disagreement between appellate courts regarding whether bad faith must be established in a financial elder abuse case involving undue influence. Even if that is the case, meeting the “oppression, fraud, or malice” standard will almost certainly mean that the bad faith standard has been met as well. That said, separate findings should be requested in order to present a clear record on appeal.
- 58 In *Yeh v. Tai, supra*, 18 Cal.App.5th at pp. 968-969, the wife alleged in her petition that her now deceased husband’s actions met the oppression, fraud or malice standard required for the entire asset to be awarded to her under Fam. Code, section 1100, subd. (h). It does not appear that the decedent’s children challenged the application of the statute in that context, instead relying upon the statute of limitations.
- 59 *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 36.
- 60 *Ibid.*
- 61 *Id.* at pp. 38-39.
- 62 *Id.* at p. 37.
- 63 *Id.* at p. 38.
- 64 *Ibid.*
- 65 *Ibid.*
- 66 *Ibid.*
- 67 *Ibid.*
- 68 *Ibid.*
- 69 *Ibid.*
- 70 *In re Marriage of Rossi, supra*, 90 Cal.App.4th at p. 39.
- 71 *Ibid.*

- 72 *Id.* at p. 39. Notably, the trial court could have ordered the wife to pay the husband's attorney's fees but did not do so. Perhaps the court felt that Mrs. Rossi had already learned her lesson.
- 73 *Id.* at p. 42.
- 74 *In re Marriage of Wiese* (2024) 102 Cal.App.5th 917, 924.
- 75 *Ibid.*
- 76 *Ibid.*
- 77 *Ibid.*
- 78 *Ibid.*
- 79 *In re Marriage of Wiese, supra*, 102 Cal.App.5th at p. 935 (citations omitted).
- 80 *In re Marriage of Wiese, supra*, 102 Cal.App.5th at p. 934 (citations omitted).
- 81 *In re Marriage of Wiese, supra*, 102 Cal.App.5th at p. 934, citing Code Civ. Proc., section 343.
- 82 *In re Marriage of Moore* (1980) 28 Cal.3d 366; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.
- 83 *Pereira v. Pereira* (1909) 156 Cal. 1; *Van Camp v. Van Camp* (1921) 53 Cal.App. 17.
- 84 *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326; *Bono v. Clark* (2002) 103 Cal.App.4th 1409. See generally Lamping, *Until Death Do Us Part: Marital Property Characterization in the Postmortem Setting* (2015) 24 Cal. Tr. & Est. Q. No. 4.
- 85 The text of the opinion does not expressly address this point. However, the lack of a reference to the funds being used to acquire any particular asset implies that was the case.
- 86 It bears mention that Family Code section 721, unlike Family Code section 1101, does apply to transactions involving separate property. (See, e.g., *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991 [involving a transmutation of husband's separate property].)
- 87 Fam. Code, section 1101, subs. (g) & (h).
- 88 A transmutation of one spouse's separate property assets to community property is an immediate transfer of one half of the transferring spouse's separate property interest to the other. Family Code section 751 provides: "(t)he respective interests of each spouse in community property during continuance of the marriage relation are present, existing, and equal interests." Similarly, a transfer of one spouse's separate property into joint tenancy is an immediate transfer of one half of the transferring spouse's interest in the property. A joint tenancy "... is one owned by two or more persons in equal shares..." (Civ. Code, section 683, subd. (a); see also, e.g., 12 Witkin, Summary of California Law (11th ed.), Real Property sections 33 to 38; Miller and Starr 4 Cal. Real Est. section 11:22 (4th ed., 2023).)
- 89 See generally, e.g., *Andersen v. Hunt* (2011) 196 Cal. App.4th 722; Lamping, *The Andersen Twist in Trust Contests: Testamentary Capacity Standard Sometimes Applies When Document Resembles a Will* (2016) 17 Cal. Tr. & Est. Q. No. 2. Incidentally, the term "undue influence" for purposes of a

trust contest is the definition provided in section 15610.70 of the Welfare and Institutions Code, discussed in the context of Probate Code section 859, above. (Prob. Code, section 86.)

- 90 While *Delaney, supra*, 111 Cal.App.4th 991 involved a purported transfer of property into the names of both spouses, the same theory would appear to have applied if the property had instead been transferred from the husband's separate property into the wife's name alone. After all, that would have resulted in an even greater unfair advantage to the wife.
- 91 Code Civ. Proc., section 377.42 provides:  
 In an action or proceeding against a decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, on a cause of action against the decedent, all damages are recoverable that might have been recovered against the decedent had the decedent lived *except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.* (Emphasis added.)
- 92 However, the remedies under Probate Code section 859 are different than punitive damages and therefore may be obtained even after the person who committed the wrongdoing has died. (See *Hill v. Super. Ct.* (2016) 244 Cal. App.4th 1281.) Similarly, as discussed above, the text of Family Code section 1101 specifically provides that its remedies, including the one hundred percent remedy, may be applied after the death of the spouse who committed the breach.

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