

By Marshall S. Zolla and Deborah Elizabeth Zolla

# Marital Duty

Current state law often creates a

**Hobson's choice when a spouse decides  
between separate and community property  
to fund an investment opportunity**

**There is no doubt** that a fiduciary duty exists between spouses in California, but the scope of that duty has become a much debated legal issue. Changing standards emanating from the courts and arguably inconsistent legislative enactments have created great uncertainty as to what is or should be the governing standard of the fiduciary duty owed by one spouse to the other. Anything less than a careful and thorough reading of recently amended Family Code Section 721 will not shed clarifying light on whether the prudent investor rule does or does not apply between spouses. The current ambiguity in this regard has created frustration for lawyers and confusion for clients.

Recognition of a duty between spouses began over 40 years ago, with *Vai v. Bank of America*,<sup>1</sup> in which the California Supreme Court held that "because of his management and control over the community property, the husband occupies the position of trustee for his wife in respect to her one-half interest in the community assets." From then until today, courts and the legislature have twisted and turned in

their respective efforts to define an equitable standard of duty between spouses. In 1973, the court of appeal held that the fiduciary duty did not extend to all the husband's business dealings with community property but was to be limited to property settlements with his wife.<sup>2</sup> In 1975, the legislature enacted Civil Code Section 5125, which provided equal management and control of community property and reduced the spousal duty to "good faith."

In 1979, the California Supreme Court spoke again,<sup>3</sup> this time to limit the period during which the spousal duty exists to the time prior to filing a petition for dissolution. As a result, the court held, "from the time that wife filed her petition seeking dissolution of the marriage...her relationship with her husband was an adversary one. Any obligation of trust between them [is] terminated."<sup>4</sup> The supreme court held that the mere disclosure of an asset was sufficient and that further information regarding the nature or value of the asset was not necessary.<sup>5</sup> Still, notwithstanding the end of an obligation of trust, in 1983, the court of appeal recognized that a duty of good faith re-

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mained on the husband as a fiduciary for his wife beyond the date of the parties' separation as to those community assets remaining in his control.<sup>6</sup>

*In re Marriage of Stevenot*<sup>7</sup> set forth a restrictive interpretation of spousal duties. The standard of fiduciary duty, compared with a standard of "good faith" at a certain stage of the relationship, juxtaposed with a confidential relationship prior to the date of separation, created an ambiguous mix of definitions and standards. What *Stevenot* did not do was to discuss and explain the nature, scope, and meaning of the fiduciary duty between spouses before filing a dissolution proceeding.

In 1991, applicable sections of the Civil Code were amended to replace the good faith standard with a heightened duty of care between spouses, making applicable the rules governing fiduciary rela-

tionships.<sup>8</sup> The ambiguity which had by then evolved, however, required definition and distinction between the standards of good faith and fiduciary duty. An attempted clarification came in 1994 in *In re Marriage of Reuling*,<sup>9</sup> in which the court of appeal explained that "given a stated judicial distinction between the two standards and the subsequent change in the statutory language from 'good faith' to 'fiduciary duty,' we may reasonably infer that the Legislature intended by the 1991 amendments to replace a lesser standard with one deemed higher."<sup>10</sup>

A stricter standard of spousal fiduciary duty emerged at the dawn of the new century. *In re Marriage of Brewer & Federici*<sup>11</sup> heightened the fiduciary duty and shifted the burden of disclosure to the spouse in a superior position to obtain records or financial information from which an asset could be valued.<sup>12</sup>

## In Re Marriage of Duffy

**At the time of the 2001 decision** in *In re Marriage of Duffy*, Family Code Section 721 set forth the fiduciary duties between spouses. The statute specifically excluded Probate Code Section 16040 from the definition of spousal fiduciary duties. The duty of care mandated by Section 16040 is synonymous with the level of care required by the prudent investor rule.<sup>13</sup> Section 16040 requires a trustee to administer a trust with "reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use...."<sup>14</sup>

*In re Marriage of Duffy*<sup>15</sup> reversed the trial court and held that a spouse generally is not bound by the prudent investor rule and does not owe to the other spouse the duty of care that one business partner owes to another.<sup>16</sup> The *Duffy* facts illustrate this point and are helpful in better understanding the practical impact this case would have on the duty that spouses owe to each other. Vincent and Patricia Duffy were married in 1962. For 34 years, between 1963 and 1997, Vincent made investments in real estate, business ventures, and vacation property. The trial court found that Vincent made investments without consulting his wife or obtaining her input and failed to tell her how he was funding the investments, ignored some of her requests for financial information, and treated her in a curt and dismissive manner that had the effect of discouraging further questioning. The trial court determined that Vincent breached his fiduciary duty to his wife and ordered him to pay her approximately \$400,000 in damages.<sup>17</sup> Vincent appealed the trial court's finding of breach of his fiduciary duty; Patricia appealed the trial court's denial of her request for fees. The Second District affirmed in part and reversed in part.

The court of appeal dealt with the degree of Patricia's requests and the degree of Vincent's refusals to respond. The appellate panel concluded that Vincent had a duty to disclose financial information, but Patricia had a corresponding duty to request information. The court determined that the trial court had erred in concluding that Vincent breached his fiduciary duty of disclosure to Patricia. According to the court of appeal, "[A] spouse generally is not bound by the prudent investor rule and does not owe to the other spouse the duty of care one business partner owes to another....To summarize, [Vincent Duffy did not owe Patricia Duffy] a duty of care in investing the community assets. Inasmuch as [he owed her] no duty of care, he cannot have breached that duty."<sup>18</sup>

The legislature reacted swiftly to the *Duffy* decision with enactment of Senate Bill 1936. Although this amendment to Family Code Section 721, which became effective January 1, 2003, consisted of only six words and four numbers,<sup>19</sup> it has produced a torrent of debate and uncertainty. There is a good reason why so much confusion on this topic has arisen. The language of Section 721 is seemingly inconsistent with the uncodified section of the statute. For example, the leg-

islature on one hand appears to exclude the prudent investor rule by stating at the beginning of the statute:

Except as provided in Section...16047 of the *Probate Code* [which defines and embodies the prudent investor rule], in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other.<sup>20</sup>

However, just a few lines later, in the same statute, the legislature appears to include the prudent investor rule in uncodified Section 2 in stating:

It is the intent of the Legislature in enacting this act to clarify that Section 721 of the *Family Code* provides that the fiduciary relationship between the spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in Sections 16403, 16404, and 16503 of the *Corporations Code*, and to abrogate the ruling in *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, to the extent that it is in conflict with this clarification.<sup>21</sup>

Many who adopt the view that the amended statute has inconsistent provisions argue that the legislature intended to exclude the prudent investor rule.<sup>22</sup> Their argument rests on the fact that the legislature failed to specify in Section 2 of the uncodified provision which of the two holdings in *Duffy* it intended to abrogate.<sup>23</sup> According to this viewpoint, the legislature did not abrogate the *Duffy* holding that the prudent investor rule did not apply.<sup>24</sup> This is a legitimate argument because it attempts to harmonize the two seemingly inconsistent provisions.

A better reasoned basis for this position eliminates the fog that has hovered over the statute since its enactment. Careful reading of the cross references in Section 721 to the Probate and Corporations Codes clarifies the legislature's intent. Prior to *Duffy* and the enactment of SB 1936, the legislature excluded Probate Code Section 16040 (the duty of care contained in the prudent investor rule) from the definition of spousal fiduciary duties. With the enactment of SB 1936, the legislature also excluded Probate Code Section 16047 from the definition of spousal fiduciary duties. By excluding Section 16047 in the newly amended statute, the legislature affirmed the *Duffy* holding that spouses do not owe a duty of care to each other as non-marital business partners do.

The legislature, rather than abrogating *Duffy's* exclusion of the prudent investor rule, opted for a more moderate set of duties encompassed by amended Section 721's cross-reference to Corporations Code Section 16404.<sup>25</sup> Section 16404 requires business partners to refrain from "engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law."<sup>26</sup> By adding to Section

721 a reference to Corporations Code Section 16404, the legislature intended that spouses would owe each other a duty of care. However, it would be the degree of care owed between nonmarital business partners instead of the duty of care mandated by Probate Code Section 16040. For example, under Corporations Code Section 16404, a spouse's conduct would have to be more egregious to breach the fiduciary duty. Mere negligence, which would be sufficient to hold spouses accountable under Probate Code Section 16040, would not be sufficient under Corporations Code Section 16404. Thus, the legislature made clear that spouses do indeed owe each other a duty of care, however, a lesser duty than the one rejected in *Duffy*.



This argument explains the debatable inconsistency in the provisions of Section 721. It allows *Duffy's* exclusion of the prudent investor rule to stand and clarifies which holding in *Duffy* the legislature intended to abrogate in Section 2 of the uncodified part of the statute. Meaningful support exists for the view that the prudent investor rule does not apply as part of the fiduciary duty between spouses in the new statutory language.

Although no published court of appeal case has yet dealt with these issues, two recent unpublished California appellate opinions, *In re Marriage of Fell*<sup>27</sup> and *In re Marriage of McGuire*,<sup>28</sup> share the conclusion that the prudent investor rule does not apply. In addition, well-reasoned commentary substantiates the position that the prudent investor rule does not and should not apply to the duty between spouses.<sup>29</sup>

On the other hand, if one wanted to argue that the prudent investor rule does and should apply, the core argument would rest on five spe-

cific words added to Section 721. SB 1936 added the language "including, but not limited to" when referring to the duties set forth in Family Code Section 721(b)(1)-(3).<sup>30</sup> "By not limiting the right of spouses to sue each other for only the rights specifically enumerated in Family Code Section 721(b), the new code section allows spouses to sue each other for breach of fiduciary duty even though [it is] not specifically listed in Family Code Section 721(b)."<sup>31</sup> If the statute expressly "excludes" the prudent investor rule, however, the general language of "including, but not limited to" does not bring it back. In statutory construction,

the specific controls over the general.<sup>32</sup> On the other hand, the position that the fiduciary duty described in amended Section 721 is the same as contained in the prudent investor rule is strengthened in the introduction to SB 1936.<sup>33</sup> However, this minority viewpoint leads to numerous interpretive problems and would open the door to endless litigation.

Regardless of how one reads Section 721—to include or exclude the prudent investor rule—much can and should be done to clarify the existing law. Despite the fact that one respected family law attorney recently wrote that the new amendments "have added a welcome clarity to understanding spousal fiduciary duty,"<sup>34</sup> few would disagree that more clarity is needed. The legislature should state explicitly whether the prudent investor rule applies. It would be even more constructive if the legislature would enact language stating affirmatively what the fiduciary duty between spouses is, rather than continually obfuscating the issue with convoluted cross-references to the Family, Corporations, and Probate Codes.<sup>35</sup>

## The Shifting Burden of Proof

*In re Marriage of Haines* firmly established the doctrine in California that when one spouse alleges a breach of fiduciary duty, the burden shifts to the accused spouse to prove that he or she has not committed the breach.<sup>36</sup> There are two different theories under which courts have reached this conclusion. One theory appears in the context of undue influence and the other arises within the ambit of constructive fraud.

According to Family Code Section 721(b), transactions between a husband and a wife 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 unfair advantage of the other.<sup>37</sup>

In *Haines*, a case involving undue influence, the wife deeded her interest in a residence to her husband in exchange for his cosignature on a loan to purchase an automobile.<sup>38</sup> At the trial, the wife argued that she only deeded away her interest in the residence because of undue influence. The court held she had the burden of proving this allegation and had failed to do so.<sup>39</sup> The court of appeal reversed the trial court, observing that, although spouses have the right to enter into transactions, when an interpersonal transaction

advantages one spouse, the law presumes the transaction to have been induced by undue influence.<sup>40</sup>

The reasoning supporting this judicially created presumption is that spouses are subject to special rules that control the actions of persons occupying confidential relations with each other.<sup>41</sup> Because of these special rules, the burden is placed on the advantaged spouse to prove by a preponderance of the evidence that no undue influence was exerted and that the transaction was made freely and voluntarily with a complete understanding of the effect of the transfer.<sup>42</sup> Based on this determination, the *Haines* court emphasized that the trial court should have placed the burden of proof on the husband, the advantaged spouse, and not on the wife.<sup>43</sup>

A recent important case illuminating this principle, *In re Marriage of Delaney*,<sup>44</sup> held that the *Haines* presumption of undue influence overcomes the presumptions in Family Code Section 2581 (that property acquired during marriage in joint tenancy is community property) and Evidence Code Section 662 (that an owner of legal title to property owns the full beneficial title). In *Delaney*, one spouse gained an advantage over the other in a property transaction in which the husband's separate property house was transferred by grant deed to the husband and wife as joint tenants incident to obtaining a home improvement

loan. The trial court set aside the deed, and the court of appeal affirmed, relying on the *Haines* presumption of undue influence in transactions between spouses. The *Delaney* opinion restated the requisite burden to overcome the presumption of undue influence in an interspousal transaction in straightforward language that underscores the difficulty in overcoming the presumption:

[I]t 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.<sup>45</sup>

One can now legitimately argue that *Delaney* has raised the bar to overcoming the *Haines* presumption of undue influence. The *Haines* standard of preponderance of the evidence to rebut the presumption remains, but *Delaney's* language and holding emphasize the strength of the presumption of undue influence and the current difficulty of overcoming it. Creative practitioners, responding to these developments, may consider addressing and attempting to overcome the presumption of undue influence in a postnuptial agreement incident to a material interspousal transfer or transmutation of property interests.

Another recent California case focusing on the burden of proof issue is *In re Marriage of Lange*.<sup>46</sup> *Lange* held that a rebuttable presumption arises when one spouse obtains an advantage over the other spouse in a community property transaction.<sup>47</sup> This result occurs because a fiduciary generally obtains an advantage if his or her position is improved, he or she obtains a favorable opportunity, or he or she otherwise gains, benefits, or profits in an interspousal transaction.<sup>48</sup> In *Lange*, the husband executed a promissory note and deed of trust to his wife. The court held as a matter of law that the wife received an advantage or benefit from her husband's execution of the promissory note and deed of trust because she then became a secured creditor, entitled to a 10 percent interest on her husband's obligation. As the court explained, the wife was charged with dispelling the presumption of undue influence and, because she failed to do so, the note

and the deed of trust were held unenforceable.<sup>49</sup>

These cases are intensely fact-driven. *In re Marriage of Friedman*<sup>50</sup> provides a good example of a case in which a factual showing rebutted the presumption of undue influence. *Friedman* upheld a postnuptial agreement on the ground that the *Haines* presumption of undue influence was dispelled by the evidence. The husband met his burden of showing that his wife was "not induced to execute the postnuptial agreement through mistake, undue influence, fraud, misrepresentation, or any other breach of the Friedman's confidential relationship" and that there was no "taint" to the agreement.<sup>51</sup>

Burden of proof issues also arise in breach of fiduciary duty claims that involve constructive fraud. In fact, a finding of constructive fraud formed part of the basis for the holding in *Haines*. Similarly, in *In re Marriage of Baltins*, the court held that "constructive fraud comprises all acts, omissions, and concealments involving breach of legal or equitable duty, trust, or confidence, and resulting in damage to another."<sup>52</sup> Numerous law review articles echo the logic and arguments of the courts.<sup>53</sup>

In contrast to these cases, the court of appeal, in *Bono v. Clark*,<sup>54</sup> recently held that the presumption of wrongdoing does not arise simply from the disappearance of a community asset. As in cases involving undue influence, in this area of the law the inquiry is particularly fact-intensive. *Bono* upheld a trial court's determination that the wife had failed to carry her burden of proof that her husband inappropriately disposed of assets. According to this opinion, the mere absence of personal property assets years after separation is insufficient to raise an inference that the husband disposed of them inappropriately.<sup>55</sup>

Critics of the holding in *Bono* have argued that if it can be demonstrated that certain marital assets exist on the date of separation and are in the possession of one spouse, it becomes that spouse's obligation to account for them. If he or she cannot do so, then that party should be charged for their value. To hold otherwise, opined one commentator, makes a mockery of the concept of fiduciary duty because the spouse in possession of real or personal property should bear full responsibility.<sup>56</sup>

## Potential Breaches of Fiduciary Duty

**An inherent tension** has long existed when one spouse chooses between separate property and community property to fund investment opportunities presented during marriage. As the duty of spouses toward each other has been heightened from disclosure to good faith and then to fiduciary duty, this tension has increased. Proposed resolution of this conflict is often addressed in prenuptial agreements. But once married, the fiduciary duty one spouse owes the other makes this tension a Hobson's choice (given the vagaries of the nature and extent of factual disclosures between married partners illustrated by *Duffy*) because of the present uncertainty in the nature and scope of spousal fiduciary duties. In *Duffy*, the court put it this way: "A breach of loyalty could occur simply from seizing an excellent investment opportunity for the benefit of one's personal property rather than for the benefit of the community estate."<sup>57</sup>

The duty of loyalty to one's spouse and to the community has been infused into the fiduciary duty obligation.<sup>58</sup> If no notice is given to the other spouse and marital property is utilized for an investment, undisclosed profits are susceptible to a claim of breach of fiduciary duty, with possibly draconian results.<sup>59</sup> If community property is not properly handled, and the investment loses value, losses are susceptible to a claim of breach of the fiduciary duty owed to the other spouse, and a charge for the lost funds may be imposed against the mismanaging spouse.<sup>60</sup>

A recent case illustrates the dilemma. In *In re Marriage of Destein*,<sup>61</sup> the husband had historically successfully invested the bulk of his sep-

arate property in growth assets, specifically non-income-producing real estate. The trial court imputed investment earnings for purposes of calculating child support. On appeal, the husband contended that the trial court was not entitled to second-guess his reasonable investment strategy. The court of appeal rejected his argument and upheld the trial court's ruling. The *Destein* opinion cites authority from other jurisdictions and text authority to support its reasoning and conclusion that the historic allocation of assets to growth, rather than income, does not preclude imputation of income to such assets.<sup>62</sup> This type of second-guessing of marital investment philosophy and decision making, if applied to a prudent investor rule between spouses, could create endless litigation between spouses and requires courts to act as investment advisers.

Another recent appellate decision, *In re Marriage of Hixson*, restricted the requirement for disclosing and sharing business opportunities that are presented to just one spouse.<sup>63</sup> The trial court held that the ex-husband was not required to share a postjudgment investment opportunity with his ex-wife because, based on Family Code Section 2102(a), the asset had been distributed by a stipulated judgment.<sup>64</sup> However, there was no indication in the opinion that the asset had "actually been distributed" as required by Section 2102(b), and continuation of the fiduciary duty until distribution, as required by that section, should have been discussed and considered.<sup>65</sup> The surprisingly restrictive opinion in the *Hixson* case teaches the lesson that duration of the spousal fiduciary duties after separation and even judgment

must be carefully examined under both Family Code Section 2102(a) and Section 2102(b).

It is difficult enough in California for intended spouses to negotiate and sign an enforceable prenuptial agreement. Statistics tell us it is even harder to stay married. Now we see that even during marriage, California spouses are confronted with a combustible mix of disclosures, decisions, and duties that affect their money, investments, businesses, and financial well-being. Ultimately, their emotional well-being is at stake when the complexities of legislative enactments and judicial interpretation are made known to them. Professional representatives, including attorneys, accountants, business managers, investment advisers, and financial planners have a duty and responsibility to inform clients of their rights and responsibilities during all stages of a relationship. It is no longer acceptable to wait until things go wrong, to advise clients after the fact of the new rules and standards. As the court of appeal recently observed: "Judicial decisions in family law cases have lasting effects on the parties' homes, familial relationships, and families."<sup>66</sup> The new rules and standards, amended statute, spirited current debate, and changing and often inconsistent judicial interpretations are too critically important to overlook when providing advice to clients. Professional excellence and responsibility to clients deserve no less commitment than faithful and continuing study and critique of this evolving and important area of the law. ■

<sup>1</sup> Vai v. Bank of Am., 56 Cal. 2d 329, 15 Cal. Rptr. 71 (1961).  
<sup>2</sup> Bank of Calif. v. Connolly, 23 Cal. 3d 590, 600, 153 Cal. Rptr. 423 (1973).  
<sup>3</sup> Id.  
<sup>4</sup> Id.  
<sup>5</sup> Id.  
<sup>6</sup> In re Marriage of Munguia, 146 Cal. App. 3d 853, 195 Cal. Rptr. 199 (1983).  
<sup>7</sup> In re Marriage Stevenot, 154 Cal. App. 3d 151, 202 Cal. Rptr. 116 (1984).  
<sup>8</sup> CIV. CODE §§5103, 5125, 5125.1.  
<sup>9</sup> In re Marriage of Reuling, 23 Cal. App. 4th 1428, 28 Cal. Rptr. 2d 726 (1994).  
<sup>10</sup> Id.  
<sup>11</sup> In re Marriage of Brewer & Federici, 93 Cal. App. 4th 1334, 113 Cal. Rptr. 2d 849 (2001).  
<sup>12</sup> Id.  
<sup>13</sup> PROB. CODE §§16045-16054. Probate Code §16040 mandates the same standard of behavior as the prudent investor rule, but is not called the "prudent investor rule" and falls outside the Uniform Prudent Investor Act.  
<sup>14</sup> PROB. CODE §16040.  
<sup>15</sup> In re Marriage of Duffy, 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160 (2001).  
<sup>16</sup> Id.  
<sup>17</sup> Id.  
<sup>18</sup> Id. The Duffy court's reference to a duty of care is the equivalent of the prudent investor rule.  
<sup>19</sup> FAM. CODE §721(b) (amended effective Jan. 1, 2003). The following is the text of the prior version of Family



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Code §721 indicating changes enacted by SB 1936: § 721 Contracts with each other and third parties; fiduciary relationship

(a) Subject to subdivision (b), either husband or wife 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, and 16040 and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which 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 15010, 15020, 15021, and 15022 16403, 16404, and 16503 of the Corporations Code, including, but not limited to the following:

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

(2) Rendering upon request, true and full information of all things affecting any transaction which 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 which concerns the community property.

Sec. 2: It is the intent of the Legislature in enacting this act to clarify that Section 721 of the Family Code provides that the fiduciary relationship between the spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, and to abrogate the ruling in *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, to the extent that it is in conflict with this clarification.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Garrett C. Dailey, *Fiduciary Duty and the Prudent Investor Rule: Legislature Continues Efforts to Define Marital Duties*, ATTORNEY'S BRIEFCASE 94-97 (2003); Garrett C. Dailey, *Prudent Investor Rule Does Not Apply to Investment Decisions Made During Marriage—Yet*, FAMILY L. NEWS, Summer 2003, at 5-6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> CORP. CODE §16404

<sup>27</sup> *In re Marriage of Fell*, 2003 WL 21380860 (Cal. App. 2d Dist., June 16, 2003) (unpublished).

<sup>28</sup> *In re Marriage of McGuire*, 2002 WL 177279 (Cal. App. 2d Dist., Aug. 1, 2002) (unpublished) (decided prior to Jan. 1, 2003, the date the amendment to FAM. CODE §721 became effective.)

<sup>29</sup> Dailey, *supra* note 22.

<sup>30</sup> Peter M. Walzer & Gregory W. Herring, *What Words Don't You Understand—Fiduciary or Duty? In Amending Family Code Section 721, the Legislature Gives Unhappy Couples One More Thing to Fight About*, FAM. L. NEWS,

Winter 2003, at 5-7.

<sup>31</sup> *Id.*

<sup>32</sup> CODE CIV. PROC. §1859.

<sup>33</sup> The introduction states: "[T]his bill would subject a husband or wife that enters into any real property transaction with the other to those general rules governing fiduciary relationships where the transaction involves the administering of a trust." Unfortunately, this explanatory language is confusing. The reference to only real property makes no sense, inasmuch as Section 721 otherwise expressly applies to all property transactions. Nonetheless, this language undeniably expresses an intent to apply the prudent investor rule to marital transactions.

<sup>34</sup> Diana Richmond, *Clarifying the Marital Partnership*, CAL. FAM. L. MONTHLY, Feb. 2003, at 43-46.

<sup>35</sup> See FAM. CODE §721; PROB. CODE §§143, 144, 146, 16040, 16047; and CORP. CODE §§16403, 16404, 16503.

<sup>36</sup> In re Marriage of Haines, 33 Cal. App. 4th 277, 39 Cal. Rptr. 2d 673 (1995).

<sup>37</sup> FAM. CODE §721(b).

<sup>38</sup> Haines, 33 Cal. App. 4th at 284.

<sup>39</sup> *Id.* at 297.

<sup>40</sup> *Id.* at 293.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 295-297; HOGOBOOM & KING, CALIFORNIA PRACTICE GUIDE TO FAMILY LAW Ch. 8-B at 559-74 (2002).

<sup>43</sup> Haines, 33 Cal. App. 4th at 297.

<sup>44</sup> In re Marriage of Delaney, 111 Cal. App. 4th 991, 4 Cal. Rptr. 3d 378 (2003).

<sup>45</sup> *Id.* at 999-1000.

<sup>46</sup> In re Marriage of Lange, 102 Cal. App. 4th 360, 125 Cal. Rptr. 2d 379 (2002).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> In re Marriage of Friedman, 100 Cal. App. 4th 65, 122 Cal. Rptr. 2d 412 (2002).

<sup>51</sup> *Id.*

<sup>52</sup> In re Marriage of Baltins, 212 Cal. App. 3d 66, 260 Cal. Rptr. 403 (1989). See also Estate of Cover, 188 Cal. 133 (1922).

<sup>53</sup> Bradley L. Adams, *The Doctrine of Fraud on the Community*, 49 BAYLOR L. REV. 445 (1997); Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367 (1997). Both law review articles support the argument that the presumption of constructive fraud shifts the burden of proof.

<sup>54</sup> Bono v. Clark, 103 Cal. App. 4th 1409, 128 Cal. Rptr. 2d 31 (2002), *rev. denied*.

<sup>55</sup> *Id.*

<sup>56</sup> Dailey, *supra* note 22.

<sup>57</sup> In re Marriage of Duffy, 91 Cal. App. 4th 923, 937, 111 Cal. Rptr. 2d 160 (2001).

<sup>58</sup> Richmond, *supra* note 34.

<sup>59</sup> In re Marriage of Rossi, 90 Cal. App. 4th 34, 108 Cal. Rptr. 2d 270 (2001).

<sup>60</sup> In re Marriage of Hokanson, 68 Cal. App. 4th 987, 80 Cal. Rptr. 2d 699 (1998).

<sup>61</sup> In re Marriage of Destein, 91 Cal. App. 4th 1385, 111 Cal. Rptr. 2d 487 (2001).

<sup>62</sup> *Id.* at 1394-96.

<sup>63</sup> In re Marriage of Hixson, 111 Cal. App. 4th 1116, 4 Cal. Rptr. 3d 483 (2003), *reh'g denied, petition for rev. filed* (Nov. 4, 2003).

<sup>64</sup> *Id.*; FAM. CODE §2102(a).

<sup>65</sup> Hixson, 111 Cal. App. 4th 1116; FAM. CODE §2102(b).

<sup>66</sup> *Settlemyre v. Superior Court*, 103 Cal. App. 4th 1150, 127 Cal. Rptr. 2d 381 (2002); JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF COURTS, REPORT OF THE SUBORDINATE JUDICIAL OFFICER WORKING GROUP ON SUBORDINATE JUDICIAL OFFICERS DUTIES AND TITLES 22 (2002).

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