

Hill v. National Collegiate Athletic Assn.

Supreme Court of California

January 28, 1994, Decided

No. S018180.

Reporter

7 Cal. 4th 1 *; 865 P.2d 633 **; 26 Cal. Rptr. 2d 834 ***; 1994 Cal. LEXIS 9 ****; 94 Cal. Daily Op. Service 681; 9 I.E.R. Cas. (BNA) 716; 94 Daily Journal DAR 1141

JENNIFER HILL et al., Plaintiffs and Respondents,
v. NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, Defendant and Appellant;
BOARD OF TRUSTEES OF LELAND
STANFORD JUNIOR UNIVERSITY, Intervener
and Respondent.

Prior History: [****1] Superior Court of Santa Clara County, No. 619209, Conrad Lee Rushing, Judge.

Disposition: The judgment of the Court of Appeal affirming the permanent injunction against the NCAA's drug testing program is reversed. This case is remanded with instructions to direct entry of a final judgment in favor of the NCAA. The NCAA shall recover its costs.

Core Terms

privacy, athlete, right to privacy, urine, drug testing program, privacy interest, intrusion, student athlete, drug testing, ballot argument, compelling interest, voter, invasion of privacy, constitutional right, entity, invasion, monitor, intrude, ballot, public need, drug use, nongovernmental, abridgment, reasonable expectation of privacy, athletic competition, steroid, intercollegiate, state constitutional, safeguard, disclosure

Case Summary

Procedural Posture

Defendant athletic association sought review of a

judgment from the Court of Appeals (California), which affirmed the superior court's decision to grant a permanent injunction precluding defendant from enforcing its drug testing program against plaintiff student athletes and other athletes attending intervenor university on the ground that defendant failed to establish a "compelling state interest" in support of its program.

Overview

On review, the court reversed the decision to uphold the permanent injunction against defendant athletic association and directed entry of a final judgment for defendant, determining that defendant's drug testing program did not violate plaintiff student athletes' state constitutional right to privacy. The court found that although defendant, a private organization, was properly subject to a claim for invasion of privacy, defendant was not required to justify its drug testing program through proof of a "compelling state interest" and the absence of any alternative means of accomplishing that interest. The court noted that plaintiffs had no right to participate in intercollegiate athletic competition and that plaintiffs' reasonable expectation of privacy had been diminished by the notice and consent elements of defendant's testing program. The court concluded that defendant's decision to enforce a ban on the use of drugs by means of drug testing as its information-gathering procedure had been reasonably calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition and in protecting plaintiffs' health and safety.

Outcome

The court reversed the permanent injunction against defendant athletic association and remanded the case for entry of judgment for defendant on plaintiff student athletes' state constitutional invasion of privacy claims. Defendant had not violated plaintiffs' privacy rights through its use of a drug testing program that was reasonably calculated to further defendant's legitimate interest in safeguarding intercollegiate athletic competition.

constitutional declarations of rights, the section does not define "privacy" or explain its relationship to other rights or interests. Nor does it specify how or against whom the right of privacy is to be safeguarded.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Legislation > Initiative & Referendum

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > State Constitutional Operation

HN1 Substantive Due Process, Privacy

See [Cal. Const. art. I, § 1](#).

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN2 Elementary & Secondary School Boards, Authority of School Boards

The National Collegiate Athletic Association is private actor that enjoys no governmental powers.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN3 Substantive Due Process, Privacy

[Cal. Const. art. I, § 1](#) is an enumeration of the "inalienable rights" of all Californians. "Privacy" is declared to be among those rights. Typical of broad

HN4 Substantive Due Process, Privacy

The Privacy Initiative is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California. When the language of an initiative measure does not point to a definitive resolution of a question of interpretation, it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. Such indicia include the analysis and arguments contained in the official ballot pamphlet.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN5 Substantive Due Process, Privacy

Although none of the California Supreme Court's decisions squarely addresses the question whether the state constitutional right to privacy may be enforced against private parties, the Courts of Appeal consistently answer in the affirmative.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN6 Substantive Due Process, Privacy

The constitutional provision in the Privacy Initiative is self-executing; hence, it confers a judicial right of action on all Californians. Privacy

is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > State Constitutional Operation

HN7 Fundamental Rights, Procedural Due Process

What the "drafters" of the state constitution's due process clause "intended by that enactment" remains the pivotal factor in determining whose activity is subjected to regulation.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Legislation > Initiative & Referendum

HN8 Substantive Due Process, Privacy

The Privacy Initiative in [Cal. Const. art. I, § 1](#) creates a right of action against private as well as government entities. The legal concept of "privacy" as embodied in the initiative is susceptible of such an interpretation; the ballot arguments strongly support it. The court's holding in this regard is necessarily confined to the Privacy Initiative. The court intimates nothing about the existence of rights of action or permissible defendants in legal proceedings that may be brought either under other clauses in [Cal. Const. art. I, § 1](#) or other parts of the California Constitution.

Governments > Legislation > Interpretation

HN9 Legislation, Interpretation

When an initiative contains terms that have been judicially construed, the presumption is almost irresistible that those terms have been used in the precise and technical sense in which they have been used by the courts. The adopting body is presumed to be aware of existing laws and judicial construction thereof.

Real Property Law > Torts > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

HN10 Real Property Law, Torts

The privacy tort seeks to vindicate multiple and different interests that range from freedom to act without observation in a home, hospital room, or other private place to the ability to control the commercial exploitation of a name or picture.

Governments > Courts > Common Law

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN11 Courts, Common Law

The common law right of privacy contains several important limiting principles that have prevented its becoming an all-encompassing and always litigable assertion of individual right. Initially, not every kind of conduct that strays from social custom or implicates personal feelings gives rise to a common law cause of action for invasion of privacy. The various branches of the privacy tort refer generally to conduct that is "highly offensive to a reasonable person," thereby emphasizing the importance of the objective context of the alleged invasion, including: (1) the likelihood of serious harm, particularly to the emotional sensibilities of the victim; and (2) the presence or absence of countervailing interests

based on competing social norms which may render defendant's conduct inoffensive, e.g., a legitimate public interest in exposing and prosecuting serious crime that might justify publication of otherwise private information or behavior.

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN12 Invasion of Privacy, Intrusions

The plaintiff in an invasion of privacy case must conduct himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability. The maxim of the law "volenti non fit injuria," no wrong is done to one who consents, applies as well to the invasion of privacy tort.

Communications Law > Overview & Legal
Concepts > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN13 Overview & Legal Concepts, Privacy

In determining the "offensiveness" of an invasion of a privacy interest, common law courts consider, among other things: the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN14 Invasion of Privacy, Intrusions

The common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized. A plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved.

Governments > Fiduciaries

Healthcare Law > Medical Treatment > Patient
Confidentiality > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Healthcare Law > Medical Treatment > General
Overview

HN15 Governments, Fiduciaries

Particularly when professional or fiduciary relationships premised on confidentiality are at issue, such as doctor and patient or psychotherapist and client, the state constitutional right to privacy may be invaded by a less-than-public dissemination of information. Moreover, the common law right of privacy may not be violated by word of mouth only and can be infringed only by printings, writings, pictures or other permanent publications.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Environmental Law > Land Use &
Zoning > Constitutional Limits

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Unenumerated Rights

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN16 Privacy, Personal Decisions

Although the federal Constitution contains no explicit reference to a "privacy" right, implicit in the Bill of Rights are "zones of privacy" emanating from the "penumbras" of the specific constitutional guarantees.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

HN17 Bill of Rights, Fundamental Rights

Like other rights contained in or derived from provisions of the Bill of Rights, the federal constitutional right to privacy applies only against state action.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN18 Substantive Due Process, Privacy

U.S. Const. amend. IV's search and seizure clause is sometimes referred to as a "privacy" provision. U.S. Const. amend. IV does not proscribe all searches and seizures, but only those that are unreasonable. Under U.S. Const. amend. IV and the parallel search and seizure clause of the Cal. Const. art. 1, § 13, the reasonableness of particular searches and seizures is determined by a general balancing test weighing the gravity of the governmental interest or public concern served and the degree to which the challenged government conduct advances that concern against the intrusiveness of the interference with individual liberty.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Legislation > Initiative & Referendum

HN19 Substantive Due Process, Privacy

The "privacy" protected by the Privacy Initiative is no broader in the area of search and seizure than the "privacy" protected by U.S. Const. amend. IV or by Cal. Const. art. I, § 13.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

HN20 Substantive Due Process, Privacy

In privacy cases involving informational interests, the federal courts generally apply balancing tests that avoid rigid "compelling interest" or "strict scrutiny" formulations. When it is applied, strict scrutiny generally functions as a judicial "trump card," invalidating any attempt at state regulation because the state's interest is rarely sufficiently compelling to justify abridgement of the right. But the U.S. Supreme Court does not endorse strict scrutiny for all privacy-based interests at all conceivable levels of intrusion.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > ... > Defenses > Privileges > Constitutional Privileges

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN21 Substantive Due Process, Privacy

Challenged surveillance activities can only be sustained if defendant can demonstrate a "compelling" state interest which justifies the resultant deterrence of U.S. Amend. I rights and which cannot be served by alternative means less intrusive on fundamental rights. This pertains to government invasion of one distinct set of privacy interests--those which overlap [U.S. Const. amend. I](#) and relate to "one's expressions," "the freedom of communion," and "the freedom to associate with the people one chooses."

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Torts > Intentional Torts > Invasion of

Privacy > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN22 Privacy, Personal Decisions

Some aspects of the state constitutional right to privacy--those implicating obvious government action impacting freedom of expression and association--are accompanied by a "compelling state interest" standard. The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

HN23 Substantive Due Process, Privacy

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to

privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information, which is "informational privacy;" and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference, which is "autonomy privacy."

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Torts > ... > Invasion of Privacy > Intrusions > General Overview

HN24 Search & Seizure, Expectation of Privacy

Informational privacy is the core value furthered by the Privacy Initiative. A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Legislation > Initiative & Referendum

Torts > ... > Invasion of Privacy > Intrusions > General Overview

HN25 Substantive Due Process, Privacy

Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy--common law development, constitutional

development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Sobriety Checkpoints

Public Health & Welfare Law > Healthcare > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN26 Warrantless Searches, Sobriety Checkpoints

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part. The extent of a privacy interest is not independent of the circumstances. Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to limit an intrusion upon personal dignity and security that would otherwise be regarded as serious. In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant.

Torts > ... > Invasion of

Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN27 Invasion of Privacy, Intrusions

Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN28 Substantive Due Process, Privacy

Privacy concerns are not absolute; they must be balanced against other important interests. Not every act which has some impact on personal privacy invokes the protections of the state constitution. A court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN29 Substantive Due Process, Privacy

Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.

Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN30 Invasion of Privacy, Intrusions

Confronted with a defense based on countervailing interests, plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests. For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged. On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

Constitutional Law > Bill of
Rights > Fundamental Freedoms > Freedom of
Association

HN31 Fundamental Freedoms, Freedom of Association

Freedom of association is also protected by U.S. Const. amend. I and extends to all legitimate organizations, whether popular or unpopular.

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN32 Invasion of Privacy, Intrusions

A plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

Torts > Intentional Torts > Invasion of
Privacy > General Overview

HN33 Substantive Due Process, Privacy

Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.

Civil Procedure > ... > Defenses, Demurrers &
Objections > Affirmative Defenses > Unclean
Hands

Torts > Intentional Torts > Invasion of
Privacy > Defenses

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN34 Affirmative Defenses, Unclean Hands

A defendant may prevail in a state constitutional privacy case by negating any of the elements or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Torts > ... > Invasion of
Privacy > Intrusions > General Overview

HN35 Substantive Due Process, Privacy

The existence of a sufficient countervailing interest or an alternative course of conduct in a state constitutional privacy case present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN36 Substantive Due Process, Privacy

A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Education Law > Intercollegiate & Interscholastic Athletics > Conduct Standards

HN37 Substantive Due Process, Privacy

The observation of urination--a human excretory function--obviously implicates privacy interests. But the reasonable expectations of privacy of plaintiffs and other student athletes in private urination must be viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Education Law > Intercollegiate & Interscholastic Athletics > Conduct Standards

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN38 Search & Seizure, Expectation of Privacy

As a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external. In recognition of this practical reality, drug testing programs involving athletic competition routinely survive [*U.S. Const. amend. IV*](#) "privacy" challenges. Drug testing is a highly visible, pervasive, and well accepted part of athletic competition, particularly

on intercollegiate and professional levels. It is a reasonably expected part of the life of an athlete, especially one engaged in advanced levels of competition, where the stakes and corresponding temptations are high.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN39 Fundamental Freedoms, Freedom of Association

One aspect of the state constitutional right to privacy is the freedom to associate with the people one chooses.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Education Law > Intercollegiate & Interscholastic Athletics > Student Participation

HN40 Fundamental Freedoms, Freedom of Association

Students and universities have no legal right to participate in intercollegiate athletic competition.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN41 Standards of Review, Clearly Erroneous Review

"Clearly erroneous" standard of review does not apply to a finding of fact that is predicated on a misunderstanding of the governing rule of law.

Governments > Police Powers

HN42 Governments, Police Powers

Government is not limited to addressing public safety problems after serious accidents reveal its want of foresight.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN43 Fundamental Freedoms, Freedom of Association

The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. However, a "less drastic means" analysis might not be applicable in other constitutional contexts. In other areas, involving different constitutional issues, more administrative leeway is thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. Thus, at the roots of the "least restrictive alternative" burden lie cases of government infringement of fundamental freedoms of expression and association. Those cases do not involve: (1) broad-based assertions of autonomy privacy interests, i.e., freedom of action as opposed to freedom of expression and association) (2) in circumstances of diminished

expectations of privacy on the part of participants in a voluntary extracurricular activity conducted by a private entity.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN44 Standards of Review, Substantial Evidence

Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not any evidence--it must be reasonable in nature, credible, and of solid value.

Criminal Law & Procedure > Search & Seizure > General Overview

Labor & Employment Law > Employee Privacy > Alcohol & Drug Testing

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN45 Criminal Law & Procedure, Search & Seizure

In the government employment context, for example, the [*U.S. Const. amend. IV*](#) protection against unreasonable searches and seizures is generally interpreted to require more than an employer interest in employee job performance or a "drug-free workplace" to justify drug testing without reasonable suspicion. Drug testing is

upheld when particular kinds of employment settings--including prison guarding, train operations, or customs inspection--present extraordinary risks to employer or public interests from employee drug use.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Legislation > Interpretation

HN46 Substantive Due Process, Privacy

The court prefers to avoid the continuing uncertainty and confusion inherent in the rigid application of a "compelling interest" test to a multi-faceted right to privacy. The court will not perpetuate this kind of error by continuing to say "compelling" when the court means merely "legitimate" or "important." There is enough confusion in the law. The court should say what it means and mean what it says.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Torts > ... > Invasion of Privacy > Intrusions > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN47 Substantive Due Process, Privacy

The National Collegiate Athletic Association's drug testing program does not violate the California constitutional right to privacy.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

University student athletes brought an action for injunctive relief against the National Collegiate Athletic Association (NCAA), challenging the NCAA's drug testing program of student athletes, and the university intervened on the students' behalf. The trial court entered judgment permanently enjoining the NCAA from testing athletes from this university. The court found that the program violated the athletes' right to privacy under [*Cal. Const., art. I, § 1*](#), and that the NCAA had failed to establish a compelling need for the program and failed to establish that there were no alternative means of accomplishing the NCAA's objectives. (Superior Court of Santa Clara County, No. 619209, Conrad Lee Rushing, Judge.) The Court of Appeal, Sixth Dist., No. H005079, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded with instructions to direct entry of a final judgment in favor of the NCAA. The court preliminarily held that the right to privacy under the California Constitution may be enforced against private entities. However, the court held that the NCAA's drug testing program did not violate the state constitutional right to privacy. The NCAA's program affected protected privacy interests, since, by monitoring plaintiffs' urination, the NCAA intruded on a human bodily function that is generally performed in private, and since, by collecting and testing plaintiffs' urine and by inquiring about drug use, the NCAA obtained information about the medical state of plaintiffs' bodies. However, by participating in athletic activity that required physical examinations, plaintiffs had a diminished expectation of privacy; moreover, plaintiffs had advance notice of the testing and an opportunity to consent to the program. Disqualification from competition, the consequence of refusal to be tested, did not render consent involuntary, since plaintiffs had no legal right to participate in sports. Also, the NCAA's program was reasonably calculated to further the countervailing interests of safeguarding the integrity of intercollegiate sports, in light of the widespread perception that drugs enhance

performance, and protecting the health and safety of students. The court also held that both the trial court and the Court of Appeal erred in imposing on the NCAA the burden of proving a compelling interest and the absence of alternative means of accomplishing that interest. Neither the language of [Cal. Const., art. I, § 1](#), nor judicial decisions concerning the right to privacy require this heightened scrutiny in all cases involving an alleged invasion of privacy by a nongovernmental entity. (Opinion by Lucas, C. J., with Panelli, Arabian and Baxter, JJ., concurring. Separate concurring and dissenting opinions by Kennard and George, JJ. Separate dissenting opinion by Mosk, J.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Nongovernmental Entities.

--The right of privacy under [Cal. Const., art. I, § 1](#), enacted by the voters in 1972 as an initiative measure by Prop. 11, applies to nongovernmental entities. The ballot arguments in favor of the initiative observed that there were then "no effective restraints on the information gathering activities of government and business." They stated that the initiative would prevent "government and business" from collecting unnecessary information, and that the "proliferation of government and business records" interfered with the personal lives of residents. The rebuttal arguments challenged the need for a constitutional safeguard, but did not challenge the application of the measure to private entities. Although some other constitutional rights impose a state-action prerequisite to a lawsuit by their language and history, the repeated reference in the ballot arguments to private party relationships underscored the efforts of the initiative's framers to create enforceable privacy rights against both governmental and nongovernmental entities. Thus,

the right of privacy may be enforced against private parties.

[See 7 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 454.]

[CA\(2\)](#) (2)

Initiative and Referendum § 6—State Elections—Initiative Measures—Interpretation.

--An enacted state initiative measure is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California. When the language of an initiative measure does not point to a definitive resolution of a question of interpretation, it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. These indicia include the analysis and arguments contained in the official ballot pamphlet.

[CA\(3\)](#) (3)

Initiative and Referendum § 1—Interpretation—Terms Already Judicially Construed.

--When an initiative measure contains terms that have been judicially construed, there is a presumption that those terms have been used in the precise and technical sense in which they have been used by the courts.

[CA\(4\)](#) (4)

Privacy § 3—Nature and Extent of Right—Purpose of Common Law Tort of Invasion of Privacy.

--The common law tort of invasion of privacy seeks to vindicate multiple and different interests that range from freedom to act without observation in a home, hospital room, or other private place to the ability to control the commercial exploitation of

a name or picture. The common law tort of invasion of privacy identifies distinct interests associated with an individual's control of the process or products of his or her personal life. The common law tort safeguards the interests of individuals in the maintenance of rules of civility.

CA(5) (5)

Privacy § 3—Nature and Extent of Right—Requirements to Maintain Action.

--Not every conduct that strays from social custom or implicates personal feelings gives rise to a common law cause of action for invasion of privacy. The tort refers generally to conduct that is highly offensive to a reasonable person, thereby emphasizing the importance of the objective context of the alleged invasion, including the likelihood of serious harm, particularly to the emotional sensibilities of the victim, and the presence or absence of countervailing interests based on competing social norms that may render the defendant's conduct inoffensive. Moreover, the plaintiff must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by conduct a voluntary consent to the invasive actions of the defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed highly offensive to a reasonable person so as to justify tort liability. In determining the offensiveness of an invasion of privacy, courts consider, among other factors, the degree of the intrusion, the context, conduct, and circumstances surrounding the intrusion, as well as the intruder's motives and objectives, the setting into which he or she intrudes, and the expectations of those whose privacy is invaded.

CA(6) (6)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under Federal Constitution—

Requirement of State Action.

--Like other rights contained in or derived from the [Bill of Rights of the federal Constitution](#), the federal constitutional right to privacy applies only against state action.

CA(7a) (7a) CA(7b) (7b)

Searches and Seizures § 9—Constitutional Provisions—Reasonableness of Search or Seizure—Balancing Test.

--The search and seizure clause of [U.S. Const., 4th Amend.](#), sometimes referred to as a "privacy" provision, does not proscribe all searches and seizures, but only those that are unreasonable. Under the Fourth Amendment and the parallel search and seizure clause of [Cal. Const., art. I, § 13](#), the reasonableness of particular searches and seizures is determined by a general balancing test weighing the gravity of the governmental interest or public concern served and the degree to which the challenged government conduct advances that concern against the intrusiveness of the interference with individual liberty.

CA(8) (8)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Application to Search and Seizure: Searches and Seizures § 9—Constitutional Provisions.

--The privacy protected by the Privacy Initiative (which added the right to privacy to [Cal. Const., art. I, § 1](#)) is no broader in the area of search and seizure than the privacy protected by the search and seizures provisions of [U.S. Const., 4th Amend.](#), and [Cal. Const., art. I, § 13](#).

CA(9a) (9a) CA(9b) (9b)

Constitutional Law § 58—First Amendment and

Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Nongovernmental Entities—Legal Standard for Determining Invasion of Privacy.

--In an action by university student athletes challenging the drug testing program of the National Collegiate Athletic Association (NCAA) as violating the athletes' right to privacy under [Cal. Const., art. I, § 1](#), the trial court and the Court of Appeal each erred in applying the same legal test for an invasion of privacy that applies to governmental entities. The courts imposed on the NCAA the burden of proving both a compelling state interest in support of drug testing and the absence of alternative means of accomplishing that interest. Neither the language of the provision nor the history of the initiative that added privacy to the Constitution requires the use of a "compelling interest" test in all cases involving privacy rights. Also, neither the common law tort of invasion of privacy nor cases involving the federal constitutional right of privacy require a "compelling need" test in all situations. The judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action, since the pervasive presence of coercive government power poses greater dangers to personal freedoms, individuals have greater choice in dealing with private parties, and private conduct is already constitutionally protected in the freedom of association.

[CA\(10\)](#) (10)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Identification of Protected Privacy Interest.

--The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Legally recognized privacy interests are generally of two classes:

interests in precluding the dissemination or misuse of sensitive and confidential information (informational privacy), and interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (autonomy privacy). Informational privacy is the core value furthered by the privacy initiative which amended [Cal. Const., art. I, § 1](#). A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. These norms create a reasonable expectation of privacy in the data at issue. Autonomy privacy is also a concern of the privacy initiative. However, whether social norms protect a particular type of information or personal decision is to be determined from the various sources of law governing the right of privacy.

[CA\(11\)](#) (11)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Expectation of Privacy.

--An essential element of a state constitutional cause of action for invasion of privacy under [Cal. Const., art. I, § 1](#), is a reasonable expectation of privacy on the plaintiff's part. The extent of a privacy interest is not independent of the circumstances. Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. A reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. Also, the presence or absence of opportunities to consent voluntarily to activities that affect privacy interests affects the expectations of the participant. Furthermore, actionable invasions of privacy must be sufficiently

serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. The extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

CA(12) (12)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Balancing of Privacy Interest Against Competing Interests.

--Privacy concerns under [Cal. Const., art. I, § 1](#), are not absolute; they must be balanced against other important interests. Invasion of a privacy interest is not a violation of [art. I, § 1](#), if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate competing interests. Confronted with a defense based on countervailing interests, a plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to the defendant's conduct that would minimize the intrusion on privacy interests.

CA(13) (13)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Elements of Cause of Action.

--A plaintiff alleging a violation of the right of privacy under [Cal. Const., art. I, § 1](#), must establish each of the following: a legally protected interest, a

reasonable expectation of privacy, and conduct by the defendant constituting a serious invasion of privacy. Whether a legally recognized privacy interest is present is a question of law to be decided by the court. The existence of the other two elements presents mixed questions of law and fact. A defendant may prevail by negating any of the three elements or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff may rebut the defendant's claim of countervailing interests by showing there exist feasible and effective alternatives to the defendant's conduct that have a lesser impact on privacy interests. The defendant may also plead and prove other appropriate defenses. The existence of a sufficient countervailing interest or an alternative course of conduct are questions of law; the relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact.

CA(14) (14)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Drug Testing—Collegiate Athletes.

--The trial court erred in permanently enjoining the National Collegiate Athletic Association (NCAA) from enforcing its drug testing program against plaintiff university athletes. The NCAA's program affected protected privacy interests; by monitoring plaintiffs' urination, the NCAA intruded on a human bodily function that is generally performed in private, and, by collecting and testing plaintiffs' urine and by inquiring about drug use, the NCAA obtained information about the medical state of plaintiffs' bodies. However, by participating in athletic activity that required physical examinations, plaintiffs had a diminished expectation of privacy, and plaintiffs had advance notice of the testing and an opportunity to consent

to the program. Disqualification from competition, the consequence of refusal to be tested, did not render consent involuntary, since plaintiffs had no legal right to participate in sports. Also, the NCAA's program was reasonably calculated to further the countervailing interests of safeguarding the integrity of intercollegiate sports and protecting the health and safety of student athletes.

[See 7 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 465 et seq.]

CA(15a) (15a) CA(15b) (15b)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Drug Testing—Collegiate Athletes—Evidence.

--In an action in which university athletes challenged the drug testing program of the National Collegiate Athletic Association (NCAA) as a violation of their right to privacy under Cal. Const., art. I, § 1, evidence that student athletes' use of drugs was legally insignificant as compared to other students' use was immaterial. By participating in athletics, plaintiffs had set themselves apart from other students and had diminished their expectation of privacy. It was also not the NCAA's burden to prove that prohibited drugs enhanced athletes' performance, and art. I, § 1, did not empower the court to make an item-by-item review of the desirability of retaining each item on the list of banned drugs. Moreover, even though the NCAA's method of monitoring athletes, observing them urinate, was highly intrusive, the NCAA justified this method as being necessary to prevent the alteration of specimens which would undermine the NCAA's interest in preserving the integrity of intercollegiate athletics, and plaintiffs failed to demonstrate the existence of fully viable alternatives.

CA(16) (16)

Appellate Review § 148—Scope of Review—Sufficiency of Evidence.

--Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not just any evidence. It must be reasonable in nature, credible, and of solid value.

CA(17) (17)

Constitutional Law § 58—First Amendment and Other Fundamental Rights of Citizens—Right of Privacy—Under California Constitution—Drug Testing—Collegiate Athletes—Interest in Privacy of Medical Information.

--In an action in which university athletes challenged the drug testing program of the National Collegiate Athletic Association (NCAA) as a violation of their right to privacy under Cal. Const., art. I, § 1, plaintiffs failed to demonstrate the NCAA violated their interest in the privacy of their medical treatment and information. As athletes, plaintiffs had a diminished expectation of privacy, since competition presupposes a continuing exchange of otherwise confidential information of competitors' medical and physical condition. Also, the NCAA had a "reason to know" of drug usage in order to protect the integrity of the games and to protect the health and safety of students. Further, the NCAA followed extensive procedures to safeguard test results, including the numbering of urine specimens, chain of custody procedures, and control of disclosures regarding disqualified athletes.

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Judges: Opinion by Lucas, C. J., with Panelli, Arabian and Baxter, JJ., concurring. Separate concurring and dissenting opinions by Kennard and George, JJ. Separate dissenting opinion by Mosk, J.

Opinion by: LUCAS, C. J.

Opinion

[*8] [**637] [***838] **LUCAS, C. J.**—The National Collegiate Athletic Association (NCAA) sponsors and regulates intercollegiate athletic competition throughout the United States. Under the NCAA's drug testing program, randomly selected college student athletes competing in postseason championships and football bowl games are required to provide samples of their urine under closely monitored conditions. Urine samples are chemically analyzed for proscribed substances. Athletes testing "positive" are subject to disqualification.

[*9] Plaintiffs, who were student athletes attending Stanford University (Stanford) at the time of trial, sued the NCAA, contending its drug testing program violated their right to privacy [****3] secured by [article I, section 1 of the California](#)

[Constitution](#). Stanford intervened in the suit and adopted plaintiffs' position. Finding the NCAA's program to be an invasion of plaintiffs' right to privacy, the superior court permanently enjoined its enforcement against plaintiffs and other Stanford athletes. The Court of Appeal upheld the injunction.

By its nature, sports competition demands highly disciplined physical activity conducted in accordance with a special set of social norms. Unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.

A student athlete's already diminished expectation of privacy is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs. As a sponsor and regulator of sporting events, the NCAA has self-evident interests in ensuring fair and vigorous competition, as well as protecting the health and safety [****4] of student athletes. These interests justify a set of drug testing rules reasonably calculated to achieve drug-free athletic competition. The NCAA's rules contain elements designed to accomplish this purpose, including: (1) advance notice to athletes of testing procedures and written consent to testing; (2) random selection of athletes actually engaged in competition; (3) monitored collection of a sample of a selected athlete's urine in order to avoid substitution or contamination; and (4) chain of custody, limited disclosure, and other procedures designed to safeguard the confidentiality of the testing process and its outcome. As formulated, the NCAA's regulations do not offend the legitimate privacy interests of student athletes.

For these reasons, as more fully discussed below, the NCAA's drug testing program does not violate plaintiffs' state constitutional right to privacy. We

will therefore reverse the judgment of the Court of Appeal and direct entry of final judgment in favor of the NCAA.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Plaintiffs' action for injunctive relief was tried to the court. We summarize the facts as revealed by the uncontradicted evidence in the record [****5] and the findings of the trial court.

[*10] The NCAA, a private association of more than 1,000 colleges and universities, was created to foster and regulate intercollegiate athletic competition. NCAA rules are made by member institutions, acting collectively and democratically at national conventions. Member institutions and college athletes are [***839] required to abide by NCAA rules as a condition to participation in NCAA-sponsored events.

*[**638] 1. EVENTS LEADING TO THE NCAA'S ADOPTION OF DRUG TESTING*

In 1973, the NCAA enacted a rule prohibiting student athlete drug use. Ten years later, at the Pan American Games in Caracas, Venezuela, several college student athletes tested positive for prohibited drugs. Others withdrew from competition when faced with the prospect of testing. In response to the incident, the United States Olympic Committee (USOC) developed a drug testing program modeled after the program of the International Olympic Committee, which had been established in the early 1970's. Following the lead of the USOC, the NCAA began to study drug use among student athletes.

The NCAA commissioned Michigan State University to conduct a nationwide survey of college athlete drug use. [****6] The results revealed substantial use of a variety of drugs--8 percent of the athletes surveyed reported using amphetamines, 36 percent marijuana or hashish, 17 percent cocaine, and 4 percent steroids. Nine percent of football players reported using steroids

at some time; six percent reported using steroids within the preceding twelve months.

In January 1984, the members of the NCAA's Pacific 10 Conference, including Stanford, introduced a resolution calling on the NCAA to adopt a mandatory drug testing program. The resolution recited that "the use of controlled substances and allegedly performance-enhancing drugs represents a danger to the health of students and a threat to the integrity of amateur sport."

Acting on the Pacific 10 Conference resolution, the NCAA created a special committee to study drug use and testing. The committee recommended a comprehensive drug testing program based on the Olympic model, concluding in part: "The NCAA has a legitimate interest in maintaining the integrity of intercollegiate athletics, including insuring fair competition and protecting the health and safety of all participating student athletes. The use of 'performance-enhancing' drugs by individual [****7] student-athletes is a violation of the ethic of fair competition, [and] poses a potential health and safety hazard to those utilizing such drugs and a potential safety hazard to those [*11] competing with such individuals. The most effective method of ensuring that student-athletes are not utilizing 'performance enhancing' drugs is through a consistent, national drug testing program."

At the NCAA's 1985 convention, the drug use and testing committee's proposal was referred back for further study and refinement. At the 1986 convention, the committee's revised proposal was adopted by an overwhelming vote of the member institutions. The NCAA's drug testing program has continued, with certain amendments, through the time of this appeal.

2. THE NCAA DRUG TESTING PROGRAM

The NCAA prohibits student athlete use of chemical substances in several categories, including: (1) psychomotor and nervous system stimulants; (2) anabolic steroids; (3) alcohol and

beta blockers (in rifle events only); (4) diuretics; and (5) street drugs. At the time of trial, sympathomimetic amines (a class of substances included in many medications) were also included in the NCAA's list of banned drugs. The **[****8]** NCAA has amended its rules to delete sympathomimetic amines from its list of proscribed substances.

Student athletes seeking to participate in NCAA-sponsored competition are required to sign a three-part statement and consent form. New forms must be executed at the beginning of each year of competition. The first part of the form affirms that the signator meets NCAA eligibility regulations and that he or she has duly reported any known violations of those regulations.

The second part of the form, entitled Buckley Amendment Consent, authorizes limited disclosure of the form, the results of NCAA drug tests, academic transcripts, financial aid records, and other information pertaining to NCAA eligibility, to authorized **[***840]** representatives of the athlete's institution and conference, as well as to the NCAA. The items of information to be disclosed are identified in the statement as "education records" pursuant to the federal Educational Rights and Privacy Act of 1974. ([20 U.S.C. § 1232\(g\)](#).)

[639]** The final part of the form is a "Drug-Testing Consent" including the following provisions:

"By signing this part of the form, you certify that you agree to be tested **[****9]** for drugs.

"You agree to allow the NCAA, during this academic year, before, during or after you participate in any NCAA championship or in any postseason **[*12]** football game certified by the NCAA, to test you for the banned drugs listed in Executive Regulation 1-7(b) in the NCAA Manual.

"You reviewed the procedures for NCAA drug testing that are described in the NCAA Drug-Testing Program brochure.

"You understand that if you test positive (the NCAA finds traces of any of the banned drugs in your body), you will be ineligible to participate in postseason competition for at least 90 days.

"If you test positive and lose eligibility for 90 days, and then test positive again after your eligibility is restored, you will lose postseason eligibility in all sports for the current and next academic year.

"You understand that this consent and the results of your drug tests, if any, will only be disclosed in accordance with the Buckley Amendment consent."

The Drug Testing Consent contains dated signature spaces for the student athlete and, if the student athlete is a minor, a parent. Failure to sign the three-part form, including the Drug Testing Consent, renders the student athlete **[****10]** ineligible to participate in NCAA-sponsored competition.

Drug testing is conducted at NCAA athletic events by urinalysis. All student athletes in championship events or postseason bowl games are potentially subject to testing. Particular athletes are chosen for testing according to plans that may include random selection or other selection criteria such as playing time, team position, place of finish, or suspicion of drug use.

Upon written notice following his or her participation in an athletic event, the selected athlete must report promptly to a collection station. The athlete may choose to be accompanied by a witness-observer. At the collection station, the athlete picks a plastic-sealed beaker with a personal code number. In the presence of an NCAA official monitor of the same sex as the athlete, the athlete supplies a urine specimen of 100-200 milliliters. The specimen is identified, documented, and divided into two samples labeled A and B. Both samples are delivered to one of three certified testing laboratories. Chain of custody procedures provide for signed receipts and acknowledgments at each transfer point.

At the laboratory, a portion of sample A is tested by gas chromatography/mass [****11] spectrometry--the most scientifically accurate method of analysis available. Positive findings, signifying use of proscribed drugs, are confirmed by [*13] testing another portion of sample A, and then reviewed by the laboratory director and reported to the NCAA by code number. The NCAA decodes the reports and relays positive findings to the athletic director of the college or university involved by telephone and overnight letter marked "confidential." The institution is required to notify the athlete of the positive finding. Within 24 hours of notice of a positive finding, sample B of the athlete's urine is tested. A positive finding may be appealed to a designated NCAA committee.

A positive test finding results in loss of postseason eligibility. Refusal by a student athlete to follow NCAA-mandated drug testing procedures yields the same consequence--the offending athlete is barred from competition.¹

[****12] [**640] [***841] 3. EFFECTS OF THE DRUG TESTING PROGRAM

In considering whether the NCAA's drug testing program violated plaintiffs' state constitutional right to privacy, the trial court and the Court of Appeal required the NCAA to demonstrate that its drug testing program advanced a "compelling state interest" by proving each of the following: (1) the program furthered its stated purposes, i.e., to safeguard the integrity of athletic competition and to protect the health and safety of student athletes; (2) the utility of the program manifestly

outweighed any resulting impairment of the privacy right; and (3) there were no alternatives to drug testing less offensive to privacy interests.

Much of the trial was devoted to a debate among scientists, physicians, and sports professionals regarding the merits of the NCAA's list of proscribed drugs and the general efficacy of its drug testing program. There were sharp differences in professional opinions on a wide range of subjects, including what substances should be banned, as well as the attitudes and behaviors of athletes and coaches toward certain drugs (e.g., steroids) that some may regard as enhancing athletic performance. The trial court's [****13] findings, sustained by the Court of Appeal, heavily favored plaintiffs' side of the professional debate.

The trial court found in part that the NCAA drug testing program invades the privacy interests of student athletes by requiring them: (1) to disclose [*14] medications they may be using and other information about their physical and medical conditions; (2) to urinate in the presence of a monitor; and (3) to provide a urine sample that reveals chemical and other substances in their bodies.

The court further found that college athletes do not use drugs any more frequently than college students as a general class. It observed that in 1986-1987, the first year of the NCAA's drug testing program, 34 of the 3,511 athletes tested for drugs were declared ineligible because of proscribed drug use. Of the 34 athletes declared ineligible, 31 were engaged in football, 1 was in track and field, and 2 were in basketball. Of the football players, 25 had tested positive for use of steroids. The track and field athlete tested positive for steroids, the two basketball players for cocaine.

From its findings, the court concluded there was no "compelling need" for drug testing to protect the health [****14] of college athletes or the integrity of athletic competition. According to the court, the NCAA program was "overbroad" because it banned "useful" over-the-counter medications and

¹ Since the trial in this case, the NCAA has expanded its drug testing program and made more serious the consequences of a positive finding. At its 1990 convention, the NCAA approved a mandatory, year-round testing program, although the program was restricted to the testing of NCAA Division I football players through August 1992. Under the new program, first-time offenders lose an entire year's eligibility. Those testing positive a second time for "street drugs" lose another year of eligibility. And those caught using steroids twice are banned from intercollegiate athletics for life. (Note, *Drug Testing and the Student Athlete: Meeting the Constitutional Challenge* (1990) [76 Iowa L.Rev. 107, 116-117.](#))

prescription drugs "designed to improve the health of the athlete." The court observed the NCAA had not been completely consistent in its professed concern for the health of athletes as shown by its failure to require measles vaccinations of athletes despite previous measles outbreaks at postseason competition or to provide counselling or rehabilitation services for drug-using athletes. The court added that Stanford "believes it is wrong to single out athletes for drug testing" and "favors drug education for its students."

The trial court also found the NCAA had failed to produce evidence that certain banned substances, e.g., amphetamines, diuretics, marijuana, and heroin, actually enhance athletic performance. It did find, however, that marijuana clearly impairs athletic performance and that cocaine may do so. Addressing the alleged perception that use of certain drugs may enhance performance, the court found that drugs are generally not perceived by college athletes and coaches to enhance performance or [****15] to be "a major problem." With respect to steroid use, the "perception," according to the court, is that steroids "might only help certain types of positions in football."

[***842] On the issue of public perception of drug use, the court offered its general view that "the NCAA drug testing program is probably doing more harm than good" and further determined the NCAA had failed to show that drug education and testing based on reasonable suspicion were inadequate to the task of controlling drug use by athletes.

From its conclusions, the trial court determined that the NCAA's drug testing program violated the state constitutional privacy rights of Stanford [*15] University student athletes. It permanently enjoined any testing of those athletes wherever it might be conducted, [**641] whether inside or outside of California. ²

²The injunction provides as follows: "[I]t is hereby ordered that the National Collegiate Athletic Association is permanently enjoined from enforcing its requirement that Stanford [University] obtain

[****16] On appeal, the Court of Appeal upheld the trial court's factual findings and sustained its legal determinations regarding the NCAA's drug testing program, including its holding that the NCAA had failed to establish a "compelling state interest" in support of the program. The trial court's judgment, including the permanent injunction, was affirmed. We granted review.

DISCUSSION

Article I, section 1 of the California Constitution provides: "HN1 All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Italics added.)

The phrase "and privacy" was added to California Constitution, article I, section 1 by an initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment).

To resolve the dispute between the parties, we address three questions of first impression in this court: (1) Does the Privacy Initiative govern the conduct of private, nongovernmental entities such as the NCAA; and (2) if it does, what legal standard is to be applied in assessing alleged invasions of privacy; [****17] and (3) under that standard, is the NCAA's drug testing program a violation of the state constitutional privacy right?

1. APPLICATION OF THE CALIFORNIA CONSTITUTIONAL RIGHT TO PRIVACY TO NONGOVERNMENTAL ENTITIES

Neither plaintiffs nor Stanford assert that the NCAA is an agency or instrumentality of government or a vehicle for state action. Case law

signed drug testing consent forms from its athlete[s] or requiring Stanford athletes to sign such forms as a condition for participating in NCAA activities. NCAA may not declare any athlete ineligible or take punitive action against such athlete for failure to comply with or participate in the NCAA drug testing program or in any way discriminate against Stanford or its athletes by virtue of their refusal of this order."

generally confirms the status of the NCAA as a private organization, comprised of American colleges and universities, and democratically governed by its own [*16] membership. (*National Collegiate Athletic Assn. v. Tarkanian* (1988) 488 U.S. 179, 197 [102 L.Ed.2d 469, 488, 109 S.Ct. 454] [HN2 NCAA is private actor that "enjoy[s] no governmental powers"]; *Arlosoroff v. National Collegiate Athletic Ass'n* (4th Cir. 1984) 746 F.2d 1019, 1021 [NCAA is "a voluntary association of public and private institutions"]; *O'Halloran v. University of Washington* (W.D.Wash. 1988) 679 F.Supp. 997, 1001, revd. on other grounds, 856 F.2d 1375 [NCAA is private entity].)

CA(1a) (1a) In its opening attack on the judgment, [****18] the NCAA asserts that its private status is dispositive of this action because the Privacy Initiative does not embody a right of action against nongovernmental entities. We disagree.

HN3 *Article I, section 1 of the California Constitution* is an enumeration of the "inalienable rights" of all Californians. "Privacy" is declared to be among those rights. Typical of broad constitutional declarations of rights, the section does not define "privacy" or explain its relationship to other rights or interests. Nor does it specify how or against [****843] whom the right of privacy is to be safeguarded. Mere use of the word "privacy" is not definitive in this regard--at the time of the Privacy Initiative there were two distinct and well established legal sources of privacy rights--the federal Constitution (applicable only to government action) and common law and statutory provisions (applicable as well against nongovernmental entities). (See discussion in pt. 2, *post*.)

CA(2) (2) **HN4** The Privacy Initiative is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505 [286 Cal.Rptr. 283, 816 P.2d 1309]; [****19] *In re Lance W.* (1985) 37 Cal.3d 873, 889 [210 [**642] Cal.Rptr. 631, 694 P.2d 744].) When, as here, the language of an

initiative measure does not point to a definitive resolution of a question of interpretation, " 'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself.' . . . Such indicia include the analysis and arguments contained in the official ballot pamphlet." (*Legislature v. Eu*, *supra*, 54 Cal.3d at p. 504, quoting in part *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, 250 [279 Cal.Rptr. 325, 806 P.2d 1360]; see also *Amador Valley Joint High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281].)

CA(1b) (1b) The official ballot pamphlet section dealing with Proposition 11, the Privacy Initiative, contains arguments for and against the measure as well as rebuttals. The argument in favor of Proposition 11 is replete with [****20] references to information-amassing practices of both "government" and [*17] "business." (Ballot Pamph., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 26 [hereafter Ballot Argument].) The authors of the argument, then-Assemblyman Kenneth Cory and then-Senator George Moscone, emphasized the capacity of both governmental and nongovernmental agencies to gather, keep, and disseminate sensitive personal information without checking its accuracy or restricting its use to mutually agreed or otherwise legitimate purposes.

As the argument in favor of Proposition 11 observes: "At present there are no effective restraints on the information activities of government *and business*. This amendment creates a legal and enforceable right of privacy for every Californian. [P] *The right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.* [P] . . . The proliferation of government *and business* records over which we have no control limits our ability to control [****21] our personal lives. . . . [P] Even

more dangerous is the loss of control over the accuracy of government *and business* records on individuals. . . . Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors. [P] . . . *Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job[,] or get a drivers' license, a dossier is opened and an informational profile is sketched.*" (Ballot Argument, *supra*, at pp. 26-27, italics omitted and added.)

The rebuttal to the argument in favor of Proposition 11 and the argument against Proposition 11, both of which were written by then-Senator James Whetmore, do not contest the privacy measure's potential impact on "business" as well as "government." Rather, they challenge only the need for additional privacy safeguards, observing: "To say there are at present no effective restraints on the information activities of government *and business* is simply untrue." (Ballot Argument, *supra*, at p. 27, italics added.) Opponents further argued that the receipt of personal information is essential [****22] to effectuate the *private* party relationships and transactions referred to by proponents of the measure, e.g., credit cards, life insurance policies, and employment interviews. (*Ibid.*)

The repeated emphasis in the competing ballot arguments on private party relationships [***844] and transactions, as well as individual encounters with government, underscores the efforts of the Privacy Initiative's framers to create enforceable privacy rights against *both* government agencies and private entities. As we have recognized: "[T]he overbroad collection and retention of unnecessary personal information by government *and business* interests" [*18] was one of the principal "mischiefs" at which the Privacy Initiative was directed. (*White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94, 533 P.2d 222], italics added.)

HN5 Although none of our decisions has squarely

addressed the question whether our state constitutional right to privacy may be enforced against private parties (we had no occasion to decide the issue in *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389, fn. 14256 Cal.Rptr. 750, 769 P.2d 932]), [***643] [****23] the Courts of Appeal have consistently answered in the affirmative. (See, e.g., *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1040-1044 [264 Cal.Rptr. 194] [hereafter *Wilkinson*]; *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1489-1493 [232 Cal.Rptr. 668, 69 A.L.R.4th 1027]; *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 841-843 [228 Cal.Rptr. 545]; *Kinsey v. Macur* (1980) 107 Cal.App.3d 265 [165 Cal.Rptr. 608]; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829-830 [134 Cal.Rptr. 839] [hereafter *Porten*]; see also *Chico Fem. Women's Health Cr. v. Butte Glen Med. S.* (E.D.Cal. 1983) 557 F.Supp. 1190, 1201-1203.)

In *Porten, supra*, 64 Cal.App.3d 825, a college student sought damages from the University of San Francisco, a private institution, alleging it had, without his permission or any good reason, disclosed [****24] his academic transcript from another school to a state government agency. The Court of Appeal held the student had stated a cause of action against the university for violation of his state constitutional right to privacy by alleging the unauthorized and improper use of personal and confidential academic information for a purpose not in keeping with its creation or retention. Relying on the references in the ballot argument we have quoted, the court noted that "business" as well as government was the focus of the Privacy Initiative and concluded: "**HN6** The constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. [Citations.] Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." (*Id. at pp. 829-830.*)

Similarly, in *Wilkinson, supra*, 215 Cal.App.3d 1034, the court reviewed prior cases in support of its holding that the California constitutional right to

privacy afforded protection against a private employer that required drugtesting as part of pre-employment physical examinations. Emphasizing that the concerns underlying [****25] the Privacy Initiative extended to the conduct of both governmental and nongovernmental entities, the court observed: "Common experience with the ever-increasing use of computers in contemporary society confirms that the [Privacy Initiative] was needed and intended to safeguard individual privacy from intrusion by both private and governmental action. That common experience makes it only too evident that personal [*19] privacy is threatened by the information-gathering capabilities and activities not just of government, but of private business as well. If the right of privacy is to exist as more than a memory or a dream, the power of both public and private institutions to collect and preserve data about individual citizens must be subject to constitutional control. Any expectations of privacy would indeed be illusory if only the government's collection and retention of data were restricted." (*Id. at p. 1043.*)

In its day-to-day operations, the NCAA is in a position to generate, retain, and use personal information about student athletes and others. In this respect, it is no different from a credit card purveyor, an insurance company, or a private employer (the private entity examples [****26] used in the ballot arguments) in its capacity to affect the [***845] privacy interests of those with whom it deals.³

The NCAA nonetheless urges us to impose a state action prerequisite to suits under the Privacy Initiative because it adds "privacy" to the declaration of rights portion of our state Constitution. The NCAA correctly observes that

our decisions construing *other* provisions in the declaration of rights impose a state action requirement (e.g., *People v. Zelinski* (1979) 24 Cal.3d 357, 365 [155 Cal.Rptr. 575, 594 P.2d 1000] [****27] [search and seizure]; *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 281-282 [146 Cal.Rptr. 208, 578 P.2d 925], app. dism. (1978) 439 U.S. 949 [58 L.Ed.2d 340, 99 S.Ct. 343] [due process]; *Kruger v. [**644] Wells Fargo Bank* (1974) 11 Cal.3d 352, 366 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266] [same]). But those decisions were not premised on the *mere location* of the respective provisions in the constitutional text, but on their distinct language and histories. As we recognized in *Kruger, supra*, *HN7* what the "drafters" of our Constitution's due process clause "intended by that enactment" remains the pivotal factor in determining whose activity is subjected to regulation. (11 Cal.3d at p. 366.) Similarly, what the voters intended in enacting the Privacy Initiative must determine the propriety of any state action requirement in this case. As we have seen, the ballot arguments contain persuasive evidence of drafter [****28] and voter intent to recognize a right of action for invasion of privacy against private as well as government entities. (*White v. Davis, supra*, 13 Cal.3d at pp. 773-776.)

Finally, the NCAA advocates a narrow reading of the history of the Privacy Initiative, calling the reference to "business" in the ballot arguments [*20] "nothing more than a general description of increasing strains on privacy in society generally." To the contrary, the repeated ballot argument references to "business" as an equal source of invasions of privacy, when coupled with examples of specific "business" entities that regularly obtain and use personal information, reveal an attempt by the framers of the Privacy Initiative to make their case to voters based on the conduct and practices of entities in the private as well as the public sector. Reading this language, a reasonable voter would most likely have concluded he or she was casting a ballot to safeguard his or her personal privacy

³The NCAA does not assert that its nonprofit status or any other aspect of its organization or operations entitles it to any immunity from laws or regulations generally applicable to businesses. We have been directed to no authority that would support such an assertion. (Contra, see *NCAA v. Board of Regents of Univ. of Okla.* (1984) 468 U.S. 85 [82 L.Ed.2d 70, 104 S.Ct. 2948] [NCAA subject to antitrust laws].)

against private as well as government entities.⁴ After the case was so presented, the voters were persuaded. To remove by judicial construction a significant [****29] part of what the voters desired would amount to an electoral "bait and switch."

In summary, [HN8](#) the Privacy Initiative in [article I, section 1 of the California Constitution](#) creates a right of action against private as well as government entities. The legal concept of "privacy" as embodied in the initiative is susceptible of such an interpretation; the ballot arguments strongly support it. Our holding in this regard is necessarily confined to the Privacy Initiative. We intimate nothing about the existence of rights of action or permissible defendants in legal proceedings that may be brought either under other clauses in [article I, section 1](#) or other parts of our state Constitution.

2. STANDARDS [****30] FOR DETERMINING INVASION OF PRIVACY UNDER ARTICLE I, SECTION 1

In evaluating the NCAA's drug testing program, the trial court and the Court of Appeal assumed that private entities were subject to the same legal standards as government agencies with respect to claims of [***846] invasion of privacy. Borrowing from a few of our cases involving the conduct of government in its dealings with individual citizens, the lower courts imposed on the NCAA the burden of proving both: (1) a "compelling state interest" in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest. (See [Long Beach City Emp. v. City of Long Beach \(1986\) 41 Cal.3d 937, 948 \[227 Cal.Rptr. 90, 719 P.2d 660\]](#); [White v. Davis, supra, 13 Cal.3d at p. 775.](#)) Because the NCAA failed to shoulder the purported burden, it was enjoined from carrying out its drug testing program.

The text of the Privacy Initiative does not define "privacy." The Ballot Argument in favor includes broad references to a "right to be left alone," [*21] calling it a "fundamental and compelling [****31] interest," and purporting to include within its dimensions no less than "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27.) Regrettably, such vague and all-encompassing terms afford little guidance in developing a workable legal definition of the state constitutional right to privacy.

[**645] The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities--images of "government snooping," computer stored and generated "dossiers" and " 'cradle-to-grave' profiles on every American" dominate the framers' appeal to the voters. (Ballot Argument, *supra*, at p. 26.) The evil addressed is government and business conduct in "collecting and stockpiling unnecessary information . . . and misusing information gathered for one purpose in order to serve other purposes or to embarrass" (*Id.* at p. 27.) "The [Privacy Initiative's] primary purpose is to afford individuals some measure of protection against this most modern [****32] threat to personal privacy." ([White v. Davis, supra, 13 Cal.3d at p. 774.](#))

Although the argument in favor does contain a cryptic reference to a "compelling public need" for abridgement of privacy, the reference occurs in the context of informational privacy rights against government. The argument states in part: "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First](#), [Third](#), [Fourth](#), [Fifth](#), and [Ninth Amendments to the U.S. Constitution](#). This right should be abridged only when there is compelling *public* need. Some *information* may remain as designated *public* records but only when the availability of such *information* is clearly in the

⁴ See [Luedtke v. Nabors Alaska Drilling, Inc. \(Alaska 1989\) 768 P.2d 1123, 1130 \[79 A.L.R.4th 75\]](#) ["history surrounding the 1972 adoption of the privacy amendment by the voters of California evinces a clear intent that the clause applies to private as well as governmental action"].

public interest." (Ballot Argument, *supra*, at p. 27, italics added.) Nothing in this passage compels the conclusion that the phrase "compelling public need" was intended to supply a single, all-encompassing legal test for privacy rights.

Even within the context of government information-gathering, the limited references in the ballot arguments to "compelling" necessity in the ballot arguments are not consistent. [****33] When pressed by the opponents of the Privacy Initiative, who maintained that the new right to privacy would place unwieldy burdens on government efforts to obtain information needed to police the welfare system, the framers equivocated, narrowing their description of the initiative's effect. In a rebuttal to the argument against the Privacy Initiative, Assemblyman Cory stated in part: "The right to privacy will not destroy welfare nor undermine any important government program. It is [*22] limited by 'compelling public necessity' and the public's need to know. [*The Privacy Initiative*] will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information." (Ballot Argument, *supra*, at p. 28, italics added.)

The references to a public "need to know" and to information "legitimately need[ed]" by government serve to limit and narrow the [****847] prior reference to "compelling public interest." A mere "legitimate need" for information may be less than overwhelming. Similarly, a type of information may not be "extraneous" [****34] or "frivolous" in pursuit of a government task, but the government's claim of entitlement may not be "compelling." For example, if a perceived "need" merely represents greater efficiency or effectiveness in the performance of some public function, but its fulfillment is by no means indispensable to government existence or operation, it might not be regarded as "compelling." And yet, as the ballot arguments reveal, the framers of the Privacy Initiative preferred, at least in responding

to the arguments of their opponents, a more flexible and pragmatic approach to the privacy right than the isolated term "compelling public interest" appears to demand.

As applied to private entities, a "compelling public interest" standard poses additional difficulties. Private entities pursue private ends and interests, not those of government. If every private organization had to establish a "compelling *public* interest" or "compelling *state* interest" to justify any activity that had an impact on individual privacy, it would fail to do so in most, if not all, conceivable cases. To use an example referred to in the ballot arguments, a private business extending credit or selling insurance may [****35] have a legitimate commercial need for obtaining personal information, but such a need is not thereby legally transformed into [**646] a "state interest," let alone a "compelling" one.

The Ballot Argument on the Privacy Initiative is useful in identifying the general evils that concerned its authors, but it does not provide clear or unequivocal support for a universal "compelling public interest" standard for privacy rights, regardless of context or circumstances.⁵ Indeed, the argument offers little guidance in developing privacy standards. Rather, at bottom, it counsels careful evaluation in context of all asserted "legitimate" interests at stake in the resolution of privacy claims.

[****36] [*23] Although confined to the single word "privacy," the language of the Privacy Initiative may be more helpful in developing a suitable legal standard. The term "privacy" was not

⁵ Ballot arguments often embody the sound-bite rhetoric of competing political interests vying for popular support. However useful they may be in identifying the general evils sought to be remedied by an initiative measure, they are principally designed to win votes, not to present a thoughtful or precise explication of legal tests or standards. The ballot arguments here are no different--their diverse references to "public" and "business" entities reflect perceived abuses of information-gathering power by both, but do not yield a useful legal standard with which to gauge the scope or limits of the right to privacy.

coined by the authors of the Privacy Initiative. At the time the Privacy Initiative was considered and adopted by the voters, a right to privacy had been recognized and defined in several distinct branches of the law.

CA(3) (3) HN9 When an initiative contains terms that have been judicially construed, " ' ' ' ' the presumption is almost irresistible" " ' " that those terms have been used " ' " 'in the precise and technical sense' " ' " in which they have been used by the courts. (*In re Harris* (1989) 49 Cal.3d 131, 136 [260 Cal.Rptr. 288, 775 P.2d 1057], quoting *People v. Weidert* (1985) 39 Cal.3d 836, 845-846 [218 Cal.Rptr. 57, 705 P.2d 380]; see also *In re Lance W.*, *supra*, 37 Cal.3d at p. 890, fn. 11 ["The adopting body is presumed to be aware of existing laws and judicial construction thereof."]; *People v. Weidert*, *supra*, 39 Cal.3d at p. 844; [****37] *In re Jeanice D.* (1980) 28 Cal.3d 210, 216 [168 Cal.Rptr. 455, 617 P.2d 1087] [same effect].) Therefore, in order to discern the meaning of "privacy" as used in the Privacy Initiative, we must examine the various legal roots of the privacy concept.

A. SOURCES OF THE RIGHT TO PRIVACY

The pre-initiative judicial construction of the right to privacy developed along two distinct lines: (1) a common law right, supplemented in some instances by statutes, protecting a diverse set of individual interests from interference by nongovernmental entities; and (2) a federal constitutional right, derived from various provisions of the [***848] Bill of Rights, that took distinct shape in United States Supreme Court decisions in the 1960's safeguarding the rights of individuals and private entities from government invasion.

THE COMMON LAW RIGHT

The origin of the common law right to privacy is often traced to a seminal law review article written at the end of the last century. Samuel D. Warren and Louis D. Brandeis observed a trend in tort law extending protection beyond property rights to what

they described as "inviolate personality"-- "the [****38] right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others." (Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv.L.Rev. 193, 205, 198.) Warren and Brandeis attempted to weave together various strands of tort law into a single thread--in Judge Thomas Cooley's phrase, a "right 'to be let alone.'" (*Id.* at p. 195.) Nearly 40 years later, Brandeis regarded the privacy right as broad-based and rooted in the federal Constitution. As he stated: "The [*24] makers of our Constitution . . . conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." (*Olmstead v. United States* (1928) 277 U.S. 438, 478 [72 L.Ed. 944, 956, 48 S.Ct. 564, 66 A.L.R. 376]; (dis. opn. of Brandeis, J.).)

The Privacy Initiative's debt to the legal tradition begun by Warren and Brandeis is revealed in ballot arguments: "The right of privacy is *the right to be left alone*. . . . It [**647] protects our homes, our families, our thoughts, our emotions, [****39] our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27, italics added.)

Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. (Prosser, *Privacy* (1960) 48 Cal.L.Rev. 381, 389.) Prosser's classification was adopted by the Restatement Second of Torts in sections 652A-652E. California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 580-

594, pp. 674-693.)

CA(4) (4) HN10 The privacy tort seeks to vindicate multiple and different interests that range from freedom to act without observation in a home, hospital room, or other private place to the ability to control [****40] the commercial exploitation of a name or picture. (*Rest.2d Torts*, § 652B; 652C; see also *Miller v. National Broadcasting Co.*, supra, 187 Cal.App.3d 1463 [television producer and camera crew entered home without permission to film unsuccessful efforts of paramedics to save the life of plaintiff's husband who had suffered heart attack]; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654 [109 Cal.Rptr. 269, 73 A.L.R.3d 1164] [private investigator entered hospital room to interrogate patient]; Civil Code; § 3344 [right to recover damages for knowing use of a person's name, photograph, likeness, voice, or signature for commercial exploitation; statutory right cumulative to the common law].)

Each of the four categories of common law invasion of privacy identifies a distinct interest associated with an individual's control of the process or products of his or her personal life. To the extent there is a common denominator among them, it appears to be improper interference (usually by means of observation or communication) with aspects of life consigned to [*25] [****41] the realm of the "personal and confidential" by strong and widely shared social norms.

"The [common law invasion of privacy] tort safeguards the interests of individuals in the maintenance of rules of civility. . . . [P] . . . [In everyday life we experience privacy] as [***849] an inherently normative set of social practices that constitute a way of life, our way of life. . . . In the tort, 'privacy' is simply a label we use to identify one aspect of the many forms of respect by which we maintain a community. It is less important that the purity of the label be maintained, than that the forms of community life of which it is a part be preserved." (Post, *The Social Foundations of*

Privacy (1989) 77 Cal.L.Rev. 957, 1008.)

Privacy rights also have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure: "In a society in which multiple, often conflicting role performances are demanded of each individual, the original etymological meaning of the word 'person'--mask--has taken on new meaning. [People] fear exposure not only to those closest to them; much of the outrage underlying the [****42] asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy--to choose who shall see beneath the quotidian mask. Loss of control over which 'face' one puts on may result in literal loss of self-identity [citations], and is humiliating beneath the gaze of those whose curiosity treats a human being as an object." (*Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 534 [93 Cal.Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1], fn. omitted.)

The legally amorphous character of a tort based on social custom and psychological well-being did not escape either common law judges or American Law Institute commentators. HN11 The common law right of privacy contains several important limiting principles that have prevented its becoming an all-encompassing and always litigable assertion of [**648] individual right. CA(5) (5) Initially, not every kind of conduct that strays from social custom or implicates personal feelings gives rise to a common law cause of action for [****43] invasion of privacy. The various branches of the privacy tort refer generally to conduct that is "highly offensive to a reasonable person," thereby emphasizing the importance of the *objective context* of the alleged invasion, including: (1) the likelihood of serious harm, particularly to the emotional sensibilities of the victim; and (2) the presence or absence of countervailing interests based on competing social norms which may render defendant's [*26] conduct inoffensive, e.g., a

legitimate public interest in exposing and prosecuting serious crime that might justify publication of otherwise private information or behavior.⁶

[****44] Moreover, [HN12](#) the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed "highly offensive to a reasonable person" so as to justify tort liability. (*Rest.2d Torts*, § 652B, *com. c* [no liability for public observation of plaintiff "since he is not then in seclusion, and his appearance is public and open to the public eye"]; [Gill v. Hearst Publishing Co. \(1953\) 40 Cal.2d 224, 230 \[253 P.2d 441\]](#) [plaintiffs waived any right to privacy by a "pose voluntarily assumed in a public market place"]; [Aisenson v. American Broadcasting Co. \(1990\) 220 Cal.App.3d 146, 162 \[269 Cal. Rptr 379\]](#) ["One factor relevant to whether an intrusion is 'highly offensive to a reasonable person' is the extent to which the person whose privacy is at issue voluntarily entered into the public sphere."]; [Melvin v. Reid \(1931\) 112 Cal.App. 285, 290 \[297 P. 91\]](#) [****45] [no right to privacy in matters publicized with consent: "There can be no privacy in that which is already public."]; see also [Kapellas v. Kofman \(1969\) 1 Cal.3d 20, 36-37 \[***850\] \[81 Cal.Rptr. 360, 459 P.2d 912\]](#).) The maxim of the law "volenti non fit injuria" (no wrong is done to one who consents) applies as well to the invasion of privacy tort. (*Rest.2d Torts*, § 892A, *com. a*; see also [Civ. Code, § 3515](#).)

[HN13](#) In determining the " 'offensiveness' " of an

⁶ See, e.g., *Restatement Second of Torts*, sections 652B, comment d (intrusion into private affairs must be of a kind highly offensive to reasonable person), 652C, comment d (appropriation of commercial or other value of name or likeness is essential--mere incidental use not actionable), 652D, comment c (publicity given to private life must be highly offensive to reasonable person), 652E, comment c (false light publicity must be highly offensive to reasonable person).

invasion of a privacy interest, common law courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." ([Miller v. National Broadcasting Co., supra, 187 Cal.App.3d at pp. 1483-1484.](#))

Thus, [HN14](#) the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right [****46] is judicially recognized. A plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, [*27] especially in light of the competing social interests involved. As one commentator has summarized: "Through a careful balancing of interests, the courts developed specific [common law] causes of action which protected somewhat well-defined aspects of personal privacy. Although privacy was clearly identified as an interest worthy of some legal protection, courts generally did not give privacy a privileged place or undue weight in the balancing process." (Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 376 [hereafter Kelso].)

Our reference to the common law as background to the California constitutional right to privacy is not intended to suggest that the constitutional right is circumscribed by the common law tort. The ballot arguments do not reveal any such limitation. To the contrary, common law invasion of privacy by public disclosure of private facts requires [***649] that the actionable disclosure be widely published and not confined to a few persons or limited circumstances. [****47] (*Rest.2d Torts*, § 652D, *com. a*.) In contrast, the ballot arguments describe a privacy right that "prevents government and business interests from collecting and stockpiling unnecessary information about us and or misusing information gathered for one purpose in order to

serve other purposes or to embarrass us." (Ballot Argument, *supra*, at p. 27.) Obviously, sensitive personal information may be misused even if its disclosure is limited.⁷

[**48]** By referring to the common law, we seek merely to draw upon the one hundred years of legal experience surrounding the term "privacy" in identifying legally protected privacy interests and in describing the process by which such interests are compared and weighed against other values. That experience suggests that the common law's insistence on objectively reasonable expectations of privacy based on widely shared social norms, serious violations of those expectations, and thorough consideration of competing interests, is an invaluable guide in constitutional privacy litigation.

[*28] [*851] THE FEDERAL CONSTITUTIONAL RIGHT**

The ballot arguments refer to the right to privacy as "an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, and Ninth Amendments to the U.S. Constitution," thereby invoking the federal constitutional right to privacy as recognized in decisions of the United States Supreme Court.

⁷ **HN15** Particularly when professional or fiduciary relationships premised on confidentiality are at issue (such as doctor and patient or psychotherapist and client), the state constitutional right to privacy may be invaded by a less-than-public dissemination of information. (See, e.g., Urbanik v. Newton (1991) 226 Cal.App.3d 1128, 1138 [277 Cal.Rptr. 354] [complaint stated cause of action against physicians for nonpublic disclosure of positive status for human immunodeficiency virus].)

Moreover, the common law right of privacy "may not be violated by word of mouth only" and can be infringed only by " 'printings, writings, pictures or other permanent publications . . . ' " (Grimes v. Carter (1966) 241 Cal.App.2d 694, 698, 699 [50 Cal.Rptr. 808, 19 A.L.R.3d 1310]; see also Gautier v. General Tel. Co. (1965) 234 Cal.App.2d 302, 309 [44 Cal.Rptr. 404]; Melvin v. Reid, *supra*, 112 Cal.App. at p. 290.) Although the Privacy Initiative reveals no voter intent to extend the common law to create a cause of action for mere gossip, in an age of oral mass media (e.g., radio), widespread oral disclosure may tread upon our state constitutional right to privacy as readily as written dissemination. (H & M Associates v. El Centro (1980) 109 Cal.App.3d 399, 412 [167 Cal.Rptr. 392].)

(Ballot Argument, *supra*, at p. 27.)

The Privacy Initiative was placed before the voters following a two-thirds vote of each house of the Legislature. (Cal. Const., art. XVIII, § 1.) Testimony before the Assembly Constitution **[****49]** Committee, together with staff reports and analyses prepared for that committee and the Senate Constitution Committee, makes explicit reference to the federal constitutional right to privacy, particularly as it developed beginning with Griswold v. Connecticut (1965) 381 U.S. 479 [14 L.Ed.2d 510, 85 S.Ct. 1678]. (Kelso, *supra*, 19 Pepperdine L.Rev. at pp. 468, 473, 475, 477 [reproducing legislative history of Privacy Initiative].)

In *Griswold*, the Supreme Court invalidated a state statute prohibiting the use of contraceptive devices and the giving of medical advice regarding their use. **HN16** Although the federal Constitution contains no explicit reference to a "privacy" right, the court found implicit in the Bill of Rights provisions cited in the ballot argument--the First, Third, Fourth, and Ninth Amendments--"zones of privacy" emanating from what it called the "penumbras" of the specific constitutional guarantees. The court located with those "zones of privacy" personal decisions made by married persons regarding the use of birth control devices. (Griswold v. Connecticut, *supra*, 381 U.S. at p. 484 [14 L.Ed.2d at pp. 514-515].) **[****50]**

Concurring justices in *Griswold* sought to place the interest in marital privacy violated by the anticontraception law on other, less "penumbral", constitutional grounds. (381 U.S. 479: " 'tradition and [collective] conscience of our people' " regarding fundamental rights manifested in Due Process Clause and Ninth Amendment (*id.*, at p. 493 [14 L.Ed.2d at p. 520]) (conc. opn. of Goldberg, J.); "basic values 'implicit in the concept of ordered liberty' " in Fourteenth **[**650]** Amendment (*id.*, at p. 500 [14 L.Ed.2d at pp. 524-525]) (conc. opn. of Harlan, J.); due process denied because no "end" of government could support

state law at issue (*id.*, at p. 507 [14 L.Ed.2d at pp. 528-529]) (conc. opn. of White, J.).) The concurring justices' approach has been preferred to the more amorphous "penumbral" privacy analysis in at least one recent case. (*Cruzan v. Missouri* (1990) 497 U.S. 261, 279, fn. 7 [111 L.Ed.2d 224, 242, 110 S.Ct. 2841] [****51] [right to refuse medical treatment [*29] analyzed as Fourteenth Amendment liberty interest rather than part of right to privacy].)

The Supreme Court has included within the post-*Griswold* implicit right to privacy "certain rights of freedom of choice in marital, sexual, and reproductive matters" but has not recognized a general right to engage in sexual activities done in private. *CA(6) (6)* (See fn. 8.) (3 Rotunda & Nowak, Treatise on Constitutional Law (2d ed. 1992) § 18.26, p. 298; cf., e.g., *Roe v. Wade* (1973) 410 U.S. 113 [35 L.Ed.2d 147, 93 S.Ct. 705]; and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833 [120 L.Ed.2d 674, 112 S.Ct. 2791] [abortion laws struck down in part and upheld in part]; *Webster v. Reproductive Health Services* (1989) 492 U.S. 490 [106 L.Ed.2d 410, 109 S.Ct. 3040] [same] with *Bowers v. Hardwick* (1986) 478 U.S. 186 [92 L.Ed.2d 140, 106 S.Ct. 2841] [consensual homosexual sodomy law upheld].)⁸

⁸ *HN17* Like other rights contained in or derived from provisions of the Bill of Rights, the federal constitutional right to privacy applies only against state action. (*Pittsley v. Warish* (1st Cir. 1991) 927 F.2d 3 [violation of right to familial associational privacy requires state action directly aimed at parent-child relationship]; *Miami Herald Pub. Co. v. Ferre* (S.D.Fla. 1985) 636 F.Supp. 970, 975-976 [right to privacy secured only against state action]; *Houghton v. New Jersey Mfgs. Ins. Co.* (E.D.Pa. 1985) 615 F.Supp. 299, 306 [same]; see also *Lugar v. Edmonson Oil Co.* (1982) 457 U.S. 922, 936-937 [73 L.Ed.2d 482, 495-496, 102 S.Ct. 2744] [Fourteenth Amendment generally imports state action element]; Nowak et al., Constitutional Law (2d ed. 1983) p. 497 ["The safeguards against deprivations of individual rights which are contained in the text of the Constitution specifically apply only to the activities of either the state or federal governments. Similarly, the Bill of Rights by its terms and necessary implications has been viewed only to limit the freedom of the government when dealing with individuals. Finally, the amendments to the Constitution which protect individual liberties [with the exception of the Thirteenth] specifically address themselves to

[****52] *CA(7a) (7a) HN18*

[***852] The Fourth Amendment's search and seizure clause is sometimes referred to as a "privacy" provision. (See, e.g., *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 672 [103 L.Ed.2d 685, 706, 109 S.Ct. 1384].) The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. (*Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 619 [103 L.Ed.2d 639, 661, 109 S.Ct. 1402].) *CA(8) (8)* (See fn. 9.) *CA(7b) (7b)* Under the Fourth Amendment and the parallel search and seizure clause of the *California Constitution (art. I, § 13)*, the reasonableness of particular searches and seizures is determined by a general balancing test "weighing the gravity of the governmental interest or public concern served and the degree to which the [challenged government conduct] advances that concern against the intrusiveness of the interference with individual liberty." [*30] (*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1338 [241 Cal.Rptr. 42, 743 P.2d 1299].)⁹

[****53] Collectively, the federal cases "sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." (*Whalen v. Roe* (1977) 429 U.S. 589, 598-600 [51 L.Ed.2d 64, 73, 97 S.Ct. 869] [hereafter *Whalen*], fns. omitted.) The former interest is informational or data-based; the latter involves issues of personal freedom of action and autonomy in individual encounters with government. The distinction between the two interests is not sharply drawn--disclosure of information, e.g., information about one's financial

actions taken by the United States or a state."].)

⁹ *HN19* The "privacy" protected by the Privacy Initiative is no broader in the area of search and seizure than the "privacy" protected by the Fourth Amendment or by *article I, section 13 of the California Constitution*. (*People v. Crowson* (1983) 33 Cal.3d 623, 629 [190 Cal.Rptr. 165, 660 P.2d 389].)

affairs, may have an impact on personal decisions and relationships **[**651]** between individuals and government. (*Plante v. Gonzalez* (5th Cir. 1978) 575 F.2d 1119, 1130, cert. den. (1979) 439 U.S. 1129 [59 L.Ed.2d 90, 99 S.Ct. 1047].)

The diversity of federal constitutional "privacy" interests has left the federal right to privacy, **[****54]** especially in its comprehensive "penumbral" sense, without any coherent legal definition or standard. **HN20** In privacy cases involving informational interests, the federal courts have generally applied balancing tests that avoid rigid "compelling interest" or "strict scrutiny" formulations. (See, e.g., *Whalen, supra*, 429 U.S. 589 [upholding state statute requiring drug prescriptions to be reported to a state government agency]; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 457-458 [53 L.Ed.2d 867, 899-901, 97 S.Ct. 2777] [sustaining archivists' right of access to presidential papers against individual president's privacy claim]; see also *Doe v. Attorney General* (9th Cir. 1991) 941 F.2d 780, 796 [in informational privacy cases, "courts balance the government's interest in having or using the information against the individual's interest in denying access"]; *Plante v. Gonzalez, supra*, 575 F.2d at p. 1134 [public official financial disclosure law case; court applies balancing test, confining strict scrutiny to serious intrusions of specific **[****55]** autonomy rights such as marriage, family, and contraception].)

When it is applied, strict scrutiny generally functions as a judicial "trump card," invalidating any attempt at state regulation because the state's interest is rarely sufficiently compelling to justify abridgement of the right. (See, **[*31]** e.g., *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 786 [55 L.Ed.2d 707, 724, 98 S.Ct. 1407]; *Loving v. Virginia* (1967) 388 U.S. 1, 11 [18 L.Ed.2d 1010, 1017-1018, 87 S.Ct. 1817]; Gunther, **[***853]** *The Supreme Court, 1971 Term* (1972) 86 Harv. L. Rev. 1, 8 [strict scrutiny is " 'strict' in theory and fatal in fact"].) But the Supreme Court has not endorsed strict scrutiny for all privacy-

based interests at all conceivable levels of intrusion. Even in specific fields of federal privacy protection, such as abortion rights, the high court has experienced difficulty articulating a consistent standard of review. (Compare, e.g., *Roe v. Wade, supra*, 410 U.S. at pp. 155-156 [35 L.Ed.2d at pp. 178-179] **[****56]** [reference to "compelling state interest"] with *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 876, 919, 929 [120 L.Ed.2d at pp. 713-715, 742-743, 748-749, 112 S.Ct. at pp. 2820, 2842, 2847] [court unable to arrive at majority position regarding legal standard to measure burdens on abortion rights: three justices favor "undue burden" standard, one justice "strict scrutiny," five justices various other rules and standards].)

In summary, outside the separate context of Fourth Amendment searches and seizures, the "penumbral" federal constitutional right to privacy has been applied to intrusions by the government into a narrow and defined class of personal autonomy interests in contraceptive and reproductive decisions. There is at least some prospect that what have been regarded as "privacy" interests may henceforth be viewed as Fourteenth Amendment "liberty" interests in federal constitutional analysis. (See, e.g., *Cruzan v. Missouri, supra*, 497 U.S. 261.) But whatever predictions **[****57]** one might hazard, the murky character of federal constitutional privacy analysis at this stage teaches that privacy interests and accompanying legal standards are best viewed flexibly and in context.

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¹⁰ While at least two of our cases decided before the Privacy Initiative referred in part to a constitutional right of privacy, a closer examination of those cases reveals a grounding in statutory or constitutional provisions not creating a "privacy" right. (*In re Lifschutz* (1970) 2 Cal.3d 415 [85 Cal.Rptr. 829, 467 P.2d 557, 44 A.L.R.3d 1] [no broad federal constitutional right of privacy in disclosures to psychotherapist under *Griswold*; court interprets psychotherapist-patient privilege as inapplicable to communications at issue]; *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 263, 267 [85 Cal.Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313] [First Amendment right to participate in political activity infringed by financial disclosure law; cryptic reference to *Griswold* without mention of a distinct "right to privacy" in state Constitution].) Thus,

[**58] [*32] [**652] B. ELEMENTS OF A CAUSE OF ACTION FOR INVASION OF THE STATE CONSTITUTIONAL RIGHT OF PRIVACY**

[CA\(9a\)](#) (9a) Our cases do not contain a clear statement of the elements of a cause of action for invasion of the state constitutional right to privacy. Plaintiffs and Stanford succeeded in convincing the lower courts that the NCAA was required to justify any conceivable impact on plaintiffs' privacy interests by a "compelling interest" and to establish that its drug testing program was the "least restrictive" alternative furthering the NCAA's interests. The NCAA assails the "compelling interest/least restrictive alternative" test; plaintiffs and Stanford naturally come to its defense. We consider the positions of the parties in light of the history of the Privacy Initiative.

Our Privacy Initiative jurisprudence emanates from [White v. Davis, supra, 13 Cal.3d 757](#). In *White*, we upheld against a general demurrer a taxpayer's complaint seeking to enjoin expenditures of public funds for a police department's covert surveillance of university classes at the University of California at Los Angeles. (*Id. at p. 773*.) The complaint alleged [****59] a level of "extensive, routine, covert police surveillance of university classes and organization meetings" that was "unprecedented in our nation's history." (*Id. at p. 776*.) According to plaintiff's allegations, police informants and undercover agents disguised themselves as students, attended university functions, and compiled dossiers of statements made by others in [***854] attendance, despite the absence of any illegal activity.

Because *White* arose on the pleadings, we necessarily assumed the truth of plaintiff's

allegations and intimated no view regarding the ultimate question, i.e., whether plaintiff's state and federal constitutional rights had been violated by the challenged conduct of law enforcement authorities. ([White v. Davis, supra, 13 Cal.3d at p. 776](#).) Focusing on plaintiffs' rights to academic freedom and freedom of expression, we held the facts as alleged revealed government conduct "likely to pose a substantial restraint upon the exercise of First Amendment rights" and observed that "the [HN21](#) challenged surveillance activities can only be sustained if defendant can demonstrate a 'compelling' state interest which [****60] justifies the resultant deterrence of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights." (*Id. at p. 772*.)

Commenting on the state constitutional right to privacy, we characterized the law enforcement conduct alleged in the complaint as inherently "intrusive," noting defendant would have the opportunity to "contest any of the allegations of the complaint as well as to designate the compelling governmental interests upon which they rely" ([White v. Davis, supra, 13 Cal.3d at p. 776](#).) [*33]

Properly analyzed, our decision in *White* did not establish a blanket "compelling interest" test for all state constitutional right-to-privacy cases. According to the *White* plaintiffs' allegations, the government was spending taxpayer dollars to gather information and construct dossiers containing the surreptitious observations of academic speech by government agents. There was no legitimate government interest in this activity; its continuation threatened to harass and embarrass citizens in the exercise of their rights to free expression and association. Plaintiff's [****61] charge in *White* thus pertains to government invasion of one distinct set of privacy interests--those which overlap the First Amendment and relate to "our expressions," "our freedom of communion," and "our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27.)

appellate decisions inferring the creation of a "penumbral" *Griswold*-type state constitutional privacy right from our pre-Privacy Initiative cases represent an overbroad reading of the pertinent holdings. (See, e.g., [Luck v. Southern Pacific Transportation Co. \(1990\) 218 Cal.App.3d 1, 17 \[267 Cal.Rptr. 618\]](#) citing [Central Valley Chap. 7th Step Foundation v. Younger \(1979\) 95 Cal.App.3d 212, 234-235 \[157 Cal.Rptr. 117\]](#) & [People v. Porras \(1979\) 99 Cal.App.3d 874, 879 \[160 Cal.Rptr. 627\]](#).)

This view of *White* is supported by an examination of the authority cited by the court. The *White* court refers without discussion to three cases in support of its "compelling governmental interests" language. None of the cases involves our state constitutional right of privacy.

Two of the three cases cited in *White* deal with freedom of expression and the concomitant right to hold public office. In [City of Carmel-by-the-Sea, supra, \[**653\] 2 Cal.3d 259](#), plaintiffs attacked a sweeping conflict-of-interest law requiring "every public officer" and "each candidate" for state or local public office to file a statement disclosing all investments in excess of \$10,000 owned by the officer, a spouse, or a minor child. (*Id.* at p. 262.) Drawing on state and federal cases recognizing a First Amendment right to participate [****62] in political activity, we emphasized that laws restraining political expression must be justified by a government showing of "compelling state purpose" as well as an absence of any "alternatives" that are " 'less offensive' " or " 'less subversive of constitutional rights.' " (*Id.* at pp. 264-265.) Finding the conflict-of-interest statute overbroad and not subject to a reasonable limiting construction, we held it unconstitutional. (*Id.* at p. 272.)

In [County of Nevada v. MacMillen \(1974\) 11 Cal.3d 662, 670-672 \[114 Cal.Rptr. 345, 522 P.2d 1345\]](#), we upheld a revision of the conflict-of-interest law designed to satisfy the demands of *City of Carmel-by-the-Sea*. Both of the conflict of interest cases make reference to a right to privacy, but in the context of the federal "penumbral" right. ([City of Carmel-by-the-Sea v. Young, supra, 2 Cal.3d at pp. 266-268](#); [County of Nevada v. MacMillen, supra, 11 Cal.3d at p. 672.](#))

[***855] The third case cited in *White*--the Supreme Court's *Griswold* decision--involves [****63] the federal "penumbral" right to privacy as applied to a married couple's right to use contraceptives. *White* refers to Justice Goldberg's [*34] concurring opinion, which discusses a "compelling" state interest standard for a

"significant encroachment on personal liberty." ([White v. Davis, supra, 13 Cal.3d at p. 776](#) citing [Griswold v. Connecticut, supra, 381 U.S. at p. 497 \[14 L.Ed.2d at pp. 522-523\]](#) (conc. opn. of Goldberg, J.)) The standard is borrowed from [Bates v. City of Little Rock \(1959\) 361 U.S. 516 \[4 L.Ed.2d 480, 80 S.Ct. 412\]](#), a National Association for the Advancement of Colored People membership-list disclosure case involving "privacy" as an aspect of freedom of association protected by the First Amendment. Justice Goldberg's concurrence represented the views of three justices. The majority opinion, written by Justice Douglas, does not adopt a "compelling interest" standard. ([Griswold v. Connecticut, supra, 381 U.S. at pp. 480-486 \[41 L.Ed.2d at pp. 512-516\].](#)) [****64]

As we have observed in part 2(a)(2), *ante*, there is no clear or uniform "compelling interest" standard emanating from the federal penumbral "privacy" decisions. Based on its language and the authority it cites, our decision in *White* signifies only that [HN22](#) some aspects of the state constitutional right to privacy--those implicating obvious government action impacting freedom of expression and association--are accompanied by a "compelling state interest" standard.

Some of our decisions following *White* use "compelling interest" language; others appear to rely on balancing tests giving less intense scrutiny to nonprivacy interests. The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide [****65] dispute, general balancing

tests are employed.¹¹

[****66] [**654] For the reasons stated above, we decline to hold that every assertion of a [***856] privacy interest under article I, section 1 must be overcome by a "compelling [*35] interest." Neither the language nor history of the Privacy Initiative unambiguously supports such a standard. In view of the far-reaching and multifaceted character of the right to privacy, such a standard imports an impermissible inflexibility into the process of constitutional adjudication.

¹¹ See, e.g., *Schmidt v. Superior Court*, *supra*, 48 Cal.3d at pages 389-390 (right to familial privacy not violated by mobilehome park rule excluding persons under 25; no reference to "compelling interest;" court appears to balance privacy interest against competing interests); *Long Beach City Employees Assn. v. City of Long Beach*, *supra*, 41 Cal.3d at page 948, footnote 12 (polygraph testing of government employees by city; case decided on state equal protection grounds; "compelling governmental interest" reference in footnote dictum on constitutional right to privacy); *Doyle v. State Bar* (1982) 32 Cal.3d 12, 20 [184 Cal.Rptr. 720, 648 P.2d 942] (State Bar subpoena for trust account records; clients' privacy interest "is not absolute but must be balanced against the need for disclosure"); *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 164 [219 Cal.Rptr. 387, 707 P.2d 760] (right to elect sterilization as method of contraception; restriction on exercise of fundamental constitutional right must be justified by "compelling interest that is within the police power of the state in regulating the subject"); *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 [194 Cal.Rptr. 431, 668 P.2d 738] (patient's privacy interest in psychotherapy must yield to compelling state interests; detection and prevention of child abuse constitutes such an interest); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118] (invalidating restrictions on state funding of abortions; applying standard employed in *Bagley v. Washington Township Hosp. Dist.* (1966) 65 Cal.2d 499, 505-507 [55 Cal.Rptr. 401, 421 P.2d 409], a political speech case, to rights of privacy and equal protection); *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219] (right to live in an alternative family with persons not related by blood, marriage, or adoption; abridgement must be justified by compelling public need); *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864 [132 Cal.Rptr. 464, 553 P.2d 624] (no privacy right to expungement of arrest record; reference to common law interest in public reporting of crime; reference to "compelling interest"); *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-657 [125 Cal.Rptr. 553, 542 P.2d 977] (bank customer has reasonable expectation of privacy in bank records referring to customer's financial affairs; right of privacy must be balanced against civil litigant's right to discover facts).

There remains, however, the question of the correct legal standard to be applied in assessing plaintiffs' claims for invasion of privacy. Based on our review of the history of the Privacy Initiative, we will describe in the remainder of this part the elements of the cause of action for violation of the state constitutional right to privacy and the defenses that might be asserted against such a cause of action.

A LEGALLY PROTECTED PRIVACY INTEREST

CA(10) (10) HN23 The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to [****67] privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").

HN24 Informational privacy is the core value furthered by the Privacy Initiative. (*White v. Davis*, *supra*, 13 Cal.3d at p. 774.) A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue. As the ballot argument observes, the [*36] California constitutional right of privacy "prevents government and business interests from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one [****68] purpose in order to serve other purposes or to embarrass us." (Ballot Argument, *supra*, at p. 27.)

Autonomy privacy is also a concern of the Privacy Initiative. The ballot arguments refer to the federal

constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws. (Ballot Argument, *supra*, at p. 27.) But they do not purport to create any unbridled right of personal freedom of action that may be vindicated in lawsuits against either government agencies or private persons or entities.

HN25 Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing **[**655]** the right to privacy--common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.

REASONABLE EXPECTATION OF PRIVACY

CA(11) (11) HN26 The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part.

"The extent of [a privacy] interest is **[****69]** not independent of the circumstances." (*Plante v. Gonzalez, supra*, 575 F.2d at p. 1135.) Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to "limit [an] intrusion upon personal dignity and security" that would otherwise be regarded as serious. (*Ingersoll v. Palmer, supra*, 43 Cal.3d at p. 1346 [upholding the use of sobriety checkpoints].)

[*857]** In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. (See, e.g., *Whalen, supra*, 429 U.S. at p. 602 [51 L.Ed.2d at p. 75] [reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many

facets of health care"]; *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia* (3d Cir. 1987) 812 F.2d 105, 114 **[****70]** [no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part **[*37]** because of applicant awareness that such disclosure "has historically been required by those in similar positions"].)

A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See, e.g., *Rest.2d Torts, supra*, § 652D, *com. c* ["The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."])

Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant. (See pt. 2(a)(1), *ante*.)

SERIOUS INVASION OF PRIVACY INTEREST

No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure **[****71]** the ordinary incidents of the community life of which he is a part." (*Rest.2d Torts, supra*, § 652D, *com. c*.) **HN27** Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

C. DEFENSES TO A STATE CONSTITUTIONAL PRIVACY CAUSE OF ACTION

CA(12) (12) HN28 Privacy concerns are not

absolute; they must be balanced against other important interests. (*Doyle v. State Bar, supra*, 32 Cal.3d at p. 20; *Wilkinson, supra*, 215 Cal.App.3d at p. 1046.) "[N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution] [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." (215 Cal.App.3d at p. 1046.)

The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically [****72] identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a "balancing test." The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law. [*38] [HN29](#)

Invasion of a privacy interest is not a violation of the state constitutional right to [**656] privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests. (See pt. 2(a), *ante*; Ballot Argument, *supra*, at pp. 26-27.)

[HN30](#) Confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests. (*Whalen, supra*, 429 U.S. at pp. 600-602 [****73] [106 L.Ed.2d at pp. 498-500]; [***858] *Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. at p. 626, fn. 7 [103 L.Ed.2d at pp. 665-666].) For example, if intrusion is limited and confidential information is carefully shielded from disclosure except to those

who have a legitimate need to know, privacy concerns are assuaged. On the other hand, if sensitive information is gathered and feasible safeguards are slipshod or nonexistent, or if defendant's legitimate objectives can be readily accomplished by alternative means having little or no impact on privacy interests, the prospect of actionable invasion of privacy is enhanced.

[CA\(9b\)](#) (9b) The NCAA is a private organization, not a government agency. Judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.

First, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons. "The government not [****74] only has the ability to affect more than a limited sector of the populace through its actions, it has both economic power, in the form of taxes, grants, and control over social welfare programs, and physical power, through law enforcement agencies, which are capable of coercion far beyond that of the most powerful private actors." (Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?* (1989) 17 Hastings Const.L.Q. 139, 142-143 [hereafter Sundby].)

Second, "an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government." (Sundby, *supra*, 17 Hastings Const.L.Q. at p. 143.) Initially, individuals usually have a range of choice among landlords, employers, vendors and others with [*39] whom they deal. To be sure, varying degrees of competition in the marketplace may broaden or narrow the range. But even in cases of limited or no competition, individuals and groups may turn to the Legislature to seek a statutory remedy against a specific business practice regarded as undesirable. State and federal governments routinely engage in extensive [****75] regulation of all aspects of

business. Neither our Legislature nor Congress has been unresponsive to concerns based on activities of nongovernment entities that are perceived to affect the right of privacy. (See, e.g., [Lab. Code, § 432.2, subd. \(a\)](#) ["No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment"]; [29 U.S.C. § 2001](#) [regulating private employer use of polygraph examination].)

Third, private conduct, particularly the activities of voluntary associations of persons, carries its own mantle of constitutional protection in the form of freedom of association. Private citizens have a right, not secured to government, to communicate and associate with one another on mutually negotiated terms and conditions. The ballot argument recognizes that state constitutional privacy protects in part "our freedom of communion and our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27.) [HN31](#) Freedom of association is also protected by the First [\[****76\]](#) Amendment and extends to all legitimate organizations, whether popular or unpopular. ([Britt v. Superior Court \(1978\) 20 Cal.3d 844, 854 \[143 Cal.Rptr. 695, 574 P.2d 766\]](#); see also Tribe, [\[**657\]](#) American Constitutional Law (2d ed. 1988) § 18-2, p. 1691 [noting rationale of federal constitutional requirement of state action protects "the freedom to make certain choices, such as choices of the persons with whom [one associates]" which is "basic under any conception of liberty"].)

These generalized differences between public and private action may affect privacy rights differently in different contexts. If, for example, a plaintiff claiming a violation of the state constitutional right to privacy was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service, his or her privacy interest may weigh less in the balance. In contrast, if a public or private

[\[***859\]](#) entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals.

SUMMARY OF ELEMENTS AND DEFENSES

[CA\(13\)](#) (13) Based on our review of the [\[****77\]](#) Privacy Initiative, we hold that [HN32](#) a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally [\[*40\]](#) protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.

[HN33](#) Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. (Cf. [Gill v. Hearst Publishing Company, Inc., supra, 40 Cal.2d at p. 229](#); [Johnson v. Harcourt, Brace, Jovanovich \(1974\) 43 Cal.App.3d 880, 892 \[118 Cal.Rptr. 370\]](#) [common law cases].) Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.

[HN34](#) A defendant may prevail in a state constitutional privacy [\[****78\]](#) case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and

the relief requested.

[HN35](#) The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate.

3. APPLICATION OF THE ELEMENTS OF INVASION OF PRIVACY TO THIS CASE

[CA\(14\)](#) (14) The NCAA challenges the decision of the Court of Appeal upholding a permanent injunction against its drug testing program [****79] as a violation of the state constitutional right to privacy. We will therefore review the record, including the findings made by the trial court, in light of the elements of a cause of action for invasion of privacy as we have just discussed them.

Plaintiffs correctly assert that the NCAA's drug testing program impacts legally protected privacy interests. First, by monitoring an athlete's urination, the NCAA's program intrudes on a human bodily function that by law [*41] and social custom is generally performed in private and without observers. (Cf. [Skinner v. Railway Labor Executives' Assn.](#), *supra*, 489 U.S. 602, 617 [103 L.Ed.2d 639, 659-660]; [Pen. Code, § 653n](#) [installation or maintenance of two-way mirror permitting observation of restroom is misdemeanor].) Second, by collecting and testing an athlete's urine and inquiring about his or her ingestion of medications and other substances, the NCAA obtains information about [**658] the internal medical state of an athlete's body that is regarded as personal and confidential. ([Board of Medical Quality Assurance v. Gherardini](#) (1979) 93 Cal.App.3d 669, 678 [156 Cal.Rptr. 55] [****80] ["[HN36](#) A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected."]; see also

[Wilkinson, supra](#), 215 Cal.App.3d at p. 1048.)

Observation of urination and disclosure of medical information may cause embarrassment to individual athletes. The first implicates autonomy privacy--an interest in [***860] freedom from observation in performing a function recognized by social norms as private. The second implicates informational privacy--an interest in limiting disclosure of confidential information about bodily condition. But, as we have noted, the identification of these privacy interests is the beginning, not the end, of the analysis.

A. FREEDOM FROM OBSERVATION DURING URINATION

(1) REASONABLE EXPECTATIONS OF PRIVACY

[HN37](#) The observation of urination--a human excretory function--obviously implicates privacy interests.¹² But the reasonable expectations of privacy of plaintiffs (and other student athletes) in private urination must be viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken.

[****81] By its nature, participation in intercollegiate athletics, particularly in highly competitive postseason championship events, involves close regulation and scrutiny of the physical fitness and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large. Athletes

¹² In our culture, urination is generally regarded as private, but perhaps not absolutely private in all conceivable settings. "Men urinate side by side in public restrooms without embarrassment even though there is very little, and often no, attempt to partition the urinals. In hospitals and physicians' offices, urine samples of both men and women are generally taken by female nurses or technicians under conditions of privacy similar to those prescribed by [athletic drug testing rules]." (*Dimeo v. Griffin* (7th Cir. 1990) 943 F.2d 679, 682.)

frequently disrobe in the presence of one another and their athletic mentors and [*42] assistants in locker room settings where private bodily parts are readily observable by others of the same sex. They also exchange information about their physical condition and medical treatment with coaches, trainers, and others who have a "need to know."

HN38 As a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectation of personal privacy in his or her bodily condition, both internal and external. In recognition of this practical reality, drug testing programs involving athletic competition [****82] have routinely survived Fourth Amendment "privacy" challenges.¹³ Drug testing has become a highly visible, pervasive, and well accepted part of athletic competition, particularly on intercollegiate and professional levels. (*Schaill, supra*, 864 F.2d at p. 1319.) It is a reasonably expected part of the life of an athlete, especially one engaged in advanced levels of competition, where the stakes and corresponding temptations are high.

[****83] The student athlete's reasonable expectation of privacy is further diminished by two elements of the NCAA's drug testing program-- [**659] advance notice and the opportunity to consent to testing. A drug test does not come as a unwelcome surprise at the end of a postseason match. Full disclosure of the NCAA's banned substances rules and testing procedures is made at

the beginning of the athletic season, long before the postseason competition during which drug testing may take place. Following disclosure, the informed written consent of each student athlete is obtained. Thus, athletes have complete [***861] information regarding the NCAA's drug testing program and are afforded the opportunity to consent or refuse before they may be selected for testing.

To be sure, an athlete who refuses consent to drug testing is disqualified from NCAA competition. But this consequence does not render the athlete's consent to testing involuntary in any meaningful legal sense. Athletic participation is not a government benefit or an economic necessity that society has decreed must be open to all. **HN39** One aspect of the state constitutional right [*43] to privacy is "our freedom to associate with the people we choose." [****84] (Ballot Argument, *supra*, at p. 27.) Participation in any organized activity carried on by a private, nongovernment organization necessarily entails a willingness to forgo assertion of individual rights one might otherwise have in order to receive the benefits of communal association.

HN40 Plaintiffs and Stanford have no legal right to participate in intercollegiate athletic competition. (Cf. *Steffes v. California Interscholastic Federation* (1986) 176 Cal.App.3d 739 [222 Cal.Rptr. 355].) Their ability to do so necessarily depends upon their willingness to arrive at and adhere to common understandings with their competitors regarding their mutual sporting endeavor. The NCAA is democratically governed by its member institutions, including Stanford.¹⁴ Acting collectively, those institutions, including Stanford, make the rules, including those regarding

¹³ For example, in the leading case of *Schaill by Kross v. Tippecanoe County School Corp.* (7th Cir. 1988) 864 F.2d 1309, the federal court of appeals upheld a program consisting in part of random drug testing of high school athletes, noting the "element of 'communal undress' inherent in athletic participation" and central role of physical examinations in athletic training and evaluation. (*Id. at p. 1318*.) (See also *Dimeo v. Griffin, supra*, 943 F.2d at p. 682 [upholding drug testing of horse racing participants, noting generally reduced privacy expectations of athletes in general]; *Shoemaker v. Handel* (3d Cir. 1986) 795 F.2d 1136, 1141-1143 [86 A.L.R.Fed. 405] [same]; *O'Halloran v. University of Washington, supra*, 679 F.Supp. 997, 1005, revd. on other grounds (9th Cir. 1988) 856 F.2d 1375 [upholding the NCAA's drug testing program, noting "communal undress" and routine physical examinations].)

¹⁴ The NCAA's drug testing program was adopted by, and has been continued with the overwhelming support of, the NCAA's member institutions, both public and private. Although Stanford has chosen to join plaintiffs in challenging the NCAA's drug testing program in court, the record does not reveal any Stanford-initiated opposition to the program through established NCAA channels, either at the NCAA's annual conventions or in any other NCAA setting.

drug use and testing. If, knowing the rules, plaintiffs and Stanford choose to play the game, they have, by social convention and legal act, fully and voluntarily acquiesced in the application of those rules. To view the matter otherwise would impair the privacy and associational rights of [****85] all NCAA institutions and athletes.

(3) SERIOUSNESS OF INVASION

Although diminished by the athletic setting and the exercise of informed consent, plaintiffs' privacy interests are not thereby rendered de minimis. Direct observation of urination by a monitor, an intrusive act, appears to be unique to the NCAA's program. Other decided cases, including those involving athlete drug testing, have involved less invasive testing methods, typically unobserved urination in a restroom stall. (See, e.g., *Dimeo v. Griffin*, *supra*, 943 F.2d at p. 682 [****86] [urine specimen given in "(relative) privacy" of toilet stall with representative standing by but not observing urination]; *Schaill by Kross v. Tippecanoe County School Corp.*, *supra*, 864 F.2d at p. 1311 [no direct visual observation of urination; monitor stands outside stall to listen for normal sounds of urination and to check temperature of sample by hand].) The NCAA's use of a particularly intrusive monitored urination procedure justifies further inquiry, even under conditions of decreased expectations of privacy.

(3) COMPETING INTERESTS

To justify its intrusion on student athletes' diminished expectations of privacy, the NCAA asserts two countervailing interests: (1) safeguarding the [*44] integrity of intercollegiate athletic competition; and (2) protecting the health and safety of student athletes. The central purpose of the NCAA is to promote competitive athletic events conducted pursuant to "rules of the game" enacted by its own membership. In this way, the NCAA creates and preserves the "level playing field" necessary to promote vigorous, high-level, and nationwide competition in intercollegiate sports.

[**660] Plaintiffs and Stanford [****87] do not contend that the purpose or objectives of the NCAA are contrary to law or public policy. Nor do they attribute bad faith motives to the NCAA or challenge its important role as "the guardian of [the] important American tradition [****862] " of intercollegiate athletic competition. ([*NCAA v. Board of Regents of Univ. of Okla.*, *supra*, 468 U.S. at p. 101, fn. 23 \[82 L.Ed.2d at p. 84\]](#).) The NCAA is, without doubt, a highly visible and powerful institution, holding, as it does, a virtual monopoly on high-level intercollegiate athletic competition in the United States. Although the NCAA, like other private businesses and organizations, is subject to numerous regulations, neither Congress nor our Legislature has seen fit to interfere with its general rulemaking functions, whether in the area of drug testing or in other fields. Therefore, we regard the NCAA's stated motives and objectives, not with hostility or intense skepticism, but with a "respectful presumption of validity." (*Ibid.*)

Considered in light of its history, the NCAA's decision to enforce a ban on the use of drugs by means of a drug testing program is reasonably [****88] calculated to further its legitimate interest in maintaining the integrity of intercollegiate athletic competition. As one author observed: "[Athletic] competition should be decided on the basis of who has done the best job of perfecting and utilizing his or her natural abilities, not on the basis of who has the best pharmacist." (Zemper, *Drug Testing in Athletics*, in *Drug Testing: Issues and Options* (Coombs & West, eds., 1991) p. 120.)

The NCAA began to study drug testing in response to a specific incident of probable drug ingestion by athletes at the Pan American Games. It followed other established and respected amateur sporting organizations--principally the USOC and the International Olympic Committee--in promulgating and enforcing its drug testing program. And, although the NCAA followed the lead of others, it did not do so blindly. Before beginning its testing program, the NCAA commissioned its own study--

one that showed significant and widespread use of drugs by student athletes. Other studies included in the record, as well as testimony from physicians, trainers, and others, confirm substantial, if not extensive, drug use by student athletes. Despite advance notice [****89] and warnings to student athletes before the testing [*45] program began, approximately 1 percent of the athletes tested in the first two years of operation were declared ineligible because of drug use.¹⁵

[****90] But whatever the provable incidence of drug use, perception may be more potent than reality. If particular substances are *perceived* to enhance athletic performance, student athletes may feel pressure (whether internal or external, subtle or overt) to use them. A drug testing program serves to minimize that pressure by providing at least some assurance that drug use will be detected and the user disqualified. As a result, it provides significant and direct benefits to the student athletes themselves, allowing them to concentrate on the merits of their athletic task without undue concern about loss of a competitive edge. These benefits offset the limited impact on privacy imposed by the prospect of testing.

There was ample evidence in the record that certain kinds of drugs--such as anabolic steroids and amphetamines--are perceived by some athletes to enhance athletic performance. Among other findings, the Michigan State University study showed that 69 percent of the student athletes who reported taking steroids and 37 percent of those

taking amphetamines admitted doing so "to improve athletic performance." Plaintiffs' own expert, Dr. David Lowenthal, wrote in 1985: "[**661] In spite of [****91] physicians' efforts to provide rational and individual therapy for patients and despite warnings to healthy participants in sports, the consumption of caffeine, salicyclates, nonsteroidal antiinflammatory [***863] drugs . . . alcohol, anabolic steroids, and amphetamines to improve athletic performance is rampant."

As to anabolic steroids, Dr. Lowenthal commented: "The use of these drugs by athletes has now reached alarming proportions. . . . In the United States, anabolic steroid use has spread from professional athletes to college and high school athletes. . . . It would be extremely difficult to determine the number of athletes who use anabolic steroids in different sports. Much of the information in this area comes from former users [and] from informal surveys. It has been suggested that between 80 and 100 per cent of male bodybuilders and weight lifters at the national and international level use these agents during training. Use among shot putters and discus, hammer and [*46] javelin throwers is probably comparable. The use of anabolic steroids has spread rapidly to include football players, swimmers and other competitive athletes, as well as noncompetitive athletes."

Dr. Lowenthal [****92] confirmed his written findings and opinions in testimony given at trial. Although other experts expressed different views, the testimony, considered in light of the entire record, supplies uncontradicted evidence of a substantial, though perhaps not universal, perception that the use of certain drugs may enhance athletic performance.

Finally, the practical realities of NCAA-sponsored athletic competition cannot be ignored. Intercollegiate sports is, at least in part, a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition. Scandals involving drug use,

¹⁵ Contrary to plaintiffs' argument, we do not regard the results of drug testing after the NCAA announced and began its program as the *only* persuasive evidence of actual drug use by student athletes. Plaintiffs ignore the self-evident deterrent effect of the program itself, particularly in the context of highly competitive sports activity. Once a program of drug testing is formally announced and in effect, athletes who wish to avoid the disastrous effects of disqualification have a strong incentive to refrain from ingesting prohibited substances. Indeed, one possible yardstick of a drug testing program accompanied by advance consent and publicity is a percentage of positive drug test findings that starts low and continues either at the same level or downward. When so measured, the NCAA's program is successful.

like those involving improper financial incentives or other forms of corruption, impair the NCAA's reputation in the eyes of the sports-viewing public. A well announced and vigorously pursued drug testing program serves to: (1) provide a significant deterrent to would-be violators, thereby reducing the probability of damaging public disclosure of athlete drug use; and (2) assure student athletes, their schools, and the public that fair competition remains the overriding principle in athletic events. Of course, these outcomes also serve the NCAA's overall interest [****93] in safeguarding the integrity of intercollegiate athletic competition. (Cf. *Dimeo v. Griffin*, *supra*, 943 F.2d at p. 685 [state's financial interest in horse racing revenues provides partial justification for drug testing of participants to preserve appearance and reality of fair competition]; *Shoemaker v. Handel*, *supra*, 795 F.2d at p. 1142 ["It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless [drug] testing [in the horse racing industry]."])

The NCAA also has an interest in protecting the health and safety of student athletes who are involved in NCAA-regulated competition. Contrary to plaintiffs' characterization, this interest is more than a mere "naked assertion of paternalism." The NCAA sponsors and regulates intercollegiate athletic events, which by their nature may involve risks of physical injury to athletes, spectators, and others. In this way, the NCAA effectively creates occasions for potential injury resulting from the use of drugs. As a result, it may concern itself with the task of protecting the safety of those involved [****94] in intercollegiate athletic competition. This NCAA interest exists for the benefit of all persons involved in sporting events (including not only drug-ingesting athletes but also innocent athletes or others who might be injured by a drug user), as well as the sport itself.

Plaintiffs and Stanford attempt to undermine the strength of the NCAA's interests with a series of factual arguments based on the trial court's findings. However, as we have noted, those

findings were premised on the legal [*47] assumption that the NCAA bears the burden of establishing a "compelling interest" in its drug testing program that cannot be addressed by any alternative with a lesser impact on privacy interests. No such showing is required. Because the trial court's findings were premised on an erroneous view of the applicable legal standard, they cannot save the judgment. (*Lewis Food [**662] Co. v. Fireman's Fund Ins. Co.* (1962) 207 Cal.App.2d 515, 524 [24 Cal.Rptr. 557]; *Smith [***864] v. Fetterhoff* (1956) 140 Cal.App.2d 471, 473 [295 P.2d 474]; cf. *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 500, 501 [80 L.Ed.2d 502, 516-517, 104 S.Ct. 1949] [****95] ["*HN41* 'clearly erroneous' " standard of review does not apply to a "finding of fact that is predicated on a misunderstanding of the governing rule of law"].) Although we could remand this case for reconsideration in light of the applicable rules of law, there is no reason to do so. Uncontradicted evidence in the record demonstrates as a matter of law the constitutional validity of the NCAA's program.

CA(15a) (15a) Without reviewing all of the arguments advanced by plaintiffs and Stanford, it is sufficient to note that most, if not all, are based on matters that are immaterial in light of the elements of invasion of privacy described above. For example, plaintiffs seek to dismiss college athlete drug use as legally insignificant, pointing to a finding that "athletes do not use drugs any more than college students generally" and another that they "actually use drugs less during the athletic season than their peers." The purported comparison between student athletes and other college students is beside the point. Student athletes have set themselves apart from their nonathlete peers; as we have noted, they have different and diminished expectations of privacy in the athletic context. If student athletes' [****96] drug use is, or, in the absence of drug testing could be, substantial and detrimental to competition or to the health of student athletes, the NCAA has a significant interest in conducting a testing program.

Plaintiffs also point to trial court findings that none of the NCAA's banned drugs were "scientifically proven" to enhance athletic performance, noting some controversy among experts respecting certain substances. Plaintiffs cite no authority imposing a "scientific" burden of proof on a defendant in an invasion of privacy case; we have located none. Scientific proof of this nature would require actual drug use under competitive conditions. This kind of human experimentation would pose risks to life and limb of far greater magnitude than plaintiffs' asserted privacy interest in this case. Moreover, the existence of continuing scientific controversy about particular drugs or practices on perceptions in athletic settings can reasonably be viewed as dictating caution and prohibition, rather than total deregulation.

Finally, as we have noted, perception may well overpower reality in this area. Although the trial court found that coaches and athletes in general do [*48] not perceive [****97] drugs as performance-enhancing or as a "major problem," there is clear evidence of a significant perception to the contrary on the part of *some* coaches and athletes. Plaintiffs' own expert confirmed the perception and opined that it was growing. Rules are often made and enforced to control the behavior of relatively small numbers of individuals whose conduct, if it became more widespread, would undermine a community goal or objective. If athletic drug use became widespread because of a growing perception that drug users thereby obtained a "competitive edge," the integrity and reputation of NCAA athletic competition could be seriously threatened. The NCAA is not required by state constitutional privacy principles to stay its hand until a "minor" problem becomes a "major" one. (Cf. *Dimeo v. Griffin*, *supra*, 943 F.2d at p. 684 ["[HN42](#) G]overnment is not limited to addressing public safety problems after serious accidents reveal its want of foresight."].)

Plaintiffs also challenge the NCAA's list of proscribed drugs, maintaining that it is overbroad because, as the trial court found, it "includes

substances which do not enhance performance." Accepting [****98] the factual premise of plaintiffs' argument, it is not fatal to the NCAA's drug testing program. Initially, the NCAA's interests are not limited to banning so-called performance-enhancing drugs. It also prohibits street drugs--such as marijuana and cocaine--which are illegal to possess and which probably retard athletic performance. The NCAA's interests in maintaining the integrity of competitive conditions and protecting the health and safety of student athletes certainly extends to prohibiting the use of illegal and dangerous substances, [***865] as well as others that might potentially affect [**663] athletic performance, whether positively or negatively.

Moreover, the Privacy Initiative does not empower us to make an item-by-item review of the desirability of retaining each item in the NCAA's prohibited substance list. The privacy interests asserted by plaintiffs are impacted by the *manner* in which drug testing is carried out; assuming the list contains at least some substances that may potentially injure competitors or competition and thereby justify testing, the impact of monitored urine testing on plaintiffs' privacy interests does not wax or wane depending upon the number of such substances.

[****99] The ballot arguments in support of the Privacy Initiative impliedly caution against the kind of wholesale review of the rules and regulations of a private, voluntary organization advocated by plaintiffs and Stanford. The Privacy Initiative recognizes a specific privacy-related interest in "our freedom to associate with the people we choose" (Ballot Argument, *supra*, at p. 27). To undertake, under the guise of protecting a diminished privacy interest, a review of the merits of rules enacted by the democratic process of a private [*49] organization would impair the associational freedom of organization members in a manner contrary to the purpose of the Privacy Initiative itself.

In accordance with the trial court's findings, plaintiffs also argue that the NCAA did not carry "its burden of proving that there are no less intrusive means available to further its asserted goals of assuring fair competition and protecting the health of student athletes." Plaintiffs submit that drug education and testing based on reasonable suspicion are feasible alternatives to random drug testing.

Initially, the trial court erred in imposing on the NCAA the burden of establishing that there were [****100] no less intrusive means of accomplishing its legitimate objectives. Like the "compelling interest" standard, the argument that such a "least restrictive alternative" burden must invariably be imposed on defendants in privacy cases derives from decisions that: (1) involve clear invasions of central, autonomy-based privacy rights, particularly in the areas of free expression and association, procreation, or government-provided benefits in areas of basic human need; or (2) are directed against the invasive conduct of government agencies rather than private, voluntary organizations.¹⁶

¹⁶ See, e.g., [Committee to Defend Reproductive Rights v. Myers](#), [supra](#), 29 Cal.3d at page 270 (applying *Bagley* test, including its "no less offensive alternatives" element, to government discrimination against medical care benefits for abortions); [City of Carmel-by-the-Sea](#), [supra](#), 2 Cal.3d at pages 268-269 ("less drastic means" analysis derived from federal freedom of speech and association cases applied to financial disclosure by political candidates; no reference to burden of proof; need for balancing acknowledged); [Robbins v. Superior Court](#) (1985) 38 Cal.3d 199, 213-214 [211 Cal.Rptr. 398, 695 P.2d 695] (in-kind welfare benefits to recipients of general assistance); see also [City of Long Beach Employees Assn.](#), [supra](#), 41 Cal.3d at page 948, footnote 12 ("less intrusive means" element referred to; issue not reached).

Both [Bagley v. Washington Township](#), [supra](#), 65 Cal.2d at pages 506-507, and [City of Carmel-by-the-Sea v. Young](#), [supra](#), 2 Cal.3d at pages 268-269, rely principally on [Shelton v. Tucker](#) (1960) 364 U.S. 479, 488 [5 L.Ed.2d 231, 237-238, 81 S.Ct. 247], and similar First Amendment freedom of association and expression cases. In *Shelton*, public school teachers were required by law to disclose every organization they had joined or contributed money to--social, political, religious, professional, or other--over a five-year period. Recognizing the state's interest in occupational competence and fitness of teachers, the high court nonetheless struck down the law,

[****101] [*50] [**664] [***866] We have been directed to no case imposing on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the "least offensive alternative" possible under the circumstances. Nothing in the language of history of the Privacy Initiative justifies the imposition of such a burden; we decline to impose it.

Moreover, the alternatives posited by plaintiffs--educational programs and suspicion-based drug testing--are different in kind and character from random drug testing. Education may have little effect on persons who are inclined not to listen; competitive pressures or addictive tendencies are likely to prevail over benign attempts at persuasion. Suspicion-based testing assumes reliable visible evidence of drug use and the availability of sufficient resources to make the necessary observations, neither of which finds substantial evidentiary support in the record. It also depends at least in part on the reporting of suspected athletes by their competitors, a situation fraught with conflicts of interest and other difficulties. In light of

observing that its scope far exceeded any legitimate state concern. (*Id.* at pp. 488-490 [5 L.Ed.2d at pp. 237-238].) It stated in part: "[HN43](#) The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (*Id.*, at p. 488 [5 L.Ed.2d at p. 237].) It was careful, however, to observe that a "less drastic means" analysis might not be applicable in other constitutional contexts: "In other areas, involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. [Citations.]." (*Id.* at p. 488, *fn.* 8 [5 L.Ed.2d at p. 237].)

Thus, at the roots of the "least restrictive alternative" burden lie cases of government infringement of fundamental freedoms of expression and association. Unlike this one, those cases do not involve: (1) broad-based assertions of autonomy privacy interests (i.e., freedom of action as opposed to freedom of expression and association), (2) in circumstances of diminished expectations of privacy on the part of participants in a voluntary extracurricular activity conducted by a private entity. Consistent with *Shelton*, and because the NCAA's stated purposes are legally valid and central to its function, the NCAA should be accorded the kind of "administrative leeway" necessary to accomplish those purposes with "increased efficiency." ([Shelton v. Tucker](#), [supra](#), 364 U.S. at p. 488, *fn.* 8 [5 L.Ed.2d at p. 237].)

these factors, the NCAA was not constitutionally compelled to adopt educational [****102] or suspicion-based programs to further its interests in the integrity of athletic competition and the health and safety of student athletes.

The closest question presented by this case concerns the method used by the NCAA to monitor athletes as they provide urine samples. A tested athlete's urination is directly observed by an NCAA official of the same sex as the athlete who stands some five to seven feet away. Even the diminished expectations of privacy in a locker room setting do not necessarily include direct and intentional observation of excretory functions. Plaintiffs had a reasonable expectation of privacy under the circumstances; their privacy interest was impacted by the NCAA's conduct. The NCAA was therefore required to justify its use of direct monitoring of urination.

In support of direct monitoring, the NCAA introduced substantial evidence that urine samples can be altered or substituted in order to avoid positive findings and that athletes had actually attempted to do so. The NCAA's interest in preserving the integrity of intercollegiate athletic competition requires not just testing, but effective and accurate testing of unaltered and uncontaminated samples. If direct [****103] monitoring is necessary to accomplish accurate testing, the NCAA is entitled to use it.

[*51] The trial court rejected the NCAA's evidence, finding cryptically as follows: "Direct monitoring of an athlete urinating is not necessary to ensure a valid sample." No reasons were offered to support this conclusion. Plaintiffs point only to scant expert opinion--also unaccompanied by any credible line of reasoning--on the issue. More critically, plaintiffs did not offer any evidence (whether from experts or other sources) demonstrating that any alternative to direct monitoring with a significantly lesser impact on plaintiff's privacy interests would accomplish the NCAA's objective of ensuring a valid sample.

[CA\(16\)](#) (16) [HN44](#) Trial court findings must be supported by substantial evidence on the record taken as a whole. Substantial evidence is not any evidence--it must be reasonable in nature, credible, and of solid value. ([Kroopf v. Guffey \(1986\) 183 Cal.App.3d 1351, 1356 \[228 Cal.Rptr. 807\]](#); [Bowers v. Bernards \(1984\) 150 Cal.App.3d 870, 873 \[197 Cal.Rptr. 925\]](#).) [CA\(15b\)](#) (15b) Because plaintiffs failed to demonstrate with [****104] substantial evidence the presence of fully viable alternatives to monitoring, they stopped short of proving their case. ¹⁷

[****105] [**665] [***867] Notwithstanding plaintiffs' failure of proof in this case, direct monitoring remains a significant privacy issue in athletic and nonathletic drug testing cases. Social norms validate the distinction between the mere presence of another person in or around an area where urination takes place (such as a bathroom or locker room) and the direct and purposeful observation of urination act by someone specially commissioned to witness it. (See [Capua v. City of Plainfield \(D.N.J. 1986\) 643 F.Supp. 1507, 1514](#) [urine test under close surveillance "embarrassing

¹⁷ Justice Mosk's dissent charges us with disregarding the substantial evidence rule with respect to the trial court's finding that direct monitoring of athlete urination is unnecessary to ensure a valid sample. We plead not guilty. As Justice Mosk acknowledges, plaintiffs themselves offered no expert or other evidence offering or analyzing any viable alternative to direct monitoring. Rather, the testimony of the NCAA's own expert, Ronald Heitzinger, is the sole evidence on which the court purported to base its finding. Heitzinger testified unequivocally as follows: "I have not only heard of but seen where the athletes have tried to screw up their drug tests so they will not be caught. *So we really recommend that there should be observed testing.*" (Italics added.) While he acknowledged performing testing without direct observation at the request of some of his clients, Heitzinger was not questioned regarding the feasibility of any specific alternatives or their impact on the accuracy of the testing process. In our view, Heitzinger's testimony, when read in context, acknowledges obliquely the mere possibility of testing without direct monitoring, while upholding at all times the vital importance of monitoring to ensure accuracy in the testing process. It does not satisfy plaintiff's burden of showing a practical, effective, and viable alternative. It is patently insufficient to permit a court to strike the balance in favor of the privacy right. The Privacy Initiative does not require the NCAA to settle for something less than a fully effective testing program.

and humiliating"]; Decresce & Lifshitz, *Drug Testing in the Workplace* (1989) p. 143.)

[*52] Perhaps because of its greater impact on privacy interests, direct monitoring is not used in all drug testing programs. With two exceptions, no decided case has upheld direct monitoring, even in the diminished privacy context of athletic competition. The first exception--also in an NCAA drug testing context--is a later-vacated federal trial court decision containing virtually no analysis of the serious privacy issues. (*O'Halloran v. University of Washington*, *supra*, 479 F.Supp. at p. 1005.) [****106] The second involves testing of a probationary police officer after notice and consent. (*O'Connor v. Police Com'r of Boston* (1990) 408 Mass. 324 [557 N.E.2d 1146, 1149].) Neither case considers the possibility of less intrusive alternatives to direct monitoring.

There may indeed be less intrusive alternatives to direct monitoring that could nonetheless fully satisfy the tester's objective of insuring a valid sample. (See, e.g., *Dixon v. Department of Transp. F.A.A.* (Fed.Cir. 1993) 8 F.3d 798, 803-804 [describing color and temperature tests designed to verify integrity of urine sample]; see also *Treasury Employees v. Von Raab*, *supra*, 489 U.S. at p. 661 [103 L.Ed.2d at p. 669]; Decresce & Lifshitz, *Drug Testing in the Workplace*, *supra*, p. 144; Fay, *Drug Testing* (1991) pp. 227-230 [outlining similar procedures to safeguard privacy while insuring accuracy of testing].) Because we are limited to the record before us, we necessarily leave any further consideration of less intrusive alternatives to direct monitoring initially to the judgment and [****107] discretion of the NCAA, and then to future litigation, if any.

B. INTEREST IN THE PRIVACY OF MEDICAL TREATMENT AND INFORMATION

(1) REASONABLE EXPECTATION

CA(17) (17) As discussed above, plaintiffs' interest in the privacy of medical treatment and medical information is also a protectable interest under the

Privacy Initiative. However, the student athlete's reasonable expectation of privacy is similarly diminished because of the nature of competitive athletic activity and the norms under which it is conducted. Organized and supervised athletic competition presupposes a continuing exchange of otherwise confidential information about the physical (and medical) condition of Coaches, trainers, and team physicians necessarily learn intimate details of student athletes' bodily condition, including illnesses, medical problems, and medications prescribed or taken. Plaintiffs do not demonstrate that sharing similar information with [***868] the NCAA, in its capacity as a regulator of athletic [*53] competition in which plaintiffs have voluntarily elected to participate, presents any greater risk to privacy.¹⁸

[****108] [**666] (2) SERIOUSNESS OF INVASION

Directed and specific inquiries about personal medications (including questions about birth control pills) in the potentially stressful circumstances of a random drug test are undoubtedly significant from a privacy standpoint. Without a correspondingly important "reason to know," the NCAA would have no right to demand answers to these kinds of questions. Again, however, the extent of the intrusion on plaintiffs' privacy presented by the question must be considered in light of both the diminished

¹⁸ The trial court also found that the NCAA's drug testing program "interferes with the athletes' right to treat themselves with appropriate over-the-counter medications as other students do." In view of the trial court's failure to weigh or consider the diminished expectations of privacy of student athletes when compared with "other students," this finding lacks significance. Moreover, following trial in this case, the NCAA eliminated from its list of banned substances the sympathomimetic amines--the drugs contained in over-the-counter medications. Much of the issue regarding over-the-counter medications thus appears to be moot at this stage. Finally, our review of the portions of the record cited by the parties discloses no evidence that the NCAA has applied either its drug testing policy or its ban on the use of specified substances so as to preclude any athlete from obtaining medically necessary treatment for disease or injury. Plaintiffs have failed to establish an invasion of privacy in the form of interference with medical treatment.

expectations of privacy of athletes in such questions, which are routinely asked and answered in the athletic context.

(3) *COMPETING INTERESTS*

Drug testing for multiple substances is a complex process. Although both parties acknowledge the NCAA has used and continues to use the best available methods of laboratory analysis, mistakes are possible and "false positives" can occur. The NCAA's inquiries to athletes about medications and drugs are designed to ensure accuracy in testing. The NCAA maintains that complete and accurate disclosure of these matters by athletes will, in certain instances and with respect to specified substances, serve to explain findings [****109] and prevent the embarrassment and distress occasioned by further proceedings. The record supports the NCAA's contentions. These kinds of disclosures are reasonably necessary to further the threshold purpose of the drug testing program--to protect the integrity of competition through the medium of accurate testing of athletes engaged in competition. The NCAA's interests in this regard adequately justify its inquiries about medications and other substances ingested by tested athletes.

The NCAA follows extensive procedures designed to safeguard test results, including: the numbering of urine specimens, chain of custody procedures, and control of disclosures regarding disqualified athletes. Plaintiffs [*54] and Stanford offer no serious criticism of the manner in which the NCAA protects the privacy interests of student athletes in the results or the process of drug testing. They point to no instances in which medical data or drug test results were disclosed to persons other than NCAA officials and the athlete's own college or university.

Although plaintiffs plausibly observe that media interest in positive test results is inevitable, the NCAA cannot be held responsible for public [****110] curiosity. Under established NCAA procedures, positive drug testing results are disclosed only to the athlete's school, which, in turn, informs the athlete. Only those with a "need to

know" learn of positive findings. Plaintiffs fail to identify any other feasible precaution or safeguard. The uncontradicted evidence in the record thus points to a single conclusion: the NCAA carefully safeguards the confidentiality of athlete medical information and drug test data, using the same only to determine eligibility for NCAA athletic competition in accordance with its demonstrated interests. There is no invasion of privacy in the NCAA's procedure. (*Skinner v. Railway [***869] Labor Executives' Assn., supra, 489 U.S. at p. 626, fn. 7 [103 L.Ed.2d at pp. 665-666].*)

In sum, plaintiffs and Stanford did not prove that the NCAA is "collecting and stockpiling unnecessary information about [student athletes] [or] misusing information gathered for one purpose in order to serve other purposes or to embarrass [student athletes]." (Ballot Argument, *supra*, at p. 27.) The NCAA's information-gathering procedure (i.e., drug testing through urinalysis) [****111] is a method reasonably calculated to further its interests in enforcing a ban on the ingestion of specified substances in order to secure fair competition and the health and safety of athletes participating in its programs.

[**667] In generally upholding the NCAA's drug testing program against plaintiffs' privacy challenge, we intimate no views about the legality of blanket or random drug testing conducted by employers, whether of current employees or applicants for employment, or by other kinds of entities. Employment settings are diverse, complex, and very different from intercollegiate athletic competition. Reasonable expectations of privacy in those settings are generally not diminished by the emphasis on bodily condition, physical training, and extracurricular competition inherent in athletics.

HN45 In the government employment context, for example, the Fourth Amendment protection against unreasonable searches and seizures has generally been interpreted to require more than an employer interest in employee job performance or a "drug-

free workplace" to justify drug testing without reasonable suspicion. Drug testing has been upheld when particular kinds of [*55] employment settings--including [****112] prison guarding, train operations, or customs inspection--present extraordinary risks to employer or public interests from employee drug use.¹⁹ As one federal court commented: "No one would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens." ([American Federation of Government Employees, AFL-CIO v. Roberts \(9th Cir. 1993\) 9 F.3d 1464.](#))

[****113] What requirements are imposed on private employers by the California constitutional right to privacy will depend upon the application of the elements and considerations we have discussed to the employer's special interests and the employee's reasonable expectations prevailing in a particular employment setting. We are not called upon to decide any such issues here.²⁰

¹⁹ Compare [National Treasury Employees Union v. Von Raab, supra, 489 U.S. at page 679 \[103 L.Ed.2d at page 710-711\]](#) (customs workers whose performance "might endanger the integrity or our Nation's borders or the life of the citizenry"; drug testing upheld); [Skinner v. Railway Labor Executives' Assn., supra, 489 U.S. at page 628 \[103 L.Ed.2d at pages 667\]](#) (railroad employees involved in accidents who "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences"; drug testing upheld); and [Railway Labor Executives' Assn. v. Skinner \(9th Cir. 1991\) 934 F.2d 1096, 1099-1100](#) ("safety-sensitive" railroad workers; urinalysis drug testing upheld); with [Taylor v. O'Grady \(7th Cir. 1989\) 888 F.2d 1189](#) (urinalysis drug testing permissible for prison guards but impermissible for other prison employees with no access to firearms and no opportunity to smuggle drugs); [National Federation of Federal Employees v. Cheney \(D.C. Cir. 1989\) 884 F.2d 603, 610-614 \[280 U.S.App.D.C. 248\]](#) (urinalysis drug testing permissible for aviation workers, police guards, and drug counselors but impermissible for lab workers); [Harmon v. Thornburgh \(D.C. Cir. 1989\) 878 F.2d 484, 490](#) (urinalysis drug testing permissible for Justice Department employees with top security clearance but impermissible for general employees).

²⁰ Three employment-related cases involving drug testing have arisen in our courts of appeal. In [Wilkinson, supra, 215 Cal.App.3d 1034](#), the court held, consistent with the views we express here, that the state constitutional right to privacy applies to the conduct of nongovernmental entities. It applied a general "reasonableness"

[****114] [*56] [**668] [***870] (4)
 RESPONSE TO CONCURRING AND
 DISSENTING OPINIONS

The three separate opinions filed by our colleagues reflect the diversity of views possible in a case of this magnitude and difficulty. In her concurring and dissenting opinion, Justice Kennard expresses agreement with our interpretation of the Privacy Initiative and the legal standard we articulate, but would remand this case for further proceedings rather than direct judgment for the NCAA. As a result, five justices of this court concur in the basic test defining the scope of our state constitutional right to privacy.

In contrast, both Justices George and Mosk would

balancing test to uphold a urinalysis drug testing condition imposed on all applicants for employment at a publishing company. Applicants were given advance notice of the condition; testing was conducted as part of a pre-employment physical examination. ([Id. at pp. 1044-1052.](#)) In [Semore v. Pool \(1990\) 217 Cal.App.3d 1087 \[266 Cal.Rptr. 280\]](#), the court upheld against demurrer a complaint for wrongful discharge based on termination of an employee for refusal to submit to a pupillary reaction eye test designed to measure drug influence. Holding the employee's state constitutional right of privacy was a sufficient public policy to serve as the basis of a wrongful discharge suit, the court observed in part that: "The resolution of the dispute depends upon balancing an employee's expectations of privacy against the employer's needs to regulate the conduct of its employees at work." ([Id. at p. 1097.](#)) Noting the absence of any allegations in the complaint relating to the employee's duties, the testing procedure, or the employer's interest, the court declined to strike the required balance on the meager record before it. Finally, in [Luck v. Southern Pacific Transportation Co. \(1990\) 218 Cal.App.3d 1 \[267 Cal.Rptr. 618\]](#), the court upheld a verdict for wrongful discharge in favor of a nonsafety employee of a railroad (a computer installer and technician) after she refused to submit to a urinalysis drug test. It determined in part that generalized, nonsafety interests in employee efficiency and competence and in a drug free work environment were not sufficiently "compelling" to justify drug testing. ([Id. at pp. 23-24.](#)) In light of our general discussion of the elements of invasion of privacy (which differs from the approaches taken in these cases) and the fact-specific character of this drug testing case (which involves extracurricular sports activity rather than employment), we offer no analysis of the continuing vitality of these cases. Like other claims for invasion of the state constitutional right to privacy, future claims arising in the employment context will be subject to the elements and standards we announce here, which require careful consideration of reasonable expectations of privacy and employer, employee, and public interests arising in particular circumstances.

place on the NCAA the burden of showing a "compelling interest" to justify its drug testing program. But their radically different applications of the same proffered "compelling interest" test illustrate its inherently elusive character. Justice George finds the threshold imposed sufficiently low to allow the NCAA's drug testing program to pass through unimpeded, even as a matter of law. In essence, he finds the "compelling interest" test to require an interest of "some importance," but one that may be something less than vital or absolutely essential [****115] to an enterprise. Justice Mosk, on the other hand, believes the "compelling interest" step is such a high one that the NCAA is tripped up at the outset.

[HN46](#) We prefer to avoid the continuing uncertainty and confusion inherent in the rigid application of a "compelling interest" test to a multi-faceted right to privacy. The NCAA lost this case in the lower courts because it could not, in the views of two superior court judges and three Court of Appeal justices, show a sufficiently "compelling" reason for its drug testing program. At least one other appellate court in our state has erroneously concluded in an employment drug testing case that a compelling interest test "places a heavier burden on [the defendant] than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." ([Luck v. Southern Pacific Transportation Co.](#), *supra*, 218 Cal.App.3d 1, 20.) We will not [*57] perpetuate this kind of error by continuing to say "compelling" when we mean merely "legitimate" [****116] or "important." There is enough confusion in the law. We should say what we mean and mean what we say.

Even at the risk of losing some degree of flexibility in decisionmaking, a constitutional standard that carefully weighs the pertinent interests at stake in an ordered fashion is preferable to one dominated by the vague and ambiguous adjective

"compelling." Because, unlike Justices George and Mosk, we discern confusion rather than clarity in the language and history of the Privacy Initiative on this issue, we have restated the standard in a manner consistent with the voters' intent and amenable to application in constitutional adjudication. Our lower courts, as well as the individuals and institutions in our society, [***871] are entitled to some comprehensible guidance from this Court, even in areas as abstract as "the right to be let alone."

Justice Mosk's dissent assails our views on both the law and the facts. The reasons for our interpretations of the Privacy Initiative and the case law are fully discussed elsewhere in this opinion. Our differences regarding the record in this case are also explored in the preceding sections. The dissent studiously ignores student athletes' markedly [****117] diminished expectations of privacy and the NCAA's self-evident interests in protecting athletes and athletic competition from the nefarious influence of chemical substances. Despite the broad, elaborate, and plaintiff-prepared findings of the trial court, these were not matters of legitimate factual dispute in this case--they arise from uncontradicted evidence presented at trial. Drugs [**669] have no place in intercollegiate athletics, where human physical performance is at stake and small fractions of time or distance can spell the difference between victory and defeat. As a sponsor of athletic competition, the NCAA was well within its legal rights in adopting a drug testing program designed to eliminate the actual or potential influence of drugs in competitive sports. The dissent's view that the voters of the State of California somehow used the word "privacy" to prevent a private voluntary organization from regulating college sports in the interest of fair competition finds no support in logic, reason, or social reality, let alone in the language or history of the Privacy Initiative.

DISPOSITION

[HN47](#) The NCAA's drug testing program does not

violate the state constitutional right to privacy. [****118] Therefore, the NCAA is entitled to judgment in its favor. As a result of our disposition, we do not decide whether the recognition of a state constitutional right to privacy in these circumstances would violate the [commerce clause of the federal Constitution](#).

The judgment of the Court of Appeal affirming the permanent injunction against the NCAA's drug testing program is reversed. This case is remanded [*58] with instructions to direct entry of a final judgment in favor of the NCAA. The NCAA shall recover its costs.

Panelli, J., Arabian, J., and Baxter, J., concurred.

Dissent by: KENNARD, J., GEORGE, J., MOSK, J.

Dissent

Concurring and Dissenting.--This case is a watershed event in the development of the law of privacy, and the majority opinion makes major contributions to the evolution of privacy jurisprudence. Most important, today this court firmly establishes that, in accordance with the will of the voters who enacted the Privacy Amendment to [article I, section 1 of the California Constitution](#) in 1972, the state constitutional right to privacy applies to nongovernmental as well as governmental invasions of fundamental privacy interests.

The majority provides a thorough and thoughtful [****119] exposition of the constitutional principles at issue here. I agree with the majority's basic legal analysis. I write separately to comment briefly on several of the most significant aspects of the majority opinion's legal discussion, and to explain why, after careful consideration, I cannot join the majority in its disposition of this case. As I shall discuss, in view of the principles set forth in the majority opinion, I would direct the Court of Appeal to remand this

case for further consideration by the trial court.

I

When the voters enacted the Privacy Amendment to the California Constitution in 1972, they set in motion a new phase of constitutional adjudication. In the past 20 years, this court and the Courts of Appeal have been called upon to consider and apply the broad constitutional concept of privacy to a wide array of factual scenarios. (See, e.g., [Long Beach City Employees Assn. v. City of Long Beach \(1986\) 41 Cal.3d 937, 943-948 \[227 Cal.Rptr. 90, 719 P.2d 660\]](#) [polygraph examinations]; [White v. Davis \(1975\) 13 Cal.3d 757, 773-776 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#) [****120] [police surveillance of university [****872] students]; [Luck v. Southern Pacific Transportation Co. \(1990\) 218 Cal.App.3d 1, 15-16 \[267 Cal.Rptr. 618\]](#) [collection and testing of urine]; [Porten v. University of San Francisco \(1976\) 64 Cal.App.3d 825, 829-830 \[134 Cal.Rptr. 839\]](#) [unauthorized disclosure of academic information].) Although this court has not previously addressed the question, the Courts of Appeal have concluded that the Privacy Amendment does indeed apply against nongovernmental actors as well as public entities. (See, e.g., [Wilkinson v. Times Mirror Corp. \(1989\) 215 Cal.App.3d 1034 \[264 Cal.Rptr. 194\]](#); [Kinsey v. Macur \(1980\) 107 Cal.App.3d 265 \[165 Cal.Rptr. 608\]](#); [Porten v. University of San Francisco, supra](#), 64 Cal.App.3d 825.) But at least one [*59] commentator has disagreed (Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327), and the issue could not be considered settled until [****121] this court had spoken. We have not, however, until now been required to pass [**670] upon the question whether the Privacy Amendment grants a right of action against private actors. (See [Schmidt v. Superior Court \(1989\) 48 Cal.3d 370, 389, fn. 14 \[165 Cal.Rptr. 608\]](#) [open question].)

Today the majority opinion removes all doubt as to whether there is a state action requirement for lawsuits alleging a violation of the Privacy

Amendment: there is none. (Maj. opn., *ante*, p. 20.) This conclusion is sound, and is consistent with the will of the electorate as revealed in the ballot pamphlet argument accompanying the Privacy Amendment when it was presented to the voters for their decision in 1972. The argument in favor of the Privacy Amendment in the official ballot pamphlet has numerous references to the application of the amendment to private parties. To give but one example, the argument says, "Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an informational profile is sketched." (Ballot Pamp., Proposed Stats. [****122] and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1992) p. 27 [hereafter Ballot Argument].)

Yet, as the majority recognizes, although the Privacy Amendment reaches nongovernmental invasions of privacy interests as well as government action, this does not mean that asserted invasions of privacy are to be tested by an identical legal standard regardless of whether the defendant is a public or private actor. The majority properly insists that the courts of this state, in assessing alleged invasions of privacy, be guided above all by the context of the particular case. This necessarily means that the correct legal analysis will differ depending in part on the governmental or nongovernmental status of the defendant. Thus, the majority recognizes and accepts the existing law that in appropriate circumstances the compelling interest standard continues to be applicable to governmental invasions of privacy rights, and holds that the compelling interest test must be applied when the interest invaded is fundamental to personal autonomy. (Maj. opn., *ante*, pp. 34-35; see e.g., *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [86 L.Ed. 1655, 1660, 62 S.Ct. 1110]; [****123] *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 274-275 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118]; *People v. Belous* (1969) 71 Cal.2d 954, 963, 964 [80 Cal.Rptr. 354, 458 P.2d 194].) This standard is also consistent with the Ballot Argument. (Ballot Argument,

supra, at p. 27 [right to privacy "should be abridged only when there is compelling public need"].)

But when the actions of a nongovernmental entity or person are alleged to have invaded constitutional privacy rights, the majority opinion properly [***60**] demands an additional degree of judicial caution. Under the majority's approach, nongovernmental action that allegedly abridges privacy rights is not necessarily tested by a compelling interest standard; instead, a less rigorous but still heightened standard of scrutiny will often be proper. As the majority opinion makes plain, the use of different standards for governmental and nongovernmental intrusions on privacy interests is justified by the greater coercive power of government, by the generally wider [****124] range of choice available to [***873] individuals when dealing with private entities, and by our traditions of tolerance and associational freedom in the private sphere of conduct. (Maj. opn., *ante*, pp. 38-39; see generally *Roberts v. United States Jaycees* (1984) 468 U.S. 609 [82 L.Ed.2d 462, 104 S.Ct. 3244].)

The holding that the Privacy Amendment applies to nongovernmental actors is the most significant feature of the majority's opinion. But two additional aspects of the majority's exposition of the constitutional law of privacy deserve further comment.

First, the majority opinion correctly requires that a plaintiff who alleges invasion of the constitutional right to privacy must demonstrate a reasonable expectation of privacy in the circumstances, and it characterizes the expectation of privacy as founded on broadly based and widely accepted community norms. (Maj. opn., *ante*, p. 37.) In so doing, the majority properly focuses on the context in which the invasion of the privacy interest occurs. It is important to emphasize, however, [****671**] that the applicable social norms are those of society overall, not "social norms" created [****125] by an association or an industry practice. (See, e.g., *Smith v. Maryland* (1979) 442 U.S. 735, 740-741, fn. 5 [61 L.Ed.2d 220, 226-227, 99 S.Ct. 2577]; *Rest.2d*

Torts, § 295A, *com. c.*, p. 63; Prosser & Keaton on Torts (5th ed. 1984) § 33, pp. 194-195.) No association, industry, or other group or entity may establish the parameters of the reasonable expectation of privacy at the expense of society. For instance, an employer may not, simply by announcing in advance that all employees will be subject to periodic strip searches, thereby defeat the employees' otherwise reasonable expectation that such searches will not occur. Governing social norms, not the specific practices of an individual defendant or industry, define whether a plaintiff has a reasonable expectation of privacy.

Second, the majority opinion holds that once a plaintiff has shown an invasion of a legally cognizable privacy interest, a nongovernmental defendant may assert as an affirmative defense that its actions are justified because they substantively further a countervailing interest. (Maj. opn., *ante*, p. 40.) The interest, as I understand the majority [****126] opinion, must be more than an interest that is not itself illegal. It must be an interest that is necessary to a [*61] proper and legitimate organizational purpose central to the organization's objective. In this case, the interest would be comparable to the "educational necessity" the high court has held is appropriate in assessing educational discrimination under title X. (See, e.g., *Board of Education, New York City v. Harris* (1979) 444 U.S. 130, 151 [62 L.Ed.2d 275, 290-291, 100 S.Ct. 363].) In other cases, the interest may be analogous to the "business necessity" justification applied under the Civil Rights Act. (*Dothard v. Rawlinson* (1977) 433 U.S. 321, 329 [53 L.Ed.2d 786, 797, 97 S.Ct. 2720]; 42 U.S.C. § 2000e-2(e).) In addition, the method used to advance the countervailing interest that results in the invasion of the plaintiff's privacy must be tailored to serve that interest. (Maj. opn., *ante*, p. 44; see *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 678-679 [103 L.Ed.2d 685, 710-711, 109 S.Ct. 1384]; [****127] *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 626-627 [103 L.Ed.2d 639, 665-666, 109 S.Ct. 1402].)

II

Both the trial court and the Court of Appeal determined that the applicable legal standard for resolving this case was to place on the National Collegiate Athletic Association the burden of proving that a compelling interest justified the drug testing program; this case was tried on that basis. The judgments of the trial court and Court of Appeal, although not consistent with the ultimate decision of this court today, were based on existing decisional law (see, e.g., *White v. Davis, supra*, 13 Cal.3d 757, 775; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219]), and were [***874] reasoned and good faith efforts to address the very difficult issues presented by this case. Simply put, this matter was tried by the parties and the courts in good faith on a legal theory that this court now holds to be inapplicable.

The [****128] result of the majority's change in the governing legal standard here is that the parties and the trial court, sitting as finder of fact, have not been given a full opportunity to litigate this matter under the new test. The majority holds as a matter of law that plaintiffs have a legally recognized privacy interest (maj. opn., *ante*, pp. 39-40; accord, *Skinner v. Railway Labor Executives' Assn., supra*, 489 U.S. 602, 617 [103 L.Ed.2d 639, 659-660] ["collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable"]). Plaintiffs, however, have not been given a fair opportunity to offer evidence of their reasonable expectations of privacy and of feasible and effective alternatives having a lesser impact on privacy. Plaintiffs should be given the chance to present evidence and argue this case under the legal test announced today. Defendant too should be afforded the opportunity to show that its drug testing program is justified by countervailing interests.

[*62] [**672] Accordingly, in my view, this court should direct the Court of Appeal to remand this case to the trial [****129] court for further

proceedings consistent with today's decision.

Concurring and Dissenting.--I concur in the majority's initial conclusion that the privacy provision of [article I, section 1, of the California Constitution](#) affords protection to individuals with respect to the actions of a private entity, such as the National Collegiate Athletic Association (hereinafter NCAA), as well as the actions of a governmental entity. I also concur in the majority's ultimate conclusion that, in view of the important interests served by the NCAA's athletic drug testing program, and the comparatively minor intrusion upon privacy interests that the program entails as applied in the context of competitive, intercollegiate athletics (where athletes routinely are required to submit to regular--and often repeated--medical examinations), the mandatory, random drug testing program here at issue is permissible and does not violate the provisions of [article I, section 1](#).

I dissent, however, from the majority opinion insofar as it fashions a novel general legal standard for the evaluation of privacy claims arising under the California Constitution. The privacy provision of article I, section 1 (Privacy [****130] Initiative) was added to the California Constitution more than 20 years ago, and for the past 2 decades California judicial decisions generally have evaluated state constitutional privacy claims pursuant to the familiar and well-established constitutional analysis--applicable to other constitutional rights, such as freedom of speech and free exercise of religion, as well as to privacy--under which a court considers the extent to which a defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest and "balances" or "weighs" such infringement against the relative importance or "compelling" nature of the defendant's justifications for its actions (taking into account whether there are other, less intrusive means by which the defendant could achieve its objectives). I see no reason to abandon this established analytical framework and to replace it with the entirely new legal structure fashioned by

the majority, a structure that appears, at least on its face, to weaken the protection afforded the California constitutional right of privacy in the past, by making it more difficult to prove a violation of this fundamental right.

I

To begin with, I agree [****131] with the majority's conclusion that the privacy provision of the California Constitution was intended to protect an individual's constitutional interest in privacy against infringement at the hands of private, as well as governmental, entities. As the majority explains, the ballot [*63] [***875] arguments accompanying the Privacy Initiative convincingly demonstrate that the drafters of the provision believed that the actions of both government and private entities may impinge significantly upon the privacy of individuals, and proposed that the amendment provide constitutional protection against private, as well as public, intrusions. The electorate, in enacting the measure, presumably relied upon the ballot statements and thus presumably intended to afford individuals a constitutional shield against all unjustified invasions of privacy, whether perpetrated by public or private entities. Over the past two decades, numerous Court of Appeal decisions have concluded, on this basis, that the privacy provision applies to intrusions from both types of sources (see cases cited, maj. opn., *ante*, p. 18), and I believe those decisions correctly resolved the issue. Accordingly, I agree with the [****132] majority that the NCAA cannot defeat plaintiffs' constitutional privacy claim simply on the basis of the NCAA's being a private rather than a public entity.

Although the majority holds that the constitutional privacy provision applies to private entities, it goes on to criticize the lower courts in this case for "assum[ing] that private entities were subject to the same legal standards as government agencies with respect to claims of invasion of privacy" (maj. opn., *ante*, p. 20), implying that the constitutional

provision imposes a different, and less stringent, **[**673]** standard with regard to private parties than to governmental entities. On this point, I disagree with the majority.

The ballot argument in support of the Privacy Initiative demonstrates that the drafters of the provision believed that overreaching actions by private entities frequently will pose as significant a risk to an individual's privacy as actions by a governmental entity, and intended that the constitutional guaranty protect an individual's privacy equally against both types of threats. Although in some circumstances the private status of a defendant may cause its conduct to pose less of a danger to privacy interests **[****133]** an would the conduct of a public entity--for example, when there are many other private entities, offering the identical service, that do not condition their service on the same intrusive requirement--in other circumstances the threat to privacy interests posed by private and public entities will be comparable. In the present case, for example, the impingement upon the privacy interest of the student athletes would be no different if the drug-testing program, instead of being instituted and administered by the NCAA, had been established and run by an adjunct of the state Department of Education. In my view, the significant consideration is not whether the actor is a private or public entity, but rather the nature and extent of the intrusion upon privacy resulting from the challenged conduct and the nature and strength of the justifications supporting that conduct.

[*64] II

The majority suggests that the issue of the applicable legal standard for evaluation of a state constitutional privacy claim is a question "of first impression in this court" (maj. opn., ante, p. 15), and, perhaps for that reason, the majority undertakes a lengthy exposition of the common law development **[****134]** of the invasion-of-privacy tort and discussion of the federal privacy decisions as a prelude to its promulgation of an entirely

unprecedented legal framework for the resolution of claims under the state constitutional privacy provision.

In my view, the majority, in maintaining that the legal standard governing state constitutional privacy claims is a question of first impression, has misread the prior decisions of this court. In [*White v. Davis* \(1975\) 13 Cal.3d 757, 775 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#), the first decision of this court to address a claim under the state constitutional privacy provision, our court specifically held that the ballot statement of the Privacy Initiative "makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that *any such intervention [***876] must be justified by a compelling interest.*" (Italics added.) Subsequent cases, over the past 20 years, have relied upon this interpretation of the privacy provision in referring repeatedly to the compelling interest standard as the applicable basis for evaluating the constitutionality of various measures **[****135]** under the California privacy clause. (See, e.g., [*Long Beach City Employees Assn. v. City of Long Beach* \(1986\) 41 Cal.3d 937, 948, fn. 12 \[227 Cal.Rptr. 90, 719 P.2d 660\]](#); [*Conservatorship of Valerie N.* \(1985\) 40 Cal.3d 143, 163-164 \[219 Cal.Rptr. 387, 707 P.2d 760\]](#); [*People v. Strizinger* \(1983\) 34 Cal.3d 505, 511 \[194 Cal.Rptr. 431, 668 P.2d 738\]](#); [*City of Santa Barbara v. Adamson* \(1980\) 27 Cal.3d 123, 131 \[164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219\]](#); [*Loder v. Municipal Court* \(1976\) 17 Cal.3d 859, 864 \[132 Cal.Rptr. 464, 553 P.2d 624\]](#).) In view of the rather clear language of the ballot pamphlet, the applicability of the compelling interest standard in evaluating alleged infringements of other constitutional rights (see, e.g., [*City of Carmel-by-the-Sea v. Young* \(1970\) 2 Cal.3d 259, 263-266 \[85 Cal.Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313\] \[****136\]](#) [right to engage in political activities]; [*People v. Woody* \(1964\) 61 Cal.2d 716, 718 \[40 Cal.Rptr. 69, 394 P.2d 813\]](#) [freedom of religion]), and the repeated reference to this standard in this court's constitutional privacy decisions over the past two decades, I believe there

is no justification for jettisoning the compelling interest standard at this late date.

Furthermore, in my view the majority's abandonment of the compelling interest standard is not only unwarranted, but unnecessary to achieve the majority's apparent objectives. The majority's decision to cast **[**674]** aside the **[*65]** compelling interest standard appears to have arisen from its concern with the lower courts' application of that standard in the present case; as the majority notes, the lower courts interpreted the compelling interest standard as imposing an extraordinarily heavy burden of proof and justification upon the NCAA to establish the validity of its drug testing program. I agree with the majority that the lower courts erred in imposing such a heavy burden upon the NCAA, but, in my view, the error lies in those courts' understanding and application **[****137]** of the compelling interest standard, not in the viability of the standard itself.

Contrary to the suggestion of the majority (maj. opn., *ante*, p. 31), the compelling interest standard, as articulated and applied in our past decisions on the right to privacy, is *not* a standard that is "strict" in theory and fatal in fact." (See, e.g., Loder v. Municipal Court, *supra*, 17 Cal.3d 859 [upholding legislative scheme permitting retention of record of an arrest that did not result in conviction]; Doyle v. State Bar (1982) 32 Cal.3d 12 [184 Cal.Rptr. 720, 648 P.2d 942] [upholding State Bar subpoena of attorney's financial records]; accord, County of Nevada v. MacMillen (1974) 11 Cal.3d 662 [114 Cal.Rptr. 345, 522 P.2d 1345] [upholding financial disclosure statute].) Although the standard does require that a defendant have a "compelling," i.e., important, reason for engaging in conduct that intrudes upon a constitutionally protected privacy interest, numerous decisions--both in the courts of California **[****138]** and in other jurisdictions--demonstrate that the standard does not place an insuperable or unreasonable burden upon a defendant to justify any intrusion on privacy, but rather contemplates that a court, in applying the standard, will employ a balancing test

that takes into account the nature and the degree of the intrusion: the greater the intrusiveness of the defendant's conduct, the more "compelling" the interest required in order to justify the intrusion. (See, e.g., Doyle, supra, 32 Cal.3d at pp. 19-21; McCloskey v. Honolulu Police Dept. (1990) 71 Hawaii 568 [799 P.2d 953, 957-958]; Fla. Bd. of Examiners Re: Applicant (Fla. 1983) 443 So.2d 71, 74-76; Montana Human Rights Div. v. City of Billings (1982) 199 Mont. 434 [649 P.2d 1283, 1288-1290]; State Emp. Union v. Dept. of Mental Health (Tex. 1987) 746 S.W.2d 203, 205.) Thus, application of the compelling interest standard to a state constitutional privacy claim simply calls upon a court to undertake the familiar constitutional task of determining the extent or degree **[****139]** to which a **[***877]** defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest, and of weighing or balancing that intrusion against the relative importance or compelling nature of the defendant's justifications for its actions. Properly interpreted, the "compelling interest" standard does not impose impossible or unrealistic requirements but merely calls for an inquiry that is sensitive to the various competing interests.

[*66] The majority, however, rejects application of the traditional constitutional balancing test as the standard for evaluating state constitutional privacy claims and instead fashions an entirely new legal framework that, from all appearances, has no precedent in any past constitutional decision of this state or any other jurisdiction. The new legal framework consists of (1) three distinct "elements," which a plaintiff must establish as a threshold matter (see maj. opn., *ante*, pp. 39-40), (2) a variety of "affirmative defenses" that a defendant may plead and prove (see maj. opn., *ante*, p. 40), and (3) a showing that the plaintiff may make in rebuttal (see maj. opn., *ante*, p. 40). Although the substantive content of the **[****140]** elements, defenses, and rebuttal material incorporated into the new "cause of action" devised by the majority all relate to considerations that courts traditionally have taken into account in determining whether a

challenged practice or course of conduct violates the state constitutional right of privacy, I believe that the rigid legal structure set forth by the majority is ill-suited to the resolution of constitutional issues and, if faithfully applied, inevitably will reduce the protection that has been (and, in **[**675]** my view, should continue to be) afforded the constitutional right of privacy.

The majority initially sets forth three separate "elements" that a plaintiff must establish before a defendant is required to demonstrate any justification for its actions: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (See maj. opn., *ante*, pp. 39-40.) Past state constitutional privacy decisions always have required a plaintiff to demonstrate, as a threshold matter, that the defendant's conduct has intruded or infringed upon a "legally protected"--indeed a **[****141]** constitutionally protected --privacy interest, and thus the first "element" of the majority's new cause of action is unobjectionable. In elevating the considerations embodied in the second and third "elements" of the new cause of action--whether the plaintiff under the circumstances had a "reasonable expectation of privacy," and the "seriousness" of the defendant's invasion of the plaintiff's privacy--into independent requirements that always must be established before a defendant ever is required to provide a justification for its actions, however, the majority has, in my view, introduced an undesirable and unfortunate inflexibility into the constitutional analysis that, if faithfully applied, is likely to bar privacy claims that properly should be permitted to go forward.

With regard to the "reasonable expectation of privacy" factor, it is unquestionably true that a defendant, by giving advance notice of a proposed course of conduct, generally will decrease the degree of intrusion upon the plaintiff's privacy that would result were no such notice given, and it is also true that, in many contexts, a plaintiff's consent

to a given course of conduct may **[*67]** eliminate any potential **[****142]** privacy concern. Thus, for example, were the NCAA to announce in advance that any athlete who wished to be considered for a place on a "Drug-Free All-American" team must consent to undergo a urine drug test, an athlete who chose to seek such recognition and consented to the announced drug testing regimen presumably would have no basis for subsequently asserting a violation of his or her constitutional right of privacy.

In other instances, however, even when a defendant announces in advance its intent to engage in conduct that potentially infringes upon a privacy interest protected by the **[***878]** state constitutional provision, and elicits the plaintiff's consent with regard to such conduct, it will not follow necessarily that a constitutional challenge to the conduct properly should be dismissed out of hand. For example, even if a university provides advance notice to applying students that it intends to disclose (or perhaps even to sell) to business entities unaffiliated with the university the confidential information provided by students in their application forms, and requires students to consent to such disclosure as a condition of having their applications considered by the university, **[****143]** it is not at all clear that a student who submits an application should be barred from challenging the university's use of the information for a purpose unrelated to the application process on the ground that, under the circumstances, the student has no reasonable expectation of privacy. (Cf. [*Porten v. University of San Francisco* \(1976\) 64 Cal.App.3d 825 \[134 Cal.Rptr. 839\]](#).) Similarly, even if an employer discloses before hiring an employee that it intends to engage in visual surveillance of the employee restrooms and requires all employees to consent to such surveillance as a condition of employment, a state constitutional privacy challenge to such conduct would not necessarily founder on the ground that, in view of the explicit warnings and consent, the employees had no reasonable expectation of privacy. Thus, although the issues of advance notice and consent unquestionably are relevant to a

consideration of the nature and severity of the intrusion upon privacy resulting from a defendant's conduct, the "reasonable expectation of privacy" factor should not, in my view, be transformed into a distinct "element" that a plaintiff invariably [****144] must establish before a defendant can be required to proffer a justification for its conduct.

Additionally, I believe the third element of the new cause of action, in like manner, imposes a novel and unjustified burden upon [**676] a plaintiff that, if faithfully applied, would defeat legitimate state constitutional privacy claims. I have no quarrel with the majority's observation that the state constitutional privacy provision does not signify that "every intrusion into the realm of private action, no matter how slight or trivial, [gives] rise to a cause of action for invasion of privacy." (See maj. opn., *ante*, p. 37.) Under the first element of the newly fashioned cause of action, however, the [*68] plaintiff already is required to demonstrate that the defendant's conduct infringes upon a *constitutionally protected* privacy interest--a requirement sufficient to demonstrate that a serious, rather than a trivial, privacy interest is at stake. Under the third element adopted by the majority, a plaintiff is not entitled even to put a defendant to the burden of presenting a justification for its conduct unless the plaintiff can establish not only that the defendant's conduct infringes [****145] upon a constitutionally protected privacy interest, but that the invasion of privacy is "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an *egregious* breach of the social norms underlying the privacy right." (See maj. opn., *ante*, p. 37, italics added.) In my view, no justification exists for limiting the reach of the state constitutional privacy provision only to those breaches of privacy that are "egregious." The collection of unnecessary information by a business entity or government agency, or the use of properly obtained information for a purpose unrelated to its collection, would not necessarily rise to the level of an "egregious" breach of privacy, but, as the election pamphlet argument demonstrates, the

Privacy Initiative clearly was intended to prohibit such conduct. Thus, although the extent or severity of the intrusion into the plaintiff's constitutionally protected privacy interest always is a key component of the constitutional analysis--the more serious the intrusion upon the constitutionally protected privacy interest, the more important or compelling the defendant's countervailing interest must be to sustain the challenged [****146] course of conduct--I believe the majority errs in adopting a legal standard that, at least on its face, purports to afford *no* protection to an invasion of a constitutionally protected privacy interest that does not rise to the level of an "egregious" breach of privacy, even when the defendant is unable to provide *any* justification [***879] for an intrusion upon the plaintiff's constitutionally protected privacy interest.¹

[****147] In addition to *increasing the plaintiff's burden* in establishing a *prima facie* violation of the state constitutional privacy right--i.e., the showing the plaintiff must make in order to warrant requiring the defendant to proffer some justification for its actions--the majority's new legal standard appears to *reduce the defendant's burden* to justify an infringement upon constitutionally protected privacy interest, by explicitly declining to embrace the [*69] well-established principle that requires any such infringement to be justified by a "compelling" interest. Rather than require the defendant to demonstrate the existence of a

¹In discussing the second and third elements set forth by the majority, I have added the qualifying comments that "on their face," and "if faithfully applied," the elements appear to impose inflexible requirements that improperly may bar some valid privacy claims. Such qualification appears appropriate because, in applying these elements in the present case, the majority does not in fact treat these considerations as independent requirements that must be established before there is any need to consider defendant's justifications for its conduct, but rather undertakes an analysis that closely parallels the traditional balancing approach. (See maj. opn., *ante*, pp. 40-43, 52-53.) In light of the analytical process actually utilized by the majority to resolve the constitutional privacy issue presented here, it is all the more difficult to understand the reason for the majority's adoption of a novel general legal framework to govern resolution of state constitutional privacy claims.

compelling interest, the majority suggests that any simply "competing" or "legitimate" interest may suffice to justify an infringement upon the constitutional right of privacy. (See maj. opn., *ante*, p. 38.) In my view, such an approach essentially ignores *the constitutionally protected status* that the Privacy Initiative clearly intended to afford the right of privacy. By incorporating that right into our state Constitution, the Privacy Initiative clearly sought to provide individuals with assurance that privacy interests would be taken seriously [****148] and would be abridged only [**677] for a "compelling" need.² In my view, if the constitutional status of the right of privacy is to have any significance, conduct that intrudes or impinges upon such a right cannot be sanctioned merely because there exists a minimally "competing" or "legitimate" interest that might be sufficient to justify conduct impinging only upon a nonconstitutional right. Rather, to justify the infringement upon a constitutionally protected privacy interest, the defendant must demonstrate that the intrusion is warranted by an interest of some importance.

[****149] As noted earlier, the majority's reluctance to adopt a test embodying the "compelling interest" terminology appears to be based upon a concern that such a standard would impose an inordinately high burden upon defendants. As numerous cases--including the United States Supreme Court's recent employment-drug-testing decisions--demonstrate, however, the courts have recognized a wide variety of interests that are sufficiently important to be characterized properly as "compelling." (See, e.g., [Treasury Employees v. Von Raab \(1989\) 489 U.S. 656, 677 \[103 L.Ed.2d 685, 709, 109 S.Ct. 1384\]](#) ["In sum, we believe the Government has demonstrated that

its *compelling interests* in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm." (Italics added.); [Skinner v. Railway Labor Executives' Assn. \(1989\) 489 U.S. 602, 633 \[103 L.Ed.2d 639, 670, 109 S.Ct. 1402\]](#) ["In view of our conclusion that, on [****150] the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations [***880] of privacy of covered employees, the Government's *compelling interests* outweigh privacy concerns." (Italics added.)].) These cases provide ample evidence that application of the compelling interest standard [*70] need not impose an unreasonably or unrealistically high burden upon a defendant, but rather calls for an inquiry that is, at once, sensitive to the constitutionally protected interests of the plaintiff and the significant interests of the defendant.

In sum, I believe the majority errs in adopting a new legal framework to govern claims brought under the state constitutional privacy provision. In my view, such claims should be evaluated under the traditional constitutional approach, that inquires initially whether the plaintiff has demonstrated that the defendant's action intrudes upon a constitutionally protected privacy interest, and, if it does, inquires further whether the extent of the intrusion is justified by a sufficiently compelling interest served by the intrusive action.

III

For the reasons discussed hereafter, I conclude [****151] that, under a proper application of the traditional constitutional balancing test, the NCAA athletic drug testing program at issue in this case is valid. Accordingly, I concur in the majority's determination that the lower courts erred in enjoining the program.

With respect to the initial step of the traditional constitutional analysis, I agree with the majority

²The relevant passage of the election brochure argument stated in this regard: "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First, Third, Fourth, Fifth](#) and [Ninth Amendments to the U.S. Constitution](#). This right should be abridged only when there is compelling public need." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27, italics added.)

that the NCAA's drug testing program significantly infringes upon plaintiffs' constitutionally protected privacy interests in two respects: (1) it intrudes upon plaintiffs' interest in "informational privacy" (the examination of the urine sample may reveal significant information concerning the athletes' health or illnesses, as well as what medications or drugs have been ingested), and (2) it intrudes upon plaintiffs' interest in the privacy of excretory functions, by requiring the athletes to urinate in the presence of another person. (Accord, [Skinner v. Railway Labor Executives' Assn.](#), *supra*, 489 U.S. 602, 617 [103 L.Ed.2d 639, 659-660] [mandatory testing of urine sample constitutes search for Fourth Amendment purposes].)

[678]** By establishing that the NCAA drug **[****152]** testing program significantly intrudes upon these constitutionally protected privacy interests, plaintiffs made out a prima facie case, requiring defendant to demonstrate that, under the circumstances, the degree of the intrusion upon plaintiffs' privacy interests was justified by a sufficiently compelling interest. Contrary to the conclusions of the lower courts, however, I conclude that the NCAA satisfied its burden in this case.

First, with regard to the extent or degree of the intrusion upon privacy that occurred in this context, I believe there are numerous factors, discussed by **[*71]** the majority, that demonstrate that the athletic drug testing program here at issue is less intrusive upon privacy interests than drug testing in many other settings. To begin with, by choosing to participate in a varsity sport, athletes invariably relinquish a great deal of privacy with regard to their physical condition and health, since school teams routinely require athletes to undergo frequent medical examinations to ensure that they are in good health. Thus, by seeking to participate in a varsity sport, an athlete necessarily surrenders a significant degree of privacy in health matters, **[****153]** particularly matters bearing some relation to his or her involvement in the sport. Moreover, unlike an individual subjected to drug

testing programs imposed upon all employees in a given work setting or upon all students in a particular institution or educational program--where the option of quitting one's job or leaving school usually would impose a very significant hardship--an athlete for whom the drug testing procedure would constitute a serious invasion of privacy can avoid the intrusion by not participating in a varsity sport or in postseason competition. Although there undeniably is a "cost" imposed upon a student for exercising his or her interest in privacy in this manner--particularly for student athletes who will lose needed scholarships if they choose not to **[***881]** participate--the coercion is not nearly as great as it would be in many other contexts. In past decisions, we have held that a plaintiff who brings a personal injury action and seeks special damages for unusual mental suffering necessarily relinquishes the right to maintain the confidentiality of past medical or psychiatric records that are relevant to such a claim (see, e.g., [Vinson v. Superior Court](#) (1987) 43 Cal.3d 833, 842-8 44 [239 Cal.Rptr. 292, 740 P.2d 404]), **[****154]** and I believe a similar "consent" rationale is applicable here.

Second, with respect to the significance of the interests served by the NCAA's program, I believe that the organization has identified two "compelling interests" served by the drug testing program. First, in light of the competitive nature of sports and the hazard that performance-enhancing drugs pose to the fairness of the competition, I believe that the NCAA has a very strong interest in ensuring that no competitor has an unfair advantage over another. Second, in view of the strenuous nature of varsity athletic activity, and the unusual risks to the health and safety of the student athlete (and possibly of competing athletes) if he or she engages in such activity while taking certain medications or drugs, the NCAA also has a compelling interest in protecting the well-being of student athletes.

Indeed, in my view, a drug testing program serves particularly compelling interests in the context of highly competitive intercollegiate athletics. Such a

program may, of course, be useful in deterring individuals who otherwise would be tempted to utilize drugs to attempt to gain an unfair competitive [*72] advantage over [****155] their adversaries. A drug testing program also serves the equally important purpose of assuring other athletes, who on their own would not seek an unfair advantage, that their competitors are not utilizing drugs to attain such an advantage. Without a reliable, mandatory testing program to provide such assurance, many athletes--fearing they may be at a disadvantage if their competitors use drugs--might well feel pressured to use drugs, despite knowledge of the potential long-term harmful effects, simply to ensure that they will not be at a competitive disadvantage at the time of an important championship event. The latter rationale for athletic drug testing explains the justification for including within the list of drugs for which athletes are tested not only drugs that are known definitely to have performance-enhancing qualities, but also drugs--suspected or rumored to have such qualities--with [**679] which some athletes consequently might be tempted to experiment.

Thus, although the trial court apparently placed great significance upon what it viewed as the NCAA's failure to prove that the drugs for which it was testing *in fact* are performance enhancing, or that student-athletes are [****156] more likely to use illegal drugs than other students, I believe the NCAA clearly had several compelling interests that justified the implementation of a testing program aimed at detecting the presence of drugs and medications, even in the absence of a showing that such substances actually are performance enhancing or that a particular athlete was violating the rules. Just as officials at a car racing event routinely may inspect the engines or equipment of all competing vehicles to ensure that their components comply with the applicable regulations, and just as a referee routinely may search the gloves and trunks of boxers to assure that they contain no foreign objects or substances that might injure an opponent, I believe it is permissible, in the context of highly competitive

intercollegiate athletics, for a sponsoring organization routinely to test all competitors for drugs that unfairly may enhance their performance or pose particular risks to the health and safety of athletes.

Finally, although the "visual monitoring" aspect of the drug testing program does pose an additional intrusion upon an athlete's privacy interest, I am persuaded that the NCAA properly could conclude that [****157] any *equally effective* alternative testing procedure (one that, for example, permitted the athlete to provide a urine sample in private, [***882] but only after a full body search to ensure that the athlete was not bringing a false sample into the private room) would be just as intrusive of the athlete's privacy, if not more so. (Accord, *O'Connor v. Police Com'r of Boston* (1990) 408 Mass. 324 [557 N.E.2d 1146, 1149] [upholding drug testing program utilizing monitored urination "to ensure the integrity of the urine sample"].) [*73]

Accordingly, taking into account the nature and extent of the drug testing program's intrusion upon the athletes' privacy, and the strength of the NCAA's interests served by the program, I conclude that the organization's compelling interests justify the limited intrusion upon the privacy concerns of the plaintiffs. I note, in this regard, that a number of courts in other jurisdictions that have considered constitutional challenges to comparable athletic drug testing programs have concluded similarly that the important interests served by such a program in furthering athletic competition outweigh the intrusion [****158] upon privacy imposed by such testing. (See, e.g., *Schailly by Kross v. Tippecanoe County School Corp.* (7th Cir. 1988) 864 F.2d 1309, 1318-1322; *Shoemaker v. Handel* (3d Cir. 1986) 795 F.2d 1136, 1141-1144 [86 A.L.R.Fed. 405]; *O'Halloran v. University of Washington* (W.D.Wn. 1988) 679 F.Supp. 997, 1002-1007, *revd.* on other grounds (9th Cir. 1988) 856 F.2d 1375.)

IV

For the reasons discussed above, I concur in the majority's opinion insofar as it concludes that the NCAA drug testing program here at issue does not violate the privacy clause of [article I, section 1, of the California Constitution](#). Accordingly, I concur in the majority's conclusion that the judgment of the Court of Appeal must be reversed.

I dissent.

[Article I, section 1 of the California Constitution](#) declares a right of privacy. Its pronouncement is express. Nothing is left to implication. "All people" have an "inalienable right[]" to "pursu[e] and obtain[]" "privacy."

Before proceeding a sentence further, we must make one point pellucidly clear.

This is not a case about the "policy" [****159] this court may think it best to formulate and implement with regard to privacy.

Rather, it is a case about the California Constitution and the role of the judiciary within the order it establishes.

The majority all but abrogate the right of privacy. They plainly consider it "bad policy." What of their "policy" assessment? Is the right of privacy "good policy"? Is it "bad policy"? It simply does not matter. To be sure, the right of privacy reflects a choice of [**680] policy. But it is a choice that has already been made--by the people, in their capacity as sovereign, in the California [*74] Constitution. It is therefore a choice that we as judges must accept and respect regardless of personal beliefs or predilections. (See, e.g., [In re Anderson \(1968\) 69 Cal.2d 613, 634-635 \[73 Cal.Rptr. 21, 447 P.2d 117\]](#) (conc. opn. of Mosk, J.); [People v. Frierson \(1979\) 25 Cal.3d 142, 188-189 \[158 Cal.Rptr. 281, 599 P.2d 587\]](#) (conc. opn. of Mosk, J.)) Regrettably, in this case the majority have not so conducted themselves with regard to the people's constitutional policy declaring [****160] a right of privacy.

I

[Article I, section 1 of the California Constitution](#) declares: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (Italics added.)

The right of privacy was added to the California Constitution when the voters at the November 7, 1972, General Election approved a proposed legislative constitutional [***883] amendment that was designated on the ballot as Proposition 11.

In construing the right of privacy, we must determine and adhere to the intent underlying Proposition 11. Of course, the intent that controls is that of the people who voted for the measure. ([County of Fresno v. State of California \(1991\) 53 Cal.3d 482, 488 \[280 Cal.Rptr. 92, 808 P.2d 235\]](#).)

The intent of the people must be discerned from two sources.

The first is the language of Proposition 11, to wit, the single substantive term "privacy." Since the word does not define itself, we must press on.

The second is the arguments presented in the ballot [****161] pamphlet for and against Proposition 11. Those arguments offer relevant extrinsic evidence. ([White v. Davis \(1975\) 13 Cal.3d 757, 775, fn. 11 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#).) Indeed, they offer, in essence, the only such evidence. ([Id. at p. 775.](#))¹

¹To the contrary is Professor J. Clark Kelso. He asserts that the "premise" that the "ballot argument is an important part of the legislative history of" Proposition 11 "is bad law" (Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 433.) He is incorrect. His point is without adequate support in reason. Moreover, as he himself is compelled to admit, it is against the overwhelming weight of authority as expressed in a "long line of supreme court decisions." (*Ibid.*) He also asserts that the "premise" that the "ballot argument is the only piece of significant legislative history for" the measure "is simply wrong as a matter of fact" (*Ibid.*) He is again incorrect. What he seeks to

[**162]** The argument in favor of Proposition 11 states: "The proliferation of government snooping and data collecting is threatening to destroy our **[*75]** traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles on every American.

"At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.

"The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.

[681]** *"Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social **[****163]** relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.*

"Even more dangerous is the loss of control over the accuracy of government and business records on individuals. Obviously, if the person is unaware

create can only be called a "secret legislative history," which is "stored in the state archives" and "not easy to come by" (*id.* at p. 333). It embraces "fragments" of the "legislative history" of what was to become Proposition 11. (*Ibid.*) This "secret legislative history" has no conceivable bearing on the crucial issue of the intent of the people who voted for the measure. In Professor Kelso's view, however, it speaks to the question of coverage. I shall turn to that question in due course. (See fn. 8, *post.*)

of the record, he or she cannot review the file and correct inevitable mistakes. Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

"The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. *Each time we apply for a credit **[***884]** card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an information profile is sketched.* Modern technology is capable of monitoring, centralizing and **[****164]** computerizing this information which eliminates any possibility of individual privacy.

"The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First](#), [Third](#), [Fourth](#), [Fifth](#) and **[*76]** [Ninth Amendments to the U.S. Constitution](#). This right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such information is clearly in the public interest. . . ." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, pp. 26-27, italics added in place of underscoring in original.)

The rebuttal to the argument in favor of Proposition 11 states: "To say that there are at present no effective restraints on the information activities of government and business is simply untrue. In addition to literally hundreds of laws restricting what use can be made of information, every law student knows that the courts have long protected privacy as one of the rights of our citizens.

"Certainly, when we apply for credit cards, life insurance policies, drivers' licenses, file **[****165]** tax returns or give business interviews, it is absolutely essential that we furnish certain personal

information. Proposition 11 does not mean that we will no longer have to furnish it and provides no protection as to the use of the information that the Legislature cannot give if it so desires.

"What Proposition 11 can and will do is to make far more difficult what is already difficult enough under present law, investigating and finding out whether persons receiving aid from various government programs are truly needy or merely using welfare to augment their income.

"Proposition 11 can only be an open invitation to welfare fraud and tax evasion and for this reason should be defeated." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), rebuttal to argument in favor of Prop. 11, p. 27.)

The argument against Proposition 11 states: "Proposition 11, which adds the word 'privacy' to a list of 'inalienable rights' already enumerated in the Constitution, should be defeated for several reasons.

"To begin with, the present Constitution states that there are certain inalienable rights 'among which are those' that it lists. Thus, [****166] our Constitution does not attempt to list *all* of the inalienable rights nor as a practical matter, could it do so. It has always been recognized by the law and the courts that privacy is one of the rights we have, particularly in the enjoyment of home and personal activities. So, in the first place, the amendment is completely unnecessary.

"For many years it has been agreed by scholars and attorneys that it would be advantageous to *remove* much unnecessary wordage from the Constitution, and at present we are spending a great deal of money to finance a [*77] Constitution Revision Commission [**682] which is working to do this. Its work presently is incomplete and we should not begin to lengthen our Constitution and to amend it piecemeal until at least the Commission has had a chance to finish its work.

"The most important reason why this amendment should be defeated, however, lies in an area where possibly privacy should *not* be completely guaranteed. Most government welfare programs are an attempt by California's more fortunate citizens to assist those who are less fortunate; thus, today, millions of persons are the beneficiaries of government programs, based on the *need* [****167] of the recipient, which in turn can only be judged by his revealing his income, assets and general ability to provide for himself.

[***885] "If a person on welfare has his privacy protected to the point where he need not reveal his assets and outside income, for example, how could it be determined whether he should be given welfare at all?

". . . .

"Our government is helping many people who really need and deserve the help. Making privacy an inalienable right could only bring chaos to all government benefit programs, thus depriving all of us, including those who need the help most.

"And so because it is unnecessary, interferes with the work presently being done by the Constitution Revision Commission and would emasculate all government programs based on recipient need, I urge a 'no' vote on Proposition 11." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument against Prop. 11, pp. 27-28, italics added in place of underscoring in original.)

The rebuttal to the argument against Proposition 11 states: "The right to privacy is much more than 'unnecessary wordage[.]' It is fundamental in any free society. Privacy is not now [****168] guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights.

"The work of the Constitution Revision Commission cannot be destroyed by *adding two words* [i.e., "and privacy"] to the State Constitution.

The Legislature actually followed the Commission's guidelines in drafting Proposition 11 by keeping the change simple and to the point. Of all the proposed constitutional amendments before you, this is the simplest, the most understandable, and one of the most important.

"The right to privacy will not destroy welfare nor undermine any important government program. It is limited by 'compelling public necessity' and [*78] the public's need to know. Proposition 11 will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), rebuttal to argument against Prop. 11, p. 28, italics added in place of underscoring in original.)

[****169] In view of the foregoing, we are able to say this about the right of privacy.

First, the *status* of the right of privacy is variously declared to be "fundamental," "compelling," and "basic." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27 ["fundamental" and "compelling"]; *id.*, rebuttal to argument against Prop. 11, p. 28 ["fundamental" and "basic"].) The same is implied in the statement that the "right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the [First, Third, Fourth, Fifth](#) and [Ninth Amendments to the U.S. Constitution](#)." (, argument in favor of Prop. 11, p. 27; cf. [Olmstead v. United States \(1928\) 277 U.S. 438, 478 \[72 L.Ed. 944, 956, 48 S.Ct. 564, 66 A.L.R. 376\]](#) (dis. opn. of Brandeis, J.) [stating that the right of privacy is "the most comprehensive of rights and the right most valued by civilized men"].)

It follows that the right of privacy "should be abridged only when there is compelling public need." (Ballot Pamp., Proposed Stats. and

[****170] Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27.) What is demanded is a "need" on the part of the intruding [**683] party that is both "compelling" and "public." "Compelling" means that the "need" is one in the strict sense, denoting something actually required by the intruding party under all the circumstances and not simply "useful" or "desirable." (Webster's Third New Internat. Dict. (3d ed. 1961) p. 1512.) "Public," for its part, means that the "need" is one that the community at large deems valid and not merely the intruding party. The "need" in question must extend to the means used as well as the interests furthered. Otherwise, any interests, so long as they were "compelling," would always justify every means, no matter how offensive. This is, in substance [***886] and effect, a kind of "balancing" test. Its scales, however, do not start out in equipoise, but rather verge in favor of the right of privacy.

The "compelling public need" standard, it must be noted, is not contradicted or qualified by the statement in the rebuttal to the argument against Proposition 11: "The right to privacy will not destroy welfare nor undermine any [****171] important government program. It is limited by 'compelling public necessity' and the public's need to know. Proposition 11 will not prevent the [*79] government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), rebuttal to argument against Prop. 11, p. 28.) This statement reaffirms the "compelling public need" standard by means of the virtual quotation, " 'compelling public necessity,' " and the paraphrase, "the public's need to know." Neither does it depart from that test by asserting that "Proposition 11 will not prevent the government from collecting any information it *legitimately needs*." The implication is that the requirement of a "compelling public need" is

satisfied by a "legitimate need." The further implication is that a "legitimate need" is one that is actually required by the intruding party--it is a *need*--and is deemed valid by the community at large--it is *legitimate*.

That the right of privacy "should [****172] be abridged only when there is compelling public need" (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27) does not mean that this standard must be applied to justify any interference with any asserted right of privacy. Apparently, conduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable. Of course, conduct bearing on a fictive "right of privacy" is not subject to any scrutiny at all. ²

² Generally in accord on the status of the right of privacy are, for example, *White v. Davis, supra*, 13 Cal.3d at page 761 ("[t]hough the amendment does not purport to invalidate all . . . information gathering, it does require that the government establish a compelling justification for such conduct"); *id. at page 775* ("the amendment does not purport to prohibit all incursion into individual privacy but rather . . . any such intervention must be justified by a compelling interest"); *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-658 [125 Cal.Rptr. 553, 542 P.2d 977] (the need for balancing); *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864 [132 Cal.Rptr. 464, 553 P.2d 624] (expressly recognizing the requirement of a "compelling interest" to justify an "intervention" as to the right of privacy and impliedly recognizing the need for balancing); *People v. Privitera* (1979) 23 Cal.3d 697, 702 [153 Cal.Rptr. 431, 591 P.2d 919, 5 A.L.R.4th 178] (when a "right of privacy" claimed against a governmental actor is not established but only "asserted," i.e., when it "is not encompassed by the right of privacy embodied in . . . the state Constitution[,]," it is not subject to the "compelling state interest test" (italics in original)); *id. at pages 709-710* (to similar effect); *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131 [164 Cal.Rptr. 539, 610 P.2d 436, 12 A.L.R.4th 219] ("the amendment does not purport to prohibit all incursion into individual privacy but rather . . . any such intervention must be justified by a compelling [public] interest" (brackets and bracketed material in *Adamson*, ellipsis added)); *id. at page 133* (implying that the means used are not actually required when "less restrictive" means are available); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275 [172 Cal.Rptr. 866, 625 P.2d 779, 20 A.L.R.4th 1118] (plur. opn.) (the right of privacy is "clearly among the most intimate and fundamental of all constitutional rights"); *Doyle v. State Bar* (1982) 32 Cal.3d 12, 19-20 [184 Cal.Rptr. 720, 648 P.2d 942] (*per curiam*) (impliedly acknowledging that a "compelling interest" [is] required to justify

[****173] [*80] [**684] [***887] Second, the

invasion of privacy" and expressly acknowledging that balancing is needed); *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 [194 Cal.Rptr. 431, 668 P.2d 738] ("[i]t is . . . well established . . . that the right of privacy is not absolute, but may yield [to governmental intrusion] in the furtherance of compelling state interests"); *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 164 [219 Cal.Rptr. 387, 707 P.2d 760] (a governmental "restriction" on the right of privacy "must be justified by a compelling state interest"); *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 948-949 [227 Cal.Rptr. 90, 719 P.2d 660] & fn. 12 [(governmental intrusion "upon the constitutionally protected zone of individual privacy" "must be justified by a compelling governmental interest") (dictum)]; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842 [239 Cal.Rptr. 292, 740 P.2d 404] (the need for balancing); *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389-390 [256 Cal.Rptr. 750, 769 P.2d 932] (implying that conduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable); *Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 712 [21 Cal.Rptr.2d 200, 854 P.2d 1117] (the need for balancing); *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 832 [134 Cal.Rptr. 839] (an intruding nongovernmental party must show a "compelling public interest" to justify the intrusion); *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 843 [228 Cal.Rptr. 545] (recognizing both the "compelling interest" requirement and the need for balancing); *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1046 [264 Cal.Rptr. 194] (same); *id. at page 1047* ("even if challenged conduct has some impact on the right of privacy, as long as that right is not substantially burdened or affected, justification by a compelling interest is not required"; "[i]nstead, the operative question is whether the challenged conduct is reasonable"); *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096 [266 Cal.Rptr. 280] ("privacy, like the other inalienable rights listed first in our Constitution, is . . . fundamental"); *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 20 [267 Cal.Rptr. 618] (holding that any "incursion into individual privacy . . . must be justified by a compelling interest," and that the "compelling interest test" constitutes "existing precedent"); *Miller v. Murphy* (1983) 143 Cal.App.3d 337, 343-346 [191 Cal.Rptr. 740] (to the effect that conduct adversely affecting, but not abridging, an established privacy right may be allowed if reasonable).

In *Committee to Defend Reproductive Rights v. Myers, supra*, 29 Cal.3d 252, the plurality opinion articulates a test, derived from the pre-Proposition 11 case of *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505-507 [55 Cal.Rptr. 401, 421 P.2d 409], under which "the state must demonstrate (1) 'that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege'; (2) that 'the utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights'; and (3) that there are no 'less offensive alternatives' available for achieving the state's objective." (*Committee to Defend Reproductive Rights v. Myers, supra*, 29 Cal.3d at p. 258 (plur. opn.)) The plurality opinion does not purport to substitute this test for the "compelling public need" standard. Rather, it simply uses it as a "framework for judicial analysis of restrictions . . . which

source of the right of privacy is "our traditional freedoms" and our "American heritage," evidently as reflected in the common law, [***81**] federal and state statutes, and federal and state constitutional law generally, including of course the guaranties against unreasonable searches and seizures contained in the [Fourth Amendment to the United States Constitution](#) and [article I, section 13 of the California Constitution](#). (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, pp. 26, 27.) Strictly speaking, the right of privacy is not *granted* by the state charter. Rather, it is *guaranteed*. (See Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), rebuttal to argument against Prop. 11, p. 28 ["Privacy is not now guaranteed by our State Constitution."].) ³

[******174**] Third, the *definition* of the right of privacy is simply the "right to be left alone." (Ballot [****685**] Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27; cf. [Olmstead v. United States, supra, 277 U.S. at p. 478 \[72 L.Ed. at p. 956\]](#) (dis. opn. of Brandeis, J.) [calling the right of privacy the "right to be let

alone"]; Warren & Brandeis, *The Right to Privacy* (1890) 4 Harv. L.Rev. 193, [*****888**] 193 [to similar effect].) ⁴

[******175**] Fourth, the *substance* of the right of privacy has three major aspects.

To begin with, there is a protectable interest against an intruding party's obtaining and/or publishing of private information belonging to the party intruded upon--"informational privacy." This is the value that is threatened by "government snooping and data collecting"; the "compil[ing]" of "extensive sets of dossiers of American citizens" by "[g]overnment agencies"; the "[c]omputerization of records," which "makes it possible to create 'cradle-to-grave' profiles on every American"; the "collecting and stockpiling [of] unnecessary information about us" by "government and business interests" and the "misusing" of "information gathered for one purpose in order to serve other purposes or to embarrass us"; the "proliferation of government and business records over which we have no control"; the fact that "[o]ften we do not know that these records even exist and we are certainly unable to [***82**] determine who has access to them"; the "loss of control over the accuracy of government and business records on individuals"; the fact that the "average citizen . . . does not have control over what information is collected [******176**] about him"; the "open[ing]" of a "dossier" and the "sketch[ing]" of an "information profile" for each "credit card," "life insurance policy," "tax return," "job" "interview," and "drivers' license"; and the fact that "[m]odern technology is capable of monitoring, centralizing and computerizing [personal] information which

exclude from government benefit programs potential recipients solely on the basis of their exercise of constitutional rights." (*Id.* at p. 265 (plur. opn.); accord, [Robbins v. Superior Court \(1985\) 38 Cal.3d 199, 213 \[211 Cal.Rptr. 398, 695 P.2d 695\]](#).)

The familiar observation of Professor Gerald Gunther, that the Warren Court's "aggressive 'new' equal protection" involved "scrutiny that was 'strict' in theory and fatal in fact" (Gunther, *The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv. L.Rev. 1, 8), is without import here. It does not bear on the right of privacy. Moreover, it was circulated in published form only after the November 7, 1972, General Election.

³Generally in accord on the source of the right of privacy are, for example, [People v. Porras \(1979\) 99 Cal.App.3d 874, 879 \[160 Cal.Rptr. 627\]](#) (the "adoption of the amendment was intended to strengthen the right of privacy"); [Cutter v. Brownbridge, supra, 183 Cal.App.3d at page 842](#) (implying that the right of privacy embraces the "interests protected by the common law" but also "reaches beyond" them).

⁴Generally in accord on the definition of the right of privacy are, for example, [White v. Davis, supra, 13 Cal.3d at page 774](#) ("The right of privacy is the right to be left alone."); [City of Santa Barbara v. Adamson, supra, 27 Cal.3d at page 130](#) (same); [Robbins v. Superior Court, supra, 38 Cal.3d at page 212](#) (same); [Long Beach City Employees Assn. v. City of Long Beach, supra, 41 Cal.3d at page 943](#) (same); [People v. Porras, supra, 99 Cal.App.3d at page 879](#) (same); [Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at page 1040](#) (same).

eliminates any possibility of individual privacy." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, pp. 26-27, underscoring deleted.)

There is also a protectable interest against an intruding party's interference with private conduct by the party intruded upon--"autonomy privacy." This is the value that is indicated by reference to "social relationships and personal freedom" and to "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27.)

Underlying each of these two protectable interests is a third, viz., a protectable [****177] interest against an intruding party's very act of invading the solitude of the party intruded upon--"privacy" properly so called. This is the value basic to the definition of the right of privacy as the "right to be left alone." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27.) It is also the value that is threatened by "snooping," the "monitoring" of personal conduct, and the "collecting" and "gather[ing]" of personal information. (*Ibid.*)

Each of the three protectable interests referred to above is of equal stature the one to the other. None is more "protectable than another, none is less." ⁵

⁵ Generally in accord on the substance of the right of privacy are, for example, *White v. Davis*, *supra*, 13 Cal.3d at page 774 (the "general concept of privacy relates . . . to an enormously broad and diverse field of personal action and belief"; the "moving force behind the new constitutional provision was" informational privacy); *City of Santa Barbara v. Adamson*, *supra*, 27 Cal.3d at page 129 (same as to former point); *id.* at page 130 (autonomy privacy: the "right of privacy" in "one's family" and also in "one's home"); *Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d at pages 275, 284 (plur. opn.) (autonomy privacy: a woman's "right to decide for herself whether to parent a child," "whether to bear a child or to

[****178] [**686] [***889] Fifth, the *scope* of the right of privacy is broad. The fact is established by the range of the protectable interests it embraces. It is confirmed by the [*83] evident intent not simply to adopt "various court decisions on privacy," but actually to "extend" them beyond their four corners. (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), rebuttal to argument against Prop. 11, p. 28.) ⁶

have an abortion"); *Robbins v. Superior Court*, *supra*, 38 Cal.3d at page 213 (the "right to privacy has been held to protect a diverse range of personal freedoms"); *Conservatorship of Valerie N.*, *supra*, 40 Cal.3d at p. 163 (autonomy privacy: the "right of a woman to choose whether or not to bear a child and thus to control her social role and personal destiny" is a "fundamental right protected by" the right of privacy); *Long Beach City Employees Assn. v. City of Long Beach*, *supra*, 41 Cal.3d at page 948 (informational privacy and privacy properly so called: the "coercive collection of mental thoughts, conditions and emotions" "inherently intrude[s] upon the constitutionally protected zone of individual privacy") (dictum); *Cutter v. Brownbridge*, *supra*, 183 Cal.App.3d at page 842 (informational privacy: the " 'zones of privacy' created by article I, section 1, extend to the details of one's medical history"); *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1489-1493 [232 Cal.Rptr. 668, 69 A.L.R.4th 1027] (stating that the " 'right to privacy has been held to protect a diverse range of personal freedoms' "; suggesting that both informational privacy and privacy properly so called are implicated in the intrusion by a television news camera into a residence in order to film the efforts of paramedics to save the life of a heart attack victim); *Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at page 1046 (the "general concept of privacy can be viewed as encompassing a broad range of personal action and belief"); *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at pages 15-17 (rejecting a claim that the right of privacy protects only informational privacy, with the observation that " 'the right to privacy has been held to protect a diverse range of personal freedoms[]' "; suggesting that both informational privacy and privacy properly so called are implicated in the collection and testing of urine); *Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S.* (E.D.Cal. 1983) 557 F.Supp. 1190, 1202 ("there is simply no indication that certain privacy rights were intended to be afforded greater protection than others").

⁶ Generally in accord on the scope of the right of privacy are, for example, *Porten v. University of San Francisco*, *supra*, 64 Cal.App.3d at page 829 (the "elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right"); *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at page 17 (same); *Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S.*, *supra*, 557 F.Supp. at page 1203 (same). See also Kelso, *California's Constitutional Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at page 376

[****179] [*84] [**687] Sixth, the *nature* of the right of privacy is dynamic. Its contours change with the contours of the protectable interests it embraces.⁷

[***890] Seventh, the *coverage* of the right of privacy is unlimited. That is to say, it reaches both governmental and nongovernmental actors. Intrusion is what matters, not the identity of the intruder. For example, informational privacy is guaranteed against the "collecting and stockpiling [of] unnecessary information about us" by

(observing that "[a]lthough privacy was clearly identified as an interest worthy of some legal protection [at common law], courts generally did not give privacy a privileged place or undue weight"); *id.* at page 423 (stating that the "secret legislative history" (see fn. 1, *ante*) "suggest[s] that the privacy clause was intended to do more than simply codify existing constitutional and common law doctrines").

Since the "right of privacy [under the United States Constitution] in general appears to be narrower than" the right of privacy under the California Constitution (*City of Santa Barbara v. Adamson*, *supra*, 27 Cal.3d at p. 130, fn. 3; accord, *Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal.3d at pp. 263, 280-281 (plur. opn.)), the Fourth Amendment in general appears to be narrower still. That is because the "federal constitutional right of privacy" is broader than the Fourth Amendment. (See *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at p. 20 ["The constitutional right to privacy does not prohibit all incursion into individual privacy, but provides that any such intervention must be justified by a compelling interest. [Citations.] This test places a heavier burden on [the intruding party] than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."].) In *People v. Crowson* (1983) 33 Cal.3d 623, 629 [190 Cal. Rptr 165, 660 P.2d 389], the lead opinion states: "In the search and seizure context, the *article I, section 1* 'privacy' clause has never been held to establish a broader protection than that provided by the *Fourth Amendment of the United States Constitution* or *article I, section 13 of the California Constitution*." (Italics added.) Because it is qualified by the italicized phrase, the unitalicized clause is unremarkable. (See *Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at p. 1043, fn. 4.)

⁷ See *People v. Prather* (1990) 50 Cal.3d 428, 437 [267 Cal.Rptr. 605, 787 P.2d 1012] (per Lucas, C. J.) (speaking specifically of popular initiatives but with applicability to legislative proposals as well: "In construing constitutional . . . enactments, we must give the language of the enactment 'a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people.'").

"government *and* business interests"; the "proliferation of [****180] government *and* business records over which we have no control"; the "loss of control over the accuracy of government *and* business records on individuals"; and the "open[ing]" of a "dossier" and the "sketch[ing]" of an "information profile" by government for each "tax return," "job" "interview," and "drivers' license" *and* the "open[ing]" of a "dossier" and the "sketch[ing]" of an "information profile" by business for each "credit card," "life insurance policy," and "job" "interview." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27, italics added.)

The "compelling public need" standard is applicable to both governmental and nongovernmental actors. As stated, intrusion is what matters, not the identity of the intruder. No distinction is drawn between types of actors. None need be. Certainly, the "compelling public need" standard can be satisfied by both. For example, there may be such a need for information about an individual's income on the part of a taxing body: the need seems one that is actually required by the agency under all the circumstances in order to determine tax [****181] liability, and is deemed valid by the community at large because of the importance of raising revenue. There may be a similar need for similar information on the part of a consumer credit-card company: the need seems one that is actually required by the firm under all the circumstances in order to assess financial condition, and is deemed valid by the community at large because of the importance of extending credit where appropriate.⁸

⁸ Generally in accord on the coverage of the right of privacy are, for example, *Porten v. University of San Francisco*, *supra*, 64 Cal.App.3d at pages 829-830 (the right of privacy reaches governmental and nongovernmental actors); *Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 272 [165 Cal.Rptr. 608] (following the foregoing authority in what may, or may not, be dictum); *Cutter v. Brownbridge*, *supra*, 183 Cal.App.3d at page 842 (the right of privacy reaches governmental and nongovernmental actors);

[****182] [**688] [***891] Eighth, the character of the right of privacy is justiciable. That means that it is "legal and enforceable" in the courts. (Ballot Pamp., Proposed Stats. and [*85] Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 26, underscoring omitted.)

Hence, it is clear that a right of action is implicit in the right of privacy.

It is less clear that this right of action imposes any fixed requirements of pleading and proof.

In determining such requirements, one would perhaps do best to cleave close to the analysis set out above.

Recall that the right of privacy may be abridged

Wilkinson v. Times Mirror Corp., *supra*, 215 Cal.App.3d at pages 1040-1044 (same); *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at pages 17-19 (same); *id.* at page 20 ("we see no reason to depart from existing precedent applying the compelling interest test" even when the intruding party is a nongovernmental actor); *Chico Fem. Women's Hlth. Cr. v. Butte Glenn Med. S.*, *supra*, 557 F.Supp. at pages 1202-1203 (the right of privacy reaches governmental and nongovernmental actors). To similar, if qualified, effect is *Semore v. Pool*, *supra*, 217 Cal.App.3d at pages 1093-1094 ("the courts and commentators agree that the constitutional provision provides at least some protection against nongovernmental action"; "we have no doubt that at least some types of nongovernmental conduct can interfere with the right granted by the constitutional provision").

In *Schmidt v. Superior Court*, *supra*, 48 Cal.3d 370, we assumed but did not decide that the right of privacy reaches nongovernmental as well as governmental actors (*id.* at p. 389), noting that "we ha[d] no occasion in th[at] case to consider under what circumstances, if any, purely private action . . . would constitute a violation of the state constitutional privacy provision" (*id.* at p. 389, fn. 14).

Professor Kelso reads the "secret legislative history" of what was to become Proposition 11 (see fn. 1, *ante*) to demonstrate that the right of privacy reaches governmental actors and nongovernmental actors cooperating with governmental actors, but not nongovernmental actors in and of themselves. (Kelso, *California's Constitutional Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at pp. 416-433.) As stated, this "secret legislative history" has no conceivable bearing on the crucial issue of the intent of the people who voted for the measure. In any event, it cannot reasonably be read as it is by Professor Kelso. At best, it shows that governmental actors are included within the provision. It does not even suggest that nongovernmental actors are excluded.

only when there is compelling public need; conduct adversely affecting, but not abridging, an established right of privacy may be allowed if reasonable; conduct bearing on a fictive "right of privacy" is not subject to any scrutiny at all.

Accordingly, the plaintiff must plead that he has a right of privacy and that it was interfered with by the defendant. The defendant may then plead, beyond simple denial, that any conduct on his part adversely affecting the right of privacy was justified by a compelling public need if it rose to the level of abridgment [****183] or that it was allowed as reasonable if it did not. The plaintiff must prove his right of privacy and the defendant's interference [*86] therewith by shouldering the generally applicable burden of proof by a preponderance of the evidence (Evid. Code, § 115). The defendant must prove under the same burden the justification or allowance of his conduct. ⁹

[****184] II

The subject of this proceeding is the "NCAA Drug-Testing Program" as it stood in 1987-1988. Also before the court as background is the program in its initial year of 1986-1987. The NCAA is, of course, the National Collegiate Athletic Association. It is an unincorporated association of over 1,000 colleges, universities, and other educational

⁹Generally in accord on the character of the right of privacy are, for example, *White v. Davis*, *supra*, 13 Cal.3d at page 776 (in the face of allegations in a complaint "stat[ing] a prima facie violation of the state constitutional right of privacy," the governmental defendants are "free to contest any of the allegations of the complaint as well as to designate the compelling governmental interests upon which they rely for their intrusive conduct"); *Long Beach City Employees Assn. v. City of Long Beach*, *supra*, 41 Cal.3d at page 948, footnote 12 (to "decide . . . whether [a] right of privacy was improperly violated . . . , we would inquire whether the [intruding governmental party] had demonstrated a compelling governmental interest") (dictum); *Porten v. University of San Francisco*, *supra*, 64 Cal.App.3d at page 832 (in the face of allegations in a complaint "stat[ing] a prima facie violation of the state constitutional right of privacy," the nongovernmental defendant "may contest any of the allegations of the complaint as well as show some compelling public interest justifying" its intrusion).

organizations.¹⁰

The objectives of the NCAA drug testing program, in the organization's own words, are the promotion of "fair and equitable competition at [its] championships and postseason certified events" (i.e., football bowl games) and the "protection of the health and safety of the student-athletes therein competing" who do, or might, ingest drugs. "So that no one participant might have an artificially [****185] induced advantage, so that no one participant might be pressured to use chemical substances in order to remain competitive and to safeguard the health and safety of participants, this NCAA drug-testing program has been created." This statement relates to the program in 1987-1988; it is in accord with a statement relating to the program in 1986-1987: the "goal . . . is to provide clean, equitable competition for student-athletes competing in NCAA championships [***892] and NCAA-certified postseason football bowl games."

[**689] To meet the stated objectives, the NCAA drug testing program, according to the organization's declaration, "involves urine collection on specific occasions" In individual and team championships, student athletes may be selected at random, by position of finish, or on suspicion. In team [*87] championships and postseason football bowl games, student athletes may selected at random, by position, by playing time, or on suspicion. The student athletes thus selected are required to provide urine specimens, and are "monitor[ed] . . . by observation" by NCAA representatives--denominated "urine validators"--as they do so. They are also questioned as to the identity of "each [****186] medication used recently," including "over-the-counter as well as prescription drugs." Women are specifically asked about their use of contraceptive medications. These procedures belong to the program in 1987-1988;

they follow similar procedures belonging to the program in 1986-1987. The central mechanism of the program is suspicionless selection for visually monitored urine collection.

The NCAA drug testing program, again according to the organization's declaration, also "involves . . . laboratory analyses [of the urine collected] for substances on a list of banned drug classes," entitled simply "NCAA Banned Drug Classes." These procedures, too, belong to the program in 1987-1988; they follow similar procedures belonging to the program in 1986-1987.

"NCAA Banned Drug Classes" "is comprised of substances generally purported to be performance enhancing and/or potentially harmful to the health and safety of the student-athlete. The drug classes specifically include stimulants (such as amphetamines and cocaine) and anabolic steroids as well as other drugs." To wit: (1) certain "[p]sychomotor and central nervous system stimulants . . . and Related Compounds"; (2) certain "[s]ympathomimetic [****187] amines . . . and Related Compounds"; (3) certain "[a]nabolic steroids . . . and Related Compounds"; (4) certain "[s]ubstances banned for specific sports . . . and Related Compounds"; (5) certain "[d]iuretics . . . and Related Compounds"; and (6) certain "[s]treet drugs" and "others[.]" "NCAA Banned Drug Classes" is found in the program in 1987-1988; it succeeds a "NCAA Banned Drugs List," which was found in the program in 1986-1987 and was essentially identical. The drugs and other substances in question are almost all of them lawful.

"NCAA Banned Drug Classes" is given detail in the "NCAA Prohibited Drug Reference List." The latter fills 59 single-spaced, typewritten pages. By its own declaration, it "represent[s] the majority of the drugs found in the United States" It contains 55 pages registering the brand and generic names of various substances. On each of these pages (and one other) it states, "Caution: This Is Not Considered a Complete List! Related

¹⁰ All the evidence admitted below related to the NCAA drug testing program in 1987-1988 and 1986-1987. None concerned subsequent changes. It is true that the NCAA moved the Court of Appeal to receive such evidence. The Court of Appeal, however, denied the request.

Substances Are Banned!" Again, almost all of the drugs and other substances in question are lawful.

The NCAA drug testing program provides that a "student-athlete who is found to have utilized (in preparation for or participation [****188] in an NCAA [*88] championship or certified postseason football contest) a substance on the list of banned drugs . . . shall not be eligible for further participation in postseason competition," and "shall remain ineligible for postseason competition for a minimum of 90 days after the test date. If the student-athlete tests positive after being restored to eligibility, he or she shall be charged with the loss of one season of postseason eligibility in all sports and shall remain ineligible for postseason competition at least through the succeeding academic year." The program allows for an expedited and limited appeal from a declaration that a student athlete is ineligible; the right to appeal belongs to the NCAA member institution and not to the student athlete. These procedures belong to the program in 1987-1988; they follow similar procedures belonging to the program in 1986-1987.

The NCAA drug testing program requires that "[e]ach year, student-athletes will sign a [***893] consent form demonstrating their understanding of the . . . program and their willingness to participate. This consent statement is part of a total Student-Athlete Statement required of all student-athletes prior [****189] to participation in intercollegiate competition [**690] during the year in question. Failure to complete and sign the statement annually shall result in the student-athlete's ineligibility for participation in all intercollegiate competition." The quoted statement appears in the program in both 1986-1987 and 1987-1988. The NCAA does not itself exact signed consent forms. Rather, it requires its member institutions to do so as its agents.

At the relevant time, Jennifer Hill and J. Barry McKeever were student athletes at the Leland Stanford Junior University (hereafter Stanford), a

member institution of the NCAA.¹¹ In conformity with NCAA mandate, Stanford apparently attempted to exact signed consent forms from Hill and McKeever for the NCAA drug testing program in 1987-1988, but each refused. Stanford had exacted such a form from McKeever in 1986-1987; he was selected for drug testing without suspicion, and submitted under protest.

[****190] On the complaint of Hill and McKeever against the NCAA and following the intervention of Stanford on the former's side, the superior court conducted a lengthy bench trial, made extensive findings of fact and conclusions of law, and rendered judgment issuing a permanent injunction prohibiting [*89] the NCAA from applying its drug testing program against Stanford student athletes and/or Stanford itself, or taking any adverse action against Stanford student athletes and/or Stanford itself with regard thereto, on the ground that the program violated Stanford student athletes' right of privacy under [article I, section 1 of the California Constitution](#) and was not immunized by the commerce clause of [article I, section 8](#) of the United States Constitution.

In a detailed opinion, the Court of Appeal affirmed, being of the view that the superior court's findings and conclusions were supported by the evidence and in accordance with the law.¹²

¹¹ It may be noted in passing that "[f]or the inaugural issue of College Sports Magazine, 110 sports information directors were asked what three college athletic programs they admired most. The magazine asked the SID's to take into account athletes' competitive and academic success, facilities, men's teams and women's teams, major and non-revenue sports, and all other aspects of a well-rounded program." (*Stanford Athletics #1* (Nov. 1993) College Sports Magazine, at p. 6.) Stanford finished first with 26 first-place votes and 164 total points. The institution that came in second was far behind, with only seven first-place votes and only seventy total points. (*Ibid.*)

¹² It should be noted that in conducting its analysis, the Court of Appeal applied the "compelling public need" standard through the test of [Bagley v. Washington Township Hospital Dist., supra, 65 Cal.2d 499, 505-507](#). (See fn. 2, *ante*.) The latter is not apposite. But its use is not fatal.

[**191]** Having considered the record in its entirety, I am compelled to agree.

The superior court's findings of fact and conclusions of law survive scrutiny under the appropriate standards of review.

"Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." ([*Crocker National Bank v. City and County of San Francisco* \(1989\) 49 Cal.3d 881, 888 \[264 Cal.Rptr. 139, 782 P.2d 278\].](#))

Crucial in this proceeding **[****192]** is the superior court's "establishment of historical or physical facts." Each of its findings was supported **[***894]** by either conflicting or unconflicting evidence of substance. If by unconflicting, it must be obviously sustained. But even if by conflicting, the same is true. (See, e.g., [*People v. McPeters* \(1992\) 2 Cal.4th 1148, 1176 \[Cal.Rptr.2d 834, 832 P.2d 146\]](#) (per Lucas, C. J.) [implying that a trial court's finding based on conflicting evidence "is binding upon an appellate court" (internal quotation marks omitted)].)

[691]** The question here is whether the NCAA drug testing program violates the right of privacy of Stanford student athletes. The answer, as will appear, is affirmative.

[*90] To begin with, there exists a right of privacy on the part of Stanford student athletes that is

implicated in the NCAA drug testing program. It is established beyond peradventure and not at all fictive. The superior court's determination to this effect is sound.

First, there is informational privacy, the protectable interest against an intruding party's obtaining and/or publishing of private information belonging to the party intruded upon. **[****193]** Manifestly, such information is contained in an individual's urine. It is also revealed in the identification of medications that the individual has recently used, including especially those of a contraceptive nature. The superior court found that "[t]his is confidential medical information which may reveal sensitive medical conditions" Implicit therein is a determination that is in line with the observation in [*Board of Medical Quality Assurance v. Gherardini* \(1979\) 93 Cal.App.3d 669, 678 \[156 Cal.Rptr. 55\]](#): "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." It bears emphasis that almost all of the banned drugs and other substances are lawful.

In [*Skinner v. Railway Labor Executives' Assn.* \(1989\) 489 U.S. 602 \[103 L.Ed.2d 639, 109 S.Ct. 1402\]](#) (hereafter sometimes *Railway Labor Executives*), a Fourth Amendment case, the majority declared: "It is not disputed . . . that chemical analysis of urine . . . can reveal a host of private medical facts about **[****194]** an [individual], including whether he or she is epileptic, pregnant, or diabetic. . . . [I]t is clear that the . . . testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable" (*Id.* at p. 617 [103 L.Ed.2d at pp. 659-660]; accord, [*Luck v. Southern Pacific Transportation Co.*, supra, 218 Cal.App.3d at pp. 15-17](#) [holding to the same effect under the right of privacy of [*Cal. Const., art. I, § 1*](#)].)

In his dissent in *Railway Labor Executives*, Justice Marshall expanded on the point. "[T]he chemical analysis . . . perform[ed] upon . . . urine samples

implicates strong privacy interests Technological advances have made it possible to uncover, through analysis of chemical compounds in [this] fluid[], not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression. [Citations.] . . . '[S]uch tests may provide [intruding parties] with a periscope through which they can peer into an individual's behavior in [his or] her private life, even in [his or] her own home.' " (*Skinner v. Railway Labor Executives' Assn.*, *supra*, 489 U.S. at p. 647 [103 L.Ed.2d at pp. 679-680] [****195] (dis. opn. of Marshall, J.).)

Second, there is autonomy privacy, the protectable interest against an intruding party's interference with private conduct by the party intruded [*91] upon. Such conduct includes an individual's medical treatment of himself with lawful drugs and other substances, both on his own and under the direction of his physician. The Legislature itself has expressly found that an "adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care" (*Health & Saf. Code, § 7185.5, subd. (a)*; accord, *id.*, former § 7186, Stats. 1976, ch. 1439, § 1, p. 6478.) Hence, words that Judge Cardozo wrote 80 years ago while a member of the New York Court of Appeals are vital in California today: "Every human being of adult years and sound body has a right to determine what shall be done with his own body" (*Schloendorff v. New York Hospital (1914) 211 N.Y. 125, 129 [105 N.E. 92]*, overruled on other grounds, *Bing v. Thunig (1957) 2 N.Y.2d 656, 667 [***895] [163 N.Y.S.2d. 3, 143 N.E.2d. 3]*; accord, *Thor v. Superior Court (1993) 5 Cal.4th 725, 731 [21 Cal.Rptr.2d 357, 855 P.2d 375]*.) [****196]

Third, there is privacy properly so called, the protectable interest against an intruding party's very act of invading the solitude of the party intruded upon. The mere presence of a stranger when an individual urinates is deeply invasive of the latter's solitude. (Cf. *Caruso v. Ward (1988) 72 N.Y.2d 432, 438-439 [534 N.Y.S.2d. 142, 530 N.E.2d. 850]*

[concluding under provisions including the Fourth Amendment that "[u]rine testing 'in [***692] the presence of a government official or agent[]' . . . 'is at least as intrusive as a strip search' and involves a great 'intrusion on individual privacy and dignity' ".) The stranger's visual monitoring of the individual's act of urination is more irruptive still. (Cf. *Capua v. City of Plainfield (D.N.J. 1986) 643 F.Supp. 1507, 1514* [concluding under the Fourth Amendment that a "urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience"].)

In *Railway Labor Executives*, the majority declared: It cannot "be disputed that [****197] the process of collecting . . . [a urine] sample . . . implicates privacy interests. . . . 'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.' [Citation.] . . . [I]t is clear that the collection . . . of urine intrudes upon expectations of privacy that society has long recognized as reasonable" (*Skinner v. Railway Labor Executives' Assn.*, *supra*, 489 U.S. at p. 617 [103 L.Ed.2d at p. 676]; accord, *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at pp. 15-17 [holding to the same effect under the right of privacy of *Cal. Const., art. I, § 1*].)

[*92] In his dissent in *Railway Labor Executives*, Justice Marshall expanded on this point as well. He asked rhetorically: "Who among us is not prepared to consider reasonable a person's expectation of privacy with respect to . . . the [****198] collection of his urine . . . ?" (*Skinner v. Railway Labor Executives' Assn.*, *supra*, 489 U.S. at p. 642 [103 L.Ed.2d at p. 676] (dis. opn. of Marshall, J.).) He went on: "Compelling a person to produce a urine sample on demand . . . intrudes deeply on privacy and bodily integrity. Urination is among the

most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion. . . . That the privacy interests offended by compulsory and supervised urine collection are profound is the overwhelming judgment of the lower courts and commentators. . . . '[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.' " (*Id.* at pp. 645-646 [103 L.Ed.2d at pp. 678-679] (dis. opn. of Marshall, J.); cf. *People v. Melton* (1988) 44 Cal.3d 713, 739, fn. 7 [244 Cal.Rptr. 867, 750 P.2d 741] [****199] ["[w]hile the taking of a urine sample does not involve physical invasion of the body's interior, it does invoke privacy and dignitary interests protected by the due process and search and seizure clauses" of the United States and California Constitutions].)

It cannot be said that the right of privacy of Stanford student athletes is somehow qualified or reduced as a result of their status as athletes.

It appears that, as a general matter, athletes like the student athletes here are subject to relatively strict regulation and close supervision in their lives and activities, with regard to medical concerns and others. It also appears that, as a general matter, they function in a relatively communal environment, both on the field of play and in the locker room.

[***896] Such observations, however, bear little weight on the point under consideration.

Informational privacy remains undiminished. The fact that student athletes are regulated and supervised and function in a communal environment does not make open them to urinalysis and questioning covering much of the pharmacopoeia. Remember the "NCAA Prohibited Drug Reference List": it fills 59 single-spaced, typewritten pages; "represent[s] [****200] the majority of the drugs found in the United States"; contains 55 pages registering the brand and generic

names of various substances; and states on each one of the 55 (and on one more), "Caution: This Is Not Considered a Complete List! Related Substances Are Banned!" Remember too that almost all of the drugs and other substances in question are lawful.

[*93] [**693] Autonomy privacy also remains undiminished. The fact that student athletes are regulated and supervised and function in a communal environment does not withdraw their authority to control their own medical treatment with lawful drugs and other substances.

Privacy properly so called remains undiminished as well. The fact that student athletes are regulated and supervised and function in a communal environment does not prepare them to be watched by a stranger as they urinate.

Next, there is an abridgment of the right of privacy of Stanford student athletes that is effected by the NCAA drug testing program. The interference with the right arising from the program is significant. The superior court's determination to this effect is sound.

First, as to informational privacy there is a substantial adverse effect. Through its [****201] drug testing program, the NCAA obtains private information belonging to Stanford student athletes. As stated, such information is contained in an individual's urine and in his or her identification of recently used medications, including especially those of a contraceptive nature. The NCAA requires both. As to the urine, the superior court found that the "NCAA drug testing can detect very low levels of metabolites of drugs in urine, down to a few parts per billion The type of urinalysis performed by the NCAA reveals many personal details about a person, including medical conditions, birth control methods and whether the person ingested certain substances weeks, months or even a year prior to the drug test." As to the identification: "Athletes are required to indicate to an NCAA official all medications taken for a couple of weeks prior to giving a urine sample. This is confidential medical information which may

reveal sensitive medical conditions of the athlete. Women athletes are specifically asked whether they use a birth control medication."

Second, as to autonomy privacy there is also a substantial adverse effect. The superior court's finding is this: "The NCAA drug testing [****202] program . . . interferes with the athletes' right to treat themselves . . . and interferes with their doctor's ability to treat them." This result follows ineluctably from the fact that the banned drugs and other substances "represent the majority of the drugs found in the United States" and that almost all of them are lawful.

Third, as to privacy properly so called there is a substantial adverse effect, perhaps the most substantial adverse effect of all. The superior court found: "The NCAA drug testing program . . . invades privacy by requiring that an NCAA monitor watch the partially disrobed athlete during the act of urination. . . . Urinating under the watchful eye of an NCAA monitor is degrading to both men and women."

[*94] Some of the evidence that the superior court cited in support deserves mention.

McKeever testified that an "NCAA official" whom he did not know "went into the bathroom with" him; he "led" him "to the urinal there" and "wouldn't let" him "go in the stall"; he "stood back approximately five to, five to seven feet" and "watch[ed]" him "the whole time" "as" he was "urinating."

[***897] Asked, "How did it feel . . . to have a stranger watching you while you are urinating?," [****203] McKeever answered: "It is kind of hard to explain because it's really difficult. I mean, obviously, you know, I--everyday I take a shower with the guys and everything, but the hardest part about it is because it is not voluntary; it is something that you know you are sitting there and a guy is watching you, and you say--they are saying you need a hundred milliliters for the sample. And you know, you are sitting there. You are knowing

that you have to give a hundred milliliters. Knowing you have to do it right then It is really difficult to say, do it now and give me a hundred milliliters." He went on: "It is very embarrassing because he is standing behind you and . . . you know . . . that he is watching you. . . . [I]t is just kind of hard being there with a beaker in your hand and watching someone, you know, make you give the [sample]. It is very uncomfortable. It is very embarrassing."

To the further question, "[W]hat is the difference between urinating in a public restroom with people and urinals beside you and urinating during the NCAA drug testing program [**694] with the monitor watching you?," McKeever provided this response: "I think the main difference is it is voluntary. [****204] When you go into a public bathroom you have to go to the bathroom. That is why you are going to go to a bathroom. When you are sitting there with a beaker in your hand and saying we want you to give the sample . . . and having a person sit there watching you and . . . you know . . . that the only reason he is there [is] to watch you[;] when you are in a public bathroom, the guy next to you is not there to watch you. That is just more--makes it that much more degrading and humiliating."

Testimony similar to McKeever's was given by Ruth M. Berkey, Assistant Executive Director of the NCAA. "[A]s part of [her] training," she "had to urinate in front of a monitor" and "found that embarrassing" She stated that there had been some "discussion" within the organization "about how embarrassing it would be for a woman athlete, particularly, someone having her period to give a urine sample[.]" That discussion was apparently without effect. Asked, "If a woman athlete has her period, is she still required to give a urine sample?," she answered, "Yes, she is."

[*95] The superior court's finding as to the substantial adverse effect of the NCAA drug testing program on "privacy" properly [****205] so called should cause no surprise. Indeed, any other would

have been remarkable. Apparently, only one court has found to the contrary in a reported decision. In [*O'Halloran v. University of Washington \(W.D.Wn. 1988\) 679 F.Supp. 997*](#), a federal district court denied a student athlete's application for a preliminary injunction, based on the Fourth Amendment, to prohibit the University of Washington from enforcing the NCAA drug testing program. With virtually no analysis, it trivialized the student athlete's "complaint" by asserting unsupportedly that "[m]onitored urination . . . is a relatively small intrusion" (*Id. at p. 1005.*) The decision, however, did not long survive. About six months after it was filed, it was reversed. ([*O'Halloran v. University of Washington \(9th Cir. 1988\) 856 F.2d 1375.*](#))¹³

[**206]** It goes without saying that the abridgment of the right of privacy of Stanford student athletes by the NCAA drug testing program is not nullified as a result of their status as athletes. As noted above, the fact that student athletes are regulated and supervised and function in a communal environment does not make open them to urinalysis and questioning covering much of the pharmacopoeia; does not withdraw their authority to control their own medical treatment with lawful drugs and other substances; and does not prepare them to be watched by a stranger **[***898]** as they urinate. That same fact does not remove or even reduce the substantial adverse effect of the program.

Finally, there is no compelling public need that justifies the abridgment of the right of privacy of Stanford student athletes that is effected by the NCAA drug testing program. The superior court's determination to this effect is sound.

Recall that what is demanded to satisfy the standard

¹³ Compare [*O'Connor v. Police Com'r of Boston \(1990\) 408 Mass. 324, 328 \[557 N.E.2d. 1146\]*](#) (drug testing of police cadets: "[W]e do not take lightly the intrusiveness of collecting a urine sample We accept as true, too, that the intrusiveness is increased by cadets' being monitored in the act of urinating (a practice that helps to ensure the integrity of the urine sample).")

is a "need" on the part of the intruding party that is both "compelling" and "public." It must extend to the means used as well as the interests furthered. It is "compelling" if it is actually required by the intruding party under all the **[****207]** circumstances. It is "public" if it is deemed valid by the community at large.

There are accordingly two questions that raise themselves in the analysis. Is there a "compelling" need by the NCAA for its drug testing program? If so, is there a "public" need? Since, as will appear, the first question must be answered in the negative, the second question need not be resolved.

[*96] There must be some doubt that the *interests* furthered by the NCAA drug testing program are "compelling."

The stated objectives of the program, as quoted above, are two in number. One is to promote "fair and equitable competition. **[**695]** " The other is to protect the "health and safety of the student-athletes" who do, or might, ingest drugs.

In the abstract, the interests underlying the goal of "fair and equitable competition" may be asserted to be "compelling." For competition is the very "product" that the NCAA markets. ([*NCAA v. Board of Regents of Univ. of Okla. \(1984\) 468 U.S. 85, 101-102 \[82 L.Ed.2d 70, 84, 104 S.Ct. 2948\].*](#))

So too the interests underlying the goal of the "health and safety of the student-athletes" who do, or might, ingest **[****208]** drugs. It is they who actually turn out the "product" in question.

The question, however, proves to be debatable.

On closer examination, the promotion of "fair and equitable competition" does not seem "compelling." (Cf. [*University of Colorado v. Derdeyn \(Colo. 1993\) 863 P.2d 929, 945-946*](#), [holding that "although the integrity of" a state university's "athletic program is . . . a valid and commendable [interest], it does not seem to be very significant for Fourth Amendment purposes"].) If it were, there would be a "compelling" interest for every actor in

making or doing whatever it happens to make or do.

Neither does the "health and safety of the student-athletes" who do, or might, ingest drugs seem "compelling." Otherwise, reasoned the superior court, "all students and all people could be drug tested for their own good, even if they were not suspected of drug use." It matters not that the student athletes are *student* athletes. Their status as such cannot weigh in the balance. (Cf. [University of Colorado v. Derdeyn](#), *supra*, 863 P.2d 929, 938-939, [concluding, with authorities cited, that [****209] "it cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment"]].)

In accord is the discussion in the very recent decision in [University of Colorado v. Derdeyn](#), *supra*, 863 P.2d 929 (hereafter sometimes *Derdeyn*).

In *Derdeyn*, the Colorado Supreme Court struck down a drug testing program of the University of Colorado (hereafter CU) covering its own student athletes--a program similar to the NCAA's, but if anything less [*97] intrusive (because of the absence of a strict requirement of visual monitoring during urine collection). The court held, *inter alia*, that CU's program violated the Fourth Amendment's right against unreasonable searches and seizures--a right similar to the right of privacy, but if anything more tolerant (see fn. 6, *ante*).

[***899] The *Derdeyn* court's analysis of the interests furthered by CU's drug testing program is as follows.

"We begin our consideration of these interests by observing that suspicionless urinalysis-drug-testing by the government has been upheld in numerous cases, and in many of those cases, courts [****210] have characterized the relevant government interests as 'compelling.' *E.g.*, [Skinner \[v. Railway Labor Executives' Assn.\]](#) 489 U.S. [602,] 628 [(1989)] [103 L.Ed.2d 639, 667, 109

[S.Ct. 1402\]](#) (government has 'compelling' interest in testing railroad employees whose 'duties [are] fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences'); [[Treasury Employees v.\] Treasury Employees v.\] Von Raab](#), 489 U.S. [656,] 670 [(1989)] [103 L.Ed.2d 685, 705, 109 S.Ct. 1384] (government has 'compelling interest in ensuring that front-line [drug] interdiction personnel [in the United States Customs Service] are physically fit, and have unimpeachable integrity and judgment'); *id.* at 677 [130 L.Ed.2d at page 702] (government has a compelling interest in protecting truly sensitive information from those who might compromise such information); *id.* at 679 [103 L.Ed.2d at pages 710-711] [****211] (government has 'compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry'); [[National Federation of Federal Employees v.\] Cheney](#), 884 F.2d [603,] 610 [280 U.S.App.D.C. 164] [(D.C. Cir. 1989)] (government has a 'compelling safety interest in ensuring that the approximately 2,800 civilians who fly and service its airplanes and helicopters are not impaired by drugs'). [**696] However, the Supreme Court has not held that only a 'compelling' interest will suffice, see [Skinner](#), 489 U.S. at 624 [103 L.Ed.2d at pages 664-665]; cf. [Von Raab](#), 489 U.S. at 666 [103 L.Ed.2d at pages 702-703], and some courts have upheld suspicionless urinalysis-drug-testing by the government without finding a compelling interest. *E.g.*, [Dimeo \[v. Griffin\]](#) 943 F.2d [679,] 681, 683, 685 [(7th Cir. 1991) (en banc)] (explaining that decreasing levels of intrusiveness require decreasing levels of government [****212] justification, declining to characterize as compelling the government's interest in protecting professional jockeys, starters, and outriders from injuring one another at the race track, characterizing the state's financial interest as 'substantial,' and holding that these two interests outweigh 'the very limited privacy interest[s]' of professional jockeys, starters, and outriders); *International Bhd. of Elec. Workers, Local* [*98]

1245 v. [Skinner](#), 913 F.2d 1454, 1462, 1643, 1464 (9th Cir. 1990) (finding that the government has a 'great' interest in the safety of the natural gas and hazardous liquid pipeline industry, and holding that this 'strong' interest is sufficient to justify random urinalysis testing of pipeline workers). Hence, rather than trying to characterize CU's interests as 'compelling,' 'strong,' 'substantial,' or of some lesser degree of importance, we think it is more instructive simply to compare them with other types of commonly asserted interests that have been held sufficient or insufficient to justify similar intrusions.

"Our review of the cases in this area supports the conclusion of the Ninth Circuit Court of Appeals in [****213] *Local 1245 v. Skinner*, a case involving a program for random drug testing of employees, absent individualized suspicion, that 'the concern for public safety animates the general acceptance of drug testing by courts.' *Local 1245 v. Skinner*, 913 F.2d at 1462 (citing as support for this proposition *Skinner*, *Von Raab*, and cases from the Third, Fourth, Eighth, and District of Columbia Circuits); see also *O'Keefe v. Passaic Valley Water Comm'n*, 602 A.2d 760, 763 (N.J. Super. A.D. 1992) (reading *Skinner* and *Von Raab* as holding that 'the government may nevertheless require drug testing [absent reasonable suspicion] without running afoul of the proscriptions of the Fourth Amendment in those circumstances in which the government's special and compelling need to protect the public safety outweighs the employee's privacy interest'). For example, courts have upheld suspicionless urinalysis-drug-testing of Army-employed civilian air traffic controllers, pilots, aviation mechanics, aircraft attendants, police, and guards, *Cheney*, 884 F.2d at 610-11, 612-13; civilian [****214] [***900] employees of a chemical weapons plant who 'have access to areas . . . in which experiments are performed with highly lethal chemical warfare agents,' *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (per curiam); drivers, mechanics and attendants whose primary duty is the daily transportation of handicapped children on school buses, *Jones v. Jenkins*, 878

F.2d 1476, 1477 [279 U.S.App.D.C. 19] (D.C. Cir. 1989) (per curiam), modifying *Jones v. McKenzie*, 833 F.2d 335 [266 U.S.App.D.C. 85] (D.C. Cir. 1987); bus or commercial truck drivers who operate 'enormous' trucks such that 'a single mistake in judgment or momentary lapse in attention can have devastating consequences for other travelers,' *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991); 'scrub techs' in public hospitals whose duties include bringing patients to the operating room, setting up the sterile field, laying out the proper instruments, and assisting during surgery, *Kent v. Claiborne County Hosp.*, 763 F. Supp. 1362, 1364, 1367 (S.D. Miss. 1991); [****215] employees holding top secret national security clearances, *Harmon v. Thornburgh*, 878 F.2d 484, 491-92 [278 U.S.App.D.C. 382] (D.C. Cir. 1989); county correctional employees with [*99] regular access to prisoners or weapons, *Taylor v. O'Grady*, 888 F.2d 1189, 1199, 1901 (7th Cir. 1989); and police officers who carry firearms or participate in drug interdiction efforts, *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989) (per curiam). At the same time, courts have found insufficient governmental interests to uphold suspicionless urinalysis-drug-testing of high-school students who participate in extracurricular activities, *Brooks* [v. *East Chambers Consol. Ind. School Dist.*] 730 F. Supp. [759,] 764-66 [(S.D. Tex. 1989)]; United States Department of Justice employees who are prosecutors in criminal cases and other employees who have access to grand jury proceedings, *Harmon*, 878 F.2d at 496; county correctional [**697] employees who have no reasonable opportunity to smuggle narcotics to prisoners and no access [****216] to firearms, *Taylor*, 888 F.2d at 1201; civilian laboratory workers at the Army's forensic Drug Testing Laboratories, *Cheney*, 884 F.2d at 613, 615; civilian employees in the chain of custody process for biochemical testing at the Army's forensic Drug Testing Laboratories, *id.*; and water meter readers who must enter customers' homes in order to read the meters, *O'Keefe*, 602 A.2d at 764. In addition, courts have questioned the

propriety of suspicionless testing of secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear facilities, [Cheney, 884 F.2d at 611](#); police department personnel who do not carry firearms or participate in drug interdiction efforts, [Guiney, 873 F.2d at 1558](#); heads of purchasing departments in hospitals who have 'vital and important responsibility essential to the proper supply of medical materials,' *Ke[n]t*, [763 F. Supp. at 1367](#); and United States Customs Service employees who are required [****217] to handle classified material, [Von Raab, 489 U.S. at 677 \[103 L.Ed.2d at p. 703\]](#).

". . . [Thus,] the great majority of cases following *Skinner* and *Von Raab* clearly militate[s] against the conclusion that CU's program is a reasonable exercise of state power under the Fourth Amendment. This is so despite the fact that CU's interest in protecting the health and safety of its intercollegiate athletes . . . is unquestionably significant." ([University of Colorado v. Derdeyn, supra, 863 P.2d at pp. 943-945](#), fn. omitted.)¹⁴

[****218] Let us now go back to the case at bar and the NCAA drug testing program.

It must be emphasized that whether or not interests are "compelling" is determined not in the abstract but *under all the circumstances*.

[*100] [***901] When, as here, the interests go to avoiding or minimizing a certain harm, the issue must be resolved with an eye thereto. Accordingly, it may be stated as a rule of thumb that if the harm

is very grave, the interests may be considered "compelling," and if it is insubstantial, they may not.

The interests underlying the NCAA drug testing program go to avoiding or minimizing the harm threatened by the use of drugs by student athletes, both for their own good and for the good of competition.

The superior court expressly found that the "amount of drug abuse by student-athletes in the United States is insignificant to virtually non-existent." "The minimal evidence of drug use is almost entirely limited to anabolic steroid use by certain football players" That means, of course, that there was no significant drug abuse to be deterred by any drug testing program to be established by the NCAA. The superior court impliedly found that the NCAA was, or should have [****219] been, aware of the foregoing when it established its drug testing program: The NCAA "voted to adopt the program. The reports upon which the NCAA relied were introduced here. They do not support the action taken." Because there was no significant drug abuse to be deterred before any NCAA drug testing program was established, the absence of such abuse cannot be attributed to the NCAA drug testing program that was later established. *Ante hoc, ergo non propter hoc*.

The superior court found: "[T]here is no evidence that drug use in athletic competition is endangering the health and safety of student-athletes." Further, "[t]here was no evidence that any student-athlete has ever injured anyone else as a result of drug use."

The superior court also found: "The evidence does not establish that any of the drugs on the banned list will actually enhance the performance of an athlete in the NCAA sports." "At best, the possible performance [***698] enhancement of steroids is a scientific controversy which will not be resolved in the foreseeable future. . . . [I]t is clear that steroids do not enhance aerobic performance." "The evidence is that, with the possible exception of

¹⁴The *Derdeyn* court found "of only marginal relevance" ([University of Colorado v. Derdeyn, supra, 863 P.2d at p. 939](#)) the decision in [Schaill by Kross v. Tippecanoe County School Corp. \(7th Cir. 1988\) 864 F.2d 1309](#), which upheld against a Fourth Amendment claim of unreasonableness a drug testing program covering student athletes and cheerleaders. Its reason was that the drug testing program in *Schaill* was directed against minors, who are assertedly entitled to a lower level of protection under the Fourth Amendment. Another reason is apparent. Simply put, the analysis in *Schaill* seems dubious. How else to explain the sustaining of a drug testing program reaching beyond student athletes to cheerleaders

steroid use in football, [****220] drugs are not perceived by college athletes and coaches to enhance college athletic performance Even for steroid use, the 'perception' is that it might only help certain types of positions in football."

In view of these findings, the interests underlying the NCAA drug testing program in avoiding or minimizing the harm threatened by the use of drugs by student athletes cannot be held to be "compelling." (Cf. [National Treasury Employees Union v. Watkins \(D.D.C. 1989\) 722 F.Supp. 766, 770](#) [*101] [concluding under the Fourth Amendment that a government employer's "interest in randomly testing [certain] employees" for drug use "is sharply undercut by the complete absence of any history of drug-related" incidents].)

Even if the *interests* furthered by the NCAA drug testing program could be considered "compelling," the same cannot be said of the *means* used.

As stated, the central mechanism of the NCAA drug testing program is suspicionless, visually monitored urine collection.

Is *visually monitored* urine collection actually required? The superior court found that it was not. It could not have been clearer on the point: "Direct monitoring [****221] of an athlete urinating is not necessary to ensure a valid sample." And again: "It is not necessary to scrutinize the athletes while urinating." The finding was squarely based on the testimony of Ronald Heitzinger, one of the NCAA's expert witnesses. Heitzinger stated that he had heard of a collection device "which is basically a beaker or some kind of receptacle into which the urine sample is placed which contains a thermometer so that you can detect whether or not someone is using their own urine as opposed to trying to cheat [with] someone else's urine[.]" Indeed, he admitted that he himself had "develop[ed] a method for checking [a] urine sample that did not require actually monitoring the person giving urine"

[***902] Is *suspicionless* urine collection actually

required? The superior court found that it was not.

Note the superior court's findings, quoted above, that the "amount of drug abuse by student-athletes in the United States is insignificant to virtually non-existent"; that the "minimal evidence of drug use is almost entirely limited to anabolic steroid use by certain football players"; and that the only "possible exception" to the general perception among "college [****222] athletes and coaches" that drugs do "not . . . enhance college athletic performance" is the case of "steroid use in football."

The reasoning underlying the superior court's finding against suspicionless urine collection is this: "A drug testing program for anabolic steroids based on reasonable suspicion would accurately detect many of those using steroids" "There are factors which can give rise to a clinical suspicion of use of anabolic steroids, including large increases in weight in a short period of time, aggressive behavior, pimples, body odor, changing hair patterns and others." These "factors" would surely be noticed. As was generally observed, student athletes are subject to relatively strict regulation and close supervision in their lives and activities, and function in a relatively communal environment.

[*102] One additional comment. It seems plain that the means used to further any given interests cannot be deemed to be "compelling" if they are ineffective. (See [City of Santa Barbara v. Adamson, supra, 27 Cal.3d at p. 132](#) [implying that the means used must "truly and substantially [****223] help effect" the interests in question]; cf. [Delaware v. Prouse \(1979\) 440 U.S. 648, 659 \[59 L.Ed.2d 660, 671, 99 S.Ct. 1391\]](#) [implying that under the Fourth Amendment the "mechanism" must be "productive" in order "to justify the intrusion"].) The superior court found the means here to be such. Its very words are these: "The NCAA's drug testing program is not effective in reaching its stated goals of clean and equitable postseason competition and protecting the health and safety of student-athletes."

[**699] To summarize: The record in this proceeding "will be searched in vain for real evidence of a real problem [among student athletes] that will be solved by" the NCAA drug testing program. (*Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 681 [103 L.Ed.2d 685, 712, 109 S.Ct. 1384] (dis. opn. of Scalia, J.).)¹⁵

¹⁵The party intruded upon, of course, may consent to the conduct of the intruding party. In such a case, the former may be said to have "waived" his right of privacy or the latter may be said to have effected no intrusion. Under the Fourth Amendment, consent is valid only if it "was, in fact, freely and voluntarily given." (*Schneekloth v. Bustamonte* (1973) 412 U.S. 218, 222 [36 L.Ed.2d 854, 859-860, 93 S.Ct. 2041], internal quotation marks omitted.) It was so given only if it was not the "product of duress or coercion, express or implied . . ." (*Id.* at p. 227 [36 L.Ed.2d at pp. 862-863]). The issue of consent "is a question of fact to be determined from the totality of the circumstances." (*Ibid.*) The burden rests on the intruding party to prove consent (*Id.* at p. 222 [36 L.Ed.2d at pp. 859-860]) by a preponderance of the evidence (*United States v. Matlock* (1974) 415 U.S. 164, 177-178, fn. 14 [39 L.Ed.2d 242, 253-254, 94 S.Ct. 988]; *People v. James* (1977) 19 Cal.3d 99, 106137 Cal.Rptr. 447, 561 P.2d 1135). & fn. 4 [Principles no less favorable to the party intruded upon should govern here. That is because the right of privacy provides no less protection than the Fourth Amendment. (See fn. 6, *ante.*)

In this case, neither Hill nor McKeever even purported to consent to the NCAA drug testing program in 1987-1988. Indeed, each refused to do so.

All the same, the superior court proceeded: " 'Consent' to drug testing in these circumstances is a fiction."

Responding to a "contract law" argument urged by the NCAA, the superior court reasoned: "[The] NCAA is a monopoly albeit a lawful one. It . . . regulate[s] intercollegiate athletic competition. A student who has any desire to participate in intercollegiate athletics is not free to compete under another regulatory body. The facts here show that the testing policy was unilaterally formulated by the NCAA and that student athletes have little or no means of negotiating changes or the elimination of the testing program. . . . There is no equal bargaining between the athletes and the NCAA. Without free and equal bargaining the theoretical underpinnings of contract law are vitiated."

Implicit in the superior court's reasoning seems a view similar to that expressed by the *Derdeyn* court: "It is, to be sure, only a very small percentage of college athletes whose college 'careers' are essential as stepping stones to lucrative contracts--or to any contract --as professional athletes. On the other hand, however, we must also recognize that many intercollegiate athletes who otherwise could not afford a college education receive athletic scholarships that enable them to obtain a college degree and thereby increase their earning potential. Continuation of such scholarships . . . is dependent upon

[****224] [*103] [***903] The only question remaining pertains not to the right of privacy under the California Constitution but to the [commerce clause of the United States Constitution](#). With careful analysis, the superior court determined that the NCAA drug testing program was not immunized by the federal constitutional provision. After independent review, the Court of Appeal agreed. Having brought the same scrutiny to bear, I come to the same conclusion.

III

In conducting an analysis that is completely novel, the majority adopt what must be termed a balanced approach: they do equal violence to both the law and the facts.

[**700] As to the law. The majority appear to take a position to the following effect: "The 'compelling public need' standard does not exist. If it does exist, it does not apply to nongovernmental actors. If it

continued participation in the intercollegiate athletic program, which in turn requires consent to the drug-testing program. Furthermore, many intercollegiate athletes pursue professional careers as high school or college coaches, or as administrators in athletic or recreational programs. . . . While having participated in intercollegiate athletics may not be a formal requirement for such jobs, it is commonplace that applicants with experience at the intercollegiate athletic level will not be disadvantaged in seeking such jobs in comparison with those who lack such experience." (*University of Colorado v. Derdeyn*, *supra*, 863 P.2d at p. 942.)

Under the Fourth Amendment, a finding on consent is reviewed for substantial evidence (e.g., *People v. James*, *supra*, 19 Cal.3d at p. 107) apparently as the resolution of a question of fact. Under the same constitutional provision, a determination on the possibility of valid consent may arguably be subject to independent review as the resolution of a predominantly legal mixed question of law and fact. It appears that these standards are applicable to the right of privacy as well.

Whether the superior court's statement--" 'Consent' to drug testing in these circumstances is a fiction"--is construed to embody a finding on consent or a determination on the possibility of valid consent would not matter. Such a finding would be supported by substantial evidence; such a determination would survive independent review. (Compare *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at pp. 24-25 [on the facts therein, no valid consent] with *Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at pp. 1046-1052 [on the facts therein, valid consent].)

does apply to such actors, it operates as to them only with regard to autonomy privacy." As will appear, this is not mere "revisionism," but creation *ex nihilo*.

Is it true that the "compelling public need" standard does not exist? No.

The ballot arguments on Proposition 11 establish the "compelling public need" standard. The argument in favor of the measure declares: "The [****225] right of privacy . . . should be abridged only when there is compelling public need." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments [*104] to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27.) The rebuttal to the argument against the measure acknowledges that the right of privacy is "limited," but "limited [only] by 'compelling public necessity'" (, rebuttal to argument against Prop. 11, p. 28.)

The case law is in accord. (See fn. 2, *ante*; see especially [Long Beach City Employees Assn. v. City of Long Beach](#), *supra*, 41 Cal.3d at p. 948 & fn. 12 (dictum); [Conservatorship of Valerie N.](#), *supra*, 40 Cal.3d at p. 164; [People v. Stritzinger](#), *supra*, 34 Cal.3d at p. 511; [Doyle v. State Bar](#), *supra*, 32 Cal.3d at pp. 19-20 (*per curiam*); [City of Santa Barbara v. Adamson](#), *supra*, 27 Cal.3d at pp. 131-134; [Loder v. Municipal Court](#), *supra*, 17 Cal.3d at p. 864; [****226] [White v. Davis](#), *supra*, 13 Cal.3d at pp. 761, 775; [Luck v. Southern Pacific Transportation Co.](#), *supra*, 218 Cal.App.3d at p. 20; [Wilkinson v. Times Mirror Corp.](#), *supra*, 215 Cal.App.3d at p. 1046; [Cutter v. Brownbridge](#), *supra*, 183 Cal.App.3d at p. 843; [***904] [Porten v. University of San Francisco](#), *supra*, 64 Cal.App.3d at p. 832.)

In a word, far from nonexistent, the "compelling public need" standard is actually "existing precedent." ([Luck v. Southern Pacific Transportation Co.](#), *supra*, 218 Cal.App.3d at p. 20.)

It is altogether remarkable that the majority attempt

to deny the existence of the "compelling public need" standard. They are defeated by their own words.

Concerning the coverage of the right of privacy as revealed in the ballot arguments on Proposition 11, the majority conclude: "Reading this language, a reasonable voter would most likely have concluded he or she was casting [****227] a ballot to safeguard his or her personal privacy against private as well as government entities. After the case was so presented, the voters were persuaded. To remove by judicial construction a significant part of what the voters desired would amount to an electoral 'bait and switch.'" (Maj. opn., *ante*, at p. 20, fn. omitted.)

By parity of reasoning, the majority should have arrived at a similar conclusion concerning the "compelling public need" standard as revealed in the ballot arguments on Proposition 11. "Reading this language, a reasonable voter would most likely have concluded he or she was casting a ballot to safeguard his or her personal privacy from abridgment except for compelling public need. After the case was so presented, the voters were persuaded. To remove by judicial construction a significant part of what the voters desired would amount to an electoral 'bait and switch.'" "

Next, is it true that the "compelling public need" standard does not apply to nongovernmental actors? Again, no.

[*105] The ballot arguments on Proposition 11 suggest a single standard for use against all abridgments of the right of privacy, that of "compelling public need." That is [****228] shown above. Further, they make plain that such abridgments may be effected by nongovernmental actors as well as governmental actors. Although they speak much of "government," "tax return[s]," and "drivers' license[s]," they also speak much of "business," "credit card[s]," and "life insurance polic[ies]." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. [**701] (Nov. 7, 1972), argument in

favor of Prop. 11, p. 27.)

Here too, the case law is in accord. (See fn. 2, *ante*; see especially *Luck v. Southern Pacific Transportation Co.*, supra, 218 Cal.App.3d at p. 20; *Porten v. University of San Francisco*, supra, 64 Cal.App.3d at p. 832.)

The majority fabricate three reasons to support a standard for nongovernmental actors lower than that of "compelling public need." None is substantial.

"First, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons." (Maj. opn., *ante*, at p. 38, italics in original.)

The people who voted [****229] for Proposition 11 did not share that view. To judge from the ballot arguments on the measure, they deemed nongovernmental actors to be no less threatening than governmental actors. To quote, informational privacy is guaranteed against the "collecting and stockpiling [of] unnecessary information about us" by "government *and* business interests"; the "proliferation of government *and* business records over which we have no control"; the "loss of control over the accuracy of government *and* business records on individuals"; and the "open[ing]" of a "dossier" and the "sketch[ing]" of an "information profile" by government each "tax return," "job" "interview," and "drivers' license" and the "open[ing]" of a "dossier" *and* the "sketch[ing]" of an "information profile" by business for each "credit card," "life insurance policy," and "job" "interview." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. [***905] (Nov. 7, 1972), argument in favor of Prop. 11, p. 27, italics added.)

But even if the people who voted for Proposition 11 considered governmental actors to be more threatening than nongovernmental actors, such a fact would not matter [****230] for purposes

here. The "compelling public need" standard is applied against *actual abridgments* of the right of privacy, not against *the power to abridge*. Let us assume for argument's sake that [*106] nongovernmental actors possess less of that power. Is that a reason to scrutinize their conduct more tolerantly when they successfully wield whatever power they have to effect an actual abridgment? The question answers itself.

"Second, 'an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government.' " (Maj. opn., *ante*, at p. 38, italics in original.)

That may be. But so what? The fact that an individual may have more freedom with regard to nongovernmental actors may mean that he can more readily consent to conduct on their part that would otherwise have amounted to an abridgment of his right of privacy. But it does *not* mean that the individual should be forced to bear an actual abridgment of his right of privacy with more tolerance simply because it was effected by a nongovernmental actor.

"Third, private conduct, particularly the activities of voluntary associations of persons, carries its [****231] own mantle of constitutional protection in the form of freedom of association." (Maj. opn., *ante*, at p. 39, italics in original.)

What this means is hard to say. It seems to suggest that each and every nongovernmental actor has a "right of privacy" to deny any individual his right of privacy in any circumstance. That cannot be. As a general matter, the recognition of such a "right of privacy" in nongovernmental actors would bestow on them a "right" to conduct themselves with impunity. More particularly, it would grant the NCAA a "right" to watch Stanford student athletes while they urinate. To so transmogrify the right of privacy into a "right of voyeurism" is absurd. (See maj. opn., *ante*, at pp. 35-36 [stating that the "ballot arguments" "do not purport to create any unbridled right of personal freedom of action"].)

Finally, is it true that the "compelling public need" standard operates as to nongovernmental **[**702]** actors only with regard to autonomy privacy? Yet again, no.

As stated, the ballot arguments on Proposition 11 suggest a single standard for use against all abridgments of the right of privacy, that of "compelling public need," and make plain that such abridgments may **[****232]** be effected by nongovernmental actors as well as governmental actors. That is shown above. Further, they demonstrate that such abridgments may involve not only autonomy privacy but also informational privacy and privacy properly **[*107]** so called. For privacy properly so called, they refer simply to the "right to be left alone." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 27.) For informational privacy, they speak again and again of "data," "dossiers," "records," "profiles," "information," etc. (*Id.*, pp. 26-27.) Indeed, it was informational privacy that was the "moving force behind" the measure. (*White v. Davis*, *supra*, 13 Cal.3d at p. 774.)

Here too, the case law is in accord. (See fn. 5, *ante*; see especially *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at pp. 15-20.)

It is plain that the majority's refusal to follow the law is driven by a fear that the "compelling public need" standard is always applicable whenever any right of privacy is asserted **[****233]** and that it is always fatal whenever it is applied. Of course, even if the test were such, it would still have to be employed. But it is not. As explained above, the "compelling public need" standard is triggered only when an *established* right of privacy is **[***906]** abridged. Apparently, a test of reasonableness may be used when such a right is adversely affected short of abridgment. (*Schmidt v. Superior Court*, *supra*, 48 Cal.3d at pp. 389-390; *Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at pp. 1046-1048; *Miller v. Murphy*, *supra*, 143

Cal.App.3d at pp. 343-346.) And obviously, no scrutiny at all is called for when the "right of privacy" is merely fictive. (See *People v. Privitera*, *supra*, 23 Cal.3d at pp. 709-710; but see *id.* at p. 702 [stating that the "appropriate standard of review . . . is the rational basis test"].) Last, and perhaps most **[****234]** important, it must be noted that even within its proper sphere, the "compelling public need" standard is not always fatal. (See *Loder v. Municipal Court*, *supra*, 17 Cal.3d at pp. 864-877.)

The majority's refusal to follow the law does not simply result in the rejection of the "compelling public need" standard, which was intended to make the right of privacy a "legal and enforceable right" (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, p. 26, underscoring omitted) and, unsurprisingly, constituted "existing precedent" until this very day (*Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at p. 20). But even worse, it leads to the stitching together of a kind of "rational basis" test. Such a test is contrary to authority, being appropriate for an interest that is merely legitimate as opposed to a "right" that is truly "fundamental," like the right of privacy. (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, **[****235]** 1972), argument in favor of Prop. 11, p. 27.) Moreover, since it is almost infinitely **[*108]** tolerant of any intrusion no matter how great, it all but renders the right of privacy nugatory.¹⁶

Let us turn from the law to the facts. As the

¹⁶It may be noted in passing that among the "sources of privacy rights" at the time of Proposition 11 (maj. opn., *ante*, at p. 16) the majority do *not* include the right of privacy that we had found implied in the California Constitution in decisions such as *People v. Belous* (1969) 71 Cal.2d 954, 963-964 [80 Cal.Rptr. 354, 458 P.2d 194]. That right embraces the "fundamental right of [a] woman to choose whether to bear children." (*Id.* at p. 963.) I fear that the majority's omission may intimate a willingness on their part to turn back the clock in this regard.

majority eye the goal they have selected, viz., the validation of the NCAA drug testing program, they recognize that the superior court's findings form an [****236] insuperable obstacle [**703] in their course. Only one thing to do: remove the findings by any and every means.

To begin with, say the majority, the superior court's findings fall of their own weight because they are based on an erroneous view of the law.

That is wrong.

We may assume for argument's sake that the superior court's view of the law was in fact erroneous. Of course, in fairness to the superior court we should hasten to add that its error was in adhering to the law as it then stood instead of foreseeing the novelties the majority have today put in its place.

Be that as it may, it is difficult to discern how any error on the part of the superior court could have affected its crucial findings. These concern the establishment of historical or physical facts which underlie such questions as whether there exists a right of privacy on the part of Stanford student athletes that is implicated in the NCAA drug testing program and, if so, whether the right is abridged by the program. On these issues, Hill and McKeever and Stanford bore the burden of proof at trial.

Next, say the majority, even if the superior court's findings do not fall of their own weight as based on an erroneous [****237] view of the law, they lack the support of substantial evidence.

That is wrong as well.

[***907] To avoid extending our discussion beyond need, let us select a single example.

The superior court found: "Direct monitoring of an athlete urinating is not necessary to ensure a valid sample." "It is not necessary to scrutinize the [*109] athletes while urinating." The NCAA had apparently borne the burden of proof on this question. No error there. Even the majority concede

that "[t]he NCAA was . . . required to justify its use of direct monitoring of urination." (Maj. opn., ante, at p. 50.)

How then can the majority assert that this finding was not supported by substantial evidence? Ronald Heitzinger, *one of the NCAA's expert witnesses*, testified that he had heard of a collection device "which is basically a beaker or some kind of receptacle into which the urine sample is placed which contains a thermometer so that you can detect whether or not someone is using their own urine as opposed to trying to cheat [with] someone else's urine[.]" Heitzinger further testified that he himself had "develop[ed] a method for checking [a] urine sample that did not require actually monitoring the person [****238] giving urine" Any claim that evidence of "hearing" is insufficient must fall in the face of evidence of "doing." If Heitzinger's testimony had been open to question, it would surely have been challenged by the NCAA. For at trial the NCAA bore a burden of proof to the contrary.

But even if the superior court's findings lacked the support of substantial evidence--which they do not--the majority are not justified in reversing the judgment of the Court of Appeal with directions to remand to the superior court *with directions to render judgment in favor of the NCAA*.

The majority state: "Although we could remand this case for reconsideration in light of the applicable rules of law, there is no reason to do so. Uncontradicted evidence in the record demonstrates as a matter of law the constitutional validity of the NCAA's program." (Maj. opn., ante, at p. 47.)

According to the majority, the "evidence in the record" was developed under burdens of proof that they now hold erroneous, burdens of proof that they now conclude call for too much from the NCAA and too little from Hill and McKeever and Stanford.

In such a situation, how can the "evidence in the record" be relied [****239] on to the detriment of

Hill and McKeever and Stanford? Without any fault on their part, they satisfied the demands placed on them by the superior court. Why do the majority not give them an opportunity to meet the much greater requirements they now impose on them for the first time? It must be that they recognize this controlling fact: under what they today make the "applicable rules of law," privacy claims are practically doomed to fail. Nevertheless, fairness insists on an opportunity. It should not be denied.

[*110] [704] IV**

Today, the majority take away from Stanford student athletes--and all other Californians--the right of privacy guaranteed by the California Constitution. At the same time, they grant to the NCAA--and any other intruding party--a "right of publicity" based on nothing more than their own views of "good" and "bad" "policy."

The NCAA is now free to use in California the weapons it had chosen for its "war on drugs." "What better way to show that" it "is serious about its 'war on drugs' than to subject" student athletes "to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious . . . [****240] harm resulting from" student athlete "drug use, but it will show to the world that" it "is 'clean,' and--most important of all--will demonstrate" its "determination . . . to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for [a] worthy . . . cause . . . , cannot" justify an abridgment of the right of privacy. ([*Treasury Employees \[***908\] v. Von Raab, supra, 489 U.S. at pp. 686-687 \[103 L.Ed.2d at pp. 715-716\]*](#) (dis. opn. of Scalia, J.).)

Accordingly, I dissent.



In re Marriage of Arceneaux

Supreme Court of California

December 13, 1990

No. S010627

Reporter

51 Cal. 3d 1130 *; 800 P.2d 1227 **; 275 Cal. Rptr. 797 ***; 1990 Cal. LEXIS 5325 ****; 90 Cal. Daily Op. Service 9056; 90 Daily Journal DAR 14189

In re the Marriage of GLORIA S. and JOHN V. ARCENEUX. GLORIA S. ARCENEUX, Respondent, v. JOHN V. ARCENEUX, Appellant

Subsequent History: [****1] Appellant's petition for a rehearing was denied February 20, 1991.

Prior History: Superior Court of Los Angeles County, No. D119019, Richard E. Denner, Judge.

Disposition: The judgment of the Court of Appeal is affirmed.

Core Terms

trial court's attention, statement of decision, trial court, prevailing party, implied finding, ambiguity, omission, appellate court, special finding, waive, tentative decision

Case Summary

Procedural Posture

Appellant husband sought review of the decision of Superior Court of Los Angeles County (California), which found that the trial court had found in favor of respondent wife as to all issues not addressed in the trial court's statement of decision and that appellant had waived any deficiencies in the statement of decision.

Overview

In a dissolution action involving appellant husband, the trial court orally announced its intended decision. Appellant filed a request for a statement of decision a few days later, and the trial court ordered respondent wife to prepare the statement. Thereafter, respondent served on appellant a proposed statement of decision, and the trial court signed it after making a few modifications. Appellant failed to object to either the proposed statement or the final statement, nor did he move for a new trial under [Cal. Civ. Proc. Code § 657](#) or to vacate the judgment. The appellate court held that appellant had waived his reliance on the alleged deficiencies on appeal because he had not brought them to the attention of the trial court. The court affirmed holding that *Cal. Civ. Proc. Code* §§ 632 and [634](#) provided that a statement of decision must have been rendered at the request of a party, explaining the factual and legal basis for the trial court's decision on the issues specified by that party, and that if the statement failed to resolve a controverted issue or was ambiguous the defects must have been brought to the trial court's attention to avoid presumptions in favor of the judgment.

Outcome

The trial court's decision in favor of respondent wife as the prevailing party on all issues not addressed in the trial court's statement of decision was affirmed because appellant husband waived the right to complain of deficiencies in the statement of decision.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From
Judgments > Altering & Amending Judgments

HN1 Relief From Judgments, Altering & Amending Judgments

Cal. R. Ct. 232(d) provides for the filing of objections to a proposed statement of decision as follows: Any party affected by the judgment may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment. Cal. R. Ct. 232(f) states that the court may order a hearing on proposals or objections to a proposed statement of decision or the proposed judgment if a statement of decision is not required.

Civil Procedure > Appeals > Standards of
Review > General Overview

Evidence > Inferences &
Presumptions > General Overview

HN2 Appeals, Standards of Review

A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.

Civil Procedure > Judgments > Relief From
Judgments > Altering & Amending Judgments

Evidence > Inferences &
Presumptions > General Overview

HN3 Relief From Judgments, Altering & Amending Judgments

Cal. Civ. Proc. Code §§ 632 and [634](#) set forth the means by which to avoid application of inferences in favor of the judgment. When the court announces its tentative decision, a party may, under § 632, request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which the party is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement. Thereafter, under [§ 634](#), the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. [§ 634](#) declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party.

Civil Procedure > Judgments > Relief From
Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions > Preservation for
Review

HN4 Relief From Judgments, Altering & Amending Judgments

The clear implication of [Cal. Civ. Proc. Code § 634](#) is that if a party does not bring deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, [§ 634](#) clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in *Cal. Civ. Proc. Code* § 632.

Governments > Courts > Court Records

HN5 Courts, Court Records

51 Cal. 3d 1130, *1130; 800 P.2d 1227, **1227; 275 Cal. Rptr. 797, ***797; 1990 Cal. LEXIS 5325, ****1

See *Cal. Civ. Proc. Code* § 632.

Governments > Courts > Court Records

HN6 Courts, Court Records

See [Cal. Civ. Proc. Code § 634](#).

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN7 Relief From Judgments, Motions for New Trials

[Cal. Civ. Proc. Code § 657](#) sets forth the standards and procedure for motions for new trial, and [Cal. Civ. Proc. Code § 663](#) states the grounds on which a motion to vacate a judgment may be granted.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Evidence > Inferences & Presumptions > General Overview

HN8 Relief From Judgments, Altering & Amending Judgments

A party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision, *Cal. Civ. Proc. Code* § 632; if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment. [Cal. Civ. Proc. Code § 634](#).

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN9 Relief From Judgments, Altering & Amending Judgments

If a party is not required to challenge the findings of the trial court but may simply rely on the fact that the court asked to find on a particular issue, [Cal. Civ. Proc. Code § 634](#) becomes a nullity.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a proceeding for dissolution of marriage, the husband filed a request for a statement of decision, but he failed to object to either the proposed statement or the final statement, and he did not move for a new trial or to vacate the judgment. (Superior Court of Los Angeles County, No. D119019, Richard E. Denner, Judge.) The Court of Appeal, Second Dist., Div. Seven, No. B022753, refused to entertain the husband's objections to deficiencies in the trial court's statement, concluding that the husband had waived his reliance on the alleged deficiencies on appeal by failing to bring them to the attention of the trial court, and affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that the Court of Appeal was permitted to make implied findings in favor of the wife, since the husband waived his right to complain of alleged deficiencies in the trial court's statement of decision by failing to bring such errors to the trial court's attention. The court held that the clear implication of [Code Civ. Proc., § 634](#) (party must state any objections to statement of decision in order to avoid implied finding on appeal in favor of prevailing party), is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the

statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Further, [Code Civ. Proc., § 634](#), clearly refers to a party's need to point out deficiencies in the trial court's statement as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in *Code Civ. Proc.*, § 632. Thus, the court held, the husband's request for a statement of decision as to certain issues was not, by itself, sufficient to bar the appellate court from drawing inferences in favor of the wife. (Opinion by Mosk, J., expressing the unanimous view of the court.)

Headnotes

[CA\(1\)](#) (1)

Appellate Review § 135—Presumptions—Correctness of Trial Court's Judgment.

--A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.

[CA\(2\)](#) (2)

Appellate Review § 48—Presenting and Preserving Questions in Trial Court—Findings—Deficiencies in Statement of Decision—Waiver.

--On appeal from a judgment of dissolution of marriage, the Court of Appeal properly made implied findings in favor of the prevailing party (the wife), since the husband waived his right to complain of alleged deficiencies in the trial court's statement of decision by failing to bring such errors to the trial court's attention. The clear implication of [Code Civ. Proc., § 634](#) (party must state any objection to statement of decision in order to avoid implied finding on appeal in favor of prevailing party), is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the

statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Further, [Code Civ. Proc., § 634](#), clearly refers to a party's need to point out deficiencies in the trial court's statement as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in *Code Civ. Proc.*, § 632. Thus, the husband's request for a statement of decision as to certain issues was not, by itself, sufficient to bar the appellate court from drawing inferences in favor of the wife. (Disapproving [McCurter v. Older \(1985\) 173 Cal. App.3d 582 \[219 Cal. Rptr. 104\]](#); [Employers Casualty Co. v. Northwestern Nat. Ins. Group \(1980\) 109 Cal. App.3d 462 \[167 Cal. Rptr. 296\]](#); [Danning v. Bank of America \(1984\) 151 Cal. App.3d 961 \[199 Cal. Rptr. 163\]](#); and [Lynch v. Cook \(1983\) 148 Cal. App.3d 1072 \[196 Cal. Rptr. 544\]](#), to the extent they hold to the contrary.)

[See 7 **Witkin**, Cal. Procedure (3d ed. 1985) Trial, § 389.]

Counsel: Carl I. Leibovitz, John V. Spilker and Jerrold S. Gross for Appellant.

Ivie & McNeill, Inc., Robert H. McNeill, Jr., and Michael J. Rand for Respondent.

Judges: Opinion by Mosk, J., expressing the unanimous view of the court. Lucas, C. J., Broussard, J., Panelli, J., Eagleson, J., Kennard, J., and Arabian, J., concurred.

Opinion by: MOSK

Opinion

[*1132] [**1227] [***797] Does a litigant who fails to bring to the attention of the trial court alleged deficiencies in the court's statement of decision waive the right to complain of such errors on appeal, thereby allowing the appellate court to make implied findings in favor of the prevailing party? We conclude that a waiver occurs in these circumstances pursuant to [section 634 of the Code](#)

[of Civil Procedure](#), and therefore affirm the judgment of the Court of Appeal.

In a dissolution action, the trial court orally announced its intended decision on January 28, 1986. Husband [****2] filed a request for a statement of decision a few days later, and the court ordered wife to prepare the statement. Thereafter, wife served on husband a proposed statement of decision, and the court signed it after making a few modifications. Husband failed to object to [**1228] [***798] either the proposed statement¹ or the final statement, nor did he move for a new trial (*Code Civ. Proc.*, § 657)² or move to vacate the judgment (§ 663).

[****3] On appeal, husband asserted that the statement failed to decide two matters on which a decision was requested, and that it was deficient in three other respects.³ The Court of Appeal refused to entertain these objections on the ground that husband had waived his reliance on the alleged

deficiencies [*1133] on appeal because he had not brought them to the attention of the trial court. Thus, the Court of Appeal inferred that the trial court decided in favor of wife as the prevailing party on any issue not addressed in the statement.

[****4] [CA\(1\) \(1\) HN2](#) A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. (*Aceves v. Regal Pale Brewing Co. (1979) 24 Cal.3d 502, 507 [156 Cal. Rptr. 41, 595 P.2d 619]*; *Munoz v. Olin (1979) 24 Cal.3d 629, 635-636 [156 Cal. Rptr. 727, 596 P.2d 1143]*; *Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925 [101 Cal. Rptr. 568, 496 P.2d 480].*)

[HN3](#) Sections 632 and [634](#) (both as amended in 1981) set forth the means by which to avoid application of these inferences in favor of the judgment. When the court announces its tentative decision, a party may, under section 632, request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which the party is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement.⁴ [****6] Thereafter, under [section 634](#),

¹ [HN1](#) Rule 232(d) of the California Rules of Court provides for the filing of objections to a proposed statement of decision as follows: "Any party affected by the judgment may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment."

Subdivision (f) of that rule states, "The court may order a hearing on proposals or objections to a proposed statement of decision or the proposed judgment if a statement of decision is not required."

² All further code references are to the Code of Civil Procedure unless otherwise noted.

³ Husband asked the trial court to determine whether the community had an interest in certain real property in Texas. The court's response was to hold that the property was to be partitioned equally between husband and wife, who were to hold it as tenants in common until the property was sold. Husband claims this statement was unresponsive to the request.

Another alleged omission in the statement of decision is the court's response to husband's request that it determine whether there was any community indebtedness with respect to the property, and if so in what amount, in the event the court found there was a community interest. The court's response was "None."

The three matters as to which husband claims the statement failed to explain the court's tentative decision relate to shares of stock that the court found were partially community property.

⁴ [HN5](#) Section 632 provides: "In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

"The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties."

the party must state any objection to the statement in order to avoid an implied finding on appeal in favor [****5] of the prevailing party.⁵ The section [**1229] [***799] declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. [HN4 CA\(2\) \(2\)](#) The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, [*1134] that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment. Furthermore, [section 634](#) clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in [section 632](#).

The statutes thus describe a two-step process: first, [HN8](#) a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision (§ 632); second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment ([§ 634](#)). The section does not specify the particular [****7] means that the party may use to direct the court's attention to the claimed defects in the statement.

In the case at bar husband essentially asserts that he was required to fulfill only the first step of this process, and that his request for a statement of

decision as to certain issues was sufficient to bar the appellate court from drawing inferences in favor of wife even though he failed to bring the purported deficiencies in the statement to the trial court's attention.

In making this contention, however, husband does not address the express requirement of [section 634](#) that a litigant point out deficiencies in the statement of decision. Instead, he relies on language in cases decided largely under prior versions of [sections 632](#) and [634](#), which he asserts hold that an appellate court cannot draw the inference referred to in [section 634](#) if a party *either* requested a statement of decision on an issue *or* challenged the ensuing statement itself.

The contention is without merit. Husband has apparently lost sight of the fact that the requirement of [section 634](#) is that a claimed deficiency *in the statement of decision* must be brought to the trial court's attention. A party [****8] who asks only that the court explain its tentative decision by requesting a statement as to a particular issue obviously has not fulfilled this requirement. If husband's assertion were correct, the requirement of [section 634](#) that errors or omissions in a statement of decision must be brought to the trial court's attention would be nullified.

Most of the cases on which husband relies were decided before 1981, at a time when [section 632](#) provided that findings of fact and conclusions of law [*1135] must be made at the request of a party. At that time [section 634](#) provided that if "the court has not made findings as to all facts necessary to support the judgment or a finding on a material issue of fact is ambiguous or conflicting, *and . . . such omission, ambiguity or conflict was brought to the attention of the trial court* either prior to entry of judgment or in conjunction with a motion under [Section 657](#) or [663](#)," the inference in favor of the prevailing party would not be drawn on appeal. (Stats. 1968, ch. 716, § 2, p. 1418, italics added.) This version of [section 634](#), like the current one, requires that omissions or ambiguities in the

⁵ [HN6 Section 634](#) provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under [Section 657](#) or [663](#), it shall not be inferred on appeal or upon a motion under [Section 657](#) or [663](#) that the trial court decided in favor of the prevailing party as to those facts or on that issue."

[HN7 Section 657](#) sets forth the standards and procedure for motions for new trial, and [section 663](#) states the grounds on which a motion to vacate a judgment may be granted.

findings (now, statement of decision) be [****9] brought to the trial court's attention if the inference in favor of the judgment is to be avoided.

With a few exceptions, the authorities relied on by husband cite [section 634](#) and declare that if a special finding is not requested, an implied finding supporting the judgment will be made. (E.g., [Rees v. Department of Real Estate \(1977\) 76 Cal. App.3d 286, 291 \[142 Cal. Rptr. 789\]](#) ["In interpreting the language of [Code of Civil Procedure section 634](#), it has been held that a failure to file objections or counterfindings, [**1230] [***800] or to request special findings as therein provided, constitutes a waiver of any claim that such findings are not sufficiently specific."]; [In re Marriage of Dawley \(1976\) 17 Cal.3d 342, 354 \[131 Cal. Rptr. 3, 551 P.2d 323\]](#) ["The issue of whether or not undue influence has been exerted frames a question of fact [citations]; the trial court in the instant case, however, rendered no finding on that issue. Since [wife] did not invoke her right to request a special finding (see [Code Civ. Proc., § 634](#)), we may resort to an implied finding to uphold the judgment."]; [Banville v. Schmidt \(1974\) 37 Cal. App.3d 92, 102 \[112 Cal. Rptr. 126\]](#) [****10] ["no attempt was made by [defendant] to request a special finding or otherwise to bring to the attention of the trial court any omission or ambiguity in the trial court's determination of [defendant's] negligence. ([Code Civ. Proc., § 634](#) . . ."); [Associated Creditors' Agency v. Dunning Floor Covering, Inc. \(1968\) 265 Cal. App.2d 558, 559 \[71 Cal. Rptr. 494\]](#) ["since none of the parties objected to the findings or conclusions of the court nor requested specific findings, we must resolve all conflicts and ambiguities in the findings in support of the judgment"].)

These references to a "special finding" or a "specific finding" do not support husband's assertion that a request to the trial court to render a statement of decision on an issue is sufficient to satisfy the requirements of [section 634](#). A "special finding" in the present context is a finding on an issue necessary to support the judgment. ([South](#)

[Bay Irr. Dist. v. California-American Water Co. \(1976\) 61 Cal. App.3d 944, 994 \[133 Cal. Rptr. 166\]](#).) As used in the cases cited, the term "special finding" describes one means by which deficiencies in the findings [****11] may be brought to the trial court's [*1136] attention, i.e., by a request for findings necessary to support the judgment that embody the views of the party proposing the findings. None of the cases even remotely suggests that, as a means of avoiding the inference, a litigant may choose between making an initial request for a finding on an issue and calling the trial court's attention to defects in the findings. Indeed, by their reliance on [section 634](#), which clearly required that defects in the findings be raised in the trial court, these cases stand for the proposition that failure to raise such defects results in drawing the inference in favor of the prevailing party. As pointed out above, [HN9](#) if a party is not required to challenge the findings of the trial court but may simply rely on the fact that the court asked to find on a particular issue, [section 634](#) becomes a nullity.

Our holding in [Guardianship of Brown \(1976\) 16 Cal.3d 326 \[128 Cal. Rptr. 10, 546 P.2d 298\]](#), illustrates the application of [section 634](#) as it read during the period in question. Husband cites the case for the proposition that the failure of the trial court to find [****12] on a material issue ordinarily constitutes reversible error. But the context in which this statement was made supports our conclusion. There the appellant claimed on appeal that the court failed to make findings regarding certain issues. She objected to the proposed findings, proposed her own counterfindings, and requested specific findings on certain issues. Quoting [section 634](#), we held that the inference in favor of the judgment may not be invoked "when the complaining party has made known to the trial court his claim as to the inadequacy of the findings." ([16 Cal.3d at p. 333](#).) We concluded, therefore, that we would not imply a determination in favor of the prevailing party regarding the issues omitted in the findings.

Other decisions also hold that omissions in the

findings or statement of decision must be brought to the attention of the trial court to avoid the inference on appeal. ([*In re Marriage of Neal* \(1984\) 153 Cal. App.3d 117, 127 \[200 Cal. Rptr. 341\]](#); [*Ripani v. Liberty Loan Corp.* \(1979\) 95 Cal. App.3d 603, 614 \[157 Cal. Rptr. 272\]](#); [*Rees v. Department of Real Estate, supra*, 76 Cal. App.3d 286, 291.](#)) [****13]

Sections 632 and [634](#) were amended in 1981 to provide respectively, as they do now, that a statement of decision must be rendered at the request of a party, explaining the factual and legal basis for the court's decision on the issues specified by [**1231] [***801] that party, and that if the statement fails to resolve a controverted issue or is ambiguous the defects must be brought to the court's attention to avoid presumptions in favor of the judgment.

[*1137] Husband cites two cases, one decided just before the 1981 amendment and one after it, in support of his claim that he was not required to object to the statement in order to complain of its deficiencies on appeal. These cases hold that the fact a litigant did not object to the findings or statement of decision in the trial court does not waive a claim of error based on the court's failure to find on a material issue. ([*McCurter v. Older* \(1985\) 173 Cal. App.3d 582, 594 \[219 Cal. Rptr. 104\]](#); [*Employers Casualty Co. v. Northwestern Nat. Ins. Group* \(1980\) 109 Cal. App.3d 462, 474 \[167 Cal. Rptr. 296\].](#))

Neither decision provides persuasive authority for husband's contention. [****14] First, neither discusses or even cites [section 634](#), which provides for just such a waiver. Second, the cases rely on older authorities ([*Sharove v. Middleman* \(1956\) 146 Cal. App.2d 199, 202-203 \[303 P.2d 900\]](#); [*San Jose etc. Title Ins. Co. v. Elliott* \(1952\) 108 Cal. App.2d 793, 802-803 \[240 P.2d 41\]](#)) which were decided at a time when [section 632](#) required findings of fact and conclusions of law to be made unless waived (Stats. 1933, ch. 744, § 105, p. 1876), and when [section 634](#) had no provision

requiring a challenge to the findings as a condition of avoiding inferences in favor of the judgment (Stats. 1933, ch. 744, § 106, pp. 1876-1877). During that period, no objection to findings and conclusions was necessary because they were deemed excepted to by statute. ([*San Jose etc. Title Ins. Co. v. Elliott, supra*, at p. 802.](#)) Thus, the statements in these older cases merely reflected the prevailing law at the time, a rule abrogated by the present version of [section 634](#). Insofar as [*McCurter v. Older, supra*, 173 Cal. App.3d 582, 594](#), and [*Employers Casualty Co. v. Northwestern Nat. Ins. Group, supra*, 109 Cal. App.3d 462, 474](#), [****15] can be read to hold that a party who fails to bring to the attention of the trial court an omission or ambiguity in its statement of decision may nevertheless avoid the presumptions in favor of the judgment, they are disapproved.

Two additional cases, although decided after the amendment of [sections 632](#) and [634](#) in 1981, appear to apply the pre-1981 version of these statutes, inasmuch as they refer to "findings" rather than to a statement of decision. These opinions declare: "When findings on material subsidiary issues of fact are requested or when the omission of such findings is brought to the trial court's attention prior to entry of judgment, the trial court is required to make such findings. If it does not do so, it cannot be inferred on appeal that the trial court found in favor of the prevailing party on the issues covered by the requested findings. ([Code Civ. Proc., § 634 . . .](#))" (Italics added, internal quotation marks omitted.) ([*Danning v. Bank of America* \(1984\) 151 Cal. App.3d 961, 972 \[199 Cal. Rptr. 163\]](#), quoting [*Lynch v. Cook* \(1983\) 148 Cal. App.3d 1072, 1080 \[196 Cal. Rptr. 544\]](#).) Husband relies [****16] on use of the [*1138] disjunctive in the quoted passage as supporting his claim that a party may either request findings before any are rendered or object to findings thereafter, in order to avoid the inference.

This statement is mere dictum in both cases. If the quoted language means that a litigant may avoid the presumption merely by asking for findings on an

issue without challenging the findings when actually made, we disapprove it, because such an interpretation is contrary to [section 634](#).

Our conclusion is not only compelled by the language of [section 634](#), it also represents sound policy. As the Court of Appeal pointed out in its opinion below, it would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial. (See, e.g., *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [588 P.2d 1261]; see cases collected in 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 311, p. 321.) In the present case, for example, husband claims that the trial **[**1232]** **[****17]** **[***802]** court's ruling as to one of the issues on which he requested a statement of decision was "unresponsive." It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal.

Husband denies that his attorney was aware of the claimed deficiencies in the findings and deliberately failed to bring them to the trial court's attention. Even assuming the failure was inadvertent, the consequence of a holding that a party is not required to raise defects in the trial court's statement would be to delay the final settlement of a dispute because, as the Court of Appeal pointed out, "a losing litigant can delay the process by appealing the statement on procedural grounds, wait for the appellate court to remand for a proper statement, and then finally appealing any substantive claims." We must avoid if possible a construction of [section 634](#) that could have this undesirable result. Fortunately, in the present case the language of the statute and most of the decisions construing it coincide with the policy of fairness and expeditious determination of appeals.⁶

⁶Husband also complains that the Court of Appeal did not address his contention that the evidence was insufficient to support the

[**18]** **[*1139]** The judgment of the Court of Appeal is affirmed.

End of Document

determination in the statement of decision, thereafter embodied in the judgment, that the community had an interest in certain real property in Texas. But as noted above (fn. 3, *ante*), the trial court did not expressly make such a determination, and its omission to do so is among the points that we now hold has been waived by husband's failure to object to the statement of decision in timely fashion.



Positive

As of: October 18, 2026 6:38 AM Z

In re Marriage of Balcof

Court of Appeal of California, Fourth Appellate District, Division Three

August 15, 2006, Filed

G035868

Reporter

141 Cal. App. 4th 1509 *; 47 Cal. Rptr. 3d 183 **; 2006 Cal. App. LEXIS 1252 ***; 2006 Cal. Daily Op. Service 7524; 2006 Daily Journal DAR 10762

In re Marriage of RALPH and KATHLEEN
BALCOF. RALPH BALCOF, Respondent, v.
KATHLEEN BALCOF, Appellant.

Subsequent History: Rehearing denied by [Balcof v. Balcof, 2006 Cal. App. LEXIS 1412 \(Cal. App. 4th Dist., Sept. 7, 2006\)](#)

Review denied by [In re Balcof, 2006 Cal. LEXIS 13551 \(Cal., Nov. 15, 2006\)](#)

Prior History: [***1] Superior Court of Orange County, No. 00D001015, Gary P. Ryan, Judge. (Retired judge of the Orange County Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

[In re Marriage of Balcof, 2004 Cal. LEXIS 1325 \(Cal., Feb. 18, 2004\)](#)

Disposition: Affirmed.

Case Summary

Procedural Posture

Appellant wife sought review of a judgment and order from the Superior Court of Orange County (California), which ruled, in a divorce proceeding, that a document transferring property to the wife from respondent husband was unenforceable by reason of duress and undue influence. The trial court denied the wife's new trial motion.

Overview

The husband presented evidence that the wife yelled at him, struck him, and threatened to keep the children away from him. The wife denied that she had done so. The court noted that the wife could not challenge a prior appellate ruling because the court had no power to review a prior final decision, as provided in Cal. Rules of Court, rules 24(b), 25(a). In accordance with [Fam. Code, § 721, subd. \(b\)](#), when one spouse secured an advantage from an interspousal transaction, a statutory presumption arose that the advantaged spouse exercised undue influence, and the transaction had to be set aside. Substantial evidence supported the trial court's implied finding that the wife did not rebut the presumption by a preponderance of the evidence. Moreover, the husband met his burden to demonstrate duress under [Civ. Code, § 1569](#), by a preponderance of the evidence. Duress excused the husband's failure to rescind promptly, as provided in [Civ. Code, § 1691](#), and the wife did not show prejudice from the delay under [Civ. Code, § 1693](#). Any evidentiary errors were harmless under the circumstances. The trial court's statement of decision was adequate under *Code Civ. Proc.*, § 632.

Outcome

The court affirmed the judgment and affirmed the order that denied the new trial motion.

LexisNexis® Headnotes

Civil Procedure > Appeals > Rehearings in Appellate Courts

HN1 When an opinion is a final decision of an appellate court, the appellate court has no power to review it. Cal. Rules of Court, rules 24(b), 25(a).

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN2 Under the law of the case doctrine, the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Family Law > Marital Duties & Rights > Property Rights > General Overview

HN3 According to *Fam. Code, § 721, subd. (b)*, husbands and wives are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. If one spouse secures an advantage from an interspousal transaction, a statutory presumption arises under *§ 721* that the advantaged spouse exercised undue influence and the transaction will be set aside. Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview
Evidence > Inferences &

Presumptions > Presumptions > Rebuttal of Presumptions

Family Law > Marital Duties & Rights > Property Rights > General Overview

HN4 The burden of rebutting the presumption of undue influence in an interspousal transaction is on the spouse who acquired an advantage or benefit from the transaction. Consequently, it is that spouse's burden to establish that the other spouse's signing of the writing was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the property separate property. It is that spouse's burden to rebut the presumption by a preponderance of the evidence.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN5 Consent is not free when obtained through duress, menace, or undue influence.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

HN6 Lack of independent advice is a factor to be weighed in determining if a party acted voluntarily and with understanding of a transaction.

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN7 The power of a reviewing court begins and ends with a determination of whether there is in the record substantial evidence, contradicted or uncontradicted, which supports the result reached; and the reviewing court must also assume in favor of the determination below the existence of every fact which the trier of facts could have reasonably deduced from the evidence.

Contracts Law > ... > Affirmative
 Defenses > Coercion & Duress > General Overview
 Evidence > Burdens of Proof > Preponderance of
 Evidence

[HN8 Evid. Code, § 115](#), provides for three burdens of proof. Except as otherwise provided by law, issues of fact are determined by a preponderance of the evidence. The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. Preponderance of the evidence results in the roughly equal sharing of the risk of error. To impose any higher burden of proof demonstrates a preference for one side's interests. Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake. When the risk of the loss of an economic interest is compared with the interests at stake in cases applying the clear and convincing standard, it falls short. All involve interests more substantial than the mere loss of money. Where the interests at stake are the same for both parties and the interests involved are economic, the parties should share the risk of error roughly equally. The preponderance of the evidence standard is sufficient to demonstrate duress.

Contracts Law > ... > Affirmative
 Defenses > Coercion & Duress > General Overview

[HN9](#) The stringent definition of duress contained in [Civ. Code, § 1569](#), codifying the early common law rule, has been relaxed. Under the modern rule, duress, which includes whatever destroys one's free agency and constrains him or her to do what is against his or her will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party intentionally used threats or pressure to induce action or nonaction to the other party's detriment. The coercion must induce the

assent of the coerced party, who has no reasonable alternative to succumbing.

Contracts Law > Remedies > Rescission &
 Redhibition > General Overview

[HN10](#) See [Civ. Code, § 1691](#).

Contracts Law > Remedies > Rescission &
 Redhibition > General Overview

[HN11](#) See [Civ. Code, § 1693](#).

Contracts Law > Remedies > Rescission &
 Redhibition > General Overview

[HN12](#) A plain reading of [Civ. Code, § 1691](#), indicates that a party seeking to rescind must do so promptly, as long as he or she is free from duress, menace or undue influence or disability. Moreover, under [Civ. Code, § 1693](#), any delay in promptly providing a notice of rescission does not preclude relief, unless the opposing party is substantially prejudiced by the delay.

Civil Procedure > Appeals > Standards of
 Review > Abuse of Discretion

Evidence > Admissibility > Procedural
 Matters > Rulings on Evidence

[HN13](#) An abuse of discretion standard applies to the admission of evidence.

Civil Procedure > ... > Standards of
 Review > Harmless & Invited Errors > Harmless
 Error Rule

[HN14](#) In the event of error, the error is not reversible unless it is reasonably probable a result more favorable to the appellant would have been reached absent the error.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Standards of

Review > Harmless & Invited Errors > Harmless
Error Rule

HN15 In rendering a statement of decision under *Code Civ. Proc.*, § 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. A failure to find on an immaterial issue is not error. The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis of the court's decision regarding the principal controverted issues at trial as are listed in the request.

Civil Procedure > ... > Standards of

Review > Substantial Evidence > Sufficiency of
Evidence

HN16 Appellate courts do not reweigh evidence or reassess the credibility of witnesses. Put another way, a court of appeal is not a second trier of fact.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ruled, in a divorce proceeding, that a document transferring property to the wife from the husband was unenforceable by reason of duress and undue influence. The trial court also denied the

wife's new trial motion. The husband presented evidence that the wife yelled at him, struck him, and threatened to keep the children away from him. The wife denied that she had done so. (Superior Court of Orange County, No. 00D001015, Gary P. Ryan, Judge. *)

The Court of Appeal affirmed the judgment and affirmed the order that denied the new trial motion. The court noted that the wife could not challenge a prior appellate ruling because the court had no power to review a prior final decision, as provided in Cal. Rules of Court, rules 24(b), 25(a). In accordance with *Fam. Code, § 721, subd. (b)*, when one spouse secured an advantage from an interspousal transaction, a statutory presumption arose that the advantaged spouse exercised undue influence, and the transaction had to be set aside. Substantial evidence supported the trial court's implied finding that the wife did not rebut the presumption by a preponderance of the evidence. Moreover, the husband met his burden to demonstrate duress under *Civ. Code, § 1569*, by a preponderance of the evidence. Duress excused the husband's failure to rescind promptly, as provided in *Civ. Code, § 1691*, and the wife did not show prejudice from the delay under *Civ. Code, § 1693*. Any evidentiary errors were harmless under the circumstances. The trial court's statement of decision was adequate under *Code Civ. Proc.*, § 632. (Opinion by Moore, J., with Sills, P. J., and Fybel, J., concurring.) [***1510**]

Headnotes

CA(1) (1)

Appellate Review § 125—Calendars and Hearings—Rehearing—Final Decisions.

When an opinion is a final decision of an appellate court, the appellate court has no power to review it

* Retired judge of the former Municipal Court for the Central Orange County Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

(Cal. Rules of Court, rules 24(b), 25(a)).

CA(2) (2)

Appellate Review § 156—Scope of Review— Successive Appeals and Law of the Case—Rule Necessary to Decision.

Under the law of the case doctrine, the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.

CA(3) (3)

Husband and Wife § 23—Property—Transactions Between Spouses—Presumption of Undue Influence.

According to Fam. Code, § 721, subd. (b), husbands and wives are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. If one spouse secures an advantage from an interspousal transaction, a statutory presumption arises under § 721 that the advantaged spouse exercised undue influence and the transaction will be set aside. Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits.

CA(4) (4)

Husband and Wife § 23—Property—Transactions Between Spouses—Presumption of Undue Influence—Rebuttal.

The burden of rebutting the presumption of undue influence in an interspousal transaction is on the spouse who acquired an advantage or benefit from the transaction. Consequently, it is that spouse's burden to establish that the other spouse's signing

of the writing was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the property separate property. It is that spouse's burden to rebut the presumption by a preponderance of the evidence.

[*1511] CA(5) (5)

Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence— Nature of Consent.

Consent is not free when obtained through duress, menace, or undue influence.

CA(6) (6)

Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence— Lack of Independent Advice.

Lack of independent advice is a factor to be weighed in determining if a party acted voluntarily and with understanding of a transaction.

CA(7) (7)

Husband and Wife § 23—Property—Transactions Between Spouses—Presumption of Undue Influence.

Substantial evidence supported the trial court's determination in a divorce proceeding that the husband's version of events was more credible, that the husband did not freely and voluntarily execute a writing transferring assets to the wife, that the husband did not understand the legal significance of his execution of the writing, and that the wife did not meet her burden to rebut the presumption of undue influence by a preponderance of the evidence. Consequently, the writing was unenforceable as the product of undue influence.

[11 Witkin, Summary of Cal. Law (10th ed. 2005)]

Community Property, § 133.]

CA(8) (8)

Contracts § 5—Consent—Effect of Duress—Burden of Proof.

Evid. Code, § 115, provides for three burdens of proof. Except as otherwise provided by law, issues of fact are determined by a preponderance of the evidence. The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. “Preponderance of the evidence” results in the roughly equal sharing of the risk of error. To impose any higher burden of proof demonstrates a preference for one side’s interests. Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake. When the risk of the loss of an economic interest is compared with the interests at stake in cases applying the clear and convincing standard, it falls short. All involve interests more substantial than the mere loss of money. Where the interests at stake are the same for both [*1512] parties and the interests involved are economic, the parties should share the risk of error roughly equally. The preponderance of the evidence standard is sufficient to demonstrate duress.

CA(9) (9)

Contracts § 5—Consent—Effect of Duress—Threats or Other Coercion.

The stringent definition of duress contained in Civ. Code, § 1569, codifying the early common law rule, has been relaxed. Under the modern rule, duress, which includes whatever destroys one’s free agency and constrains him or her to do what is against his or her will, may be exercised by threats,

importunity or any species of mental coercion. It is shown where a party intentionally used threats or pressure to induce action or nonaction to the other party’s detriment. The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing.

CA(10) (10)

Contracts § 39—Alteration and Extinction—Rescission—Delay.

A plain reading of Civ. Code, § 1691, indicates that a party seeking to rescind must do so promptly, as long as he or she is free from duress, menace or undue influence or disability. Moreover, under Civ. Code, § 1693, any delay in promptly providing a notice of rescission does not preclude relief, unless the opposing party is substantially prejudiced by the delay.

CA(11) (11)

Judgments § 107—Pleading and Proof—Findings—Statement of Decision.

In rendering a statement of decision under *Code Civ. Proc.*, § 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court’s determination would reversible error result. Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party’s favor which would have the effect of countervailing or destroying other findings. A failure to find on an immaterial issue is not error. The trial court need not discuss each question listed in a party’s request; all that is required is an explanation of the factual and legal basis of the court’s decision regarding the principal controverted issues at trial as are listed in the request.

[*1513]

Counsel: Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

Honey Kessler Amado for Respondent.

Judges: Moore, J., with Sills, P. J., and Fybel, J., concurring.

Opinion by: MOORE

Opinion

[185] MOORE, J.**—In a prior appeal,¹ Kathleen Balcof challenged a judgment holding that a writing she and her husband, Ralph Balcof, signed during marriage did not constitute a transmutation of certain of his property interests to those of hers.² We held that the **[**186]** writing satisfied the requirements for a transmutation of Ralph's interest in the marital residence and 20 percent of the stock in his separate property corporation. However, we observed that Ralph had been precluded from presenting evidence to the effect that he was under duress when he signed the writing. Consequently, we reversed and remanded the matter to give him an opportunity to present his evidence and to make his arguments concerning the enforceability of the otherwise valid transmutation. On remand, the trial court held that the **[***2]** transmutation document was unenforceable due to both duress and undue influence.

Kathleen appeals, challenging the judgment on a plethora of grounds. We hold that the trial court did not exceed the scope of this court's instructions on remand, and furthermore, that retrial was not precluded either because of a “judicial admission”

on Ralph's part or because of case law concerning the use of extrinsic evidence. We also hold that substantial evidence supports the trial court's findings on both duress and undue influence. In addition, the trial court did not err in receiving the testimony of Attorney Brenda Agren, the tape recording of a discussion between Kathleen and the children, **[***3]** or the stipulated evidence that Kathleen struck Ralph in the face in front of the children. Finally, the statement of decision was not inadequate and the motion for new trial was properly denied. We affirm the judgment and the order denying the new trial motion.

I

FACTS

Ralph and Kathleen were married in 1988. They had two children, born in 1990 and 1992, respectively. In October 1999, Ralph and Kathleen signed a **[*1514]** writing concerning their marital residence and a portion of the stock in Ralph's separate property corporation. They separated three or four months later. Ralph filed a petition for dissolution in January 2000. Their marriage was dissolved as to status only on December 5, 2000.

The court bifurcated the trial proceedings pertaining to the effect of the October 1999 writing. The first issue to be tried was whether the writing constituted a transmutation of Ralph's community property interest in the marital residence and 20 percent of his stock in his separate property corporation, to Kathleen as her separate property. The second item to be tried, provided that the October 1999 writing were held to be a transmutation, was whether there were any defenses to the enforcement **[***4]** of the writing.

After a trial on the first issue, the court held that the October 1999 writing was ineffective to transmute property from that of Ralph to that of Kathleen. Given this, there was never any trial pertaining to Ralph's defenses to the enforceability of the October 1999 writing. Kathleen appealed from the judgment to the effect that the October 1999 writing was not a transmutation.

¹ *In re Marriage of Balcof* (Nov. 21, 2003, G030572) (nonpub. opn.).

² Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. (*In re Marriage of Smith* (1990) 225 Cal. App. 3d 469, 475–476, fn. 1 [274 Cal. Rptr. 911].)

On appeal, we held that the October 1999 writing satisfied the transmutation requirements of [Family Code section 852](#). However, we observed that Ralph had never had his opportunity to raise his claim of duress, so we remanded the matter for further trial proceedings.

On remand, the trial court entered judgment in favor of Ralph, holding that the October 1999 writing was unenforceable due to duress and undue influence. It thereafter denied Kathleen's new trial motion. Kathleen again appeals.

[187] II**

DISCUSSION

A. Background:

The following background information is taken directly from the prior opinion:

“(1) Prenuptial agreement

“Shortly before their marriage, the parties signed a prenuptial agreement, the validity of which is not an issue in this [***5] matter. As disclosed in the exhibits to the agreement, Ralph then owned property worth several million [*1515] dollars, including more than \$ 2 million in Bolcof Plastic Materials, Inc. stock. ³ Kathleen's assets were minimal.

“Under the prenuptial agreement, the parties agreed that Ralph would transfer the bulk of his property into a separate property trust and that Kathleen would not acquire any interest in that property or in the trust during the course of the marriage. In short, she would never acquire any interest in Bolcof Plastic Materials, Inc., even to the extent the value of the corporation might increase due to the efforts of Ralph during the marriage. However, Ralph agreed to transfer two \$ 15,000 life insurance policies he owned to himself and Kathleen as community property. Also, Ralph and Kathleen

agreed that if they were still living together as man and wife upon Ralph's [***6] death, Kathleen would receive the marital dwelling, free and clear of debt, plus \$ 250,000.

“At the time the prenuptial agreement was signed, the parties had not yet acquired the property located on Pelican Drive, which was purchased after marriage and was not placed in the trust.

“(2) Transmutation document

“The parties have stipulated that in October 1999, while they were in a room together at an inn, Ralph penned a writing which is the subject matter of this dispute. That writing provides as follows: ‘I, Ralph Balcof Deed over all Interest in our house at 770 Pelican Dr.—Laguna Beach—also 20% interest (stock) in Bolcof Plastic Materials[.] This will be legal by Dec 1 1999[.]’ Then appear the signatures of each of Kathleen and Ralph. Immediately thereafter is written: ‘P.S. I will pay \$ 1000 a day Penlty [sic] iF [sic] this is not done by Dec 1[.]’ [¶] ... [¶]

“(3) Stipulated judgment

“In the March 12, 2002 judgment on reserved issues, the court divided certain [of] the assets between the parties and ordered the payment of spousal and child support, pursuant to their stipulated judgment.

“Ralph stipulated to pay Kathleen the sum [***7] of \$ 8,000 per month in spousal support while she was living in the marital dwelling. After she vacated the dwelling, Ralph was required to pay her \$ 12,000 per month, until the first to occur of the death of either party, Kathleen's remarriage, or June 15, 2012. The judgment contains a provision for the payment of an additional \$ 33,000 [*1516] in spousal support for a time period that cannot be ascertained due to the fact a portion of the copy of the judgment as contained in the record is illegible. In addition, the judgment addressed the provision of COBRA medical insurance coverage for Kathleen.

³ “In his respondent's brief, Ralph explains that the parties' correct surname is ‘Balcof’ but that the company name is ‘Bolcof.’ ”

“Ralph also stipulated to pay child support in the amount of \$ 2,488 per month for his daughter, Kelsey, and \$ 4,172 per **[**188]** month for his son, Andrew. He further committed to provide health insurance for the children.

“In addition, Ralph stipulated to maintain an initial sum of \$ 500,000 in life insurance, decreasing by \$ 50,000 each year, with respect to spousal support. He also agreed to maintain \$ 75,000 in life insurance with respect to child support.

“The court awarded Ralph the marital dwelling, with an assigned value of \$ 2 million, as his sole and separate property. In addition, it awarded **[***8]** Ralph half of the miscellaneous personal property, furniture and furnishings the parties acquired during marriage, half of the parties' three Wells Fargo checking accounts, and half of the \$ 403,177.56 community interest in the Bolcof Plastic Materials, Inc. Profit-Sharing Plan and Trust.

“Kathleen was awarded, as her sole and separate property, the following: (1) \$ 123,026 in a joint Wells Fargo account; (2) \$ 154,745 in the parties' Paine Webber account; (3) \$ 141,000 in pre-distributions of community funds; (4) a 1996 GMC Suburban automobile; (5) half of the miscellaneous personal property, furniture and furnishings the parties acquired during marriage; (6) half of the parties' three Wells Fargo checking accounts; (7) half of the \$ 403,177.56 community interest in the Bolcof Plastic Materials, Inc. Profit-Sharing Plan and Trust; (8) the Mammoth condominium, valued at \$ 403,000; and (9) an equalization payment of \$ 589,114.50. Also, Ralph was ordered to pay \$ 100,000 of Kathleen's attorney fees.

“In addition to the foregoing, the judgment recited that Kathleen had indicated that she might file an appeal with respect to the characterization of the marital dwelling and the Bolcof **[***9]** Plastic Materials, Inc. business. The parties reserved the right to assert different values for those assets and to argue that the amount of the equalization payment was incorrect, depending on the outcome

of any appeal.

“In the April 17, 2002 judgment on reserved issues, Ralph was awarded the following items as his sole and separate property: (1) any and all shares of Bolcof Plastic Materials, Inc. common stock; (2) any and all shares of e-resin.com common stock; (3) any and all shares of Bolcof Plastic Materials (Southeast), Inc. common stock; (4) any and all interest in Azusa Packaging, **[*1517]** a California general partnership; (5) certain real property located in Azusa; and (6) certain real property located in Fontana.”

On remand, the trial court held that the April 17, 2002 judgment on reserved issues would remain in full force and effect.

B. Kathleen's Arguments:

(1) Introduction:

Kathleen has chosen to wage a wide-ranging attack on many fronts. She claims: (1) retrial was precluded because of a “judicial admission” on Ralph's part; (2) the case should not have been remanded because of case law concerning the use of extrinsic evidence; (3) the trial court exceeded **[***10]** the scope of this court's instructions on remand; (4) the trial court's findings on duress were not supported by the evidence; (5) Ralph waived his right to rescind the October 1999 writing due to duress; (6) Ralph ratified the October 1999 writing; (7) the trial court erred in receiving the testimony of Attorney Agren into evidence; (8) the trial court erred in receiving a tape recording into evidence; (9) the evidence that Kathleen struck Ralph in the face in front of the children was irrelevant and prejudicial; (10) the statement of decision was inadequate; and (11) the motion for new trial should not have been denied. We address these arguments in turn.

[189]** (2) *Prior opinion:*

Kathleen levels a tardy attack on this court's opinion in the prior appeal. She says that the case

never should have been remanded at all, for two reasons. First, she says that Ralph conceded, in an October 16, 2001 memorandum of points and authorities in opposition to motion to certify judgment, that the court had “bifurcated for early hearing the issue of the validity and enforceability of a handwritten document ...” and that “[f]ollowing full hearing on the matter the court ruled the document [***11] was ineffective as a transmutation of any interest in the real property or the stock.” She says this wording constitutes a concession that the enforceability of the transmutation document was already resolved by the trial court and that the doctrine of judicial admission bars a remand for a trial on defenses to the enforceability of the writing. Second, Kathleen says that the case should not have been remanded because case law (see, e.g., [Estate of MacDonald \(1990\) 51 Cal.3d 262 \[272 Cal. Rptr. 153, 794 P.2d 911\]](#)) encourages courts to resolve transmutation issues without resort to extrinsic evidence.

[*1518]

[CA\(1\)](#) (1) Kathleen's arguments challenging this court's prior opinion come too late. [HN1](#) The opinion is a final decision of this court and we have no power to review it. (Cal. Rules of Court, rules 24(b), 25(a); [Woodridge Escondido Property Owners Assn. v. Nielsen \(2005\) 130 Cal.App.4th 559, 577 \[30 Cal. Rptr. 3d 15\]](#).) [HN2](#) [CA\(2\)](#) (2) “Under the law of the case doctrine, ‘the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any [***12] subsequent retrial or appeal in the same case.’” [Citation.]” ([Yu v. Signet Bank/Virginia \(2002\) 103 Cal.App.4th 298, 309 \[126 Cal. Rptr. 2d 516\]](#).) If Kathleen believed that this court had made an error in ordering a remand, her remedy was to bring a petition for rehearing on the matter. (Cal. Rules of Court, rule 25.) Furthermore, we are not persuaded either that Ralph's imprecise wording in his October 16, 2001 memorandum of points and authorities constituted a waiver of defenses to enforcement, or that [Estate of](#)

[MacDonald, supra, 51 Cal.3d 262](#), would make consideration of defenses inappropriate. But we need not resolve either of these issues. The prior decision of this court is final and the trial court did not err in following the remand instructions.

(3) *Scope of Remand:*

In our prior opinion, we stated: “Kathleen Balcof appeals from a judgment holding that a writing she and her husband, Ralph Balcof, signed during marriage did not constitute a transmutation of certain of his property interests to those of hers. We agree with Kathleen that the writing contained an express declaration of a change in ownership with respect to certain [***13] real property and stock holdings, and that it was a valid transmutation as to those items. However, the writing did not constitute a present transmutation of penalties in the amount of \$ 1,000 per day, which would accrue, if at all, only on the happening of a future event. In addition, we observe that Ralph was precluded from presenting evidence to the effect that he was under duress when he signed the writing, so the matter must be remanded to give him an opportunity to present his evidence and to make his arguments concerning the enforceability of the otherwise valid transmutation. We reverse and remand.” (Fn. omitted.)

According to Kathleen, when this court referenced Ralph's argument concerning duress, we meant to limit the remand to [**190] that issue exclusively. She further contends that, because the trial court's actions exceeded the scope of the instructions on remand, those actions are void. She reads our remand instructions too narrowly.

[*1519]

The remand was intended “to give [Ralph] an opportunity to present his evidence and to make his arguments concerning the enforceability of the otherwise valid transmutation.” Although it was anticipated that the arguments concerning enforceability [***14] would include arguments on duress, which Ralph had mentioned specifically, there was no intention to exclude any other

arguments Ralph might make with respect to enforceability, such as undue influence. The court correctly understood the instructions on remand and did not err by permitting the presentation of evidence and argument on undue influence.

(4) *Undue Influence*:

Aside from contending that the trial court should not have considered undue influence at all, Kathleen makes little argument concerning that defense. In its statement of decision, the trial court held that “[Kathleen] exerted undue influence on [Ralph] in order to obtain the [October 1999] writing.” Ralph asserts that this holding was correct. We agree.

CA(3) (3) HN3 According to *Family Code section 721, subdivision (b)*, husbands and wives “are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. ...” “If one spouse secures an advantage from [an interspousal] transaction, a statutory presumption arises under *section 721* that the advantaged spouse exercised undue influence and the transaction [***15] will be set aside. [Citation.]” (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 628–629 [35 Cal. Rptr. 3d 1]; see also *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996–997 [4 Cal. Rptr. 3d 378].) “Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or otherwise gains, benefits, or profits. [Citation.]” (*In re Marriage of Mathews, supra*, 133 Cal.App.4th at p. 629.)

In this case, Kathleen secured an advantage through the October 1999 writing, because she obtained a 20 percent interest in Ralph's separate property corporation as well as his share of the marital residence. (See *In re Marriage of Delaney, supra*, 111 Cal.App.4th at pp. 995–997.) Therefore, the statutory presumption arose that she exercised undue influence against Ralph in obtaining his signature on the October 1999 writing, and that the writing should be set aside. (*In re Marriage of*

Mathews, supra, 133 Cal.App.4th at pp. 628–629; *In re Marriage of Delaney, supra*, 111 Cal.App.4th at pp. 996–997.)

CA(4) (4) HN4 “The burden of rebutting the presumption of undue influence [was] on [Kathleen, [***16] as] the spouse who acquired an advantage or benefit from the transaction. [Citation.]” (*In re Marriage of Mathews, supra*, 133 Cal.App.4th [*1520] at p. 630.) “Consequently, it was [her] burden to establish [Ralph's] signing of the [October 1999 writing] was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the [shares of stock and the marital residence] separate property. [Citation.]” (*Ibid.*) It was her burden to rebut the presumption by a preponderance of the [***191] evidence. (*Id.* at p. 631.) Substantial evidence supports the trial court's implied finding that Kathleen did not rebut the presumption by a preponderance of the evidence. (*Id.* at pp. 631–632 [standard of review is substantial evidence, of proof by preponderance of evidence].)

The trial court found that “[t]he writing was a transaction between the parties, which arose out of their confidential relationship as spouses and was not made at arms length.” It also found that “[Kathleen] gained an advantage over [Ralph] by virtue of the writing, in that it transferred assets to her which she [***17] did not previously own.” In addition, the court stated, in its statement of decision: “4. [Kathleen] threatened [Ralph] with divorce and the obstruction of his relationship with their children if he did not prepare the writing. [¶] 5. [Kathleen] harangued and berated [Ralph] during the marriage in an effort to force him to modify the parties' prenuptial agreement to provide more security for [her]. The berating included several incidents where [Kathleen] physically struck [Ralph]. [¶] [Kathleen] screamed at [Ralph] for at least 45 minutes immediately preceding his writing the October 1999 writing, which screaming included threats of divorce and obstructing [Ralph's] relationship with the minor children if he

did not make the writing. [Ralph] reasonably believed [Kathleen's] threats, and that she intended to follow through with her threats. These threats alone or coupled with his state of mind resulting from the many prior episodes of verbal and physical abuse, constituted duress which resulted in his making the writing. [¶] Further, [Kathleen] subjected [Ralph] to a continuous barrage of yelling and threats of divorce and obstructing [Ralph's] relationship [***18] with the minor children in the parties' hotel room from the time he started the writing until he was initially finished. Thereafter, [Kathleen's] barrage of threats continued until [Ralph] wrote an additional penalty clause, which he did at her insistence. [¶] Coupled with the prior history of [Kathleen's] haranguing and berating [Ralph] concerning the prenuptial agreement, the threats to take his children away from him immediately before he made the writing, unless he made the writing, constituted duress."

CA(5) (5) The threats also constituted undue influence, inasmuch as his execution of the document was not "freely and voluntarily made." (*In re Marriage of Mathews, supra*, 133 Cal.App.4th at p. 630; see also *In re Marriage of Baltins* (1989) 212 Cal. App. 3d 66, 83 [260 Cal. Rptr. 403] [consent HN5 is not [*1521] "free" when obtained through duress, menace, or undue influence].) He executed the document as a reaction to Kathleen's continued yelling and screaming and out of fear that she would otherwise block him from having a continued relationship with his children.

Ralph's testimony at trial provided substantial evidence of Kathleen's striking him on occasion, [***19] and from time to time screaming at him and threatening to disrupt his relationship with his children if he did not provide her with the property she demanded. It also provided substantial evidence that, on the date of the October 1999 writing, she yelled and screamed at him and threatened him until he complied with her demand to write what she told him to right then and there. "Free" and "voluntary" are not words that appropriately

describe his actions on the date in question.

CA(6) (6) Moreover, Ralph testified that he broke down and wrote word-for-word what Kathleen dictated to him. He further testified that he did not know the legal effect of the words he was writing and that he did not have an opportunity to discuss their legal effect with counsel. His testimony on these points provided substantial evidence that he did not sign the October 1999 [***192] writing "with a complete understanding of the effect" of doing so. (*In re Marriage of Mathews, supra*, 133 Cal.App.4th at p. 630; see *In re Marriage of Baltins, supra*, 212 Cal. App. 3d at p. 85 [lack HN6 of independent advice a factor to be weighed in determining if party acted voluntarily and with understanding of transaction].) [***20]

True enough, Kathleen testified contrarily to Ralph, both about the circumstances surrounding the execution of the October 1999 writing, and about whether she had the habit of striking him, screaming at him, and threatening to undermine his relationship with his children. Given the conflicts in the respective testimony of Kathleen and Ralph, it is clear that one of them was lying. The trial court found: "As to the events at the time the October 1999 writing was made, [Ralph's] testimony was credible, but [Kathleen's] testimony was not."

CA(7) (7) HN7 "The power of a reviewing court begins and ends with a determination of whether there is in the record substantial evidence, contradicted or uncontradicted, which supports the result reached; and we must also assume in favor of the determination below the existence of every fact which the trier of facts could have reasonably deduced from the evidence. [Citation.]" (*In re Marriage of Gonzalez* (1976) 57 Cal. App. 3d 736, 745 [129 Cal. Rptr. 566].) Substantial evidence supports the trial court's determination that Ralph's version of events was more credible, that Ralph did not freely and voluntarily [*1522] execute that October 1999 writing, [***21] that Ralph did not understand the legal significance of his execution of the writing, and that Kathleen did not meet her

burden to rebut the presumption of undue influence by a preponderance of the evidence. Consequently, we hold the October 1999 writing is unenforceable as the product of undue influence.

(5) *Duress*:

(a) *introduction*

Kathleen argues at length that Ralph did not prove duress. As a technical point, this is a matter we need not address, inasmuch as the October 1999 was unenforceable as a result of undue influence. However, we nonetheless choose to address her concerns.

(b) *burden of proof*

Kathleen says that Ralph was required to show duress by clear and convincing evidence. She supports her argument with a citation to [Stevenson v. Stevenson \(1940\) 36 Cal. App. 2d 494 \[97 P.2d 982\]](#). That case was decided before [Evidence Code section 115](#) became operative in 1967. (Stats. 1965, ch. 299, § 2, pp. 1297–1298.) As at least one commentator has observed, “[e]arly decisions require proof of the existence of duress ... with reasonable certainty by clear, cogent and convincing evidence, but these decisions no longer have vitality following [***22] the Supreme Court’s 1977 decision [[Liodas v. Sahadi \(1977\) 19 Cal.3d 278 \[137 Cal. Rptr. 635, 562 P.2d 316\]](#)] rejecting the application of a burden of proof in excess of a preponderance of the evidence in fraud cases. There is no statutory or logical basis for imposition of a higher level of proof for duress than for fraud.” (2 Schwing, Cal. Affirmative Defenses (2006 ed.) § 33:9, fns. omitted; see also [Weiner v. Fleischman \(1991\) 54 Cal.3d 476, 483 \[286 Cal. Rptr. 40, 816 P.2d 892\]](#); [In re Marriage of Peters \(1997\) 52 Cal.App.4th 1487 \[61 Cal. Rptr. 2d 493\]](#).)

[CA\(8\)](#) (8) “[HN8 Evidence Code section 115](#) provides for three burdens of proof ‘ “Except as otherwise provided by law,” ’ issues of fact are determined by a preponderance of the evidence. ([Citation]; [Evid. Code, § 115](#).)” ([In re Marriage of](#)

[Peters, supra, 52 Cal.App.4th at p. 1490](#), [****193**] italics omitted.) “The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. [Citation.] The burden of proof thus serves to allocate the risk of error between the parties, and [*****23**] varies in proportion to the gravity of the consequences of an erroneous resolution. [Citations.] Preponderance of [***1523**] the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side’s interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake [Citations.]” (*Ibid.*)

“[W]hen we compare [the] risk of the loss of an economic interest with the interests at stake in cases applying the ‘clear and convincing’ standard, it falls short. All involve interests more substantial than the mere loss of money. [Citations.]” ([In re Marriage of Peters, supra, 52 Cal.App.4th at p. 1492](#).) “Because the interests at stake [in the case before us] are the same for both parties and the interests involved are economic, the parties should share the risk of error roughly equally. The preponderance of the evidence standard is sufficient.” (*Id.* at p. 1494.)

Based on the same evidence noted in our discussion of undue influence, Ralph met his burden to demonstrate [*****24**] duress, by a preponderance of the evidence. Kathleen disagrees.

(c) *free will*

[CA\(9\)](#) (9) In addition to pointing to the portions of her testimony that conflict with his, Kathleen, again citing older case law (see, e.g., [Burke v. Gould \(1894\) 105 Cal. 277 \[38 P. 733\]](#)), says that there was no duress because Kathleen did not commit any unlawful act or subject Ralph to confinement in order to get his signature. However, [HN9](#) “[t]he stringent definition of duress contained in [Civil Code section 1569](#), codifying the early common

law rule, has been relaxed. [Citations.] Under the modern rule, ‘ “[d]uress, which includes whatever destroys one's free agency and constrains [him or her] to do what is against [his or her] will, may be exercised by threats, importunity or any species of mental coercion [citation]” ’ [Citation.] It is shown where a party ‘intentionally used threats or pressure to induce action or nonaction to the other party's detriment. [Citation.]’ [Citations.] The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing. [Citation.]” (*In re Marriage of Baltins, supra, 212 Cal. App. 3d at p. 84*, [***25] fns. omitted.)

In this case, Ralph's free will was constrained by Kathleen's threats to deny him access to his children. Kathleen disagrees, saying that any threat to deny Ralph access to the children could hardly constitute duress, inasmuch as child custody and visitation matters are resolved by the courts. She emphasizes that Ralph, as a successful businessman, had access to lawyers and [*1524] should have known better than to be frightened at the suggestion that she somehow could have thwarted his rights to see his children. However, as Ralph testified, he did not discuss Kathleen's threats with legal counsel until after the date he was constrained to execute the October 1999 writing. Moreover, it is not unheard-of for one parent to fail to comply with court custody or visitation orders or to engage in efforts to scuttle the relationship between the children and the other parent. As a practical matter, the courts are ill-equipped to undo the damage done by infighting parents.

[**194] It is true, as Kathleen suggests, that the facts of the case before us are not as egregious as those in the case of *In re Marriage of Gonzalez, supra, 57 Cal. App. 3d 736*, wherein the husband threatened [***26] to remove the children to another country and even intimated that he might have the wife killed. However, that does not mean that the degree of coercion in the case before us was not sufficient to rise to the level of duress. Kathleen “aimed at [Ralph's] most vulnerable spot”

when she threatened to interfere with his relationship with the children. (*In re Marriage of Baltins, supra, 212 Cal. App. 3d at p. 86*.)

It is also true, as Kathleen states, that Ralph admitted he was not actually afraid for his physical safety on account of Kathleen's physical abuse of him. The fact that he did not expect to wind up in the hospital the next time she struck him does not, however, mean that her abuse did not have a cumulative and real effect on his mental state.

(d) *failure to rescind*

Continuing on, Kathleen asserts that Ralph is precluded from obtaining relief on the ground of duress, because he failed to promptly rescind the October 1999 writing.⁴ In support of that assertion, she cites a number of old cases concerning rescission of fully or partially performed contracts based on fraud, primarily cases having to do with real estate transactions. (See, e.g., *Fabian v. Alphonzo E. Bell Corp. (1942) 55 Cal. App. 2d 413 [130 P.2d 779]*; [***27] *Campbell v. Title Guarantee etc. Co. (1932) 121 Cal.App. 374 [9 P.2d 264]*.) These cases, founded on *Civil Code section 1691*, are inapposite.

Kathleen omits to address the underlying statute, which provides: *HN10* “Subject to *Section 1693*, to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind: [¶] (a) Give notice of rescission to the party as to whom he rescinds; and [¶] (b) Restore to the other party everything of value which he has [*1525] received from him under the contract or offer to restore the same upon condition that the other party do likewise, [***28] unless the latter is unable or positively refuses to do so. ...” (*Civ. Code, § 1691*.) *Civil Code section 1693* states

⁴ In her reply brief, Kathleen argues at length that Ralph's failure to rescind the October 1999 writing also precludes him from obtaining relief on the ground of undue influence. Our analysis of the rescission issue applies equally to both the duress and undue influence defenses.

in part that [HN11](#) “[w]hen relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of rescission unless such delay has been substantially prejudicial to the other party.”

[CA\(10\) \(10\) HN12](#) A plain reading of [Civil Code section 1691](#) indicates that the party seeking to rescind must do so promptly, as long as he or she is free from duress, menace or undue influence or disability. In this case, the duress continued after the date of the October 1999 writing, so that the requirement to rescind promptly was held in abeyance. Moreover, under [Civil Code section 1693](#), any delay on Ralph's part to promptly provide Kathleen with notice of rescission would not preclude relief, unless Kathleen were substantially prejudiced by the delay. Kathleen does not explain what prejudice she suffered.

The only case that Kathleen cites that bears any similarity to the case before us is [Clanton v. Clanton \(1942\) 52 Cal. App. 2d 550 \[126 P.2d 639\]](#). [***29](#) In that case, the husband and wife entered into a property [**195](#) settlement agreement concerning the division of 20 parcels of real property, and 20 items of personal property, including oil leases and subleases, and stocks and bonds. ([Id. at p. 552.](#)) The husband subsequently filed a complaint for divorce and annulment of the property settlement agreement. (*Ibid.*) The trial court sustained a demurrer to the cause of action for annulment of the property settlement agreement. (*Ibid.*) The appellate court affirmed. ([Id. at p. 558.](#))

The appellate court in *Clanton* stated that the case was none other than one for rescission of the fully performed property settlement agreement. ([Clanton v. Clanton, supra, 52 Cal. App. 2d at pp. 553–554.](#)) It noted that the agreement had been effectuated “by duly executed conveyances, presumably at or about the time of the execution of the agreement.” ([Id. at p. 553.](#)) The court further noted that the husband had not offered to restore the wife to her share of the properties he had acquired pursuant to the agreement, and, additionally, that he had

delayed for a period of 22 months in bringing [***30](#) his action. ([Id. at pp. 554, 557.](#)) The court concluded that the husband's “neglect to act promptly is fatal to his right to rescind. Not even the slightest effort was made to excuse the delay. ... It is to be assumed that [the wife] had been dealing with her share of the property as her own and that [the husband] had been doing likewise. During this long period of time each party had had the advantages and had suffered the disadvantages consequent upon their agreement. ... The elapse of time inevitably brings changed conditions with [*1526](#) resulting advantages and disadvantages to the respective parties, and obstacles arise which make it difficult, if not impossible, to restore the parties to their former status, a desideratum of rescission which distinguishes it from other forms of relief.” ([Id. at pp. 557–558.](#))

There is no reason why [Clanton v. Clanton, supra, 52 Cal.App.2d 550](#), should compel a reversal in the case before us. No properties were transferred pursuant to the October 1999 writing, so neither party has suffered advantages or disadvantages based upon a transfer. Moreover, despite Kathleen's protestations, there was [***31](#) no lengthy delay in challenging the writing. It was signed in October 1999 and Ralph filed his petition for dissolution of marriage in January 2000, asserting therein that his separate property was defined by the prenuptial agreement. Property ownership and division then became a matter for court determination. Kathleen simply has not convinced us that laws pertaining to the rescission of fully performed contracts should apply to preclude Ralph from challenging the enforceability of the October 1999 writing in this context.

(e) ratification

Finally, Kathleen argues that Ralph ratified the October 1999 writing. She claims that the evidence of ratification includes (1) Ralph's failure to rescind, (2) a “to-do list,” (3) a car transfer, and (4) meetings with Attorney Mitchell Schwary. We have already discussed the significance of the lack

of rescission and need not belabor that point. We address Kathleen's other items in turn.

The record contains an undated and unsigned handwritten list of eight action items. The items pertained to a trust, life insurance, title to the house, stock options, alimony, title to cars, profit sharing, and notification of Kathleen when actions were [***32] completed. The parties gave conflicting testimony as to the date and significance of this list. Kathleen testified that Ralph, of [**196] his own volition, made the list towards the end of December 1999. Ralph, on the other hand, testified that he wrote the “to-do list” in the summer of 1999 “[a]t Kathleen's insistence,” during one of “[h]er yelling sprees.” He stated that Kathleen “wanted [him] to do everything and then show her that [he] had done everything.” Ralph further testified that he did not take most of the actions on the list, but that he did put a Jaguar in her name in December 1999.

Resolving the conflicting evidence in a light most favorable to the judgment ([Akins v. State of California \(1998\) 61 Cal.App.4th 1, 36 \[71 Cal. Rptr. 2d 314\]](#)), it would appear the “to-do list” is evidence not of a ratification of the October 1999 writing, but rather of a precursor to it. That is, Ralph wrote out the “to-do list” in the summer of 1999, during one of Kathleen's earlier [**1527] “yelling sprees” and by October 1999 Kathleen was so angry that he had not taken the actions itemized on the list that she engaged in another “yelling spree” until he wrote out the terms of the October 1999 writing, [***33] including a penalty clause in case he did not get the job done this time. Furthermore, the transfer of the Jaguar to Kathleen in 1999 is not evidence of a ratification of the October 1999 writing, which does not mention the Jaguar. Rather, it is only evidence that Ralph finally acquiesced to performing one of the items on the “to-do list.”

Ralph testified that he went to Attorney Schwary in late 1999, not to address implementation of the October 1999 writing, but to address updating his

trust, because one of his children had not been born when the trust was prepared. Kathleen, on the other hand, testified that she and Ralph met with Attorney Schwary in late January or early February 2000, to discuss the implementation of the October 1999 writing. However, Kathleen's only citation to documentary evidence of contact with Attorney Schwary is a copy of a November 23, 1999 letter from him to Ralph. In that letter, Attorney Schwary addressed with Ralph the tax ramifications of his trust, and ways to change the trust to achieve tax benefits on his death. Kathleen does not explain how Ralph's consultation with Attorney Schwary with respect to tax issues on death constitutes a ratification [***34] of the provision of the October 1999 writing requiring Ralph to transfer to her a portion of his corporate stock or his share of the residence. Kathleen has not shown us how the trial court's implied finding that there was no ratification was erroneous.

(6) Agren Testimony:

At trial, Kathleen testified that she did not have a temper. Attorney Agren, former counsel for Kathleen, also testified with respect to that assertion.⁵ Attorney Agren's testimony pertained to an incident that took place on August 7, 2003, at the Lamoreaux Justice Center.⁶ On appeal,

⁵ According to Ralph, Attorney Agren was subpoenaed to testify.

⁶ Attorney Agren and Attorney Michael Monarch, who represented Ralph, had reached an agreement as to a visitation issue and had resolved that Attorney Monarch would prepare a stipulation on the matter. On the morning in question, about 9:00 a.m., Attorney Agren and Kathleen were sitting on a bench outside the courtroom. Attorney Monarch approached the two of them, with the stipulation in hand. As Attorney Monarch approached, Kathleen said to him, “Get out of here.” Under questioning by Attorney Monarch at trial, Attorney Agren testified that as Attorney Monarch started handing the stipulation to Attorney Agren, Kathleen “suddenly jumped up and grabbed the piece of paper very forcefully as it was being almost yanked out of your hand. She—and again I'm holding my hand up because I have this very strong visual. She shook the piece of paper in the air with her fist very close to your face. I recall you putting up both hands in a defensive manner, walking backwards. And I've had other cases with you. Your eyes were very large. And you had an expression on your face of—looked stunned. I was stunned. I jumped up shortly after she did. And I said to her in your presence something like ‘you're out of line. This is inappropriate. This is not going to be

[197]** Kathleen argues that the court abused its discretion in permitting Attorney Agren to testify as to the incident.

[*35] [*1528]**

At the time of trial, Kathleen's counsel objected to the testimony. Ralph's counsel argued that the testimony should be permitted for the purpose of impeaching Kathleen's assertion that she has no temper. The court overruled the objection, limiting receipt of the testimony to address the issue of credibility.

Kathleen does not explain why the testimony could not be admitted for this purpose. However, she asserts that the incident in question was irrelevant, as taking place years after the execution of the October 1999 writing, and was more prejudicial than probative. The incident was not irrelevant in terms of ascertaining whether Kathleen lied about having a temper. As for it being more prejudicial than probative, the trial was a court trial, not a jury trial, and we have confidence that the court was capable of considering the evidence for the limited purpose for which it was admitted. No abuse of discretion has been shown. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund.* (1998) 65 Cal.App.4th 1422, 1431 [77 Cal. Rptr. 2d 574] [abuse [HN13](#) of discretion standard on admission of evidence].)

(7) Evidence of Tape Recording:

At trial, Ralph's counsel offered a transcript of a tape recording **[***36]** left on Ralph's answering

tolerated.' ” Attorney Agren further testified: “I think agitated is an understatement, if you will, to describe her demeanor at that point.” She also said that Kathleen looked “explosive” and “rageful” and that Attorney Monarch “looked very frightened.” In addition, Attorney Agren testified that Kathleen “was shaking her fist, waving the piece of paper in the air, pressing forward. And you were backing up, again with your hands up, appearing to defend yourself. And I was concerned that there was going to be some kind of physical altercation; that there was—she was close enough to you that I thought she was going to hit you in your face with her fist.” Attorney Agren concluded: “I would say again temper is an understatement for what I observed that morning.” Kathleen testified that Attorney Agren was untruthful in her description of the event.

machine some time after the dissolution proceedings were commenced. As the transcript showed, Ralph's son telephoned him and the answering machine picked up the call. However, the boy did not completely hang up the telephone. After he completed the message to Ralph, the boy, his sister and Kathleen had a discussion and the answering machine recorded that discussion. The transcript showed that Kathleen swore at the children, said the son could not talk to Ralph, and threatened not to let the daughter go to Ralph's house the next day. In addition, the tape recording purportedly showed that Kathleen was yelling at them.

[*1529]

Kathleen's counsel objected to the admissibility of the transcript, on the ground of relevance. Ralph's counsel proffered that the transcript was admissible to impeach Kathleen's testimony on three points: (1) she never yelled at the children; (2) she never used profanities when addressing the children; and (3) she never interfered with their seeing Ralph. Ultimately, the court permitted the introduction of the evidence. According to the statement of decision, the evidence was admissible for the limited purposes of impeaching Kathleen's testimony **[***37]** and/or corroborating Ralph's testimony.

On appeal, Kathleen says that admitting the evidence violated the principles stated **[**198]** in [Estate of MacDonald, supra, 51 Cal.3d 262](#). She also argues that the evidence of the discussion was “irrelevant, immaterial, remote, collateral and prejudicial to the limited determination before the court.” She explains that the evidence puts her in a bad light while having nothing whatever to do with whether she exerted duress on Ralph in October 1999.

However, Kathleen has not explained why the evidence was not admissible for the limited purposes of impeachment or corroboration. As for her arguments, we first note that [Estate of MacDonald, supra, 51 Cal.3d 262](#), having to do

with the requirement under former Civil Code section 5110.730, subdivision (a) that a transmutation be made by express written declaration, is inapposite. Second, we are once again persuaded that, while it may sometimes be difficult for a jury to consider evidence for limited purposes, there was no jury in this matter. We remain convinced that the trial court is able to consider the evidence only for the limited purposes for which it is admitted.

While [***38] we agree that the transcript of the recording, made long after the execution of the October 1999 writing, is of little, if any, relevance, to duress or undue influence suffered in October 1999, we disagree that it was an abuse of discretion to admit the evidence for impeachment purposes under these particular circumstances. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund.*, *supra*, 65 Cal.App.4th at p. 1431 [abuse of discretion standard].) Moreover, [HN14](#) in the event of error, “the error is not reversible unless ‘ “it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]” [Citation.]’ [Citations.]” (*Id.* at pp. 1431–1432.) Given Ralph's credible testimony, it is unlikely the court would have ruled in favor of Kathleen even had it excluded the evidence of the tape recording for any purpose. Any error in admitting the evidence did not result in a miscarriage of justice. ([In re Marriage of Rosevear \(1998\) 65 Cal.App.4th 673, 682 \[76 Cal. Rptr. 2d 691\]](#).)

(8) Evidence of December 1999 Physical Abuse:

At trial, the parties stipulated that Kathleen struck Ralph in the face in front of the children [***39] once, in December 1999. Although they had some [*1530] disagreement as to how to characterize the nature of the strike, i.e., a slap, a slug, or a punch, and whether Ralph used profanity either before or after Kathleen struck him, they certainly agreed that the striking took place in December 1999 in front of the children. The parties entered

into the stipulation in order to avoid having the children called to testify.

On appeal, Kathleen says that the evidence of that event is irrelevant, because it occurred after the October 1999 writing was executed. She also contends that it was prejudicial. She does not mention the fact that she stipulated to the evidence and does not explain how she preserved a right to object to the evidence even though she stipulated to it. We may deem any objection she has to that evidence to have been waived. ([Heiner v. Kmart Corp. \(2000\) 84 Cal.App.4th 335, 346–347 \[100 Cal. Rptr. 2d 854\]](#).)

This notwithstanding, any error in admitting the evidence would not constitute reversible error in any event. Considering Ralph's testimony that Kathleen struck him from time to time, including beating her fists on his chest, prior to October 1999 and outside of the presence of the [***40] children, it is not reasonably probable that the court would have arrived at a result [**199] more favorable to Kathleen even without the admission of the stipulated evidence. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund.*, *supra*, 65 Cal.App.4th at pp. 1431–1432.)

(9) Adequacy of Statement of Decision:

Kathleen filed a request for statement of decision in which she plied the court with 37 questions, some of which included subparts. The court filed a seven-page statement of decision in which it made seven findings and nine holdings. Most importantly, it stated the court's findings concerning undue influence and duress, and the evidence and reasoning underlying those findings. Kathleen nonetheless insists that the statement of decision was inadequate.

She notes that she had objected to the proposed statement of decision and “pointed out that the proposals [didn't] follow the inquiries and the requested legal and factual bas[es] [were] for the most part neither broached nor mentioned.” In

addition, Kathleen says that the statement of decision is inadequate to guide this court on review.

The trial court is not, however, constrained to provide a statement of decision [***41] addressing every single one of Kathleen's 37 questions. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230 [8 Cal. Rptr. 2d 293].) Furthermore, its statement of decision was adequate for the purposes of this court's review.

[*1531]

CA(11) (11) As stated in *Hellman v. La Cumbre Golf & Country Club*, *supra*, 6 Cal.App.4th at page 1230: **HN15** "In rendering a statement of decision under *Code of Civil Procedure* section 632, a trial court is required only to state ultimate rather than evidentiary facts; only when it fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.] Even then, if the judgment is otherwise supported, the omission to make such findings is harmless error unless the evidence is sufficient to sustain a finding in the complaining party's favor which would have the effect of countervailing or destroying other findings. [Citation.] A failure to find on an immaterial issue is not error. [Citations.] The trial court need not discuss each question listed in a party's request; all that is required is an explanation of the factual and legal basis of [***42] the court's decision regarding the principal controverted issues at trial as are listed in the request. [Citation.]"

(10) Motion for New Trial:

Next, Kathleen claims that the court erred in failing to grant her new trial motion. In her motion, Kathleen primarily argued credibility issues. She asserted that the court erred in finding Ralph's testimony credible and her own testimony not credible. She also argued that the court should have found that Attorney Agren was a biased and untruthful witness. These are not issues we rework on appeal. **HN16** Appellate courts "do not reweigh evidence or reassess the credibility of witnesses. [Citation.]" (*Johnson v. Pratt & Whitney Canada,*

Inc. (1994) 28 Cal.App.4th 613, 622 [34 Cal. Rptr. 2d 26].) Put another way, "[t]he Court of Appeal is not a second trier of fact" (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021 [41 Cal. Rptr. 2d 762].)

In her motion, Kathleen also complained that the testimony of Attorney Agren should not have been received and that the stipulated evidence regarding the December 1999 striking was irrelevant and prejudicial. She also argued that the evidence did not show that Ralph was under duress at the [***43] time he signed the October 1999 [**200] writing. Finally, she stated that the statement of decision was inadequate, resulting in reversible error. She rehashes these issues on appeal.

These are issues we have already addressed. They fare no better on appeal than they did before the trial court. The court did not err in denying the motion.

[*1532] III

DISPOSITION

The judgment and the order denying the new trial motion are affirmed. Ralph shall recover his costs on appeal.

Sills, P. J., and Fybel, J., concurred.

A petition for a rehearing was denied September 7, 2006, and appellant's petition for review by the Supreme Court was denied November 15, 2006, S146669.



Caution

As of: October 18, 2026 6:38 AM Z

In re Marriage of Burkle

Court of Appeal of California, Second Appellate District, Division Eight

May 18, 2006, Filed

B179751

Reporter

139 Cal. App. 4th 712 *; 43 Cal. Rptr. 3d 181 **; 2006 Cal. App. LEXIS 732 ***; 2006 Cal. Daily Op. Service 4104; 2006 Daily Journal DAR 5978

In re the Marriage of JANET E. and RONALD W. BURKLE. JANET E. BURKLE, Appellant, v. RONALD W. BURKLE, Respondent.

Subsequent History: Rehearing denied by [Burkle v. Burkle, 2006 Cal. App. LEXIS 1008 \(Cal. App. 2d Dist., June 12, 2006\)](#)

Review denied by [Burkle, Marriage of, 2006 Cal. LEXIS 9552 \(Cal., Aug. 16, 2006\)](#)

Related proceeding at [Burkle v. Burkle, 144 Cal.App.4th 387, 50 Cal.Rptr.3d 436, 2006 Cal. App. LEXIS 1694 \(Cal. App. 2d Dist., Oct. 30, 2006\)](#)

Prior History: [***1] Superior Court for the County of Los Angeles, No. BD390479, Stephen M. Lachs, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).

Case Summary

Procedural Posture

Appellant wife challenged an order of the Superior Court for the County of Los Angeles, which found a postmarital agreement between the wife and respondent husband valid and enforceable in the wife's dissolution of marriage action. The agreement was entered into after the dissolution petition was filed.

Overview

After the filing of the dissolution petition, the parties attempted to reconcile and lived together for more than four years after executing the agreement. The court held that a presumption of undue influence under [Fam. Code, § 721](#), did not arise in an interspousal transaction unless one spouse obtained an unfair advantage or obtained property for which no or clearly inadequate consideration had been given. The presumption did not apply to the agreement at issue because both spouses obtained advantages, both were represented by independent and competent legal counsel, the wife was offered full access to the husband's business records relating to the marital assets, and both spouses acknowledged in the agreement that neither had obtained any unfair advantage as a result of the agreement. Even if a presumption of undue influence applied and the trial court erred in allocating to the wife the burden of proving the agreement was invalid, substantial evidence supported the finding that the agreement was not procured by undue influence. [Fam. Code, §§ 2104 and 2105](#), did not apply. The doctrines of ratification and estoppel precluded the wife from claiming the agreement was unenforceable.

Outcome

The court affirmed the trial court's order.

LexisNexis® Headnotes

Evidence > Inferences &
Presumptions > Presumptions

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

Family Law > ... > Marital Agreements > Postnuptial
& Separation Agreements > Enforcement

Family Law > Marriage > Nature of Marriage

HN1 The fiduciary relationship between husband and wife is expressly described in [Fam. Code, § 721](#), particularly as it relates to transactions between themselves. The spouses occupy a confidential relationship with each other and are subject to the general rules governing fiduciary relationships. 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. [Fam. Code, § 721, subd. \(b\)](#). Whenever spouses enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence. The primary consequences of designating a relationship as fiduciary in nature are that the parties owe a duty of full disclosure and that a presumption arises that a party who owes a fiduciary duty, and who secures a benefit through an agreement, has done so through undue influence. When an interspousal transaction advantages one spouse, the law, from considerations of public policy, presumes such transactions to have been induced by undue influence.

Evidence > Inferences &
Presumptions > Presumptions

Family Law > ... > Property
Rights > Characterization > Community Property

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

Family Law > ... > Marital Agreements > Postnuptial

& Separation Agreements > Enforcement

HN2 The predicate for applying a presumption of undue influence in an interspousal transaction is that one spouse has obtained an advantage over the other in the transaction. The presumption of undue influence is regularly applied in marital transactions in which one spouse has deeded property to the other. In such cases, it is evident one spouse has obtained an advantage - the deeded property - from the other. In other more comprehensive marital transactions involving the division of community assets, the nature of the “advantage” required to raise a presumption of undue influence has not been much discussed in the cases. However, the language of [Fam. Code, § 721](#), is clear, prohibiting either spouse from taking any unfair advantage of the other. [Section 721, subd. \(b\)](#). [Section 721](#), together with case authorities, leads to the conclusion that the “advantage” which raises a presumption of undue influence in a marital transaction involving a contractual exchange between spouses must necessarily be an unfair advantage. In short, both [§ 721](#) and case precedents support the conclusion that in a contractual exchange between spouses, a presumption of undue influence arises only if one of the spouses has obtained an unfair advantage over the other.

Evidence > Inferences &
Presumptions > Presumptions

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

Family Law > Marriage > Nature of Marriage

HN3 The precedents construing statutory requirements applicable to transactions between trustees and their beneficiaries are not controlling in interspousal transactions. Interspousal transactions are expressly governed by [Fam. Code, § 721](#), which prohibits a spouse from taking any unfair advantage of the other, and treats the fiduciary duties of spouses like those of business partners. The distinction between the two types of

fiduciary relationship - trustee-beneficiary on the one hand, and spouses or business partners on the other - is entirely reasonable, because in the latter fiduciary duties run in both directions. Just as it would be patently irrational to presume undue influence in a contract between business partners, it would likewise be unreasonable to presume undue influence in a contract between spouses, unless one of the spouses has obtained an unfair advantage. For these reasons, a contract between spouses that advantages one spouse, and therefore raises a presumption the transaction was induced by undue influence, is a transaction in which one spouse obtains an unfair advantage over the other.

Evidence > Inferences &
Presumptions > Presumptions

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

HN4 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.

Civil Procedure > ... > Standards of
Review > Substantial Evidence > General Overview
Evidence > Burdens of Proof > Allocation
Evidence > Admissibility > Procedural
Matters > Rulings on Evidence

HN5 Misallocation of the burden of proof is not reversible error per se, does not vitiate the substantial evidence rule, and would not require reversal of a judgment.

Civil Procedure > Trials > Jury Trials > Province of
Court & Jury
Civil Procedure > ... > Standards of

Review > Substantial Evidence > General Overview

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

HN6 The question of whether a 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.

Evidence > Burdens of Proof > Allocation

Evidence > Admissibility > Procedural
Matters > Rulings on Evidence

HN7 An error in allocating the burden of proof must be prejudicial in order to constitute reversible error.

Evidence > Inferences &
Presumptions > Presumptions

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Undue Influence

Family Law > ... > Marital Agreements > Postnuptial
& Separation Agreements > Enforcement

HN8 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 full knowledge of all the facts, and with a complete understanding of the effect of the transaction.

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Concealment

Family Law > ... > Postnuptial & Separation
Agreements > Defenses > Misrepresentation

Family Law > ... > Marital Agreements > Postnuptial
& Separation Agreements > Enforcement

Family Law > ... > Property Distribution > Equitable
Distribution > Property Settlements

[HN9](#) Spouses entering into agreements relating to marital assets may not misrepresent or conceal facts materially affecting the value of the marital assets. When a spouse, represented by independent counsel, determines to forego a suggested investigation and to accept a proposed settlement, that spouse may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts. Under such circumstances, the spouse proposing the agreement is under no duty to compel the other to investigate, and the accepting spouse's decision, though ill advised, is binding.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Family Law > ... > Property Distribution > Equitable Distribution > Property Settlements

[HN10](#) The California Family Code requires the parties to a dissolution proceeding to serve on each other a preliminary, sworn declaration, on forms prescribed by the Judicial Council, identifying all assets and liabilities. [Fam. Code, § 2104, subds. \(a\) & \(c\)](#). Similarly, before the parties to a dissolution proceeding enter into an agreement for the resolution of property issues, or before any trial, each must serve on the other a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council. [Fam. Code, § 2105, subd. \(a\)](#). These mandatory statutory requirements cannot be waived, except in strict compliance with provisions of the statute.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

[HN11](#) See [Fam. Code, § 2105, subd. \(a\)](#).

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

[HN12](#) Parties to a dissolution proceeding may stipulate to a mutual waiver of the requirements concerning the final declaration of disclosure, but only under specified conditions, including exchange of the preliminary disclosure declarations and exchange of current income and expense declarations. [Fam. Code, § 2105, subd. \(d\)](#).

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

[HN13](#) [Fam. Code, §§ 2104](#) and [2105](#), were not intended to and do not apply to a postmarital agreement that was not executed in contemplation of the imminent dissolution of the marriage and that was expressly intended to promote increased understanding, harmony and trust and was made with the intent to make a good faith effort to reconcile the parties' differences. The legislative findings and declarations in [Fam. Code, § 2100](#), make clear that the statute applies to agreements that contemplate a judgment dissolving the marriage, not agreements that contemplate a reconciliation. The structure and language of other provisions of the statute likewise make this intention clear. Nothing in the statutory language suggests any intent to extend the asset disclosure requirements to postmarital agreements that do not contemplate imminent dissolution, and instead contemplate an effort to reconcile.

Governments > Legislation > Interpretation

[HN14](#) A reviewing court does not determine the meaning of a statute - assuming it is ambiguous - from a single word or sentence. Instead, the court construes the words and sentences in context and in the light of the statutory scheme.

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > Requirements

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN15 Parties to a dissolution proceeding cannot be permitted to avoid [Fam. Code, § 2100](#)'s mandatory sworn disclosure declarations merely by asserting an intention to attempt reconciliation, executing an agreement without statutory disclosures, and then resuming the dissolution proceedings. Trial courts are well-equipped to determine whether a dissolution proceeding was in abeyance or whether one or both spouses were improperly attempting to avoid mandatory and non-waivable disclosure requirements. The factors the trial court must assess include, but are not limited to, the bona fides of the spouses' intention to attempt reconciliation; their intention to hold the dissolution proceeding in abeyance; the length of time during which the spouses reside together, after initiating the dissolution proceeding, in connection with their attempts to reconcile; the duration of any actual reconciliation; and the length of time during which no activity has occurred in the dissolution proceeding.

Contracts Law > Breach > Anticipatory
Repudiation > General Overview

Business & Corporate
Compliance > Contracts > Breach > Nonperformance

Contracts Law > Breach > Nonperformance

HN16 A mere declaration of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of a contract. To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute. An unequivocal repudiation of the contract by one party prior to material breach of the contract by the other party excuses the other party from tendering performance of his concurrently conditional obligations.

Contracts Law > Breach > Anticipatory
Repudiation > General Overview

HN17 See [Civ. Code, § 1440](#).

Civil Procedure > ... > Defenses, Demurrers &
Objections > Affirmative Defenses > General
Overview

Family Law > Marital Duties & Rights > Causes of
Action > General Overview

HN18 The California Family Code expressly permits the defense of laches in actions in which a spouse asserts a breach of fiduciary duty that impairs community entitlements.

Civil Procedure > ... > Defenses, Demurrers &
Objections > Affirmative Defenses > General
Overview

Family Law > Marital Duties & Rights > Causes of
Action > General Overview

HN19 See [Fam. Code, § 1101, subd. \(d\)\(3\)](#).

Family Law > Marital Duties & Rights > Causes of
Action > General Overview

HN20 See [Fam. Code, § 1101, subd. \(a\)](#).

Contracts Law > ... > Estoppel > Equitable
Estoppel > Elements of Equitable Estoppel

HN21 Accepting and retaining the benefits of an agreement will operate as an estoppel if the person to be estopped acted with full knowledge of all the material facts and circumstances and with full knowledge of her rights in the premises.

Contracts Law > Remedies > Ratification

HN22 The essence of ratification is that it is done

with full knowledge of a party's rights; ratification will be strongly presumed against one who has accepted and had the beneficial use of the property or money involved in the transaction.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN23 The defense of laches requires unreasonable delay plus either acquiescence in the act about which a plaintiff complains or prejudice to the defendant resulting from the delay.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court entered an order finding that a postmarital agreement between a wife and her husband was valid and enforceable. The wife had filed a petition for dissolution of the marriage prior to entering into the agreement. The parties then attempted to reconcile and lived together for more than four years after executing the agreement. (Superior Court of Los Angeles County, No. BD390479, Stephen M. Lachs, Temporary Judge.*)

The Court of Appeal affirmed the order, holding that a presumption of undue influence under [Fam. Code, § 721](#), does not arise in an interspousal transaction unless one spouse obtains an unfair advantage or obtains property for which no or clearly inadequate consideration has been given. The presumption does not apply to a postmarital agreement in which both spouses obtain advantages, both are represented by independent and competent legal counsel, the wife is offered full access to the husband's business records relating to the marital assets, and both spouses acknowledge in

the agreement that neither has obtained any unfair advantage as a result of the agreement. Even if a presumption of undue influence applied to the parties' postmarital agreement and the trial court erred in allocating to the wife the burden of proving the agreement was invalid, substantial evidence supported the trial court's finding that the credible evidence established overwhelmingly that the agreement was not procured by undue influence. The wife's claim that the postmarital agreement was procured by the husband through actual fraud, by reason of his failure to provide written information to her on the effects of a prospective merger that would later affect the value of marital assets, was without merit. [Fam. Code, §§ 2104 and 2105](#), do not apply to spouses who negotiate and execute a postmarital agreement while a dissolution proceeding is in abeyance and the spouses are attempting to reconcile rather than contemplating the imminent dissolution of the marriage. The wife's claim that she properly rescinded the postmarital agreement for nonperformance and failure of consideration was also without merit. The doctrines of ratification [***713**] and estoppel precluded the wife from claiming the postmarital agreement was unenforceable. (Opinion by Boland, J., with Cooper, P. J., and Rubin, J., concurring.)

Headnotes

[CA\(1\)](#) (1)

Husband and Wife § 2—Nature of Relation—Fiduciary—Agreements in Which One Spouse Gains Advantage.

The fiduciary relationship between husband and wife is expressly described in [Fam. Code, § 721](#), particularly as it relates to transactions between themselves. The spouses occupy a confidential relationship with each other and are subject to the general rules governing fiduciary relationships. Whenever spouses enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the

* Pursuant to California Constitution, article VI, section 21.

agreement was not obtained through undue influence.

CA(2) (2)

Husband and Wife § 23—Property—Transactions Between Spouses—Undue Influence—Unfair Advantage—Presumption.

The predicate for applying a presumption of undue influence in an interspousal transaction is that one spouse has obtained an advantage over the other in the transaction. The presumption of undue influence is regularly applied in marital transactions in which one spouse has deeded property to the other. In such cases, it is evident one spouse has obtained an advantage—the deeded property—from the other. In other more comprehensive marital transactions involving the division of community assets, the nature of the “advantage” required to raise a presumption of undue influence has not been much discussed in the cases. However, the language of [Fam. Code, § 721](#), is clear, prohibiting either spouse from taking any unfair advantage of the other ([§ 721, subd. \(b\)](#)). [Section 721](#), together with case authorities, leads to the conclusion that the advantage which raises a presumption of undue influence in a marital transaction involving a contractual exchange between spouses must necessarily be an unfair advantage. In short, both [§ 721](#) and case precedents support the conclusion that in a contractual exchange between spouses, a presumption of undue influence arises only if one of the spouses has obtained an unfair advantage over the other.

CA(3) (3)

Husband and Wife § 23—Property—Transactions Between Spouses—Undue Influence—Presumption—Fiduciary Duties Comparable to Those of Business Partners.

The precedents construing statutory requirements applicable to transactions between trustees and

[*714] their beneficiaries are not controlling in interspousal transactions. Interspousal transactions are expressly governed by [Fam. Code, § 721](#), which prohibits a spouse from taking any unfair advantage of the other, and treats the fiduciary duties of spouses like those of business partners. The distinction between the two types of fiduciary relationship—trustee-beneficiary on the one hand, and spouses or business partners on the other—is entirely reasonable, because in the latter fiduciary duties run in both directions. Just as it would be patently irrational to presume undue influence in a contract between business partners, it would likewise be unreasonable to presume undue influence in a contract between spouses, unless one of the spouses has obtained an unfair advantage. For these reasons, a contract between spouses that advantages one spouse, and therefore raises a presumption the transaction was induced by undue influence, is a transaction in which one spouse obtains an unfair advantage over the other.

CA(4) (4)

Husband and Wife § 23—Property—Transactions Between Spouses—Undue Influence—Presumption—Burden of Proof—Postmarital Agreements.

Because 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 in a marital dissolution proceeding in which the wife sought to have her postmarital agreement declared invalid, and that the wife therefore had the burden of proving, by a preponderance of the evidence, that the agreement was invalid.

[11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, § 24.]

CA(5) (5)**Husband and Wife § 23—Property—Transactions
Between Spouses—Undue Influence—
Presumption—Burden of Proof—
Misrepresentation and Concealment—Avoidance
of Agreement.**

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 full knowledge of all the facts, and with a complete understanding of the effect of the transaction. Spouses entering into agreements relating to marital assets may not misrepresent or conceal facts materially affecting the value of the marital assets. When a spouse, represented by independent counsel, determines to forgo a suggested investigation and to accept a proposed settlement, that spouse may not later avoid the [*715] agreement unless there has been a misrepresentation or concealment of material facts. Under such circumstances, the spouse proposing the agreement is under no duty to compel the other to investigate, and the accepting spouse's decision, though ill advised, is binding.

CA(6) (6)**Dissolution of Marriage; Separation § 7—
Proceedings—Disclosure of Assets and
Liabilities—Application to Postmarital
Agreements.**

The Family Code requires the parties to a dissolution proceeding to serve on each other a preliminary, sworn declaration, on forms prescribed by the Judicial Council, identifying all assets and liabilities (*Fam. Code, § 2104, subds. (a) & (c)*). Similarly, before the parties to a dissolution proceeding enter into an agreement for the resolution of property issues, or before any trial, each must serve on the other a final declaration of disclosure and a current income and expense

declaration, executed under penalty of perjury on a form prescribed by the Judicial Council (*Fam. Code, § 2105, subd. (a)*). These mandatory statutory requirements cannot be waived, except in strict compliance with provisions of the statute. *Fam. Code, §§ 2104* and *2105*, were not intended to and do not apply to a postmarital agreement that was not executed in contemplation of the imminent dissolution of the marriage and that was expressly intended to promote increased understanding, harmony and trust and was made with the intent to make a good faith effort to reconcile the parties' differences. The legislative findings and declarations in *Fam. Code, § 2100*, make clear that the statute applies to agreements that contemplate a judgment dissolving the marriage, not agreements that contemplate a reconciliation. The structure and language of other provisions of the statute likewise make this intention clear. Nothing in the statutory language suggests any intent to extend the asset disclosure requirements to postmarital agreements that do not contemplate imminent dissolution, and instead contemplate an effort to reconcile.

CA(7) (7)**Statutes § 28—Construction—Language—
Context.**

A court does not determine the meaning of a statute—assuming it is ambiguous—from a single word or sentence. Instead, the court construes the words and sentences in context and in the light of the statutory scheme.

CA(8) (8)**Dissolution of Marriage; Separation § 7—
Proceedings—Disclosure of Assets and
Liabilities—Determining Whether Spouses
Attempted to Avoid Disclosure Requirements.**

Parties to a dissolution proceeding cannot be permitted to avoid *Fam. Code, § 2100*'s mandatory sworn disclosure declarations merely by asserting

an intention to attempt reconciliation, executing an agreement without statutory disclosures, and **[*716]** then resuming the dissolution proceedings. Trial courts are well equipped to determine whether a dissolution proceeding was in abeyance or whether one or both spouses were improperly attempting to avoid mandatory and nonwaivable disclosure requirements. The factors the trial court must assess include, but are not limited to, the bona fides of the spouses' intention to attempt reconciliation; their intention to hold the dissolution proceeding in abeyance; the length of time during which the spouses reside together, after initiating the dissolution proceeding, in connection with their attempts to reconcile; the duration of any actual reconciliation; and the length of time during which no activity has occurred in the dissolution proceeding.

CA(9) (9)

Contracts § 44—Performance—Breach—Renunciation Requirements.

A mere declaration of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of a contract. To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute. An unequivocal repudiation of the contract by one party prior to material breach of the contract by the other party excuses the other party from tendering performance of his concurrently conditional obligations.

CA(10) (10)

Husband and Wife § 50—Actions—Between Spouses—Breach of Fiduciary Duty—Laches Defense.

The Family Code expressly permits the defense of laches in actions in which a spouse asserts a breach

of fiduciary duty that impairs community entitlements. The defense of laches requires unreasonable delay plus either acquiescence in the act about which a plaintiff complains or prejudice to the defendant resulting from the delay.

CA(11) (11)

Husband and Wife § 37—Community Property—Ratification and Estoppel—Knowledge of Party's Rights.

Accepting and retaining the benefits of an agreement will operate as an estoppel if the person to be estopped acted with full knowledge of all the material facts and circumstances and with full knowledge of her rights in the premises. The essence of ratification is that it is done with full knowledge of a party's rights; ratification will be strongly presumed against one who has accepted and had the beneficial use of the property or money involved in the transaction.

[*717]

Counsel: Philip Kaufler, Hugh John Gibson and Hillel Chodos for Appellant.

Wasser, Cooperman & Carter, Dennis M. Wasser, Bruce E. Cooperman; Greines, Martin, Stein & Richland, Irving H. Greines; Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro and Patricia L. Glaser for Respondent.

Judges: Boland, J., with Cooper, P. J., and Rubin, J., concurring.

Opinion by: Boland

Opinion

[184] BOLAND, J.—**

SUMMARY

The issue in this case is the enforceability of a postmarital agreement. We affirm the trial court's order finding the agreement valid and enforceable. Our conclusions are:

—A presumption of undue influence does not arise in an interspousal transaction unless one spouse obtains an unfair advantage or obtains property for which no or clearly inadequate consideration has been given. The presumption does not apply to a postmarital agreement in which both spouses obtain advantages; both are **[**185]** represented by independent and competent legal counsel; the wife is offered full access to the husband's business records **[***2]** relating to the marital assets; and both spouses acknowledge in the agreement that neither has obtained any unfair advantage as a result of the agreement.

—Even if a presumption of undue influence applied to the parties' postmarital agreement and the trial court erred in allocating to the wife the burden of proving the agreement was invalid, substantial evidence supported the trial court's finding that the credible evidence “established overwhelmingly” that the agreement was not procured by undue influence.

—The wife's claim that the postmarital agreement was procured by the husband through actual fraud, by reason of his failure to provide written information to her on the effects of a prospective merger that would later affect the value of marital assets, is without merit.

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—[Family Code sections 2104](#) and [2105](#), requiring parties to a marital dissolution action to serve preliminary and final verified declarations disclosing all assets and liabilities, do not apply to spouses who negotiate and execute a postmarital agreement while a dissolution proceeding is in abeyance, and the spouses are attempting to reconcile rather than contemplating **[***3]** the imminent dissolution of the marriage.

—The wife's claim that she properly rescinded the

postmarital agreement for “non-performance and failure of consideration” is without merit, because the wife repudiated the agreement in her dissolution petition, excusing further performance by the husband pending judicial determination of the validity of the agreement.

—The doctrines of ratification and estoppel preclude the wife from claiming the postmarital agreement is unenforceable.

FACTUAL AND PROCEDURAL BACKGROUND

Ronald W. Burkle and Janet E. Burkle were married on March 23, 1974. In April 1997, Ms. Burkle hired a personal attorney who assisted her in interviewing and obtaining family law counsel. In May, Ms. Burkle retained Barry T. Harlan, a certified family law specialist with more than 30 years of legal experience, and in June 1997 she filed a petition for dissolution of the marriage. Ms. Burkle was also advised by two other certified family law specialists, as well as by other lawyers in Harlan's firm with expertise in tax law, real estate law and other areas. She engaged forensic accountants (Gursey, Schneider & Co.) and hired a private investigative firm. **[***4]** After Ms. Burkle's petition was filed, Mr. Burkle engaged David S. Karton to represent him in the dissolution proceeding.

The marriage did not proceed to dissolution in 1997. Instead, by August 1997, both parties were seriously considering an effort to reconcile, coupled with a postmarital agreement that would resolve all present and future financial issues between them. The parties resumed living together in September 1997, and executed a postmarital agreement in November 1997. According to Ms. Burkle, they lived together until April 2002. On June 13, 2003, Ms. Burkle filed the current petition for dissolution of marriage, in which she contends the postmarital agreement is void and unenforceable.

We first describe the postmarital agreement, and

then turn to the events surrounding its execution and the subsequent proceedings leading to this appeal, including **[**186]** the relevant findings and conclusions of the trial court.

[*719]

I. The postmarital agreement.

In broad strokes, the significant financial effects of the agreement executed by the Burkle family in November 1997 were these:

—Schedules were prepared by Mr. Burkle listing and valuing community property assets (Schedule **[***5]** A) and assets he claimed as separate property (Schedule C), as of June 6, 1997. As to these schedules:

—The community property schedule showed property with a tax-effected fair market value of \$ 60,028,267.

—The property listed as separate was acquired during a five-year period between 1992 and 1997, during which Mr. Burkle contended the parties had lived separate and apart (a contention disputed by Ms. Burkle), and was valued at a tax-effected fair market value of \$ 86,755,898.¹

—All appreciation and income from the community property accruing from the date of the agreement were to be Mr. Burkle's separate property.

—Mr. Burkle was to pay Ms. Burkle, on the anniversary date of the agreement for every year (or pro rata portion) the parties lived together, \$ 1 million in cash or negotiable securities, deemed her distributive share of the appreciation and income from community assets for the preceding year, and considered her separate property upon receipt.

—If either party sought a dissolution of the

marriage, or elected a division of the community property, then:

—Mr. Burkle would be awarded, as his share of the community assets, all the assets on the **[***6]** community property schedule and/or all assets acquired with any proceeds derived from those assets.

—Ms. Burkle would be awarded, as her share of the community assets, in cash and tax free, \$ 30,014,134 (50 percent of the total net value as of the date of the agreement, adjusted for liabilities and tax consequences), plus 5 percent simple interest per annum **[*720]** accruing from the date of the agreement. Of this amount, Mr. Burkle would pay Ms. Burkle (a) \$ 5 million within 90 days of service of a petition for dissolution (or written notice of an election to divide the community property); (b) \$ 5 million with 90 days after the first payment; and (c) \$ 10 million on each annual anniversary date of the second \$ 5 million payment, until paid in full.

—Mr. Burkle was given sole management and control over all community property as if it were his separate property, with no duty to account for the community assets so long as he made the agreed annual million-dollar payments to Ms. Burkle.

—If either party sought a dissolution of the marriage or elected a division of community property, Mr. Burkle was to purchase a residence for Ms. Burkle, selected by her, provided the residence was within **[***7]** three miles of the residence in which the parties were then living. The cost was to be the amount necessary to purchase a residence **[**187]** valued at up to \$ 3 million as of June 1997.

—Mr. Burkle was obligated to pay all family living expenses, described as “all expenses necessary to maintain the Parties and the Parties' minor children in a lifestyle consistent with that which each of them has maintained while living separate and apart

¹ This separate property consisted of stock and stock warrants in Smith's and Dominick's, held by various limited and general partnerships and limited liability corporations. A third schedule listed Ms. Burkle's separate property, principally personal effects, furniture, automobiles and several horses.

during the last five (5) years.” The agreement recited that Mr. Burkle had paid, as Ms. Burkle’s marital living expenses during that period, an amount between \$ 400,000 and \$ 500,000 per year, net of taxes, an amount Ms. Burkle acknowledged had “more than adequately maintained her in her desired lifestyle.”

—Ms. Burkle waived any rights to spousal support.

*****8]** The postmarital agreement was initially drafted in August 1997, and was signed by Ms. Burkle on November 5, 1997 and by Mr. Burkle on November 21, 1997. The parties initialed each page of the agreement. It was also signed by Harlan, Ms. Burkle’s attorney, who certified that he had fully explained to Ms. Burkle the effect the agreement had upon the rights she would otherwise have as a matter of law, and that she acknowledged to him that she understood the legal effect of the agreement. The agreement included a statement of intent and other recitals and provisions, including the following:

[*721]

—Ms. Burkle desired financial security and assurance she would be able to enjoy her present lifestyle without hindrance or risk of loss.²

—Mr. Burkle desired the financial freedom to make investments that could yield high returns but which carried the risk of significant loss.

—If the parties were ultimately unable to reconcile their differences and either of them desired to dissolve the marriage, both parties wanted the agreement to fully resolve all possible financial issues so they would be spared the financial and emotional costs of litigation.

—The parties had been living separate *****9]** and apart for approximately five years. They disputed the legal effect of their separate residences, and

acknowledged the dispute would create a substantial difference in the value of the community estate, depending on which party prevailed.

—The parties acknowledged that:

—They discussed with their respective legal counsel, “at length, numerous alternatives available with respect to the form and substance of a postmarital agreement, and that they have adopted the provisions of this agreement after careful consideration of such available alternatives.”

—They were aware that the assets on Schedules A and C “may, and probably will, increase dramatically in value in the future and that Jan’s interest therein is being fixed at this time, notwithstanding the possibility of future increases.”

—They had the right to conduct formal discovery in the dissolution proceeding, and voluntarily elected to forgo such discovery.

—They did not rely on any statement, warranty or representation of the other party, except as stated in the agreement, “as being a representation upon which reliance was based ****188]** in agreeing to” the postmarital agreement.

—Neither party had obtained any unfair *****10]** advantage as a result of the agreement. **[*722]**

—No presumption concerning the fiduciary duty owed by one spouse to another ([*Fam. Code, §§ 721 & 1100*](#)) would be applicable to the agreement, and the benefits of any such presumptions were waived.

—Ms. Burkle acknowledged that her attorneys and accountants “have had a minimum of six (6) months to conduct independent investigations, analysis and review of transactions in order to determine the extent and value of all assets and

² Elsewhere, the agreement recited that “the most significant factors and critical elements for Jan in entering into this Agreement are that it provides her with liquidity and predictability and reduces her risk of potential loss.”

liabilities of the Parties.”

—The parties agreed, as to the disclosure of assets, that:

—The purpose of the disclosure schedules was “to identify the assets and liabilities of the Parties as accurately as possible in order to arrive at an equitable, mutually agreeable division of these assets”

—Mr. Burkle had made “a good faith estimate of what he believes to be the reasonable value” of the assets on Schedules A and C, and that the notes to those schedules further amplified the assumptions on which his estimates were premised.

—Ms. Burkle acknowledged she had had “the opportunity to do as much independent discovery, appraisal and valuation of the assets [***11] ... as she wishes and that she has not relied on the word of Ron in determining the value of the assets set forth therein.”

—The parties were aware of the rights and duties of a spouse exercising unilateral management and control of community assets under the Family Code ([Fam. Code, § 1100 et seq.](#)), and waived those provisions, specifically stating that: “It is understood that for the purposes of negotiating and preparing this Agreement, Jan is not acting as a fiduciary for Ron and Ron is not acting as a fiduciary for Jan.”

—The parties understood there is a substantial issue under California law as to whether public policy allowed them to contract for a release of their fiduciary responsibilities to each other, and nonetheless voluntarily did so.

[***12] II. Subsequent events and proceedings.

As mentioned *ante*, the parties lived together for more than four years after executing the agreement,

until (according to Ms. Burkle) April 2002. In June [***13] 2003, Ms. Burkle filed a petition for dissolution of the marriage in which she asserted the agreement was void and unenforceable. The parties stipulated to the appointment of Retired Judge Stephen M. Lachs, as a privately compensated judge pro tempore, to hear and determine all disputes arising from the postmarital agreement, including its validity and enforceability. Judge Lachs was also charged with resolving all other issues arising from the marital relationship, including child custody, child and spousal support, property rights, and so on. The parties stipulated that an evidentiary hearing focusing on the validity and enforceability of the postmarital agreement would constitute a bifurcated trial on that issue.

Ms. Burkle sought to compel extensive discovery—which she had forgone when the postmarital agreement was in negotiation—to determine whether the financial and property disclosures and valuations in the schedules to the postmarital agreement were “truthful or [***13] fraudulent.” The [***189] court, however, declined to compel any discovery concerning the assets and liabilities identified on the schedules, limiting discovery—at this stage of the proceeding—to the circumstances surrounding the entry into the agreement.³ The court observed that: “If it turns out that the circumstances surrounding the entry into the agreement are such that it appears that Ms. Burkle was taken advantage of, then it may very well be that she is entitled to further discovery.”

[***14] A 10-day trial ensued, at which Ms. Burkle raised two principal issues: (1) whether she was so depressed and emotionally dependent upon Mr. Burkle that she did not sign the agreement of

³ The court elaborated: “What representations were made, if Ms. Burkle wants to bring in the lawyers and accountants who represented her, that’s her decision. If she wants to do discovery as to the representations made to her from Mr. Burkle and his entourage, legal and financial, certainly she is entitled [to] do that, as to what representations were made. [¶] She is entitled to do discovery as to, in my opinion, the reasons that things happened the way they did, and why is it that she received only these documents and not the other documents.”

her own free will, and (2) whether Mr. Burkle concealed assets or significant financial information from Ms. Burkle. The principal component involved in the second issue was Ms. Burkle's complaint that the schedules to the agreement did not mention two mergers Mr. Burkle was negotiating during the period between June 1997 and November 1997, which transformed his two major business assets from privately held regional supermarket chains to publicly merged national supermarket chains. These mergers were:

1) A merger between Smith's (holdings in which Mr. Burkle claimed as separate property) and Fred Meyer, which was announced publicly in May [*724] 1997 and was consummated on September 9, 1997, almost two months before Ms. Burkle signed the agreement; and

2) A later, second merger between Food-4-Less/Ralphs (a community property holding) and Fred Meyer/Hughes, which was announced publicly on November 6, 1997, the day after Ms. Burkle signed the postmarital agreement (and two weeks before Mr. Burkle signed [***15] it), and which was consummated four months later, on March 10, 1998.

Ms. Burkle also asserted that, when the second merger closed in March 1998, Mr. Burkle obtained valuable benefits (though the community's interest in various "Yucaipa" companies) that had not been disclosed to Ms. Burkle before she signed the agreement. These benefits were 75 percent of a \$ 20 million management contract termination fee, and 75 percent of \$ 14 million in Fred Meyer shares, received in return for surrender of Yucaipa warrants.

Both of the Burkles testified at length at the hearing, as did Karton (Mr. Burkle's lawyer) and several other witnesses, and more than 70 exhibits were offered into evidence.⁴ The trial court's

ultimate findings were that Ms. Burkle signed the agreement "freely and voluntarily, and free from any emotional influence that interfered with an exercise of her own free will," and that Mr. Burkle did not conceal assets or significant financial information from Ms. Burkle. We summarize *post*, in two categories roughly corresponding to the court's two ultimate conclusions and in a third general category, various of the [***190] court's findings, all of which are supported by substantial evidence [***16] in the record.

A. *The undue influence issue.*

With respect to its conclusion that Ms. Burkle signed the agreement freely and voluntarily, the trial court found, *inter alia*:

—In June 1997, Mr. Burkle transferred \$ 100,000 into a bank account in Ms. Burkle's name so she would feel no financial pressure, and Ms. Burkle testified that she felt no financial pressure during the period culminating in the execution of the agreement.

—In a conversation in which Mr. Burkle first made reference to a sum Ms. Burkle might receive under a postmarital agreement, Ms. Burkle told [*725] Mr. Burkle she did not feel comfortable discussing financial issues with him directly. Thereafter, the parties did not discuss between themselves the substantive provisions of the proposed postmarital agreement.

—Both parties genuinely wanted to reconcile with each [***17] other.

—Ms. Burkle's written and oral statements evidenced that she was in full control of her faculties and emotions in connection with the negotiation of and her entry into the agreement.

—Mr. Burkle did not coerce or threaten Ms. Burkle in any way, "including physically, emotionally, or economically, to get her to sign the Agreement," and no persuasive evidence supported a conclusion she entered into the agreement as a result of a depressed mental condition.

⁴ The other witnesses were Donald L. Gursey (of the forensic accounting firm), Melinda Wade (a friend of the Burkles), and Naoma Nicholls (Mr. Burkle's assistant).

—Mr. Burkle made all relevant financial information available to Ms. Burkle's attorneys and accountants for their inspection and review, and Ms. Burkle was free at all times to have her representatives review and investigate that information. Her decisions regarding the scope and extent of investigations, including her decision to limit the scope, were freely made, with the advice of her attorneys, and not as the result of any pressure applied by Mr. Burkle.

—Ms. Burkle exercised her own judgment, with the advice of skilled attorneys, to conclude that the agreement was satisfactory to her.

—Ms. Burkle, “did, in fact, enter into the Agreement freely, willingly and voluntarily, and free of any fraud, duress, medical [***18] condition or undue influence.”

B. The concealment issue.

With respect to the claim that Mr. Burkle concealed assets and significant financial information from Ms. Burkle, the trial court further found, inter alia:

—On August 22, 1997, Karton (Mr. Burkle's lawyer) sent the initial draft of the proposed agreement to Harlan, including Schedules A and C setting forth Mr. Burkle's view of the parties' community and Mr. Burkle's separate property. In Karton's letter forwarding the draft, he advised Harlan that: “With regard to the financial information, it appears more sensible to provide you with access and information as you request. When you are ready to proceed in that regard, let me know, and we will arrange a meeting at Ron's office, together with personnel to assist you in reviewing the documentation.”

[*726]

—Karton's offer to make all information available to Ms. Burkle's representatives remained open until the agreement was executed.

—On September 6, 1997, the Burkles and their respective counsel met for a substantial portion of the day to discuss [**191] the initial draft. Two

days later, Harlan advised Karton that Ms. Burkle was prepared to accept the [***19] basic terms of the proposed agreement. Negotiations continued, however, until late October. On October 27, 1997, at Harlan's request, Karton sent him four execution-ready copies of the agreement, and Ms. Burkle subsequently met for two hours with Harlan and two other of her attorneys to discuss the agreement.

—Mr. Burkle fulfilled his fiduciary duties to Ms. Burkle, “including his duty to make a true and full disclosure of community assets,” and he “did disclose in good faith his sincerely held and reasonable estimates of the value and characterization of the community property and his separate property.”

—The merger between Smith's and Fred Meyer (the first merger, consummated on September 9, 1997 and involving property Mr. Burkle claimed as separate) was known to Ms. Burkle before she entered into the agreement.

—At the meeting of the parties and counsel on September 6, 1997, Mr. Burkle discussed with Ms. Burkle and Harlan the possibility of a merger between Food-4-Less/Ralphs and Fred Meyer/Hughes (the second merger). And, Harlan subsequently referred to a possible merger in his September 16, 1997 memorandum to Karton: “[I]t seems to me from a fairness point of view [***20] that if there is a great increase in the value of the community property assets, that Jan should share in the appreciation in a defined amount. ... [¶] I would propose that if for example, Ralphs was to merge with Hughes and go public and the value skyrockets to several hundred millions, that Jan should share in this appreciation. I will let you and your client determine what is a fair and equitable defined, ascertainable amount.”⁵

⁵ The trial court expanded on the point: “This reference [in Harlan's memorandum] was not by chance. [Ms. Burkle's] failure to call Mr. Harlan to testify regarding this matter at trial further supports the Court's finding that such possible merger was disclosed by [Mr. Burkle] to [Ms. Burkle]. Furthermore, the merger between Food-4-Less and Fred Meyer Co., was publicly announced on November 6, 1997, and [Mr. Burkle] did not execute the Agreement until

—“[M]any of the issues raised by [Ms. Burkle] and her counsel at time of trial regarding purported inadequacies in disclosure could or should readily have been discovered and addressed prior to the parties' entry into the [*727] Agreement in 1997 if [Ms. Burkle] and her counsel had reviewed the information which [Mr. Burkle] made available to them, including, but not limited to, information regarding the Yucaipa warrants and the management agreement cancellation fee.”

—The overall value of the assets on the community property schedule to the postmarital agreement did not materially change between June 6, 1997 (the agreed valuation date), and November 22, 1997 (the date of the agreement).

[***21] C. Other pertinent findings.

The trial court made several other pertinent findings and conclusions, including these:

—Ms. Burkle was represented by a host of attorneys, including three certified [**192] family law specialists, throughout the process that culminated with the execution of the agreement. She also engaged a preeminent forensic accounting firm, and hired a private investigative firm to conduct an asset search on her behalf.⁶ The investigative firm provided a three-volume report to Ms. Burkle's attorneys. Ms. Burkle asserted the attorney-client and work product privileges as to the advice and information provided by her attorneys, accountants and investigators.⁷

—Under the postmarital agreement, Ms. Burkle “in

November 22, 1997. Yet, despite exchanges of correspondence and telephone calls between Mr. Harlan and Mr. Karton during that 16-day period, at no time ... did Mr. Harlan request a change in the Agreement as a result of the publicly-announced merger.”

⁶ The forensic accounting firm, Gurse, Schneider & Co., performed comparatively minor services, preparing a cash flow report and billing \$ 4,552.50 through July 31, 1997. However, as of August 28, 1997, the firm continued ready, willing and able to do further work, had it been assigned.

⁷ The trial court's statement of decision states that the court drew no inference from Ms. Burkle's assertion of these privileges.

fact obtained the advantage she was bargaining for of financial security;” and no presumption of undue influence arose by virtue of the parties' entry into the agreement.

—“Even if a presumption of undue influence had arisen ... the credible evidence at trial established overwhelmingly that any such presumption would have been fully and completely rebutted.”

—Ms. Burkle accepted the benefits she received under the agreement for more than five [***22] years before raising claims relating to the second merger. “The Court finds that such a delay in raising that issue was unreasonable, and that, by her conduct, [Ms. Burkle] ratified the Agreement and is estopped to deny the validity and enforceability of the Agreement at this late juncture.”

—“The doctrine of laches bars [Ms. Burkle] from contesting the validity and enforceability of the Agreement on the basis of the circumstances [*728] surrounding its negotiation and execution, its performance, and the long delay in raising challenge to the Agreement.”

After the trial court issued its [***23] tentative decision, Ms. Burkle timely requested a statement of decision. She filed objections to the proposed statement of decision; various revisions were made; and the objections were overruled. A final statement of decision was filed on December 9, 2004, together with an order finding the agreement valid and enforceable and certifying the order for immediate appellate review. This appeal followed.

DISCUSSION

Ms. Burkle's challenge to the trial court's decision is premised upon several mistaken legal contentions, which we address in succeeding sections of this opinion.

First, Ms. Burkle ignores the substantial evidence rule, reciting the facts as she thinks they should have been found rather than as the trial court found them. The substantial evidence rule does not apply,

she contends, because the court misallocated the burden of proof, an error she claims is “reversible error *per se*” We conclude in part I, *post*, that the court properly applied the burden of proof, and that no presumption of undue influence applied under the circumstances of this case. We further conclude in part II, *post*, that, even if a presumption of undue influence arose, the [***24] evidence revealed it was thoroughly [**193] rebutted, and no legal basis exists for reversing the court's order.

Second, we reject in part III, *post*, Ms. Burkle's claim that, because Mr. Burkle did not provide her with written information about the mergers in progress during the negotiation of the postmarital agreement, the agreement was procured “through actual fraudulent misrepresentation and concealment” as a matter of law.

Third, Ms. Burkle erroneously asserts the agreement must be set aside for failure to comply with [Family Code section 2100 et seq.](#), which require parties to a dissolution proceeding to serve on each other financial disclosure declarations before or at the time of an agreement resolving property or support issues. As we explain in part IV, *post*, those sections do not apply to a postmarital agreement that was not executed in contemplation of the imminent dissolution of the marriage.

Fourth, we reject Ms. Burkle's claim that she properly rescinded the agreement on January 7, 2004 for failure of consideration, based on Mr. Burkle's allegedly defective tender of payment under the agreement. We conclude in part V, *post*, that Ms. Burkle [***25] unequivocally repudiated the [*729] agreement in her petition for dissolution and her verified responses to interrogatories, excusing any further performance by Mr. Burkle pending a judicial determination of the validity of the agreement.

Finally, as a further ground supporting the trial court's order, we conclude in part VI, *post*, that the doctrines of ratification and estoppel preclude Ms. Burkle's challenge to the validity of the agreement.

I. *No presumption of undue influence arose from the execution of the Burkles' postmarital agreement, and the trial court therefore did not err in assigning the burden of proof to Ms. Burkle.*

We begin with a brief discussion of several principles that generally apply to the analysis of interspousal transactions.

CA(1) (1) First, [HN1](#) the fiduciary relationship between husband and wife is expressly described in [Family Code section 721](#), particularly as it relates to transactions between themselves. The spouses occupy a confidential relationship with each other, and are subject to the general rules governing fiduciary relationships: “This confidential relationship imposes a duty of the highest good faith and fair dealing [***26] 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” ([Fam. Code, § 721, subd. \(b\).](#))

Second, “whenever [spouses] enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence” ([In re Marriage of Bonds \(2000\) 24 Cal.4th 1, 27 \[99 Cal. Rptr. 2d 252, 5 P.3d 815\] \(Bonds\)](#); see [In re Marriage of Haines \(1995\) 33 Cal.App.4th 277, 293 \[39 Cal. Rptr. 2d 673\] \(Haines\).](#))⁸

[***27] [**194] From these two settled principles, Ms. Burkle concludes that her postmarital agreement was presumptively obtained through undue influence, and that Mr. Burkle had

⁸ The Supreme Court explains: “The primary consequences of designating a relationship as fiduciary in nature are that the parties owe a duty of full disclosure, and that a presumption arises that a party who owes a fiduciary duty, and who secures a benefit through an agreement, has done so through undue influence. ... It has long been the rule that ‘[w]hen an interspousal transaction advantages one spouse, “[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.” ’ ” ([Bonds, supra, 24 Cal.4th at pp. 27–28](#), citations omitted.)

the burden of demonstrating otherwise. Ms. Burkle contends that “even a cursory reading” of the agreement shows that Mr. Burkle “obtained many advantages over Jan by virtue of the postmarital agreement.” [*730] According to Ms. Burkle, if the spouse relying on a marital agreement obtained any advantage from it, fair or unfair, the presumption of undue influence arises, and any advantage obtained by the spouse challenging the agreement is “completely irrelevant.” We do not agree with Ms. Burkle’s analysis, which is inconsistent with the express language of [Family Code section 721](#) and with the applicable case law.

A. The meaning of “advantage” in a marital transaction.

[CA\(2\) \(2\) HN2](#) It is settled that the predicate for applying a presumption of undue influence in an interspousal transaction is that one spouse has obtained an advantage over the other in the transaction. ([Haines, supra, 33 Cal.App.4th at p. 297](#); see [Bonds, supra, 24 Cal.4th at p. 27](#).) The presumption of undue [***28] influence is regularly applied in marital transactions in which one spouse has deeded property to the other, as in *Haines*. In such cases, it is evident one spouse has obtained an advantage—the deeded property—from the other. In other more comprehensive marital transactions involving the division of community assets, the nature of the “advantage” required to raise a presumption of undue influence has not been much discussed in the cases. However, the language of [Family Code section 721](#) is clear, prohibiting either spouse from taking “any unfair advantage of the other.” ([Fam. Code, § 721, subd. \(b\).](#)) [Section 721](#), together with our analysis of the case authorities, leads us to conclude that the “advantage” which raises a presumption of undue influence in a marital transaction involving a contractual exchange between spouses must necessarily be an unfair advantage.

As long ago as 1894, the Supreme Court stated that: “The moment it appears ... that ‘an unfair advantage’ has been obtained, the presumption that

it was procured by undue influence arises out of the existence of the confidential relation of husband and wife ... [***29] .” ([Dimond v. Sanderson \(1894\) 103 Cal. 97, 102 \[37 P. 189\]](#) (*Dimond*.) Almost a century later, the principle of unfair advantage was codified by the predecessor to [Family Code section 721](#) (former Civil Code section 5103), which expressly defines the fiduciary duties of spouses in transactions with each other. The existence of unfair advantage—or lack of consideration—as a predicate to the presumption of undue influence in a marital transaction has been frequently suggested in precedents over the years, both before and after the enactment of [section 721](#) and its predecessor. Thus:

—In [Estate of Cover \(1922\) 188 Cal. 133, 144 \[204 P. 583\]](#) (*Cover*), the Supreme Court said that the “mere existence of the marriage relation alone will not, in and of itself, suffice to initiate and support the presumption of undue influence where the transaction between husband and wife is *prima facie*, or, from all of the circumstances thereof, shown to be fair and free from any material advantage to the husband from and over the wife.” [*731]

—In [In re Marriage of Baltins \(1989\) 212 Cal. App. 3d 66, 88 \[260 Cal. Rptr. 403\]](#), the court [***30] observed: “The marriage [**195] relationship alone will not support a presumption of undue influence by one spouse over the other where the transaction between them is shown to be fair.”

—In [Haines, supra, 33 Cal.App.4th 277](#), the court expressly stated that the presumption of undue influence arises under [Family Code section 721](#) “[w]here one spouse has taken advantage of another” in the transaction. ([Haines at p. 301](#).) The word “advantage,” in this context, plainly does not mean merely that a gain or benefit has been obtained. Taking “advantage of another” necessarily connotes an unfair advantage, not merely a gain or benefit obtained in a mutual exchange.

—[In re Marriage of Delaney \(2003\) 111](#)

[Cal.App.4th 991, 996 \[4 Cal. Rptr. 3d 378\]](#) (*Delaney*) stated that “when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence.” Again, a mere benefit is not enough; the advantage must operate “to the disadvantage” of the other spouse.

—In [In re Marriage of Saslow \(1985\) 40 Cal.3d 848 \[221 Cal. Rptr. 546, 710 P.2d 346\]](#), the Supreme Court, [***31] while it did not discuss the presumption issue, likewise emphasized the necessity for a showing of unfairness: “To support a finding of undue influence, [the] evidence, in addition to a showing of marriage relationship, must also show such unfairness of the transaction as will tend to establish that the wrongful spouse made use of the confidence reposed for the purpose of gaining an unreasonable advantage over the mate.’ ” (*Id. at pp. 863–864*, quoting [Snyder v. Snyder \(1951\) 102 Cal. App. 2d 489, 492 \[227 P.2d 847\]](#).)

—Finally, numerous cases apply the presumption of undue influence when the marital transaction is one in which one spouse deeds his or her interest in community property to the other spouse, for no consideration or for clearly inadequate consideration. (E.g., [Weil v. Weil \(1951\) 37 Cal.2d 770, 787–789 \[236 P.2d 159\]](#) [husband who secures a property advantage from his wife has the burden to show the absence of undue influence; wife's deed to husband was voluntary where the wife was aware that the spouses' interests were in conflict and she had ample opportunity to obtain independent advice].) Cases such as *Weil* and *Haines*, involving property [***32] transfers without consideration, necessarily raise a presumption of undue influence, because one spouse obtains a benefit at the expense of the other, who receives nothing in return. The advantage obtained in these cases, too, may be reasonably characterized as a species of unfair advantage.

[*732]

In short, both [Family Code section 721](#) and case precedents support the conclusion that in a contractual exchange between spouses, a presumption of undue influence arises only if one of the spouses has obtained an *unfair* advantage over the other. The Supreme Court's language in *Bonds*—that the advantaged spouse bears the burden of demonstrating that the agreement was not obtained through undue influence—is in no way inconsistent with this conclusion. *Bonds* involved a premarital agreement and, in its discussion contrasting premarital agreements with marital settlement agreements, expressly posits a transaction which “advantages one spouse” ([Bonds, supra, 24 Cal.4th at p. 28](#))—not a transaction [**196] in which both spouses obtain advantages. *Bonds* had no occasion to elucidate the meaning of “advantage” in a contractual exchange between spouses [***33] where both spouses obtain different advantages from the agreement. We discern no incongruity between *Bonds* and our conclusion that a spouse is presumed to have induced a transaction through undue influence only if he or she, in the words of [Family Code section 721](#), has obtained an “unfair advantage” from the transaction.

Ms. Burkle insists that [Bradner v. Vasquez \(1954\) 43 Cal.2d 147 \[272 P.2d 11\]](#) (*Bradner*) requires the conclusion that any advantage, fair or unfair, obtained in a marital agreement is sufficient to generate a presumption that the agreement was induced through undue influence. We disagree. In *Bradner*, the Supreme Court did conclude that, in an action between a fiduciary and his beneficiary, a statutory presumption of undue influence applies when the fiduciary “gains, benefits, or profits” from the transaction, without regard to whether the advantage gained is fair or unfair. (*Id. at p. 152.*) In *Bradner*, the Supreme Court construed the presumptions in [Civil Code section 2235](#) (now [Probate Code section 16004](#)). [Section 2235](#) then provided that all transactions between [***34] a trustee and his beneficiary, by which the trustee obtains “any advantage” from his beneficiary, were presumed to be entered into by the beneficiary “

‘without sufficient consideration, and under undue influence.’ ”⁹ (*Bradner, supra*, 43 Cal.2d at p. 151, quoting former Civ. Code, § 2235.) *Bradner*, which involved a transaction between attorney and client, expressly rejected the proposition that the advantage gained by the fiduciary “must be an unfair advantage before the presumptions of [former Civil Code] section 2235 are properly in the case.” (43 Cal.2d at p. 151.) The court found “no language in this section which imposes such an additional requirement.” (*Ibid.*) It concluded that where a fiduciary “gains, benefits, or profits” from a transaction with a beneficiary, it may fairly be said that an advantage has been obtained. Further: “To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would [*733] result in the imposition of a condition which is not required by section 2235.” (*Id.* at p. 152.) Similarly, the Supreme Court in *Rader v. Thrasher* (1962) 57 Cal.2d 244 [18 Cal. Rptr. 736, 368 P.2d 360] [***35] (*Rader*)—which, like *Bradner*, involved an attorney-client transaction—stated that proof of an advantage, not an unfair advantage, was “sufficient to raise the presumption of insufficient consideration under section 2235,” and expressly disapproved “[a]ny language in *Dimond v. Sanderson* [and two other cases] inconsistent with this Conclusion ... ”¹⁰ (*Rader, supra*, 57 Cal.2d at p. 252.)

[***36] In our view, neither *Bradner* nor *Rader* is controlling. Both construed a different statute governing the trustee-beneficiary relationship

(former Civ. Code, § [**197] 2235), and that statute required a presumption of undue influence if “any advantage” was obtained by the trustee from his beneficiary. The fiduciary duties of spouses are now expressly controlled by *Family Code section 721*, which prohibits a spouse from taking “any unfair advantage” of the other. Moreover, while principles governing trustee-beneficiary relationships are obviously similar to those governing marital relationships, in that both are fiduciary in nature, the two relationships are not identical. *Dimond* long ago identified a significant difference, namely that the statutory requirements applicable to the one-way trustee-beneficiary relationship do not necessarily apply to an interspousal transaction in which fiduciary duties run in both directions. Indeed, *Dimond* expressly stated that the marital relationship is not that of trustee and beneficiary: “The relation of husband and wife is not that of trustee and beneficiary, though it is a confidential relation, and transactions [***37] between them are to be considered in the same light and controlled by the same general rules ... ; but whether any particular transaction between husband and wife creates a trust, and, if so, which is the trustee and which the beneficiary, must depend upon the facts of the particular transaction involved in the controversy.” (*Dimond, supra*, 103 Cal. at p. 101.)

CA(3) (3) In sum, *HN3* the precedents construing statutory requirements applicable to transactions between trustees and their beneficiaries are not controlling in interspousal transactions. Interspousal transactions are expressly governed by *Family Code section 721, subdivision (b)*, which prohibits a spouse from taking “any unfair advantage of the other,” and treats the fiduciary duties of spouses like those of business partners. The distinction between the two types of fiduciary relationship—trustee-beneficiary on the one hand, and spouses or business partners on the other—is entirely reasonable, because in the latter fiduciary duties run in both directions. Indeed, just as it would be patently [*734] irrational to presume undue influence in a contract between business

⁹ *Probate Code section 16004*, the successor to former Civil Code section 2235, now provides in pertinent part: “A transaction between the trustee and a beneficiary ... by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee’s fiduciary duties.” (*Prob. Code, § 16004, subd. (c).*)

¹⁰ In *Dimond*, the Supreme Court took the view, disapproved in *Rader, supra*, 57 Cal.2d at page 252, that the presumption of undue influence in a spousal transaction “cannot appear until the presumption of a sufficient consideration, arising from the written obligation, has been overcome by proof.” (*Dimond, supra*, 103 Cal. at p. 102.)

partners, it would likewise be unreasonable to [***38] presume undue influence in a contract between spouses, unless one of the spouses has obtained an unfair advantage. For these reasons, we conclude that a contract between spouses that “advantages one spouse” ([Bonds, supra, 24 Cal.4th at p. 28](#)), and therefore raises a presumption the transaction was induced by undue influence, is a transaction in which one spouse obtains an unfair advantage over the other.

B. The Burkles' postmarital agreement did not give Mr. Burkle an unfair advantage.

Whether an interspousal transaction gives one spouse an unfair advantage is a question for the trier of fact.¹¹ The trial court declined to apply a presumption of undue influence to the Burkles' postmarital agreement, finding nothing unfair about the transaction. The court instead found the agreement provided mutual advantages [**198] — the converse of an agreement which “advantages one spouse to the disadvantage of the other” ([Delaney, supra, 111 Cal.App.4th at p. 996](#)): “In light of each party's goals and desires, the Court finds that the Agreement was fair and equitable, effectively compromising a multitude of issues between the parties. At the time [***39] that the Agreement was entered into, substantial good faith disputes existed as to the date of separation, the valuation and characterization of marital and separate property, the use of a tax-effected valuation basis for calculating values, and other factors. The Agreement provided mutual advantages to both [Ms. Burkle] and [Mr. Burkle]. The Agreement provided [Ms. Burkle] with an

assured and very substantial sum, bearing interest at 5% per annum until paid, regardless of any decrease in the overall size of the marital estate. It also provided [Ms. Burkle] with annual payments of \$ 1 million which were to be her sole and separate property. At the same time, the Agreement provided [Mr. Burkle] with the ability to pursue his high-risk business ventures.” Thus, the trial court found that the agreement provided mutual advantages to both Ms. Burkle and Mr. Burkle; that Ms. Burkle “in fact obtained the advantage she was bargaining for of financial security”; and that no presumption of undue influence arose by virtue of the parties' entry into the agreement. We can discern no flaw in the trial court's findings on this point, which are further supported by the express terms [***40] of the agreement itself, as well as by [**735] the fact that Ms. Burkle was advised by a number of sophisticated lawyers when she executed the agreement.¹²

[***41] Ms. Burkle cites [In re Marriage of Lange \(2002\) 102 Cal.App.4th 360 \[125 Cal. Rptr. 2d 379\]](#) (*Lange*) and [Haines, supra, 33 Cal.App.4th 277](#), asserting that the disadvantaged spouses in those cases also obtained “some advantage,” but the courts nonetheless concluded that a presumption of undue influence applied. An examination of the cases belies Ms. Burkle's assertion. In neither case did the trial court find that the transaction involved advantages to both spouses. Indeed, both cases reflect express conclusions, in *Lange* by the trial court and in *Haines* by the Court of Appeal, that one spouse obtained an advantage over the other, giving rise to the presumption of undue influence. While the courts in those cases did not use the term “unfair” to describe the advantage obtained by one spouse over the other, the essence of both *Haines*

¹¹ The point is demonstrated by cases involving the presumption of undue influence exercised by a beneficiary under a will. The presumption of undue influence arises if three elements are shown: a confidential relationship, active participation in the preparation of the will, and undue profit accruing to the beneficiary. If those elements are shown, a presumption of undue influence arises and the will proponent has the burden of proving no undue influence. However, “[i]t is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied.” ([Estate of Sarabia \(1990\) 221 Cal.App.3d 599, 605 \[270 Cal. Rptr. 560\]](#).)

¹² Ms. Burkle points out that the employment of able counsel does not relieve a spouse of his or her fiduciary obligations. ([Vai v. Bank of America \(1961\) 56 Cal.2d 329, 339–340 \[15 Cal. Rptr. 71, 364 P.2d 247\]](#) (*Vai*)). We agree. The point, however, is irrelevant to the determination of whether one spouse has obtained an unfair advantage in an interspousal transaction and thus raised a presumption of undue influence.

and *Lange* was that the advantage was unfair.¹³ Neither case involved circumstances [**199] even faintly comparable to those giving rise to the Burkles' postmarital agreement.

[***42] [CA\(4\)](#) (4) 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 [*736] transaction”¹⁴ ([Haines, supra, 33 Cal.App.4th](#)

¹³ *Haines* involved a quitclaim deed by which the wife deeded her interest in the couple's residence to the husband, during the period in which their marriage was deteriorating, in return for the husband's cosignature on a car loan for an automobile needed by the wife. As the court observed, “where Judy transferred her interest in real property to Clarence for his cosignature on an automobile loan—clearly inadequate consideration for execution of the quitclaim deed—Clarence properly should have borne the burden of rebutting the presumption of undue influence” ([Haines, supra, 33 Cal.App.4th at p. 296.](#))

In *Lange*, the trial court found a husband's \$ 250,000 promissory note and deed of trust in favor of his wife, which the husband executed at the wife's behest for her separate property contributions to the acquisition and improvement of their jointly owned residence, provided the wife with a financial advantage and were presumed to have been obtained through undue influence. ([Lange, supra, 102 Cal.App.4th at pp. 361, 363.](#)) The wife argued she obtained no advantage as a matter of law, because the note and deed of trust she prepared for her husband's signature were a substitute for her statutory rights to reimbursement. The Court of Appeal found the wife received an advantage as a matter of law, because she became a secured creditor additionally entitled to 10 percent interest on the husband's obligation (which amounted to \$ 870,000 by the time of trial), rights to which she would not be entitled had she pursued her statutory right to reimbursement. ([Id. at p. 364.](#)) The Court of Appeal also found the trial court correctly concluded the wife did not dispel the presumption of undue influence. ([Id. at p. 365.](#)) *Lange* was not a case where the husband received any advantage from the transaction.

¹⁴ Ms. Burkle argues the agreement gave Mr. Burkle an advantage as a matter of law, because the \$ 30 million plus 5 percent interest to be paid to her upon division of the community estate was an unsecured promise, and was to be paid in installments. Her theory is that Mr. Burkle's unsecured promise was “worth much less than Jan's share of the community property which was to be actually turned over to Ron when the [postmarital agreement] was triggered.” The argument is flawed for two reasons. First, it is impossible to know the value of the community property that was to be awarded to Mr. Burkle at an unknown future date. As the trial court observed, Ms. Burkle was willing to accept the agreed amount, “rather than accept the risk of

[at p. 301.](#)) [HN4](#) 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 postmarital agreement was invalid.

[***43] II. *Even if a presumption of undue influence applied, the trial court's conclusion must be affirmed because it is supported by substantial evidence.*

Even if we assume Mr. Burkle gained an advantage sufficient to invoke the presumption of undue influence, and the trial court therefore misallocated the burden of proof, we would nevertheless be required to affirm the trial court's order. Contrary to Ms. Burkle's claim, [HN5](#) misallocation of the burden of proof is not “reversible error *per se*,” does not vitiate the substantial evidence rule and, in this case, would not require reversal of the judgment.¹⁵

falling asset values, given [Mr. Burkle's] investment strategy.” In other words, Ms. Burkle would obtain the agreed \$ 30 million plus interest “regardless of any decrease in the overall size of the marital estate.” Ms. Burkle's argument works only in retrospect. Second, when spouses agree on a division of property, “no law requires them to divide the property equally, and the court does not scrutinize the [marital settlement agreement] to ensure that it sets out an equal division.” ([Mejia v. Reed \(2003\) 31 Cal.4th 657, 666 \[3 Cal. Rptr. 3d 390, 74 P.3d 166\].](#))

¹⁵ Ms. Burkle also contends the substantial evidence rule does not apply because the trial court “failed to respond to virtually all of Jan's Objections and Requests for Findings, thus invoking the provisions of [C.C.P. § 634](#)” Ms. Burkle misconceives the purpose and effect of [Code of Civil Procedure section 634](#). [Section 634](#) applies when a statement of decision fails to resolve or is ambiguous as to a controverted issue, and the omission or ambiguity is brought to the court's attention. In such a case, “it shall not be inferred on appeal ... that the trial court decided in favor of the prevailing party as to those facts or on that issue.” ([Code Civ. Proc., § 634.](#)) However, the trial court is not required to respond point by point to issues posed in a request for a statement of decision. “The

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[200]** A. *The trial court's decision must be affirmed if substantial evidence supports the conclusion that the presumption of undue influence was rebutted.*

HN6 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.” (*In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 632 [35 Cal.Rptr.3d 1] (*Mathews*); see *Weil v. Weil*, *supra*, 37 Cal.2d at p. 788.) *Mathews* is directly on point, as the trial court in that case improperly refused to apply the presumption of undue influence. The judgment was nonetheless affirmed because substantial evidence rebutted the presumption.

In *Mathews*, the wife had quitclaimed her interest in the couple's residence to the husband, in order to obtain a more favorable interest rate on a mortgage. Throughout the marriage, both parties believed the residence was community property and, after separation, discovered title was in the husband's

name alone. The trial court declined to apply a presumption of undue influence, and determined the wife entered into the transaction **[***45]** freely, voluntarily and with a full understanding of the quitclaim deed. The Court of Appeal concluded that the trial court “improperly refused to apply the [\[Family Code\] section 721](#) presumption of undue influence” and that the husband had the burden of overcoming the presumption of undue influence. (*Mathews*, *supra*, 133 Cal.App.4th at p. 630.) However, the trial court had “conclu[ded] that the quitclaim deed was the voluntary and deliberate act of [the wife], taken with full knowledge of its legal effect, and [the husband] did not unduly influence [the wife] to acquire title to the residence in his name alone.” (*Id.* at p. 632.) Because the question whether the presumption of undue influence was overcome is a question for the trier of fact, and because substantial evidence supported the trial court's conclusion, the Court of Appeal affirmed the **[*738]** judgment: **[**201]** “Substantial evidence supports the conclusion that Husband rebutted the presumption of undue influence over Wife's signing the quitclaim deed by a preponderance of the evidence.” ¹⁶ (*Mathews*, *supra*, 133 Cal.App.4th at p. 632.)

court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case.” (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 [25 Cal. Rptr. 2d 242]; **[***44]** see also *Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118 [54 Cal. Rptr. 2d 377] [trial court “is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case”]; *In re Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 686–687 [226 Cal. Rptr. 485] [trial court's statement of decision is required only to state ultimate rather than evidentiary facts].) Ms. Burkle fails to identify specifically any material controverted issue or ultimate fact that the statement of decision left unresolved or ambiguous. The five or six objections she mentions in her brief as having been unanswered in the statement of decision include, for example, an objection to the trial court's finding that the credible evidence overwhelmingly established that any presumption of undue influence was rebutted. Her objection, as Mr. Burkle points out, was merely an expression of disagreement with the trial court's conclusion. The trial court's statement of decision in this case fairly discloses its determinations on all the ultimate facts and material issues in the case, and Ms. Burkle's challenge on this ground has no merit.

[*46]** Ms. Burkle urges us to disregard *Mathews*, and cites several cases which find that an error in assigning the burden of proof was reversible error. The cases do not assist her, because **HN7** an error in allocating the burden of proof must be prejudicial in order to constitute reversible error. In the cases cited, the result may have been different had the proper party been

¹⁶ Ms. Burkle claims not only that Mr. Burkle had the burden of proof, but also that he was required to prove lack of undue influence by clear and convincing evidence. For this point, she cites *Gold v. Greenwald* (1966) 247 Cal.App.2d 296, 306 [55 Cal. Rptr. 660], which held an attorney must offer “‘clear and satisfactory evidence’” that a transaction with a client was fair and equitable, no advantage was taken by him, and the client was fully informed. To the extent *Gold* may be read to require clear and convincing evidence, we prefer to follow the more recent decision in *Mathews*, which involves a marital dissolution and is directly on point. In any event, the trial court in this case found the credible evidence was overwhelming on the point.

assigned the burden of proof.¹⁷ The case is otherwise here, where the trial court found the credible evidence “established overwhelmingly” that the agreement was not procured by undue influence. Accordingly, if substantial evidence supports the trial court's conclusion, we must affirm the order.

[*47]** B. *In this case, the trial court's conclusion that any presumption of undue influence was rebutted is supported by substantial evidence.*

CA(5) (5) HN8 When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the **[*739]** disadvantaged spouse's action “was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of” the transaction. ([Delaney, supra, 111 Cal.App.4th at p. 1000](#); see also [Mathews, supra, 133 Cal.App.4th at p. 631](#);

[Haines, supra, 33 Cal.App.4th at p. 296](#).) In this case, the trial **[**202]** court expressly found that, even if a presumption of undue influence had arisen, “the credible evidence at trial established overwhelmingly that any such presumption would have been fully and completely rebutted.” Substantial evidence supports that conclusion. The trial court heard testimony from both of the Burkle and made express findings on each of the three factors, delineated in *Delaney* and other cases, that rebut the presumption of undue influence: the transaction was entered freely and voluntarily, with full knowledge **[***48]** of the facts, and with a complete understanding of its legal effect. Thus:

—The court found that Ms. Burkle “did, in fact, enter into the Agreement freely, willingly and voluntarily, and free of any fraud, duress, medical condition or undue influence.” Numerous subsidiary findings supported this conclusion. (See pp. 724–725, *ante*.)

—As to Ms. Burkle's “full knowledge of all the facts”—a point addressed further in the succeeding section—the trial court found that Mr. Burkle fulfilled “his duty to make a true and full disclosure of community assets,” and he “did disclose in good faith his sincerely held and reasonable estimates of the value and characterization of the community property and his separate property.” It found that Mr. Burkle made all relevant financial information available to Ms. Burkle's attorneys and accountants for their inspection and review, and Ms. Burkle was free at all times to have her representatives review and investigate that information. It found that Ms. Burkle knew about the first merger, between Smith's and Fred Meyer, before she signed the agreement. It found that the possibility of a second merger between Food-4-Less/Ralphs and Fred Meyer/Hughes **[***49]** was discussed at a meeting among the parties and their counsel. It further found that in later correspondence Ms. Burkle's attorney referred to the possibility of the merger and proposed that Ms. Burkle should share in future appreciation from such a merger. In the agreement itself, Ms. Burkle acknowledged she was aware that

¹⁷ E.g., [Fukuda v. City of Angels \(1999\) 20 Cal.4th 805, 824 \[85 Cal. Rptr. 2d 696, 977 P.2d 693\]](#) (trial court erred in placing the burden of proof in administrative proceeding on the wrong party and in failing to presume the correctness of the administrative decision; court rejected the contention that the error did not affect the trial court's decision, because the record demonstrated that the trial court repeatedly relied on the failure to meet the burden of proof, and indeed stressed that the evidence was evenly balanced and the party with the burden of proof would lose); [Searle v. Allstate Life Ins. Co. \(1985\) 38 Cal.3d 425, 439 \[212 Cal. Rptr. 466, 696 P.2d 1308\]](#) (insurer had the burden to prove insured's suicide was intentional; an erroneous instruction allowed the jury to conclude that beneficiary of policy was required to prove that the insured acted unintentionally and insurer had no burden to prove any of the contested issues); [Buzgheia v. Leasco Sierra Grove \(1997\) 60 Cal.App.4th 374, 393 \[70 Cal. Rptr. 2d 427\]](#) (giving the wrong party the burden of proof on a dispositive issue when the evidence is in dispute is a major instructional error, but a judgment may not be reversed for misdirection of the jury absent a miscarriage of justice); [In re Marriage of Schwartz \(1980\) 104 Cal.App.3d 92, 95–96 \[163 Cal. Rptr. 408\]](#) (wife sought modification of a court-approved custody agreement that allowed one child to reside with the wife and the other with the husband; trial court prejudicially abused its discretion by making its ruling on the basis of its “unshakable prejudice” and preexisting bias against splitting custody; in addition, “[s]omehow the court had persuaded itself that [the husband], rather than [the wife] was the moving party” and had the burden of proof, an error which was itself sufficient to mandate reversal).

the assets on Schedules A and C “may, and probably will, increase dramatically in value in the future”

—As to Ms. Burkle's understanding of the effect of the agreement, the recitals in the agreement, her representation by a number of attorneys, including family law specialists, and her own and her attorney's certifications leave no doubt that she understood the legal effect of the agreement.

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In sum, substantial evidence supports the trial court's conclusion that any presumption of undue influence was rebutted. (*Mathews, supra*, 133 Cal.App.4th at p. 632.) Indeed, Ms. Burkle does not address the trial court's factual findings, but instead takes the position that the substantial evidence rule does not apply, and that she is at liberty to state the case as she chooses and without reference to the findings. As we have seen, that position **[***50]** is mistaken. As in *Mathews*, this record furnishes no basis for overturning the trial court's decision that Ms. Burkle “did, in fact, enter into the Agreement ... free of any ... undue influence.”¹⁸

[203]** III. *Ms. Burkle's contention that the agreement must be set aside because Mr. Burkle procured it through “actual fraudulent misrepresentation and concealment” is entirely without [***51] merit.*

Of course, *HN9* spouses entering into agreements relating to marital assets may not misrepresent or conceal facts materially affecting the value of the marital assets. (*Boeseke v. Boeseke* (1974) 10

Cal.3d 844, 850 [112 Cal. Rptr. 401, 519 P.2d 161] (Boeseke) [spouse represented by independent counsel who has accepted a proposed settlement and has forgone a suggested investigation “may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts”].) Ms. Burkle contends she may avoid the Burkles' postmarital agreement because Mr. Burkle procured it through “actual fraudulent misrepresentation and concealment” as a matter of law. The contention again is without merit.

Ms. Burkle's argument is premised on the fact that two mergers were in various stages of negotiation between June 1997, when Ms. Burkle filed her petition for dissolution, and November 21, 1997, when Mr. Burkle signed the agreement, and “[n]ot one word of either of these mergers is referenced in the [postmarital agreement].” Further, the footnotes to the schedules are alleged to “affirmatively dramatically misrepresent these assets [marital assets affected **[***52]** by the mergers].” As best we can discern the argument, these alleged concealments and misrepresentations are claimed to constitute both constructive fraud and actual fraud, as a matter of law, because Mr. Burkle had a **[*741]** fiduciary duty “to furnish in writing to Jan, without demand, sufficient information concerning the merger transaction so as to afford Jan the opportunity to properly exercise her rights and duties as a partner in the assets.”¹⁹ Neither the law nor the facts support this claim.

[*53]** The applicable law is clear. The pertinent rule is that a spouse who forgoes investigation and

¹⁸ See also *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 72, 67 [122 Cal. Rptr. 2d 412] (appellate court was bound by the trial court's factual finding that the husband carried the burden of showing that the wife “ ‘was not induced to execute the postnuptial agreement through mistake, undue influence, fraud, misrepresentation, false promise, concealment, nondisclosure or any other breach of the [spouses’] confidential relationship’ ”; “[j]udicial erasure of a competent adult's signature on an agreement does not serve the purpose of the law of contracts, i.e., to protect the reasonable expectations of the parties”).

¹⁹ Ms. Burkle claims, for example, that Mr. Burkle was required to inform her, in writing, that upon consummation of the Food-4-Less/Ralphs merger with Fred Meyer/Hughes (announced just after Ms. Burkle signed the agreement and consummated some four months later), the Ralphs stock “would no longer be privately held but traded into public shares of Fred Meyer stock,” and the merger would result in a “\$ 20 Million fee payable to Yucaipa, a community company; and the issuance of to Ron of \$ 14 Million in stock warrants.” The trial court found that this information “should readily have been discovered and addressed prior to the parties' entry into the Agreement in 1997 if [Ms. Burkle] and her counsel had reviewed the information which [Mr. Burkle] made available to them”

accepts a proposed settlement “may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts.” (*Boeseke, supra*, 10 Cal.3d at p. 850.) In this case, the Burkles agreed to value the marital estate as of June 6, 1997; Ms. Burkle's representatives were offered full access at Mr. Burkle's office to all financial information throughout the negotiations; Ms. Burkle knew about the first merger, which was consummated before she signed the agreement, and she knew Mr. Burkle was working on the second merger; Mr. Burkle testified that documentation on the second merger was available for review by Ms. Burkle's representatives in Mr. Burkle's office; and Ms. Burkle's representatives did not review the information. Under **[**204]** these circumstances, only an actual concealment or misrepresentation would allow Ms. Burkle to avoid her agreement.

Boeseke is instructive. In that case, the spouses executed a property settlement agreement which was subsequently adopted in a divorce decree. In negotiating the property settlement, the husband, who had **[***54]** managed the community property, gave the wife and her attorney his verbal valuation of the community property. However, he insisted on a “no representation” provision stating that neither party made any representations concerning property values and that each relied on his or her own investigation. Against her attorney's advice, the wife elected not to investigate and signed the agreement proposed by the husband. After the husband died leaving a substantial estate, the wife sued to rescind the agreement. The trial court concluded that the husband failed to disclose the facts relating to the value, nature and extent of the community assets, and that this nondisclosure constituted concealment of a material fact, breach of fiduciary duty, and fraud. (*Boeseke, supra*, 10 Cal.3d at p. 848.) The Supreme Court, however, **[*742]** held otherwise. The court observed it was true the husband did not disclose all facts in his possession relating to the value, nature and extent of the community property, but the wife and her counsel were fully advised of the property

descriptions; were aware some of it was of substantial value; but did not request further facts relating to the value, the **[***55]** nature or the extent of the marital assets. Instead, the wife chose to accept her husband's offer of settlement “even after being advised by counsel that she should investigate.” (*Id.* at p. 849.) The trial court's finding of fraud predicated on lack of disclosure therefore failed. (*Ibid.*) The Supreme Court observed: “[W]hen a spouse, represented by independent counsel, determines to forego a suggested investigation and to accept a proposed settlement, that spouse may not later avoid the agreement unless there has been a misrepresentation or concealment of material facts. Under such circumstances, the spouse proposing the agreement is under no duty to compel the other to investigate, and the accepting spouse's decision, though ill advised, is binding.” ²⁰ (*Boeseke, supra*, 10 Cal.3d at p. 850, fn. omitted.)

[*56]** Ms. Burkle insists that *Vai* is controlling, and supports the proposition that Mr. Burkle violated his fiduciary duty to Ms. Burkle by failing affirmatively to advise her, in writing, that he was “in the final stages of negotiation and completion of a second major merger.” ²¹ **[***58]** *Vai* does not

²⁰ Cf. *Collins v. Collins* (1957) 48 Cal.2d 325 [309 P.2d 420] (wife who was aware that her husband had not disclosed any information about their community property, and who waived the disclosure in writing when she executed a property settlement agreement, knowingly chose to deal at arm's length and rely on her own investigation of community assets, thus terminating the fiduciary relationship and attendant duty to disclose). While we do not suggest the fiduciary relationship was terminated in this case, certainly Ms. Burkle knew about the mergers being negotiated by Mr. Burkle; knew the postmarital agreement contained no references to any mergers; acknowledged she had had the opportunity to conduct as much independent discovery, appraisal and valuation as she wished; and expressly stated that “she ha[d] not relied on the word of Ron in determining the value of the assets set forth” in the agreement.

²¹ In the Burkles' agreement, the parties purported to release their fiduciary responsibilities to each other. We need not consider the question whether such a release is permissible under California law, as the trial court did not rely on or even allude to any waiver or release of fiduciary duties. It expressly found that Mr. Burkle fulfilled his fiduciary duties to Ms. Burkle, “including those in connection with the negotiation of and entry into” the agreement and

assist Ms. Burkle, and **[**205]** indeed was expressly distinguished by the Supreme Court in *Boeseke*. In *Vai*, the wife sued the executor of her deceased husband's estate to rescind a property settlement agreement on the ground of actual and constructive fraud. (*Vai, supra*, 56 Cal.2d at pp. 333, 335.) The trial court found the husband was not a fiduciary, the parties dealt at arm's length, and there was no issue of constructive fraud and no proof of actual fraud. (*Id. at p. 335*.) The Supreme Court reversed the judgment, holding that, under the facts found by the trial court, the husband was a fiduciary, and the "failure of the husband ... to disclose fully and fairly material facts relating **[*743]** to the value of community assets from which [he] gained an advantage constitutes a concealment of material facts and a breach of this fiduciary duty." **[***57]** (*Id. at p. 342*.) The facts found by the trial court included the husband's representations that the adversary proceedings the wife had begun would be detrimental to his health; that the wife need not pursue her legal remedies of discovery; and that he would supply full and complete information concerning the property. (*Id. at p. 334*.) The husband then represented to the wife that the book value of vineyard land was \$ 200 per acre, but did not inform her that, several weeks before the property settlement agreement, he had executed a sale deposit receipt for the land at a price of \$ 814 per acre. ²² (*Id. at p. 340*.) These "facts as found by the trial court show[ed] ... constructive fraud as a matter of law." (*Id. at p. 342*.)

The "facts as found by the trial court" in this case are light years from those in *Vai*. As the Supreme Court explained in *Boeseke*, distinguishing *Vai*: "*Vai* ... is distinguishable because the wife did

investigate, and while the husband made representations of fact and value relating to their ranch, he failed to disclose he had accepted a deposit on the property for a price greatly in excess of the value suggested by his representations. ... [T]he husband's failure to disclose that information constituted a concealment of a material fact concerning the property. In contrast, [the wife in *Boeseke*] was made aware that the **[***59]** facts relating to value and income were neither fully disclosed nor settled." ²³ **[**206]** (*Boeseke, supra*, 10 Cal.3d at p. 850, fn. 5.) Neither *Vai* nor any other case suggests that, as a matter of law, Mr. Burkle was required to provide Ms. Burkle with written details about a contemplated merger—the prospect of which was known to and had been discussed previously among the parties and counsel—in order to fulfill his fiduciary duty of full and fair disclosure.

[*60]** As for the facts, no evidence indicates actual concealment or misrepresentation of information relating to the mergers. Again, Ms. Burkle ignores the trial court's findings. As we have seen, the court concluded that Mr. Burkle **[*744]** did not conceal assets or significant financial information from Ms. Burkle. This ultimate conclusion was based on substantial evidence reflected in numerous subsidiary factual findings, many of which have already been enumerated. The court found that Mr. Burkle fulfilled his fiduciary duties to Ms. Burkle, "including those in connection with the negotiation of and entry into the Agreement." It found that the selection of a

"including his duty to make a true and full disclosure of community assets."

²² The court also observed that it was "readily apparent" that many representations the husband made to the wife "were either not true or at least only partially true" (*Vai, supra*, 54 Cal.2d at p. 340); that many of the wife's contentions relating to the existence of actual fraud appeared meritorious; and that the deception was practiced on the husband's own attorneys as well as on the wife. (*Id. at p. 342*.)

²³ Ms. Burkle also cites *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334 [113 Cal. Rptr. 2d 849] (Brewer). It, too, is of no assistance to Ms. Burkle. In *Brewer*, a marital settlement agreement was set aside on the ground of mistake of fact, because the wife's final declaration of disclosure, required by *Family Code section 2105* to include all material facts regarding the valuation of community assets, listed as "unknown" the value of one of her pension plans. The case does not involve misrepresentation or concealment; it merely held the wife did not meet her disclosure obligations when she stated the value of the pension, which was one of the largest community assets and whose monetary value was easily ascertainable, was unknown. (*93 Cal.App.4th at pp. 1346–1347*.)

fixed date for valuation of the assets was reasonable and necessary, given the size of the marital estate, and that the agreed valuation date—June 6, 1997—was reasonable and selected in good faith. It found that the overall value of the assets on the community property schedule did not materially change between June and November 1997. It found that Ms. Burkle had “every opportunity to investigate any changes in value of any assets from the chosen June 6, 1997 date to the date of execution of the Agreement.” It found she and her attorneys [***61] knew about the first merger—which involved shares in Smith's which she agreed to characterize as Mr. Burkle's separate property—well before the agreement was executed.²⁴ It found the parties discussed the possibility of a second merger, and Ms. Burkle's counsel proposed she should share in any resulting appreciation from such a merger, a proposition that was rejected. It found that Mr. Burkle made all relevant financial information available for review by Ms. Burkle's attorneys and accountants.

[***62] Under these circumstances, there was no constructive or actual fraud. If Ms. Burkle wanted further information on the particulars of a contemplated transaction, she should have pursued the opportunity to review and investigate information open to her throughout the negotiations. (See [Boeseke, supra, 10 Cal.3d at p. 850](#).) Certainly, it cannot be said that Mr. Burkle either concealed or misrepresented any information about either merger. The trial court's conclusion that Mr. Burkle did not conceal significant financial information from Ms. Burkle was fully justified.²⁵

²⁴ Ms. Burkle's claims of actual misrepresentations relate to the first merger, specifically, the description and value of the Smith's shares which Mr. Burkle claimed as separate property. However, as *Boeseke* stated, “when the husband takes the position certain property is separate, the wife must then investigate the facts. If she and her counsel choose to accept his assertion, she may not collaterally attack the subsequent judgment approving the settlement.” ([Boeseke, supra, 10 Cal.3d at p. 850](#).)

²⁵ Ms. Burkle makes several other arguments related to her claims of concealment and other bases for asserting the invalidity of the postmarital agreement, none of which have merit:

[***63]

[*745]

[**207] IV. *Ms. Burkle's claim the agreement must be set aside for failure to serve the sworn disclosure declarations required by Family Code section 2100 et seq. is without merit.*

[CA\(6\)](#) (6) [HN10](#) The Family Code requires the parties to a dissolution proceeding to serve on each other a preliminary, sworn declaration, on forms prescribed by the Judicial Council, identifying all assets and liabilities.²⁶ ([Fam. Code, § 2104, subds.](#)

1. Ms. Burkle complains in effect that she was unable to show whether the information Mr. Burkle provided in the schedules to the agreement was “truthful or fraudulent” because of the discovery “firewall” erected when the trial court refused, at this stage of the proceedings, to compel discovery concerning the assets and liabilities identified on the schedules. We can discern no error in the court's discovery ruling, which allowed full discovery on the circumstances surrounding entry into the agreement—which circumstances included Ms. Burkle's full access to the information she now complains is behind the firewall.

2. Ms. Burkle contends that, even in the absence of any actual fraud or actual undue influence, statutory limitations on the specific enforcement of contracts in [Civil Code section 3391](#) prevent Mr. Burkle from enforcing the contract against Ms. Burkle. [Section 3391](#) prevents enforcement of specific performance against a party to a contract if she has not received adequate consideration, or if the contract is not, as to her, just and reasonable. [Section 3391](#) does not apply, because (a) this is not an action for specific enforcement of a contract, and (b) even if it were, the trial court found the agreement was fair and equitable in light of each party's objectives, and implicitly, if not explicitly, found adequate consideration. Ms. Burkle has not challenged the sufficiency of the evidence supporting these findings, but relies on her claim that all the trial court's fact findings are “vitiate[d]” by the asserted misallocation of the burden of proof. As we have seen, that claim is mistaken.

3. In connection with her contention that Mr. Burkle must prove the postmarital agreement was “fair, just and equitable,” Ms. Burkle asserts that “this means that the division of the community must be equal.” Her assertion is mistaken. Spouses may agree on an unequal distribution of assets. “As long as such agreement is based upon a complete and accurate understanding of the existence and value of community and separate assets that are material to the agreement, the parties are free to decide on an unequal distribution.” ([Brewer, supra, 93 Cal.App.4th at p. 1349](#).)

²⁶ [Family Code section 2104](#) requires each party to a dissolution proceeding to serve on the other, “[a]fter or concurrently with

(a) & (c).) Similarly, before the parties to a dissolution proceeding enter into an agreement for the resolution of property issues, or before any trial, each must serve on the other “a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council”²⁷ [***65] (*Fam. Code, § 2105, subd. (a)*.) These mandatory statutory requirements cannot be waived, except in strict compliance with provisions of the statute.²⁸ (*In [**208] re [**746] Marriage of Fell (1997) 55 Cal.App.4th 1058, 1060, 1064–1066 [64 Cal. Rptr. 2d 522]* [affirming a judgment setting aside an original judgment of dissolution and marital settlement agreement, based [***64] upon an impermissible waiver of the mandatory exchange of disclosure declarations at the time of dissolution].)

Ms. Burkle contends that, because the parties did not exchange the sworn preliminary and final disclosure declarations described in *sections 2104* and *2105*, their postmarital agreement is invalid and unenforceable as a matter of law. The trial court rejected this contention, concluding that the Family

service of the petition for dissolution ... a preliminary declaration of disclosure, executed under penalty of perjury on a form prescribed by the Judicial Council.” Along with the preliminary declaration of disclosure, each party must provide the other party with a completed income and expense declaration. (*Fam. Code, § 2104, subs. (a) & (e)*.)

²⁷ *Family Code section 2105, subdivision (a)*, states: *HN11* “Except by court order for good cause, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council, unless the parties mutually waive the final declaration of disclosure. The commission of perjury on the final declaration of disclosure by a party may be grounds for setting aside the judgment” (*Fam. Code, § 2105, subd. (a)*.)

²⁸ The *HN12* parties may stipulate to a mutual waiver of the requirements concerning the final declaration of disclosure, but only under specified conditions, including exchange of the preliminary disclosure declarations and exchange of current income and expense declarations. (*Fam. Code, § 2105, subd. (d)*.)

Code provisions in question were not applicable to the Burkles' agreement: “Based on the location of those sections in Chapter 9 of Division 6 of the Family Code, and considering the references therein to trials, trial dates and the like, *Family Code § 2100 et seq.* only apply to agreements entered into incident to a dissolution of marriage or legal separation action that is proceeding to judgment. Unlike an agreement ... which contemplates [***66] prompt entry of a judgment of marital dissolution ... , the Agreement clearly was not entered into by the parties in connection with the contemplated ending of their marriage. Rather, the Agreement was reached after the dissolution proceeding had been placed in abeyance for the purpose of attempting to continue the marriage and allowing the parties the opportunity to reconcile, even though a reconciliation was not a condition of the Agreement. The purposes and goals of the Agreement were consistent with the clear public policy of the State of California favoring the continuation of marriages, and not ending them.”

We agree with the trial court that *HN13 Family Code sections 2104* and *2105* were not intended to and do not apply to a postmarital agreement that was not executed in contemplation of the imminent dissolution of the marriage, and indeed, that was expressly intended “to promote increased understanding, harmony and trust” and was made with the “intent to make a good faith effort to reconcile [the parties’] differences” The legislative findings and declarations in *Family Code section 2100* make clear that the statute applies to agreements [***67] that contemplate a judgment dissolving the marriage, not agreements that contemplate a reconciliation. The structure and language of other provisions of the statute likewise make this intention clear. A few examples should suffice.²⁹

²⁹ Some amendments have been made to *Family Code section 2100 et seq.* since the Burkles' 1997 postmarital agreement. Because the changes are insignificant for purposes of our discussion, all quotations in this section reflect the current statutory language.

First, [Family Code section 2100](#) states the Legislature's findings and declarations. The first policy declared by the Legislature is to marshal and preserve community assets “that exist at the date of separation so as to avoid dissipation of the community estate before distribution” ([Fam. Code, \[*747\] § 2100, subd. \(a\)\(1\).](#)) The second policy is to ensure fair and sufficient child and spousal support awards, and the third is to achieve a division of community assets as provided under California [***68] law “on the dissolution or nullity of marriage or legal separation of the parties” ([Fam. Code, § 2100, subd. \(a\)\(2\) & \(3\).](#)) The Legislature further states that sound public policy “favors the reduction of the adversarial [**209] nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.” ([Fam. Code, § 2100, subd. \(b\).](#)) From these stated policies, it is apparent that the asset disclosures required by the statute are attendant upon the separation of the parties and the imminent dissolution of the marriage, whether after a trial or by agreement of the parties.

Second, other provisions likewise make clear that the statute contemplates a judgment of dissolution in connection with the agreement for resolution of property issues to which the statute refers. [Family Code section 2104](#), which requires service of preliminary disclosure declarations, indicates in the immediately succeeding sentence that the commission of perjury on the preliminary declaration “may be grounds for setting aside the judgment” ([Fam. Code, § 2104, subd. \(a\).](#)) The [***69] same language is used in [section 2105](#) with respect to perjury on the final declaration of disclosure. ([Fam. Code, § 2105, subd. \(a\).](#)) [Family Code section 2106](#) specifies that “no judgment shall be entered with respect to the parties' property rights without” the execution and service of the final declaration of disclosure and current income and expense declaration.³⁰ In addition, [section](#)

[2105](#) requires the service of a current income and expense declaration with the disclosure declaration, a requirement which makes no sense in the context of a postmarital agreement in which the parties do not intend an imminent dissolution of the marriage. ([Fam. Code, § 2105, subd. \(a\).](#))

[***70] In short, the Legislature's own words show it intended the asset disclosure requirements of [Family Code section 2100 et seq.](#) to apply to property agreements executed in connection with or in contemplation of a judgment of dissolution of the marriage. Nothing in the statutory language suggests any intent to extend the asset disclosure requirements to postmarital agreements that do not contemplate imminent dissolution, and instead contemplate an effort to reconcile.

[CA\(7\) \(7\)](#) Ms. Burkle insists that [Family Code section 2105, subdivision \(a\)](#), is applicable “[b]y its terms ... whenever ‘the parties enter into an agreement [**748] for the resolution of property or support issues.’” If so, we are inclined to think the Legislature would have stated exactly that, and of course it did not. Ms. Burkle ignores the remainder of the sentence, not to mention the rest of the subdivision and the other provisions of the statute. In any event, [HN14](#) we do not determine the meaning of a statute—assuming it is ambiguous—“from a single word or sentence. Instead, we construe the words and sentences in context and in the light of the statutory scheme.” ([Department of Industrial Relations v. Lee \(1999\) 73 Cal.App.4th 763, 767 \[86 Cal. Rptr. 2d 710\].](#)) [***71] The statutory scheme leaves no doubt as to the statutory meaning.³¹

Finally, Ms. Burkle protests the parties did not

requirements, “the court shall set aside the judgment.” ([Fam. Code, § 2107, subd. \(d\).](#))

³¹ See also the language in [Bonds, supra, 24 Cal.4th at page 30](#), referring to [Family Code section 2100 et seq.](#) and to the statute's “policy of equal division of assets at the time of dissolution” The Burkles' postmarital agreement was not entered into “at the time of dissolution,” and indeed permitted an election to divide the community estate at any time.

³⁰ In 2001, the Legislature also added a provision to [Family Code section 2107](#), which now specifies that if a court enters a judgment when the parties have failed to comply with the statutory disclosure

agree to reconcile; the agreement constitutes a “pre-packaged divorce”; and a dissolution proceeding was pending when **[**210]** the agreement was executed. None of these arguments is sufficient to induce us to apply a statute governing dissolution proceedings to circumstances in which the parties are not in fact using the judicial system to seek dissolution of their marriage. It may be a preferable rule, where a petition for dissolution has been filed, to require spouses who wish simultaneously to attempt reconciliation and resolve their **[***72]** financial disputes to file sworn disclosure declarations, unless the dissolution proceeding is dismissed. That, however, is a matter for the Legislature, and not for the courts, to undertake.

CA(8) (8) The remaining question involves the standard under which a trial court may find that a dissolution proceeding was “placed in abeyance” and that an agreement resolving property issues was not executed in contemplation of imminent dissolution of the marriage. Certainly **HN15** parties to a dissolution proceeding cannot be permitted to avoid [Family Code section 2100](#)’s mandatory sworn disclosure declarations merely by asserting an intention to attempt reconciliation, executing an agreement without statutory disclosures, and then resuming the dissolution proceedings. We are confident, however, that trial courts are well equipped to determine whether a dissolution proceeding was in abeyance or whether one or both spouses were improperly attempting to avoid mandatory and nonwaivable disclosure requirements. The factors the trial court must assess include, but are not limited to, the bona fides of the spouses’ intention to attempt reconciliation; their intention to hold the dissolution proceeding in abeyance; the length **[***73]** of time during which the **[*749]** spouses reside together, after initiating the dissolution proceeding, in connection with their attempts to reconcile; the duration of any actual reconciliation; and the length of time during which no activity has occurred in the dissolution proceeding.³²

³² Needless to say, given the vagaries of available proof, the parties

In this case, the trial court properly concluded the dissolution proceeding was in abeyance, and the agreement “clearly was not entered into by the parties in connection with the contemplated ending of their marriage.” **[***74]** The parties expressly stated their intent to make a good faith effort to reconcile their differences. They were not separated when they executed the agreement, explicitly acknowledging in the agreement that they were “currently residing together at the Green Acre property.” They continued to reside together for at least four years after executing the postmarital agreement. After the dissolution petition was filed on June 10, 1997, followed by a confidentiality stipulation on August 26, 1997, no activity occurred in the proceeding for almost six years.³³ **[***75]** Under these circumstances, no conclusion is possible except that the dissolution proceeding was “placed in abeyance for the purpose of attempting to continue **[**211]** the marriage” Accordingly, because the postmarital agreement was not executed in connection with the imminent dissolution of the marriage, [Family Code sections 2104](#) and [2105](#) do not apply.³⁴

to a dissolution proceeding who hope to reconcile and at the same time resolve property issues in a postmarital agreement would be well advised to dismiss the proceeding before executing an agreement. Dismissal will avoid the uncertainties attendant upon the need to later present sufficient proof that an agreement was executed while the dissolution proceeding was in abeyance and that neither party contemplated the imminent dissolution of the marriage.

³³ Mr. Burkle’s request for judicial notice of the certified case history report in the first dissolution proceeding is granted. The report shows the only documents filed in the 1997 case before May and June 2003 (when a substitution of attorney and notice relating to unavailability of counsel were filed, followed by a request for dismissal on June 24, 2003) were the two documents described in the text.

³⁴ [Family Code section 2105](#) also contains a “good cause” exception to its provisions. (*Fam. Code*, § 2105, subd. (a).) The trial court found that even if the disclosure declaration requirements applied to this case, good cause would exist to enforce the agreement without strict compliance because the parties were represented by sophisticated counsel and expert forensic accountants, there was no impediment to investigation, and Ms. Burkle accepted the benefits of the agreement for years before challenging it. In view of our conclusion that [section 2105](#) does not apply, we need not consider the parties’ arguments on the “good cause” exception.

V. Ms. Burkle's claim that she properly rescinded the agreement for nonperformance and failure of consideration is without merit.

Ms. Burkle served her petition for dissolution on Mr. Burkle on June 26, 2003. Under the postmarital agreement, Mr. Burkle was required to make the [*750] first \$ 5 million payment to Ms. Burkle within 90 days. In her petition, however, Ms. Burkle stated the agreement was “void [***76] and unenforceable.” Her verified interrogatory answers served August 5, 2003, likewise asserted the agreement was void and unenforceable. Subsequently, by letter from counsel dated September 23, 2003, Mr. Burkle tendered the sum of \$ 3,584,601 on the first \$ 5 million payment due, crediting himself with claimed overpayments of \$ 1,415,399 in respect of his obligation to pay Ms. Burkle \$ 1 million per year while they continued to live together. Counsel's letter requested immediate written notice if Ms. Burkle's lawyers disputed the calculation or the validity of the tender. Her lawyers responded that the agreement was void and unenforceable; they disagreed with the accounting in Karton's letter, so that even if the agreement were enforceable, the letter was not a valid tender; and “[w]hat your client should do is make a payment to Jan without prejudice to the rights or claims of any party”

Ms. Burkle argues, as she did to the trial court, that Mr. Burkle's tender was defective and “amounted to a failure of consideration and an anticipatory breach chargeable to Ron, giving Jan an election to rescind,” which she later purported to do by letter of January 7, 2004. ³⁵ [***77] The trial court concluded that Ms. Burkle had unequivocally repudiated the agreement in her petition for dissolution and her verified responses to interrogatories, excusing any further performance by Mr. Burkle and rendering irrelevant any defect

in the payment he tendered. We agree with the trial court.

CA(9) (9) Ms. Burkle contends she did not repudiate the contract, because HN16 “[a] mere declaration ... of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of the contract” (Atkinson v. District Bond Co. (1935) 5 Cal. App. 2d 738, 743 [43 P.2d 867].) Ms. Burkle's verified statements in her petition and interrogatory answers, [***78] however, constituted more than a “mere declaration” of intention not to be bound, and she omits reference to the remainder of the principle for which *Atkinson* stands: “To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of [***212] the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute.” (*Ibid.*) In *Atkinson*, a subsequent letter disclaiming any liability under the contract “was tantamount to a distinct, unequivocal and absolute refusal to perform, ... sufficient to justify plaintiffs in ... acting thereon as though it were a wrongful renunciation.” (*Id. at p. 744.*) We discern no error in the trial court's finding that Ms. Burkle unequivocally repudiated the contract in her dissolution petition and in her discovery responses. [*751]

Ms. Burkle's further contention that, even if she repudiated the contract, Mr. Burkle's subsequent tender somehow “nullified” her repudiation has no merit. “It is well settled that an unequivocal repudiation of the contract by one party prior to material breach of the contract by the other party excuses the other party from tendering [***79] performance of his concurrently conditional obligations.” ³⁶ (Kossler v. Palm Springs

³⁵ Ms. Burkle's January 7 letter stated in part that, “to the extent that the filing of the Petition for Dissolution of Marriage did not constitute notice of rescission under the Civil Code, Janet Burkle hereby formally rescinds the purported agreement entered into as of November 22, 1997, with Ronald W. Burkle.”

³⁶ See also Civil Code section 1440: HN17 “If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.”

[Developments, Ltd. \(1980\) 101 Cal. App. 3d 88, 102 \[161 Cal. Rptr. 423\].](#)) Moreover, Ms. Burkle cites no legal support for the claim that an allegedly defective tender somehow nullifies the other party's repudiation of a contract, and we are aware of none. Indeed, Ms. Burkle's response to the defective tender reiterated her position that the contract was void and unenforceable. Consequently, Mr. Burkle's allegedly defective tender of less than \$ 5 million is, as the trial court stated, irrelevant.

[*80]** VI. *Doctrines of ratification and estoppel likewise preclude Ms. Burkle's claim that the postmarital agreement is void and unenforceable.*

In addition to its other conclusions, the trial court observed that Ms. Burkle accepted the benefits she received under the agreement for more than five years before asserting that it was unenforceable based on Mr. Burkle's failure to inform her in writing of the contemplated Food-4-Less/Ralphs merger with Fred Meyer/Hughes and the impact it would have on the community estate. The court continued: "The Court finds that such a delay in raising that issue was unreasonable, and that, by her conduct, [Ms. Burkle] ratified the Agreement and is estopped to deny the validity and enforceability of the Agreement at this late juncture. [Ms. Burkle] waited over five years to complain about any aspect of the Agreement, which is evidence that she felt the Agreement was fair, given the obvious and notorious success of [Mr. Burkle's] post-Agreement ventures." ³⁷ In addition, the court found: "By willingly accepting all of the substantial financial benefits to which she was entitled under the Agreement for more than five **[***81]** years, including but not limited to, accepting the annual payments due thereunder and causing [Mr. Burkle] to provide her with the **[**213]** funds needed for her to purchase a house for herself as provided for

therein, [Ms. Burkle] has ratified the Agreement and waived any right to seek to rescind it." Again, we are compelled to agree with the court's analysis. ³⁸

[*752]

[*82]** [CA\(10\)](#) (10) Ms. Burkle argues the doctrines of laches, ratification and estoppel have no application to this case. First, she contends, the trial court's determinations were based solely on her delay in asserting the invalidity of the agreement, and delay is irrelevant when the invalidity of a contract is asserted defensively. She maintains she asserted the invalidity of the agreement, in effect, as a defense to Mr. Burkle's interposition of the agreement in the dissolution action. She then relies on *Cover*, which states the doctrine of laches does not bar a defense of invalidity of an agreement on the ground of fraud, because one who has been defrauded "may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." ([Cover, supra, 188 Cal. at pp. 140–141](#); see also [Styne v. Stevens \(2001\) 26 Cal.4th 42, 51–52 \[109 Cal. Rptr. 2d 14, 26 P.3d 343\]](#) [one sued on a contract may urge defenses that render the contract unenforceable, even if the same matters would be untimely if asserted as the basis for affirmative relief].) The short answer to this contention is that Ms. Burkle was not sued on the agreement and is not urging its **[***83]** invalidity as a defense to an action against her, as in *Cover* and *Styne*. She affirmatively asserted the invalidity of the agreement in support of her claim for a division of community property. Moreover, even if she were challenging the agreement defensively, [HN18](#) the

³⁷ The trial court also found that the "doctrine of laches bars [Ms. Burkle] from contesting the validity and enforceability of the Agreement on the basis of the circumstances surrounding its negotiation and execution, its performance, and the long delay in raising challenge to the Agreement."

³⁸ Mr. Burkle argues at length that, because Ms. Burkle did not challenge the trial court's findings on ratification, estoppel and laches in her opening brief, the findings are presumed correct and the issue is forfeited on appeal. ([Christoff v. Union Pacific Railroad Co. \(2005\) 134 Cal.App.4th 118, 125 \[36 Cal. Rptr. 3d 6\]](#).) However, since these equitable defenses may not have applied if there had been any merit to Ms. Burkle's contention the agreement was the product of undue influence, and since Mr. Burkle had the opportunity to file a supplemental brief, we exercise our discretion to address the matter on the merits.

Family Code now expressly permits the defense of laches in actions in which a spouse asserts a breach of fiduciary duty that impairs community entitlements.³⁹

[***84] [CA\(11\)](#) (11) Further, Ms. Burkle's contention the trial court's determinations were "all based solely on Jan's 'delay' in asserting the invalidity of the [agreement]" is erroneous. The court's findings of ratification and estoppel were expressly premised on her acceptance of the agreement's benefits—including \$ 1 million each year as her separate property—over the course of the five-year period. As *Cover* states, "[t]here might perhaps be much force in [the] contention" that the defendant widow would be estopped from claiming the invalidity of an agreement, under which she accepted benefits, if it were shown that she had discovered the deceased's fraud before his death. ([Cover, supra, 188 Cal. at p. 146.](#)) In *Cover*, the evidence revealed the widow had no [*753] occasion to discover the fraud. In this case, it can scarcely be claimed that Ms. Burkle, like [*214] the widow in *Cover*, accepted and retained the benefits of the agreement "in continuing ignorance" (*ibid.*) of the second merger and its effect on the community estate. Ms. Burkle knew her husband was negotiating a second merger; a public announcement of the merger was made two days after she signed the postmarital [***85] agreement; and it strains credulity to suggest that she remained "in continuing ignorance" thereafter, given, in the trial court's words, "the obvious and notorious success of [Mr. Burkle's] post-Agreement ventures." In short, even if the doctrine of laches did not apply, the doctrines of ratification and

estoppel surely do. (See [Cover, supra, 188 Cal. at p. 146](#) [[HN21](#) accepting and retaining benefits of an agreement would operate as an estoppel if the person to be estopped "acted with full knowledge of all the material facts and circumstances and with full knowledge of her rights in the premises"]; [Brown v. Rouse \(1894\) 104 Cal. 672, 676](#) [[38 P. 507](#)] [[HN22](#) essence of ratification is that it is done with full knowledge of the party's rights; "ratification will be strongly presumed against one who has accepted and had the beneficial use of the property or money involved in the transaction"].)⁴⁰

[***86] Finally, Ms. Burkle argues that none of the doctrines of laches, ratification or estoppel applies because Mr. Burkle was not prejudiced, as the amounts he paid under the agreement were far less than Ms. Burkle would have been entitled to receive in the absence of the agreement, as her share of the marital accumulations from 1997 to 2003. Ms. Burkle misconceives the applicable principle. As the Supreme Court stated in [HN23 Conti v. Board of Civil Service Commissioners \(1969\) 1 Cal.3d 351](#) [[82 Cal. Rptr. 337, 461 P.2d 617](#)], "[t]he defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Id. at p. 359*, fns. omitted, italics added.) In this case, Ms. Burkle plainly acquiesced in the terms of the agreement by accepting its benefits. Moreover, the element of prejudice has no bearing on the issue of ratification.⁴¹

³⁹ [Family Code section 1101, subdivision \(d\)\(3\)](#), provides that [HN19](#) "[t]he defense of laches may be raised in any action brought under this section." [Subdivision \(a\)](#) states that: [HN20](#) "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."

⁴⁰ See also [Gedstad v. Ellichman \(1954\) 124 Cal.App.2d 831, 834-835](#) [[269 P.2d 661](#)] (judgment affirmed against a wife seeking to void a property settlement agreement based on concealment of community assets; wife was precluded from claiming the agreement was void because a letter showed "such knowledge of the possible defects of the agreement as to put [wife] on inquiry and to require her to act diligently to protect her rights"; trial court's finding of laches, absent a palpable abuse of discretion, is binding on appeal).

⁴¹ In any event, the trial court found that Mr. Burkle detrimentally relied on Ms. Burkle's promises and representations by, "among other things, complying with the Agreement for years and accumulating property with the understanding that under the Agreement it would be his separate property."

***87]

*754]

Accordingly, the trial court properly found that the doctrines of ratification and estoppel precluded Ms. Burkle from claiming the postmarital agreement was unenforceable.

DISPOSITION

The order is affirmed. Ronald W. Burkle is to recover his costs on appeal.

Cooper, P. J., and Rubin, J., concurred.

A petition for a rehearing was denied June 12, 2006, and appellant's petition for review by the Supreme Court was denied August 16, 2006, S144723.



In re Marriage of Buzzanca

Court of Appeal of California, Fourth Appellate District, Division Three

March 10, 1998, Decided

Nos. G022147, G022157.

Reporter

61 Cal. App. 4th 1410 *; 72 Cal. Rptr. 2d 280 **; 1998 Cal. App. LEXIS 180 ***; 98 Cal. Daily Op. Service 1782; 77 A.L.R.5th 775; 98 Daily Journal DAR 2436

In re the Marriage of JOHN A. and LUANNE H. BUZZANCA. JOHN A. BUZZANCA, Respondent, v. LUANNE H. BUZZANCA, Appellant.

Subsequent History: [***1] Review Denied June 10, 1998, Reported at: [1998 Cal. LEXIS 3830](#).

Prior History: Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 95D002992. Robert D. Monarch, Judge.

Disposition: (1) The portion of the judgment which declares that Luanne Buzzanca is not the lawful mother of Jaycee is reversed. The matter is remanded with directions to enter a new judgment declaring her the lawful mother. The trial court shall make all appropriate orders to ensure that Luanne Buzzanca shall have legal custody of Jaycee, including entering an order that Jaycee's birth certificate shall be amended to reflect Luanne Buzzanca as the mother.

Case Summary

Procedural Posture

Appellant wife challenged a judgment of the Superior Court of Orange County (California), which held that appellant and appellee husband were not the legal parents of the child because there was no biological connection with the minor child they intended to procreate by surrogate, using an embryo and sperm not of either party, and as a result appellee owed no child support.

Overview

Appellant wife and appellee husband entered into a surrogate contract for birthing a child. Appellant did not contribute the embryo and appellee did not contribute the sperm. During divorce proceedings appellant petitioned to establish herself as the lawful mother of the child. The trial court held that neither party was biologically connected to the child, nor were they the lawful mother and father. On appeal the court reversed. Under the Uniform Parentage Act, [Cal. Fam. Code § 7613](#), a husband who consented to artificial insemination was treated in law as the father by virtue of the consent. Similarly, therefore, the result was the same when a married couple consented to in vitro fertilization by unknown donors and implantation into a surrogate. Also noted was that [§ 7613](#) incorporated common law estoppel that prevented appellee was claiming he was not the father because the consent to a medical procedure that resulted in a birth of a child established parenthood. Finally, the court held that the same reasoning which established paternity by reason of appellee's conduct of consent necessarily applied to establish maternity. Thus, appellant and appellee were the lawful parents.

Outcome

The court reversed the judgment which held that appellant wife and appellee husband were not the lawful mother and father of the child, because when a married couple using non-genetically related embryo and sperm implanted into a surrogate intended to procreate a child, under the Uniform

Parentage Act they were the lawful parents of the born child. Therefore, appellee owed child support.

[HN3](#) See [Cal. Fam. Code § 7610](#).

LexisNexis® Headnotes

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

[HN1](#) When an infertile husband consents to allowing his wife to be artificially inseminated, the husband is the "lawful father" because he consented to the procreation of the child.

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General Overview

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

[HN2](#) Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > General Overview

[HN4](#) Genetic consanguinity is equally "acceptable" as "proof of maternity" as evidence of giving birth.

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Birth Certificates > General Overview

Family Law > Paternity & Surrogacy > Birth Certificates > Named Father

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > Uniform Parentage Act

Family Law > ... > Proof of Paternity > Types of Evidence > Blood Tests

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

[HN5](#) In addition to blood tests there are several other ways the Uniform Parentage Act (Act) allows paternity to be established. Those ways are not necessarily related at all to any biological tie. Thus, under the Act, paternity may be established by: marrying, remaining married to, or attempting to marry the child's mother when she gives birth, [Cal. Fam. Code § 7611\(a\)](#), [\(b\)](#); marrying the child's mother after the child's birth and either consenting to being named as the father on the birth certificate, [Cal. Fam. Code § 7611\(c\)\(1\)](#), or making a written promise to support the child, [Cal. Fam. Code § 7611\(c\)\(2\)](#). A man may also be deemed a father under the Act in the case of artificial insemination of his wife, as provided by [Cal. Fam. Code § 7613](#).

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

HN6 See [Cal. Fam. Code § 7613](#).

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > Medical Treatment > General Overview

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN7 If a husband who consents to artificial insemination under [Cal. Fam. Code § 7613](#) is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them.

Family Law > Marital Duties & Rights > Duty of Support

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Governments > Legislation > Interpretation

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN8 [Cal. Fam. Code § 7613](#) is, after all, the clearest expression of past legislative intent when the Legislature did contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General Overview

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN9 A reasonable man who actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.

Family Law > Paternity & Surrogacy > General Overview

Governments > Courts > Common Law

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN10 The estoppel concept, after all, is already inherent in the artificial insemination statute. In essence, [Cal. Fam. Code § 7613](#) is nothing more than the codification of the common law rule that: By consenting to a medical procedure which results in the birth of a child--which establishes parenthood by common law estoppel--a husband incurs the legal status and responsibility of fatherhood.

Overview

Family Law > Paternity & Surrogacy > General Overview

Healthcare Law > ... > Reproductive Services > Reproductive Technology > Artificial Insemination

HN11 For purposes of the [Cal. Fam. Code § 7613](#) with its core idea of estoppel, the fact that the wife did not give birth is irrelevant. The statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father's, as well as the mother's, consent to a medical procedure.

Governments > Courts > General Overview

Governments > Courts > Judicial Precedent

HN12 When courts do not consider propositions, their subsequent decisions are not precedent for them.

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

HN13 See [Cal. Fam. Code § 7570\(a\)](#).

Family Law > Paternity & Surrogacy > General Overview

Family Law > Paternity & Surrogacy > Establishing Paternity > General Overview

HN14 The statutes which follow [Cal. Fam. Code § 7570\(a\)](#) seek to provide a simple system allowing for the establishment of voluntary paternity. [Cal. Fam. Code § 7570\(b\)](#).

Family Law > Paternity & Surrogacy > General

HN15 In cases of "genetic consanguinity" and "giving birth" the intended mother is to be held the lawful mother.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A married couple agreed to have an embryo that was genetically unrelated to either of them implanted in a woman--a surrogate--who would carry and give birth to the child for them. After the fertilization, implantation, and pregnancy, the husband filed a petition for dissolution of marriage, asserting that there were no children of the marriage, and the wife filed her response, asserting that the parties were expecting a child by way of surrogate contract. The child was born six days later. The trial court entered a judgment declaring that the parties were not the lawful parents of the child. (Superior Court of Orange County, No. 95D002992, Robert D. Monarch, Judge.)

The Court of Appeal reversed the judgment and directed the trial court to enter a new judgment declaring that both parties were the lawful parents of the child. The court held that the parties were the lawful parents of the child. Even though neither party was biologically related to the child, they were still her lawful parents given their initiating role as the intended parents in her conception and birth. The same statute that makes a husband the lawful father of a child born because of his consent to artificial insemination ([Fam. Code, § 7613](#)) applied to both intended parents in this case. Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. (Opinion by Sills, P. J., with Wallin and Crosby, JJ., concurring.)

Headnotes

CA(1) (1)

Parent and Child § 13—Parentage of Children—Surrogacy Contract—Procreation Initiated and Consented to by Intended Parents Biologically Unrelated to Child—Application of Artificial Insemination Statute.

--In a marital dissolution action involving a couple who had agreed to have an embryo that was genetically unrelated to either of them implanted in a woman--a surrogate--who would carry and give birth to the child for them, the trial court erred in declaring that the parties were not the lawful parents of the child, who was born six days after the dissolution proceedings began. Even though neither party was biologically related to the child, they were still her lawful parents given their initiating role as the intended parents in her conception and birth. The same statute that makes a husband the lawful father of a child born because of his consent to artificial insemination ([Fam. Code, § 7613](#)) applied to both intended parents in this case. Just as a husband is deemed the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The Legislature has declared its preference for assigning individual responsibility for the care and maintenance of children, not leaving the task to the taxpayers.

[See 10 Witkin, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 448F.]

Counsel: Van Deusen, Youmans & Walmsley and Robert R. Walmsley for Appellant.

Taylor Flynn and Mark Rosenbaum as Amici Curiae on behalf of Appellant and Minor.

Schwamb & Stabile, Thomas P. Stabile and Mark A. Hewitt for Respondent.

Jeffrey W. Doeringer, under appointment by the Court of Appeal, for Minor.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Carol Ann White and Mary A. Roth, Deputy Attorneys General, and Leslie Ellen Shear as Amici Curiae on behalf of Minor.

Judges: Opinion by Sills, [***2] P. J., with Wallin and Crosby, JJ., concurring.

Opinion by: SILLS

Opinion

[*1412] [**282] SILLS, P. J.

INTRODUCTION

Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a woman--a surrogate--who would carry and give birth to the child for them. After the fertilization, implantation and pregnancy, Luanne and John split up, and the question of who are Jaycee's lawful parents came before the trial court.

Luanne claimed that she and her erstwhile husband were the lawful parents, but John disclaimed any responsibility, financial or otherwise. The woman who gave birth also appeared in the case to make it clear that she made no claim to the child.

The trial court then reached an extraordinary conclusion: Jaycee had *no* lawful parents. First, the woman who gave birth to Jaycee was not the mother; the court had--astonishingly--already accepted a stipulation that neither she nor her husband were the "biological" parents. Second, Luanne was not the mother. According to the trial court, she could not be the mother because she had neither contributed the egg nor given birth. And John could not be the father, because, [***3] not

having contributed the sperm, he had no biological relationship with the child.

We disagree. Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.

The trial judge erred because he assumed that legal motherhood, under the relevant California statutes, could *only* be established in one of two ways, either by giving birth or by contributing an egg. He failed to consider the substantial and well-settled body of law holding that there are times when *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child. The typical example is [HN1](#) when an infertile husband consents to allowing his wife to be artificially inseminated. As our Supreme Court noted in such a situation over 30 years ago, the husband is the "lawful father" because he *consented* to the procreation of the child. (See [People v. Sorensen \(1968\) 68 Cal. 2d 280, 284-286 \[66 Cal. Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093\]](#).)

The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here--by *****4** **[*1413]** the same parity of reasoning that guided our Supreme Court in the first surrogacy case, [Johnson v. Calvert \(1993\) 5 Cal. 4th 84 \[19 Cal. Rptr. 2d 494, 851 P.2d 776\]](#)--to both husband and wife. [HN2](#) Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The only difference is that in this case--unlike artificial insemination--there is no reason to distinguish between husband and wife. We therefore must reverse the trial court's judgment and direct that a new judgment be entered, declaring that both

Luanne and John are the lawful parents of Jaycee. ¹

*****5** CASE HISTORY

John filed his petition for dissolution of marriage on March 30, 1995, alleging there were no children of the marriage. Luanne filed her response on April 20, alleging that the parties were expecting a child by way of surrogate contract. Jaycee was born six days later. In September 1996 Luanne filed a separate petition to establish herself as Jaycee's mother. Her action was consolidated into the dissolution case. In February *****283** 1997, the court accepted a stipulation that the woman who agreed to carry the child, and her husband, were not the "biological parents" of the child. ² At a hearing held in March, based entirely on oral argument and offers of proof, the trial court determined that Luanne was not the lawful mother of the child and therefore John could not be the lawful father or owe any support.

*****6** The trial judge said: "So I think what evidence there is, is stipulated to. And I don't think there would be any more. One, there's no genetic tie between Luanne and the child. Two, she is not the

¹Technically, artificial insemination is classed as one of two kinds, (1) with or (2) without using the husband's semen, known respectively as homologous artificial insemination and heterologous artificial insemination. (See [People v. Sorensen, supra, 68 Cal. 2d at p. 284, fn. 2](#).) When we refer to artificial insemination in this opinion we are only referring to the heterologous variety.

²John's attorney was present at the hearing when the court accepted the stipulation that the surrogate was not the "biological" parent of Jaycee. He made no objection. Yet in the respondent's brief on appeal and in oral argument, he has argued that the surrogate is the lawful mother of Jaycee by virtue of the biological connection of having given birth.

One reaction to this inconsistency might be to hold, simply, that John is barred from arguing the point that the surrogate is the lawful mother because he did not object to the surrogate being let off the hook when he had the chance at the trial level. We reject that course of analysis because in this case of first impression it would be an intellectual cheat. Particularly in matters regarding children and parental responsibilities, courts must be wary of allowing lawyers from trying to cleverly (or inadvertently) maneuver a case into a posture where the court's decision does not reflect the underlying legal reality.

gestational mother. Three, [*1414] she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother."

After another hearing on May 7, regarding attorney fees, a judgment on reserved issues in the dissolution was filed, terminating John's obligation to pay child support, declaring that Luanne was not the legal mother of Jaycee, and declining "to apply any estoppel proposition to the issue of John's responsibility for child support." Luanne then filed a petition for a writ of supersedeas to stay the judgment; she also filed an appeal from it. This court then granted a stay which had the effect of keeping the support order alive for Jaycee. We also consolidated the writ proceeding with the appeal.

In his respondent's brief in this appeal, John tries to intimate--though he stops short of actually saying it--that Jaycee was not born as a result of a surrogacy agreement with his ex-wife. He points to the fact that the actual [***7] written surrogacy agreement was signed on August 25, 1994, but the implantation took place a little less than two weeks before, on August 13, 1994. The brief states: "At the time that the implantation took place, no surrogacy contract had been executed by the parties to this action."

Concerned with the implication made in John's respondent's brief, members of this court questioned John's attorney at oral argument about it. It turned out that the intimation in John's brief was a red herring, based merely on the fact that John did not sign a *written* contract until after implantation. Jaycee was nonetheless born as a result of a surrogacy agreement on the part of both Luanne and John; it was just that the agreement was an *oral* one prior to implantation. The written surrogacy agreement, John's attorney acknowledged in open court, was the written memorialization of that oral contract.

Members of this panel also pressed John's attorney to state whatever factually based defenses John might have offered if the case had actually been

tried. John's attorney had not specifically stated such defenses at the hearing in March 1996; he had only vaguely indicated that "the facts as [***8] testified to would be somewhat different than" those which the trial court had "assumed."

Again, there was less than was intimated. John's signature on the written surrogacy agreement was not forged, or anything of the sort. His one trump card, finessed out only after repeated questioning and the importuning of one of our panel to articulate his "best facts," WAS THIS: John would offer testimony to the effect that Luanne told him that she would assume all responsibility for the care of any child born. Luanne alone would assume "the burdens of childrearing."

[*1415] Therefore, even though there was no actual trial in front of the trial court on the matter, this appellate court will assume *arguendo* that if there had been a trial the judge would have believed John's evidence on [***284] the point and concluded that Luanne had indeed promised not to hold John responsible for the child contemplated by their oral surrogacy agreement.

DISCUSSION

The Statute Governing Artificial Insemination Which Makes a Husband the Lawful Father of a Child Unrelated to Him Applies to Both Intended Parents in This Case

CA(1) (1) Perhaps recognizing the inherent lack of appeal for any result which makes Jaycee [***9] a legal orphan, John now contends that the surrogate is Jaycee's legal mother; and further, by virtue of that fact, the surrogate's husband is the legal father. His reasoning goes like this: Under the Uniform Parentage Act (the Act), and particularly as set forth in [section 7610 of Family Code](#), there are only two ways by which a woman can establish legal motherhood, i.e., giving birth or contributing genetically.³ Because the genetic contributors are

³The Act can be found in 9B West's Uniform Laws Annotated (1987) Uniform Parentage Act (1973 act) page 287.

not known to the court, the only candidate left is the surrogate who must therefore be deemed the lawful mother. And, as John's counsel commented at oral argument, if the surrogate and her husband cannot support Jaycee, the burden should fall on the taxpayers.

The law doesn't say what John says it says. It doesn't say: "The legal relationship between mother and child shall be established only by either proof of her giving birth or by genetics." The [***10] statute says "may," not "shall," and "under this part," not "by genetics." Here is the complete text of [HN3 Family Code section 7610](#): "The parent and child relationship may be established as follows: [P] (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part. [P] (b) Between a child and the natural father, it may be established under this part. [P] (c) Between a child and an adoptive parent, it may be established by proof of adoption."

The statute thus contains no direct reference to genetics (i.e., blood tests) at all. The *Johnson* decision teaches us that genetics is simply *subsumed* in the words "under this part." In that case, the court held that [HN4](#) genetic consanguinity was equally "acceptable" as "proof of maternity" as evidence of giving birth. ([Johnson v. Calvert, supra, 5 Cal. 4th at p. 93.](#))

It is important to realize, however, that in construing the words "under this part" to include genetic testing, the high court in *Johnson* relied on several [*1416] statutes in the Evidence Code (Evid. Code, former § 892, 895, & 895.5) all of which, by their terms, only applied to [***11] *paternity*. (See [Johnson v. Calvert, supra, 5 Cal. 4th at pp. 90-92.](#))⁴ It was only by a "parity of

reasoning" that our high court concluded those statutes which, on their face applied only to men, were also "dispositive of the question of maternity." ([5 Cal. 4th at p. 92.](#))

[***12] The point bears reiterating: It was only by a parity of reasoning from statutes which, on [***285] their face, referred only to *paternity* that the court in *Johnson v. Calvert* reached the result it did on the question of *maternity*. Had the *Johnson* court reasoned as John now urges us to reason--by narrowly confining the means under the Act by which a woman could establish that she was the lawful mother of a child to texts which on their face applied only to motherhood (as distinct from fatherhood)--the court would have reached the opposite result.⁵

paternity is a relevant fact, the court may . . . order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve *the question of paternity* against such party Any party's refusal . . . shall be admissible in evidence in any proceeding to *determine paternity*." (Italics added.)

Evidence Code former section 895: "If the court finds that the conclusions of all the experts . . . are that the alleged father is not the father of the child, *the question of paternity* shall be resolved accordingly. If the experts disagree . . . or if the tests show the probability of *the alleged father's paternity*, the question . . . shall be submitted upon all the evidence, including evidence based upon the tests." (Italics added.)

Evidence Code former section 895.5: "(a) There is a rebuttable presumption, affecting the burden of proof, *of paternity*, if the court finds that the paternity index . . . is 100 or greater." (Italics added.)

With the introduction of the Family Code, Evidence Code former sections 892, 895, and 895.5 have become, respectively, [Family Code sections 7551, 7554, and 7555](#). There is no material change in the language; the statutes still refer only to *paternity*.

⁵ In [In re Marriage of Moschetta \(1994\) 25 Cal. App. 4th 1218, 1224-1226 \[30 Cal. Rptr. 2d 893\]](#), the court refused to apply certain *presumptions* regarding *paternity* found in the Act to overcome the claim of a woman who was both the genetic and birth mother. Relying on [In re Zacharia D. \(1993\) 6 Cal. 4th 435 \[24 Cal. Rptr. 2d 751, 862 P.2d 751\]](#), we observed that there may be times when the Act cannot be applied in a gender interchangeable manner. (See [In re Moschetta, supra, 25 Cal. App. 4th at p. 1225, fn. 8.](#))

It made sense in *Moschetta* not to apply the *paternity* statutes cited by the father to the biologically unrelated intended mother because those statutes merely embody *presumptions*. The statutes were: (1)

⁴ All three of the statutes were designed for proceedings involving disputed *paternity*. None mentioned *maternity*. Here is the relevant portion of each statute as it read in 1993 when *Johnson* was decided, all emphasis ours:

Evidence Code former section 892: "In a civil action *in which*

[***13] [HN5](#)

[*1417] In addition to blood tests there are several other ways the Act allows paternity to be established. Those ways are not necessarily related at all to any biological tie. Thus, under the Act, paternity may be established by:

--marrying, remaining married to, or attempting to marry the child's mother when she gives birth (see [Fam. Code, § 7611, subds. \(a\) & \(b\)](#));

--marrying the child's mother after the child's birth and either consenting to being named as the father on the birth certificate ([Fam. Code, § 7611, subd. \(c\)\(1\)](#)) or making a written promise to support the child (see [Fam. Code, § 7611, subd. \(c\)\(2\)](#)).

A man may also be deemed a father under the Act in the case of artificial insemination of his wife, as provided by [section 7613 of the Family Code](#).

⁶ [***14] To track the words of the statute: "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby

the presumption that a child of a wife cohabiting with her husband at the time of birth is conclusively presumed to be a child of the marriage unless the husband is impotent or sterile (see [Fam. Code, § 7540](#)), and (2) the presumption that a man is the natural father if he receives the child into his home and openly holds out the child as his own ([Fam. Code, § 7611, subd. \(d\)](#)). We rejected application of these presumptions because, even assuming they could be applied to a woman, they were only presumptions and, just like a paternity case, could be overcome by blood tests showing an actual genetic relationship. ([In re Marriage of Moschetta, supra, 25 Cal. App. 4th at pp. 1225-1226](#).) Most fundamentally, as we pointed out on page 1226 of the opinion, the presumptions were inapposite because they arose out of the "old law of illegitimacy" and were designed as evidentiary devices to make a determination of a child's biological father.

Moschetta thus cannot be read for the proposition that statutes which are part of the Act and refer to an individual of one sex can never be applied to an individual of another. For one reason, *Moschetta* never said that. For another, such a broad proposition would contradict the rationale used by a higher court in *Johnson*.

⁶ [Family Code section 7613](#) is California's enactment of the artificial insemination provision of section 5 of the Act

conceived." ⁷

[***15] As noted in *Johnson*, "courts must construe statutes in factual settings not contemplated [**286] by the enacting legislature." ([Johnson v. Calvert, supra, 5 \[*1418\] Cal. 4th at p. 89](#).) So it is, of course, true that application of the artificial insemination statute to a gestational surrogacy case where the genetic donors are unknown to the court may not have been contemplated by the Legislature. Even so, the two kinds of artificial reproduction are *exactly* analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie.

[HN7](#) If a husband who consents to artificial insemination under [Family Code section 7613](#) is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors

⁷ [HN6](#)

The entire statute reads as follows: "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown. [P] (b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." ([Fam. Code, § 7613](#).)

[Family Code section 7613](#) varies from the promulgated version in that it omits the word "married" in subdivision (b) in front of the word "woman," a textual indication that the California Legislature contemplated use of artificial insemination by single women.

and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them. [HN8](#) The statute is, after all, the clearest expression of past legislative intent when the Legislature did [\[***16\]](#) contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.

Indeed, the establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law.⁸ The leading case in the country (so described by a New York family court in [In re Adoption of Anonymous \(1973\) 74 Misc.2d 99 \[345 N.Y.S.2d 430, 433\]](#)) is [People v. Sorensen, supra, 68 Cal. 2d 280](#), in which our Supreme Court held that a man could even be *criminally* liable for failing to pay for the support of a child born to his wife during the marriage as a result of artificial insemination using sperm from an anonymous donor.

In *Sorensen*, the high court emphasized the role of the husband in *causing* the birth, even though he [\[***17\]](#) had no biological connection to the child: [HN9](#) "[A] reasonable man who . . . actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, *knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.*" ([68 Cal. 2d at p. 285](#), italics added.) The court went on to say that the husband was "directly responsible" for the "existence" of the child and repeated the point that "without defendant's active participation and consent the child would not have been procreated." (*Ibid.*)

Sorensen expresses a rule universally in tune with other jurisdictions. "Almost exclusively, courts which have addressed this issue have assigned

[\[*1419\]](#) parental responsibility to the husband based on conduct evidencing his consent to the artificial insemination." ([In re Baby Doe \(1987\) 291 S.C. 389 \[353 S.E.2d 877, 878\]](#); accord, [Gursky v. Gursky \(1963\) 39 Misc.2d 1083 \[242 N.Y.S.2d 406, 411-412\]](#) [even though child was not technically "legitimate" under New York law at the time, husband's conduct in consenting to the artificial insemination [\[***18\]](#) properly invoked application of the doctrine of equitable estoppel requiring him to support the child]; [Anonymous v. Anonymous \(1964\) 41 Misc.2d 886 \[246 N.Y.S.2d 835, 836-837\]](#) [following *Gursky*]; [K.S. v. G.S. \(1981\) 182 N.J. Super. 102 \[440 A.2d 64, 68\]](#) [because husband did not offer clear and convincing evidence that he had *withdrawn* his consent to artificial insemination procedure, he was bound by initial consent given earlier and accordingly held to be lawful father of the child]; [In re Marriage of Adams \(1988\) 174 Ill.App.3d 595 \[124 Ill.Dec. 184, 528 N.E.2d 1075, 1087\]](#) [affirming child support award where trial court had determined there was "actual consent" to artificial insemination];⁹ [K.B. v. N.B. \(Tex.Ct.App. 1991\) 811 S.W.2d 634, 639\]](#) [even though husband did not consent in [\[**287\]](#) writing to insemination procedure, his full knowledge of the facts and willing participation in the artificial insemination, involvement in child birth classes, speaking of the child as "our baby" and passage of time before repudiation established that he ratified procedure and was therefore liable for child support]; [Levin v. Levin \(Ind. 1994\) 645 N.E.2d \[***19\] 601, 605](#) [consent of husband to wife's artificial insemination meant obligation to support because child was a "child of the marriage," the same as if the child had been adopted during the marriage].)

One New York family court even went so far as to hold the lesbian partner of a woman who was

⁸The cases have been collected in the Annotation, Rights and Obligations Resulting From Human Artificial Insemination ([1991](#)) [83 A.L.R.4th 295](#).

⁹*Adams* was later reversed on the procedural ground that Florida law, not Illinois law, governed the dispute and the case was remanded to the trial court for further proceedings in light of that. (See [In re Marriage of Adams \(1990\) 133 Ill.2d 437 \[141 Ill.Dec. 448, 551 N.E.2d 635\]](#).)

artificially inseminated responsible for the support of two children where the partner had dressed as a man and the couple had obtained a marriage license and a wedding ceremony had been performed prior to the inseminations. ([Karin T. v. Michael T. \(1985\) 127 Misc.2d 14 \[484 N.Y.S.2d 780\]](#).)¹⁰ Echoing the themes of causation and estoppel which underlie the cases, the court noted that the lesbian partner had "by her course [***20] of conduct in this case . . . brought into the world two innocent children" and should not "be allowed to benefit" from her acts to the detriment of the children and public generally. ([484 N.Y.S.2d at p. 784](#).)¹¹

[***21] Indeed, in the one case we are aware of where the court did not hold that the husband had a

¹⁰Michael T.'s name was originally Marlene. ([Karin T. v. Michael T., supra, 484 N.Y.S.2d at p. 781](#).)

¹¹In *Karin T. v. Michael T.*, the court held in a case involving child support that the lesbian partner was "indeed a 'parent' to whom such responsibility attaches." ([484 N.Y.S.2d at p. 784](#).) By contrast, [Nancy S. v. Michele G. \(1991\) 228 Cal. App. 3d 831 \[279 Cal. Rptr. 212\]](#) held that the lesbian partner of a woman who gave birth to two children through artificial insemination was not a parent *for purposes of custody and visitation*, even though the partner alleged that she "helped facilitate the conception and birth of both children." ([Id. at p. 836](#).) The parties presented no issue of support obligation in *Nancy S.*, so while the court acknowledged the doctrine of estoppel in *that* context, it declined to extend the estoppel doctrine "for the purpose of awarding custody and visitation to a nonparent." ([Id. at p. 839](#).)

Likewise, in [West v. Superior Court \(1997\) 59 Cal. App. 4th 302 \[69 Cal. Rptr. 2d 160\]](#), the court held that a former lesbian partner did not even have standing to obtain visitation rights. As in *Nancy S.* there was no issue of child support based on the partner's role in the conception and birth.

In the present case we are dealing with a man and woman who were married at the time of conception and signing of the surrogacy agreement, and we are reasoning from a statute, [Family Code section 7613](#), which contemplates parenthood on the part of a married man without biological connection to the child borne by his wife. Whether [section 7613](#) might be applied by a parity of reasoning, as we do today to a married couple, to a *non*married couple is not before us and we will not speculate as to the answer. It is enough to say that because the *Nancy S.* and *West* cases did not involve the issue of support and did involve *non*married couples at the time of the artificial insemination, they are distinguishable.

support obligation, the reason was *not* the absence of a [*1420] biological relationship as such, but because of actual lack of consent to the insemination procedure. (See [In re Marriage of Witbeck-Wildhagen \(1996\) 281 Ill.App.3d 502 \[217 Ill.Dec. 329, 667 N.E.2d 122, 125-126\]](#) [it would be "unjust" to impose support obligation on husband who never consented to the artificial insemination].)

It must also be noted that in applying the artificial insemination statute to a case where a party has caused a child to be brought into the world, the statutory policy is really echoing a more fundamental idea--a sort of *grundnorm* to borrow Hans Kelsen's famous jurisprudential word--already established in the case law. That idea is often summed up in the legal term "estoppel." Estoppel is an ungainly word from the Middle French (from the word meaning "bung" or "stopper") expressing the law's distaste for inconsistent actions and positions--like consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility.

While the *Johnson* [***22] v. *Calvert* court was able to predicate its decision on the Act rather than making up the result out of whole cloth, it is also true that California courts, prior to the enactment of the Act, had based certain decisions establishing paternity merely on the common law doctrine of estoppel. We have already discussed one of those decisions, *People v. Sorensen*, in detail. There an ex-husband was [**288] held, in light of his role in causing the birth of the child, to be estopped from disclaiming responsibility. Common law estoppel was also the basis for establishing paternity and its concomitant responsibility as far back as the 1961 decision of [Clevenger v. Clevenger \(1961\) 189 Cal. App. 2d 658, 662 \[11 Cal. Rptr. 707, 90 A.L.R.2d 569\]](#) (husband who took illegitimate child into his home and held child out [*1421] as his own "estopped" to assert illegitimacy and "avoid liability for its support").

There is no need in the present case to predicate our decision on common law estoppel alone, though the doctrine certainly applies. [HN10](#) The estoppel concept, after all, is *already* inherent in the artificial insemination statute. In essence, [Family Code section 7613](#) is nothing more than [\[***23\]](#) the codification of the common law rule articulated in *Sorensen*: By consenting to a medical procedure which results in the birth of a child--which the *Sorensen* court has held establishes parenthood by common law estoppel--a husband incurs the legal status and responsibility of fatherhood. (See [People v. Sorensen, supra, 68 Cal. 2d at p. 285.](#))

John argues that the artificial insemination statute should not be applied because, after all, his wife did not give birth. But [HN11](#) for purposes of the statute with its core idea of estoppel, the fact that Luanne did not give birth is irrelevant. The statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father's (as well as the mother's) *consent* to a medical procedure.

Luanne is the Lawful Mother of Jaycee, Not the Surrogate, and Not the Unknown Donor of the Egg

In the present case Luanne is situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child. Her motherhood may therefore be established "under [\[***24\]](#) this part," by virtue of that consent. In light of our conclusion, John's argument that the surrogate should be declared the lawful mother disintegrates. The case is now postured like the *Johnson v. Calvert* case, where motherhood could have been "established" in either of two women under the Act, and the tie broken by noting the intent to parent as expressed in the surrogacy contract. (See [Johnson v. Calvert, supra, 5 Cal. 4th at p. 93.](#)) The only difference is that this case is not even close as between Luanne and the surrogate. Not only was Luanne the clearly intended mother, no bona fide attempt has been made to establish the

surrogate as the lawful mother. ¹²

[\[***25\]](#) We should also add that neither could the woman whose egg was used in the fertilization or implantation make any claim to motherhood, even if she [\[*1422\]](#) were to come forward at this late date. Again, as between two women who would both be able to establish motherhood under the Act, the *Johnson* decision would mandate that the tie be broken in favor of the intended parent, in this case, Luanne.

Our decision in [In re Marriage of Moschetta, supra, 25 Cal. App. 4th 1218](#), relied on by John, is inapposite and distinguishable. In *Moschetta*, this court held that a contract giving rise to a "traditional" surrogacy arrangement where a surrogate was simply inseminated with the husband's sperm could not be *enforced* against the surrogate by the intended father. ([Id. at p. 1231.](#)) In order for the surrogate not to be the lawful mother she would have to give the child up for adoption. (See [id. at pp. 1231, 1233.](#)) In *Moschetta*, the surrogate was the mother both by birth and genes; the woman contemplated as the intended mother in the surrogacy contract gave up any claim to the child. ([Id. at pp. 1223-1225.](#)) In fact, at the appellate level, she went so far as to [\[***26\]](#) file a brief in favor of the birth mother's claim. (See [id. at p. 1224.](#))

[\[**289\]](#) *Moschetta* is inapposite because this court never had occasion to consider or discuss whether the original intended mother's participation in the surrogacy arrangement, which brought about the child's birth, might have formed the basis for holding her responsible as a parent. She had given up her claim; the issue was not before the court. Unlike the *Johnson* case there was no tie to break between two women both of whom could be held to be mothers under the Act. (See [25 Cal. App. 4th at](#)

¹² As noted in footnote 2, *ante*, John's attorney did nothing to object when the trial court accepted a stipulation taking the surrogate and her husband out of this case. Accordingly, nothing in this opinion is intended to address the question of who might be responsible for a child when *only* the surrogate mother is available.

[p. 1224](#). ["There is no 'tie' to break."].) [HN12](#) When courts do not consider propositions, their subsequent decisions are not precedent for them. (E.g., [American Federation of Labor v. Unemployment Ins. Appeals Bd. \(1996\) 13 Cal. 4th 1017, 1039 \[56 Cal. Rptr. 2d 109, 920 P.2d 1314\]](#); [Roberts v. City of Palmdale \(1993\) 5 Cal. 4th 363, 372 \[20 Cal. Rptr. 2d 330, 853 P.2d 496\]](#).)

Moschetta is distinguishable because it involved the claim of a woman who both gave birth to the child, "contributed" the egg, and who wanted the child enough to go to court to seek custody. (See [In re Marriage of Moschetta, supra, \[***27\] 25 Cal. App. 4th at p. 1223](#).) The only alternative was a woman who did not give birth, did not contribute genes, and who gave up her claim. ([Id. at pp. 1224-1225](#).) Only if the surrogacy contract were *specifically enforced* in *Moschetta* could this court have ruled in favor of the father's claim to *exclusive* parenthood.

There is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed* in a surrogacy agreement. (See [25 Cal. App. 4th at pp. 1230, 1235, fn. 23](#).) By the same token, there is also an important distinction between enforcing a surrogacy [*1423] contract and making a legal determination based on the fact that the contract itself *sets in motion* a medical procedure which results in the birth of a child.

In the case before us, we are not concerned, as John would have us believe, with a question of the enforceability of the oral and written surrogacy contracts into which he entered with Luanne. This case is not about "transferring" parenthood pursuant to those agreements. We are, rather, concerned with the consequences of those agreements as *acts* which *caused the birth* [***28] of a child.

The legal paradigm adopted by the trial court, and now urged upon us by John, is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness. It means that, absent

adoption, such children will be dependents of the state. One might describe this paradigm as the "adoption default" MODEL: The idea is that by not specifically addressing some permutation of artificial reproduction, the Legislature has, in effect, set the default switch on adoption. The underlying theory seems to be that when intended parents resort to artificial reproduction without biological tie the Legislature wanted them to be *screened* first through the adoption system. (Thus John, in his brief, argues that a surrogacy contract must be "subject to state oversight.")

The "adoption default" model is, however, inconsistent with both statutory law and the Supreme Court's *Johnson* decision. As to the statutory law, the Legislature has already made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility. [HN13 \[***29\] Family Code section 7570, subdivision \(a\)](#) states that "There is a compelling state interest in establishing paternity for all children." The statute then goes on to elaborate why establishing paternity is a good thing: It means someone besides the taxpayers will be responsible for the child: "Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits" (*Ibid.*) In light of this strong public policy, [HN14](#) the statutes which follow [section 7570, subdivision \(a\)](#) seek to provide a "simple system allowing for the establishment of voluntary paternity." ([Fam. Code, § 7570, subd. \(b\)](#).)

[Family Code Section 7570](#) necessarily expresses a legislative policy applicable to maternity as well. It would be lunatic for the Legislature to declare that establishing paternity is a compelling state interest yet conclude that establishing maternity is not. The obvious reason the Legislature did not include an explicit [***290] parallel statement on "maternity" is that the issue almost never arises except for extraordinary cases involving artificial reproduction.

[*1424] Very plainly, the Legislature has declared its [***30] preference for assigning *individual* responsibility for the care and maintenance of children; not leaving the task to the taxpayers. That is why it has gone to considerable lengths to ensure that parents will live up to their support obligations. (Cf. [Moss v. Superior Court \(1998\) 17 Cal. 4th 396, 424 \[71 Cal. Rptr. 2d 215, 950 P.2d 59\]](#) [noting legislative priority put on child support obligations].) The adoption default theory flies in the face of that legislative value judgment.

As this court noted in [Jaycee B. v. Superior Court \(1996\) 42 Cal. App. 4th 718, 731 \[49 Cal. Rptr. 2d 694\]](#), the *Johnson* court had occasion, albeit in dicta, to address "pretty much the exact situation before us." THE LANGUAGE BEARS QUOTING AGAIN: "In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability" ([Johnson v. Calvert, supra, 5 Cal. 4th at pp. 94-95.](#)) This language quite literally describes precisely the case [***31] before us now: neither the woman whose ovum was used nor the woman who gave birth have come forward to assume custody of the child after birth.

John now argues that the Supreme Court's statement should be applied only in situations, such as that in the *Johnson* case, where the intended parents have a genetic tie to the child. The context of the *Johnson* language, however, reveals a broader purpose, namely, to emphasize the intelligence and utility of a rule that looks to intentions.

The statement, quoted above, is at the bottom of [5 Cal. 4th at page 94](#) and top of page 95 of the opinion. Contextually, however, it is part of the development of a series of ideas which begin on page 93. The *Johnson* court had just enunciated its conclusion that [HN15](#) in cases of "genetic

consanguinity" and "giving birth" the intended mother is to be held the lawful mother. ¹³ [***33] The court then found "support" for its conclusions in the writings of several legal commentators (*id. at p. 93*), the first of whom, Professor Hill, had made the point that the intended parents are the " 'first cause, or prime movers, of the procreative relationship.' " (*Id. at p. 94*, quoting Hill, *What Does It Mean [***32] to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights* (1991) [66 N.Y.U. L. Rev. 353, 415.](#)) The court then quoted two more law review [*1425] articles, both of which emphasized the same theme as Professor Hill. ¹⁴ This laid the foundation for the court's next point, which was that people who " 'choose' " to bring a child into being are likely to have the child's best interest at heart, ¹⁵ which the court immediately juxtaposed against the surrogate's position which would result in a woman becoming the legal mother *against* her expectations. ([Johnson v. Calvert, supra, 5 Cal. 4th at p. 94.](#)) Then came the sentence which we have already quoted addressing the "extremely rare situation" where--as is precisely [**291] the case before us now--neither the woman who has given birth nor the woman who provided the ovum were "willing to assume custody of the child after birth"--and therefore recognizing intentions as the best rule to

¹³ This rule, incidentally, has the salutary effect of working both ways. Thus if an intended mother who could carry a baby to term but had no suitable eggs was implanted with an embryo in which the egg was from a donor who did not intend to parent the child, the law would still reflect the intentions of the parties rather than some arbitrary or imposed preference.

¹⁴ The *Johnson* court quoted Professor Schulz to the effect that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood' " ([Johnson v. Calvert, supra, 5 Cal. 4th at p. 94](#), quoting Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality* (1990) Wis. L.Rev. 297, 323) and a Yale Law Journal Note that the " '[m]ental concept of the child is a controlling factor of its creation' " ([Johnson v. Calvert, supra, 5 Cal. 4th at p. 94](#), quoting Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) [96 Yale L.J. 187, 196](#) (italics added).)

¹⁵ See [Johnson v. Calvert, supra, 5 Cal. 4th at page 94](#), quoting Schulz, *op. cit. supra*, Wis. L.Rev. at page 397.

promote certainty and stability for the child. (*Id.* at pp. 94-95.)

In context, then, the high court's considered dicta is directly applicable to the case at hand. The context was not limited to just *Johnson*-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been [***34] born " 'but for the efforts of the intended parents.' " (5 Cal. 4th at p. 94, quoting Hill, *op. cit.*, *supra*, 66 N.Y.U. L.Rev. at p. 415.)

Finally, in addition to its contravention of statutorily enunciated public policy and the pronouncement of our high court in *Johnson*, the adoption default model ignores the role of our dependency statutes in protecting children. Parents are not screened for the procreation of their own children; they are screened for the adoption of *other* people's children. It is the role of the dependency laws to protect children from neglect and abuse from their own parents. The adoption default model is essentially an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning.

In the case before us, there is absolutely no dispute that Luanne caused Jaycee's conception and birth by initiating the surrogacy arrangement whereby an embryo was implanted into a woman who agreed to carry the [*1426] baby to term on Luanne's behalf. In applying the artificial insemination statute to a gestational surrogacy [***35] case where the genetic donors are unknown, there is, as we have indicated above, no reason to distinguish *between* husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being. ¹⁶ Accordingly, Luanne

should have been declared the lawful mother of Jaycee.

*John [***36] Is the Lawful Father of Jaycee Even If Luanne Did Promise to Assume All Responsibility for Jaycee's Care*

The same reasons which impel us to conclude that Luanne is Jaycee's lawful mother also require that John be declared Jaycee's lawful father. Even if the written surrogacy contract had not yet been signed at the time of conception and implantation, those occurrences were nonetheless the direct result of actions taken pursuant to an oral agreement which envisioned that the fertilization, implantation and ensuing pregnancy would go forward. Thus, it is still accurate to say, as we did the first time this case came before us, that for all practical purposes John caused Jaycee's conception every bit as much as if things had been done the old-fashioned way. (*Jaycee B. v. Superior Court, supra*, 42 Cal. App. 4th at p. 730.)

When pressed at oral argument to make an offer of proof as to the "best facts" which John might be able to show if this case were tried, John's attorney raised the point that Luanne had (allegedly, we must add) promised to assume all responsibility for the child and would not hold him responsible for the child's upbringing. However, even if this case were [***37] returned for a trial on this point (we assume that Luanne would dispute the allegation) it could make no difference as to John's lawful paternity. It is well established that parents cannot, by agreement, limit or abrogate a child's right to support. ¹⁷

artificial insemination statute, however, most certainly is. Unlike *presumptions* used to establish paternity which have their root in the "old law of illegitimacy" (see *id.*, at p. 1226), the artificial insemination statute bears directly on a medical procedure which contemplates parenthood apart from any biological tie with the father.

¹⁶ Apropos our discussion in footnote 5, *ante*, it may be--though the question does not need to be decided now--that some of the other ways by which *paternity* may be shown under the Act in addition to genetics are not "interchangeable" between the sexes. (*In re Marriage of Moschetta, supra*, 25 Cal. App. 4th at p. 1225.) The

¹⁷ The legal consequences of John's allegation that Luanne would assume sole responsibility were briefed. Minor's appointed counsel specifically anticipated the point on page 11, footnote 11 of the minor's opening brief. Rather than attempt to show that Luanne's alleged promise would make a difference, John's respondent's brief

[***38] [**292] The rule is nicely illustrated by the case of *In re Marriage of Ayo* (1987) 190 Cal. App. 3d 442 [235 Cal. Rptr. 458]. There, a husband adopted his [*1427] wife's son from a previous marriage, then the couple were divorced. (*Id. at p. 445.*) A year after the dissolution, the son's natural father (despite the fact he had already been adopted) started visiting him. (*Ibid.*) In light of the natural father's renewed interest, and in settlement of some arrearages in the division of community property and child support by a lump sum payment, the parties entered into a written agreement in which the wife promised, as Luanne has allegedly promised in this case, to hold the husband "harmless from any claims of any kind regarding her minor child." (*Id. at p. 448.*) The agreement was filed as a written stipulation with the court and was even signed by the trial judge after the words, "it is so ordered." (*Id. at p. 448.*)

More than five years later the wife reneged on the agreement and sought to renew the husband's child support obligation. (190 Cal. App. 3d at p. 445.) The appellate court held that the agreement was invalid, reasoning that the "rights of the contracting [***39] parties under agreements such as this one affecting children must yield to the welfare of the children." (*Id. at p. 451.*)

The rule against enforcing agreements obviating a parent's child support responsibilities is also

merely alludes to a vague need to consider "[a]ll of the aspects of contract formation . . . including, but not limited to, the issues of mistake of law or fact, fraud, coercion and duress" and claims that John had been precluded from presenting evidence on these issues by the "preemptive ruling of the trial court." Three times now--when this case was here before (*Jaycee B. v. Superior Court, supra*, 42 Cal. App. 4th 718), at the trial, and in his respondent's brief--John has had the opportunity to present offers of proof of facts to the court which would change the result which would otherwise flow from his oral and written consent to the surrogacy. Having chosen not to respond to a point made by minor's counsel in her opening brief, John cannot now be heard to complain that he didn't have the opportunity to brief it. Then again, to be fair, John's attorney may himself have recognized that Luanne's alleged promise was of no consequence and it would be almost frivolous to press the issue at the appellate level. Every family law attorney knows that courts will not enforce promises by one parent to hold the other parent harmless from any claims of child support.

illustrated by *Stephen K. v. Roni L.* (1980) 105 Cal. App. 3d 640 [164 Cal. Rptr. 618, 31 A.L.R.4th 383], a case which is virtually on point about Luanne's alleged promise. In *Stephen K.*, a woman was alleged to have falsely told a man that she was taking birth control pills. In "reliance" upon that statement the man had sexual intercourse with her. (*Id. at p. 642.*) The woman became pregnant and brought a paternity action. While the man did not attempt to use the woman's false statement as grounds to avoid paternity, he did seek to achieve the same result by cross-complaining against the woman for damages based on her fraud.

The trial court dismissed the cross-complaint on demurrer and the appellate court affirmed. The cross-complaint was "nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct." (105 Cal. App. 3d at pp. 644-645.)

There is no meaningful [***40] difference between the rule articulated in *Stephen K.* and the situation here--indeed, the result applies a fortiori to the present [*1428] case: If the man who engaged in an act which merely opened the possibility of the procreation of a child was held responsible for the consequences in *Stephen K.*, how much more so should a man be held responsible for giving his express consent to a medical procedure that was *intended* to result in the procreation of a child. Thus, it makes no difference that John's wife Luanne did not become pregnant. John still engaged in "procreative conduct." In plainer language, a deliberate procreator is as responsible as a casual inseminator.¹⁸

[***41] [**293] CONCLUSION

Even though neither Luanne nor John are

¹⁸This specific point was urged by Attorney Shear, counsel for amicus curiae Association of Certified Family Law Specialists, at oral argument. The phrase "casual inseminator" was coined by Justice Mosk in his concurring opinion in *Michael U. v. Jamie B.* (1985) 39 Cal. 3d 787, 797 [218 Cal. Rptr. 39, 705 P.2d 362].

biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in both the most famous child custody case of all time, ¹⁹ [***42] and in our Supreme Court's *Johnson v. Calvert* decision, the court looked to *intent to parent* as the ultimate basis of its decision. ²⁰ Fortunately, as the *Johnson* court also noted, intent to parent " 'correlate[s] significantly' " with a child's best interests. (*Johnson v. Calvert, supra*, 5 Cal. 4th at p. 94, quoting Schultz, *op. cit. supra*, Wis. L.Rev., at p. 397.) That is far more than can be said for a model of the law that renders a child a legal orphan. ²¹

Again we must call on the Legislature to sort out the parental rights and responsibilities [***43] of those involved in artificial reproduction. No matter what [*1429] one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and--as now appears in the not-too-distant future, cloning and even gene splicing--courts are still going to be faced with the problem of determining lawful parentage. A child cannot be

ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who--other than the taxpayers--is obligated to provide maintenance and support for the child. These cases will not go away.

Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As [***44] jurists, we recognize the traditional role of the common (i.e., judge-formulated) law in applying old legal principles to new technology. (See, e.g., *Hurtado v. State of California* (1884) 110 U.S. 516, 530 [4 S. Ct. 111, 118, 28 L. Ed. 232] ["This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 394 [115 Cal. Rptr. 765, 525 P.2d 669] ["in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them"].) However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all its constituencies, which is the more desirable forum for lawmaking.

That said, we must now conclude the business at hand.

(1) The portion of the judgment which declares that Luanne Buzzanca is not the lawful mother of Jaycee is reversed. The matter is remanded with directions to enter a new judgment declaring her the lawful mother. [**294] The trial court shall make all appropriate orders to ensure that Luanne Buzzanca shall have legal [***45] custody of

¹⁹ See 1 Kings 3: 25-26 (dispute over identity of live child by two single women, each of whom had recently delivered a child but one child had died, resolved by novel evidentiary device designed to ferret out intent to parent).

²⁰ While in each case intent to parent was used as a tiebreaker as between two claimants who either had or claimed a biological connection, it is still undeniable that, when push came to shove, the court employed a legal idea that was *unrelated* to any necessary biological connection.

²¹ It is significant that even if the *Johnson* majority had adopted the position of Justice Kennard advocating best interest as the more flexible and better rule (see 5 Cal. 4th at p. 118 (dis. opn. of Kennard, J.)) there is no way the trial court's decision could stand. Luanne has cared for Jaycee since infancy; she is the only parent Jaycee has ever known. It would be unthinkable, given the facts of this case and her role as caregiver for Jaycee, for Luanne not to be declared the lawful mother under a best interest test.

As for the father, John would not be the first man whose responsibility was based on having played a role in causing a child's procreation, regardless of whether he really wanted to assume it.

Jaycee, including entering an order that Jaycee's birth certificate shall be amended to reflect Luanne Buzzanca as the mother.

End of Document

(2) The judgment is reversed to the extent that it provides that John Buzzanca is not the lawful father of Jaycee. The matter is remanded with directions to enter a new judgment declaring him the lawful father. Consonant with this determination, today's ruling is without prejudice to John in future proceedings as regards child custody and visitation as his relationship [*1430] with Jaycee may develop.²² The judgment shall also reflect that the birth certificate shall be amended to reflect John Buzzanca as the lawful father.

[***46] (3) To the degree that the judgment makes no provision for child support it is reversed. The matter is remanded to make an appropriate permanent child support order. Until that time, the temporary child support order shall remain in effect. (See [*Jaycee B. v. Superior Court, supra*, 42 Cal. App. 4th at p. 730.](#))

Luanne and Jaycee will recover their costs on appeal.

Wallin, J., and Crosby, J., concurred.

Respondent's petition for review by the Supreme Court was denied June 10, 1998.

²²Luanne has had actual physical custody of Jaycee from the beginning. Obviously, it would be frivolous of John to seek custody of Jaycee right now in light of that fact. However, as the lawful father he certainly must be held to have the right, consistent with Jaycee's best interest, to visitation. Our decision today leaves Luanne and John in the same position as any other divorced couple with a child who has been exclusively cared for by the mother since infancy.

And while it may be true that John's consent to the fertilization, implantation and pregnancy was done as an accommodation to allow Luanne to surmount a formality, who knows what relationship he may develop with Jaycee in the future? Human relationships are not static; things done merely to help one individual overcome a perceived legal obstacle sometimes become much more meaningful. (See, e.g., Nicholson, *Shadowlands* (1990) [play based on true story of prominent British author who married American citizen in Britain in perfunctory civil ceremony to allow her to remain in country; a deeper relationship then developed].)



Caution

As of: October 18, 2026 6:38 AM Z

In re Marriage of Cream

Court of Appeal of California, First Appellate District, Division Five.

February 10, 1993, Decided

No. A054760

Reporter

13 Cal. App. 4th 81 *; 16 Cal. Rptr. 2d 575 **; 1993 Cal. App. LEXIS 133 ***; 93 Cal. Daily Op. Service 1031; 93 Daily Journal DAR 2018

In re the Marriage of OLGA L. AND HOWARD J. CREAM. OLGA L. CREAM, Appellant, v. HOWARD J. CREAM, Respondent.

Subsequent History: [***1] Review Denied May 13, 1993, Reported at: [1993 Cal. LEXIS 2544](#). Panelli, J., and Baxter, J., are of the opinion the petition should be granted.

Prior History: Superior Court of Napa County, No. 54795, W. Scott Snowden, Judge.

Case Summary

Procedural Posture

Appellant wife sought review of an order by the Superior Court of Napa County (California), which pursuant to *Cal. Civ. Code* § 4800 ordered appellant and respondent husband to conduct an interspousal auction to determine the value of a family business and the party to whom the business should be awarded.

Overview

Appellant wife and respondent husband owned and operated a family business known as the old faithful geyser of California which was the only privately owned geyser in the United States. The trial court gave appellant the exclusive occupancy and operation of the geyser pending trial and the parties shared the profit. The trial court ordered an interspousal auction of the family business to determine the value of the business and the party to whom the business was to be awarded. Appellant

objected to the auction but subsequently won the bid for the business. The court reversed and held that pursuant to *Cal. Civ. Code* § 4800, the trial court must divide the community property equally, and cannot delegate the responsibility to fix the fair market value of the community estate where assets were not divided in kind. The court remanded to the trial court to determine the fair market value of the property on the date of the bid. If the price appellant paid exceeded the fair market value then respondent would be ordered to pay the difference.

Outcome

The court reversed the trial court judgment, which ordered the interspousal auction of the family business and affirmed the part of the judgment that awarded appellant wife the business. The court remanded to the trial court to determine the fair market value of the business on the date appellant and respondent husband made their bids.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN1 The rule that voluntary acceptance of the benefits of a judgment bars appeal therefrom is subject to qualifications. The appellant must demonstrate a clear and unmistakable acquiescence in the judgment, an unconditional, voluntary, and

absolute acceptance of the fruits thereof.

Estate, Gift & Trust Law > Estate

Planning > Community Property > General Overview

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

HN2 *Cal. Civ. Code § 4800(a)*, is the trial court's authority to divide the community estate. California has restricted judicial authority by requiring trial courts to divide the community estate equally between the parties, except for limited circumstances specified in later provisions of § 4800. The parties, on the other hand, by written agreement or oral stipulation in open court, are free to divide their community estate in any fashion they wish and need not divide it equally.

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

HN3 In *Cal. Civ. Code § 4351*, the legislature specifically confers jurisdiction upon the trial court in actions under the family law act to inquire into and render any judgment and make such orders as are appropriate concerning the settlement of the property rights of the parties. *Section 4800(f)*, provides that the trial court may make such orders, as it deems necessary to carry out the purposes of this section.

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

HN4 Cal. R. Ct. 1242, provides in part, that the trial court in every case shall ascertain the nature and extent of all assets and obligations subject to disposition by the court in the proceeding and shall divide such assets and obligations as provided in the family law act. Rule 1249, states that in the exercise of the trial court's jurisdiction pursuant to the family law act, if the course of proceeding is not specifically indicated by statute or these rules,

any suitable process or mode of proceeding may be adopted by the trial court which appears conformable to the spirit of the family law act and these rules.

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

HN5 Trial courts possess broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division. Likewise, as long as its determination is within the range of the evidence presented, the court possesses broad discretion to determine the value of community assets.

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

Real Property Law > Estates > Concurrent
Ownership > Tenancies in Common

Tax Law > Federal Income Tax Computation > Tax
Accounting > General Overview

HN6 One or more of the following methods of dividing marital property may be used: (1) in kind, (2) asset distribution or cash out, 3) sale and division of proceeds, or (4) conversion to tenancy in common where the sale of the family home is deferred pursuant to *Cal. Civ. Code § 4700.10*. The asset distribution or cash out method involves distributing one or more community assets to one spouse and other community assets of equal value to the other. When this method is used *Cal. Civ. Code § 4800*, confers upon the trial court the responsibility to fix the value of assets and liabilities in order to accomplish an equal division.

Estate, Gift & Trust Law > Estate
Planning > Community Property > General Overview

Family Law > ... > Dissolution & Divorce > Property
Distribution > General Overview

HN7 Except for those provisions of *Cal. Civ. Code* § 4800, which specify circumstances in which the community estate need not be divided equally, which are inapplicable here, the court possesses no authority to divide the community estate between the parties other than equally, and cannot delegate its responsibility to fix the fair market value of the community estate where assets are not divided in kind.

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

HN8 The fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing.

Estate, Gift & Trust Law > Estate Planning > Community Property > General Overview

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

HN9 Without a stipulation of the parties, the trial court cannot abdicate its statutory responsibility to value and divide the community estate. The trial court has no authority to order an interspousal auction of a community asset, over the objection of a party, as a substitute for the court valuing and making its award of that asset.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Estate, Gift & Trust Law > Estate Planning > Community Property > General Overview

Family Law > ... > Dissolution & Divorce > Property Distribution > General Overview

HN10 Where the asset at issue is a family business which the court finds either party is capable of operating, and each, seeks its award and can purchase the other's share, a sale to a third party should not be ordered. Although the business may be difficult to value, and it may be even more difficult to decide the spouse to whom it should be awarded where both have been operating the business and both want it and can purchase it, it will usually be an abuse of discretion not to award it to one of the spouses.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court, in a marital dissolution proceeding in which both parties desired to run the family business, the only privately owned geyser in the United States, ordered a nonbinding private auction between the parties to dispose of the business over the repeated objections of the wife. The auction was held, and the wife purchased the business after the husband was unable to close escrow. (Superior Court of Napa County, No. 54795, W. Scott Snowden, Judge.)

The Court of Appeal affirmed the judgment awarding the wife the property, but remanded to the trial court to fix the fair market value. The court held that the trial court possesses no authority to divide the community estate other than equally and cannot delegate its responsibility to fix the fair market value of the community estate when assets are not divided in kind, which was the effect of the court-ordered interspousal auction. Because of the terms of the auction and the threat of a public sale, and most importantly because the wife's objection to the procedure established she was not a willing buyer within the definition of fair market value, the procedure ordered by the trial court did not establish fair market value. Without a stipulation of the parties, the trial court could not abdicate its

statutory responsibility to value and divide the community estate. (Opinion by King, J., with Peterson, P. J., and Haning, J., concurring.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b) [CA\(1c\)](#) (1c)

Dissolution of Marriage; Separation § 53— Division of Community and Quasi-community Property—Family Business—Involuntary Interspousal Auction.

--In a marital dissolution proceeding in which both parties desired to run the family business, the only privately owned geyser in the United States, the trial court erred in ordering a nonbinding private auction between the parties to dispose of the business over the repeated objections of the wife. The trial court possesses no authority to divide the community estate other than equally (*Civ. Code*, § 4800) and cannot delegate its responsibility to fix the fair market value of the community estate when assets are not divided in kind, which was the effect of the court-ordered interspousal auction. The procedure ordered by the trial court, because of the terms of the auction and the threat of a public sale, did not establish fair market value, particularly in view of the wife's objection to the procedure, which established that she was not a willing buyer within the definition of fair market value. Without a stipulation of the parties, the trial court could not abdicate its statutory responsibility to value and divide the community estate.

[See 11 **Witkin**, Summary of Cal. Law (9th ed. 1990) Community Property, §§ 174, 183.]

[CA\(2\)](#) (2)

Appellate Review § 6—Who May Appeal—Waiver of Right—Acceptance of Benefits.

--The rule that voluntary acceptance of the benefits of a judgment bars appeal therefrom is subject to

qualifications, including that the appellant must have made a clear and unmistakable acquiescence in the judgment, an unconditional, voluntary, and absolute acceptance of the fruits thereof.

[CA\(3\)](#) (3)

Dissolution of Marriage; Separation § 52— Division of Community and Quasi-community property—Valuation—Discretion—Methods.

--Trial courts possess broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division. As long as its determination is within the range of the evidence presented, the court possesses broad discretion to also determine the value of community assets. One or more of the following methods of division may be used: (1) in kind; (2) asset distribution or cash out; (3) sale and division of proceeds; or (4) conversion to tenancy in common where the sale of the family home is deferred pursuant to [Civ. Code](#), § 4700.10.

[CA\(4\)](#) (4)

Dissolution of Marriage; Separation § 50— Division of Community and Quasi-community Property—Cash Out Method of Division: Words, Phrases, and Maxims—Cash Out Division of Community Property.

--The asset distribution or "cash out" method of division of community property involves distributing one or more community assets to one spouse and other community assets of equal value (which may include an equalizing promissory note) to the other. When this method is used, *Civ. Code*, § 4800, confers on the court the responsibility to fix the value of assets and liabilities in order to accomplish an equal division.

[CA\(5\)](#) (5)

Dissolution of Marriage; Separation § 53—

Division of Community and Quasi-community Property—Award of Particular Asset to One Party to Effect Equal Division—Family Business.

--The trial court has authority under *Civ. Code*, § 4800, to order an asset sold, with the proceeds divided in the proportion necessary to accomplish an equal division of the community estate. However, where the asset at issue is a family business which the court finds either party is capable of operating, and each seeks its award and can purchase the other's share, a sale to a third party should not be ordered. Although the business may be difficult to value, and it may be even more difficult to decide the spouse to whom it should be awarded when both have been operating the business and both want it and can purchase it, it will usually be an abuse of discretion not to award it to one of the spouses.

CA(6) (6)

Dissolution of Marriage; Separation § 61—Property Rights of Parties—Spousal Support—Effect on Reimbursement Claim for Work Performed.

--In dissolution of marriage proceedings involving the division and valuation of a family business, the trial court did not err in finding that the wife's reimbursement claim for a reasonable salary for her postseparation work at the business was cancelled out by the husband's support claim for the same period. The fact the husband was receiving one-half of the profits from the business just like the wife was not dispositive of his claim, since, unlike the wife, he was prohibited by court order from working and earning his salary in the business.

Counsel: Bernard N. Wolf for Appellant.

Vincent M. Spohn and James L. McIntosh for Respondent.

Judges: Opinion by King, J., with Peterson, P. J., and Haning, J., concurring.

Opinion by: KING, J.

Opinion

[*84] [576]** In this case we hold that trial courts lack authority in marital dissolution cases to order interspousal auctions of property over the objection of a party because determination of the value and division of community property is a nondelegable judicial function. For the benefit of the family law bench and bar we suggest alternatives to judicial determination which parties, by stipulation, might utilize to resolve property issues.

Olga L. Cream (now Kolbek) appeals from a dissolution judgment, challenging (1) the trial court's method of valuing and disposing of a parcel of community real property on which a community business was operated, and (2) the denial of her request for compensation for the operation of the business pending trial.

I

Olga and Harold Cream were **[***2]** married in 1970. ¹ In 1973 they purchased real property and a business known as the Old Faithful Geyser of California. On November 9, 1987, Olga filed a petition for dissolution of marriage. In January 1988, the trial court gave her exclusive occupancy and operation of the geyser pending trial. Apparently, the parties shared the profits equally during that time. On August 3, 1989, the trial court rendered a judgment of dissolution as to status only. At a later time the issue of division of property was tried.

The property in dispute is unique, the only privately owned geyser in the United States. Each party was prepared to submit an appraisal valuing the property at \$ 800,000, although neither appraisal

¹For ease of reference, we will refer to the parties by their first names, Olga and Harold. (See [In re Marriage of Smith \(1990\) 225 Cal.App.3d 469, 475-476, fn. 1 \[274 Cal.Rptr. 911\]](#).)

was actually received in evidence. While Olga, the trial court said in a [***3] statement of decision, made "a persuasive showing that she is particularly interested in the business and that she is particularly capable of running it profitably," Howard offered "to have it awarded to him at significantly above the market value." The court stated it had "a duty, owed jointly to the parties to maximize the assets of the community." The court felt that ignoring Howard's offer to pay more than fair market value "would not be a just result," since it would not maximize the value of community property.

Accordingly, "in exercise of its discretion in providing for a fair and equal division of the community property of the parties," and over Olga's repeated objections, the court ordered a nonbinding private auction [**577] between the [*85] parties to dispose of the geyser. Under tentative guidelines, each party would bid for the one-half interest of the other, unconditionally except for the procurement of financing, in increments of \$ 1,000 beginning with \$ 400,000. If the successful bidder failed to post a 10 percent deposit within one day or to close escrow within 90 days, the property would be sold to the other party at his or her highest offer. If neither party was [***4] able to complete a sale in this manner, the geyser would be sold through a public auction or listing process.

The court denied both Olga's request for credit for her pendente lite work at the geyser and Howard's request for "prospective and retroactive" spousal support. The court reasoned, "To the extent that [Olga] may have been entitled to payment for her services, [Howard] may also have been entitled to support since he was excluded from the business." Furthermore, "depending upon the result of the auction, [Howard] will have either enough cash to support himself or a business by which to employ himself."

In a partial response to Olga's objections, the court modified the auction procedure, deleting the 10 percent deposit requirement and retaining jurisdiction to extend for good cause the escrow

closing date. More importantly, the court ruled that should the high bidder fail to close escrow on time, the other party might either buy at his or her last bid or refer the matter to the court, which would then have the duty--taking into account the evidence at trial and the expressions of value shown by the parties during the auction--to fix the value of the asset and award it, or [***5] to order its public sale to a third party.

The auction took place on May 21, 1991. Olga's highest bid for Howard's one-half was \$ 596,000; Howard's was \$ 600,000. The court accordingly valued the geyser at \$ 1.2 million and awarded it to Howard subject to the previously specified conditions. Olga continued to object to the auction procedure. The trial court rendered judgment on June 27, 1991.

On August 20, Howard having been unable to close escrow, Olga purchased his interest in the property for \$ 596,000, but filed a notice of appeal contesting "the fact that she should be required to pay \$ 596,000 instead of one-half the actual appraised value of the property and business." On August 26, Howard filed a cross-appeal which he subsequently abandoned. Escrow closed on December 18, 1991.

II

CA(1a) (1a) Olga's primary contention is that the court lacked authority to order interspousal disposition of this community asset by auction. CA(2) (2) Howard maintains she has waived this issue by accepting the benefits of and/or [*86] voluntarily complying with the judgment. (Lee v. Brown (1976) 18 Cal.3d 110, 114, 115 [132 Cal.Rptr. 649, 553 P.2d 1121].) [***6] However, HN1 the rule that voluntary acceptance of the benefits of a judgment bars appeal therefrom is subject to qualifications. (In re Marriage of Brockman (1987) 194 Cal.App.3d 1035, 1044 [240 Cal.Rptr. 96].) The appellant must demonstrate a "clear and unmistakable acquiescence in" the judgment, an "unconditional, voluntary, and absolute" acceptance of the fruits thereof. (In re

[*Marriage of Fonstein* \(1976\) 17 Cal.3d 738, 744 \[131 Cal.Rptr. 873, 552 P.2d 1169\]](#).) Olga's consistent objections to the auction procedure, the resultant valuation of the geyser, and the terms of the judgment preserved the issue on appeal.

CA(1b) (1b) Olga contends an interspousal auction such as the one employed here cannot be ordered over the objection of a spouse and that it necessarily results in an unequal division of property contrary to the mandate of *Civil Code* section 4800.² In support of this conclusion she notes that the fair market value as established by the auction procedure in this case was 50 percent higher than the appraisals the parties were prepared to submit.

[***7] The trial court's authority to order an interspousal auction of community property generally, and to determine the value of [***578] a family business and the party to whom it is to be awarded in particular, is an issue of first impression in California. Indeed, our research has determined that the only reported decision in the United States involving this issue is [*In re Marriage of Dennis* \(Iowa Ct.App. 1991\) 467 N.W.2d 806](#), in which the court rejected the use of an interspousal bidding process to establish the value of a closely held corporation in which each party owned 50 percent of the stock. Although *Dennis* is not binding authority in California, its reasoning is persuasive. The court held the trial court's use of a bidding process "avoids the judicial responsibility of valuation and is, therefore, an unacceptable methodology." ([*Id. at p. 808*](#).) It found the process particularly inappropriate where the parties are not willing buyers and sellers, but "dissolution litigants . . . in a highly charged setting." (*Ibid.*) "Parties may be experiencing a number of emotions including depression, anger, vengeance, or stress. Furthermore, there are several mechanical [***8] difficulties and potential inequalities that may arise in this type of transaction and affect the bidding,

such as the availability of financing and other resources (i.e., access to guarantors or banking connections, etc.), the establishment of management, and the reputation of the respective spouses. In such a setting," the court concluded, "we do not believe a trial court is able to take sufficient precautions to ensure a fair value will result from a bidding process." ([*Id. at pp. 808-809*](#).) The court acknowledged the difficulty of the trial court's task in determining value of a marital asset, especially where, as in that case, the asset was a closely held [***87] corporation and large variations in value were presented in evidence, and noted that this is why the law provides trial courts great leeway. "Yet, the law does not provide so much 'leeway' as to condone the relinquishment of judicial duties." ([*Id. at p. 808*](#).)³

[***9] We must examine California's statutory scheme to ascertain whether a trial court here nevertheless possesses the authority to order, over the objection of a party, an interspousal auction for the purpose of fixing the fair market value of community property and awarding it to a party at that value. The only applicable statutes appear to be sections 4800 and [4351](#).

HN2 Section 4800, subdivision (a) is the court's authority to divide the community estate. It is worth mentioning, for reasons which will become evident later in our discussion, that unlike virtually every other state, California has restricted judicial

²Unless otherwise indicated, all further statutory references are to the Civil Code.

³The factual circumstances in *Dennis* bear a startling resemblance to those present here. The marital asset at issue there was also a family business which the parties ran jointly. Each wanted to purchase the 50 percent interest of the other. The trial court determined that the business was worth more to either of the parties than the \$ 290,000 fair market value testified to by an expert witness. Since there was some evidence that the business was worth more than the value testified to by the expert, including testimony by one of the parties, the court concluded that the fairest way to determine fair market value would be by a bidding process between the parties. The husband objected to the use of an interspousal auction, but when it proceeded by court order over his objection, he was the high bidder at \$ 576,000 for the entire business. The court fixed \$ 576,000 as the fair market value of the business, and awarded it to the husband, who then appealed.

authority by requiring trial courts to divide the community estate equally between the parties, except for limited circumstances specified in later provisions of *section 4800* which are inapplicable here. The parties, on the other hand, by written agreement or oral stipulation in open court, are free to divide their community estate in any fashion they wish and need not divide it equally.

HN3 In *section 4351*, the Legislature has specifically conferred jurisdiction upon the court in actions under the Family Law Act "to inquire into and render any judgment and make such orders as [***10] are appropriate concerning . . . the settlement of the property rights of the parties. . . ." Finally, *section 4800, subdivision (f)* provides that the court "may make such orders as it deems necessary to carry out the purposes of this section." Although the Family Law Act contains other provisions pertaining to the property rights of the parties, none relate [**579] to the issue of the court's authority to make the order in dispute in this case.

Our examination of the statutory scheme also requires us to consider Family Law Rules adopted as California Rules of Court since, uniquely in this field of law, the Legislature has specifically authorized the Judicial [*88] Council to adopt rules superseding contrary statutes. (See *In re Marriage of McKim* (1972) 6 Cal.3d 673, 678, fn. 4 [100 Cal.Rptr. 140, 493 P.2d 868].) Only two rules are possibly applicable to the issue before us. **HN4** Rule 1242 pertains to division of property and provides in part, "The court in every case shall ascertain the nature and extent of all assets and obligations subject to disposition by the court in the proceeding and shall divide such assets and obligations [***11] as provided in the Family Law Act" Rule 1249 states, "In the exercise of the court's jurisdiction pursuant to the Family Law Act, if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court which appears conformable to the spirit of the Family Law Act and these rules."

CA(3) (3) In applying these statutes and rules, **HN5** trial courts possess broad discretion to determine the manner in which marital property is divided in order to accomplish an equal division. (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 603 [153 Cal.Rptr. 423, 591 P.2d 911].) Likewise, as long as its determination is within the range of the evidence presented, the court possesses broad discretion to determine the value of community assets. (See *In re Marriage of Bergman* (1985) 168 Cal.App.3d 742 [214 Cal.Rptr. 661].)

HN6 One or more of the following methods of division may be used: (1) in kind, (2) asset distribution or cash out, 3) sale and division of proceeds, or (4) conversion to tenancy in common where the sale [***12] of the family home is deferred pursuant to *section 4700.10*. (For a detailed discussion of these methods, see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1992) P 8:225 et seq.)

CA(4) (4) The asset distribution or cash out method involves distributing one or more community assets to one spouse and other community assets of equal value (which may include an equalizing promissory note) to the other. When, as here, this method is used, *section 4800* confers upon the court the responsibility to fix the value of assets and liabilities in order to accomplish an equal division. (*In re Marriage of Micalizio* (1988) 199 Cal.App.3d 662 [245 Cal.Rptr. 673]; *In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244 [105 Cal.Rptr. 483].)

CA(1c) (1c) **HN7** Except for those provisions of *section 4800* which specify circumstances in which the community estate need not be divided equally, which are inapplicable here, the court possesses no authority to divide the community estate between the parties other than equally, and cannot delegate its responsibility to fix the fair market value of the community estate where assets [***13] are not divided in kind. (*In re Marriage of Knickerbocker* (1974) 43 Cal.App.3d 1039, 1047-1048 [118 Cal.Rptr. 232].) This was the effect of the court-ordered interspousal auction in this case, which was

therefore unauthorized by the pertinent statutes and rules. [*89]

In our view, [HN8](#) the fair market value of a marketable asset in marital dissolution cases is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no obligation or urgent necessity to do so, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing. ⁴ We restrict the use of this definition to marketable assets because some marital assets are not marketable, but nonetheless may have to be valued. Obviously, the procedure ordered by the trial court in the present case does not establish fair market value as so defined because of the terms of the auction and the threat of a public sale, and most importantly because Olga's objection to the procedure **[**580]** clearly establishes she was not a willing buyer within the definition.

[*14]** [HN9](#) Without a stipulation of the parties, the trial court cannot abdicate its statutory responsibility to value and divide the community estate. We hold the court has no authority to order an interspousal auction of a community asset, over the objection of a party, as a substitute for the court valuing and making its award of that asset. ⁵

⁴This definition is a modification of the definition of fair market value for condemnation cases contained in [Code of Civil Procedure section 1263.320](#).

⁵Even if we had found the court could order an interspousal auction over a party's objection, we would have reversed because the court erred in the ground rules it set for the conduct of the auction. The fact the bidding was not binding created the possibility that Harold, knowing how much Olga wanted this asset, would keep increasing his bid until she dropped out, knowing he would not be required to purchase it for his bid price. In a marital action, where emotion often overcomes judgment, this should not be permitted. It is for this very reason that [California Uniform Commercial Code section 2328](#) precludes the final bidder at an auction from retracting his or her bid, and [Business and Professions Code section 5776, subdivision \(o\)](#) precludes an auctioneer from allowing anyone to bid for the sole purpose of increasing the bid.

Additionally, the court erred in stating it would order a public sale if neither party purchased the property as a result of the auction. This statement, in the context of a family business, could be especially

[*15]** III

[CA\(5\)](#) (5) Nothing in this opinion should be construed as limiting in any way the court's authority under *section 4800* to order an asset sold, with the proceeds divided in the proportions necessary to accomplish an equal division of the community estate. ([In re Marriage of Holmgren \(1976\) 60 Cal.App.3d 869, 873 \[130 Cal.Rptr. 440\]](#).) A sale is often required. ⁶ However, [HN10](#) where the asset at issue is a family business which the court finds **[*90]** either party is capable of operating, and each, seeks its award and can purchase the other's share, a sale to a third party should not be ordered. Although the business may be difficult to value, and it may be even more difficult to decide the spouse to whom it should be awarded where both have been operating the business and both want it and can purchase it, it will usually be an abuse of discretion not to award it to one of the spouses.

[*16]** In the instant case, the spouses jointly operated this family business for over 15 years. The business could be awarded to one spouse with offsetting community or separate property assets used to cash out the other spouse. Under these circumstances, it would be an abuse of discretion to sell the business out from under both parties, simply because they could not agree upon its value or the one to whom it should be awarded. Those decisions are the court's responsibility. After all, such businesses do not simply represent an

coercive. Olga contends that when Harold did not fulfill his bid, the court's threat of a public sale compelled her to purchase the business at her bid price, even though she believed the appraisal value was the true fair market value. This potential for coercion takes the auction result outside our definition of fair market value.

⁶An order for the sale of an asset or assets and for division of the proceeds is often the most expeditious and least expensive method of resolving disputes over property, especially items of personal property of limited value. Other alternatives available to the court include the court's appointment of its own expert to value the assets under [Evidence Code section 730](#) or of a referee or special master, either by agreement of the parties or on the court's own motion. (See [Code Civ. Proc., § 638, 639](#).) These alternatives can involve considerable expense and, of course, delay.

investment of capital; they are also an investment of sweat, toil, worry, and hopes. No matter how difficult the decision, the trial judge must bite the bullet, value the business and award it to one of the parties. No one ever said judging was easy.

If the court has no authority to resolve property disputes by ordering an interspousal auction over the objection of a party, does this mean auctions are a disfavored method of resolving disputes between divorcing spouses? On the contrary, auctions and other alternative methods of resolving property disputes are regularly used by innovative and knowledgeable family law lawyers, often at the suggestion of innovative *****17** and knowledgeable family law judges. For the benefit of the family law bench and bar--indeed, for the benefit of the increasing number of parties who represent themselves in marital dissolution ****581** cases--we attach as an appendix to this opinion a laundry list of alternative methods of resolving property division and valuation disputes which are frequently suggested by family law judges and lawyers, and stipulated to by parties.⁷

*****18** However useful these methods may be as a substitute for a judicial determination, absent statutory authority they can only be used by stipulation ***91** of the parties. The Legislature was wise to provide in *section 4800* that the court must accept stipulations of the parties with regard to the disposition of their property. The court has no role in approving or disapproving property divisions agreed to by the parties. Except for

conduct violative of *section 4800.11*, the parties possess the exclusive authority to agree upon the disposition of their property. The court's only role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if requested, to incorporate the disposition into the judgment.

For the most part, the methods to resolve disputes over marital property listed in the appendix can and should be utilized without any direct judicial participation. Although the judge may recommend one or more of these methods at a settlement conference or at trial, negotiation of the terms and implementation of the method chosen can be done outside the presence of the judge. It has been our experience as trial judges, as well as the *****19** experience of knowledgeable family law judges in California, that there is rarely any hesitancy on the part of divorcing spouses to agree to use one or more of these methods to resolve an impasse in the division of assets. Indeed, the parties usually greet the suggestion with enthusiasm.

These methods can be valuable tools in both ascertaining the value of community property and determining the party to whom it is awarded. Their use can avoid game-playing, discovery disputes, the expense of experts and lengthy and costly trials. The conditions under which they are used must be fair, and neither party should be disadvantaged by the method selected. The parties must be on a reasonably equal financial footing and be fully informed about the legal effect of the terms to which they are agreeing. If the process is conducted fairly, the recipient of the property at the price specified has no basis for complaint because the recipient believes the property is worth what he or she is paying for it. The other party has no basis for complaint because that party is receiving more for the property than he or she thought it was worth, since he or she was unwilling to pay that much to the other *****20** party to obtain the property.

The items most typically disposed of by the use of

⁷Many family law judges have recommended the use of these alternatives. The leading exponent of their use in California was Riverside County Superior Court Judge Robert Garst, when he served as that court's family law judge. One of California's most innovative and successful family law judges, he used methods such as these to fairly and effectively handle a high-volume family law caseload. By urging parties to use alternative methods to resolve their own disputes, especially disputes over property, Judge Garst recognized and respected the fact that the parties should be given every opportunity to reach their own decisions. After all, judges do not possess magical powers which enable them to reach the perfect solution to every dispute. Their role is to make the parties' decisions for them only if the parties cannot decide for themselves.

one of these methods are the proverbial "pots and pans." Indeed, furniture, furnishings and other personal property are regularly disposed of by one of these methods. The alternative may be a court-ordered garage sale. Disputes over appraised items where the appraised value is accepted by the parties as correct, such as wine collections, works of art, etc., are often resolved by one of these methods. These methods are especially useful when, as is frequently the [*92] case, each party wants the same item or items and there is no good reason for the court to award an item to one spouse rather than the other. As in the instant case, these methods can also be used to determine both the value and the disposition of a community business, although this may be appropriate only where each spouse is capable of operating the business. Even where a family [**582] business is not operated by both spouses, one of these methods may be utilized when each spouse wants the business, if the business is readily saleable or can be operated by a capable manager.

Experienced family judges and lawyers know that the best resolution [***21] of marital disputes is that reached by agreement of the parties themselves. The alternatives in the appendix are vehicles to assist disputing spouses in reaching agreement on how to dispose of their property. Indeed, they represent self-empowerment vehicles to assist the parties in making their own decisions, rather than having a decision imposed upon them by the court after a lengthy and expensive trial. In some cases the cost of the trial could exceed the value of the property in dispute. We encourage the family law bench and bar to recommend that parties in marital dissolution actions consider making use of whatever alternatives to judicial resolution of property disputes can be agreed upon by the parties.

IV

CA(6) (6) By analogy with In re Marriage of Epstein (1979) 24 Cal.3d 76 [154 Cal.Rptr. 413, 592 P.2d 1165] (reimbursement for postseparation expenditure of separate property funds to preserve

and maintain family residence), Olga also contends she was entitled to a reasonable salary for her postseparation work at the Geyser. She alleges the trial court erred in finding that her reimbursement claim was cancelled out [***22] by Howard's support claim for the same period. This point was expressly placed before the court in Howard's trial brief and argued in Olga's posttrial brief.⁸ We find no error. The fact that Howard was receiving one-half the profits from the geyser "just like Wife" is not dispositive of his claim since, unlike Wife, he was prohibited by court order from working and earning a salary there.

V

Since Olga has paid the amount she bid for the property and has been operating the business, we affirm the judgment awarding her the property. However, we remand the case to the trial court for the purpose of fixing the fair market value of the property as of the date the parties made their bids. If the price Olga paid exceeded the fair market value of one-half the property [*93] as of that date, Harold shall be ordered to pay her the difference, plus interest from the date of her payment. Olga shall recover her costs on appeal. [***23] Any request for attorney fees on appeal shall be directed to the trial court.

Peterson, P. J., and Haning, J., concurred. Respondent's petition for review by the Supreme Court was denied May 13, 1993, Panelli, J., and Baxter, J., were of the opinion that the petition should be granted.

[*94] APPENDIX

METHODS OF DIVISION OF COMMUNITY PROPERTY OTHER THAN BY JUDICIAL DECISION

1. In-Kind Division: Each party takes one-half of fungible assets such as bank accounts, stock in a corporation, etc.

⁸The court also had before it the parties' income and expense declarations and tax returns.

2. Trade-off Division: The parties stipulate to settle their property disputes, without regard to value, by agreeing one will take certain items of property, e.g., the furniture, and the other will take other items, e.g., the car.

3. Piece-of-cake Division: This method gets its name from the common situation where two children have a piece of cake to be cut in half. To avoid the argument over who gets the "bigger" half, it is agreed that one will cut the cake and the other gets to choose which piece he or she will receive. In the marital property context, one party makes up two lists of the property in question, e.g., furniture, personal property, etc., which he or she believes are equal, [***24] and the other party chooses which list of items she or he will take. In using this or any other method, it is important not to break up sets, e.g., a dining room set, a set of dishes, matching art works, etc. The piece-of-cake method is particularly useful for dividing furniture and furnishing which usually have a real [**583] value to the parties far in excess of their fair market value as used furniture. This method is also useful in short-term marriages where the dispute is over the division of wedding gifts received by the parties.

4. One Values, the Other Chooses: In this method, one party places a value on each item of community property in dispute and the other party chooses those items he or she will take at the stated value up to one-half the total value. Alternatively, the parties may agree that the party choosing may select any, all or none of the items, with any items not chosen going at the stated value to the one who set the value. An equalization payment can be required. In dividing furniture and furnishings using this or one of the other methods listed, an alternative to piece-by-piece choice is to list furniture and furnishings room-by-room and have alternate choices [***25] by room.

5. You Take It or I Will Take It: In this method one party places a value on an asset at which that party is willing to let the other party be awarded the

asset, or else the former will be awarded the asset at that value.

6. Appraisal and Alternate Selection: An appraiser is selected by stipulation to value each of the items in question. The parties then choose items alternately until all items are taken. The one to make the first choice can be designated by the flip of a coin. Another approach is to let one party go first and the other party then gets two selections, after which choices are made alternatively. As mentioned in No. 3 above, it is usually preferable to agree that sets not be broken up. It might be agreed that if a party takes a set it counts as that many choices, e.g., a dining room table and four matching chairs counts as five choices, and the other party then makes the next five choices.

7. Sale: The parties agree that the items in question be sold at a public sale or to a particular buyer with the proceeds divided equally, or in whatever other proportion is necessary to accomplish a satisfactory or equal division, considering the other marital assets [***26] or obligations each is receiving. For modest furniture or furnishings, the sale may be a garage sale, since this might be what the court would order.

8. Sealed Bid: Each of the parties submits a sealed bid on each item of property in dispute, using the same list. The bids are opened simultaneously and the one bidding the highest amount for an item gets that item valued at the figure he or she bid, with an equalizing payment to be made, if necessary. This method can also be used for disposition of the family home, other real property and a family business which both parties have operated, where each seeks to have it awarded to him or her.

9. Interspousal Auction: This is a straight auction between the parties, usually with an agreed minimum incremental increase over the last bid being required. The high bidder gets the asset at the amount of his or her bid with an equalizing payment being made, if necessary. To the extent a major asset is involved such as a family business or real estate, the stipulation might provide that each

of the parties have an advisor present during the bidding.

[*95] 10. Arbitration: The valuation and division of the community property in question **[***27]** could be determined by an arbitrator selected by the parties. The parties should understand that the arbitrator is not required to follow the law, and his or her decision, for all practical purposes, is final and not subject to appeal. Because arbitration usually takes much less time than a court trial, the parties might consider stipulating with the consent of the judge, that the judge hear the case as an arbitrator.

11. Mediation: Mediation is greatly underutilized in family law cases. It can be a very effective and satisfying way for the parties to reach agreement on the value and division of their marital property.

12. Real Property: If both parties want community real property, one of the foregoing methods of resolution can be used. If neither wants it, it can be listed for sale with a broker stipulated to by the parties, at a listing price recommended by **[**584]** the broker. If one wants the property but the other feels he or she is offering too little, the latter can list it for sale with a broker of his or her choosing. If the property does not sell within a specified period of time, the listing price will be periodically reduced until it reaches the figure where the net proceeds **[***28]** would be equal to what the other party offered. The property then goes to the offering party for the amount of the offer.

13. Combination: Where more than one marital asset is in dispute, one of the foregoing methods might be used for one asset, while one or more other methods might be used for other assets.



Caution

As of: October 18, 2026 6:38 AM Z

In re Marriage of Delaney

Court of Appeal of California, First Appellate District, Division Three

August 29, 2003, Filed

A098403

Reporter

111 Cal. App. 4th 991 *; 4 Cal. Rptr. 3d 378 **; 2003 Cal. App. LEXIS 1359 ***; 2003 Cal. Daily Op. Service 8036; 2003 Daily Journal DAR 9920

In re the Marriage of STEVEN J. and LINDA SUE DELANEY. STEVEN J. DELANEY, Respondent, v. LINDA SUE DELANEY, Appellant.

Prior History: [***1] Superior Court of Marin County, No. FL 992147, Randolph E. Heubach, Temporary Judge.

Disposition: Judgment affirmed.

Case Summary

Procedural Posture

Appellant former wife sought review of a final judgment of dissolution of the Marin County Superior Court (California), which set aside a joint tenancy grant deed of property from appellee former husband to the parties as joint tenants. The wife also appealed subsequent orders requiring her to sign a quit claim deed of her interest in the property, requiring her to vacate the residence, and ordering the sheriff to remove her from the property.

Overview

When the parties began living together, the husband owned the property free and clear of any encumbrances. The husband, who allegedly had a learning disability that severely limited his reading comprehension, testified that he relied on the wife to handle all legal and financial matters for the couple. In connection with an application for a loan to finance a remodeling project, the husband

executed a grant deed conveying the property to the wife and husband as joint tenants. The husband testified that he did not realize he was giving half of his property to the wife in order to obtain the bank loan until he noticed that both of their names appeared on a property tax bill. The court held that the conflict between the two presumptions established by [Cal. Evid. Code § 662](#) and [Cal. Fam. Code § 721](#) had been resolved in favor of [§ 721](#), based on the intent of the legislature in enacting fiduciary protections for interspousal transactions and general rules of statutory construction. This rationale applied equally to any conflict between [§ 721](#) and the presumption under [Cal. Fam. Code § 2581](#) that property acquired as joint tenancy by a married couple was community property.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

Evidence > Inferences & Presumptions > Presumptions > Conflicting Presumptions

Family Law > Marital Duties & Rights > General Overview

HN1 See [Cal. Fam. Code § 721](#).

Business & Corporate Law > Agency
 Relationships > Fiduciaries > General Overview

Contracts Law > ... > Affirmative
 Defenses > Coercion & Duress > General Overview

Estate, Gift & Trust Law > Estate
 Planning > Community Property > General Overview

Family Law > Marital Duties & Rights > General
 Overview

Family Law > ... > Property
 Rights > Characterization > Community Property

Governments > Fiduciaries

HN2 [Cal. Fam. Code § 721](#) establishes that with respect to property transactions, married couples are subject to the same standards of disclosure toward each other applicable to any confidential fiduciary relationship. As a consequence, when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence.

Evidence > Inferences & Presumptions > General
 Overview

Real Property Law > Ownership &
 Transfer > Equitable Interests

HN3 See [Cal. Evid. Code § 662](#).

Estate, Gift & Trust Law > Estate
 Planning > Community Property > General Overview

Evidence > Inferences & Presumptions > General
 Overview

Family Law > ... > Property
 Rights > Characterization > Community Property

Family Law > ... > Dissolution & Divorce > Property
 Distribution > General Overview

Family Law > ... > Property
 Distribution > Characterization > Community
 Property

Family Law > ... > Property Distribution > Inferences
 & Presumptions > Community Property

Real Property Law > Estates > Concurrent
 Ownership > Joint Tenancies

Real Property Law > Estates > Concurrent
 Ownership > Tenancies by Entireties

Real Property Law > Estates > Concurrent
 Ownership > Tenancies in Common

HN4 See [Cal. Fam. Code § 2581](#).

Evidence > Inferences & Presumptions > General
 Overview

Evidence > Inferences &
 Presumptions > Presumptions > Conflicting
 Presumptions

Family Law > Marital Duties & Rights > General
 Overview

Governments > Fiduciaries

Real Property Law > Ownership &
 Transfer > Equitable Interests

HN5 Whenever the presumption favoring stability of title found in [Cal. Evid. Code § 662](#) is in direct conflict with the presumption of undue influence arising where one spouse obtains an advantage over the other in an interspousal property transaction, the presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title.

Evidence > Inferences & Presumptions > General
 Overview

Evidence > Inferences &
 Presumptions > Presumptions > Conflicting
 Presumptions

HN6 Where two presumptions are in conflict, the more specific presumption applicable in particular cases must control over the more general presumption arising under ordinary circumstances.

Contracts Law > ... > Affirmative
 Defenses > Coercion & Duress > General Overview
 Estate, Gift & Trust Law > Estate
 Planning > Community Property > General Overview
 Evidence > Inferences & Presumptions > General Overview
 Evidence > Inferences & Presumptions > Presumptions > Conflicting Presumptions
 Family Law > Marital Duties & Rights > Property Rights > General Overview
 Family Law > ... > Property Rights > Characterization > Community Property
 Family Law > ... > Property Distribution > Inferences & Presumptions > Community Property
 Governments > Fiduciaries
 Real Property Law > Estates > Concurrent Ownership > Joint Tenancies

HN7 In cases involving interspousal property transactions, the "irreconcilable conflict" between the two presumptions established by [Cal. Fam. Code § 721](#) and [Cal. Evid. Code § 662](#) has been resolved in favor of [Cal. Fam. Code § 721](#). The rationale applies equally to any conflict between [§ 721](#) and the presumption under [Cal. Fam. Code § 2581](#) that property acquired as joint tenancy by a married couple is community property. In the first place, [§ 2581](#) by its terms expressly applies to property acquired by the parties during marriage in joint form. The acquisition of property during marriage by purchase or gift is clearly different from an interspousal transmutation of property already owned by one or both spouses. Moreover, even if [§ 2581](#) were construed as applicable to interspousal transmutations, the presumption set out in that section would be as much in direct conflict with the presumption established by [Cal. Fam. Code § 721](#) as was [Cal. Evid. Code § 662](#). To apply [Cal. Fam. Code § 2581](#) to transmutations in preference to [Cal. Fam. Code § 721](#) would effectively abrogate the protections given to married persons by [Cal. Fam. Code § 721](#). Interspousal transactions must be governed by the

fiduciary standards established in [§ 721](#), and the presumption established by that provision governs when it is in conflict with [Cal. Fam. Code § 2581](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A husband filed a petition for dissolution of marriage. The trial court set aside a joint tenancy grant deed of property from the husband to the wife and husband as joint tenants. The trial court ordered the wife to sign a quit claim deed of her interest in the property in favor of the husband and to vacate the residence. It also issued an ex parte order requiring the sheriff to remove the wife from the property. (Superior Court of Marin County, No. FL 992147, Randolph E. Heubach, Temporary Judge.)*

The Court of Appeal affirmed. The court concluded the trial court properly applied the presumption of undue influence that arises from the statutory fiduciary relationship between spouses. After cohabiting for approximately five years, the parties married. When the parties began living together in the husband's home on the property, the husband owned the property free and clear of any encumbrances except a deed of trust in favor of his grandfather. It was the wife's burden to establish that the 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 supported the trial court's conclusion that wife failed to bear her burden of establishing this. The evidence showed that husband suffered cognitive impairments and as a consequence had entrusted all marital financial and legal matters to

* Pursuant to [California Constitution, article VI, section 21](#).

the wife, trusting and relying upon her judgment and management in this regard. On the other hand, the wife, who had worked in law offices as a secretary and legal assistant, 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. The husband signed the documents conveying his unencumbered separate interest in the property to himself and the wife jointly without questioning her instruction that it was necessary to do so. [*992] On this record, the court had no basis for overturning the trial court's determination that the wife failed to rebut the presumption of undue influence. (Opinion by McGuiness, P. J., with Corrigan and Pollak, JJ., concurring.)

Headnotes

[CA\(1\)](#) (1)

Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence.

The trial court did not err in determining that a wife used undue influence in an interspousal transaction to secure a joint tenancy in the separate property interest of the husband in residential real property. The trial court properly applied the presumption of undue influence that arises from the statutory fiduciary relationship between spouses.

[11 Witkin, Summary of Cal. Law (9th ed. 1990) Community Property, §§ 245, 251.]

[CA\(2\)](#) (2)

Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence.

[Fam. Code, § 721](#), establishes that with respect to property transactions, married couples are subject to the same standards of disclosure toward each other applicable to any confidential fiduciary relationship. As a consequence, when any

interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence.

[CA\(3\)](#) (3)

Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence.

With regard to the situation presented in which the presumption favoring stability of title found in [Evid. Code, § 662](#), is in direct conflict with the presumption of undue influence arising where one spouse obtains an advantage over the other in an interspousal property transaction, in every such instance, the presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title.

[CA\(4\)](#) (4)

Evidence § 14—Presumptions, Inferences, and Burden of Proof—Conflicting Presumptions.

Where two presumptions are in conflict, the more specific presumption applicable in particular cases must control over the more general presumption arising under ordinary circumstances.

[CA\(5\)](#) (5)

Evidence § 14—Presumptions, Inferences, and Burden of Proof—Conflicting Presumptions—:—Husband and Wife § 23—Property—Transactions Between Spouses—Fraud and Undue Influence.

In [*993] cases involving interspousal property transactions, the irreconcilable conflict between the two presumptions established by [Fam. Code, § 721](#), and [Evid. Code, § 662](#), has been resolved in favor of [Fam. Code, § 721](#), based on the intent of the Legislature in enacting fiduciary protections for interspousal transactions and general rules of

statutory construction. This rationale applies equally to any conflict between [Fam. Code, § 721](#), and the presumption under [Fam. Code, § 2581](#), that property acquired as joint tenancy by a married couple is community property. In the first place, [Fam. Code, § 2581](#), by its terms expressly applies to property acquired by the parties during marriage in joint form. The acquisition of property during marriage by purchase or gift is clearly different from an interspousal transmutation of property already owned by one or both spouses.

[1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 158; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 427.]

Counsel: Stephen Kent Rose for Appellant.

James I. Cohen for Respondent.

Judges: McGuinness, P. J.; Corrigan and Pollak, JJ., concurred.

Opinion by: McGuinness

Opinion

[**379] **McGUINNESS, P. J.**—Linda Sue Delaney (Wife) appeals from a final judgment of dissolution. [CA\(1\) \(1\)](#) She contends the trial court erred in determining that she used undue influence in an interspousal transaction to secure a joint tenancy in the separate property interest of respondent Steven J. Delaney (Husband) in residential real property (the Property). Wife asks that the matter be remanded and that Husband be required to prove his claim to the Property by clear and convincing evidence. We conclude the trial court properly applied the presumption of undue influence that arises from the statutory fiduciary relationship between spouses, and therefore affirm the judgment.

Factual and Procedural Background

The Property at issue in this case is located at 77 Mountain View Avenue in San Anselmo. It was

purchased by Husband in or around 1982, using money originally loaned to him by his grandfather. [***2] Husband and Wife first met in or around July 1989. They began living together in Husband's home on the Property in the spring or summer of 1990. At the time, Husband owned the Property free and clear of any encumbrances except a deed of trust [**994] in favor of his grandfather. When Husband's grandfather died in June 1995, that debt was forgiven in his will.

Wife had worked in law offices as a secretary and legal assistant; as such, she [**380] had specialized in probate work. In a prior dissolution, Wife had been awarded a one-half community interest in real property as a result of a joint interest in property she had earlier obtained from her former spouse in connection with a loan on that property. Husband testified he had been diagnosed with a learning disability that severely limited his reading comprehension. He relied on Wife to handle all legal and financial matters for the couple.

The parties' first child was born in March 1991. After cohabiting for approximately five years, the parties married in September 1995. Around that time, Wife became pregnant again. In anticipation of the birth of their second child, the parties decided to add a nursery room to the Property. They obtained a \$ [***3] 25,000 bank loan, secured by the value of the Property, in order to finance the remodeling construction. In July 1996, and in connection with the loan application process, Husband executed a grant deed conveying the Property—which at the time was entirely his separate property—to Wife and Husband as joint tenants. The grant deed was recorded on August 6, 1996. Husband testified that he did not realize he was giving half of his Property to Wife in order to obtain the bank loan until he noticed that both of their names appeared on a property tax bill.

The parties' second child was born in August 1996. They continued to reside together at the Property until April 1999. On April 29, 1999, Husband filed a petition for dissolution of marriage. After several

failed attempts at reconciliation, the parties separated permanently on December 5, 1999. Property.

The trial court bifurcated the issues to be resolved. Over a two-day period (Dec. 11, 2000, and Jan. 23, 2001), it took evidence on the single issue of the validity of the grant deed conveying the Property from Husband to Wife and Husband as joint tenants. In its statement of decision filed on March 22, 2001, the trial court determined [***4] that: (a) Wife had not given sufficient consideration for the transfer of Husband's Property to joint tenancy; (b) as a fiduciary, she bore the burden of establishing that the joint tenancy grant deed was not the product of undue influence; (c) she had failed to sustain her burden in this regard; and (d) the grant deed was therefore void. The trial court ordered set aside the grant deed transferring title to the Property to the parties in joint tenancy.

Pursuant to its judgment voiding and setting aside the grant deed, on July 5, 2001, the trial court ordered Wife to sign a quitclaim deed to the Property [*995] in favor of Husband, and to vacate the residence by August 15, 2001. After Wife failed to vacate the premises and sought the protection of the bankruptcy court in August 2001, Husband obtained relief from the automatic stay and sought an order evicting Wife from the Property. Ultimately, on October 16, 2001, the trial court issued an ex parte order requiring the sheriff to remove Wife from the Property. On January 28, 2002, bifurcated trial was held on the reserved issues of spousal support and attorney fees, and the marriage was ordered dissolved.

Final judgment of dissolution [***5] was entered on February 5, 2002. In this appeal from the final judgment of dissolution, appellant seeks review of the bifurcated judgment setting aside the joint tenancy grant deed of the Property from Husband to Wife and Husband as joint tenants, as well as the subsequent orders requiring Wife to sign a quit claim deed of her interest in the Property, requiring her to vacate the residence by October 15, 2001, and ordering the sheriff to remove her from the

[**381] Discussion

Appellant Wife contends that the trial court erred by placing on her the burden of proving that the transfer of Husband's separate ownership of the subject Property to joint tenancy was not the product of undue influence. Instead, she argues, the trial court should have required Husband to rebut by clear and convincing evidence the presumption under [Evidence Code section 662](#) that record title to the Property was held by the parties in joint tenancy; or else have required him to rebut, by documentary evidence of a written agreement or deed of title, the presumption set out in [Family Code section 2581](#)¹ that the Property was community property because [***6] it was acquired by the parties during marriage in joint tenancy. Appellant is wrong on both counts.

This case concerns a conflict between legal presumptions. In imposing on Wife the burden of establishing that she did not obtain a joint interest in the Property by means of undue influence, the trial court relied on [section 721](#), as that provision has been interpreted by the appellate courts.² [Section 721](#) states that "[HN1](#) in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions [*996] of persons occupying confidential [**382] 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

¹ For ease of reference, unless otherwise indicated all further unspecified statutory references are to the Family Code.

² In its statement of decision, the trial court referred to [section 761](#). That provision concerns the community property status of certain transfers in trust. A review of the decision in the context of the factual circumstances, the issues before the court, and the parties' arguments makes it clear that the trial court meant to refer to [section 721](#), and the reference to [section 761](#) was a clerical error.

same rights and duties of nonmarital [***7] business partners”³

[***8] HN2 CA(2) (2) This provision establishes that with respect to property transactions, married couples are subject to the same standards of disclosure toward each other applicable to any confidential fiduciary relationship. As a consequence, when any interspousal transaction advantages one spouse to the disadvantage of the other, the presumption arises that such transaction was the result of undue influence. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 287, 293–294, 301–302 [39 Cal. Rptr. 2d 673] (*Haines*) “[u]nder California community property law, because spouses occupy confidential relations with each other, when an interspousal transaction advantages one spouse over the other, a presumption of undue influence arises”]; see also *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 27 [99 Cal. Rptr. 2d 252, 5 P.3d 815] (*Bonds*) “[persons, once they are married, are in a fiduciary relationship to one another (*Fam. Code, § 721, subd. (b)*), so that whenever the parties enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence”].)

³ Section 721 provides in pertinent part as follows: “(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) [I]n 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, ... 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 [¶] (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.”

Rather than applying this presumption [***9] derived from section 721, appellant Wife contends the trial court should have applied the two presumptions derived from Evidence Code section 662 and section 2581, respectively: first, the presumption in favor of the owner of record title to property and its concomitant requirement of clear and convincing evidence to rebut that [***9] presumption (Evid. Code, § 662);⁴ and second, the presumption that property acquired during marriage in joint form, including property held in joint tenancy, is community property unless otherwise agreed in writing (§ 2581).⁵ We disagree.

[***10] This appeal is controlled by *Haines*. CA(3) (3) In that case, the Court of Appeal specifically addressed the kind of situation presented here, in which the presumption favoring stability of title found in Evidence Code section 662 is in direct conflict with the presumption of undue influence arising where one spouse obtains an advantage over the other in an interspousal property transaction. The court concluded that HN5 in every such instance, the presumption based on the confidential fiduciary relationship between spouses must prevail over the presumption based on record title. The *Haines* court based its holding on the unique protected status of marriage, and the fact that applying the presumption of Evidence Code section 662, with its higher evidentiary standard,

⁴ Evidence Code section 662 provides: “HN3 The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.”

⁵ Section 2581 provides in pertinent part: “HN4 For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following: [¶] (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property. [¶] (b) Proof that the parties have made a written agreement that the property is separate property.”

would in every case inevitably defeat the spousal protection intended by the Legislature in enacting [section 721](#). (*Haines, supra*, 33 Cal.App.4th at pp. 286–294, 301.) [CA\(4\)](#) (4) In addition, the court cited the principle that [HN6](#) where two presumptions are in conflict, the more specific presumption applicable in particular cases must control over the more general presumption arising [***11] under ordinary circumstances. (*Id.* at p. 301, citing *Rader v. Thrasher* (1962) 57 Cal.2d 244, 252 [18 Cal. Rptr. 736, 368 P.2d 360]; *McKay v. McKay* (1921) 184 Cal. 742, 746–747 [195 P. 385].)⁶

⁶ “Statutorily, spouses have the right to enter into transactions with each other as well as other persons. (Former *Civ. Code*, § 5103, *subd. (a)* [*Fam. Code*, § 721, *subd. (a)*].) However, that same statute also states that interspousal transactions must comport with the rules controlling the actions of persons occupying confidential relations with each other. (Former *Civ. Code*, § 5103, *subd. (b)* [*Fam. Code*, § 721, *subd. (b)*].) Thus, the competence of spouses to engage in transactions with each other is subject to the circumstances being pleasing to the fiduciary standard. [Citations.]

“When an interspousal transaction advantages one spouse, ‘[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence.’ [Citation.] ‘Courts of equity ... view gifts and contracts which are made or take place between parties occupying confidential relations with a jealous eye.’ [Citation.]

“Because transmutations must conform to the legal standard codified in former *Civil Code* section 5103, subdivision (b) (*Fam. Code*, § 721, *subd. (b)*), where the transmutation is evidenced by a deed as is the case here, the presumption of undue influence arising from advantage necessarily conflicts with the common law presumption of title, codified in [*Evidence Code*] section 662.” (*Haines, supra*, 33 Cal.App.4th at pp. 293–294.)

“Where one spouse has taken advantage of another in an interspousal transaction, a presumption of undue influence arises under former *Civil Code* section 5103, subdivision (b) (*Fam. Code*, § 721, *subd. (b)*). However, this presumption, which the law provides to protect married persons, cannot come into play if [section 662](#) is applied because of the higher evidentiary standard of [section 662](#). Therefore, application of [section 662](#) in such situations can significantly weaken protections the Legislature intended to provide for spouses who are taken advantage of in interspousal transactions. This cannot be in keeping with the intent of the Legislature, which conditioned the power of spouses to transact with each other on their compliance with the fiduciary standard. (See former *Civ. Code*, § 5103, [*Fam. Code*, § 721].) ... ‘[W]henever an interspousal transaction is challenged, it should be analyzed under the same statute which gives

[***12] [***998] [***383] The reasoning of *Haines* is clearly applicable here. [CA\(5\)](#) (5) [HN7](#) In cases such as this, involving interspousal property transactions, the “irreconcilable conflict” between the two presumptions established by [section 721](#) and [Evidence Code section 662](#) has been resolved in favor of [section 721](#), based on the intent of the Legislature in enacting fiduciary protections for interspousal transactions and general rules of statutory construction. (*Haines, supra*, 33 Cal.App.4th at pp. 296–302; see also *Bonds, supra*, 24 Cal.4th at pp. 27–28.)

The *Haines* rationale applies equally to any conflict between [section 721](#) and the presumption under [section 2581](#) that property acquired as joint tenancy by a married couple is community property. In the first place, [section 2581](#) by its terms expressly applies to property “acquired by the parties during marriage in joint form.” The *acquisition* of property during marriage by purchase or gift is clearly different from an interspousal transmutation of property *already* owned by one or both spouses. (*Haines, supra*, 33 Cal.App.4th at p. 293 [a transmutation is “an interspousal transaction [***13] or agreement which works a change in the character of the property”].)

Moreover, even if we were to construe [section 2581](#) as applicable to interspousal transmutations, the presumption set out in that section would be as much in direct conflict with the presumption established by [section 721](#) as was [Evidence Code](#)

spouses the conditional authority to transact with each other’ [Citation.] Application of [*Evidence Code*] section 662 would preclude this; in effect it would abrogate the protections afforded to married persons under former *Civil Code* section 5103, subdivision (b) (*Fam. Code*, § 721, *subd. (b)*).

“Finally, we note that where two presumptions are in conflict, the more specific presumption will control over the more general one. [Citation.] In *McKay v. McKay* (1921) 184 Cal. 742, 746–747 [195 P. 385], the Supreme Court held the specific presumption that any advantage obtained by a husband from a wife was without consideration and under undue influence ‘must, in the absence of any rebutting evidence, prevail over’ the more general assumption that money paid by one to another was due to the latter.” (*Haines, supra*, 33 Cal.App.4th at p. 301.)

[section 662](#), in both *Haines* and this case. To apply [section 2581](#) to transmutations in **[**384]** preference to [section 721](#) would effectively abrogate the protections given to married persons by [section 721](#). (*Haines*, **[*999]** *supra*, 33 Cal.App.4th at p. 301.) Interspousal transactions must be governed by the fiduciary standards established in [section 721](#), and the presumption established by that provision governs when it is in conflict with [section 2581](#). (*Haines*, at pp. 293–302.)

Appellant Wife attempts to distinguish *Haines* from this case on its facts. In *Haines*, the husband had in 1983 deeded his separate property to himself and his wife as joint tenants. In 1987, the wife executed a quitclaim deed conveying her joint interest in the property back to the husband, making it once again his separate property. The wife testified that **[***14]** she did so under considerable emotional and physical duress; the husband disputed this, instead characterizing the transaction as “calm and businesslike.” (*Haines*, *supra*, 33 Cal.App.4th at pp. 283–285.) In 1988, during a period of reconciliation the husband reconveyed his separate property interest in the property to himself and his wife as joint tenants. After the parties ultimately separated in 1989, the wife filed for dissolution. In the division of property, the trial court awarded the husband reimbursement for the full value of the property at the time of the second transmutation to joint property, as his separate property contribution to the community. (*Id.* at pp. 285–286.)

Concluding that the presumption of undue influence trumped the conflicting presumption of record title and that the husband had failed to rebut the wife’s claim of duress in the 1987 transaction, the appellate court reversed the trial court’s reimbursement of the husband’s separate property interest. “ ‘[W]henver an interspousal transaction is challenged, it should be analyzed under the same statute which gives spouses the conditional authority to transact with each other **[***15]**’ [Citation.] [¶] ... [¶] We conclude that application

of [\[Evidence Code\] section 662](#) is improper when it is in conflict with the presumption of undue influence that emanates from [\[section 721\]](#). Any other result would abrogate the protections afforded to married persons and denigrate the public policy of the state that seeks to promote and protect the vital institution of marriage.” (*Haines*, *supra*, 33 Cal.App.4th at pp. 301–302.)

Although the facts of *Haines* do differ from those before us here, the reasoning supporting the applicability of [section 721](#) is the same in both cases. The rationale of *Haines* clearly applies to *any* interspousal property transaction where evidence is offered that one spouse has been disadvantaged by the other. Nothing in *Haines* would confine its holding to situations in which the interspousal property conveyance was from joint tenancy to separate property. Where there is undue influence, as much injustice may be effected by the reverse transaction.

We conclude that the trial court properly determined that the presumption of undue influence applies to the facts of this case. Consequently, **[***16]** it was **[*1000]** 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. (*Haines*, *supra*, 33 Cal.App.4th at p. 296.) 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 **[**385]** 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 [***17] had failed to rebut the presumption of undue influence. ([*In re Marriage of Mix* \(1975\) 14 Cal.3d 604, 611-614 \[122 Cal. Rptr. 79, 536 P.2d 479\].](#))

Disposition

The judgment is affirmed.

Corrigan, J., and Pollak, J., concurred.

In re Marriage of Feldman

Court of Appeal of California, Fourth Appellate District, Division One

July 20, 2007, Filed

D047896

Reporter

153 Cal. App. 4th 1470 *; 64 Cal. Rptr. 3d 29 **; 2007 Cal. App. LEXIS 1293 ***

In re the Marriage of ELENA and AARON
FELDMAN.ELENA FELDMAN, Respondent, v.
AARON FELDMAN, Appellant.

Subsequent History: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published August 7, 2007.

Prior History: Superior Court of San Diego County, No. D479546, Randa Trapp, Judge.

Disposition: The court affirmed the trial court's order.

Case Summary

Procedural Posture

Appellant husband sought review of an order of the Superior Court of San Diego County (California), which required him to pay sanctions and attorney fees based on his nondisclosure of financial information to respondent wife in a marital dissolution proceeding.

Overview

During the marriage, the husband created a large number of privately held companies of substantial value. The parties disputed their characterization as separate or community property. The husband provided responses to interrogatories and a schedule of assets and debts. The wife alleged that the husband failed to disclose financial transactions that included the purchase of a personal residence

through one of his companies, the existence of several entities, the purchase of a bond, and the existence of a 401(k) account. The trial court, in sanctioning the husband, found that he intentionally sought to circumvent the disclosure process and frustrated the policy of promoting settlement. The court concluded that the husband failed to meet his obligations under [Fam. Code, §§ 1100, subd. \(e\), 2100, subd. \(c\), 2102, subd. \(a\), 2103, 2104, subd. \(c\)\(1\), \(2\)](#), to disclose material information. The trial court did not abuse its discretion under [Fam. Code, §§ 271, subd. \(a\), 2107, subd. \(c\)](#), in imposing sanctions. Proof of injury to the wife was not necessary, and she was not required to move under [§ 2107, subds. \(a\), \(b\)](#), to compel disclosure or to preclude evidence before seeking sanctions.

Outcome

The court affirmed the trial court's order.

LexisNexis® Headnotes

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN1 See [Fam. Code, § 1100, subd. \(e\)](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN2 See [Fam. Code, § 2100, subd. \(c\)](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN3 To implement the disclosure obligation in a proceeding for dissolution of marriage or legal separation, the California Family Code requires the service of a preliminary and final declaration of disclosure in order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest. [Fam. Code, § 2103](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN4 See [Fam. Code, § 2104, subd. \(c\)\(1\), \(2\)](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Sanctions

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN5 See [Fam. Code, § 2107, subd. \(c\)](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Sanctions

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN6 See [Fam. Code, § 271, subd. \(a\)](#).

Civil Procedure > Discovery &

Disclosure > Disclosure > Sanctions

Civil Procedure > Appeals > Standards of
Review > Abuse of Discretion

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN7 A sanction order under [Fam. Code, § 271](#), is reviewed under the abuse of discretion standard. A trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order. In reviewing such an award, an appellate court must indulge all reasonable inferences to uphold the court's order. Because an order awarding sanctions under [Fam. Code, § 2107, subd. \(c\)](#), is similar to that imposed under [Fam. Code, § 271](#), as well as similar to a sanction for civil discovery abuses (which are reviewed for abuse of discretion), it is appropriate to apply an abuse of discretion standard to an order for sanctions under [Fam. Code, § 2107, subd. \(c\)](#).

Civil Procedure > Sanctions > General Overview

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > ... > Standards of
Review > Substantial Evidence > Sufficiency of
Evidence

HN8 To the extent that an appellate court is called upon to interpret the statutes relied on by a trial court to impose sanctions, a de novo standard of review is applied. The appellate court reviews any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review. In reviewing the evidence on appeal, all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences indulged in order to uphold the finding if possible.

Civil Procedure > Discovery &
Disclosure > Disclosure > Sanctions

Family Law > Marital Termination & Spousal

Support > Dissolution & Divorce > Procedures

HN9 Neither [Fam. Code, § 2107, subd. \(c\)](#), nor [Fam. Code, § 271, subd. \(a\)](#), sets forth any requirement of separate injury to the complaining spouse as a precondition to the imposition of sanctions. [Fam. Code, § 2107, subd. \(c\)](#), indicates that sanctions are to be imposed to effectuate compliance with the laws that require spouses to make disclosure to each other. The statute is not aimed at redressing an actual injury. [Fam. Code, § 271, subd. \(a\)](#), authorizes sanctions to advance the policy of promoting settlement of litigation and encouraging cooperation of the litigants. This statute, too, does not require any actual injury. Indeed, as expressed in [Fam. Code, § 2100, subd. \(b\)](#), the legislature has indicated that sound public policy favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery. In light of this legislatively expressed intention, the authority to impose sanctions for nondisclosure is plainly aimed at effectuating the goal of reducing the adversarial nature of marital dissolution rather than at redressing any actual harm inflicted on the complaining spouse.

Civil Procedure > Discovery &
Disclosure > Disclosure > Motions to Compel

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN10 See [Fam. Code, § 2107, subs. \(a\), \(b\)](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Sanctions

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN11 The terms of [Fam. Code, § 2107](#), do not require that before seeking sanctions for nondisclosure a party (1) seek further disclosure and (2) bring a motion to either compel further responses or preclude evidence.

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN12 [Fam. Code, § 2102, subd. \(a\)\(1\)](#), requires the accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN13 A spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse and should not expect the spouse who is not in a superior position to search for the information.

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN14 See [Fam. Code, § 2102](#).

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

HN15 [Fam. Code, § 2102](#), does not contain an exception that exempts a spouse from having to disclose transactions in the ordinary course of

business. [Section 2102, subd. \(a\)\(2\)](#), refers to disclosures that must be made only when outside the ordinary course of business. However, that provision describes the circumstances in which one spouse must disclose a post-separation business opportunity to the other spouse prior to the transaction so that the spouse may decide whether to participate in the opportunity. Under the statute, a spouse is required to give prior written disclosure with respect to a significant business activity outside the ordinary course of business.

Civil Procedure > Discovery &
Disclosure > Disclosure > Mandatory Disclosures

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

[HN16](#) A spouse who runs a business is not under a duty to sua sponte update every insignificant occurrence in the operation of a business. [Fam. Code, §§ 2100, subd. \(c\), 2102, subd. \(a\), 1100, subd. \(e\)](#), refer to the immediate disclosure of material changes and material facts and information.

Civil Procedure > Discovery &
Disclosure > Disclosure > Sanctions

Family Law > Marital Termination & Spousal
Support > Dissolution & Divorce > Procedures

[HN17](#) The text of [Fam. Code, § 271](#), contains no requirement that a trial court impose a sanction at the end of a lawsuit. Indeed, the only procedural requirement in the statute is that an award of attorney fees and costs as a sanction may be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard. [§ 271, subd. \(b\)](#). Further, [§ 271](#) is meant to advance the policy of the law to promote settlement and to encourage cooperation, which will reduce the cost of litigation. As a matter of logic, to promote cooperation a trial court must be able to apply

sanctions during the course of the litigation when the uncooperative conduct arises in order to encourage better behavior as the litigation progresses. Accordingly, based on the statutory language and the express purpose of [§ 271](#), a trial court may impose sanctions under [§ 271](#) before the end of the lawsuit.

Civil Procedure > Appeals > Reviewability of Lower
Court Decisions > Preservation for Review

[HN18](#) An appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below.

Civil Procedure > Trials > Bench Trials

[HN19](#) There is no basis in statute or case law for a rule requiring a trial court to exercise its discretion to issue a statement of decision in instances where *Code Civ. Proc.*, § 632, does not require it.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court required a husband to pay sanctions and attorney fees based on his nondisclosure of financial information in a marital dissolution proceeding. During the marriage, the husband created a large number of privately held companies of substantial value. The parties disputed their characterization as separate or community property. The husband provided responses to interrogatories and a schedule of assets and debts. The wife alleged that the husband failed to disclose financial transactions that included the purchase of a personal residence through one of his companies, the existence of several entities, the purchase of a bond, and the existence of a 401(k) account. The

trial court, in sanctioning the husband, found that he intentionally sought to circumvent the disclosure process and frustrated the policy of promoting settlement. (Superior Court of San Diego County, No. D479546, Randa Trapp, Judge.)

The Court of Appeal affirmed the order, finding that the husband failed to meet his obligations under the Fam. Code, to disclose material information. The trial court did not abuse its discretion in imposing sanctions. Proof of injury to the wife was not necessary, and she was not required to move, to compel disclosure or to preclude evidence before seeking sanctions. The court concluded that attorney fees were statutorily authorized either under [Fam. Code, § 2107, subd. \(c\)](#), in connection with the imposition of sanctions for violation of disclosure obligations, or [Fam. Code, § 271, subd. \(a\)](#), based on the trial court's finding that the husband's acts of nondisclosure frustrated the statutory policy to promote settlement. Based on the statutory language and the express purpose of [§ 271](#), a trial court may impose sanctions under [§ 271](#) before the end of the lawsuit. (Opinion by Irion, J., with O'Rourke, Acting P. J., and Aaron, J., concurring.) [*1471]

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Dissolution of Marriage § 7—Proceedings— Disclosure of Assets and Liabilities.

To implement the disclosure obligation in a proceeding for dissolution of marriage or legal separation, the Family Code requires the service of a preliminary and final declaration of disclosure in order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest ([Fam. Code, § 2103](#)).

[CA\(2\)](#) (2)

Dissolution of Marriage § 25—Proceedings— Appeal and Review—Order Awarding Sanctions—Abuse of Discretion.

A sanction order under [Fam. Code, § 271](#), is reviewed under the abuse of discretion standard. A trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order. In reviewing such an award, an appellate court must indulge all reasonable inferences to uphold the court's order. Because an order awarding sanctions under [Fam. Code, § 2107, subd. \(c\)](#), is similar to that imposed under [§ 271](#), as well as similar to a sanction for civil discovery abuses (which are reviewed for abuse of discretion), it is appropriate to apply an abuse of discretion standard to an order for sanctions under [§ 2107, subd. \(c\)](#).

[CA\(3\)](#) (3)

Dissolution of Marriage § 7—Proceedings— Disclosure of Assets and Liabilities—Sanctions.

Neither [Fam. Code, § 2107, subd. \(c\)](#), nor [Fam. Code, § 271, subd. \(a\)](#), sets forth any requirement of separate injury to the complaining spouse as a precondition to the imposition of sanctions. [Section 2107, subd. \(c\)](#), indicates that sanctions are to be imposed to effectuate compliance with the laws that require spouses to make disclosure to each other. The statute is not aimed at redressing an actual injury. [Section 271, subd. \(a\)](#), authorizes sanctions to advance the policy of promoting settlement of litigation and encouraging cooperation of the litigants. This statute, too, does not require any actual injury. As expressed in [Fam. Code, § 2100, subd. \(b\)](#), the Legislature has indicated that sound public policy favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery. In light of this legislatively expressed intention, the authority to impose sanctions for

nondisclosure is plainly aimed [*1472] at effectuating the goal of reducing the adversarial nature of marital dissolution rather than at redressing any actual harm inflicted on the complaining spouse.

CA(4) (4)

Dissolution of Marriage § 7—Separation Proceedings—Disclosure of Assets and Liabilities—Sanctions.

The terms of [Fam. Code, § 2107](#), do not require that before seeking sanctions for nondisclosure a party (1) seek further disclosure and (2) bring a motion to either compel further responses or preclude evidence.

CA(5) (5)

Dissolution of Marriage § 7—Proceedings—Disclosure of Assets and Liabilities.

A spouse who is in a superior position to obtain records or information from which an asset can be valued and can reasonably do so must acquire and disclose such information to the other spouse and should not expect the spouse who is not in a superior position to search for the information.

CA(6) (6)

Dissolution of Marriage § 7—Proceedings—Disclosure of Assets and Liabilities—Sanctions.

A husband had a fiduciary duty to disclose the existence of his 401(k) account on his schedule of assets and debts in the first place without prodding from the wife and to produce relevant documents upon the wife's request. The trial court reasonably concluded that the husband breached that duty by not disclosing the existence of the 401(k) account until an inquiry was made during his deposition; moreover, the husband failed to disclose other assets and debts. Sanctions were appropriate under

the circumstances.

[Cal. Forms of Pleading and Practice (2007) ch. 221, Dissolution of Marriage: Procedure, § 221.48; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, § 238; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Husband and Wife, § 10; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 401.]

CA(7) (7)

Dissolution of Marriage § 7—Proceedings—Disclosure of Assets and Liabilities.

[Fam. Code, § 2102](#), does not contain an exception that exempts a spouse from having to disclose transactions in the ordinary course of business. [Section 2102, subd. \(a\)\(2\)](#), refers to disclosures that must be made only when outside the ordinary course of business. However, that provision describes the circumstances in which one spouse must disclose a postseparation business opportunity to the other spouse prior to the transaction so that the spouse may decide whether to participate in the opportunity. Under the statute, a spouse is required to [*1473] give prior written disclosure with respect to a significant business activity outside the ordinary course of business.

CA(8) (8)

Dissolution of Marriage § 7—Proceedings—Disclosure of Assets and Liabilities.

A spouse who runs a business is not under a duty to sua sponte update every insignificant occurrence in the operation of a business. [Fam. Code, §§ 2100, subd. \(c\), 2102, subd. \(a\), 1100, subd. \(e\)](#), refer to the immediate disclosure of material changes and material facts and information.

CA(9) (9)

Dissolution of Marriage § 7—Proceedings—

Disclosure of Assets and Liabilities—Sanctions.

The text of [Fam. Code, § 271](#), contains no requirement that a trial court impose a sanction at the end of a lawsuit. The only procedural requirement in the statute is that an award of attorney fees and costs as a sanction may be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard ([§ 271, subd. \(b\)](#)). Further, [§ 271](#) is meant to advance the policy of the law to promote settlement and to encourage cooperation, which will reduce the cost of litigation. As a matter of logic, to promote cooperation a trial court must be able to apply sanctions during the course of the litigation when the uncooperative conduct arises in order to encourage better behavior as the litigation progresses. Accordingly, based on the statutory language and the express purpose of [§ 271](#), a trial court may impose sanctions under [§ 271](#) before the end of the lawsuit.

[CA\(10\)](#) (10)

Trial § 131—By Court—Statement of Decision—Necessity—When Not Statutorily Required.

There is no basis in statute or case law for a rule requiring a trial court to exercise its discretion to issue a statement of decision in instances where *Code Civ. Proc.*, § 632, does not require it.

Counsel: Honey Kessler Amado for Appellant.

Stephen Temko for Respondent.

Judges: Irion, J., with O'Rourke, Acting P. J., and Aaron, J., concurring.

Opinion by: Irion [*1474]

Opinion

[**31] **IRION, J.**—In this marital dissolution proceeding, Aaron Feldman appeals from the trial

court's order requiring him to pay sanctions and attorney fees based on his nondisclosure of financial information to respondent [**32] Elena Feldman. As we will explain, we conclude that the appeal lacks merit, and accordingly we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Aaron and Elena ¹ were married in 1969 and separated after 34 years of marriage. Elena filed a petition for dissolution of marriage in August 2003.

During the marriage Aaron created a large number of privately held companies referred to as Sunroad Enterprises (the Sunroad entities). The Sunroad entities are devoted to, among other things, investing in and developing real estate and owning auto dealerships. [***2] According to Aaron, his assets are worth in excess of \$50 million. The characterization of the Sunroad entities as either separate or community property is an issue in the dissolution proceeding.

As the litigation proceeded, Elena served interrogatories and a request for production of documents on Aaron and conducted depositions of Aaron and employees of the Sunroad entities. Aaron provided responses to interrogatories and a schedule of assets and debts (the Schedule) on November 24, 2003. He subsequently provided updates to the Schedule at the request of Elena's attorney. Aaron also produced a significant number of documents in response to the request for production.

On September 2, 2004, Elena filed an application for an order (1) imposing monetary sanctions against Aaron for a violation of his fiduciary duty to make financial disclosures to her during the dissolution proceedings, and (2) requiring Aaron to pay her attorney fees (the sanctions motion). The sanctions motion was based on [Family Code](#)

¹ For purposes of clarity, we refer to the parties by their first names and intend no disrespect.

[sections 1101, subdivision \(g\)](#),² [2107, subdivision \(c\)](#), and [271, subdivision \(a\)](#), which collectively give the trial court authority to order sanctions and the payment of attorney **[***3]** fees for breach of a party's fiduciary duty of disclosure and for conduct which frustrates the policy of promoting settlement. **[*1475]**

Elena's declaration in support of the sanctions motion alleged that Aaron had failed to disclose several different financial transactions, including the purchase of a personal residence through one of his companies, the purchase of a \$1 million bond, the existence of a 401(k) account, and the existence of several of the Sunroad entities.

The sanctions motion was taken off calendar while the parties pursued mediation. When the mediation was unsuccessful, Elena renoticed the sanctions motion and submitted a supplemental declaration, which described additional instances of nondisclosure.

Following full briefing and a hearing, the trial court ruled that Aaron breached his fiduciary duty to disclose financial information to Elena, and it ordered Aaron to pay sanctions in the amount of \$250,000 and attorney fees of \$140,000.³ As part of **[***33]** its ruling, the trial court found that Aaron intentionally had sought to circumvent the disclosure process and that his conduct had frustrated the **[***4]** policy of promoting settlement. Aaron appeals from the trial court's order.

II

DISCUSSION

Our analysis of Aaron's appeal requires us (1) to

review the duty of disclosure that applies to spouses involved in dissolution proceedings, and (2) to apply those principles to the several instances of nondisclosure alleged by Elena and cited by the trial court in support of its sanctions order.

A. Applicable Statutory Provisions

We first examine the fiduciary obligations of disclosure that govern the relationship between spouses involved in a dissolution proceeding and the sanctions available for the breach of such obligations.

The fiduciary obligations of spouses to each other are set forth in [section 721](#),⁴ and are made specifically applicable during dissolution proceedings by [section 1100, subdivision \(e\)](#). **[***5]** [HN1](#) “Each spouse shall act with respect to the other **[*1476]** spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in [Section 721](#), until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.” ([§ 1100, subd. \(e\)](#).)

Consistent with these fiduciary obligations, [section](#)

²Unless otherwise indicated, all further statutory references are to the Family Code.

³Elena requested that Aaron be sanctioned in the amount of \$250,000, and that the trial court impose an additional conditional sanction of \$750,000, which would be stayed on the condition that Aaron read the statutory provisions concerning his duty of disclosure and that he immediately, fully and accurately comply with his duty of disclosure. The trial court did not order conditional sanctions.

⁴[Section 721, subdivision \(b\)](#) provides that generally “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 **[***6]** 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”

[2100, subdivision \(c\)](#) provides that [HN2](#) “a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties.” This disclosure duty is ongoing, as section 2100 provides that “*each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes* so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts.” ([§ 2100, subd. \(c\)](#), italics added.)⁵

[**34] [HN3 CA\(1\)](#) (1) To implement the disclosure obligation, the Family Code requires the service of a preliminary and final declaration of disclosure “[i]n order to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest” ([§ 2103](#).) Specifically, [HN4](#) “[t]he preliminary declaration of disclosure shall set forth with sufficient particularity,” to the extent that “a person of reasonable and ordinary intelligence can [[*1477](#)] ascertain [them],” “[t]he identity of all assets in which the declarant has or may have an interest [[***8](#)] and all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate.” ([§ 2104, subd. \(c\)\(1\)](#).) It also shall include “[t]he declarant's percentage of

ownership in each asset and percentage of obligation for each liability where property is not solely owned by one or both of the parties.” ([§ 2104, subd. \(c\)\(2\)](#).)

[Section 2107, subdivision \(c\)](#) requires the trial court to impose monetary sanctions and award reasonable attorney fees if a party fails to comply with any portion of the chapter of the Family Code that deals with a spouse's fiduciary duty of disclosure during dissolution proceedings, i.e., [sections 2100 to 2113](#). The statute provides, [HN5](#) “If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other [[***9](#)] circumstances make the imposition of the sanction unjust.” ([§ 2107, subd. \(c\)](#).)

Similarly, [section 271, subdivision \(a\)](#) provides the trial court with authority to order the opposing party to pay attorney fees and costs in the nature of a sanction when “the conduct of each party or attorney ... frustrates the policy of the law to promote settlement of litigation.” Specifically the statute provides: [HN6](#) “Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In

⁵ Similarly, [section 2102, subdivision \(a\)](#) [[***7](#)] states: “From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in [Section 721](#), as to all activities that affect the assets and liabilities of the other party, including, but not limited to ... : [[¶](#)] (1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, *including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.*” (Italics added.)

order to obtain an *****10** award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.” (§ 271, *subd. (a)*.) [Section 271](#) “advances the policy of the law ‘to promote settlement and to encourage ***1478** cooperation which will reduce the cost of litigation.’ ” (*In re Marriage of Petropoulos (2001) 91 Cal.App.4th 161, 177 [110 Cal. Rptr. 2d 111] (Petropoulos)*.)⁶

*****35** B. Standard of Review

[HN7 CA\(2\) \(2\)](#) “A sanction order under ... [section 271](#) is reviewed under the abuse of discretion standard. ‘ “[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order.” ’ ” (*In re Marriage of Burgard (1999) 72 Cal.App.4th 74, 82 [84 Cal. Rptr. 2d 739]*.) “In reviewing such an award, we must indulge all reasonable inferences to uphold the court's order.” (*In re Marriage of Abrams (2003) 105 Cal.App.4th 979, 991 [130 Cal. Rptr. 2d 16]*.) Although no case law discusses which standard of review we should apply to an order awarding sanctions under [section 2107, subdivision \(c\)](#), because the sanction is similar to that imposed under [section 271](#) as well as similar to

a sanction for civil discovery abuses (which are reviewed for abuse of discretion), we will apply an abuse of *****12** discretion standard to an order for sanctions under [section 2107, subdivision \(c\)](#). (See *American Home Assurance Co. v. Société Commerciale Toutélectric (2002) 104 Cal.App.4th 406, 435 [128 Cal. Rptr. 2d 430]* [“The court's discretion to impose discovery sanctions is broad, subject to reversal only for manifest abuse exceeding the bounds of reason”].)⁷

***1479**

[HN8](#) To the extent that we are called upon to interpret the statutes relied on by the trial court to impose sanctions, we apply a de novo standard of review. (See *In re Marriage of Hokanson (1998) 68 Cal.App.4th 987, 992 [80 Cal. Rptr. 2d 699]*.) We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review. (*In re Marriage of Rossi (2001) 90 Cal.App.4th 34, 40 [108 Cal. Rptr. 2d 270]*.) “ ‘In reviewing the evidence on ... appeal all conflicts must be resolved in favor *****36** of the [prevailing party], and all legitimate and reasonable inferences indulged in [order] to uphold the [finding] if possible.’ ” ’ ” (*Ibid.*)

C. Aaron's Argument Concerning Statutory

⁶ Setting forth additional remedies available when a spouse breaches a fiduciary duty of disclosure, [section 1101, subdivision \(g\)](#) provides that “[r]emedies 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*.” (Italics added.) In its written order, the trial court cited this provision, along with others, as support for the sanctions award, but cited only [section 1101, subdivision \(g\)](#) as the basis for the attorney fee award. Because we determine that the sanctions award (including the payment of attorney fees) is well supported by the *****11** authority provided in [section 2107, subdivision \(c\)](#) and [section 271, subdivision \(a\)](#), we need not, and do not, discuss whether the award of attorney fees might also properly be premised on [section 1101, subdivision \(g\)](#). We may affirm the order on any ground supported by the record. (See *In re Marriage of Mathews (2005) 133 Cal.App.4th 624, 632 [35 Cal. Rptr. 3d 1]*.)

⁷ Aaron argues that the imposition of sanctions should be reviewed under the standards applicable to the award of punitive damages, including the undertaking of a de novo review, because punitive damages, like sanctions, are intended to deter and punish. Aaron has cited no authority for this novel argument, and we are aware of no case law that would support it. We accordingly reject Aaron's argument and apply the well-settled abuse of discretion standard of review. Indeed, Aaron concedes in his reply brief that the abuse of discretion standard of review is applicable. To the extent Aaron is arguing that we should borrow from the United States Supreme Court's case law to determine whether the trial court selected an appropriate dollar amount for the sanctions award, we reject this argument. We rely instead on the text of the relevant statutes to determine whether sanctions *****13** were warranted and whether the trial court was within its discretion in setting the amount of the sanction. Specifically, we apply the standard set forth in [section 2107, subdivision \(c\)](#), which requires sanctions when a party fails to comply with disclosure obligations, unless the imposition of sanctions would be unjust, and states that the “[s]anctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct”

Interpretation Issues

Before discussing the particular instances of nondisclosure [***14] at issue in this case, we pause to address some of Aaron's arguments concerning the applicable statutory standards.

1. No Injury to the Other Party Is Required for the Trial Court to Impose Sanctions

Aaron argues that sanctions may not be imposed on a spouse who breaches his fiduciary duty of disclosure if the other party fails to establish any *harm* resulting from the breach. We disagree.

CA(3) (3) According to Aaron, “[t]hematic to the ... statutes is the presence of some injury to the complaining party as a prerequisite to the remedy.” However, we conclude that this argument finds no support in the language of the relevant statutes that authorize the imposition of sanctions here, i.e., sections 2107, subdivision (c) and 271, subdivision (a). HN9 Neither statute sets forth any requirement of separate injury to the complaining spouse as a precondition to the imposition of sanctions.

Section 2107, subdivision (c) indicates that sanctions are to be imposed to effectuate *compliance with the laws* that require spouses to make disclosure to each other. (See § 2107, subd. (c) [referring to sanctions imposed to “deter repetition” of conduct that “fails to comply” with the disclosure requirements].) The statute [***15] is not aimed at redressing an actual injury. Section 271, [*1480] subdivision (a) authorizes sanctions to advance the *policy* of promoting settlement of litigation and encouraging cooperation of the litigants. This statute, too, does not require any actual injury.

Indeed, as expressed in section 2100, subdivision (b), the Legislature has indicated that “[s]ound public policy ... favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery.” In light of this legislatively expressed intention, the authority to impose sanctions for nondisclosure is plainly aimed at

effectuating the goal of reducing the adversarial nature of marital dissolution rather than at redressing any *actual harm* inflicted on the complaining spouse.

In addition to relying on the purported “thematic” approach of the applicable statutes, Aaron attempts to rely on case law for his argument that *harm* is a prerequisite to the imposition of sanctions. However, the cases that Aaron cites are not applicable here because they address a different issue—whether a party must show prejudice *when seeking to vacate a judgment of dissolution* on the [***16] ground that the other party did not comply with disclosure obligations. (See In re Marriage of Jones (1998) 60 Cal.App.4th 685, 695 [70 Cal. Rptr. 2d 542] [denying relief to party who sought to have a dissolution judgment vacated for failure of the opposing party to formally comply with certain disclosure requirements because “[s]he failed to show how she was prejudiced”]; In re Marriage of Brewer & Federici (2001) 93 Cal.App.4th 1334, 1345 [113 Cal. Rptr. 2d 849] (Brewer & Federici) [in a case where one party sought to vacate the judgment because the other party did not comply with disclosure obligations, the court cited the principle, established by § 2121, subd. (b), that a party seeking relief from a judgment of dissolution must show that “ ‘the facts alleged as the grounds for relief materially affected the original outcome’ ”].) Elena did not seek to [***37] vacate a judgment of dissolution; she sought to impose sanctions aimed at deterring future misconduct in the *ongoing* dissolution proceedings. Thus neither the case law that Aaron cites, nor the statutory authority relied on by those cases, apply here.

Because there is no requirement that Elena show harm as a prerequisite to an award of sanctions, we need not and do not analyze [***17] whether Elena was harmed by Aaron's failure to disclose.

2. The Imposition of Sanctions Does Not Require Additional Procedural Prerequisites

Aaron argues that sanctions may not be imposed under section 2107, subdivision (c) unless the

complaining party first makes a request for the information that has not been disclosed and then brings either (1) a motion to [*1481] compel further response or (2) a motion to preclude evidence on the nondisclosed issue. His argument is based on a misreading of [section 2107](#), and we reject it.

The initial portion of [section 2107](#) provides as follows:

HN10 “(a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104 or a final declaration of disclosure under Section 2105, or fails to provide the information required in the respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

“(b) If the noncomplying party fails to comply with a request under subdivision (a), the complying party [***18] may do either or both of the following:

“(1) File a motion to compel a further response.

“(2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.”

CA(4) (4) Independent of these remedies, [section 2107, subdivision \(c\)](#) states that “[i]f a party fails to comply with any provision of this chapter [i.e., [sections 2100 to 2113](#)], the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party.”

HN11 The terms of the statute simply do not require that before seeking sanctions for nondisclosure a party (1) seek further disclosure and (2) bring a motion to either compel further

responses or preclude evidence.⁸

Thus, sanctions were available here despite the fact that Elena did not avail herself of the remedies set forth in [subdivisions \(a\) and \(b\) of section 2107](#).

D. Aaron's Nondisclosures

We next review the nondisclosures that Elena alleged as the basis for the sanctions motion and that the trial court relied on in ordering sanctions.

[*1482]

1. The Israeli Bond

On November 24, 2003, Aaron served the Schedule. It is undisputed that the [***38] Schedule failed to list a \$1 million bond that Aaron personally had purchased from the Israeli government in October 2003 (the Israeli bond).

Aaron signed the agreement to acquire the Israeli bond on July 10, 2003, the bond was issued on October 8, 2003, and Aaron was notified of that fact by a letter dated October 27, 2003. Thus Aaron clearly knew about the Israeli bond when he served the Schedule, but he did not list it as one of his assets.

Further, the bond was purchased with borrowed funds. According to Aaron, he “borrowed \$1,000,000 from Bank Leumi, USA; purchased an Israeli bond with the proceeds; and, in turn, assigned to Bank Leumi USA as collateral for the loan.” [***20] Aaron also did not disclose the loan from Bank Leumi on the Schedule as one of his debts.

Not only did Aaron fail to disclose the Israeli bond and the Bank Leumi loan on the Schedule, he also did not timely produce *documents* about the

⁸ According to Aaron, [Elden v. Superior Court \(1997\) 53 Cal.App.4th 1497, 1510 \[62 Cal. Rptr. 2d 322\]](#) “suggests that the remedies [in [section 2107](#)] are available to the complying party in the order presented in the statute.” The availability of sanctions was not at issue in *Elden*, and we do not perceive *Elden* as advancing any such interpretation of [section 2107](#). Moreover, as we have explained, such an interpretation would, in any event, find no support in the statutory [***19] language.

transaction. Although Elena served Aaron with a request for production asking for all bond certificates and any documents evidencing loans, Aaron produced no documents concerning the Israeli bond or the corresponding loan from Bank Leumi either in his initial October 2003 production or in his supplemental production in January 2004. In addition, during his January 28, 2004 deposition, in response to a direct question on the subject, Aaron stated that he had no personal loans from Bank Leumi.

Elena's attorney sent a letter to Aaron's attorney on February 20, 2004, requesting that Aaron update the Schedule. Aaron replied on February 27, 2004, with a notice of correction to the Schedule. Among other things, the corrections identified the Israeli bond, which Aaron claimed was acquired in December 2003,⁹ and the \$1 million loan payable to Bank Leumi. On March 1, 2004, Aaron produced documents relating to the Israeli bond and the Bank Leumi loan.

[*1483]

In her sanctions motion Elena argued that Aaron's failure to disclose the Israeli bond and the Bank Leumi loan in the Schedule, his failure to produce corresponding documents, and his failure to disclose the Bank Leumi loan during his deposition was a breach of his duty under [HN12 section 2102, subdivision \(a\)\(1\)](#), which requires "[t]he accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes." The trial court

agreed, concluding **[***22]** that the nondisclosure of the Israeli bond was part of a "clear pattern that [Aaron] has no intentions of complying with the policy ... that this information is to be shared from the very beginning." The trial court also found that Aaron's conduct was intentional, that he was "trying to circumvent the process, hide the ball," and it stated that "[g]o fish, you figure it out, is not acceptable."

On appeal Aaron argues that "[a]s the bond was purchased with Bank Leumi *loan* proceeds and as the loan was to be **[**39]** paid off with the *bond* proceeds, the bond and loan were a self-contained, symbiotic package with *zero* effect on Aaron's net worth." He argues that "[g]iven the off-setting relationship[, he] forgot to list either the bond or the debt on his November 24, 2003 Schedule of Assets and Debts." Aaron also claims that he "misspoke" when he stated at his deposition that he had no personal debt to Bank Leumi.

To the extent that Aaron is attempting, through these statements, to excuse his nondisclosure, we conclude that Aaron's position lacks merit. The statutory policy in favor of disclosure contains no exception for debts and assets that offset each other, and Aaron has cited no authority **[***23]** to support such an exception. Instead, Aaron was required to provide a "complete disclosure of all assets and liabilities." ([§ 2102, subd. \(a\)\(1\)](#).)¹⁰ Further, the trial court explained that in light of the other nondisclosures detailed in the sanctions motion, it was rejecting Aaron's explanation that the failure to disclose the Israeli bond and the Bank Leumi loan was a mere oversight. The trial court's inference is reasonable, and in light of the standard of review we will not disturb it.

2.The Calumet Avenue Property

The next nondisclosed item identified in the

⁹ Contrary to **[***21]** Aaron's representation in his notice of corrections to the Schedule, subsequently produced documents show that the Israeli bond was acquired in October 2003, not December 2003, which was *before* Aaron served the Schedule on November 24, 2003. The trial court might reasonably infer that Aaron's claim that he acquired the bond in December 2003 was a deliberate misstatement calculated to hide the fact that in November 2003 he *could have* identified the Israeli bond on the Schedule. This conduct would further support an award of sanctions.

¹⁰ As is required of any litigant, Aaron was also required to respond in good faith to Elena's request for production of documents by producing all relevant documents and to refrain from giving false answers in his deposition testimony, which he failed to do with respect to the Israeli bond and the Bank Leumi loan.

sanctions motion was Aaron's acquisition in early 2004, through a newly created business entity, of a multimillion-dollar home that became his personal residence.

[*1484]

The factual background to this issue begins with a letter sent by Elena's attorney to Aaron's attorney on March 1, 2004, specifically asking "whether [Aaron] [***24] has acquired, or is in the process of acquiring, any interest in any assets or incurred any obligations" This letter followed up on a February 20, 2004 letter, which asked "if there have been any financial changes with regard to [Aaron], including the acquisition of any new interests in properties, either personal or business in nature"

On April 1, 2004, Aaron's attorney sent a letter stating that "[Aaron], along with his son Dan, recently moved to a residence on Calumet Street [sic] in the Birdrock area of La Jolla. [Aaron] is leasing the residence for \$15,000 a month. Otherwise, we are not aware of any substantial changes that warrant an update of [Aaron's] Income and Expense Declaration or further corrections to his Schedule of Assets and Debts."

However, the next day, April 2, 2004, in response to questions asked during the deposition of Frederick Tronboll, a senior vice-president for Sunroad Holding, Inc. (Sunroad Holding), Elena learned that an entity created by Sunroad Holding—Calumet Real Estate Holdings, LLC—had purchased a residence on Calumet Avenue in La Jolla in a cash transaction for \$5,797,500.¹¹

The contract to purchase was signed on February 3, 2004, and the transaction closed on March 12, 2004. Calumet Real Estate Holdings, LLC, is 100 percent owned by Sunroad Holding, which in turn is 100 percent owned by Aaron. The funds for the purchase were originally provided by Sunroad Auto Holding, which is 100 percent owned by Sunroad

Holding, [**40] and thus ultimately 100 percent owned by Aaron. Aaron pays a monthly lease of \$15,000 to Calumet Real Estate Holdings, LLC, which transfers the funds to Sunroad Holding, which in turn repays Aaron's company Sunroad Auto Holding for the funds used to purchase the property. In his September 2004 income and expense declaration, Aaron disclosed for the first time that he *personally* pays the property taxes, insurance and maintenance on the Calumet Avenue property.

In short, Aaron caused one of the Sunroad entities to buy the Calumet Avenue property, he made the property into his personal residence, and he funded the purchase with funds that, because they came from one of the [*1485] Sunroad entities, could possibly be characterized as community property. However, Aaron told Elena in the [***26] April 1, 2004 letter only that he was leasing a residence for \$15,000 per month.

Elena argued that Aaron's selective disclosure of the nature of the transaction involving the Calumet Avenue property was inconsistent with Aaron's fiduciary obligation toward her. The trial court agreed, citing the transaction involving the Calumet Avenue property as one example of Aaron's pattern of nondisclosure.

Aaron argues that he complied with his fiduciary obligation because he "disclosed the acquisition of the Calumet Avenue property within one month of the close of escrow." We disagree. Significantly, Aaron did *not* disclose the transaction; instead Elena stumbled upon the fact of the transaction while deposing Tronboll. Indeed, Elena may never have found out about the transaction had her attorney not asked the appropriate question of Tronboll. Based on the content of the April 1, 2004 letter, the trial court could reasonably conclude that contrary to his fiduciary duty of disclosure, Aaron was attempting to *hide* or *delay* Elena's discovery of the fact that he had used possible community property assets to buy a house in which he was residing. Indeed, the trial court could reasonably

¹¹ According to Aaron's briefing, almost three months [***25] later, on June 28, 2004, Aaron produced documents about the transaction.

assume that [***27] absent Elena's discovery of the true facts, Aaron intended to maintain that he was merely leasing his residence from an unrelated third party. Aaron's conduct was inconsistent with his duty under [section 1100, subdivision \(e\)](#), which gave him an obligation "to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest."

In at least two separate respects, the transaction involving the Calumet Avenue property was a "material fact," giving Aaron a duty to disclose it under [section 1100, subdivision \(e\)](#).

First, Elena is claiming that the Sunroad entities are community assets. In order for Elena to trace those community assets, she needs to obtain information about whether, postseparation, Aaron used any of those alleged community assets to capitalize new companies. Thus, the fact that Aaron took approximately \$6 million from one of the other Sunroad entities and used it to capitalize Calumet Real Estate Holdings, LLC (and to purchase a personal [*1486] residence in the name of that company), is a material fact concerning the community assets. Aaron accordingly [***28] had a duty of candor regarding that transaction.

Second, in the division of community property, Elena may attempt to claim reimbursement for any postseparation benefit that Aaron obtained from the use of community property. (See [In re Marriage of Watts \(1985\) 171 Cal. App. 3d 366, 374 \[217 Cal. Rptr. 301\]](#).) The knowledge that Aaron is living in a house that was bought with alleged community assets would be material information to Elena because it would allow her to evaluate whether, [***41] postseparation, Aaron has used community property for his personal benefit under circumstances that would give rise to an obligation to reimburse the community.¹²

In light of the facts in the record, we conclude that the trial court did not abuse its discretion in concluding that Aaron's lack of candor about the transaction involving the Calumet Avenue property was part of a pattern of nondisclosure that warranted the imposition of sanctions.¹³

[*1487]

3.401(k) Account

In the Schedule, Aaron stated that he did not have any retirement or pension assets. In response to Elena's request for production of documents relating to Aaron's pension plans and retirement [***31] and investment programs, Aaron produced no responsive documents, either in his initial

estate is the type of transaction that the Sunroad entities carry out in the ordinary course of business, and that, in fact, during the marriage, he had purchased the family's personal residences through the Sunroad entities. We reject Aaron's argument. As we have explained, the transaction involving the Calumet Avenue property is material to this litigation because (1) Elena must know about it to be able to trace alleged community assets [***29] and (2) Elena must know about it to determine if the community is entitled to reimbursement. On these two grounds, the transaction involving the Calumet Avenue property is distinguishable from a transaction in the ordinary course of business of the Sunroad entities, and Aaron breached his duty to disclose by attempting to hide its existence in the April 1, 2004 letter.

¹³ Relying on the fact that [section 2102, subdivision \(a\)\(1\)](#) and [section 2104, subdivision \(c\)\(1\)](#) call upon a spouse to disclose only "assets [in which the spouse] has or may have an interest," Aaron argues at length that he was not obligated to disclose the transaction involving the Calumet Avenue property because that property was an asset of the Sunroad entities, and was thus not one of his personal assets. Further, he argues that the trial court and Elena have confused Aaron as an *individual* with Aaron as a *shareholder* of the Sunroad [***30] entities. We acknowledge the distinction between a shareholder and a corporation, and we recognize that a listing of the corporation's assets need not be provided when [section 2102, subdivision \(a\)\(1\)](#) and [section 2104, subdivision \(c\)](#) call for a party to disclose "assets [in which the party] has or may have an interest." However, different statutory provisions obligate a spouse to disclose information concerning all *community* assets, not just assets directly held by the spouse as an individual. Specifically, under [section 1100, subdivision \(e\)](#), Aaron had an obligation "to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest." The transaction involving the Calumet Avenue property is clearly relevant to understand "the existence, characterization, and valuation of all assets in which the community has or may have an interest." (*Ibid.*)

¹² Aaron argues that he did not have to disclose the transaction involving the Calumet Avenue property because the purchase of real

production or in his January 2004 supplemental production. Similarly, in response to form interrogatories propounded by Elena, Aaron stated in November 2003 that he had no interest in any retirement plan.

However, during a July 23, 2004 deposition, when Aaron was asked why, according to his disclosures, he did *not* participate in the Sunroad entities' 401(k) plan, Aaron stated that he probably *did* participate. At Elena's request, Aaron subsequently produced information about his 401(k) account, showing that he had an account in the amount of \$8,679.20.

In the sanctions motion, Elena argued that Aaron's failure to disclose his 401(k) account was a breach of his fiduciary duty to disclose his assets. Aaron conceded that he had not disclosed the 401(k) account and that he did indeed receive statements for the account, but he explained that he did not review the statements and that no contribution had been made to the [**42] account for 12 years. The trial court agreed with Elena that the failure to disclose the 401(k) account was another instance of Aaron's breach of his duty of disclosure, and it cited the omission [***32] of the 401(k) account as part of Aaron's pattern of misconduct.

On appeal Aaron argues that he did not breach his fiduciary duty to Elena by not disclosing the 401(k) account, because Elena had been secretly copying financial documents during their marriage and as a result she had copies of certain account statements from 1998 through 2000 for the 401(k) account, which she produced to Aaron on April 29, 2004.

CA(5) (5) We do not view this fact as in any way exonerating Aaron's failure to disclose the information about the 401(k) account on the Schedule or to produce documents concerning the account in response to Elena's request for production. The 401(k) account is clearly one of Aaron's assets and may be community property. He was thus required to disclose it in the Schedule and to disclose it upon request from Elena. (See §§ 2102, subd. (a)(1), 2104, subd. (c)(1), 1100, subd. (e), 721, subd. (b)(2).) **HN13** “[A] spouse who is in

a superior position to obtain records or information from which an asset can be [*1488] valued and can reasonably do so must acquire and disclose such information to the other spouse” and should not expect the spouse who is not in a superior position to search for the information. [***33] (*Brewer & Federici, supra, 93 Cal.App.4th at p. 1348.*) If Elena had not, without Aaron's knowledge, obtained statements from the 401(k) account, Elena may *never* have found out about the account, and her attorney may not have known to ask Aaron about this asset during the deposition.

We note that in November 2003 when Aaron omitted the 401(k) account from the Schedule, and in January 2004 when he omitted the account statements from his supplemental document production, Aaron likely did *not* know that Elena had any account statements. In contrast, at the time of his deposition in July 2004 when he admitted to the 401(k) account, Aaron *did* know that Elena had the documents, as she had produced them in April 2004. The trial court might reasonably have inferred that Elena's demonstrated knowledge of the 401(k) account was what prompted Aaron to finally admit to the existence of the asset and that Aaron's conduct was not consistent with his fiduciary duty of disclosure.¹⁴

CA(6) (6) In sum, Aaron had a fiduciary duty to disclose the existence of the 401(k) account on the Schedule in the first place without prodding from Elena and to produce relevant documents upon Elena's request. The trial court reasonably concluded that Aaron breached that duty by not disclosing the existence of the 401(k) account until July 2004 in response to an inquiry during his

¹⁴ Aaron also appears to believe that in light of his wealth, the \$8,679.20 in the 401(k) account was immaterial and thus he did not breach a duty to Elena by not disclosing it. We reject this argument. As the trial court [***34] pointed out, the nondisclosure of the 401(k) account was part of a *pattern* of nondisclosure. Although the amount of the account may not be significant standing alone, the trial court was within its discretion to conclude that taken together with Aaron's other nondisclosures, Aaron's nondisclosure of the 401(k) account demonstrated a pattern of misconduct that justified the imposition of sanctions.

deposition.

4. *The Addition of New Companies*

As another basis for its conclusion that Aaron had engaged in a pattern of nondisclosure, the trial court cited “the addition of new companies.” Although the **[**43]** trial court could have been more clear about the transactions to which it was referring, our review of the record reveals several instances of documented nondisclosure of new Sunroad entities that the trial court reasonably **[***35]** could have relied upon to support its decision to order sanctions.

[*1489]

a. *Inmobiliaria Camino del Sol*

Two of the Sunroad entities owned by Aaron created the Mexican subsidiary Inmobiliaria Camino del Sol, S de R.L. de C.V. (Inmobiliaria) at some point in 2003.¹⁵ Inmobiliaria was formed to own land for an auto dealership in Mexico City. Sunroad Auto Holding Corporation loaned \$2.52 million to Inmobiliaria, evidenced by an October 23, 2003 promissory note signed by Aaron.

In October 2003 and January 2004, Aaron responded to Elena's request for production which sought, among other things, (1) articles of incorporation and similar documents for the Sunroad entities and (2) evidence of any loans to the Sunroad entities. Aaron did not produce any documents concerning Inmobiliaria.

In February 2004, Elena's attorney asked “if there have been any financial changes with regard to [Aaron], including the acquisition of any **[***36]** new interests in properties, either personal or business in nature.” In June 2004, Elena's attorney asked if there had been “any changes to [Aaron's] income or assets, whether personally or through Sunroad Holding Corporation or any other

subsidiary corporation” and whether “[Aaron] has created any new corporations or subsidiary corporations.” Despite these requests, Aaron did not disclose the existence of Inmobiliaria or the loan to it.

Further, until he produced a copy of the promissory note in August 2004, Aaron did not produce documents concerning Inmobiliaria or evidencing the \$2.52 million loan to it. The existence of Inmobiliaria was also not disclosed on the organizational chart of the Sunroad entities that Aaron produced in December 2003, even though it clearly existed at that time.¹⁶

Thus, the trial court could reasonably conclude that by failing to disclose the information about Inmobiliaria when specifically requested to do so by Elena, Aaron breached his duty under [section 1100, subdivision \(e\)](#) “to make full disclosure to the other spouse of all material facts and information **[*1490]** regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest.” As we have explained, Elena had an interest in ascertaining and valuing all of the Sunroad entities, and in tracing any transfer of capital from the Sunroad entities to newly created entities. Because Aaron failed to disclose the existence of Inmobiliaria and the \$2.52 million loan made to it by another Sunroad entity, Aaron did not comply with his duty of disclosure.

[44]** b. *Entities Appearing on Later Organizational Charts*

In Elena's July 2005 supplemental declaration in

¹⁵ Aaron makes conflicting statements about the date on which Inmobiliaria was formed. Aaron's appellate briefing states that the company was formed in October 2003, but a letter in the record written by Aaron's attorney states that the company was incorporated on January 22, 2003.

¹⁶ Aaron points out that in response to questions during his May 2004 deposition, he stated that he had formed an entity to invest in Mexican real estate for an auto dealership. In our view, this fact does not establish that Aaron complied with his fiduciary duty of disclosure. The information was offered only upon exact questioning by Elena's attorney, and even then, Aaron was not able to provide **[***37]** many of the relevant details, including the name of the entity. Moreover, as we have explained, the information about Inmobiliaria was available months before the May 2004 deposition.

support of the sanctions motion, she described several new Sunroad entities that she had learned of in January 2005, although [***38] they were formed several months earlier.

On January 25, 2005, Aaron produced corporate organizational charts for the Sunroad entities dated December 31, 2004. Despite the fact that Aaron has admitted that new organizational charts are created on a quarterly basis, this was Aaron's first production of organizational charts since December 2003, when he produced organizational charts dated September 30, 2003.

Upon reviewing the new charts, Elena noticed that nine new entities were listed. Several rounds of correspondence between Elena's and Aaron's attorneys followed between January 28, 2005, and May 16, 2005, as Elena attempted to obtain detailed information about the new entities. Like Inmobiliaria, several of the companies were associated with automobile dealerships in Mexico. Another two of the new entities owned real property in Chula Vista, and still another owned land in San Diego. Six of the companies were incorporated in June or July 2004, one was incorporated in August 2004, one was incorporated in January 2005, and one was still in the process of being incorporated as of February 2005.

Thus, several of these new entities had been in existence for several months before Aaron disclosed [***39] their existence by producing updated organizational charts in January 2005.

As we have explained, Aaron was under a duty, among other things, to give “an immediate, full, and accurate update or augmentation to the extent there have been any material changes” as to his assets and liabilities ([§ 2102, subd. \(a\)\(1\)](#)). Under [section 1100, subdivision \(e\)](#), Aaron had an obligation “to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest.” (See also [§ 721, subd. \(b\)\(2\)](#) [requiring a spouse to provide upon request

“true and full information ... affecting any transaction which concerns the community [[*1491](#) property”].) Further, based on the inquiry of Elena's attorneys in June 2004 as to whether “[Aaron] has created any new corporations or subsidiary corporations,” Aaron knew that Elena was interested in receiving updates concerning the creation of any new Sunroad entities.

On these facts, the trial court was within its discretion to conclude that Aaron's tardy disclosure of the new entities was another instance of Aaron's pattern of noncompliance with the statutory [[***40](#)] policy of disclosure.

Aaron argues that he was not required to disclose the existence of Inmobiliaria, the \$2.52 million loan, or the creation of the new entities, because they were “standard business transaction[s].” Specifically, Aaron disputes that “every transaction” of a business must be reported under [section 2102](#), “even when the transactions are within the ‘ordinary course of business’ of the reported asset.”

Aaron relies on [section 2102](#) for his argument. That section provides:

[HN14](#) “(a) From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities:

[**45] “(1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes.

“(2) The accurate and complete written disclosure of any investment opportunity, [[***41](#)] business opportunity, or other income-producing opportunity

that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure shall be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity. In the event of nondisclosure of an investment opportunity, the division of any gain resulting from that opportunity is governed by the standard provided in Section 2556.

[*1492]

“(3) The operation or management of a business or an interest in a business in which the community may have an interest.

“(b) From the date that a valid, enforceable, and binding resolution of the disposition of the asset or liability in question is reached, until the asset or liability has actually been distributed, each party is [***42] subject to the standards provided in Section 721 as to all activities that affect the assets or liabilities of the other party. Once a particular asset or liability has been distributed, the duties and standards set forth in Section 721 shall end as to that asset or liability.”

CA(7) (7) Despite Aaron's argument to the contrary, HN15 this statute does not contain an exception that exempts a spouse from having to disclose transactions “in the ordinary course of business.” Aaron points out that section 2102, subdivision (a)(2) refers to disclosures that must be made only when “outside the ordinary course of business.” However, that provision describes the circumstances in which one spouse must disclose a postseparation business opportunity to the other spouse *prior* to the transaction so that the spouse may decide whether to participate in the

opportunity. Under the statute, a spouse is required to give *prior* written disclosure with respect to a “significant business activity *outside the ordinary course of business*.” (*Ibid.*, italics added.)

The issue here is not whether Aaron was required to disclose the various activities of Sunroad Holdings *before* they occurred. Elena's motion for sanctions is not [***43] based on Aaron's failure to disclose business opportunities *before* the Sunroad entities took advantage of them. Instead, the request for sanctions was warranted because he failed, even when Elena made it clear that she desired the information, “to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest.” (§ 1100, subd. (e).)¹⁷ As the spouse involved in [**46] running the Sunroad entities, Aaron was in a superior position to obtain information about those entities and was thus obligated to disclose material information regarding them to Elena.¹⁸

[*1493]

CA(8) (8) We agree with Aaron that as a matter of

¹⁷ Citing Gale v. Superior Court (2004) 122 Cal.App.4th 1388, 1393 [19 Cal. Rptr. 3d 554], Aaron argues that he was not required to disclose the business dealings of the Sunroad entities that he made in “the ordinary course of business.” *Gale* is not on point. It addresses whether an automatic restraining order prevents a spouse who runs a family-owned real estate investment business from selling one of the properties in the “‘usual course of business.’” (*Ibid.*) Here, the issue is not whether Aaron was authorized to conduct [***44] ordinary business on behalf of the Sunroad entities, it was whether Aaron was required to *disclose* such business transactions, immediately, fully and accurately, to the extent they impacted his assets and liabilities.

¹⁸ It is significant that the Sunroad entities are privately held corporations. Because of their privately held status, information regarding them is not available to Elena, but it is available to Aaron as a shareholder and manager of the company, giving him a duty to obtain that information in carrying out his duty to provide disclosure about community assets. (See Brewer & Federici, supra, 93 Cal.App.4th at p. 1348 [the spouse in a superior position to obtain information has a duty to do so]; In re Marriage of Heggie (2002) 99 Cal.App.4th 28, 34 [120 Cal. Rptr. 2d 707] [because the value of the stock of a public company was publicly available information, spouse did not breach duty by failing to disclose the value].)

common sense, [HN16](#) a spouse who runs a business is not under a duty to sua sponte update every *insignificant* occurrence in the operation of a business. We note as well that the statutes refer to the immediate disclosure of “material changes” ([§§ 2100, subd. \(c\), 2102, subd. \(a\)](#)) and [\[***45\]](#) “material facts and information” ([§ 1100, subd. \(e\)](#)). However, as we will explain, the facts here clearly justify the trial court's exercise of its discretion to conclude that the existence of Immobiliaria, the \$2.52 million loan, and the creation of the entities shown on the December 31, 2005 organizational chart were items that Aaron had a duty to promptly disclose.¹⁹

Significantly, with respect to the creation of the new entities, because Elena specifically asked about the creation of any new corporations or subsidiary corporations in June 2004, Aaron was on notice that the creation of the entities reflected on the December 31, 2004 organizational charts was a significant event that he should promptly disclose. Further, any spouse seeking to ascertain the value of a community business and to trace community assets would reasonably need to know of the existence of all of the business entities existing at the time of separation and the creation of any new

postseparation entities. With respect to Immobiliaria, Elena served a request for production [\[***47\]](#) seeking documents that encompassed evidence of the creation of new Sunroad entities and any loans made by those entities. These requests put Aaron on notice that [\[**47\]](#) he had a duty to disclose the information.²⁰
[\[*1494\]](#)

5. Other Instances of Nondisclosure Not Cited by the Trial Court

In support of the sanctions motion, Elena cited several other alleged instances of nondisclosure.²¹ On appeal the parties have briefed whether those alleged nondisclosures warranted the imposition of sanctions. However, because the trial court did not cite those items as the basis on which it was exercising its discretion to impose sanctions, we do not analyze whether they support the trial court's ruling. Instead, we have limited our analysis to whether, under the applicable standard of review, the instances of nondisclosure cited by the trial court support its order requiring Aaron to pay

¹⁹ Aaron argues that because he personally did not own any of the Sunroad Holding assets, including its numerous subsidiary entities, he did not have a duty to disclose their existence. Although acknowledging that he was the 100 percent owner of Sunroad Holding and the other Sunroad entities, Aaron argues that because [section 1100, subdivision \(d\)](#) “allows the spouse who is managing and controlling the asset to act alone in all transaction[s] except those which would result in a liquidation of the business[,] Aaron's conduct [in not disclosing some of Sunroad's assets] was consistent with his fiduciary duties.” We reject this argument. The issue of which assets must be disclosed under [section 2102](#) is a distinct issue from whether one spouse is permitted exclusive *management and control* [\[***46\]](#) of the assets of a business owned by the community. [Section 2102, subdivision \(a\)\(1\)](#) requires “[t]he accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation” and imposes a duty to immediately, fully and accurately update the disclosure upon a material change. Aaron breached that duty of disclosure when, despite Elena's request for the information, he failed to disclose documents concerning Immobiliaria and the formation of new Sunroad entities.

²⁰ Aaron argues that he has complied with his disclosure obligations because he has produced extensive documentation, and that the parties have hired a joint appraiser regarding the value of Sunroad businesses and a joint financial expert to determine monies available for support. These facts do not persuade us that the trial court abused its discretion in imposing sanctions. First, the trial court reasonably concluded that the documentation Aaron provided did not sufficiently fulfill his fiduciary duty of disclosure because the undisclosed items noted by the trial court were not contained in that production, namely, information about the Calumet Avenue property, information about the Israeli bond, information about the 401(k) account, and information about Immobiliaria. Second, the parties retained the appraiser and financial expert *after* most of the conduct by Aaron that gave rise to the sanctions, and *after* Elena filed the application for sanctions. Thus, Aaron's agreement to [\[***48\]](#) the appraiser and financial expert is not relevant to whether his conduct during the relevant time frame warranted the imposition of sanctions.

²¹ For example, Elena complained that Aaron did not disclose the subsidiaries of Sunroad Holding on the Schedule, that he did not disclose several other business transactions of the Sunroad entities, that he did not disclose that he converted the Sunroad entities from C corporations to S corporations, and that he did not produce a draft appraisal report concerning [\[***49\]](#) the value of the Sunroad entities.

sanctions and attorney fees.

E. Attorney Fees

We next discuss Aaron's challenges to the trial court's attorney fee award.

1. The Award of Fees Under Section 271 Prior to the Conclusion of the Litigation

As we have explained, attorney fees are statutorily authorized in this case either under (1) [section 2107, subdivision \(c\)](#) in connection with the imposition of sanctions for violation of disclosure obligations; or (2) [section 271, subdivision \(a\)](#), based on the trial court's finding that Aaron's acts of nondisclosure frustrated the statutory policy to promote settlement.

Aaron contends that to the extent the award of attorney fees was premised on [section 271, subdivision \(a\)](#), that award was improper because attorney fees may not be ordered under [section 271, subdivision \(a\)](#) until the end of the lawsuit.

In support of his argument, Aaron cites [In re Marriage of Freeman \(2005\) 132 Cal.App.4th 1, 6 \[33 Cal. Rptr. 3d 237\]](#), and [In re Marriage of Quay \(1993\) \[*1495\] 18 Cal.App.4th 961, 970 \[22 Cal. Rptr. 2d 537\]](#). Quay concerned the predecessor statute to [section 271](#) (Civ. Code, former § 4370.6). In the context of rejecting an argument that the attorney fee sanction was improper because “the only attorney's fees before the court were incurred [***50] after [the party's] wrongful conduct,” Quay stated that “[t]he statute, we think, contemplates assessing a sanction at the end of the lawsuit, when the extent and severity of the party's bad conduct can be judged.” ([Quay, at p. 970.](#)) In the course of deciding that a trial court could require the [**48] payment of attorney fees incurred on appeal under [section 271](#), Freeman quoted this language from Quay. ([Freeman, at p. 6.](#))

Thus, neither Quay nor Freeman dealt with the issue that we consider here, i.e., whether a trial court must wait until the end of the lawsuit to

assess attorney fees as sanctions under [section 271](#). We accordingly do not rely on those authorities in assessing Aaron's argument. Instead, in conducting our analysis we rely on the language of the statute.

HN17 CA(9) (9) The text of [section 271](#) contains no requirement that the trial court impose the sanction at the end of the lawsuit. Indeed, the only procedural requirement in the statute is that an award of attorney fees and costs as a sanction may be imposed “only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.” (§ 271, *subd. (b).*) Further, as we have stated, [section 271 \[***51\]](#) is meant to “advance[] the policy of the law ‘to promote settlement and to encourage cooperation which will reduce the cost of litigation.’ ” ([Petropoulos, supra, 91 Cal.App.4th at p. 177.](#)) As a matter of logic, to promote cooperation a trial court must be able to apply sanctions *during the course of the litigation* when the uncooperative conduct arises in order to encourage better behavior as the litigation progresses.

We accordingly conclude that based on the statutory language and the express purpose of [section 271](#), a trial court may impose sanctions under [section 271](#) before the end of the lawsuit.

2. Aaron Has Waived the Argument that Elena's Attorney Fees Were Not Reasonable and Necessary

Aaron argues that the trial court abused its discretion in setting the amount of attorney fees at \$140,000, because those fees were not shown to be “reasonable and necessary.”²²

[*1496]

²² Aaron bases his argument for a “reasonable and necessary” standard by citing the attorney fee provision set forth in [section 2032](#) and cases decided under that provision, including [In re Marriage of Keech \(1999\) 75 Cal.App.4th, 860, 869–870 \[89 Cal. Rptr. 2d 525\]](#), and [In re Marriage of Braud \(1996\) 45 Cal.App.4th 797, 827 \[53 Cal. Rptr. 2d 179\]](#). We note that the trial [***52] court did not rely on [section 2032](#) in awarding attorney fees, and Elena did not move for attorney fees based on that section.

We reject Aaron's argument because he failed to raise a timely objection in the trial court. Elena submitted a series of declarations in support of her request for attorney fees as part of the sanctions motion. Although Aaron had ample opportunity to do so prior to or during the hearing on the sanctions motion, Aaron did not object to the amount of the fees that Elena was seeking. He did not argue that Elena had failed to show that the fees were reasonable or necessary, and he raised no other objection to the amount of the fees sought or to the documentation that Elena submitted in support of her fee request.²³ “ [HN18](#) ‘An appellate **[**49]** court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the court below.’ ” (*Children's Hospital & Medical Center v. Bonta'* (2002) 97 Cal.App.4th 740, 776 [118 Cal. Rptr. 2d 629]; see also *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 648 [67 Cal. Rptr. 2d 380] [party that failed to object to the trial court that the opposing party's attorney fees were not sufficiently documented waived the right to object on appeal **[***53]** to the amount of the fee award].) We accordingly reject Aaron's challenge to the amount of the fees awarded to Elena.²⁴

²³ At the trial court's request, after the trial court orally delivered its ruling, Elena submitted a proposed written order and findings (proposed order). Aaron subsequently objected to Elena's proposed order on the ground that it described the \$140,000 fee award as “attorney fees for this Motion.” (Italics added.) Aaron argued that this wording was wrong because Elena had not sufficiently established that \$140,000 in fees were incurred in litigating the sanctions motion. We do not believe that, through this objection, Aaron preserved for appeal the issue of whether Elena established that her attorney fees were reasonable and necessary. Aaron's objection was to the wording of Elena's proposed order, not to the substance of the trial court's decision, and Aaron was not, through the objection, seeking relief from the trial court's ruling. Moreover, the objection would not have been a *timely* objection to the amount of the fees claimed by Elena, as it was made *after* the fee application was litigated.

²⁴ We note that Aaron makes no argument that the attorney fee award **[***54]** should be reversed because it imposed an unreasonable financial burden on him. Aaron does, however, take issue with the amount of the \$250,000 sanction, arguing that it was excessive because “there is nothing in the evidence to establish that Aaron could reasonably pay this amount.” We reject this argument based on

F. The Trial Court Was Not Required to Issue a Statement of Decision

At the conclusion of the trial court's oral ruling, Aaron made a request for a statement of decision under *Code of Civil Procedure* section 632. The trial **[***55]** **[*1497]** court stated at the conclusion of the hearing that it did not think that Aaron was entitled to a statement of decision. In a minute order issued several days later, the trial court clarified that it was denying the request for a statement of decision because “[s]tatements of decision are not required for orders made after hearing on motions or orders to show cause.”

In subsequent correspondence with the trial court, Aaron's attorney stated that “[Aaron] agrees that a statement of decision is not required,” but he nevertheless asked the court to “exercise its discretion to issue a formal statement of decision.” The trial court thereafter issued a six-page ruling, entitled “Findings and Order After Hearing,” but it did not formally issue a statement of decision.

As Aaron properly concedes, the trial court was not required to issue a statement of decision. (See *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 678 [78 Cal. Rptr. 2d 225] [“The general rule is that a trial court need not issue a statement of decision after a ruling on a motion”]; see also *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294 [240 Cal. Rptr. 872, 743 P.2d 932].)²⁵ Aaron argues, however, that even though a

evidence of Aaron's financial condition contained in the record, which shows, among other things, that as of November 2004 he had in excess of \$50 million in assets, over \$300,000 available to him in deposit accounts, over \$3.5 million invested in the stock market, received over \$2 million from dividends and loan repayments in 2004, and received on average over \$150,000 per month from partnership distributions. Based on these facts, the trial court could reasonably conclude that Aaron had the means to pay the sanctions award, and an award of \$250,000 was “in an amount sufficient to deter repetition of the conduct or comparable conduct.” (§ 2107, *subd. (c)*.)

²⁵ No additional procedural rules requiring the issuance of a statement of decision appear in the Family Code in the context of a dissolution proceeding, except that [section 2127](#) specifically requires a trial court to provide a statement of decision when it resolves

statement of decision was not required [***56] in this case, the trial court erred by refusing to exercise its *discretion* to issue a statement of decision. In support of his argument, Aaron points out that the trial court has the *discretion* to issue a [**50] statement of decision even in instances where it is not *required* to do so. (See [Khan v. Superior Court \(1988\) 204 Cal. App. 3d 1168, 1173, fn. 4 \[251 Cal. Rptr. 815\]](#) “[Code of Civil Procedure s]ection 632 and [the corresponding rule of court] are directed to situations where a statement of decision is required; they do not limit situations where a statement of decision can be permitted”].)

[CA\(10\)](#) (10) We reject Aaron's argument. He has cited no authority *requiring* the trial court to exercise its discretion to issue a statement of decision in any specific instance. Further, [HN19](#) we find no basis in statute or case law for a rule requiring the trial court to exercise its discretion [***57] to issue a statement of decision in instances where *Code of Civil Procedure section 632* does not require it. Accordingly, we conclude that the trial court did not err in refusing to issue a statement of decision when it was not required by statute to do so.

[*1498]

DISPOSITION

The trial court's order is affirmed.

O'Rourke, Acting P. J., and Aaron, J., concurred.

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controverted factual evidence in ruling on a request for relief from a judgment.

In re Marriage of Fossum

Court of Appeal of California, Second Appellate District, Division One

January 28, 2011, Filed

B214824

Reporter

192 Cal. App. 4th 336 *; 121 Cal. Rptr. 3d 195 **; 2011 Cal. App. LEXIS 102 ***

In re the Marriage of SANDRA and EDWARD FOSSUM.SANDRA FOSSUM, Respondent, v. EDWARD FOSSUM, Appellant.

Subsequent History: Modified and rehearing denied by [In re Marriage of Fossum, 2011 Cal. App. LEXIS 165 \(Cal. App. 2d Dist., Feb. 10, 2011\)](#)

Modified by [In re Marriage of Fossum, 2011 Cal. App. LEXIS 205 \(Cal. App. 2d Dist., Feb. 24, 2011\)](#)

Review denied by, Request denied by [Fossum, 2011 Cal. LEXIS 4903 \(Cal., Apr. 27, 2011\)](#)

Prior History: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BD382683, Scott M. Gordon, Judge.

Disposition: Affirmed in part; reversed in part.

Case Summary

Procedural Posture

The Superior Court of Los Angeles County, California, found that a house was community property, even though title was in the name of appellant former husband, and declined to award the husband attorney fees under [Fam. Code, § 1101, subd. \(g\)](#), despite a finding under [Fam. Code, § 721, subd. \(b\)](#), that respondent wife breached her statutory fiduciary duty by failing to disclose a cash advance of \$24,000 on a credit card. The husband appealed.

Overview

The court of appeal found that the house was community property. Substantial evidence supported a conclusion that it was community property when acquired, even though the wife quitclaimed her interest to the husband in order to obtain a more favorable interest rate on the mortgage, because the wife testified the downpayment funds came from money they earned together. The house was clearly community property when the husband executed a second quitclaim deed placing title in both names. Under [Fam. Code, § 721](#), it was presumed that the husband exerted undue influence when the wife signed a third quitclaim deed, based on the husband's promise to restore her name to the title once a refinance was complete. The wife did not have to show fraud, deceit, or threat. The spouses jointly wished to refinance their mortgage to obtain a fixed rate at the best possible interest rate and therefore repeated the interspousal transaction once before completed without negative incident. However, the second time around, the husband either never intended to restore the wife's name to the title, or refused to do so after she failed to comport herself in the way he believed his wife should "behave."

Outcome

The court remanded the matter to permit the trial court to determine the amount of mandatory attorney's fee to which the husband was entitled, under [Fam. Code, 1101, subd. \(g\)](#), due to the wife's violation of [Fam. Code, § 721](#). In all other respects, the court affirmed judgment.

LexisNexis® Headnotes

Family Law > ... > Property
Rights > Characterization > Community Property

HN1 Subject to statutory exceptions, all property acquired during marriage is presumptively community property. [Fam. Code, § 760](#).

Civil Procedure > ... > Standards of
Review > Substantial Evidence > Sufficiency of
Evidence

Family Law > Marital Duties & Rights > Property
Rights > General Overview

Family Law > Marriage > Nature of Marriage

Real Property Law > Ownership & Transfer > Agents
& Fiduciaries

Real Property Law > ... > Contracts of
Sale > Enforceability > Undue Influence

HN2 Spouses have the right to enter into property-related transactions with each other. [Fam. Code, § 721, subd. \(a\)](#). However, spouses occupy a confidential and fiduciary relationship with each other. [§ 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. If one spouse secures an advantage from the transaction, a statutory presumption arises under [§ 721](#) that the advantaged spouse exercised undue influence and the transaction will be set aside. 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. 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. The advantaged spouse must show, by a preponderance of evidence, that the advantage was not gained in violation of the fiduciary relationship. The question whether the spouse gaining an advantage has overcome the presumption is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.

Family Law > Marital Duties & Rights > Property
Rights > General Overview

Real Property Law > ... > Contracts of
Sale > Enforceability > Undue Influence

Real Property Law > Title Quality > General
Overview

HN3 The "form of title" presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other.

Family Law > Marital Duties & Rights > Property
Rights > General Overview

Real Property Law > ... > Contracts of
Sale > Enforceability > Undue Influence

HN4 The statutory presumption of undue influence applies if (1) there is an interspousal transaction by which (2) one spouse gains an advantage over the other. [Fam. Code, § 721](#).

Real Property Law > ... > Contracts of
Sale > Enforceability > Undue Influence

HN5 Undue influence consists, among other things in the use, by one in whom a confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage over him. [Civ. Code, § 1575](#).

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6 Any defects in the trial court's statement of decision must be brought to the court's attention through specific objections to the statement itself in order to preserve the complain on appeal.

Civil Procedure > Remedies > General Overview

Family Law > ... > Property

Rights > Characterization > Community Property

HN7 Under [Fam. Code, §§ 721](#) and [1100](#), spouses have fiduciary duties to each other as to the management and control of community property. [§§ 721, subd. \(b\)](#), [1100, subd. \(e\)](#). When the trial court finds a spouse has breached his or her fiduciary duty, but not in a manner rising to the level of sanctionable conduct under [Fam. Code, § 271](#), nor by conduct rising to the level of fraud, malice, or oppression, [Fam. Code, § 1101, subd. \(g\)](#), governs the applicable remedies. [§ 1101, subds. \(g\), \(h\)](#). That subdivision states that its remedies 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. [§ 1101, subd. \(g\)](#).

Governments > Legislation > Interpretation

HN8 The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are clear, the court may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Whenever possible, the court must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless.

Governments > Legislation > Interpretation

HN9 The word "shall" connotes mandatory action and "may" connotes discretionary action.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Family Law > ... > Property

Rights > Characterization > Community Property

HN10 Once a breach of a spouse's statutory fiduciary duty of care is shown, the trial court lacks discretion to deny the aggrieved spouse's request for attorney fees.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a marriage dissolution proceeding, the trial court found that a house was community property, even though the title was in the name of the former husband, and declined to award the husband attorney fees under [Fam. Code, § 1101, subd. \(g\)](#), despite a finding under [Fam. Code, § 721, subd. \(b\)](#), that the former wife breached her statutory fiduciary duty by failing to disclose a cash advance on a credit card of \$24,000. (Superior Court of Los Angeles County, No. BD382683, Scott M. Gordon, Judge.)

The Court of Appeal remanded the matter to permit the trial court to determine the amount of mandatory attorney fees to which the husband was entitled under [Fam. Code, § 1101, subd. \(g\)](#), due to the wife's breach of her statutory fiduciary duty. In all other respects, the court affirmed judgment. The house was community property. Substantial evidence supported a conclusion that it was community property when acquired, even though the wife quitclaimed her interest to the husband in order to obtain a more favorable interest rate on the

mortgage, because the wife testified that the downpayment funds came from money they earned together. The house was clearly community property when the husband executed a second quitclaim deed placing title in both names, as joint tenants. Under [Fam. Code, § 721](#), it was presumed that the husband exerted undue influence when the wife signed a third quitclaim deed, conveying her interest to the husband based on his promise to restore her name to the title once a refinance was complete. The wife did not have to show fraud or deceit or that the husband overtly or implicitly threatened her to get her to sign the deed. The spouses jointly wished to refinance their mortgage to obtain the best possible fixed interest rate and therefore repeated the interspousal transaction once before completed without negative incident. However, the second time around, the husband either never intended to restore the wife's name to the title, or refused to do so after she failed to comport herself in the way he believed his wife should [*337] “behave.” (Opinion by Johnson, J., with Chaney, J., concurring. Concurring and dissenting opinion by Rothschild, Acting P. J. (see p. 349).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Husband and Wife § 34—Community Property—Presumption.

Subject to statutory exceptions, all property acquired during marriage is presumptively community property ([Fam. Code, § 760](#)).

[CA\(2\)](#) (2)

Husband and Wife § 23—Property—Undue Influence.

Spouses have the right to enter into property-related transactions with each other, but occupy a confidential and fiduciary relationship ([Fam. Code, § 721, subds. \(a\), \(b\)](#)). The nature of this relationship imposes a duty of the highest good faith and fair dealing on each spouse as to any interspousal transaction. If one spouse secures an advantage, a rebuttable presumption arises under [§ 721](#) that the advantaged spouse exercised undue influence and the transaction will be set aside. When a presumption of undue influence applies, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of the transaction. The advantaged spouse must show, by a preponderance of evidence, that the advantage was not gained in violation of the fiduciary relationship. Undue influence consists, among other things in the use, by one in whom a confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage ([Civ. Code, § 1575](#)).

[CA\(3\)](#) (3)

Husband and Wife § 23—Property—“Form of Title” Presumption.

The “form of title” presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other.

[CA\(4\)](#) (4)

Husband and Wife § 23—Property—Undue Influence—Promise to Restore Title.

In a marriage dissolution proceeding, a house was properly found to be community property, even though title was in the husband's name, because the husband failed to rebut the presumption under [Fam. Code, § 721](#), that there was undue influence when the wife deeded her interest in the property to him

based on his promise to restore her name to the title once a refinance was complete.

[*Kirkland et al., Cal. Family Law Practice and Procedure (2010) ch. 20, § 20.12*; 11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, §§ 133, 134.]

[*338] CA(5) (5)

Husband and Wife § 38—Community Property—Fiduciary Duty—Attorney Fees.

Under *Fam. Code, §§ 721* and *1100*, spouses have fiduciary duties to each other as to the management and control of community property (*§§ 721, subd. (b), 1100, subd. (e)*). When the trial court finds a spouse has breached his or her fiduciary duty, but not in a manner rising to the level of sanctionable conduct under *Fam. Code, § 271*, nor by conduct rising to the level of fraud, malice, or oppression, *Fam. Code, § 1101, subd. (g)*, governs the applicable remedies (*§ 1101, subds. (g), (h)*). That subdivision states that its remedies 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 (*§ 1101, subd. (g)*). Once a breach of a spouse's statutory fiduciary duty of care is shown, the trial court lacks discretion to deny the aggrieved spouse's request for attorney fees.

CA(6) (6)

Statutes § 21—Construction—“Shall” and “May.”

The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are clear, the court may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Whenever possible, the court

must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless. The word “shall” connotes mandatory action and “may” connotes discretionary action.

Counsel: Law Offices of Richard A. Marcus and Richard A. Marcus for Appellant.

Law Offices of Martin S. Bakst and Martin S. Bakst for Respondent.

Judges: Opinion by Johnson, J., with Chaney, J., concurring. Concurring and Dissenting Opinion by Rothschild, Acting P. J.

Opinion by: Johnson

Opinion

[197] JOHNSON, J.**—Appellant Edward Fossum and his ex-wife, respondent Sandra Fossum, purchased a house in 1994. To obtain the best interest rate, the property was purchased in Edward's ¹ name alone, but later title was placed in both spouses' names. In 1998, the parties agreed to enter into the **[*339]** same arrangement in order to obtain a good interest rate on a loan to refinance their home. Sandra quitclaimed her interest in the property to Edward, but he never restored Sandra's name to the title. **[**198]** Following trial in this action, the trial court determined the house was community property. Edward contends that ruling was in error. We affirm.

Prior to the parties' separation, Sandra took a cash advance on **[***2]** a credit card of \$24,000, but never disclosed the transaction to Edward. The trial court found Sandra had breached her statutory fiduciary duty to her spouse. (*Fam. Code, § 721, subd. (b)*.) ² Edward contends the trial court erred

¹ We refer to the parties by their first names for the sake of clarity and ease of reference. We intend no disrespect.

² Unless stated otherwise, all statutory references are to the Family Code.

when it refused to award him attorney fees, which are mandated under [section 1101, subdivision \(g\)](#), for Sandra's fiduciary violation. On this point, we conclude Edward is correct.

FACTUAL AND PROCEDURAL BACKGROUND

Edward and Sandra Fossum were married in September 1994, after having lived together since 1992. They separated in November 2002.³ The parties had no children together, although Sandra had a minor child from a prior relationship. Sandra filed a petition for dissolution in January 2003. Trial was conducted on various dates during February, March, June and October 2007. The primary dispute at trial, and on appeal, involves the characterization of real property located at 21557 Placerita Canyon Road, Santa Clarita (the property, or house). Escrow on the property closed in October 1994. The downpayment on the property was between \$30,000 and \$38,000. The funds for the downpayment [***3] came from the Fossums' joint savings account.

The first quitclaim deed

Sandra's testimony

At trial, Sandra testified that the source of the downpayment funds was money she and Edward earned together working in Edward's construction business during 1994, repairing homes after the Northridge earthquake. Sandra worked primarily as a "laborer," laying floors, repairing cracks, working on stone, and assisting Edward with design work and shower, kitchen and complete home remodels. She and Edward traveled together to and from work each day. The funds had been kept in a savings account that previously belonged to Edward.

Sandra's name was added to the account after the marriage.

[*340]

In October 1994, Sandra first saw the house and she and Edward decided to buy it. They discussed how to take title to the property. Edward had a better credit rating than Sandra. Because of that, a lender recommended, and Edward and Sandra agreed, that Edward should finance the house and take title to the property in his name, in order to obtain a better interest rate than [***4] the one for which they could qualify if Sandra's name was also on the title. Edward recommended that Sandra execute a quitclaim deed in his favor and promised Sandra that, once the loan closed, he would deed the house back to Sandra so that title would be in both of their names. Sandra believed Edward and agreed to this arrangement.

Sandra signed a quitclaim deed in favor of Edward on October 17, 1994 (the first quitclaim deed). A grant deed executed on October 27, 1994, and recorded in January 1995, shows title to the residence taken in the name of Edward Fossum, a married man, as his sole and separate property.

Edward's testimony

Edward [***5] did not recall having discussed with Sandra the issue of the manner in [**199] which title to the property would be taken in 1994. The loan was intended to be in his name alone because his credit was better and because the funds used for the downpayment were earned by Edward in his construction business during 1994. The funds used for the downpayment were transferred from Edward's separate accounts into a savings account to which Sandra's name had been added after the marriage. Edward and Sandra also combined their checking and credit card accounts after they married.

The second quitclaim deed

³ The once-disputed date of separation, among other issues, having been determined by the trial court and not raised on appeal, is no longer at issue.

Sandra's testimony

After the loan closed in October 1994, Edward kept his promise and executed a quitclaim deed, dated August 16, 1995, in favor of Edward and Sandra Fossum, as joint tenants (the second quitclaim deed). Edward gave this deed to Sandra, and told her he was doing so based on their earlier discussion. Sandra and Edward went to the notary together at the time the second quitclaim deed was signed, and later sent it to be recorded. For reasons unimportant here, the deed was not recorded until January 28, 1997.

[200]** *Edward's testimony*

After escrow closed in 1994, Edward executed the second quitclaim **[***6]** deed, placing the property into both his name and Sandra's, and took it to be notarized. Edward did not recall whether he and Sandra had agreed whether **[*341]** the handwritten deed should be recorded. Edward was not aware the handwritten deed had been recorded until this action was initiated, and his attorney instructed him to obtain title documents. Edward was not, however, surprised when someone from the bank requested a quitclaim deed from Sandra to complete a refinance transaction in 1998.

*The refinance and third quitclaim deed**Sandra's testimony*

In 1998, Sandra and Edward discussed obtaining a fixed, lower interest rate by refinancing the property. Edward told Sandra that because her credit history remained a problem, they should do the same thing they had done when they first bought the house, in order to obtain a better interest rate. Sandra and Edward agreed to refinance the property in Edward's name alone and that, just as before, Edward would restore Sandra's name to the title once the transaction was complete. Sandra

believed Edward, and signed a quitclaim deed in his favor in May 1998 (the third quitclaim deed). Sandra, who had taken a real estate course during the marriage, knew the **[***7]** document she signed was a quitclaim deed, and understood what the document meant when it stated she was conveying title to Edward as his sole and separate property. Sandra would not have executed the third quitclaim deed if Edward had told her that he intended that the house would remain his separate property. After the refinance was completed, Sandra asked Edward several times to return title to the property to both of their names, and Edward said he would. But, Sandra and Edward “got busy,” and Edward never got around to executing a new quitclaim deed. By 2002, the marriage was in trouble and, at Edward's urging, the couple was undergoing counseling. At that point, Edward conditioned his willingness to return Sandra's name to the title on a list of requirements that she “behave” in a certain way, and become a “Godly woman and a good Christian wife,” with a “heart ... free of sin.” It was not until after Sandra moved out of the house that Edward told Sandra he would not, under any circumstances, put her name back on the title.

Edward's testimony

Sandra and Edward jointly applied for a loan to refinance the house. However, once Edward realized he could qualify for the loan without Sandra, **[***8]** he removed her name from the loan application. Sandra voluntarily executed the third quitclaim deed. While the Fossums lived together, mortgage payments on the house were made from a community checking account.

Sandra's undisclosed cash advance

In spring 2002, prior to the parties' separation, Sandra took a \$24,000 cash advance on a credit card, and transferred the funds into her personal bank **[*342]** account. She claimed she needed the funds for living expenses because Edward refused

to give her any money to pay bills. Edward agreed that as of February 2002, he stopped paying any bills that benefited Sandra directly. Edward claimed Sandra used about \$13,500 of the cash advance funds, without his permission or knowledge, to purchase a horse trailer and a car for her son.

In January 2009, the trial court issued its judgment. The court found that the house, purchased during the marriage, was presumptively community property. (§ 760.) The court further found that Edward, who claimed the house was his separate property in which Sandra had only a “ ‘Moore/Marsden’ ” interest,⁴ had failed to produce sufficient evidence to rebut the community property presumption. The court also found that Sandra had [***9] violated her statutory fiduciary duty to Edward, under [section 721](#), when she took the undisclosed cash advance. Pursuant to [section 2030](#), the court ordered Edward to pay Sandra \$20,000, as his contributive share of her attorney fees. The court rejected Edward's request for attorney fees based on Sandra's violation of [section 721](#). Edward appeals.

DISCUSSION

Edward's principal assignments of error are that the trial court erroneously characterized the house as community property, and that he was unjustly denied attorney fees under [section 1101, subdivision \(g\)](#).

1. Characterization of the property

a. The initial property acquisition

The first issue before us is whether the trial court correctly found that the house was community property when it was acquired.

The Fossums purchased the house during their marriage. To obtain a more favorable interest rate

on the mortgage, Sandra quitclaimed her interest in the house to Edward, and the property was acquired in his name alone. The first quitclaim deed was validly executed and recorded. Sandra testified that she understood and agreed [***10] the house would be acquired solely in Edward's name, but believed Edward when he told her that she would be added to the title at a later date. Edward kept that promise, and later executed the handwritten second quitclaim deed placing the property in his name and Sandra's, as joint tenants. A few years later, the Fossums wanted to refinance. They agreed [*343] Sandra would again execute a quitclaim deed in favor of Edward, so he could refinance the house in his name alone to obtain a lower interest rate. Sandra agreed to execute the third quitclaim deed, and understood what she was doing. However, she only signed the third quitclaim deed for the same reason and under the same conditions as when she had executed [**201] the first quitclaim deed—she believed her husband would make good on his promise to return title to the property to both spouses' names, once the refinancing transaction was complete.

CA(1) (1) HN1 Subject to statutory exceptions not relevant here, all property acquired during marriage is presumptively community property. (§ 760; *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 12 [99 Cal. Rptr. 2d 252, 5 P.3d 815] (Bonds).)

Here, the Fossums purchased the house during their marriage, and the trial court found the house was community property [***11] when acquired. Although Edward takes issue with the latter factual finding, substantial evidence supports the court's conclusion.

Sandra testified that the source of the downpayment funds, which came from cashier's checks drawn on the Fossums' joint savings account, was money she and Edward earned together performing home construction and repairs in 1994. Edward claimed the source of the downpayment came from his separate property accounts, and was merely transferred into the parties' joint account to expedite

⁴Referring to *In re Marriage of Moore* (1980) 28 Cal.3d 366 [168 Cal. Rptr. 662, 618 P.2d 208], and *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426 [181 Cal. Rptr. 910].

the purchase transaction. Edward was unable to substantiate this claim. He attributed his inability to do so to his claim that Sandra had taken all his bank records when she moved out of the house, and refused to return them. Edward testified his bank informed him it kept such records for 10 years. Although the timeframe between the home purchase and this dissolution action was within that timeframe, Edward failed to obtain bank records or to produce evidence to rebut Sandra's testimony. The trial court did not find Edward credible. The record supports that conclusion. The house was community property when acquired.

b. The effect of the 1998 transaction

Neither party disputes [***12] the validity of the 1995 interspousal transaction in which Edward executed the second quitclaim deed placing title in his name and Sandra's, as joint tenants. At this point, the house was clearly community property. Thus, the next issue is the effect of Sandra's execution of the third quitclaim deed placing title to the property in Edward's name, as his "sole and separate property."

CA(2) (2) HN2 Spouses have the right to enter into property-related transactions with each other. (§ 721, *subd. (a)*.) However, spouses occupy a confidential and [*344] fiduciary relationship with each other. (§ 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); see *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, [***13] a rebuttable presumption of undue influence will attach to the transaction. (*Bonds, supra*, 24 Cal.4th at pp. 27–28; *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 full knowledge of all the facts, and with a complete understanding of the effect of" the transaction.' [Citation.]" (*[**202] 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.) " '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*.)

Here, the trial court found Edward failed to rebut the presumption of undue influence. Edward contends that the trial court erred by failing to adhere to the rule that the "form of title" in [***14] the third quitclaim deed must control over Sandra's claim of the existence of an oral agreement contradicting that instrument.

Under the "form of title" presumption, the description in a deed as to how title is held presumptively reflects the actual ownership status of the property. (*In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 184–185 [86 Cal. Rptr. 3d 624] (Brooks); *Haines, supra*, 33 Cal.App.4th at p. 292.) This common law presumption is codified in Evidence Code section 662, which states, "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." The presumption is based on the promotion of a public policy that favors the stability of titles to property. (*Brooks, at p. 185*.) Accordingly, absent a showing to the contrary, the status declared by the

instrument through which a party acquired title will control. (*Ibid.*; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter [*345] Group 2010) ¶ 8:32, p. 8-9 (rev. # 1, 2010).) As the court in *Brooks* observed, “[t]he presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected [***15] in the deed is not what the parties intended.” (*Brooks*, at p. 189.)⁵

CA(3) (3) The problem with Edward's argument is that it essentially ignores the rule that **HN3** the form of title presumption simply does not apply in cases in which it conflicts with the presumption that one spouse has exerted undue influence over the other. (*Brooks*, *supra*, 169 Cal.App.4th at p. 190, fn. 8; *Haines*, *supra*, 33 Cal.App.4th at pp. 301–302.) That is the factual scenario addressed in the trial court, and the record we review. Although Edward contends there is insufficient evidence that he exerted any undue influence over Sandra, the trial court found otherwise. We resolve the action in light of that factual finding.

HN4 The statutory presumption of undue influence applies if (1) there is an interspousal transaction by which (2) one spouse gains an [***16] advantage over the other. (§ 721; *Mathews*, *supra*, 133 Cal.App.4th at p. 629.) Those prerequisite elements are satisfied here with regard to the third quitclaim deed. Thus, Edward bore the burden to establish, by a preponderance of evidence, that Sandra's signing of the third quitclaim deed was freely and voluntarily made with full knowledge of all the facts and with a complete [**203] understanding of its effect of making the house Edward's separate property. (133 Cal.App.4th at pp. 630–631.) Substantial evidence supports the trial court's finding that Edward failed to carry this burden.

CA(4) (4) Sandra did testify she executed the third quitclaim deed freely and voluntarily, and that she understood the legal import of a quitclaim deed. However, when Sandra agreed to deed her interest in the property to Edward, she did so based on his promise to restore her name to the title once the refinance was complete. She now claims the transaction was predicated on a false promise that Edward never intended to fulfill. Edward maintains Sandra never raised this argument below and that, to date, she has argued only that he reneged on a promise to put her name back on the title. There is a semantic distinction. But here it is a distinction [***17] without a difference. The pivotal point is that Sandra consistently believed she jointly owned the property with her husband, and would never have agreed to sign the quitclaim deed had she known Edward either believed otherwise, or that he never intended to fulfill his promise and employ the same procedure the couple [**346] used when they acquired the property in order to keep it for himself. **HN5** Undue influence consists, among other things, “[i]n the use, by one in whom a confidence is reposed by another ... , of such confidence ... for the purpose of obtaining an unfair advantage over him.” (*Civ. Code*, § 1575.) Contrary to Edward's assertions, Sandra was not required to show fraud, or deceit or that he overtly or implicitly threatened her to get her to sign the deed. The spouses jointly wished to refinance their mortgage to obtain a fixed rate at the best possible interest rate. To do so, they agreed it benefitted them to obtain the loan in Edward's name. Accordingly, they agreed to engage in a repeat performance of the identical interspousal transaction once before completed without negative incident. However, the second time around, Edward either never intended to restore Sandra's name to the [***18] title, or refused to do so after she failed to comport herself in the way he believed his wife should “behave.” Whatever the reason, the record contains sufficient evidence in the record to support the trial court's finding that Edward abused his position as Sandra's fiduciary and confidant, and failed to deal with his spouse in the highest good faith. Hence, he failed to

⁵ Significantly, when it applies, the form of title presumption may not be “rebutted by evidence that title was taken in a particular manner merely to obtain a loan.” (*Brooks*, *supra*, 169 Cal.App.4th at p. 190; cf. *In re Marriage of Kahan* (1985) 174 Cal.App.3d 63, 69 [219 Cal. Rptr. 700] [when title was taken by spouses as joint tenants to obtain loan, property was presumptively held in joint tenancy].)

rebut [section 721](#)'s presumption of undue influence. The house is community property.

2. No separate property reimbursement for downpayment

Edward takes issue with the trial court's failure to "make any determination about the separate property contributions to the downpayment." We reject Edward's argument because the record shows he did not specifically object to the proposed statement of decision on the basis that the trial court did not apportion his alleged separate property contribution to the downpayment. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134 [275 Cal. Rptr. 797, 800 P.2d 1227]; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 [25 Cal. Rptr. 2d 242] ["any [HN6](#) defects in the trial court's statement of decision must be brought to the court's attention through specific objections to the statement itself ..."].) Because he did not *****19** raise the issue in the trial court, Edward forfeited his right to complain on appeal about the trial court's lack of specificity.

In any event, even if the objection was not forfeited, the record supports a contrary conclusion. The trial court specifically noted it had considered all the evidence. That evidence includes conflicting ****204** testimony as to whether the source of the funds drawn on the parties' joint bank account came from their joint earnings working in Edward's construction business in 1994, or was solely the fruit of Edward's efforts and savings. The trial court found Sandra credible, and determined that Edward was not entitled to any separate property contribution for the downpayment.

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3. Attorney fees for violation of fiduciary duty

Edward contends the trial court improperly denied him an award of attorney fees to which he was entitled under [section 1101, subdivision \(g\)](#). We

agree.⁶

CA(5) (5) [HN7](#) Under [sections 721](#) and *****20** [1100](#), spouses have fiduciary duties to each other as to the management and control of community property. ([§§ 721, subd. \(b\), 1100, subd. \(e\)](#).) When, as here, the trial court finds a spouse has breached her fiduciary duty, but not in a manner rising to the level of sanctionable conduct under [section 271](#), nor by conduct rising to the level of fraud, malice, or oppression, [section 1101, subdivision \(g\)](#), governs the applicable remedies. ([§ 1101, subds. \(g\), \(h\)](#).) That subdivision states that its remedies "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." ([§ 1101, subd. \(g\)](#), italics added.)

Before the parties' separation, Sandra charged \$24,000 to a credit card without disclosing the charge to her husband. Although the parties disputed the use to which those funds were put, it was undisputed that Sandra incurred the debt without disclosure to Edward, in violation of her fiduciary obligations to her spouse and the provisions of [section 721](#). The trial court ordered Sandra to reimburse half the charged amount (\$12,000) *****21** to Edward, but did not award Edward any attorney fees. Edward filed an objection to this order. In its statement of decision, the court rejected Edward's objection, observing that, while it was aware more severe remedies were available, in its view the remedy was in accord with [section 1101, subdivision \(g\)](#). The court was mistaken.

Because the family court found that Sandra breached her fiduciary duty, but that her conduct did not rise to the level warranting an award of

⁶ Edward does not dispute the court's power to award Sandra attorney fees under [section 2030](#). Sandra's appellate brief focuses only on the needs-based attorney fee award, and fails to address the issue of whether Edward is entitled to attorney fees under [section 1101](#) at all.

attorney fees as sanctions under [section 271](#), the key question is whether the trial court properly interpreted [section 1101, subdivision \(g\)](#) as vesting it with the discretion to deny an award of fees to Edward. This issue, which is one of statutory interpretation, is reviewed de novo. (See [Eidsmore v. RBB, Inc. \(1994\) 25 Cal.App.4th 189, 195 \[30 Cal. Rptr. 2d 357\]](#).)

CA(6) (6) “HN8 The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are [*348] clear, we may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.] Whenever possible, [***22] we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless. [Citations.]” ([In re Jerry R. \(1994\) 29 Cal.App.4th 1432, 1437 \[35 Cal. Rptr. 2d 155\]](#).)

[**205] The language of [section 1101, subdivision \(g\)](#) is unambiguous and mandatory. “ ‘ “It is a well established rule of statutory construction that **HN9** the word ‘shall’ connotes mandatory action and ‘may’ connotes discretionary action.” [Citation.]’ ” ([In re Marriage of Hokanson \(1998\) 68 Cal.App.4th 987, 993 \[80 Cal. Rptr. 2d 699\] \(Hokanson\)](#).) **HN10** Once a breach is shown, the trial court lacks discretion to deny an aggrieved spouse's request for attorney fees. (See [In re Marriage of Brewer & Frederici \(2001\) 93 Cal.App.4th 1334, 1344 \[113 Cal.Rptr.2d 849\]](#) [a spouse's statutory fiduciary duty of care arises “without reference to any wrongdoing”].) Accordingly, the trial court lacked discretion to deny Edward's fee request. (*Ibid.*) ⁷ The trial court

erred when it denied any award to Edward for attorney fees attributable to Sandra's violation of [section 721](#). ⁸ The matter must be remanded to permit the trial court to determine the amount of attorney fees to which Edward is entitled, under [section 1101, subdivision \(g\)](#), due to Sandra's violation of [section 721](#).

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DISPOSITION

The matter [***25] is remanded to the trial court to conduct a hearing to determine the amount of attorney fees to which Edward is entitled, under [Family Code section 1101, subdivision \(g\)](#), due to Sandra's violation of [Family Code section 721, subdivision \(b\)](#). In all other respects, the judgment is affirmed. Each party shall bear his or her own costs of appeal.

language in [subdivision \(h\)](#) is that an award of attorney fees is discretionary, over and above the mandatory award of the entire asset at issue. Accordingly, had the Legislature intended to consign an award of attorney fees to the family court's discretion under [subdivision \(g\)](#), it could have done so in plain terms. [Citation.]” ([Hokanson, supra, 68 Cal.App.4th at p. 993](#).)

⁸ We are aware that, although both parties sought attorney fees in this action, Edward never specifically requested an award of attorney fees for Sandra's violation of [section 721](#). Following trial, in October 2007, the court ordered the parties to submit their respective closing arguments, and agreed to set up a conference call to determine if either party wanted additional [***24] time for his or her closing argument. The court also ordered that “the issue on attorney fees [would] be bifurcated after that.” In his closing argument, filed December 10, 2007, Edward noted the court had reserved the issue of attorney fees for a later date. Notwithstanding this reservation, the trial court proceeded to address the question of attorney fees in its tentative decision in March 2008, and invited the parties to file objections. On April 9, 2008, Edward filed written objections to the trial court's tentative decision. He noted he had objections to the court's ruling as to attorney fees, but did “not brief the issue ... as [the court] intended to have a hearing over this issue.” Edward requested that a hearing be conducted so that he could “expand upon [his] objection.” The court apparently conducted a further hearing on the parties' objections in July 2008, after which it issued a final ruling rejecting Edward's assertions. The record does not contain a transcript of the July 2008 hearing. Neither the final ruling nor the judgment addresses the court's resolution of the issue of Edward's entitlement to attorney fees under [section 1101, subdivision \(g\)](#).

⁷ “This [***23] conclusion receives additional support from [subdivision \(h\) of Family Code section 1101](#), which provides that when the pertinent breach of fiduciary duty falls within the ambit of [Civil Code section 3294](#), the ‘[r]emedies ... 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.’ (Italics added.) The clear import of the

Chaney, J., concurred.

Concur by: ROTHSCCHILD

Dissent by: ROTHSCCHILD

Dissent

ROTHSCCHILD, Acting P. J., Concurring and Dissenting.—I concur in the majority opinion except for part 3. of the Discussion, from which I respectfully dissent.

[**206] Assuming that [Family Code section 1101, subdivision \(g\)](#), does provide for a mandatory award of attorney fees, the statute is not self-executing (and the majority does not hold that it is self-executing).¹ If Edward did not ask the trial court for an award of attorney fees pursuant to that statute, then he cannot complain on appeal of the trial court's failure to give him one. ([In re Marriage of Falcone & Fyke \(2008\) 164 Cal.App.4th 814, 826 \[79 Cal. Rptr. 3d 588\]](#); [In re Marriage of Hinman \(1997\) 55 Cal.App.4th 988, 1002 \[64 Cal. Rptr. 2d 383\]](#).) It is Edward's burden, as appellant, to provide us with a record sufficient to demonstrate his entitlement to relief. ([Rancho Santa Fe Assn. v. Dolan-King \(2004\) 115 Cal.App.4th 28, 46 \[8 Cal. Rptr. 3d 614\]](#).) Nothing in the record on appeal shows that Edward ever [***26] asked the trial court for an award of attorney fees pursuant to [section 1101, subdivision \(g\)](#). It is possible that he requested such an award orally at the hearing in July 2008, but he did not provide us with a transcript of that hearing. As appellant, Edward must bear the consequences of that failure. I therefore disagree with the majority's decision not to treat the issue as forfeited. We should affirm the trial court's decision not to award attorney fees in connection with Sandra's breach of fiduciary duty.

I note in addition that [section 1101, subdivision \(g\)](#),

is anomalous in several respects. First, I know of no other Family Code provision calling for a mandatory award of attorney fees. In general, attorney fee awards in marital dissolution actions are discretionary and based on need and ability to pay. (See [§§ 2030–2032](#); [In re Marriage of Duncan \(2001\) 90 Cal.App.4th 617, 629–630 \[108 Cal. Rptr. 2d 833\]](#).) Even fee awards imposed as sanctions are discretionary. (See [§ 271](#).) Second, as interpreted in the case law, [subdivision \(h\) of section 1101](#) provides for a *discretionary* award of attorney fees based on conduct amounting to fraud, oppression, or malice, while [subdivision \(g\) of \[**350\] section 1101](#) provides for a *mandatory* award [***27] of attorney fees based on conduct that might be wholly innocent. (See [In re Marriage of Rossi \(2001\) 90 Cal.App.4th 34, 43 \[108 Cal. Rptr. 2d 270\]](#); [In re Marriage of Hokanson \(1998\) 68 Cal.App.4th 987, 993 \[80 Cal. Rptr. 2d 699\]](#).) Third, as a leading treatise observes, the statutorily imposed fiduciary duties in marital dissolution actions are extremely strict, making innocent violations easy to commit. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2010) ¶ 8:618, p. 8-158.2 (rev. # 1, 2008).) A mandatory award of attorney fees, imposed regardless of the value of the asset at issue, is a harsh remedy for a violation that is merely technical and wholly innocent, as might often be the case, so it is unlikely the Legislature intended such a result.²

Because I conclude that Edward has forfeited the issue, in this case we need not decide whether, contrary to *In re Marriage of Hokanson* and *In re Marriage of Rossi*, [subdivision \(g\) of section 1101](#) should be interpreted as providing for a discretionary rather than a mandatory award of attorney fees. But regardless of whether the statute as it stands is susceptible of such an interpretation, the Legislature might wish to consider amending

¹ All subsequent statutory references are to the Family Code.

² I note, however, that before imposing a mandatory attorney fees award under [subdivision \(g\) of section 1101](#), the trial court must “determine that the party has or is reasonably likely to have the ability to pay.” ([§ 270](#).)

the statute to [***28] make it unambiguously clear that the attorney fee award is discretionary, in conformity with the remainder of [**207] the Family Code and with what was likely the intent of the Legislature when it enacted the statute.

A petition for a rehearing was denied February 10, 2011, and on February 10, 2011, and February 24, 2011, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied April 27, 2011, S191025.