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CALIFORNIA CONTINUING EDUCATION OF THE BAR

In Re Marriage of Fossum

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Community Property

Advantaged husband, who had breached his promise to put his disadvantaged wife back on title to their home, is presumed to have exerted undue influence. The home is community property on dissolution.

Marriage of Fossum (2011) 192 CA4th 336, ___ CR3d ___

In 1994, one month before their marriage, Husband and Wife purchased a home (although the parties dispute the source of the downpayment as being from joint or separate funds). In November 2002, Husband and Wife separated. According to Wife in the dissolution proceeding, the lender in 1994 recommended that Husband take title in his name only because he had a better credit rating. Husband could not recall having discussed the issue. In any event, Wife alleged that she signed a quitclaim deed in favor of Husband on October 17, 1994, only after he had promised to put her back on title after the loan closed. On August 16, 1995, Husband did execute a quitclaim deed placing the home in both their names as joint tenants, which Wife alleged reflected the honoring of his promise. In 1998, the couple wished to refinance to obtain a fixed, lower interest rate. Wife stated that Husband suggested they refinance in his name only because of his superior credit rating and promised to place her back on the title later, as he had done before. In May 1998, acting on that promise, Wife signed a third quitclaim deed in Husband's favor. Wife claimed she asked Husband repeatedly to honor his promise to place her back on title, but he ultimately conditioned his promise on Wife's ability to behave like a "Godly woman." Title remained solely in Husband's name, although all mortgage payments were made from community funds. Before their separation, in the spring of 2002, Wife took an undisclosed \$24,000 cash advance on a credit card. In January 2009, the family law court held that the house was "presumptively community property" and that Husband had failed to rebut that presumption. The court further found that Wife had violated her fiduciary duty under [Fam C §721](#) by taking an undisclosed cash advance, but it refused Husband's request for attorney fees on that basis. Husband appealed.

The court of appeal affirmed the trial court's finding that the home was community property. Wife's assertion that the downpayment came from a joint account was more credible, particularly because Husband provided no evidence (such as bank records) to support his position that the source of the downpayment was his separate funds. After the second quitclaim deed in 1995, the house was indisputably community property. As fiduciaries, spouses are obligated to treat one another with "the highest good faith and fair dealing." Under [Fam C §721](#), if a transaction results in one spouse being advantaged

over another spouse, the law presumes “that the advantaged spouse exercised undue influence and the transaction will be set aside.” The advantaged spouse may rebut that presumption only by a showing by a preponderance of the evidence that he or she had not violated his or her fiduciary duties. Even though Wife freely and voluntarily executed the third quitclaim deed, she did so only after Husband promised her (falsely or not) that her name would be replaced on the title later—just as it had been previously. Wife was not obligated to show fraud, deceit, or a threat by Husband. Thus, Husband was unable to effectively rebut the presumption of undue influence.

The court found unavailing Husband’s insistence that the “form of the title” presumption should be observed to find that the third quitclaim title reflected actual ownership, *i.e.*, as Husband’s separate title. 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.” 192 CA4th at 345.

The court of appeal held that Husband was entitled to attorney fees under the mandatory provisions of Fam C §1101(g) once he proved that Wife effectively violated her fiduciary duties under Fam C §721(b) when she took the undisclosed cash advance on a credit card. The court remanded the case to the trial court to determine the amount of attorney fees due Husband.

The Editor’s Take: Although this decision clearly concerns real estate, I thought readers would profit from the analysis of a domestic relations practitioner. So I turned to Christine Tour-Sarkissian, who teaches Real Estate Transactions and Real Estate Litigation at Golden Gate University Law School and is also a certified family law specialist. Her “Take” follows.—RB

In *Marriage of Mathews* (2005) 133 CA4th 624, 35 CR3d 1 (reported at 29 CEB RPLR 223 (Jan. 2006)), a husband had taken title to the family residence under his name alone and his wife had quitclaimed her interest to him (because their lender had required it in light of her low credit score). The court held that the home was his separate property because she had executed the quitclaim knowingly, freely, and voluntarily with an understanding of its consequences. It did not matter that she had assumed that she would later be put back on title or that all mortgage payments, insurance, and taxes were paid, during the marriage, by the community.

The *Mathews* decision caused much consternation among the family court bar because its result appeared inequitable and not based on desirable policy. So, when *Marriage of Starr* (2010) 189 CA4th 277, 116 CR3d 813 (reported at 33 CEB RPLR 194 (Nov. 2010)), and now *Marriage of Fossum* (2011) 192 CA4th 336, ___ CR3d ___, appeared, family lawyers felt a sense of relief. These cases also should be of interest to real estate lawyers.

The Form of Title Presumption. The language in a deed as to how title is held presumptively establishes ownership of that property. Evidence Code §662 states that “The owner of the legal title to property is presumed to be the owner of the full beneficial title.” This public policy presumption promotes stability of titles to property. It “can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended.” *Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 184, 86 CR3d 624.

The Undue Influence Presumption. However, when dealing with parties who are in a confidential or fiduciary relationship, such as spouses, another presumption applies when one spouse secures an advantage over the other spouse. [Family Code §721](#) presumes that the advantaged spouse exercised undue influence over the other spouse. *Marriage of Haines* (1995) 33 CA4th 277, 296, 39 CR2d 673. This presumption is rebuttable if the advantaged spouse can show, by a preponderance of the evidence, that his or her advantage was not gained in violation of the fiduciary relationship.

Assumptions Versus Promises. In *Mathews*, *Starr*, and *Fossum*, the court found that the wife had freely and voluntarily signed the deed to her husband. In *Mathews*, she had testified that she “assumed” that her husband would put her back on title after close of escrow, but the holding that she had freely and voluntarily signed the deed with full knowledge of its consequences overcame the effect of that testimony. In contrast, the *Starr* and *Fossum* wives admitted having signed the deeds freely and voluntarily and with full understanding of the consequences, but they also testified that their husbands “promised” them that they would later be put back on title, which led the courts there to rule that the property was community property.

The distinction between assuming you will be put back on title and being promised that that will occur derives from the definition of “undue influence.” [Family Code §721](#) does not mention undue influence; instead, it states that spouses are in a confidential and fiduciary relationship and have a duty to each other of the highest good faith and fair dealing. Breach of a promise can therefore constitute a betrayal of confidence, a violation of trust, constructive fraud, and a breach of good faith. See *Brison v Brison* (1888) 75 C 525, 17 P 689; *Kohn v Kempner* (1922) 59 CA621, 622, 211 P 805.

From this, the *Fossum* court held that the breach of the husband’s promise to put his wife back on title defeated his ability to overcome the presumption of undue influence. Consequently, the wife was not required to show fraud, deceit, or coercion, but merely that her husband had abused his position as a fiduciary and failed to deal with his wife in the highest good faith.

Mathews may now be dead. Courts generally prefer to presume that all property acquired during marriage is community property. [Fam C §760](#); *Marriage of Bonds* (2000) 24 C4th 1, 12, 99 CR2d 252. That means that even if the advantaged spouse is able to show by a preponderance of the evidence that the disadvantaged spouse knew what she was doing, his duty of highest good faith and fair dealing may defeat his ability to overcome the presumption of undue influence.

Other Variables. In *Starr* and *Fossum*, the community paid for the mortgage, taxes, and insurance on the property, although title was held by the husband. Might the result have been different if these payments had been made by the advantaged spouse out of his separate funds? Would the result differ if husband had promised wife that title would later be put in her name alone? Would it make a difference if husband took title due to his stronger credit but promised that later wife would be the sole title holder? In *Starr* and *Fossum*, the properties in question were the parties’ family home; would the result be different if the property was an income property? Do *Starr* and *Fossum* make it unimportant that quitclaim deeds usually

recite that the party relinquishing title is doing so knowingly and voluntarily? (In any event, it would certainly not hurt to eliminate that clause from that instrument.)

The message of these cases is that, because the parties are fiduciaries or in a confidential relationship, or both, courts will look beyond the form of title in properties they have acquired and consider the conditions under which the deed was given, which could mean any and all conditions. (The effect of all this on third-party purchasers, creditors, and heirs is a separate issue, not considered here.)

Advising Clients. If the parties do consult attorneys at the outset, the best advice is for both of them to execute a side agreement that sets forth their understandings and is signed by both of them. However, that must be balanced against the risk that such an agreement would, if it were discovered, invite the lender to decline the loan or the title company to decline to insure the title.

If the client is reluctant to demand such a writing from her spouse, then she should still be advised to have evidence of his promise corroborated by independent witnesses, such as the mortgage or real estate broker, the lender, the title company's escrow or title officer, or any other ostensibly neutral witness. It would be helpful if real estate and mortgage brokers had their clients sign a preprinted form agreement to that effect (perhaps in recordable form), but it should not be hard for an attorney to draft a short and nonthreatening document to that effect.

If, on the other hand, the transaction has already occurred, an attorney should strenuously urge the disadvantaged client to promptly gather and preserve evidence that a promise was made, including but not limited to the fact that this was done at the lender's request, as a lender's request to have a quitclaim deed does not make the deed voluntarily executed. See *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378 (reported at 26 CEB RPLR 241 (Nov. 2003)).—Christine Tour-Sarkissian

Thanks, Christine.—Roger Bernhardt