Filed 8/11/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of ELAINE and ALAN D. MARGULIS.	
ELAINE PRENTIS-MARGULIS, Appellant, v. ALAN D. MARGULIS, Appellant.	G041948 (Super. Ct. No. 02D005672) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert H. Gallivan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Law Offices of Steven E. Briggs and Luis A. McKissick for Appellant Elaine Prentis-Margulis.

Law Offices of Burch, Coulston & Buncher and Todd P. Coulston for Appellant Alan D. Margulis.

Stephen Temko and Dawn Gray for the Association of Certified Family Law Specialists and the Southern California Chapter of the American Academy of Matrimonial Lawyers as Amici Curiae, upon the request of the Court of Appeal.

In a marital dissolution proceeding to divide the community property, where the nonmanaging spouse has prima facie evidence that community assets of a certain value have disappeared while in the control of the managing spouse post-separation,[1] should the managing spouse have the burden of proof to account for the missing assets? The answer is yes.

Husband and wife separated after a 33-year marriage and, for 12-postseparation years, continued to handle their joint finances as before: Husband had complete control of substantial community investment accounts and paid all the bills; wife trusted him to manage their finances for their mutual benefit. Just before trial, however, husband disclosed for the first time that the once-brimming investment accounts were virtually empty. Without any corroborating evidence, he attributed the dissipation of account values to proper expenditures and stock market losses.

At trial, wife argued the court should charge husband with the missing funds unless he proved he did not misappropriate the money. Her only evidence of missing funds was a financial statement husband prepared three years after separation and nine years before trial. The trial court concluded the document was insufficient evidence the accounts had contained the stated amounts postseparation, and declined to charge husband with the missing funds. The ensuing property division required wife to make a large equalizing payment to husband.

Based on relevant Family Code provisions, equitable principles, and case law, we conclude the trial court erred in failing to shift to the managing spouse the burden of proof concerning the missing community assets. Once a nonmanaging spouse makes a prima facie showing of the existence and value of community assets in the other spouse's control postseparation, the burden of proof shifts to the managing spouse to

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[1] As used here, "postseparation" means after the spouses have begun "living separate and apart," as that expression is used in Family Code section 771, subdivision (a).

prove the proper disposition or lesser value of those assets. Failing such proof, the court should charge the managing spouse with the assets according to the prima facie showing.

I

FACTUAL AND PROCEDURAL BACKGROUND

Alan and Elaine Margulis separated after more than 33 years of marriage. On August 12, 1996, Alan[2] moved out of the family residence in Irvine and relocated to Chicago to start a new job. Elaine remained in the family home (the Sycamore house), while the couple's two adult children lived elsewhere.

Marital Finances from Separation Through Filing of Dissolution Petition

During the marriage, Alan had been the sole breadwinner and exercised complete control of the couple's finances. He managed several community checking accounts from which he paid the bills. He also managed their investment portfolio, which included brokerage accounts at various institutions, including Sutro & Company, John Hancock Clearing Corporation, and Charles Schwab, the custodian of two community IRA's held in Alan's name.

As explained more fully below, the record contains limited documentary evidence of the *value* of the community investment accounts Alan was managing at separation, or afterward.[3] The joint income tax returns Alan submitted into evidence provide some inkling of value. The Margulis's 1996 Schedule D, the statement of their

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[2] For clarity, "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. [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn.2.)

[3] Despite repeated requests from a court appointed forensic accountant, Alan never produced any account statements for the Sutro & Company or John Hancock investment accounts. As for the two community Charles Schwab IRA accounts, Alan produced only two statements for each account, reflecting the balance of each as of December 31, 1996, and January 31, 1999. According to those statements, on December 31, 1996, four months after separation, account No. 0916 had a balance of $170,062 and account No. 1106 had a balance of $32,701.

capital gains and losses, reported that between January and July of 1996, they sold $1,142,111 worth of short- and long-term stock holdings, and two other long-term investments that generated another $68,091.

The size of the community estate grew larger post-separation due to several substantial infusions of community cash. This increase consisted of $104,839.75 in severance pay related to Alan's preseparation employment, $179,708 from the sale of the couple's Palm Desert house, and $84,858 from cashing out a life insurance policy.[4] Collectively, these additional sums amounted to $369,405.

After Alan moved to Chicago, he continued to manage the community investments and to pay Elaine's bills, including all the expenses for the Sycamore house, and other community obligations. On a number of occasions, Alan also wrote a check directly to Elaine, typically for $1,000 to $1,500.

Initially, Alan paid the bills with checks drafted from the couple's Merrill Lynch money market checking account. In September 1998, Alan began paying his, the community's, and Elaine's bills from a new separate property account, identified as his "Chevy Chase" bank account. In testimony, Alan acknowledged that he freely transferred community property funds into his Chevy Chase account and other separate bank accounts.

Both parties appeared content with the postseparation status quo since neither filed for divorce, and Elaine did not seek a temporary support order. During the separation, as before, Elaine left management of their joint finances entirely to Alan. She received no account statements from the various banks or brokerage firms holding the community assets.

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[4] At trial, Alan stipulated to the community property character of the proceeds received from the desert house and life insurance policy; the trial court found the severance pay was a community asset and Alan does not challenge that finding on appeal.

The Petition for Dissolution and Alan's Property Disclosures

In 2001, Elaine began paying the mortgage on the Sycamore house and also began earning income as an actress. On June 7, 2002, nearly six years after separation, Elaine filed a marital dissolution petition. Alan waited until February 21, 2007, to file his response. Neither document disclosed the extent of the marital property. Elaine's declaration regarding community assets listed only the Sycamore house and miscellaneous art and jewelry, but stated she would amend the petition to add community assets as they became known. Alan claimed in his declaration that "[t]he nature and extent of community . . . property has not yet been ascertained" and that he would amend the petition as the property "is discovered."

The mandatory settlement conference briefs, exchanged in October 2007, more than 11 years after separation, gave the first inkling of the dispute brewing. The two briefs painted dramatically different views of the community property subject to division.

Elaine's brief identified the following community assets within Alan's possession and control, and thus chargeable to him in the division: $180,000 proceeds from the sale of the Palm Desert house; $100,000 proceeds from a Bank of America line of credit; $271,000 severance package from his preseparation employer; $350,000 proceeds "from the IRA and securities sale"; and $75,000 when Alan cashed out a life insurance policy. Elaine estimated the total community property chargeable to Alan as approximately $901,000. Elaine asserted the court could achieve an equal property division if it allowed her to retain the Sycamore house, with $450,270 in equity, and $20,000 cash received from refinancing the property in 1994, and she paid an outstanding tax obligation of $45,000, with Alan providing her a $237,865 equalizing payment.

Alan's settlement conference brief identified the Sycamore house as "the main remaining community asset" and proposed that it be sold and the proceeds divided equally between the parties. He asserted the court could achieve an equal property

division by halving any community retirement or pension benefits and allowing each party to keep the car, bank accounts, and "other financial accounts in [his or her] name since the date of separation."

Alan's brief failed to mention any of the community property investment accounts that had existed at date of separation, such as the Sutro & Company account or the John Hancock and Charles Schwab accounts. Nor did his brief mention the Merrill Lynch bank account or the $369,405 in community funds Alan received postseparation from the severance package, desert house sale, and life insurance policy.

The parties obtained a status only judgment of dissolution on April 4, 2008, and a trial date to resolve the reserved property division issues.

The parties' trial briefs simply expanded on their settlement briefs. Elaine's trial brief asserted higher values for the investment accounts chargeable to Alan, based on a key document she would later offer into evidence as "exhibit 18." She contended Alan had received "from Charles Schwab [IRA] accounts . . . $230,000" and "from Sutro EQ Account . . . $450,000 . . . ."

Alan's trial brief asserted the only "presently existing community" property consisted of the Sycamore house, the personal property within it, and an IRS tax loss carry-forward of $312,122. As for the various financial accounts Alan maintained postseparation, he asserted these had been depleted over the ensuing 12 years by paying community expenses, Elaine's "daily maintenance and expenses," and by stock market losses. He claimed he would introduce evidence of both the expenditures and market losses that depleted the accounts.

Evidence and Findings on the Community Assets Chargeable to Alan

Though the parties clashed at trial on a number of issues relating to the value of the community assets chargeable to Alan,[5] the most significant dispute concerned whether to charge Alan with the value of the stock brokerage and money market accounts in Alan's postseparation control, namely, the Sutro & Company, John Hancock, Charles Schwab, and Merrill Lynch accounts.

Except as to the Charles Schwab IRA's, Alan presented no evidence on the value of these community accounts at any time post-separation. Instead, Alan generally testified that these community accounts were now virtually empty (except for $20,000 at Charles Schwab) due to stock market losses and expenditures for the community's or Elaine's benefit. Alan argued that the only community assets chargeable to him were the $20,000 remaining in the Charles Schwab IRA's.

Contrary to the representation in his trial brief, Alan produced no evidence at trial to show how he disposed of the funds under his control. Nor did he produce evidence tracing funds from community accounts to a community expenditure or purchase. The only specific evidence he offered concerning the disposition of any community funds was his testimony about withdrawing funds from the Charles Schwab IRAs in 1999, 2000, and 2001, in amounts collectively totaling $164,390, as reported on the couple's joint tax returns. Alan testified that he withdrew these IRA funds because he needed money to pay current expenses and wanted to avoid further losses in a declining market. Alan did not offer any evidence to corroborate this claim.

In closing argument, Alan claimed that his general assertion of loss-related IRA withdrawals corresponded to the $312,000 tax loss carry-forward identified as a

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[5] The other asset disputes relevant to this appeal concern a $100,000 line of credit from Bank of America and Elaine's claim Alan unilaterally benefitted from a $46,500 payment for unused vacation received in 1995. Alan asserted both sums were used for the benefit of the community.

community asset in his trial brief. Alan's counsel asserted, "The remaining balance [in those investment accounts] would have been . . . in the tax loss carried forward . . . ." In other words, he argued that after subtracting Alan's expenditures for the community and for Elaine, all that remained in the investment accounts was $312,000, a sum that was lost in the market as "evidenced" by the $312,000 tax-loss carry forward that existed at time of trial.[6]

Elaine introduced evidence to prove the value of the investment accounts in Alan's control postseparation. She testified that, as the nonmanaging spouse, she had no personal knowledge or records of the value of the accounts at any particular time. But she offered into evidence as exhibit 18 a two-page document entitled "confidential personal financial statement" for "Alan/Elaine Margulis," dated February 1, 1999, reflecting total assets of $1,305,500. The itemized list of assets included $133,000 in a money market (identified on the second page as the Merrill Lynch account); $230,000 in the Charles Schwab IRAs; $424,000 in "marketable securities" (presumably the Sutro & Company account), real estate and other investments. Alan admitted under cross-examination that he had prepared and signed this document in February 1999. Elaine's counsel argued the trial court should accept the values of the Merrill Lynch, Charles Schwab, and Sutro & Company accounts as stated on exhibit 18 unless Alan proved he properly disposed of those assets for community purposes or the stock holdings lost value due to market decline. In other words, Elaine argued the burden of proof should shift to Alan to *disprove* the values stated on exhibit 18 because he controlled those accounts and

[6] The limited documentary evidence in the record belies Alan's counsel's assertion that the $312,000 tax loss carry-forward explains what happened to the "remaining" community funds from 1999 onward, when Alan began the IRA withdrawals. According to the couple's joint tax records, in 1999 they already had a preexisting loss carryover of $299,717 from 1998. Moreover, the couple reported receiving approximately $1,570,000 in cash from their short- and long-term stock sales in 1999. Obviously, a market loss of $312,000 would not have wiped out investment accounts holding sales proceeds of that magnitude.

therefore was the only one with the personal knowledge or records to prove the value and disposition of the community funds postseparation. The trial court admitted exhibit 18 into evidence.

In closing argument, Alan's counsel argued exhibit 18 should be given "little weight" because Elaine presented no testimony explaining the document Alan created, and the document was unreliable because it failed to distinguish between community and separate property. Alan also argued exhibit 18 was outdated and therefore shed little light on the value of "the community assets present now."

The trial court ultimately did not rely on the account values listed in exhibit 18. The court explained, "I don't believe it supports, standing alone, [that] your assets listed did, in fact, exist." Without exhibit 18, the trial court had no evidence on the value of any specific investment accounts, except for the Charles Schwab IRA's. As for the IRA's, Charles Schwab account statements showed a combined value in December 1996 of $202,763, tax records reported Alan's withdrawal of $164,390 from those accounts in 1999-2001, and current account statements showed $20,000 remaining in the IRA's. Based on that evidence, the trial court charged Alan with $184,390 in IRA funds. The trial court made no findings on the value of the other investment accounts at separation or later, and did not charge Alan with any of those funds, impliedly accepting Alan's assertion that he spent the money from these accounts on the community and Elaine, and lost the remainder in market downturns.

The trial court also charged Alan with the $369,405 community cash he received from the desert property, life insurance policy, and severance pay. The trial court rejected Elaine's argument that Alan should be charged with the $100,000 Bank of America line of credit or the $46,500 for unused vacation, concluding Alan used both sums for the community's benefit.

Evidence and Findings on Alan's Right to Reimbursement for Postseparation Payments

The other major trial issue concerned Alan's right to be reimbursed from the community property for his postseparation payments on community debts or for Elaine's benefit. The parties stipulated that Dennis Sperry, a certified public accountant, would serve as the court's forensic accountant (Evid. Code, § 730) "to conduct a tracing and analysis of both parties' claims for credits" regarding postseparation payments on community property obligations or for the benefit of the other party. In the stipulation, the parties agreed to provide Sperry with all documents previously produced in discovery and to "cooperate with any reasonable requests" for additional information.

Sperry asked Alan to produce "[a]ll personal bank statements and check registers" for all bank accounts Alan held in his own name or jointly with another from the date of separation through the present. Sperry also asked for "[a]ll brokerage statements for any investments owned individually or jointly" for the same time period.

In response, Alan gave Sperry bank documents for only two accounts, Merrill Lynch and Chevy Chase, although he admitted at trial that he maintained various other community and separate property accounts and freely commingled them. The bank documents Alan provided for the two accounts were incomplete. He gave Sperry Merrill Lynch check registers but no bank statements. Alan provided check registers for the Chevy Chase account from September 10, 1998, through November 12, 2007, but the Chevy Chase bank statements he provided were from December 1, 1999, forward.

Alan gave Sperry no brokerage statements for the Sutro & Company, John Hancock, or Charles Schwab community investment accounts mentioned in the tax records, or for Alan's own brokerage accounts, such as Raymond James or another account referred to in a check register as "LFG trading account." [7]

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[7] When pressed at trial to explain his failure to produce these documents, Alan offered two excuses. First, he stated that when he moved to Chicago in 1996, he left all then-existing financial records at the Sycamore house. Second, he testified that he

Despite Sperry's initial charge to "conduct a tracing" and analyze Alan's claim for reimbursement, his eventual report merely recorded and summarized all the checks listed on the Merrill Lynch and Chevy Chase check registers Alan provided. As Sperry explained at trial, he could not substantiate or disprove Alan's claim for reimbursement for postseparation payments because Alan failed to provide the complete documentation needed for such an analysis. Sperry conceded that his report shed little light on the validity of Alan's claim for credits.

Alan retained his own forensic accounting expert, Jack White, to testify on the issue of credits. White's report, accepted into evidence, purported to do what Sperry's did not: It stated the total amount of credits due Alan for post-separation payments made for the benefit of the community or Elaine. White testified that, based on the check registers and Alan's verbal "explanations," he tallied the checks Alan wrote from the Merrill Lynch and Chevy Chase accounts and characterized each payment as a community expense, Elaine's expense, or Alan's expense. In his report, White concluded that postseparation Alan paid $517,774.85 for community expenses, $25,387.56 for Elaine's separate expenses and $37,825 directly to Elaine. Adding these sums together, White concluded Alan should be credited with reimbursable payments totaling $580,986.

At trial, Elaine objected to White's testimony and report as lacking proper foundation. She argued White had no basis for concluding that particular payments were for the benefit of the community or her, and thus reimbursable, based on merely check registers and Alan's "explanations." She argued White could only conclude a payment was reimbursable if it was made from separate funds, and Alan admitted he commingled funds to such an extent that he could not trace the source of any payments. Consequently, she argued, the trial court should exclude White's opinion that Alan was due reimbursement for payments totaling $580,986.

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did not keep financial records in his Chicago residence because he shared the house with three other men.

The trial court overruled Elaine's objections. The trial court stated it found White's testimony persuasive, and awarded Alan all the credits White recommended.

The Findings on Alan's Breach of Fiduciary Duty

The trial court specifically found Alan breached the fiduciary duty he owed to Elaine "to maintain proper records of all community assets which he had exclusive control and management over . . . ." The court noted that Alan, as managing spouse, "had the best knowledge of where the assets and accounts were located in spite of his protestations otherwise. . . . [H]ad [Alan] taken the opportunity to avail himself of the possibility of locating the documentation . . . it might have enabled the financial experts to present a more detailed analysis of the financial issues in this matter." Instead, Alan produced few records and his failure to keep adequate records hampered the equitable disposition of assets: The court concluded that "the evidence is insufficient to support what really happened to these accounts." Accordingly, the trial court ordered Alan to pay Elaine $20,000 in sanctions for the breach of fiduciary duty and $30,000 as "a contributed share of [Elaine's] attorney fees and costs . . . ."

The Property Division

The trial court awarded the Sycamore house to Elaine, but ordered her to make an equalizing payment to Alan of $189,736, after subtracting the $50,000 he owed her for the sanctions and attorney fees. The court furthered ordered Elaine to sell the house if she could not make the equalizing payment in 45 days.

Elaine appealed from the judgment ordering her to make the equalizing payment or sell the house. Alan filed a cross-appeal from the finding he breached his fiduciary duty and from the resulting award to Elaine of sanctions and attorney fees.

II

DISCUSSION

A. *Elaine's Appeal*

Elaine argues the trial court erred in its community property division, both undervaluing the community assets chargeable to Alan and over-crediting him for payments purportedly made for the community's and Elaine's benefit. She is correct on both counts.

1. The Trial Court Erred in Tallying the Community Assets Chargeable to Alan

Elaine contends the trial court erred when it excluded from the community property chargeable to Alan the investment account funds he controlled postseparation but which were unaccountably missing at time of trial. We agree the trial court erred in refusing to "count" these missing assets, and, more fundamentally, in refusing to shift the burden of proof to *Alan* to show the disposition and valuation of community assets in his control postseparation.

Though Alan never stated a value for the community investment accounts at separation or otherwise (except the Charles Schwab IRAs), the tax records he offered into evidence suggest that in 1996 these accounts likely held more than $1 million and, by the end of 1999, potentially an additional $1.5 million.[8] Exhibit 18, which Alan prepared in early 1999, acknowledged a total value in just three of the couple's accounts (Sutro & Company, Charles Schwab, and Merrill Lynch) stood at $787,000. Collectively, the brokerage and checking accounts were the most valuable community

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[8] The Margulis's 1996 Schedule D, the statement of their capital gains and losses, reported that between January and July 1996, they sold $1,142,111 worth of short- and long-term stock holdings, and two other long-term investments that generated another $68,091. Their 1999 Schedule D reported sales of short- and long-term stock holdings totaling $1,570,150. Alan nowhere on the record accounted for these capital proceeds.

assets the couple owned. By the time of trial, however, Alan claimed that all that was left of this community property was a mere $20,000 in the Charles Schwab IRA's.

While the judgment did charge Alan with a portion of the IRA funds he had controlled — the $164,000 he admittedly removed and the $20,000 that remained — it made no provision for the rest of the community funds Alan had managed postseparation. The trial court was explicit about its reason for refusing to charge Alan with any of these other missing funds: Elaine's only proof that money was missing was exhibit 18, and the court considered the exhibit insufficient to establish the account values. The court stated: "I don't believe [exhibit 18] supports, standing alone, [that] your assets listed did, in fact, exist." The judgment further noted: "The court finds there was no showing as to the total amounts of funds available to [Alan] and it has not heard any evidence to support argument on [Elaine's] part that [Alan] should be charged with the receipt of" the community assets listed on exhibit 18.

In other words, the trial court concluded that Elaine, the nonmanaging spouse who lacked both personal knowledge and records concerning the assets listed on exhibit 18, failed to meet the difficult burden of proving these now missing assets had existed (i.e., there had been $424,000 in Sutro & Company, $133,000 in Merrill Lynch, $230,000 in Charles Schwab IRA's in 1999).

The trial court's failure to place the burden of proof on Alan relieved him of the duty to account for his postseparation management of these assets. Thus, Alan did not have to prove the *amounts* that had been in these accounts or that he had properly disposed of those sums. This lack of accountability poses a risk of abuse and runs afoul of the statutory scheme imposing broad fiduciary duties of disclosure and accounting on a managing spouse.

We thus adopt a rule advocated by amici curiae,[9] but not fully articulated in any published case to date. We conclude that once a nonmanaging spouse makes a prima facie showing concerning the existence and value of community assets in the control of the other spouse postseparation, the burden of proof shifts to the managing spouse to rebut the showing or prove the proper disposition or lesser value of these assets. If the managing spouse fails to meet this burden, the court should charge the managing spouse with the assets according to the prima facie showing. As we explain in detail below, we find support for this rule in general case law explaining the circumstances and equitable principles that justify shifting the burden of proof, Family Code provisions that impose fiduciary duties of disclosure and accounting on spouses, and family law cases addressing the problem of missing community assets.

a. Principles Governing the Decision Whether to Shift the Burden of Proof

We begin by reviewing the principles relevant to deciding whether to shift the burden of proof on a particular issue. Ordinarily, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) This general rule applies "[e]xcept as otherwise provided by law." (*Ibid.*) "[C]ourts may alter the normal allocation of the burden of proof" based on considerations of fairness and policy. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188 (*Amaral*).)

Indeed, California courts consistently approve shifting the burden of proof where circumstances make it impossible for a plaintiff to prove his or her case as, for example, in the wage-and-hour context when employers' "inadequate records prevent

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[9] In response to an invitation from this court, the Association of Certified Family Law Specialists and the Southern California Chapter of the American Academy of Matrimonial Lawyers have filed a joint amicus curiae brief. Amici indicate in their brief that they do not write in support of any party in this case, but only to address an issue of concern to family law practitioners.

employees from proving their claims for unpaid overtime hours [citation] and unpaid meal and rest breaks [citation]." (*Amaral*, *supra*, 163 Cal.App.4th at p. 1189; see also *Fowler v. Seaton* (1964) 61 Cal.2d 681, 687 [applying res ipsa loquitur in case of small child injured at preschool].)

These burden-shifting decisions recognize that "'determining the incidence of the burden of proof . . . "is merely a question of policy and fairness based on experience in the different situations."' [Citations.]" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 120, original italics (*Adams*).) In deciding the issue, "Fundamental fairness must be the lodestar for our analysis." (*Id.* at p. 119.)

The factors relevant to the burden-shifting analysis are well established: "'In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.' [Citations.]" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661.)

Given that "bedrock concerns" of "policy and fairness" drive the analysis (*Adams*, *supra*, 54 Cal.3d at p. 120), it is not surprising that a common trigger for burden-shifting is "when the parties have unequal access to evidence necessary to prove a disputed issue. '"Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim." [Citations.]' [Citation.]" (*Amaral*, *supra*, 163 Cal.App.4th at p. 1189; see also *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35 ["where essential financial records are in the exclusive control of the defendant who would benefit from any incompleteness, public policy is best served by shifting the burden of proof to the

defendant, thereby imposing the risk of any incompleteness in the records on the party obligated to maintain them"].)

Concerns over "unequal access to evidence" (*Amaral*, *supra*, 163 Cal.App.4th at p. 1189) are particularly pressing in the context of a marital dissolution where financial records can be crucial to ensuring the equal division of property required by Family Code section 2550. (All further statutory references are to the Family Code unless otherwise indicated.) Undoubtedly, in marriages and separations like the Margulis's where one spouse exercised exclusive control over community property, the parties will have vastly *unequal* access to evidence concerning the disposition of that property. When this occurs, fairness requires shifting to the managing spouse the burden of proof on missing assets. Moreover, as explained in the next section, the statutory fiduciary duties of disclosure and accounting owed between spouses further justify that result.

b. Fiduciary Duties of Disclosure and Accounting Under the Family Code

Family Code provisions detailing the fiduciary obligations between spouses provide strong support for shifting the burden of proof to the managing spouse when determining the value and disposition of missing assets. The starting point is section 721, which provides that accountability for the management of community assets is a fundamental aspect of the fiduciary duties owed between spouses.

Section 721, subdivision (b), states, in relevant part: "[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, as provided in Sections 16403, 16404,

and 16503 of the Corporations Code, including, but not limited to, the following: [¶] (1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying. [¶] (2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions. [¶] (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property."

Section 721's specific incorporation of "the same rights and duties of nonmarital business partners, as provided in" section 16403 of the Corporations Code, makes clear that the duty to disclose relevant information concerning transactions affecting the community property is an affirmative and broad obligation. Corporations Code section 16403 requires each partner to "furnish to a partner . . . [¶] (1) *Without demand*, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this chapter . . . ." (Corp. Code, § 16403, subd. (c), italics added.)

Section 1100 further delineates the scope of a managing spouse's accountability. That statute not only prohibits a spouse from engaging in certain conduct, such as making a unilateral gift of community personal property or disposing of it "for less than fair and reasonable value, without the written consent of the other spouse" (§ 1100, subd. (b)), but it also requires each spouse to act as a fiduciary toward the other in the management of community assets "in accordance with the general rules governing fiduciary relationships . . . 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 . . . ." (§ 1100, subd. (e).)

Importantly, section 1101 creates a right of action and specific remedies for the breach of fiduciary duty between spouses. Subdivision (a) of section 1101 gives each spouse "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 . . . ." The statutory remedies for a breach of fiduciary duty, specifically including a breach of "those [duties] set out in Sections 721 and 1100," include a mandatory award of 50 percent "of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. . . ." (§ 1101, subd. (g).) If the nondisclosure or wrongful disposition of community property "falls within the ambit" of Civil Code section 3294 (punitive damages upon clear and convincing evidence of oppression, fraud or malice), the court must award to injured spouse the entire value of the asset (§ 1101, subd. (h)).

Finally, section 2100 makes clear that these fiduciary obligations of disclosure and accounting continue to bind spouses after separation until final distribution of assets. Section 2100 states: "[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 . . . . Moreover, 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; see also § 2102, subd. (a)(1) [from date of separation to date community assets are distributed, spouses are subject to § 721's fiduciary duty to disclose assets and update material changes].)

Taken together, these statutes impose on a managing spouse affirmative, wide-ranging duties to disclose and account for the *existence*, *valuation*, and *disposition* of all community assets from the date of separation through final property division. Simply put, these statutes require the spouse to account for his or her management of the property. The managing spouse must reveal if the community property changes value, ceases to exist, or is transferred for less than its worth, thereby depriving the nonmanaging spouse of his or her half-interest. Because of the fiduciary relationship between spouses, the managing spouse must reveal any self-dealing or other conduct that impaired the value of the property and entitles the other spouse to compensation.

Applying these statutes to the facts of this case, a trial court could conclude Alan breached his fiduciary duties of disclosure and accounting. A court could find he breached his duty to provide full and accurate disclosure of all community assets when in pretrial exchanges he failed to inform Elaine that $20,000 was in the Charles Schwab IRA's, asserting that the only existing community property was the Sycamore house. A trial court similarly could find Alan breached his duty to disclose immediately and fully "any material changes" in the community property (§ 2100, subd. (c)), by failing to tell Elaine until just before trial that all the community investment and checking accounts he had managed were virtually empty. Additionally, by refusing to provide Elaine with any documentary or other corroborating proof of what actually happened to the money that had once been in those accounts, Alan may have breached his duty to furnish to Elaine "any information concerning the [community's] business and affairs reasonably required for the proper exercise of [her] rights" (Corp. Code, § 16403, subd. (c)(1); § 721, subd. (b)), which included her right to pursue a claim against Alan for "impairment to [her] . . . one-half interest in the community estate" (§ 1101, subds. (a), (g) & (h)).

The trial court, however, found a single, narrow breach of duty by Alan: a breach of the duty to keep and provide adequate records. In so ruling, the trial court impliedly found Alan did not owe broader fiduciary duties of disclosure and accounting.

The trial court's erroneous finding on the scope of Alan's duties led it to apply the wrong remedy. Instead of awarding Elaine at least 50 percent of the value of undisclosed or wrongfully transferred assets (§ 1101, subds. (g) [50 percent], (h) [100 percent upon proof of oppression, fraud or malice]), the trial court ordered Alan to pay Elaine $20,000 as "sanctions," plus attorney fees.

The trial court's failure to find Alan breached his broader fiduciary duties of disclosure and accounting stemmed from the court's denial of Elaine's request to charge Alan with the exhibit 18 asset values unless he disproved those values or proved he properly disposed of those assets. Although the trial court found that Elaine had satisfied the requisite foundation to admit the exhibit, it accorded the document little or no weight because Elaine had not prepared it and had no evidence to support it. Consequently, according to the trial court, Elaine failed to carry her burden of proving the accounts itemized in exhibit 18 ever had the *values* listed in that document, and Alan could not be charged with wrongfully disposing of assets he never possessed. But, as discussed above, the trial court misapplied the burden of proof.

Elaine's introduction of exhibit 18, which Alan conceded he prepared, satisfied her initial burden. The statutory fiduciary duties of disclosure and accounting then effectively shifted the burden to Alan to rebut the presumption he should be charged with the assets listed on exhibit 18, a document that was prima facie evidence of the account values it stated.

Alan's duty to make "full and accurate disclosure of all [community] assets" (§ 2100, subd. (c)) and "of all material facts . . . regarding the existence, characterization and valuation" of those assets (§ 1100, subd. (e)), his duty to "immediately, fully and accurately update and augment" that disclosure (§ 2100, subd. (c)), and to furnish "[w]ithout demand . . . information concerning the [community's] business and affairs reasonably required for the proper exercise" of Elaine's community property rights (Corp. Code, § 16403, subd. (c)(1)), imposed on

Alan the duty to *produce evidence* of the existence and value of the community accounts he controlled. (See also *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1475-1476 [managing spouse has sua sponte duty of disclosure regarding existence and valuation of community assets]; *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1347-1348 [managing spouse has affirmative duty to acquire and disclose information concerning valuation of community assets].) Shifting the burden to Alan under these circumstances simply enforces this statutory duty of production.

This statutory framework also supports shifting to Alan the burden of proof on the proper disposition of the assets in his control.[10] Specifically, section 721, the lead statute articulating the fiduciary duties owed between spouses, imposes on each an affirmative duty to produce "full information of all things affecting any transaction which concerns the community property." (§ 721, subd. (b)(2).) The statute also requires the managing spouse to "[a]ccount[] to the spouse, and hold[] as a trustee, any benefit or profit derived from any transaction . . . which concerns the community property." (§ 721, subd. (b)(3).) The statute goes yet further in requiring a spouse to produce "full information" concerning his or her management of community assets by specifically incorporating from the Corporations Code a mandate that the spouse furnish "[w]ithout demand, any information concerning the [community's] business" that the other spouse requires for the exercise of his or her rights. (Corp. Code §16403, subd. (c)(1); § 721,

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[10] Another way to state this evidentiary burden is that Elaine's prima facie evidence that Alan controlled $787,000 worth of community funds in 1999 created a rebuttable presumption of the value of those funds and that Alan misappropriated or wrongfully transferred the now-missing funds. "'A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.' [Citation.] The trier of fact is required to assume the existence of the presumed fact 'unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.' [Citation.]" (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296-297 (*Haines*).)

subd. (b).) Together, these requirements compel a spouse to *produce evidence* as to the disposition of community property, or, stated differently, to *account* for the property in his or her control. (See *Haines*, at p. 296 [§ 721 is a statute "of mutual accountability, requiring each spouse to show his or her conduct in connection with an interspousal transaction conformed to the legal standard" applicable to fiduciaries].) As with requiring the managing spouse to establish the value of community assets, shifting the burden to the managing spouse to prove proper disposition of assets simply enforces this statutory duty of production.

In summary, these Family Law statutes imposing broad fiduciary duties of disclosure and accounting on spouses from separation onward justify shifting to the managing spouse the burden to establish the value and disposition of missing assets.

c. Cases Addressing the Problem of Missing Community Assets

Although there is a lack of case law addressing the specific problem of proof this case presents, three cases lend support to our conclusion that the managing spouse should bear the burden of proving the proper disposition of missing assets if the nonmanaging spouse makes the requisite prima facie showing. Of these three opinions, two reversed trial court judgments which failed to take into account missing assets in the division of marital property, thereby clarifying the trial court's duty to make findings on all community assets under a spouse's control postseparation. (See *Williams v. Williams* (1971) 14 Cal.App.3d 560 (*Williams*); *In re Marriage of Ames* (1976) 59 Cal.App.3d 234 (*Ames*).) The third opinion, *In re Marriage of Valle* (1975) 53 Cal.App.3d 837 (*Valle*), affirmed a judgment that charged the managing spouse with missing property because he failed to prove its proper disposition. In other words, *Valle* shifted the burden of proof to the managing spouse to show the proper disposition of community property — a key aspect of the approach we adopt here. While none of these

three cases addresses the added problem of proving the *value* of missing assets, they provide support for the burden-shifting approach we adopt.

The rationale for shifting the evidentiary burden concerning missing assets to the managing spouse arises from the simple fact that an accounting of all community property is required so the court may divide it equally. In *Williams, supra*, 14 Cal.App.3d 560, the appellate court reversed an interlocutory judgment dividing the community property because the trial court failed to include missing assets in the property division, the same failure that occurred here when the court erroneously rejected Elaine's prima facie showing and required no rebuttal by Alan.

The husband and wife in *Williams* were married almost 13 years when, with divorce imminent, husband withdrew $110,489.26 from community accounts ($39,251.50 from savings and $73,237.76 from a stock fund). (*Williams*, *supra*, 14 Cal.App.3d at p. 563.) An accountant appointed to audit the couple's financial records was unable to trace $49,363 of the withdrawn funds, and the accountant could not determine whether the husband spent the balance on community or separate debts. The trial court made no findings concerning the $110,489.26, and disregarded it in dividing the community estate. The appellate court reversed, agreeing that in failing to require the husband to account for the missing funds, the trial court failed to perform its duty "to equally divide the community property." (*Id.* at p. 564.)

The court noted, "The $110,489.26 in dispute here was intact immediately prior to the filing of the action. Under these circumstances, the husband would obtain 'an unfair advantage' over his wife if he is not required to account for that portion of the money which was community property and to reimburse the wife for her share of any of the community property not shown to have been used for community purposes." (*Williams*, *supra*, 14 Cal.App.3d at p. 567.) The court remanded for a "retrial of the issue of community property . . . includ[ing] all sums of money received and disposed of by the husband . . . when the divorce action was imminent." (*Id.* at p. 568.)

Ames, *supra*, 59 Cal.App.3d 234 is the second case where the court reversed a partial judgment dividing community property because the trial court failed to award the nonmanaging spouse her share of missing community funds. *Ames* concluded the trial court abused its discretion in finding husband "had properly accounted for $24,655 of community property." (*Id.* at p. 237.) The appellate court found, through its own "most benign reading of an incredibly vague record," that husband "failed to sustain his burden [to account for community funds] by a very large amount." (*Ibid.*, fn. 4.) Specifically, the court concluded "about $9,000 [remains] unexplained by George." (*Id.* at p. 237.) Though the discussion in *Ames* is relatively cryptic, the lesson is clear: A judgment for marital dissolution must take into account all community property in a spouse's management and control postseparation, and the property's "disappearance" at time of trial does not excuse the court from making the necessary findings on its disposition.

Significantly, Justice Thompson's concurrence in the *Williams* case sought to provide the trial court with additional guidance rather than merely remanding the matter with instructions to make findings on the missing funds. Unlike the majority, Justice Thompson viewed "the question" in *Williams* as "one of burden of proof and of producing evidence." (*Williams*, *supra*, 14 Cal.App.3d at p. 568 (conc. opn. of Thompson, J.).) He explained his reasoning as follows: "In a dispute over disposition of property in a divorce action, the wife has the burden of proof of establishing the existence of community property, and except as she may be aided by presumptions must produce evidence which carries that burden. [Citations.] [¶] Where, as here, the wife has concededly established the existence of community assets, has established that certain of those assets are missing, and has presented evidence from which it may be inferred that the husband wrongfully disposed of them, she has, in my opinion, met her burden of proof. The issue then shifts to the validity of dispositions of community property by the husband. On that issue, whether dispositions of community property by the husband are

proper on the one hand or fraudulent or illegal on the other, I think the better rule would place the burden of producing evidence of the nature of the dispositions upon the husband." (*Id.* at pp. 568-569.)

Justice Thompson cited the equitable "principle of burden based upon superior knowledge of the facts" as justification for shifting to the managing spouse the burden of proof on the "unexplained disappearance of community funds . . . ." (*Williams*, *supra*, 14 Cal.App.3d at p. 569 (conc. opn. of Thompson, J.), citing *See v. See* (1966) 64 Cal.2d 778, 784.) Justice Thompson explained: "It is appropriate to place the burden of producing evidence upon the party who has access to the facts where those facts are inaccessible to the other party to the litigation. [Citation.] . . . [T]he husband, as manager and controller of the community property, has access to the facts from which it may be determined whether a disposition of community assets by him was proper or improper. Conversely, the wife, as the [nonmanaging spouse] has little if any access to those facts." (*Williams*, at p. 569.)

Although no published case has adopted the concurring view in *Williams*, the opinion in *Valle*, *supra*, 53 Cal.App.3d 837 implicitly endorsed the burden-shifting approach Justice Thompson advocated. In *Valle*, *supra*, 53 Cal.App.3d 837, the husband appealed the community property division, arguing the trial court improperly charged to him the value of an automobile and Mexican realty that he lost in satisfaction of community debts. (*Id.* at p. 844.) In affirming the judgment, the appellate court approved the trial court's decision to place upon the husband the burden of proving the proper disposition of these two community assets.

The *Valle* court explained its reasoning as follows: "The uncontroverted evidence discloses that these items were community property and were in Manuel's possession [at] the time of separation. Under these circumstances it was incumbent upon Manuel to persuade the trial court that the assets in dispute had been lost by reason of discharging community debts [citation]. The record, however, is consistent with the

conclusion, implicit in the court's ruling, that Manuel fell short of sustaining the burden of proof. Although he testified at the trial that the Pontiac automobile had been given to his brother in return for a loan . . . and that the real property had been lost due to default in making the monthly payments thereon, he failed to substantiate these allegations in any manner. . . . In this situation, the trial court was fully justified in disregarding Manuel's uncorroborated testimony and in including the assets in question in the community property." (*Valle*, *supra*, 53 Cal.App.3d at p. 844.)

Although *Valle* provides support for placing the burden of proof on the managing spouse to show the disposition of missing community assets, it is Justice Thompson's concurrence in *Williams* that best articulates the equitable basis for shifting the burden of proof, namely, the "principle of burden based on superior knowledge of the facts . . . ." (*Williams*, *supra*, 14 Cal.App.3d at p. 569 (conc. opn. of Thompson, J.).) Here, Alan, as managing spouse, had full access to the facts concerning the disposition of funds in the community accounts, both as to his own withdrawals and expenditures and the purported losses from stock market downturns. Elaine had neither personal knowledge nor access to records establishing those facts. Alan's superior knowledge of the disposition and value of the accounts in his control require that he bear the burden of proof on both issues.

Alan objects to this burden-shifting approach, arguing that it erroneously presumes the managing spouse breached a fiduciary duty from the "mere" fact that assets are missing at time of trial. Alan argues a managing spouse should not be charged with missing assets unless there is evidence of mismanagement or misappropriation. But there is no statutory or equitable basis for imposing such a prerequisite on the nonmanaging spouse before shifting the burden of proof to the managing spouse. As a practical matter, Alan's proposal increases the risk of an unfair property division because a nonmanaging spouse who lacks personal knowledge and records of the disposition of missing community assets would find it extremely difficult to make the initial showing of

mismanagement or fraud to shift the burden of proof. No sound policy reason supports the adoption of Alan's proposed rule; indeed, the rule would contradict a managing spouse's obligation to provide the full disclosure and accounting owed to a nonmanaging spouse.

As authority for requiring a predicate showing of fraud or mismanagement before shifting the burden of proof, Alan cites *Bono v. Clark* (2002) 103 Cal.App.4th 1409 (*Bono*). The case does not persuade us to adopt the rule he proposes.

In *Bono*, *supra*, 103 Cal.App.4th 1409, the husband and wife separated in 1994 and their dissolution action was still pending in 1998, when the husband died. The wife sued her husband's estate for declaratory relief, asserting she was entitled to her one-half share of certain personal property assets of the community that the husband controlled at separation, but were missing from the estate inventory list. The assets consisted of approximately $25,000 worth of "livestock (11 or 12 cows and four horses)" and a few vehicles. (*Id.* at p. 1429.) At trial, the wife argued her husband must have disposed of the assets in violation of his fiduciary duties under the Family Code. The trial court rejected the wife's claim for half of the missing assets, finding she "failed to carry her burden of proving decedent's breach of fiduciary duty." (*Id.* at pp. 1429-1430.)

The Court of Appeal affirmed on the ground that the wife "offered no evidence" showing her husband "had disposed of the items in contravention of his fiduciary duties" and "[t]he mere absence of the assets four years after separation is insufficient to raise an inference that decedent disposed of them inappropriately. With respect to the cows and horses, for example, it might be equally reasonable to infer that they had died in the intervening years." (*Bono*, *supra*, 103 Cal.App.4th at p. 1430.)

We believe *Bono* has limited applicability here, given its unusual circumstances involving an action against an *estate* for missing livestock and farm vehicles. The equitable principle of burden based on superior knowledge did not apply because the managing spouse had died, leaving the estate at a disadvantage in explaining

what had happened to the livestock and vehicles. Thus, *Bono* does not support Alan's argument that proof of mismanagement or fraud should be a prerequisite to shifting the burden of proof on missing community assets to the managing spouse.

Alan's other arguments similarly lack merit. First, he argues that allowing Elaine to use exhibit 18 as prima facie evidence of the value of the assets that should be charged to him violates the rule that, for purposes of marital property division, assets should be valued as near as practicable to time of trial, citing section 2552, subdivision (a). Alan's argument ignores subdivision (b) of that statute, which allows the trial court to use an alternate valuation date where fairness requires. (See *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625 [court has broad discretion to determine valuation date to accomplish equitable division; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1435 [same].)

Alan's argument also ignores the statutory remedies for breach of fiduciary duty in the management of community property set forth in section 1101. That statute mandates that, for purposes of awarding the injured spouse 50 percent of the value of an undisclosed or wrongfully transferred asset (or 100 percent, in the event of oppression, fraud, or malice), the trial court must value the assets at the *highest* of three possible dates: "The value of the asset shall be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court." (§ 1101, subd. (g).) These statutes clearly authorize a trial court to use valuation date that best provides adequate compensation to the injured spouse.

Alan's reliance on *In re Marriage of Priddis* (1982) 132 Cal.App.3d 349 is likewise fruitless. Alan cites *Priddis* for the proposition that "the mere passage of time alone between the dates of separation and trial is an insufficient basis for setting the valuation date at a time other than 'as near as practicable to the time of trial.'" (*Id.* at p. 358.) The present case, however, involves more than simply "the mere passage of time," as was the case in *Priddis*. Instead, Elaine points to the unexplained

postseparation disappearance of substantial community funds as apt justification for an alternate valuation date.

Finally, Alan argues that shifting to the managing spouse the burden of proof on the disposition of missing assets is overly burdensome in the circumstances of a long separation, such as the 12-year separation involved here, and it conflicts with section 721's admonition that "[n]othing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions." (§ 721, subd. (b)(2).) The argument lacks merit.

Requiring a managing spouse to account for the disposition of missing assets does not entail a "detailed" accounting. To the contrary, the managing spouse simply must show by competent evidence management of assets in his or her control in accord with the fiduciary obligations set forth in sections 721 and 1100. The trial court undoubtedly will take into account the length of the separation and the attendant difficulties of proof in determining whether the account made is satisfactory.

Nevertheless, it remains clear that the duty to account for the disposition of community property exists from separation to final distribution of assets. (§§ 1100, subd. (e), 2100, subd. (c), 2102, subd. (a)(1).) The duty to account does not dissipate over the course of an unusually long separation. Weighing equities, the property in issue belongs to both spouses and the nonmanaging spouse's right to an accounting outweighs the burden on the managing spouse to account.

We do not address Elaine's specific challenges to the trial court's finding that Alan should not be charged with possession of two other community assets, a payment of $46,500 for unused vacation and $100,000 proceeds from a Bank of America line of credit. We need not discuss these issues because the trial court's erroneous placement of the burden of proof as to the disposition of assets necessitates a complete retrial of the community property issues.

2. The Trial Court Erred in Reimbursing Alan from the Community Property for Postseparation Payments

Elaine contends the trial court erred in ordering that Alan be reimbursed from community property a total of $580,986 for payments he made for the benefit of the community and Elaine after separation. She contends the trial court improperly relied on opinion testimony from Alan's expert, Jack White, which she moved to strike as lacking a proper basis. (See Evid. Code, § 803.) Elaine's argument has merit.

In the seminal case of *In re Marriage of Epstein* (1979) 24 Cal.3d 76 (*Epstein*), superseded by statute on other grounds, the California Supreme Court recognized a spouse's right to reimbursement from community property for payment of postseparation community expenses from the spouse's *separate* funds. The high court adopted the view expressed in *In re Marriage of Smith* (1978) 79 Cal.App.3d 725 (*Smith*), as follows: "'[A]s a general rule, a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution . . . .'" (*Epstein*, at p. 84, quoting *Smith*, at p. 747.) Conversely, if the managing spouse uses community money to pay a community obligation, there is no basis for reimbursing the spouse for that payment. (See *Smith*, at p. 744 [judgment reimbursing husband for postseparation payments on community debts reversed because "there is no showing these payments by husband were made with his separate funds"; court ordered retrial rather than entry of judgment for wife because evidence suggested "some of the funds came from husband's . . . separate property"].)

White's opinion lacks a proper basis because White testified that Alan was entitled to reimbursement from the community property for postseparation payments without knowing whether Alan used his *separate* funds to make the payments in issue. In fact, Alan himself admitted it would be impossible to trace his payments to either a community or separate property source because after the separation he freely

commingled community property with separate property in his various checking accounts.

Consequently, in his testimony and report, White did not trace individual payments to separate property sources. Rather he simply concluded Alan was entitled to reimbursement for particular payments based on the nature and *purpose* of the payment. In other words, if White determined a payment was for the benefit of either the community or Elaine, based on the corresponding check register entry and Alan's explanation, then he concluded Alan should be reimbursed. But the *purpose* of a payment is only part of the equation. As *Epstein* and *Smith* make clear, the *source* of the postseparation payment is crucial. A spouse is entitled to reimbursement for payment of community obligations only if those payments are made from the spouse's separate property.

Because there is no evidence Alan's postseparation payments for the community or for Elaine came from separate funds, we must reverse the judgment giving Alan a substantial credit for those payments in the community property division. (*Smith*, *supra*, 79 Cal.App.3d at p. 744.) On remand, the trial court must limit any reimbursement to payments that Alan proves came from separate property.

We note that Alan's evidentiary burden on retrial will be difficult because he commingled community and separate property funds. Commingling creates a rebuttable presumption that all the funds in the account are community property. "[T]he mere commingling of separate property and community property funds does not alter the status of the respective property interests, provided that the components of the commingled mass can be adequately traced to their separate property and community property sources. [Citation.] But if the separate property and community property interests have been commingled in such a manner that the respective contributions cannot be traced and identified, the entire commingled fund will be deemed community property

pursuant to the general community property presumption of section 760. [Citation.]" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-823.)

Of course, a spouse who has commingled community and separate funds can defeat the presumption with evidence, employing traditional family law tracing methods, such as direct tracing or the family expense method of tracing. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 612; *In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1058-1059.) Thus, to obtain reimbursement for any postseparation payments made from his commingled accounts, Alan should employ one of these tracing methods.

Tracing undoubtedly will raise additional questions concerning whether Alan owed the community reimbursement for his apparent use of community funds for separate purposes. (See *Epstein*, *supra*, 24 Cal.3d at p. 89 ["trial court erred in failing to charge husband's share of the community property for" funds withdrawn to pay his separate expenses].) For example, the Merrill Lynch check registers indicate Alan transferred approximately $37,000 of community funds from that account into either his separate accounts or unidentified accounts. On remand, the trial court can deal with all such reimbursement issues.[11]

Elaine raises another challenge to the trial court's order granting Alan credits for postseparation payments. She contends the court failed to make the necessary finding under *Epstein* on whether Alan made any part of the payments in "in discharge of his support obligation . . . ." (*Epstein*, *supra*, 24 Cal.3d at p. 86.) *Epstein* held that

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[11] Of course, careful tracing may also reveal additional community property subject to division. For example, the Merrill Lynch check registers reflect Alan transferred $25,000 of community funds into the "LFG trading account," and used another $4,000 of these community funds for "MP Stock purchase." White's report identified both expenditures as Alan's separate expenses, based on Alan's explanation. Other documentary evidence suggests Alan's separate Raymond James brokerage account may include funds from various community accounts; in fact, Alan's trial brief refers to the Raymond James account as a community property account.

otherwise reimbursable postseparation payments made from separate property may not be reimbursed if "such sums were paid to fulfill [the spouse's] support obligations." (*Id.* at p. 82.)

Alan argues Elaine waived the issue of "*Epstein* credits" by failing to raise it in the trial court. We need not resolve the issue of waiver, however, because reversal is required for insufficiency of the evidence, as discussed above. On remand, the trial court must make the necessary findings identified in *Epstein*, including whether the parties "entered into an 'agreement' for support . . . and whether husband should be estopped . . . from denying that his payments were in discharge of his duty to support." (*Epstein*, *supra*, 24 Cal.3d at p. 86, fn omitted.)

B. *Alan's Cross-Appeal*

Alan's cross-appeal merits little discussion. His challenge to the trial court's finding that he breached his fiduciary duties to Elaine is meritless. Likewise, his additional challenges to the award against him for sanctions and attorney fees fails, given the clear statutory authorization for both awards in light of Alan's breach of duty. (See § 1101, subd. (g).) Nevertheless, we reverse the attorney fees and sanctions award so the court may revisit the question of the appropriate remedy should the evidence established Alan's breach of duty.

III

DISPOSITION

The judgment is reversed. Elaine is entitled to her costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.