

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)

ORDER MODIFYING OPINION;
NO CHANGE IN JUDGMENT

It is ORDERED that the opinion filed August 11, 2011, is modified as follows:

1. On page 19, add the following sentence to the end of the last paragraph on that page:

Section 2107, subdivision (c), mandates an award of sanctions, including reasonable attorney fees, against a spouse who fails to comply with these fiduciary duties of disclosure and accounting. (§ 2107, subd. (c); *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1477 (*Feldman*).)

2. Beginning at the top of page 20 with the words “Taken together,” delete the remainder of part b of the opinion, which concludes on page 23 with the paragraph that begins “In summary,” and replace it with the following text, including new footnotes numbered in order, which will require renumbering of all subsequent footnotes:

Taken together, these Family Code provisions 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. These statutes obligate a managing spouse to disclose soon after separation all the property that belongs or might belong to the community and its value, and then to account for the management of that property, revealing any material changes in the community estate, such as the transfer or loss of assets. This strict transparency both discourages unfair dealing and empowers the nonmanaging spouse to remedy any breach of fiduciary duty by giving that spouse the “information concerning the [community’s] business” needed for the exercise of his or her rights (Corp. Code, § 16403, subd. (c)(1); § 721, subd. (b)), including the right to pursue a claim for “impairment to” his or her interest in the community estate (§ 1101, subs. (a), (g) & (h)). And most importantly for present purposes, in a trial where community assets are missing, these statutory duties of disclosure and accounting serve to shift the burden of proof on missing assets to the managing spouse.

We find support for this crucial shift of the burden of proof in the recurring mandate, running throughout the statutory scheme, that the managing spouse must furnish information to the other spouse concerning the community property. For example, various statutes require the managing spouse 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)), and to “immediately, fully and accurately update and augment” that

disclosure (§ 2100, subd. (c)). Collectively, these provisions impose a sua sponte duty on the managing spouse to advise the nonmanaging spouse of the *existence* and *value* of the community property. (See *Feldman, supra*, 153 Cal.App.4th at p. 1488 [“Aaron had a fiduciary duty to disclose the existence of the 401(k) account . . . in the first place without prodding from Elena”]; *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334, 1347-1348 [managing spouse had affirmative duty to acquire and disclose information concerning value of community pension plan].)

These Family Code statutes impose a similar sua sponte duty on the managing spouse to furnish information concerning the *disposition* of community assets. For example, section 721 requires a spouse to produce “full information of all things affecting any transaction which concerns the community property” (§ 721, subd. (b)(2)), to “[a]ccount[] to the [other] spouse, and hold[] as a trustee, any benefit or profit derived from any transaction . . . which concerns the community property” (§ 721, subd. (b)(3)), and to 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), italics added; § 721, subd. (b)). (See *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 296 (*Haines*) [§ 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].)¹

¹ *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408 (*Walker*), explains that although certain language in section 721, subdivision (b), suggests the spousal duty of disclosure depends upon a “request” for information, the legislative history of the statute compels a contrary conclusion. (See *Walker*, at pp. 1419-1428.) *Walker* cites the ambiguity created by subpart (2) of subdivision (b) of the statute, which lists as one of the fiduciary duties of a spouse “[r]endering upon request, true and full information of all things affecting any transaction which concerns the community property. . . .” (§ 721, subd. (b)(2), italics added.) The “upon request” language in that subpart conflicts with

These substantial sua sponte duties of disclosure and accounting bind the managing spouse until the community property is divided. (§ 2100, subd. (c); § 2102, subd. (a)(1).) It follows, then, that these statutory duties can play a significant role at a trial to divide the property. In a situation like the present case, where the nonmanaging spouse makes a prima facie showing that community assets are missing, that showing implicates the managing spouse's duty to "update and augment" disclosure as to "any material changes" in the community property. (§ 2100, subd. (c).) In fact, section 2100 states that the purpose of this continuing disclosure requirement is "so that . . . at the time of trial on these issues, each party

subdivision (b)'s broader requirement that spouses act in conformity with the fiduciary duties of nonmarital business partners "as provided in [Corporations Code] Sections 16403, 16404, 16503," including the duty to furnish "[w]ithout 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)(1), italics added.)

Walker reviewed the legislative history of section 721 and, specifically, the 2002 amendment of the statute which "define[d]" the rights and duties of spouses by incorporating "the Corporations Code sections enacted in 1996," i.e., Corporations Code sections 16403, 16404, 16503. (*Walker, supra*, 138 Cal.App.4th at p. 1427.) The court reasoned that because these Corporations Code sections "impose a duty on partners to furnish each other *without demand* 'any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties' [citation]," the Legislature intended by this amendment to create "a new obligation . . . imposing, for the first time, a specific requirement that a spouse convey certain information about the partnership's, i.e., community's affairs, even if the other spouse has not requested this information" (*Walker, supra*, at pp. 1427-1428, original italics.) Consequently, the *Walker* court concluded section 721, subdivision (b), imposes a sua sponte duty of disclosure on the managing spouse, but declined to apply the statute retroactively in that particular case because it would be unfair. (*Walker, supra*, at p. 1428 [though wife failed to advise husband of depletion of funds in community IRA account, it was undisputed she used the funds for community purposes; moreover, all undisclosed withdrawals occurred before the effective date of the amendment to § 721, subd. (b)]; see also *Feldman, supra*, 153 Cal.App.4th at p. 1488 [managing spouse had duty under §§ 721, subd. (b), and 1101, subd. (e), to disclose assets "without prodding"].)

will have a full and complete knowledge of the relevant underlying facts.”
(§ 2100, subd. (c).) That statutory purpose is served, and the duty to account enforced, by placing the burden of proof to account for missing assets on the managing spouse.

This discussion brings us back to the evidentiary problem at the heart of this case. The evidence at trial showed that Elaine, as the nonmanaging spouse, had no personal knowledge of the extent of the community assets at separation; nor had she personal knowledge of how Alan handled those assets in the ensuing years. Elaine offered exhibit 18 to show that substantial community assets under Alan’s control had disappeared between separation and trial. Although the trial court found Elaine had satisfied the requisite foundation to admit the exhibit, which Alan conceded he prepared, the court accorded the document little or no weight because Elaine had no evidence to support it. Consequently, the trial court concluded Elaine failed to carry her burden of proving the accounts itemized in exhibit 18 ever had the *values* listed in that document. Having rejected Elaine’s proof of the *values* of these investment accounts, the trial court excused Alan from his duty to account for those sums. Alan instead painted a generic picture of legitimate expenditures and losses that wiped out all of the couple’s investment money, leaving no “missing” funds chargeable to Alan (except for the funds in the Charles Schwab IRA’s). But, as discussed above, the trial court misapplied the burden of proof.

Elaine’s introduction of exhibit 18 satisfied her initial burden to show that Alan controlled community assets of a certain value postseparation. The statutory fiduciary duties of disclosure and accounting then effectively shifted the burden to Alan to rebut the presumption charging him with the assets listed on exhibit 18, a

document that constituted prima facie evidence of the account values it stated.²

The trial court erred in failing to shift this burden of proof to Alan.

This error significantly harmed Elaine's case. The court's failure to shift the burden may have excluded from the property division a substantial pool of community assets.³ It also improperly curtailed the trial court's analysis of Alan's alleged breach of his fiduciary duties. As mentioned above, the trial court did not hold Alan to account for the investment sums listed in exhibit 18 because Elaine failed to prove the accuracy of the asset values stated in the exhibit. The court therefore failed to require Alan to trace the missing money to proper expenditures to determine whether he had "take[n] any unfair advantage of" Elaine. (§ 721, subd. (b).) Nor did the trial court hold Alan to his duty to "update" Elaine as to the "material changes" in the community estate that occurred between the date Alan prepared exhibit 18 in 1999 and the date of trial. (§ 2100, subd. (c).)

Instead, the trial court found a single, narrow breach of duty by Alan: a breach of the duty "to maintain proper records of all community assets" within his

² 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.]" (*Haines, supra*, 33 Cal.App.4th at pp. 296-297.)

³ The trial court's rejection of the exhibit 18 asset values effectively deleted \$602,610 from the property division. According to exhibit 18, in 1999 the couple had \$133,000 in the Merrill Lynch account, \$424,000 in the Sutro & Company account, and \$45,610 more in the Charles Schwab IRA's than the trial court charged to Alan (exh. 18 stated a Charles Schwab account value of \$230,000, but the court charged Alan with only \$184,390 of that sum), for a total of \$602,610 excluded from the property division.

exclusive control. Though the evidence supports this finding, the trial court's failure to consider whether Alan also breached additional fiduciary duties of disclosure and accounting was an error tied to its erroneous decision on the burden of proof. And in failing to consider other possible breaches of fiduciary duty, the trial court may have deprived Elaine of her right to recover damages under section 1101, subdivisions (g) and (h) for "any asset undisclosed or transferred in breach of the fiduciary duty"

Thus, this case illustrates the importance of shifting to the managing spouse the burden of proof on missing assets. It also illustrates how shifting this burden of proof furthers the statutory purposes of requiring complete transparency and accountability in the management of community assets and of providing a remedy to the nonmanaging spouse when a breach of that fiduciary duty occurs.

3. On page 34, delete the paragraph under the heading "B. *Alan's Cross-Appeal*" and replace it with the following paragraph:

In his cross-appeal, Alan challenges the trial court's finding that he breached his fiduciary duty "to maintain proper records of all community assets" within his exclusive control, and the award to Elaine of sanctions and attorney fees for that breach. The cross-appeal is moot, however. The trial court's error in failing to shift the burden of proof on missing assets to Alan affected not only the court's division of community property, but also its analysis of the scope of Alan's alleged breach of his fiduciary duties under the Family Code. (See *ante*, pt. IIA.1.b.) Upon remand, the trial court will necessarily retry the issue of Alan's alleged breach of fiduciary duties and revisit the question of the appropriate statutory remedies for any breach of duty it finds.

This modification does not effect a change in the judgment.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.