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# Love Your Husband – But Don't Lend Him Money

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**Love Your Husband – But Don't Lend Him Money**

**Roger Bernhardt**

If one takes the court's recitation of facts in *Marriage of Lange* (2002) 102 CA4th 360, 125 CR2d 379, reported in this issue, at face value, there are puzzles everywhere. Basically, it appears that Sandra contributed her separate funds for the acquisition, mortgage reduction, and improvement of their joint tenancy house, as well as to cover some family living expenses. She obtained from husband Heino a note secured by a deed of trust on the (same) house to cover some part of her contributions, but the court of appeal held that those documents were unenforceable because they gave Sandra an unfair advantage over Heino, which triggered a presumption of undue influence, which she never rebutted. As a real estate attorney, rather than a matrimonial attorney, I would not have predicted that result, and it means that attorneys should watch out how they advise their clients in interspousal matters.

**Unfair Advantage?**

The court held that the note gave Sandra an advantage because it had a fixed principal and earned interest; the deed of trust gave her a further advantage because it made her a secured creditor. These features were held to be advantages because, under Fam C §2640, Sandra's statutory rights of reimbursement would not have included some of the items she paid for (notably the family living expenses), would not have borne interest, and would have been limited by the value of the property; the note included none of those limitations. The deed of trust gave her an additional advantage because her status under the Family Code would have been that of an unsecured creditor.

The loan documents certainly did make Sandra better off than she would be under the Family Code, but I wonder whether that is the proper test for deciding whether a transaction results in an advantage to one spouse over the other. Had Sandra agreed to lend Heino \$250,000 of her separate funds, I would not think that taking a note and deed of trust from him for the loan gave her an unfair advantage over him. In fact, I would not think the documents gave her any advantage at all, so long as the loan funds were actually given and the loan terms were not predatory. When the debtor gets the creditor's money and the creditor gets the debtor's note, who gets the advantage?

The same appears to be the case when Sandra agrees to put \$250,000 of her separate funds into the community pot to cover various expenses. If she didn't have to put up the money in the first place, and if she actually did put up the money, how does taking a note for it constitute an unfair advantage to her? The difference between these two scenarios is that the money in the first case went to the husband and in the second case went to the community, where the Family Code adds certain reimbursement rights for the community contributions. The fact that Sandra would not independently be entitled to statutory reimbursement for loans to her husband certainly makes it all the more appropriate that she take a note, if she wants to ensure that the transaction is treated as a loan rather than a gift. But how does the right of statutory reimbursement in the other case make a note less legitimate?

What the court did was to compare Sandra's reimbursement rights under the Family Code against her repayment rights under the loan documents, whereas I would compare her repayment rights against the consideration she furnished. Most lenders ask for notes and/or deeds of trust because they don't like the remedies the system furnishes them as undocumented, unsecured creditors; but, if the court, as a prerequisite to enforcing these documents on loans that were actually made, requires that the lender be no better off than if she had no note or deed of trust, we all better watch out how generous we are in the future.

If that is now to be the standard in interspousal transactions, there is probably not much to be done on behalf of clients who wish to treat their spouses generously but not foolishly. Since any improvement over statutory reimbursement rights may constitute a suspect advantage, better drafting of documents to provide better remedies is almost self-defeating: Since statutory reimbursement is interest-free, any documentary provision for interest gives the lending spouse more than the statute and may ipso facto constitute an improper advantage. A fixed principal sum that is not contingent on the property's ultimate value, or that includes any amounts advanced for mortgage interest, maintenance, insurance, or tax payments, will also render the note unenforceable, since all these items are specifically excluded from §2640 reimbursement. The deed of trust is probably per se invalid for providing some security to the lending spouse. Advantages may beset the contributor on all sides.

### **Rebutting the Presumption of Undue Influence**

The advantage that was perceived to benefit Sandra triggered the presumption, under Fam C §721, that she had employed undue influence over Heino in getting him to sign the loan papers. Even though the trial court found that the documents were otherwise valid and had not been executed under duress, that presumption rendered them unenforceable.

That means that, on remand, Sandra must rebut the presumption of undue influence. We will have to wait for the remand to see how she (and her attorney) manage that task, but the question for other attorneys is how to ensure that the transactions their clients engage in survive this heightened scrutiny.

The conventional approach is to make sure that the other spouse has an attorney advising him and approving the deal. See *Estate of Shinkle* (2002) 97 CA4th 990, 119 CR2d 42. Indeed, the legislature came pretty close to mandating that approach last year when it made support waivers in premarital agreements unenforceable unless the waiving party was represented by independent counsel. See Fam C §§1612(c), 1615(c). I don't think the wording of those statutes necessarily implies that people like Sandra must demand that people like Heino seek counsel before signing notes, but there are enough obvious similarities between the two situations to make such a prediction plausible.

The intriguing question for me is: How should Heino's lawyer have advised him when he reported that Sandra would not contribute any more funds unless he signed a mortgage? Since the entire body of mortgage law is based on the notion that debtors need the protection of a court of equity precisely because they lack the power to protect themselves from overreaching creditors, what role is the debtor's lawyer supposed to play, other than to witness the slaughter? (My mortgage casebook has, as its inscription, the statement of Lord Chancellor Northington: "For necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the craft may impose upon them"—which certainly tells you what

judges think of mortgage lending.) If Heino's attorney merely tells him that a mortgage may mean foreclosure, but is unable to successfully bargain for different or better terms, has Heino really been effectively represented so as not to be unduly influenced?

The strategy of independent counsel also does no good in those cases where the mortgage has already been signed and the parties are in court fighting over it. Assuming that any unreviewed note and mortgage between spouses can ever be upheld, the advantaged spouse is going to have to show that there was a full and fair disclosure of everything that was important to the disadvantaged spouse to get around the undue influence presumption. See *Marsiglia v Marsiglia* (1947) 78 CA2d 701, 178 P2d 478. Of course, it would be wonderful if the disadvantaged spouse testified that he knew exactly what he was doing when he signed, but far more likely is testimony such as Heino gave here—that he mistakenly thought the documents meant something different from what they said—which was designed to support rather than refute the presumption. Rebuttal testimony from the advantaged spouse that everything really was explained and understood will have to be corroborated to be believed, but are there likely to be witnesses to these conversations? Moreover, there may be, at best, some sort of indirect collateral evidence, e.g., proof that the marriage had already broken down or that she already had good reason not to trust him because of his handling of other financial matters; but will even that suffice? In any event, it seems certain that outcomes will be unpredictable and litigation costs will be high.

### **Really Joint Tenancy?**

One issue not discussed in *Marriage of Lange* is the status of the property itself. The deed of trust was on the family residence, which the spouses held in joint tenancy. If it really was a joint tenancy, then Heino's signature on the document was sufficient to encumber his interest in the property, enabling that interest to be foreclosed on separately. Thus, if Sandra were the successful bidder at her own foreclosure sale (outsiders would be unlikely to bid for the right to become a co-owner of a house along with her), she could gain title to the entire house and thereby keep it away from a divorce court's power to divide it up.

However, referring to the house as joint tenancy property ignores Fam C §2581, which provides that all property acquired during marriage in joint form is presumed to be community property, unless there is additional documentation showing that it isn't (and nothing of that sort was mentioned here). The presumption of §2581 applies only "[for] the purpose of division of property on dissolution of marriage"; in this case, dissolution actions had been filed by both spouses shortly before Sandra filed her judicial foreclosure action, so the property was already under family court jurisdiction; furthermore, the foreclosure and dissolution actions had been consolidated.

If the house is recharacterized as community property, what happens to Heino's deed of trust? Family Code §1102 generally requires the signatures of both spouses to be affixed to any document affecting title to community property. The statute does make an exception for transactions between spouses, and specifically mentions mortgages, but leaves unstated what it means for a husband to mortgage his interest in community property to his wife. I guess it means that "his" half may still be awarded to him in the dissolution but that she can foreclose on it. I assume she gets the same rights and powers that his attorney would get if the attorney took a mortgage to secure his or her legal fees in the divorce. See Fam C §1102(e). The effect on outsiders may be more problematic, since her mortgage claim will have to be ranked against the claims of creditors against the community, against her, and against him.

Had this couple come to me to discuss their future, I would have been tempted to advise them to stick together. The legal costs necessary to untangle this property law/mortgage law/family law mess should be a strong argument in favor of California's policy encouraging marriages to endure.

#### **Postscript: Vice Versa?**

In *Bono v Clark* (2002) 103 CA4th 1409, 128 CR2d 31, reported at p , the Sixth District joins the Second and Third in concluding that spending community funds on separate property gives the community a pro tanto interest in the property if it has appreciated, and a right to reimbursement if it has not. See my column *Characterizing Separate or Community Expenditures on Community or Separate Assets*, 25 CEB RPLR 98 (Apr. 2002). That makes me wonder what would happen if the spouse who did not own the separate property wanted better protection than that rule gave her? Is the rule merely a default rule, to be applied only when no other arrangement was made, or is it the fair rule, any revision of which gives her an unfair advantage? If the wife wants her husband to give her a deed of trust on his separate house as a condition for consenting to the expenditure of community funds on it, does she have to make sure he sees a lawyer first? Is the same true if she wants the beneficiary of the deed to be the community rather than she herself, or if the note is for only half the community money expended? If they do see a lawyer, I hope it isn't me.