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When "Any" Doesn't Mean "All"

William Falor

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WHEN “ANY” DOESN’T MEAN “ALL”

William Falor*

TABLE OF CONTENTS

Introduction.....	444
I. About This Comment.....	445
A. The Simmons Court Presents the Law.....	445
B. The Simmons Court Analyzes the Law	447
C. Countering the Court.....	451
1. The Court’s Concessions.....	452
2. The Court’s Legal Arguments	454
D. Not Exclusive & Why Not Have All the Cards on Table.....	455
E. Undercutting Its Own Conclusion	457
F. Other Remedies Are Not the Only Remedies	458
G. Why the Statute Exists.....	459
H. Case Law Does Not Help.....	459
I. Secondary Authority Does Not Help.....	462
J. A Case that Kills	463
K. Notes Regarding Other Authority and Legislative History.....	464
II. Proposal	464
Conclusion	465

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INTRODUCTION

In May 2008, Buford “Keith” Simmons married Tracy Hoogenberg.¹ One year later, the parties separated, and one month after that, Tracy filed a petition for dissolution of marriage.² At the time of divorce, while Keith owned a wet-suit business and maintained an ownership interest in a commercial building, Tracy held significant investment assets acquired from her first husband following his death.³ An “astoundingly lengthy, circuitous, and expensive course of litigation” followed.⁴ By the time the trial court resolved the case in July 2011, Tracy had already expended more than \$800,000 in legal fees, due largely to Keith’s “questionable legal tactics,” which included his intentional failure to comply with the disclosure requirements.⁵ Specifically, Keith did not disclose the contents of his separate property savings account, valued at \$254,850.24. In its decision, among other sanctions applied against Keith,⁶ the trial court imposed the remedy for fraudulent failure to disclose property set forth in California Family Code Section 1101(h) and awarded Tracy the contents of Keith’s separate property savings account, valued at \$254,850.24.⁷ Keith appealed, contending that California Family Code Section 1101(h) was inapplicable to his failure to disclose the separate property savings account.⁸

The Court of Appeals identified the issue as follows: does California Family Code Section 1101(h) apply to the nondisclosure of separate property assets?⁹ After a careful consideration of the underlying law,¹⁰ the *Simmons* Court looked to statutory analysis¹¹ and other authority,¹² and

1. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 587 (4th Dist. 2013).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 587–88. The Court’s analysis of these other sanctions is in an unpublished section of the opinion.

7. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 588 (4th Dist. 2013).

8. *Id.*

9. *Id.* at 589.

10. *Id.* at 590–92.

11. *Id.* at 592–94.

12. *Id.* at 594.

agreed with Keith.¹³ In short, the Court of Appeals held that California Family Code Section 1101(h) should only apply to nondisclosures of community property.¹⁴

I. ABOUT THIS COMMENT

This Comment will explain how the *Simmons* Court erred in its decision.¹⁵ It will start by explaining the *Simmons* Court’s statement of the pertinent law¹⁶ and its subsequent analysis of this law.¹⁷ Then, this Comment will examine the *Simmons* opinion and critique its legal analysis.¹⁸ In conclusion, this Comment will offer a simple proposal that will eliminate the statutory interpretation issue currently faced by California courts.¹⁹

A. *The Simmons Court Presents the Law*

The California Court of Appeals in *Simmons* (the “Court”) began by noting that Section 721 of the California Family Code (the “CFC”)²⁰ imposes a broad fiduciary relationship between spouses in their transactions with each other.²¹ Namely, Section 721 “imposes a duty of the highest good faith and fair dealing on each spouse,” requiring that “neither [spouse take] any unfair advantage of the other.”²² The Court also noted that Section 721 “subjects the relationship to the same rights and duties applied to nonmarital partners under the Corporations Code.”²³ However, the Court did not discuss these Corporations Code sections in detail.²⁴

The Court then noted the importance of CFC Section

13. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 595 (4th Dist. 2013).

14. *Id.*

15. *See infra* Part I.A.–I.K.

16. *See infra* Part I.A.

17. *See infra* Part I.B.

18. *See infra* Part I.C.–I.K.

19. *See infra* Conclusion.

20. California Family Code and “CFC” are used interchangeably throughout this Comment.

21. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 590 (4th Dist. 2013).

22. *Id.*

23. *Id.*

24. *Id.* *See also id.* n.14 (citing the entirety of CAL. FAM. CODE § 721 (2014)). CAL. FAM. CODE § 721 links to CAL. CORP. CODE §§ 16403, 16404, and 16503, which outline the “rights and duties” referenced in the body of the Court’s opinion.

1100's specific placement in the Family Code.²⁵ Notably, CFC 1100 is located in a section entitled "Management and Control of *Marital Property*" and it delineates the rules governing "the management and control of *community property*."²⁶ In the same paragraph, the Court discussed that CFC 1100 obligates each spouse "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 . . .*"²⁷

CFC Section 1101 sets forth remedies for a breach of fiduciary duty between spouses.²⁸ Under Section 1101(a), a spouse has a claim for any breach of the fiduciary duty that results in the impairment of the "undivided *one-half interest in the community estate . . .*"²⁹ Furthermore, Section 1101(f) allows a spouse to pursue the legal remedies in this section in either a legal dissolution action or independently, without filing a dissolution action.³⁰ Section 1101(g) permits a court to award the plaintiff 50% of the value of the undisclosed asset, whereas subsection (h) permits a court to award 100% if the breach falls within California Civil Code Section 3294's "oppression, fraud, or malice" standard.³¹ The Court also noted that this part of the Family Code includes sections which "set forth rules applicable to the management and control of *community property* when a spouse conveys or encumbers the community property (Section 1102) and when a spouse has a conservator or lacks legal capacity to manage the community property (Section 1103)."³²

In the final paragraph of the pertinent law, the Court discussed a spouse's general obligation to disclose assets and liabilities in a marital dissolution.³³ First, the Court noted CFC Section 2107, which imposes sanctions upon a party's failure to comply with the duty of disclosure set forth in the

25. *Id.*

26. *Id.*

27. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 591 (4th Dist. 2013).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 591–92 (4th Dist. 2013).

chapter.³⁴ Then, the Court pointed out CFC Section 2100, which requires a party to a dissolution proceeding to disclose all assets or liabilities in which one or both parties have or may have an interest) “regardless of the characterization [of the asset] as *community or separate . . .*.”³⁵

The Court then shifted its focus to CFC Section 271, contained in a part of the code entitled “Attorney’s Fees and Costs.”³⁶ Notably, this section allows a court to award attorney fees and costs if a party’s conduct frustrates the policies of settlement, cost reduction, and cooperative resolution of litigation.³⁷ The Court specifically highlighted California Family Code Section 271(c), which reads that an award of attorney’s fees and costs “is payable only *from the property or income of the party against whom the sanction is imposed*, except that the award may be against the sanctioned party’s share of the community property.”³⁸

B. The Simmons Court Analyzes the Law

The Court examined Section 1101(h) once more and listed its goals during the process of statutory interpretation.³⁹ First, the Court quoted the statute in full:

Remedies for the breach of the fiduciary duty by one spouse, *as set forth in Sections 721 and 1100*, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100[%], or an amount equal to 100[%], of *any asset* undisclosed or transferred in breach of the fiduciary duty.⁴⁰

Then, the Court noted that its goal when interpreting a statute was to ascertain the legislative intent of the statute so as to effectuate its intended purposes.⁴¹ Pursuant to this end, the Court gave the words “their ordinary and usual meaning” and construed them “in the context of the statute as a whole.”⁴²

34. *Id.*

35. *Id.* at 592.

36. *Id.*

37. *Id.*

38. *Id.*

39. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 592 (4th Dist. 2013).

40. *Id.*

41. *Id.* (citing *In re Marriage of Fong*, 193 Cal. App. 4th 278, 288 (2d Dist. 2011)).

42. *Id.*

The Court, left to resolve a case of first impression, then discussed that it was dealing with a statutory ambiguity.⁴³ First, the Court stated that facially, Section 1101(h) simply refers to the nondisclosure of “any asset.”⁴⁴ That is, the Court elaborated that the statute does not specify whether its remedy is confined to nondisclosure of a community property asset or whether it also applies to nondisclosure of a separate property asset.⁴⁵ Finally, the Court said that neither it nor the parties had found any case authority evaluating the issue of whether Section 1101(h) could be applied to separate property.⁴⁶

In the very next sentence of the opinion, the Court stated that the Legislature intended Section 1101(h) to provide a remedy only when a spouse fails to disclose community property.⁴⁷ In support of this conclusion, it cited to the CFC generally and with regard to four specific statutory provisions.⁴⁸ Next, it considered other authority, including case law and secondary legal commentary.⁴⁹ Lastly, the Court considered a final counter argument before rendering its ultimate decision.⁵⁰

The first of the four statutory reasons cited by the Court dealt with Section 1101(h)’s specific location in the CFC.⁵¹ Specifically, the Court argued that Section 1101(h) is set forth in a section of the Family Code that “exclusively concerns” matters associated with community property.⁵² For example, Section 1101(a)—located in the same section as 1101(h)—allows a spouse to bring a breach of fiduciary duty claim if the interest of this spouse in the community is impaired by the other spouse.⁵³ The Court then admitted that, on its face, the statute’s use of “any asset” could encompass both separate and community property.⁵⁴ Nevertheless, the Court read Section 1101(h) in conjunction with Section 1101(a), and said

43. *Id.* at 593.

44. *Id.*

45. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

46. *Id.* at 593.

47. *Id.*

48. *Id.*

49. *Id.* at 594.

50. *Id.* at 594–95.

51. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

52. *Id.*

53. *Id.*

54. *Id.*

that the latter’s usage of the terms “community interest” strongly suggested “any asset [from Section 1101(h)] means any community asset.”⁵⁵

The second reason cited by the Court shed light on how Section 1101(h) could be used outside of a dissolution action.⁵⁶ That is, Section 1101(f) says that the remedy provided in Section 1101(h) may be pursued in an action even when the parties have not filed for dissolution.⁵⁷ To the Court, the availability of this remedy, even during a marriage, supported the conclusion that the remedy is not intended to extend to separate property, which “is generally *not* subject to the control of the non-owner spouse and which typically only becomes relevant upon the filing for dissolution.”⁵⁸

The Court’s third reason highlighted other existing statutory remedies for breaches of the duty to disclose separate property.⁵⁹ Notably, the Legislature purposefully enacted remedies “that are expressly applicable to separate property, including Section 271 for uncooperative conduct in dissolution proceedings, and Section 2107 for nondisclosure of marital or separate property in dissolution proceedings.”⁶⁰ The existence of these distinct statutory remedies for nondisclosure of separate property assets, to the Court, supported the conclusion that a remedy located in a “section of the code devoted solely to community property was not designed to apply to separate property.”⁶¹

The Court’s fourth and final argument based on statutory interpretation focused on the fundamental nature of community property.⁶² Citing CFC Section 2550, the Court said that a fundamental principle of family law, including during dissolution proceedings, is that each spouse has a one-half interest in community property.⁶³ This in mind, the Court then stated that Section 1101(a) provides that the fiduciary duty with respect to marital property is designed, among other things, to preserve that one-half interest.⁶⁴ To

55. *Id.*

56. *Id.*

57. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

64. *Id.*

the Court, through the enactment of the Section 1101, the Legislature had in effect altered the one-half interest community property formula “in the event a spouse violates his or [sic] duty to preserve the other spouse’s one-half right to the property, by awarding the aggrieved spouse *more* than his or her one-half interest.”⁶⁵ By its very nature, the one-half interest formula does not apply to separate property, as separate property is not subject to co-ownership-by or division-between the parties.⁶⁶ Because of this lack of co-ownership and division, the Court said, it followed that the Legislature’s alteration of the one-half interest formula was “not meant to be applied to nondisclosure of separate property.”⁶⁷

The Court then moved to relevant case law and cited four appellate court decisions whose interpretation of Section 1101 was consistent with their own.⁶⁸ The Court did not go into specific detail regarding these decisions, but rather listed them as follows: *In re Marriage of Prentis-Margulis & Margulis*,⁶⁹ *In re Marriage of Fossum*,⁷⁰ *In re Marriage of Rossi*,⁷¹ and *In re Marriage of Hokanson*.⁷² Furthermore, the Court pointed out that commentators such as the California Practice Guide for Family Law have referred to Section 1101 remedies in the context of nondisclosure of community property and not in the context of the nondisclosure of separate property.⁷³

The Court spent the remainder of its opinion refuting an argument regarding the spousal fiduciary duty.⁷⁴ Specifically, the Court noted that: (1) on its face, Section 1101(h) references Family Code Section 721; and (2) while Section 1100 exclusively applies to the fiduciary duty concerning community property, the Section 721 duty is broad enough to encompass the disclosure of separate property assets during

65. *Id.* at 593–94.

66. *Id.* at 594.

67. *Id.*

68. *Id.*

69. *In re Marriage of Prentis-Margulis & Margulis*, 198 Cal. App. 4th 1252, 1279 (4th Dist. 2011).

70. *In re Marriage of Fossum*, 192 Cal. App. 4th 336, 347 (2d Dist. 2011).

71. *In re Marriage of Rossi*, 90 Cal. App. 4th 34, 39–41 (2d Dist. 2001).

72. *In re Marriage of Hokanson*, 68 Cal. App. 4th 987, 992 (2d Dist. 1998).

73. HOGOBOOM & KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW § 8:612 (The Rutter Group 2012).

74. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 594 (4th Dist. 2013).

dissolution proceedings.⁷⁵ Nevertheless, the Court noted that when considering the statute “as a whole,” it did not think that the Legislature intended to include the disclosure of separate property.⁷⁶ Principally, the Court stated that “the statutory context and nature of the Section 1101(h) remedy” supported the conclusion that the remedy is confined to community property, and gave several reasons for so holding.⁷⁷ First, it highlighted the fact that Section 1101(h) exists in a portion of the Family Code dedicated only to community property.⁷⁸ Second, it referred to—though did not name—already existing statutory remedies for a party’s failure to disclose separate property.⁷⁹ Third, the Court stated that separate property is not subject to the one-half interest formula that is altered by the Section 1101(h) remedy.⁸⁰ Given the above, the Court was “convinced that the reference to the general fiduciary duty statute was not intended to extend the application of the Section 1101(h) remedy to reach separate property.”⁸¹

C. Countering the Court

The Court’s analysis is unpersuasive for eight reasons. One, the concessions it made at the beginning of its analysis largely put the issue to bed almost immediately.⁸² Two, the Court’s focus on the location of the statute in the Family Code is largely irrelevant.⁸³ Three, the Court does not consider an important hypothetical scenario.⁸⁴ Four, the Court undercuts its own conclusion when it discusses Section 1101(f).⁸⁵ Five, the Court mistakenly assumes that other statutory remedies thereby preclude the existence of remedies in CFC Section 1101.⁸⁶ Six, the Court ignores the reason why 1101(h) exists

75. *Id.* (referring to *In re Marriage of Walker*, 138 Cal. App. 4th 1408, 1419 (1st Dist. 2006)).

76. *In re Marriage of Simmons*, 215 Cal. App. 4th at 594.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See infra* Part I.C.1.

83. *See infra* Part I.C.2.

84. *See infra* Part I.D.

85. *See infra* Part I.E.

86. *See infra* Part I.F.

in the first place.⁸⁷ Seven, the Court's use of case law does not help its argument,⁸⁸ and neither does the secondary sources to which it cites.⁸⁹ Eight, the Court ignores the applicability of a case that cites to the issue at hand.⁹⁰

1. *The Court's Concessions*

The Court's legal analysis begins with several concessions that ultimately produce a head-scratching contradiction. As previously noted, after it recited California Family Code Section 1101(h) verbatim,⁹¹ the Court continued that when it is interpreting a statute, its goal is to divine the legislative intent so as to effectuate the purpose of the statute⁹² by giving the words their "ordinary and usual" meaning and construing them in the context of the statute *as a whole*.⁹³ One could argue that the analysis should end right here. That is, Family Code Section 1101(h) plainly reads that the remedy shall apply to "*any asset* undisclosed . . ."⁹⁴ Taken with the Court's stated intent to give statutory language the "ordinary and usual" meaning,⁹⁵ it would appear that "any asset" means "any asset" and that Section 1101(h) explicitly requires the disclosure of "any asset," regardless of the asset's characterization as community or separate.

Furthermore, the Court's decision to italicize the words "as set forth in Sections 721 and 1100" when it recites the statute in whole has additional significance.⁹⁶ Assuming the decision to italicize implies that the Court regarded Sections 721 and 1100 as important for purposes of statutory interpretation, it is important to determine what these Sections say vis-à-vis Section 1101(h). As previously noted, Section 721 "imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."⁹⁷ First, one could make the

87. *See infra* Part I.G.

88. *See infra* Part I.H.

89. *See infra* Part I.I.

90. *See infra* Part I.J.

91. *In re* Marriage of Simmons, 215 Cal. App. 4th 584, 592 (4th Dist. 2013).

92. *Id.* (citing *In re* Marriage of Fong, 193 Cal. App. 4th 278, 288 (2d Dist. 2011)).

93. *Id.*

94. CAL. FAM. CODE § 1101(h) (2014).

95. *In re* Marriage of Simmons, 215 Cal. App. 4th 584, 592 (4th Dist. 2013).

96. *Id.*

97. CAL. FAM. CODE § 721(b).

argument that a spouse who purposefully fails to disclose separate property assets in a divorce proceeding (the “offending spouse”) is taking “unfair advantage” of the other spouse. That is, the offending spouse, by their actions, hampers the ability of the other spouse (the “offended spouse”) to form his or her legal strategy in divorce proceedings because the offended spouse is not able to see the full picture of the marriage from an asset standpoint. As a result, the offending spouse has a built-in and unfair advantage in the divorce proceedings. Furthermore, not only is the offended party disadvantaged by the nondisclosure, but the presiding court suffers as well. A court is likewise unable to see the big picture of the marriage and may render a judgment based on selectively divulged information that contemplates an incomplete picture of the marriage.

In addition, even if Section 721’s fiduciary duty is insufficiently persuasive, the Corporations Code sections that it references⁹⁸ should serve to drive home this notion of unfair advantage. The Court briefly noted that these sections of the Corporations Code impose “rights and duties to non-marital partners,” but specifically, these duties include: (1) the duty of loyalty and (2) the duty of care.⁹⁹ Regarding the duty of loyalty, California Corporations Code Section 16404(b) specifically requires that a party “account to the partnership for all business dealings.”¹⁰⁰ The use of the phrase “all business dealings” echoes Family Code Section 1101(h)’s use of the phrase “any asset” and supports the notion that California Family Code Section 721’s “broad fiduciary” relationship creates a large throne before which any and all disclosures are required to kneel. Put another way, if one agrees that Section 16404(b) requires complete disclosure of all business dealings (regardless of the type of business dealing), it would logically follow that Section 1101(h) requires complete disclosure of all assets (regardless of the type of asset). Second, regarding care between partners, Section 16404(b) requires that a partner “operate under the principles of good faith and fair dealing.”¹⁰¹ Here, using the plain meaning of the words “good faith and fair dealing” and

98. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 590 (4th Dist. 2013).

99. CAL. CORP. CODE § 16404 (2014).

100. *Id.* § 16404(b).

101. *Id.*

“unfair advantage,” (as the Court requires itself to do), only necessitates a small logical leap to arrive at the conclusion that a party who purposefully hides assets in dissolution proceedings is not operating in good faith. That is, the unfair advantage that the offending spouse gains over the offended spouse reflects his or her failure to operate under the principles of good faith and fair dealing.

In the next paragraph of the opinion, the Court’s concessions only undermine its ultimate argument that separate property disclosures are not required. As previously noted, the Court acknowledged that 1101(h) “facially”¹⁰² and “simply” refers to the disclosure of any asset and is silent as to its scope of application (to community property and separate property or to just community property).¹⁰³ Furthermore, as previously noted, the Court maintained that it found no case law on point as a compass to guide its decision.¹⁰⁴ Considering these concessions with the Court’s discussion regarding the statute’s language, its own emphasis of the statutory language, and the rules it *must* follow regarding statutory construction, it appears to be a foregone conclusion that the Court would affirm the decision of the trial court and hold that Keith should be forced to forfeit all that he hid from Tracy in the divorce proceedings. After all, given that Family Code Section 1101(h) *unambiguously* refers to *any* asset,¹⁰⁵ and seeing as this issue is one of first impression to a California court,¹⁰⁶ the answer has already been discovered and the analysis is arguably already completed.

2. *The Court’s Legal Arguments*

As noted above, after the Court made several concessions, the Court nevertheless summarily concluded that Section 1101(h) applies only to nondisclosures of community property.¹⁰⁷ Furthermore, the Court transitioned to its legal arguments, supporting its conclusion with four statutory justifications,¹⁰⁸ case law and secondary

102. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

103. *Id.*

104. *Id.*

105. CAL. FAM. CODE § 1101(h) (2014)

106. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

107. *Id.*

108. *Id.* at 593–94.

authority,¹⁰⁹ and one final argument regarding California Family Code Section 721.¹¹⁰ On their faces, each of these arguments seem plausible, and the secondary references are on point. However, upon deeper inspection, each has flaws that undermine the Court’s ultimate conclusion.

D. Not Exclusive & Why Not Have All the Cards on Table

The Court’s first argument overly fixates on Section 1101(h)’s general location while ignoring the reason why the case is before the court in the first place. The Court argued that Section 1101(h)’s “any asset” means “any community asset” in part because Section 1101(h) is located “in a portion of the Family Code that *exclusively* concerns matters associated with community property.”¹¹¹ The reason why the parties are in court in the first place is because the statutory language of Section 1101(h) is ambiguous to such an extent that a judicial interpretation is necessary to determine whether or not Section 1101(h) should include separate property. By virtue of this ambiguity, it is questionable whether the statute may consider separate property issues as well as community property ones. Therefore, it is debatable whether this portion of the Family Code *exclusively* concerns community property, or whether this portion of the code may actually address separate property issues as well—even if not explicitly stated as such. Put another way, if this code section did unambiguously deal *exclusively* with community property, then this opinion likely would have been much shorter, if written at all.

Additionally, the Court fails to consider certain language in Family Code Section 1101(a). California Family Code Section 1101(a), a sister statute to Family Code Section 1101(h), “specifies that a spouse may raise a breach of fiduciary claim” when an impairment to the spouse’s interest in the community property exists.¹¹² However, in its recitation, the Court glosses over the Family Code Section 1101(a)’s use of the following phrase: “[a] spouse has a claim against the other spouse for *any breach of the fiduciary*

109. *Id.* at 594.

110. *Id.*

111. *Id.* at 593.

112. CAL. FAM. CODE § 1101(a) (2014).

duty . . .”¹¹³ Returning to the “any asset” discussion above, the statute’s direct use of the word “any”¹¹⁴ once again cuts toward a more expansive interpretation of the statute as a whole (including separate property) than away from such an interpretation (excluding separate property). Of course, on the topic of actual language, Section 1101(a) does admittedly focus on a breach “that results in impairment to the claimant spouse’s present undivided one-half interest in the community estate . . .”¹¹⁵ Facially, the Court gets this part right—that the breach must incur an impairment to community property in order to give rise to the claim.¹¹⁶

However, what if it is unclear at the time of disclosure the extent to which an asset is community property and separate property? For example, take Wilma (“W”), who has a prospering business that she developed before getting married to Harry (“H”). Unequivocally, this business, until the marriage is finalized, is separate property. However, add to the consideration that W operates the business without H’s involvement; he is there merely for emotional support with regard to the business, but does not participate at all in the day-to-day activities. Even without his direct involvement, if W continues to operate the business during marriage, the business becomes what is known as a commingled asset,¹¹⁷ with both separate property components (the business that W brought into the marriage) and community property components (the extent to which both parties contributed to the company, if only emotionally, one-half of which represents H’s share).¹¹⁸

Then H and W get divorced, and W does not include this business asset, but rather, just her interpretation of the community property portions (as the Court’s holding would condone). Should the spouses themselves make this judgment call, or should it be up to the Court to look at the asset in totality and make the ultimate determination pursuant to the accounting doctrines of *Van Camp v. Van*

113. *Id.* (emphasis added).

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* CAL. FAM. CODE § 2640 (2014).

118. The extent to which the efforts would consist of community property is governed by the twin doctrines of *Van Camp v. Van Camp*, 53 Cal. App. 17 (2d Dist. 1921) and *Pereira v. Pereira*, 156 Cal. 1 (1909).

*Camp*¹¹⁹ and/or *Pereira v. Pereira*¹²⁰? If only for judicial efficiency, a court should be given the whole asset at the onset, which would stem directly from requiring a party in this scenario to disclose the whole nature of the business (both separate and community property portions). In other words, it would be more efficient—and a better course of action—to have the parties report anything and everything, and to require them to put all of their cards on the table at the onset, rather than to encourage either of them to try and game the system.

E. Undercutting Its Own Conclusion

The Court’s second argument ignores the theme of “any” and undercuts its own conclusion. As previously noted, California Family Code Section 1101(f) states that “*any* action may be brought under this section without filing an action for dissolution of marriage”¹²¹ To the Court, the fact that the remedy is available even without a divorce proceeding illustrates that it therefore was not intended to extend to separate property, which is “generally *not* subject to the control of the nonowner spouse”¹²² and “typically only becomes relevant upon the filing for dissolution.”¹²³ Once again, the use of the word “any,” while in this instance not directly dealing with the disclosure of separate property, does reflect a common theme existent throughout the statute—that of a legislative intent to require more disclosures and not less. As such, it again cuts away from the Court’s ultimate conclusion that separate property disclosures are not required at divorce. In addition, the Court undercuts its argument against

119. *Van Camp v. Van Camp*, 53 Cal. App. 17 (2d Dist. 1921). “Van Camp accounting” grants the working spouse a market rate for their services in connection with the operation of the business. This amount is considered that working spouse’s separate property, whereas the rest of the business is considered community property. For more information, see J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 WISC. L. REV. 585, 587 (1990).

120. *Pereira v. Pereira*, 156 Cal. 1 (1909). “Pereira accounting” looks at the working spouse’s original separate property investment into the company and grants this investment a reasonable rate of return on the initial capital input. This amount is considered that contributing spouse’s separate property, whereas the rest of the business is considered community property. For more information, see Oldham *supra* note 119.

121. See CAL. FAM. CODE § 1101(f) (2014) (emphasis added).

122. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

123. *Id.*

disclosures of separate property at divorce when it states that separate property only becomes relevant upon dissolution. The thesis of this Comment—which largely argues against the Court’s reasoning—is that separate property, in particular the disclosure of separate property, is crucially important at divorce (if more so than at any other time) and therein should be disclosed in its entirety.

F. Other Remedies Are Not the Only Remedies

The Court’s third argument rests on an unfounded assumption. The Court stated that the Legislature has enacted separate statutory remedies “that are expressly applicable to separate property,”¹²⁴ and cites California Family Code Section 271 (for “uncooperative conduct in dissolution proceedings”)¹²⁵ and California Family Code Section 2107 (for “nondisclosure of marital or separate property in dissolution proceedings”).¹²⁶ The Court then states that the statutes’ placement in separate sections of the Family Code “supports that a remedy located in a section of the code devoted solely to community property was not designed to apply to separate property.”¹²⁷ By making this argument, the Court implies that remedies do not overlap between sections. Further, when interpreting a statute, the Court implies the language should be construed with greater regard for the context of where the statute is located in the code and with less regard for what the code actually says (the plain language of the statute and also the code sections a statute references). Looking at the Court’s previous arguments, the Court’s implication aligns with their previous treatment of the law: up to this point, the Court has both overlooked the unambiguous language of the word “any” and has glossed over sections of the Corporations Code referenced by Family Code Section 721.¹²⁸ Furthermore, as previously noted, there is no indication that CFC Section 1100 et seq. are exclusively designed to deal with community property.¹²⁹ As such, assuming plain language and full consideration to statutory references should be championed in interpreting a

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See supra* Part I.C.1.

129. *See infra* Part I.F.

statute, the Court here has placed misguided emphasis on the inconclusive argument of location at the expense of actual legal substance.

G. Why the Statute Exists

The Court’s fourth argument reflects tunnel vision in its interpretation of how much a party might be awarded pursuant to the CFC 1101(h) remedy. As previously discussed, the Court noted that each spouse has a one-half interest in the community property (CFC Section 2550), which the fiduciary duty from CFC Section 1101 is designed to preserve.¹³⁰ The Court then said that, by virtue of the remedy in CFC Section 1101, the “aggrieved spouse [is awarded] *more* than his or her one-half interest.”¹³¹ This is absolutely true: the sanction will result in the offended spouse receiving more than they would without the remedy in place. However, the Court then proceeds to maintain this “*more*” does not apply to separate property because this separate property is not subject to co-ownership by the parties.¹³² The Court is correct in that, by its very nature, only one party owns separate property.¹³³ However, this point is secondary to the interpretation of the statute, not primary, and therefore should not drive the interpretation of the statute. CFC Section 1101(h) does not exist to return parties to their states before marriage by assigning ownership of assets (splitting the community in half and returning separate property to each party); there are plenty of other statutes on point that serve that purpose.¹³⁴ Rather, the point of CFC Section 1101(h)—and the reason why it is unique—is to punish malfeasants who disavow the statutory requirements of disclosure. The point of the statute is for a court to wield a big stick against those who contravene the fiduciary duty to their spouse, not to reward a party for duplicity against that same spouse.

H. Case Law Does Not Help

As noted above, the Court cited to several “appellate

130. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 593 (4th Dist. 2013).

131. *Id.* at 593–94.

132. *Id.*

133. See CAL. FAM. CODE § 770 (2014).

134. See, e.g., CAL. FAM. CODE § 1101(g); see e.g., § 1101(h).

court decisions [that] refer to Section 1101 remedies in the context of nondisclosure of community property.”¹³⁵ Each of these cases indeed covers California Family Code Section 1101(h), in small or large part. However, each of these cases also, in one way or another and either directly or indirectly, support the ultimate conclusion that separate property should be a required disclosure at divorce, and not that the remedy of CFC Section 1101(h) is limited to community property.

The first case that the Court cites to, *In re Marriage of Prentis-Margulis*, does not apply congruently to *Simmons*.¹³⁶ *Prentis-Margulis*'s principal reference to CFC Section 1101 is the following sentence: “[Section 1101] mandates that, for purposes of awarding the injured spouse 50[%] of the value of an undisclosed or wrongfully transferred asset (or 100[%], in the event of oppression, fraud, or malice), the trial court must value the assets at the *highest* of three possible dates”¹³⁷ The Court then determines, pursuant to California Family Code Section 1101(g), how to value the asset and notes that the statutes “clearly authorize a trial court to . . . best [provide] adequate compensation to the injured spouse.”¹³⁸ While the discussion regarding valuation might have been helpful in that case, it is inapposite to the facts of *Simmons* and therefore does not help the Court justify its ultimate conclusion that only community property need be disclosed. That being said, there is an argument to be made that the Court implied, by its “50[%] of the value”¹³⁹ recitation, that only community property assets should be considered. Nevertheless, the Court does not affirmatively hold as such, most likely because such a determination was not the foremost issue in the case. If it was the issue that the Court was focused upon, the Court certainly could have held that the nondisclosure of a separate property asset would warrant some or all of the forfeiture of that asset.

The second case that the Court cites to, *In re Marriage of Fossum*, does not focus on the implications of applying CFC

135. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 594 (4th Dist. 2013)

136. *In re Marriage of Margulis*, 198 Cal. App. 4th 1252, 1279 (4th Dist. 2011).

137. *Id.*

138. *Id.*

139. *Id.*

Section 1101(h) against an offending spouse.¹⁴⁰ *Fossum*’s principal reference to CFC Section 1101 is the following sentence: “When . . . the trial court finds a spouse has breached her fiduciary duty, but not . . . by conduct rising to the level of fraud, malice, or oppression, Section 1101, subdivision (g), governs the applicable remedies.”¹⁴¹ The Court then recites the language of CFC 1101(g).¹⁴² A first issue here is similar to that faced by virtue of the reference to *In re Marriage of Prentis-Margulis*¹⁴³: namely, *In re Marriage of Fossum* focuses on CFC Section 1101(g),¹⁴⁴ and not CFC 1101(h)—the focal point of *Simmons*. Though the major difference between CFC Section 1101(g) and CFC Section 1101(h) is the requirement of “fraud, malice, or oppression” for CFC Section 1101(h),¹⁴⁵ the statutes do go hand in hand. Nevertheless, a truly malfeasant spouse—one who *fraudulently* conceals their assets—should rightly face greater consequences¹⁴⁶ than one who does not fraudulently conceal. As such, it makes sense that a court would not consider separate property nondisclosures with regard to Section 1101(g), because that statute, unlike Section 1101(h) is less about punishing the offending spouse and more about restitution for the offended spouse.¹⁴⁷ That in mind, were either this court or *Prentis-Margulis* faced with the circumstances in *Simmons*—where the point was to punish and not make even—they may have considered the usefulness of requiring the offending spouse to forfeit their separate property to send a message to future would-be malfeasants.

The third case that the Court cites to, *In re Marriage of Rossi*, does not touch heavily upon CFC Section 1101(h).¹⁴⁸ *Rossi*’s principal reference to CFC 1101 is simply a recitation of CFC 1101(h).¹⁴⁹ In large part, *Rossi* focused upon whether

140. *In re Marriage of Fossum*, 192 Cal. App. 4th 336, 348 (2d Dist. 2011).

141. *Id.*

142. *Id.*

143. *In re Marriage of Margulis*, 198 Cal. App. 4th 1252, 1279 (4th Dist. 2011).

144. *Id.*

145. CAL. FAM. CODE § 1101(h).

146. Consider these consequences in light of the words “but not limited to” in CAL. FAM. CODE § 1101(h), particularly as they apply to a judge’s discretion in meting out punishment upon an offending spouse.

147. See *supra* Part I.G.

148. *In re Marriage of Rossi*, 90 Cal. App. 4th 34, 39–41 (2d Dist. 2001).

149. *Id.*

or not the actions of the offending spouse—who hid lottery winnings from her husband at divorce—rose to the level of fraud as required by the statute.¹⁵⁰ Furthermore, the case only glossed over the statute, and did not delve deeply into the issue considered by the Court in *Simmons*.¹⁵¹ As such, for purposes of demonstrating support for the Court’s ultimate conclusion, *Rossi* is unhelpful.

The fourth and final case that the Court cites to, *In re Marriage of Hokanson*, similarly only briefly discusses CFC Section 1101(h).¹⁵² *Hokanson*’s principal reference to CFC Section 1101 largely echoes the language used in *Fossum* in that the court discusses the element of “fraud, malice, or oppression” and then moves to a recitation of Section 1101(g).¹⁵³ In large part, *Hokanson* focused upon whether or not an offended spouse could be awarded attorney’s fees pursuant to CFC Section 1101(g).¹⁵⁴ When the court looked at the plain meaning of the statute, which includes the words “plus attorney’s fees and court costs,”¹⁵⁵ it considered the case fairly open and shut and rendered a judgment in favor of the offended spouse.¹⁵⁶ In a similar vein as *Rossi*, the court in *Hokanson* did not cover much in the line of Section 1101(h),¹⁵⁷ and therefore like *Rossi*, is unhelpful to the Court in *Simmons* in justifying its ultimate conclusion.

I. Secondary Authority Does Not Help

The Court’s secondary authority is unhelpful in that the Court fails to show how it assists the Court in making its ultimate conclusion. As noted above, the Court states that “commentators refer to the Section 1101 remedies in the context of nondisclosure of community property.”¹⁵⁸ The Court then specifically quotes the California Practice Guide: Family Law by Hogoboom & King, including the following in brackets: “[C]onduct falling below the prescribed fiduciary

150. *Id.*

151. *Id.*

152. See *In re Marriage of Hokanson*, 68 Cal. App. 4th 987, 992–93 (2d Dist. 1998).

153. *Id.* at 992.

154. *Id.* at 992–93.

155. CAL. FAM. CODE § 1101(g) (2004).

156. *In re Marriage of Hokanson*, 68 Cal. App. 4th 987, 992–93 (2d Dist. 1998).

157. *Id.* at 993.

158. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 594 (4th Dist. 2013).

standards in the management and control of community property subjects the wrongdoing spouse to a statutory breach of fiduciary ‘claim’ for which the aggrieved spouse is given explicit statutory remedies [Fam. C. § 1101].”¹⁵⁹ Many of the arguments relating to the fiduciary standards as well as the fiduciary “claim” have already been touched upon.¹⁶⁰ However, one significant part of this quote is the “explicit statutory remedies.”¹⁶¹ As previously discussed, the statutes are facially unambiguous, and *explicitly refer* to “any asset” in consideration of scope within which the statute should apply. Because the Court did not emphasize any part of the quotation, it is unclear as to which part of this quotation the Court wanted its audience to focus upon. However, if this “explicit statutory remedies” segment was an important phrase to the Court, then once again, a source that the Court relies upon, and in this case even cites word for word, cuts against the Court’s ultimate conclusion that the nondisclosure of separate property is immaterial for purposes of interpreting CFC Section 1101(h).

J. A Case that Kills

The Court’s final argument simply ignores the usefulness and moreover the pertinence of a case to which it cited. As previously noted, the Court’s final argument countered the idea that CFC Section 721 would theoretically be “broad enough to encompass the duty to disclose separate property assets during dissolution proceedings.”¹⁶² In making this acknowledgement, the Court cited to *In re Marriage of Walker*.¹⁶³ Though the Court acknowledged that CFC Section 721 might push towards that conclusion, it countered by reciting its own argument and thus was “convinced that the reference to the general fiduciary statute was not intended to extend the application of the Section 1101(h) remedy to reach separate property.”¹⁶⁴ Because the Court took the time to cite to *Walker*, it is worthwhile to examine exactly what *Walker* says on the page to which the Court cites. Verbatim, the

159. *Id.*

160. *See supra* Part I.D.

161. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 594 (4th Dist. 2013) (quoting HOGOBOOM & KING, *supra* note 72).

162. *In re Marriage of Simmons*, 215 Cal. App. 4th 584, 594 (4th Dist. 2013).

163. *Id.*

164. *Id.*

court in *Walker* holds as follows: “We can fathom no reason to distinguish between a spouse’s duty to deal fairly and in good faith with separate property and her duty to deal fairly and in good faith with community property.”¹⁶⁵ This statement encapsulates a huge flaw in the Court’s line of reasoning. By trying to bifurcate the duty of good faith, the Court had made things needlessly complicated at its own expense. Rather than trying to fashion two separate duties of good faith, the Court should have simply stated that good faith requires full disclosure, regardless of the type of asset. That way, no party is confused about what they have to disclose, because they have to disclose everything.

K. Notes Regarding Other Authority and Legislative History

It is important to note, as the Court acknowledged in its opinion, there are no cases, law review articles, or other authorities that discuss Section 1101(h) in the manner in which the Court in *Simmons* analyzes the statute.¹⁶⁶ Excepting those cases already cited which only tangentially reference the statute or delve into the statute in a different context, *Simmons* represented the first time a court (and authority in general) has decided whether CFC Section 1101(h)’s express provisions apply to a spouse’s nondisclosure of separate property assets.

Furthermore, a search of the pertinent legislative history reveals that the only modification to CFC Section 1101(h) came in 2002.¹⁶⁷ In that year, the California Legislature added the words “as set forth in Section 721 and 1100” to the statute.¹⁶⁸ If there is an idea to be divined from this change, it must be that the Legislature saw the importance of both of these statutes in interpreting the language of CFC Section 1101(h). And specifically in regards to CFC Section 721, this change indicates that the Legislature wanted the fiduciary duty to be broadened, and not diminished.

II. PROPOSAL

California Family Code Section 1101(h) needs to be

165. *In re Marriage of Walker*, 138 Cal. App. 4th 1408, 1419 (1st Dist. 2006).

166. *See supra* Part I.C.2.

167. 2001 Cal. Legis. Serv. 4346–48 (WEST) (A.B. 583).

168. *Id.*

clarified via a legislative revision of the statutory language. For the myriad reasons listed above, courts across California should not be forced to deal with this ambiguity should this issue arise once more. Thankfully, however, though the arguments may be complex, the fix that the legislature can make is fairly simple.

After the words “any asset” in California Family Code Section 1101, the legislature should include the phrase “*whether separate property, community property, or an asset displaying characteristics of both separate and community property.*” By doing this, any and all possible ambiguity is negated and everyone is placed on clear notice that the statute is going to apply to both community property and separate property. In other words, any party who fails to disclose separate property assets at divorce will absolutely know that they are running the risk of completely forfeiting the asset. An example of a reformed statute would look like the following:

1101(h). Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100% , or an amount equal to 100%, of any asset, *whether separate property, community property, or an asset displaying characteristics of both separate and community property*, undisclosed or transferred in breach of the fiduciary duty.

CONCLUSION

If a change is to be made to CFC Section 1101(h), a similar change should also be made CFC Section 1101(g). This Comment notes the fact that those who violate 1101(h) deserve special treatment for their fraudulent behavior, but there are probably (if not certainly) arguments to be made that a similar change is unwarranted with regard to the sister statute Section 1101(g). Regardless of whether change is necessary for CFC Section 1101(g), change is absolutely warranted for CFC Section 1101(h), and the legislature must take this issue out of the hands of the courts and make the change itself. This might be wishful thinking given the gridlock in Sacramento, but even small, seldom occurring issues such as the topic of this Comment should deserve recognition when the lawmakers convene to update the

statutory language that governs our state. Hopefully, a change is made in the near future to deter malfeasants from bad behavior by requiring spouses in a divorce proceeding to divulge the existence and nature of all of their assets.