MARITAL DUTY OF CARE – MEANINGFUL AND MANAGEABLE

Introduction

“[E]ither spouse has the management and control of the community personal property ... with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.” (Fam. C. § 1100.) But this unilateral authority enjoyed by a marital partner is encumbered, or “checked and balanced,” by the standard of care that binds business partners. (Fam. C. § 721(b); Corp. C. § 16404 [“section 16404”].)

What is the meaning of the duty of care? How should it be applied to marital partners? The Legislature provides little help. Nor has any family court meaningfully addressed these questions in a published opinion.¹

Therefore, this article offers fresh insights into how the family law mind should be guided and instructed when it is called upon to decide whether a spouse has breached the duty of care in section 16404. It does so by confronting and answering the following questions:

- How did the duty of care become part of the Family Code?
- What is the governing statutory text of the duty of care?
- What important conclusions can be drawn from the facial text of these statutes?
- How is the statutory duty of care legally defined?
- When applying the duty to the facts, should “circumstances” be considered?
- What are the “circumstances” (or factors)?
- How can these “circumstances” be illustrated, using the facts of Kamgar?
- What are the affirmative defenses?
- What are the important questions regarding damages?
- How is the injured spouse satisfied in the division of community property?
- What are related remedies outside of the duty of care?

¹ The court of appeal in In re Marriage of Kamgar (2017) 18 Cal.App.5th 136 was presented with an opportunity to confront the meaning and working application of the duty of care in Corp. C. § 16404, but instead chose to affirm the trial court, relying on the duty of disclosure in Corp. C. § 16403. The better, if not correct, approach would have been to anchor the decision on the duty of care, as reasoned and illustrated (using the Kamgar facts) later in this article.
How the Duty of Care Became Part of the Family Code

In *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, husband and wife were married for 34 years. (*Id.* at 926.) During marriage husband made several investments, one of which resulted in gain and the others in losses.

At trial, wife alleged, amongst other things, that husband breached his fiduciary duty of care to the community as to the losses. Therefore, these losses should be charged solely to him. The trial court agreed.

But the reviewing court reversed. It reasoned: “In short, a spouse generally is not bound by the Prudent Investor Rule and does not owe to the other spouse the duty of care one business partner owes to another.” (*Id.* at 940.) “To summarize, Vincent Duffy did not owe Patricia Duffy a duty of care in investing the community assets. Inasmuch as Vincent Duffy owed Patricia Duffy no duty of care, he cannot have breached that duty.” (*Id.* at 941.)

The Legislature responded by abrogating *Duffy*. The Legislature concluded that marital partners (or spouses) should not be bound by the Prudent Investor Rule in Probate Code section 16047 that binds trustees, but they should be bound by the same standard of care in Corporations Code section 16404 that binds business partners. Therefore, the Legislature excluded Probate Code section 16047, but included Corporations Code section 16404. (Fam. C. § 721(b).)

**Statutory Text Relating to the Marital Duty of Care**

Family Code section 721 – governing statute

(b) **Except** as provided in sections 143, 144, 146, 16040, and 16047 [Prudent Investor Rule] of the **Probate Code**, in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each 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** [standard of care], and 16503 of the **Corporations Code** …. [emphasis added.]

Probate Code section 16047 – prudent investor rule governing trustees excluded

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise **reasonable care, skill, and caution**.

Corporations Code section 16404 – duty of care governing business partner included

(a) The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the **duty of care** set forth in subdivisions (b) and (c).

…
(c) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. [emphasis added.]

What are obvious conclusions that can be reached from a simple, literal or facial reading of these statutes?

Conclusions from the Facial Language of the Statutes

Loss caused by negligent conduct is not actionable: Section 721(b) excludes the Prudent Investor Rule in Probate Code section 16047 that governs trustees; but includes the duty of care in section 16404 that binds business partners. What does this mean?

In a nutshell, negligence is actionable under the Prudent Investor Rule, but is non-actionable under the duty of care. The latter requires more than negligent conduct, for example, “grossly negligent or reckless conduct.”

More specifically, “[i]n satisfying this standard [Prudent Investor Rule], the trustee shall exercise reasonable care, skill, and caution.” (Prob. C. § 16047(c).) “Negligence is the failure to use reasonable care ….” (Judicial Council of California Civil Jury Instructions CACI (LexisNexis Matthew Bender: 2013) # 401, p. 221.) Thus, loss caused by the negligence of a trustee breaches the Prudent Investor Rule.

In contrast, loss caused by negligence does not violate the marital duty of care. Rather, violation of the marital duty of care is “limited” in section 16404 to “grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”

Duty of care v. duty of disclosure: Is the duty of disclosure during marriage separate from, or part of, the duty of care? This question is addressed more specifically later in this article.

The word “limited”: The words “including but not limited to” are open words of illustration. (In re Marriage of Walker (2006) 138 Cal.App.4th 1408, 1424, 1426; Duffy, 91 Cal.App.4th at 939-940.) Therefore, the word “limited” in Corporations Code section 16404(c) is a closed word of limitation.

2 Section 16404’s exclusion of negligence from the remedial reach of the law appears to conform to existing case authority. (See In re Marriage of Hirsch (1989) 211 Cal.App.3d 104, 110 [“Thus, to the extent Stitt holds the negligent conduct of a spouse engaged in an activity benefiting the community provides sufficient justification to characterize a debt as a separate obligation, it is incorrect”]; see also In re Marriage of Schultz (1980) 105 Cal.App.3d 846, 855–856 [husband’s failure to appear in court to defend action brought by creditor was negligent, but not more; therefore, the debt resulting from default judgment had to be equally shared, and not charged solely to him].)
Object of duty of care: The object of the duty of care in section 16040 is partnership property. Therefore, the object of the duty of care in section 16040, as applied to marital partners by virtue of section 721(b), is marital (or community) property.³

Damage – both an asset that is absent or a debt that is present: “‘Property’ includes assets and obligations.” (Cal. Rules of Court, rule 5.2(b)(9).) Therefore, the community is damaged either on the asset side of the balance sheet or on the debt side. Harm on the asset side means that an asset is absent that would otherwise be present, had there been no breach. Harm on the debt side means a debt is present that would otherwise be absent, had there been no breach.

Action or inaction: Common reason confirms that a duty of care can be violated by action as well as inaction. That is, by action when under a duty not to act or by inaction when under a duty to act.

Question: When does action or inaction resulting in loss of value to the community, either because of subtraction of positive value on the asset side or addition of negative value on the debt side, cross the line from non-actionable mismanagement, because it is negligent, to actionable mismanagement, because it is “grossly negligent or reckless conduct, intentional misconduct, or knowing violation of the law”?

To answer this question, it is essential to have a working understanding of the events or conduct that breach the standard of care in section 16404(c).

Legal Definitions of Conduct Breaching Duty of Care in Section 16404(c)

Overview: The duty of care is not defined in the positive – what amount to compliance, but in the negative – what amounts to breach, namely, “grossly negligent or reckless conduct, intentional misconduct, or knowing violation of the law.” What is the legal definition of each of these breaching events?

Grossly negligent conduct: California makes a distinction between negligence and gross negligence. “Negligence is the failure to use reasonable care to prevent harm to oneself or to others.” (Judicial Council of California Civil Jury Instructions CACI (LexisNexis Matthew Bender: 2013) # 401, p. 221; accord Delaney v. Baker (1999) 20 Cal.4th 23, 31.)

“Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or failing to act.” (Judicial Council of California Civil Jury Instructions CACI (LexisNexis Matthew Bender: 2013) # 425, p. 273; accord City of Santa Barbara v. Superior Court (2007) 41 Cal.App.4th 747, 754.)

³ Family law distinguishes mismanagement of the marital relationship from mismanagement of marital property. In particular, community property cannot be divided unequally because of marital fault – that is, mismanagement of the marital relationship. But what remains of the community estate can be divided unequally because of mismanagement of property – for example, by an act or omission that breaches the standard of care in Corporations Code section 16404(c). (Fam. C. § 1101(a), (g).)
Questions: When does an act or omission aggravate from “failure to use reasonable care” to become “the lack of any care?” When does departure become “extreme departure?”

Reckless conduct: “By contrast, … ‘reckless’ misconduct … describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows it is highly probable that harm will result.” (City of Santa Barbara, 41 Cal.App.4th at 754, n. 4; see also Donnelly v. Southern Pacific (1941) 18 Cal.2d 863, 869; Prosser & Keeton, The Law of Torts (5th ed.1984) § 34; Delaney v. Baker, 20 Cal.4th at 31-32 [“Recklessness” refers to a subjective state of culpability greater than simple negligence, which has been described as a “deliberate disregard” of the “high degree of probability” that an injury will occur (Citations.) Recklessness, unlike negligence, involves more than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action ... with knowledge of the serious danger to others involved in it”).

Question: When does conduct become reckless conduct?

Intentional misconduct: No legal definitions could be found. Hence, intentional misconduct arguably is grossly negligent or reckless conduct that is intentional, and therefore, “intentional misconduct.”

Questions: When does misconduct become “intentional misconduct”?

Knowing violation of law: Knowing violation of law arguably is where an act or omission that knowingly violates the law causes impairment to community property.

Question: When is there legal causation between a “knowing violation of law” and damage to the community estate?

Next is the heart and soul of this article – how to transition from the theoretical discussion of the law to the real practice of law. More specifically, how to apply the foregoing legal standard to the facts of the case. To this end, three (progressive) arguments are posited:

First, the need to designate certain factual “circumstances” to consider

Second, what those “circumstances” are; and

Thirdly, how the “circumstances” can be illustrated, using the facts of Kamgar.
The Case or Need for Designating “Circumstances” to Consider

Overview: The duty of care in section 16404(c) set forth above is unfamiliar to family law judges and attorneys. Indeed, this legal standard is on the family law books but remains largely ignored.

Hence, how can judges and attorneys achieve confidence in applying this legal duty to the facts of a case? First, by legally defining the breaching events; and second, by organizing the relevant facts into “circumstances” so that they can be meaningfully managed through the duty of care in section 16404(c) and weighed accordingly. Only then can the mind of the law be intelligently expressed, either of breach or no breach.

The first – the legal definitions, is discussed above. The second – the need to designate “circumstances,” is addressed next.

How “circumstances” are pleasing to the mind, generally: A fork and knife are to eating food what circumstances (or factors) are to applying a statute. Just as a fork and spoon break down food into bite size pieces for the stomach to digest, circumstances or factors help break down application of a statute into bite size pieces for the mind to understand.

For example, when faced with whether a trustee has violated the Prudent Investor Rule, the Legislature directs the court to consider “circumstances that are appropriate,” “[a]mong” which are those expressed in subdivision (c) of Probate Code section 16047. The Legislature similarly sets forth circumstances the court must consider when addressing permanent spousal support. (Fam. C. § 4320.)

Absence of circumstances in section 16404: But in Corporations Code section 16404(c), the Legislature defines none of the operative terms - for instance, “grossly negligent or reckless conduct.” Nor does it specify any circumstances for the court to consider when applying these terms to the facts of a case.

Nor has the judiciary provided any illumination from a published family law opinion. Consequently, family law judges and attorneys are left to wrestle with a statute in which they have no working relationship.

Circumstances proposed in this article, generally: When applying the duty of care codified in Corporations Code section 16404(c) to the facts of a family law case, this article proposes “circumstances” or factors to consider. The purpose of these circumstances is to help the legal mind when it is faced with the difficult challenge of having to decide whether an act or omission, in connection with the management of community property, crosses the line from risk that is tolerable (and thus, not remedial) to risk that is intolerable (and hence, remedial). The former involves negligent conduct, whereas the latter involves “grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law” within the meaning of section 16404(c).

The court should consider each circumstance proposed below to first determine whether it applies (or is invoked by the facts of a case). If a circumstance applies, the court must then...
decide whether it weighs in favor of mitigation (tending toward or favoring no breach) or aggravation (tending toward or favoring breach).4

In the end, the court must decide whether the circumstances in aggravation outweigh the circumstances in mitigation, sufficient to establish an evidentiary bridge that supports the mind of the law to walk from one side of the bridge – non-remedial negligent conduct, to the other side of the bridge – remedial “grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”

What are these circumstances?

 Proposed “Circumstances” to Achieve Confidence with the Duty of Care

Introduction: Breaches of the duty of care arguably fall into two categories. First, those involving a bad state of mind – for example, “intentional misconduct, or a knowing violation of law.” Secondly, those involving a good state of mind – for example, a lawful, good faith belief to confer financial gain on the community estate, but accompanied with the intolerable risk of loss that is associated with “grossly negligent or reckless conduct.” This article proposes “circumstances” to consider under each category.

The first category – “intentional misconduct or knowing violation of law,” involves breaches that are easier to prove. For instance, aggravation of only one circumstance may be sufficient to proof breach. If not, the other circumstances described later in the second category should also be considered.

The second category – “grossly negligent or reckless conduct,” involves breaches that are tougher to prove. For instance, why should loss resulting from conduct that was intended to benefit both parties be allocated all to one party? In this more challenging situation, the totality of the circumstances should be considered.

Category #1 - circumstances involving a bad state of mind

Overview: The case for breach of the duty of care is more obvious in some cases. For example, where only one circumstance that is implicated weighs not only in favor of aggravation, but also breach. This is illustrated by the following circumstances.

 Intentional misconduct or knowing violation of law: A violation of law that causes harm to the community weighs heavily in favor of aggravation, if not dispositive, by itself alone, in favor of breach. (See, e.g., In re Marriage of Stitt (1983) 147 Cal.App.3d 579, 588 [“the court had conclusive evidence of recently committed criminal activity which culminated in financial consequences at the time the marriage was coming to an end”]; In re Marriage of Beltran (1986) 183 Cal.App.3d 292, 295 [“husband's criminal conduct diminished the wife's share of the community property to which the wife was otherwise entitled upon dissolution”]; see also In re Marriage of McTiernan & Dubrow (2005) 133 Cal.App.4th 1090, 1103 [husband sold stock in violation of a restraining

---

4 The word “breach” presupposes not only departure from a legal standard, but also a departure that causes damage (injury, impairment, or dissipation) to the community.
In re Marriage of Quay (1993) 18 Cal.App.4th 961, 964, 971-973 [husband withdrew money from an account frozen by court order and loaned it to a person who was not creditworthy].)

**Breach of duty of loyalty:** The duty of loyalty is codified in sub-division (b) of Corporations Code section 16404. A breach of this duty that causes harm to the community would also be a breach of the duty of care in sub-division (c) of section 16404. The clearest example of breach arguably is self-dealing – an act or omission that benefits the managing spouse’s separate property, at the expense of the community estate. (See, e.g., Enea v. Superior Court (2005) 132 Cal.App.4th 1559, 1563 [partner rents partnership property to himself, at below market rate]; see also Scott, The Fiduciary Principle (1949) 37 Cal. L. Rev. 539, 555 [quoting Justice (later Chief Justice Stone: “I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that ‘a man cannot serve two masters’”].)

**Judgment not business judgment because it lacks good faith:** Business (or partnership) judgment, even if negligent, is not actionable or remedial, because it is business judgement – that is, conduct done with the good faith belief that it will financially benefit the business. (See for example, Civ. C. § 5800(a) and Corp. C. § 7231(a).)

Therefore, when such good faith is lacking, the protection surrounding it lessens, if not disappears. That is, the absence of good faith weighs heavily in favor of aggravation, if not breach itself. (See, e.g., Quay, 18 Cal.App.4th 961 at 971-973 [“Taking 20 percent of one's capital and tying it up in an illiquid investment and making a loan, based on friendship, to a company whose financial situation was uncertain are not the hallmarks of a prudent fiduciary”; In re Marriage of Czapar (1991) 232 Cal.App.3d 1308, 1317-1318 [“William was guilty of wasting community assets by his actions in managing ACE and of violating the standard of care owed to Phyllis [relating to disbursements for a car, charity, and hiring of girlfriend]”].)

**Category #2 - circumstances involving a good state of mind**

**Overview:** In contrast to the foregoing “easy” cases, some cases present a far more difficult challenge as to whether a breach has occurred. For instance, arguably the most challenging case is when an action or inaction that was intended for financial gain results in loss. Neither spouse is better off at the expense of the other. Both are worse off. In such a situation, when should such loss be charged solely to the managing spouse?

To shepherd legal thinking through this challenging situation, this article proposes that the family law mind be guided by the following circumstances. Such circumstances

---

5 The absence of good faith means only that good faith is lacking. It is hardly means the presence of bad faith.
help the mind to decide when the risk of negligent conduct, which is not actionable, crosses the line to risk of grossly negligent or reckless conduct, which is actionable.

*Good faith business judgement:* As set forth above, the absence of good faith business judgment – that is, there is no objective reason to believe that the act or omission would financially benefit the community, would weigh heavily in favor of aggravation, if not dispositive in favor of breach.

In contrast, however, the presence of good faith does not mean the standard has been complied with (or is not breached). Rather, this factor of mitigation must be weighed against the other factors of mitigation and aggravation.

*Due diligence – third-party advisors and information:* The more normative the due diligence, the more tolerable the risk. Conversely, the less normative the due diligence – for example, a stock tip from a stranger at a bar, the less tolerable the risk.

*Level of communication:* A monarchy (unilateral decision making) may be lawful, but is far riskier than a democracy (bilateral decision making). That is, the more bilateral the communication and decision making, the greater the risk that is tolerated. Indeed, in *Duffy*, the court discusses in some detail the communication and decision making relationship of the spouses as to each investment. (91 Cal.App.4th at 926-927.)

But the law rejected joint management in favor of unilateral management of community property. Therefore, the absence of communication or joint decision making is not fatal. But if unilateral management is not a factor in mitigation, it risks being a factor of aggravation; and the more factors of aggravation, the greater the risk of breach of the standard of care.

*Level of disclosures:* The duty of disclosure is triggered either “without demand,” or “upon demand.” During dissolution of marriage, the duty is without demand as to material facts and circumstances. (Fam. C. §§ 2100 et seq.) But during marriage, the duty is both with and without demand. (Corp. C. § 16403(c), which applies to marital partners by virtue of Fam. C. § 721(b) [without demand]; Fam. C. § 1100(e) [upon demand].)

A violation of the duty of disclosure would be a factor of aggravation. Conversely, compliance with the duty would be a factor of mitigation. More broadly, the greater the level of disclosures, the greater the tolerable risk.

*Act of commission - within or without scope of normative management abilities:* The managing spouse typically operates within some areas of expertise or ability that has proven financially beneficial to the community – for example, a doctor, lawyer, businessman, and so forth. An action or inaction that is within this scope of normative management is tolerated more than an action or inaction that is not. (See, e.g., Civ. C. § 5800(a) [“act or omission … performed within the scope of the officer’s or director’s association duties” is more protected than if the act or omission was outside the same scope].) For example, a stockbroker doing stock investing is viewed differently than the same stockbroker doing real estate development. But a stockbroker who has confined his
practice to blue chip stocks who suddenly begins investing in riskier investments, such as options or hedge funds, may be venturing into a factor of aggravation.

*Act of omission - within or without scope of normative management abilities:* Ability heightens accountability – for example, experts are held accountable to a higher standard than non-experts. Thus, an act of omission that is within the expertise of the managing spouse is tolerated less (and more a factor of aggravation) than an act or omission that is outside the expertise of the managing spouse.

For example, missing a statute of limitations by a managing spouse who is not an attorney is outside the scope of normative management, thus less aggravating. (See, e.g., *Schultz*, 105 Cal.App.3d at 855–856 [husband’s failure to appear in court to defend action brought by creditor was negligent; therefore, the debt resulting from default judgment had to be equally shared, and not charged solely to him].) Conversely, the same act or omission by an attorney is within the scope of normative management, hence more aggravating.

In contrast, the failure of husband to renew a lease in connection with a business that he was managing may be a breach. (*In re Marriage of Munguia* (1983) 146 Cal.App.3d 853, 859 [“It may be husband's fiduciary duty to maximize the value of the Wagon Wheel by securing a continuation of the lease”].) The same may be true for an employee who fails to timely exercise stock options.

*General economic conditions:* What were the general economic conditions relating to the area of the economy in which the act or omission under scrutiny occurred? (See, e.g. Prob. C. § 16047(c)(1).) For example, an act or omission related to buying stocks at a time when the stock market was falling would be a factor in aggravation.

*Consent from the non-managing spouse:* The non-managing spouse’s consent, whether express or implied, should be considered, but carefully. For example, is the consent knowing and intelligent, and otherwise untainted by any undue influence? Moreover, what specifically did the non-managing spouse consent to?

*Kamgar* illustrates this scope of the consent problem well. Wife consented to Husband self-investing $2.5 million, but she did not consent to him self-investing in risky options and there was otherwise no history of him ever doing so. Is there a difference between consent that is general (self-investing) versus consent that is specifically narrowed to the act or omission that breached the duty of care (self-investing in options)?

For these reasons, the presence of any consent should be scrutinized carefully. What is the scope of the consent? Is it tainted by undue influence or lack of disclosures? On the other hand, the absence of consent is far from fatal. The Legislature did not mandate joint management and control.

*Objections from non-managing spouse:* In *Duffy*, the court took notice of wife’s objections to husband’s investments. (91 Cal.App.4th at 927.) When the managing spouse heeds the objection of the non-managing spouse in some fashion, for example,
increasing communications or disclosures, or otherwise expanding the scope of due diligence, such heeding is a factor in mitigation.

Totally ignoring the objection and the objecting spouse runs the risk of being a factor of aggravation. But the court has to be careful here. Attaching too much weight to such an aggravating factor risks ushering in the concept of joint management and control through the back door when the Legislature barred it from coming in the front door.

**Question:** The non-managing spouse is arguably subject to the fiduciary duty of care. If this spouse objects to an investment opportunity, the managing spouse yields to the objection, and the opportunity otherwise proves that it would have been beneficial to the community, are the any circumstances in which the non-managing spouse could be subject to a breach of the duty of care?

**Ages of spouses:** Loss when the spouses are older (or retired) is arguably more aggravating than loss when they are younger. In the former, there is less time or opportunity to recover from the loss.

**Timing of loss to date of separation or dissolution of marriage:** Facts during marriage that do not support a finding of “grossly negligent or reckless conduct” could support at least a finding of aggravation, if not breach itself, if the same facts occurred when the managing spouse had a view of probable separation. What is the support for this point?

Generally, marital separation uniquely changes the paradigm of risk (or tolerable risk of loss). During marriage, risks of growth (and corresponding risks of loss) are tolerated, but upon separation, the mindset shifts to fully disclosing and safely transporting assets from the time of separation to the time of distribution, and avoiding risks in the meantime. This decreased risk is enforced by expanded fiduciary duty.

More specifically, during marriage, marital partners are governed by “spouse” statutes, such as Family Code sections 721, 1100, and 1101. But marital separation adds to these “spouse” statutes new “party” statutes.

The effect of these new statutes is to replace the marital management model during marriage - unilateral decision and reduced disclosure duties, which tolerates higher risks - with the management model during separation - unilateral decision restrained in favor of joint or court decision making and the expanded duty of disclosure, which tolerates lower risk. (See generally Primer on Fiduciary Duty During Divorce and Remedies for Breach, pages 5-14.)

This decreased tolerance of risk caused by separation is clearly evidenced in new declarations of “public policy” in Family Code sections 2100(a)(1) [“to marshal, preserve, and protect community and quasi-community assets and liabilities that exist at the date of separation so as to avoid dissipation of the community estate before distribution’] and 2120(a); new and expanded duty of disclosure [Fam. C. §§ 2100 et
seq]; and new Automatic Temporary Restraining Order or ATRO. (Fam. C. § 2040(a)(2); see also In re Marriage of Van Hook (1983) 147 Cal.App.3d 970, 986 [the ATRO “allows the courts to preserve assets [tendered to the court at the beginning of a case] until an equal division can be accomplished [at the end of the case]”].

Indeed, the decrease in tolerance of risk that is more than expressed and evidenced in new “party” statutes. It is enforced by “expanded fiduciary obligations”:

It is California policy to ‘marshal, preserve, and protect’ community and quasi-community assets and liabilities existing at the date of separation ‘so as to avoid dissipation of the community estate before distribution.’ [Fam. C. § 2100(a)] Toward that end, expanded fiduciary obligations with regard to management of the community estate are triggered when spouses separate in anticipation of marriage dissolution (or legal separation or nullity). (Hogoboom & King, Cal. Practice Guide: Family Law ¶ 8:607 (2017). [emphasis added].)

What is the practical effect of an expanded fiduciary duty? Proving a violation of a lesser duty (for example, good faith) requires proof of “more egregious conduct ….” (Duffy, 91 Cal.App.4th at 937.” Therefore, it is easier to prove a violation of an expanded fiduciary duty. That is, violation of the greater duty requires proof of less egregious conduct than violation of the lesser duty.

In short, the same conduct that is not a breach during marriage, may be a circumstance of major aggravation, if not breach itself, if it occurs in anticipation of separation or during dissolution of marriage.

_Diversification of risk:_ In Duffy, the court took careful note when husband transferred his diverse portfolio of stocks in his IRA to one stock. (91 Cal.App.4th at 927.) Common sense and experience combine to support this point - a diverse allocation of assets is a more tolerable risk than putting all of your eggs into one basket.

_Tolerance for risk unique to the subject marriage:_ In Duffy, husband made a number of investments – some good, some bad. Collectively, the successes appear to have exceeded the failures, by a large margin. (91 Cal.App.4th at 926-927.) Does this suggest that this marriage has a higher tolerance for risk? Or do these gains and losses go to how to calculate or measure harm or injury to the community, as discussed below?

_Amount of loss in relation to the entire estate:_ If the loss is small in relationship to the value of the entire estate, greater aggravation from the other factors herein would be required to support a finding of breach. Conversely, if the loss is significant, less aggravation would be required from the other factors herein. Indeed, a loss large enough might alone merit a finding of breach.

_Other circumstances:_ Because each case is unique, the court should have discretion to consider such other and further circumstances that reasonably bear on the question of when an act or omission crosses the line from non-actionable
mismanagement, such as negligence, to actionable mismanagement, such as “grossly negligent or reckless conduct, intentional misconduct, or knowing violation of the law.”

How can the foregoing section 16404(c) “circumstances” be applied, using the facts in In re Marriage of Kamgar (2017) 18 Cal.App.5th 136?

**Proposed “Circumstances” Illustrated, Using the Facts of Kamgar**

**Introduction:** The court of appeal correctly affirmed the trial court, but the better, if not correct, ground of affirmance should have been the duty of care in section 16404(c), not the duty of disclosure in section 16403(c), as reasoned and illustrated herein.

**Key facts:** Husband (“Fred”) and Wife (“Moira”) married in 1990 and separated in 2013. They had four children. Moira did not work outside of the home. Fred successfully ran several businesses. He sold those businesses for sums of money that allowed him to stop working during the last 10 years of marriage.

The proceeds from the sales of these businesses were contributed to the parties’ liquid assets. These assets were managed by a professional investor and Fred.

In 2002 or 2003, Fred invested a portion of the liquid assets in Apple stock. But in 2010, his investment strategies dramatically changed. In particular, he “began to research options trading, educating himself about the topic by taking investment classes, reading publications, and meeting with other investors.”

Thereafter, with Moira’s consent, Fred opened a self-directed account at TD Ameritrade (“Ameritrade”). This account required joint signatures for any “transfer or withdrawal requests.”

In December 2011, Fred funded the Ameritrade account with the Apple stock. At the time, the stock was worth approximately $2.5 million. Moira consented to Fred having investment authority over this $2.5 million, which was approximately 25% of their net worth.

The next development was significant:

Fred then applied to Ameritrade for a ‘Portfolio Margin Upgrade Request’ to allow enhanced margin trading, which dramatically increased the potential return — and risk of loss — in his option trading by using funds borrowed through the investment account to increase the value of the trades.

As a prerequisite for the upgrade, Ameritrade required Fred and Moira to pass a test demonstrating their financial knowledge and awareness of trading risks. Fred testified that because Moira was not interested, he took the test for her and signed her name to the upgrade application. Moira claimed she never authorized Fred to sign her name to the application. Fred falsely represented on the application that he and Moira both had extensive options trading experience. Fred also stated the couple’s financial goals were growth, income, and conservation of capital, but not speculation. In February 2012, Fred changed the Ameritrade account so he no
longer would need Moira’s signature to make withdrawals or transfers to the account.

Over the next 13 months, Fred converted the Apple securities in the account to cash and then, without telling Moira, deposited another $8,188,605 in community funds into the account, for a total community investment of $10,618,605.

Fred initially enjoyed success. From these gains, Fred withdrew approximately $3.8 million from the Ameritrade account and removed it from his investment authority. But afterwards, Fred’s risky investing caused him to lose almost all of the remaining Ameritrade account – that is, the initial $2.5 million, plus the additional $8 million, less the $3.8 million withdrawn, except as to $500,000.

Court rulings – breach of duty and measure of damages: Following trial, the court concluded that Fred “had breached his fiduciary duty [of disclosure] to Moira [under Corp. C. § 16403(c)(1)] by failing to disclose the ‘series of investment transactions made by him within the Ameritrade account between December 2011 and January 2013.’ Alternately, the court also ruled that Fred breached his fiduciary duty [of care] to Moira [under Corp. C. § 16404(c)] by grossly negligent mismanagement of the parties’ assets in the [Ameritrade] trading account ….”

In measuring damages, the court excluded the initial $2.5 million from its measure of damages to the community because Moira agreed Fred could invest it. As to the additional $8 million, the court excluded the $3.5 million Fred withdrew from the investment account and returned to the community, and the $500,000 that remained. Therefore, the trial court concluded that Fred damaged the community by the sum of $4 million ($8 million - $3.5 million - $500k). Hence, Fred was ordered to pay Moira her one-half share of this $4 million loss, which was $2 million.

The court of appeal affirmed the breach of the duty of disclose in section 16403. It further affirmed the trial court’s measure of damages.

6 Subdivision (c) of Corporations Code section 16403 provides in relevant part: “Each partner . . . shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability, . . . the following . . . : [¶] (1) Without demand, any information concerning the partnership’s business and affairs reasonably required for the proper exercise of the partners’ rights and duties under the partnership agreement or this chapter . . . .” (Italics added.) Marital partners are bound to this statute by virtue of Family Code section 721(b).

7 The trial court’s exclusion of the loss of $2.5 million from the amount of damages, and the court of appeal’s affirmance of this exclusion, is perplexing indeed. How does Moira’s consent to Fred managing $2.5 million amount exempt him from the fiduciary duty of care? Management authority, however conferred, does not exempt the manager from the standard of management. Authority, by nature and necessity, is (and must be) checked and balanced by duty. That is, it is “duty-full,” not “duty-less.” The right to enforce duty arguably can be waived, but the waiver must be knowing and intelligent, and where the high fiduciary relationship is involved, subject to a corresponding high standard of scrutiny and proof.
The weaker approach – breach of the duty of disclosure in section 16403(c):

*Overview:* The court of appeal correctly affirmed the trial court’s finding of breach of fiduciary duty. But the better approach would have been to anchor the affirmance in the duty of care in section 16404(c) rather than the duty of disclosure in section 16403(c). The following discussion sets forth the reasons supporting this view.

*Reasons:* First, as a matter of law, the duty of disclosure in section 16403(c) is arguably inseparable from the standard of care in section 16404(c). Rather, the duty of disclosure is one of the “circumstances” that should be considered whether the standard of care has been breached. If a breach of the duty of disclosure (or a breach of the duty of loyalty in section 16404(b)), has caused harm to the community, such a breach, as a matter of law, is a breach of the duty of care.

Second, the duty of disclosure presents causation problems. For example, assume Fred breached his duty of disclosure but the account increased in value. There may be a breach, but it caused no damage. (See, e.g. *In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479 [breach of the duty of disclosure may involve no harm or injury].)

Conversely, assume Fred complied with his duty of disclosure but still suffered the same losses because he engaged in “grossly negligent or reckless conduct” within the meaning of section 16404(c). Does Fred’s compliance with the duty of disclosure immunize him from liability under section 16404(c)?

Third, relying solely on the duty of disclosure creates serious, if not insurmountable, practical problems. For instance, assume the following: Fred made full disclosure to Moira, Moira did not object, and Fred continued with “grossly negligent or reckless conduct.”


In short, the buck arguably stops with the managing spouse. That is, the focus should be on the actions or inactions of the managing spouse rather than the actions or inactions of the non-managing spouse?

The stronger approach – breach of duty of care in section 16404(c)

*Overview:* Kamgar demonstrates a continuing reluctance by the courts to confront the meaning and application of the standard of care in section 16404(c). This reluctance arguably stems from a lack of working knowledge of this standard of care. Hence, this article proposes such a working knowledge, by considering certain “circumstances” and answering whether they favor mitigation (compliance with the duty) or aggravation.
(breach of the duty). In particular, how can the facts of Kamgar be used to illustrate the “circumstances” listed above, either in mitigation or aggravation?

**Good faith business judgement:** Fred’s goal was financial gain to the community. This circumstance favors mitigation.

**Due diligence – third-party advisors and information:** The parties employed a professional financial or investment manager. But there is no evidence Fred ever consulted with this (or similar) manager about trading options. Rather, he chose to Lone Ranger it in a risky area that was outside his normative or proven skills or abilities – for example, he had no formal training or education in trading options. Nor had he any proven track record over years of trading. This circumstance favors aggravation.

**Level of communication:** The level of communication between the parties was poor, if not non-existent. As a result, the level of risk that was tolerable to the community decreased, especially when so much of the community estate is at risk. Therefore, trading so much of the estate in risky options, in the face of such poor communication, makes this circumstance favor aggravation.

**Level of disclosures:** Fred violated his duty of disclosure under Corporation Code section 16403(c). This circumstance favors aggravation.

**Act of commission - within or without scope of normative management abilities:** Fred’s normative or proven abilities were in managing businesses. Following the sale of these businesses, he managed a portion of the parties’ investment portfolio – the Apple stock. Therefore, trading in options was outside of his normative or proven abilities, especially those known to Moira. This circumstance favors aggravation.

**Act of omission - within or without scope of normative management abilities:** See the act of omission – concealment or non-disclosure, discussed above.

**General economic conditions:** This circumstance is neutral or not applicable.

**Consent from the non-managing spouse:** Moira consented to Fred self-investing $2.5 million. But there is no evidence that she consented to him trading in risky options. To the contrary, there is compelling evidence that Fred did not disclose his risky trading to Moira. More importantly, there is no evidence that Moira waived the standard of management that Fred as managing fiduciary was subject to (even if such a waiver was legally possible). Hence, her consent is not a factor of mitigation as to the $2.5 million.

**Objections from non-managing spouse:** There were no disclosures from Fred to Moira. Therefore, there could be no objections from her. Hence, this circumstance is neutral or not applicable.

**Ages of spouses:** Fred had sold his businesses. He had not worked for 10 years at the time of the losses. After retirement, the ability (in terms of time and opportunity) to recover from losses diminishes. Thus, the level of tolerable risk diminishes as well. This circumstance favors aggravation.
Timing of loss – date of separation: There is no evidence Fred anticipated separation when he first breached the duty of care. On the other hand, the parties were in marital counseling during the time of Fred’s breaching conduct. Moreover, Fred reasonably should have anticipated that Moira would likely end the marriage when she found out about his conduct and the magnitude of the losses.8 Indeed, she did. Thus, this circumstance is neutral, favoring neither mitigation or aggravation.

Diversification of risk: Fred did not diversify his risks. Rather, he put all of his eggs into one basket – option trading. This circumstance favors aggravation.

Tolerance for risk unique to the subject marriage: There is no evidence that Fred and Moira jointly embraced the risks of options trading. This circumstance favors aggravation.

Amount of loss in relation to the entire estate: The initial $2.5 million was approximately 25% of the parties’ net estate. Therefore, the additional $8 million consumed most of the community estate. This circumstance favors aggravation.

Other circumstances: “Fred then applied to Ameritrade for a “Portfolio Margin Upgrade Request” to allow enhanced margin trading, which dramatically increased the potential return — and risk of loss — in his option trading by using funds borrowed through the investment account to increase the value of the trades.”

In connection with this application, which materially increased the risks – both of gain and loss, Fred signed Moira’s name to the application. Moreover,

Fred falsely represented on the application that he and Moira both had extensive options trading experience. Fred also stated the couple’s financial goals were growth, income, and conservation of capital, but not speculation. In February 2012, Fred changed the Ameritrade account so he no longer would need Moira’s signature to make withdrawals or transfers to the account.

This circumstance favors aggravation.

Conclusion: The circumstances favoring aggravation greatly preponderate over the circumstances favoring mitigation. This preponderance sufficiently supports the mind of the law to walk across the bridge, from the beginning side of non-actionable negligence to the ending side of actionable “grossly negligent or reckless conduct” within the meaning of section 16404(c). In short, Fred breached the duty of care.

This ends the discussion of Kamgar. Next: What are the affirmative defenses?

---

8 Again, the issue here is not mismanagement of the marriage (or marital fault), but mismanagement of marital assets and information relating to them.
Affirmative Defenses


Moreover, “Family courts are courts of equity . . . .” (In re Marriage of Klug (2005) 130 Cal.App.4th 1389, 1403.) Accordingly, there may be equitable defenses to a breach by a marital partner that are not available to a business partner. For instance:

The Stitt court noted that not every financial loss need be accounted for upon dissolution of marriage. "We are reminded that there is a principle that one takes a spouse 'for better or worse.' This may be so. Because of the continuing nature of the marital relationship, principles of waiver, condonation and laches would in most cases prevent any belated attempt at the time of dissolution proceedings to seek an accounting of all community property losses attributable to the independent delicts of the spouses. Here, however, the court had conclusive evidence of recently committed criminal activity which culminated in financial consequences at the time the marriage was coming to an end." (Beltran. 183 Cal.App.3d at 295 n. 1, quoting Stitt, 147 Cal.App.3d at 588; see also Civ. C. § 3515 ["He who consents to an act is not wronged by it”]; Civ. C. § 3516 [“Acquiescence in error takes away the right of objecting to it”].)

Additionally, the Family Code recognizes the defenses of statute of limitations and laches. (Fam. C. § 1101(d).)

What are the key questions regarding damages?

Questions Regarding Damages

Which statute to measure damages? Subdivision (a) to Family Code section 1101 broadly provides:

A spouse has 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, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have

---

9 The marital partner relationship also differs from the business partner relationship in interests. In the former, business partners’ time, however allocated, is all devoted to the singular interest of financial gain. In the latter, however, marital partners may have chosen to allocate their time between different interests – for example, one to managing property and the other to caring for children. This difference is noted because it exists. But however accurate, should this difference have any significance in how the duty of care is applied?
caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate. (emphasis added.)

Subdivision (g) illustrates the remedies for breach:

Remedies for breach of the fiduciary duty by one spouse, including those set out in sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. [emphasis added].

The words “including but not limited to” have been construed to mean terms of illustration, not limitation. (Walker, 138 Cal.App.4th at 124, 1426; Duffy, 91 Cal.App.4th at 939.) Therefore, can damages be calculated under Civil Code § 3333,10 as an alternative to Family Code section 1101(g), if there is a difference between the two?

Losses offset by gains? In Duffy, husband made a number of investments during marriage. Some resulted in gain whereas the others resulted in loss.

At trial, wife argued that husband breached, amongst other things, his duty of care as to the losses. The trial court agreed and charged husband with the losses (apparently without offset from the gains). (91 Cal.App.4th at 926-927.)

While the trial court was reversed, the question remains: Can losses resulting from the breach of the standard of care be offset by gains?

Under the Prudent Investor Rule, the Legislature arguably directs the court to look not at individual transactions, but the overall portfolio. (Prob. C. § 16047(c)(4) [one circumstance or factor the court must consider is: “The role that each investment or course of action plays within the overall trust portfolio”].)

Should Family Court adopt a similar view? Or is there a more nuanced difference in Family Law, namely, that bilateral gains (creditable to both spouses) should not be used to offset

---

10 Civ. C. § 3333 provides: “For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

10 A related question involves Family Code section 2625, which provides: “Notwithstanding [Fam. Code § 2620 to Fam. C. § 2624], inclusive, all separate debts, including those debts incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community, shall be confirmed without offset to the spouse who incurred the debt.” Does any benefit to the community, however minute, immunize the debt from being characterized as separate? Or is the debt community but only to the extent of the benefit to the community, and any excess (the amount of the debt above the amount of the benefit to the community) separate?
unilateral losses (losses chargeable to one spouse), whereas unilateral gains can be used to offset unilateral losses.\(^\text{11}\)

**Prejudgment interest?** Is prejudgment interest allowable under Civil Code sections 3287(a) or 3288?

How is the injured spouse made whole at the time the community estate is divided?

**How the Injured Spouse Is Satisfied at The Time of Division**

A working knowledge of the breach of the duty of care requires familiarity with the difference between the actual community estate and the legal (or imputed) community estate. The former is what actually exists and the latter is what exists in the eyes of the law – that is, what should have existed, had there been no breach of the duty of care.

Thus, a breach means that the legal estate is greater than the actual estate, either by the amount of the asset that would have otherwise been present, had there been no breach, or by the amount of the debt that would have otherwise been absent, had there been no breach. The court divides the legal estate equally by distributing to the non-breaching spouse value from the actual estate equal to one-half the value of the legal estate, and distributing the balance to the breaching spouse.

For example, if the actual estate (which exists in fact) is $10 but the legal or imputed estate (which exists in the eyes of the law) is $12, the court would divide the legal estate equally as follows: to the non-breaching spouse, $6 from the actual estate and to the breaching spouse, the $4 that remains in the actual estate, plus the $2 from the legal or imputed estate.

What are the remedies related to breach of the duty of care?

**Related Remedies, Outside of the Duty of Care in Section 16404**

Remedies outside of Corporations Code section 16404 include but are not limited to misappropriation [Fam. C. § 2602], certain transfers “for less than fair and reasonable value” [Fam. C. § 1100(a)], designated transactions by one spouse “without the written consent of the other spouse” [Fam. C. § 1100(c)], debt not for the benefit of the community [Fam. C. § 2625], and reimbursement of community funds used for separate purposes [by case and statutory authority].

\(^{11}\) A related question involves Family Code section 2625, which provides: "Notwithstanding [Fam. Code § 2620 to Fam. C. § 2624], inclusive, all separate debts, including those debts incurred by a spouse during marriage and before the date of separation that were not incurred for the benefit of the community, shall be confirmed without offset to the spouse who incurred the debt.” Does any benefit to the community, however minute, immunize the debt from being characterized as separate? Or is the debt community but only to the extent of the benefit to the community, and any excess (the amount of the debt above the amount of the benefit to the community) separate?
Conclusion

This article is a maiden voyage. It is a risky adventure to provide guidance on a subject – the marital duty of care as to marital property – when there is little, if any.

The guidance comes mostly from freshly proposed circumstances that family law judges and attorneys should consider when addressing whether an act or omission in connection with managing community property crosses the line from non-actionable negligent conduct to actionable “grossly negligent or reckless conduct, intentional misconduct, or violation of law.”

Like all maiden voyages, someone often has to get it wrong before someone later gets it right. This writer’s love of the law compels him to risk being that person. May any shipwrecks by this sailor make other sailors all the better.