'Benson' Opens a Door to Oral Agreements for Transmutation

By Mitchell A. Jacobs and David L. Marcus

On Dec. 23, the Court of Appeal opened a door to the enforcement of oral transmutation agreements that previously appeared to be shut tight. *In re Marriage of Benson*, 114 Cal.App.4th 835 (2003). *Benson* enforced a disputed oral transmutation agreement based on the doctrine of partial performance, despite Family Code Section 852, which appears to require that transmutation agreements be in writing.

In 2000, after a 17-year marriage, the wife filed a petition for dissolution. During the marriage, the husband worked as truck driver, earning $4,000 per month. He participated in an employment stock ownership plan and contributed to a 401(k) retirement plan. He also operated a gum-ball business in which he made a nominal annual income. The wife worked part time, earning $32,000 per year. She also participated in a retirement plan with her employer.

The wife is the beneficiary of an irrevocable trust, which existed during the marriage. Her father is the trustee. During the marriage, she contributed portions of her salary as well as property that she inherited to this trust.

In 1996, the wife's father gave the couple a 72 percent interest in a residence. That same year, the couple deeded the 72 percent interest to the wife's trust. A short time later, the wife's father gave the parties the remaining 28 percent ownership interest in the residence. The couple likewise deeded their interest to the wife's trust.

The husband brought a motion to join the wife's father (as trustee) to the divorce action. In the motion, the husband alleged that "[t]he community transferred the property into the Trust for no consideration, and with the understanding that husband was not surrendering his interest in the property."

That motion was settled on the morning of the trial, when the husband waived any claim against the trust in exchange for a $1,500 payment.

The husband testified at trial that, when he and the wife transferred the 72 percent interest in the residence to the wife's trust, she agreed that, on divorce, she would waive any claims to his retirement funds or his gum-ball business.

The husband further testified that, although he was adamant that he did not want to transfer his community interest in the residence to the wife's separate-property trust, he did so only after months of the wife's "persuasion" and her promise to waive her rights to his pension on divorce.

The husband testified further that, although they had some "issues," the couple had not been planning on divorcing and that the wife agreed to sign a waiver of his pension rights later. He never sought that written waiver because the wife assured him that she would sign it, and he trusted her.

The wife testified that she did not recall any discussion with the husband in which she would agree to waive her rights in his pension in exchange for the husband transferring ownership in the residence.

The trial court found the husband's testimony credible. In 1996, the residence was worth between $400,000 and $500,000. The husband's retirement assets in 2000 were worth $91,000. The Court of Appeal affirmed the trial court's decision to enforce the parties' oral agreement, as testified to by the husband.

The wife argued on appeal that, based on Family Code Section 852 and two court opinions, the trial court erred in allowing the husband to present extrinsic evidence of the parties' oral agreement and that transmutation agreements must be in writing.

Section 852 provides that a "transmutation of real or personal property is not valid unless made in writing by an express declaration."

In *Estate of MacDonald*, 51 Cal.3d 262 (1990), the state Supreme Court interpreted this writing requirement, stating that "it effects the intent of the Legislature to create a writing requirement which enables courts to validate transmutations without resort to extrinsic evidence and thus, without encouraging perjury and the proliferation of litigation."

In *In re Marriage of Campbell*, 74 Cal.App.4th 1058 (1999), the court held that Section 852 precludes the introduction of extrinsic evidence to prove an oral transmutation. The wife in *Campbell* claimed that she spent her separate property to improve her husband's separate-property residence in reliance on the husband's oral promise to place her name on the title.

The *Campbell* court rejected the wife's argument, holding that the wife waived her right to challenge the husband's extrinsic evidence of the oral agreement by failing to raise a timely objection (she raised the issue first at trial in response to her counsel's questions regarding the agreement). The court also held "that the doctrine of partial performance exempts the couple's oral transmutation agreement from the writing requirement of section 852." Thus, the extrinsic evidence properly was admitted.

The *Benson* court reasoned that courts traditionally have recognized exceptions to all statute-of-frauds provisions. The court primarily relied by analogy on *Hall v. Hall*, 222 Cal.App.3d 578 (1990).

Hall held that the traditional partial-performance exception to statutes of frauds applied to a statute requiring premarital agreements to be in writing (former Civil Code Section 5311, now Family Code Section 1611).

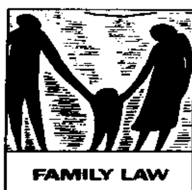
In *Hall*, the wife paid the husband $10,000, stopped working and applied for early Social Security benefits as part of an oral agreement that, if she paid him $10,000, he would give her a life estate in his residence. The husband sought an attorney's assistance to provide for the life estate but died before signing the required documents.

The *Hall* court held that the Legislature is presumed to be aware of these traditional exceptions to statute-of-frauds provisions and, thus, lawmakers did not preclude their applicability.

The *Benson* court found no reason to treat premarital and marital agreements differently in this regard. The court also relied on cases that have enforced oral contracts between nonmarital, cohabitation partners in similar circumstances, citing as an example *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

Benson also relied on the legislative comments to Section 852. According to the court, the comments "indicate that the ordinary rules and formalities applicable to real property transfers remain applicable to transmutations of real property between spouses."

The court stated that, because there is no "clear legislative direction to the contrary, we conclude that the doctrine of partial performance may be applied in proper cases and exempt oral marital transmutation agreements from the application of section 852." The court explicitly did not address whether the agreement would be enforceable under the doctrine of estoppel. The *Benson* court noted that, although *MacDonald* stated that the Legislature intended to "invalidate all solely oral transmutations," in the *Benson* case, the parties' agreement was partially in writing in the form of the transfer of the residence to the wife's trust. Accordingly, the court found the agreement enforceable because the husband substantially had changed his position in reliance on the agreement. Not to enforce it would result in a "harsh and unconscionable loss."



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The court added that it was not undermining the Section 852 writing requirement because a transmutation agreement must be proved by clear and convincing proof, transmutation agreements are subject to the laws of fraudulent transfers, and spouses are subject to the highest standard of good faith and fair dealing in transactions between themselves.

Benson allows the possibility of oral transmutation agreements, which the literal wording of Section 852 and cases such as *MacDonald* and *Campbell* appeared to have foreclosed. In light of *Benson*, the practitioner should investigate to determine whether any oral transmutation agreements could have been made and partially performed.

The Judicial Council Family Law Form Interrogatories (at the "forms" link in the "family" section of www.lasuperiorcourt.org) include a question asking whether the parties made any oral agreements affecting the disposition of assets, debts or support during the marriage. The value of the assets subject to the possible transmutation agreement, especially at the time of the partial performance of the alleged transmutation, could provide important evidence supporting an alleged transmutation.

A party opposing an oral transmutation, besides relying on factual arguments, may argue that the *Benson* court incorrectly interpreted the law. For example, the facts of *Campbell* are almost the same as those in *Benson*, but the two courts reached opposition conclusions. Both cases support their decision with legislative history.

The *Benson* court appears to have avoided directly addressing *Campbell* by limiting *Campbell* to deciding whether the exception of equitable estoppel applies to Section 852. *Benson* explicitly holds that the exception of partial performance is applicable. There appears to be a fine distinction between the two exemptions, considering that detrimental reliance is an element of equitable estoppel (11 Bernard Witkin, "Summary of California Law" Section 177 (9th ed. 1990)) and a key element in the "partial performance" exception as applied by *Benson*.

This issue undoubtedly awaits judicial or legislative clarification. In the meantime, attorneys have case law to support both sides of this argument.

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