In Divorce Cases, Changes in Title Have Consequences

By Mitchell A. Jacobs and Warren R. Shiell *

Attorneys representing married couples planning on re-financing their mortgages or taking out a home equity loan should pay special attention to the decision in *Re Marriage Of Weaver, 127 Cal. App. 4th 858*, where the Court of Appeal again confirmed the principle that a Section 2581 community presumption is triggered when one spouse changes his or her separate property title into joint title even if it is unintentional. Further even where there is no change in title, under *Weaver* if the property is held jointly before and after marriage, the commingling of funds to pay the mortgage and make improvements may cause a "transmutation" of separate property interests into community property.

Kathi Weaver and John Weaver married on September 28, 1985. After fourteen years of marriage they separated on December 9, 1999 and on January 19, 2000, Kathi petitioned for marital dissolution. The trial court considered John and Kathy's community property interests their "Scandia residence" and "Thule residence." In respect of the Thule residence, the trial court held that the Family Code Section 2581 title presumption that the Kathi had a community property interest because she was a joint tenant, was

rebutted by testimonial evidence adduced at trial that no gift had ever been intended when she was inadvertently added to the title. The Court of Appeal reversed. However, the Court of Appeal affirmed the trial court's holding that the parties separate property interests in the Scandia residence were "transmuted" into community property by the commingling of funds during marriage to pay the mortgage and make improvements even though there was no change in title.

John's mother and father purchased the Thule residence in 1989 using their earnings and the sale proceeds of their desert home. Neither John nor Kathi contributed anything to the purchase of the home. Title was taken by John and his mother and father as joint tenants. Kathi waived any interest in the home. When John's father died in 1997 Kathi was added as a joint tenant along with John and his mother. After the separation, John and his mother signed a deed purporting to change the title in the property to mother and son as joint tenants with Kathi as a one third owner.

At trial, mother, John and Kathi gave different stories regarding title and whether a gift of any property to Kathi had been intended. The mother testified that she neither intended nor was she even aware that Kathi was on the title. By contrast, Kathi testified that at her father-in-laws death, her mother-in-law had told her that she wanted her and John to own the Thule residence. She said she believed that she owned the property as a joint tenant along with John and her mother-in-law. John corroborated his mother's story and said that it was a mistake that Kathi had ended up on the deed. He said that he had not even read the deed after a real estate attorney had drafted it. However, at trial 'he conceded the wife held joint tenancy title: "We don't contest that at all.'"

The trial Court relied upon the case of *In Re Marriage of Camire (1980) 105 Cal. App. 3d 859,* in finding that Kathi had no interest in the Thule residence: "Although there is a presumption that title controls, the wife concedes that no community monies were ever invested in this house and there is no evidence from any of the witnesses that husband's mother gifted this property to both her son and his wife."

The key issue examined by the Court of Appeal was whether there was any evidence rebutting the Family Code Section 2581 presumption that title in joint names is community property. Prior to the father's death in 1997, when the property was in the name of John and his parents, John's interest was separate property because he had received his interest as a gift thereby overcoming the presumption that property acquired during marriage is community property.

The Court of Appeal found the trial court's reliance on *In Re Marriage of Camire* to be misplaced because that case had been decided prior to the enactment of Section 4800.1 (later Section 2581) which provides that the presumption that any property held in joint title by spouses during marriage is rebuttable only by written evidence. Section 2581 provides that written evidence can take the form of either "a clear statement in the deed or other documentary evidence of title" or "proof that the parties have made a written agreement that the property is separate property." In *Camire,* the husband's joint tenancy title was rebutted by evidence that the wife's brother had orally agreed to transfer title solely to the wife. The Court of Appeal stated that such oral evidence could no longer rebut the Section 2581 presumption.

In *Weaver*, there was no written evidence to rebut the title presumption – only the testimony of the mother that she never intended Kathi to have an interest and of John that it was a mistake for Kathi to end up on the title. Consequently, the Court held that at the time of dissolution, John and Kathi had a two thirds joint tenancy interest in the Thule residence and the mother a one third interest.

The Court also held that there was insufficient evidence to establish that John had effectively severed the joint tenancy when he and his mother had signed the deed after separation. The record on appeal did not contain the deed changing Kathi's interest to a one third interest and there was no evidence that Kathi ever consented to such a change. Further, the record was insufficient to determine whether the deed had been executed prior to the service of the petition for dissolution, summons and temporary restraining order enjoining any transfer of any interest in real property.

Although it is not entirely clear from the Court's decision, it appears that Kathi sought to rely on the case of *In Re Marriage of Haines* (1995) 33 Cal. App. 4th to suggest the title presumption might be rebutted by evidence of undue influence. In *Haines*, the court had reversed the trial court and disallowed a husband's right of re-reimbursement where the husband had coerced his wife into signing a quitclaim deed conveying her interest in the residence to the husband as his sole separate property. Later he deeded the property back to his wife and himself as joint tenants and claimed a right of re-reimbursement. The Court of Appeal could not see why *Haines* was relevant, since in the case at hand, it was the John that had converted the separate property into a joint tenancy. There was no question of Kathi being coerced. However, *Haines* does suggest that in

appropriate circumstances non-written evidence of undue influence may rebut the Section 2581 title presumption.

Despite holding that the joint title presumption was not rebutted, the Court held that John still had a right of re-reimbursement under Section 2640 of his separate property which he had initially acquired as a gift from his parents.

Generally, a spouse who converts his or her separate property to community property is entitled to reimbursement for the separate property contribution upon dissolution "unless the right is waived in writing." The Law Revision Commission comment to Section 2640 states that the separate property contribution is measured by the value of the contribution at the time the contribution is made. However, the community is entitled to any appreciation in value of the property. If the property depreciates (hardly imaginable in the current California property market) the value may not exceed the value of the property.

The Court seemed somewhat reluctant in following earlier rulings in the cases of *In Re Marriage of Anderson (1984) 154 Cal. App. 3d 572* and *In Re Marriage of Neal (1984) 153 Cal. App. 3d 117* which had considered Section 2640's predecessor, Civil Code 4800.2, which held that a written waiver of the right to re-reimbursement must be separate from the deed transmuting a spouses separate property interest into community property. In *Anderson,* a husband was entitled to a right of re-reimbursement where he had executed a deed transferring a house he had purchased as separate property prior to marriage into the joint property of himself and his wife in order to obtain a home equity loan. Kathi unsuccessfully argued that the granted deed itself had constituted a waiver

under Civil Code Section 4800.2. In light of the legislature's criticisms of *In Re Marriage of Lucas (1980) 27 Cal. 3d 808* which had prompted enactment of Section 4800.2, the courts in *Anderson* and *Neal* expansively construed that section's right of re-reimbursement to include the transmutation by deed of the husband's separate property interest in the house into community property. Separate property contributions were not to be limited to "downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property."

The Supreme Court criticized *Anderson* and *Neal* for applying Section 4800.2 retroactively but did not overrule them. Therefore, the Court of Appeal in *Weaver* felt bound to follow *Anderson* and *Neal.* The rule that spouses who transfer title to their separate property to the community are entitled to be reimbursed for the equity value of the separate property upon dissolution was subsequently re-affirmed in *In Re Marriage of Perkal* (1988) 203 Cal.App 3d 1198 and *In Re Marriage of Witt* (1987) 197 Cal App.3d 103. The Court of Appeal was not entirely pleased with this result because in its opinion allowing re-reimbursement under Section 2640 negates the transfer of title to joint tenancy and the Section 2581 community property presumption: "Nevertheless, unless our high court rules that section 2640 does not allow reimbursement for real property, we shall follow the current trend in construing Section 2640 broadly to allow re-reimbursement for real property contributions, unless there is a written statement, apart from a joint tenancy deed, which specifically waives the right to re-reimbursement."

Accordingly, the Court of Appeal remanded the case to the trial court with instructions to value John's one half separate property interest in the Thule residence he

had held jointly with his mother prior to transferring title to him, Kathi and mother jointly upon his father's death.

With regard to the Scandia residence, where John and Kathi had lived during marriage, the Court of Appeal upheld the trial court's decision. The parties had purchased the Scandia residence in 1985 shortly before they were married and held title as joint tenants. John had used $17, 478.50 of his separate property towards the downpayment of $10,600, and closing costs of $6,878. John and Kathi had funded the remainder with a mortgage of $76,189. After they got married John and Kathi had made about $33,000 in improvements, obtained a second mortgage of $32,500 to make further improvements and then refinanced in 1992, borrowing $124,000.

On appeal, Kathi argued that John was not entitled to reimbursement for paying the $10, 600 downpayment because it was made prior to marriage. The Court disagreed. In their view, any separate property interests had been transmuted into community property after marriage as a consequence of commingling the parties separate and community property interests used to pay the mortgage and home improvements. The Court further held that such commingling rendered inapplicable Family Code Section 852(a) which requires transmutation to be in writing and by express declaration. Unfortunately, the Justices failed to offer any authority for the "transmutation by commingling" holding and failed to note that Section 852(d) provides that the Statute does not affect the law "governing characterization of property in which separate property and community property are commingled or otherwise combined." Nevertheless, the Court found the facts of this case to be similar to *In Re Marriage of*

Rico (1992) 10 Cal. App. 4th 707 in which title held as tenancy in common prior to marriage was converted to joint tenancy during marriage when the parties refinanced. In that case the conversion created a community property interest and a right of reimbursement under Civil Code Section 4800.2 (now Family Code Section 2640]. In *Weaver*, even though there was no change in title the Court of Appeal held that property converted to community property because after marriage separate and community property interests were commingled to pay the mortgage and home improvements. However, the Court held that under Section 2650 John was entitled to a right of re-reimbursement of his downpayment of $10,600 from his separate property.

In light of *Weaver* attorneys representing a client in a re-financing or home equity loan should be keenly aware of the consequences of making changes in title. If a Bank insists that both spouses execute a joint deed, the spouse with a separate property interest should consider inserting a clear unambiguous statement in the deed if they wish to retain their separate property interest. If you are representing the spouse that has no separate property interest prior to execution of the joint title, you might consider asking the other spouse to sign a written waiver of the Section 2640 right of reimbursement if the transmutation is intended to be a complete gift to the community estate.

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