Focus

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Message to Spouses: Get All Transmutations in Writing

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Family Code Section 852(a) requires that a transmutation, which is a change in the character of separate or community property during marriage, must be made through an express declaration in writing. The strict demands of this requirement may seem unfair in cases where extrinsic evidence suggests that an adversely affected spouse did intend to effect a transmutation but no written evidence of such intent exists.

Recently, the California Supreme Court squarely addressed the possible inequities of Section 852(a) in *Marriage of Benson*, 36 Cal.4th 1096 (2005), and found that the writing requirement must be strictly enforced. In *Benson*, the husband surrendered his community interest in the marital residence by executing a grant deed in favor of an irrevocable trust to which the wife was a beneficiary, on the wife's oral promise to waive her community interest in the husband's retirement plan.

The wife's promise was not reduced to writing. At the trial of the wife's petition for dissolution, the husband tried to enforce the wife's promise. The trial court ruled in favor of the husband on grounds that the husband's deeding the house to the trust constituted partial performance of the wife's agreement to transmute the retirement accounts and that such partial performance substituted for the express declaration requirement in Section 852(a).

The Court of Appeal affirmed the judgment of the trial court, but the Supreme Court reversed, finding that a partial-performance exception was inapplicable to the writing requirement of Section 852(a).

The husband and wife were married for 17 years. On being married, the couple lived in a house in Santa Barbara owned by the wife's father. During the marriage, the wife's father deeded the property over to the couple. Thereafter, for reasons that are not explained in the court's opinion, the father asked the couple to transfer title for the residence to an irrevocable trust to which the wife was beneficiary and her father was the trustee.

In the meantime, over the course of the marriage, the husband, who was a truck driver by profession, had been participating in stock option and 401(k) plans offered by his employer.

At trial, the husband first disputed that his executing the grant deeds amounted to a waiver of his community interest in the property. In support of his claim, the husband joined the wife's father as a party to the dissolution proceeding but subsequently reached a settlement with his father-in-law partway through the trial.

The husband argued that four years before separation, he and the wife agreed that he would surrender his interest in the marital residence in exchange for her forgoing her community interest in his retirement benefits. The court took pains to note that the husband acknowledged he easily could have prepared a writing for his wife's signature but did not and that he had not raised the issue of the oral agreement before trial.

For her part, the wife denied that an oral agreement had been reached. She alleged that the husband's decision to convey the house to the trust was in recognition of her father's original generosity to them.

The trial court found the husband had, in fact, waived his community interest in the house but that the wife had relinquished her interest in the husband's retirement plans. The trial court said that traditional exceptions to other statutory writing requirements, including the general statute of frauds (Civil Code Section 1624(a)), are applicable to Section 852(a).

The trial court found the husband had, in fact, waived his community interest in the house but that the wife had relinquished her interest in the husband's retirement plans.

Consequently, the husband's deeding of the house to the trust equated to partial performance of the oral transmutation agreement such that the agreement could be enforced against the wife despite the absence of an express declaration by the wife in writing. After the Court of Appeal affirmed, the wife petitioned for review.

The wife argued that Section 852(a), which provides that "a transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected," requires an express written transmutation without exception, thereby precluding the establishment of a transmutation by way of the husband's testimony.

The court agreed with the wife. Citing its prior decision in *Estate of MacDonald*, 51 Cal.3d 252 (1990), the court determined that, in the absence of any writing, Section 852(a) cannot be satisfied. In *MacDonald*, the husband took a cash disbursement from his pension plan, which had been accumulated during marriage, and deposited the funds in various IRA accounts bearing only his name and designating as beneficiary a trust established for the husband's children by an earlier marriage. The wife had signed IRA forms containing a provision consenting to the designation of the trust as sole beneficiary.

On the wife's death, her executor claimed a community interest in the IRAs on behalf of the estate. The trial court found that the wife effectively transmuted her interest in the IRAs by signing the forms to the satisfaction of Section 852(a). However, the court upheld the Court of Appeal's decision reversing the trial court, finding that Section 852(a) was not met because the IRA forms lacked specific language expressly stating that the wife was effecting a change in the character of the IRAs as property.

The court in *MacDonald* also stated that, in the absence of express language, extrinsic evidence could not be used otherwise to prove that a writing effected a transmutation.

The *Benson* court reasoned that, if Section 852(a) cannot be satisfied without an express writing, it must follow that the requirements of that section cannot be met where there is no writing at all. The court specifically rejected the trial court's rationale that a finding of partial performance could support a determination that a transmutation had occurred despite the lack of an express written declaration by the adversely affected spouse.

The court pointed out that the language of Section 852 is unambiguous and makes no reference to exceptions to the writing requirement. Furthermore, as it did in *MacDonald*, the court emphasized legislative intent. The court reiterated the *MacDonald* court's conclusion that a finding that exceptions were applicable was inconsistent with the clear intent of the Legislature to repudiate the former rule of transmutation whereby transmutation could be inferred from the totality of circumstances, including acts and statements.

Because the Legislature's stated purpose for enacting Section 852(a) was to discourage protracted litigation and questionable legal tactics that were fostered by the former transmutation rule, anything less than strict enforcement of the writing requirement would be a frustration of legislative intent.

With respect to the possible inequities inherent in a strict interpretation of Section 852(a), the *Benson* court notes that the court in *MacDonald* found the Legislature balanced the interest in preserving informality in transmutation (thereby allowing enforcement of otherwise-valid transmutation that do not meet the statutory requirements) with the need to protect community property and promote judicial economy and chose to give weight to the latter.

The husband in *Benson* made several arguments in support of affirming the trial court, all of which the court found lacking.

First, the husband argued that, because the Law Revision Commission's comment to Section 852 specifically states that the ordinary rules and formalities applicable to real-property transfers apply also to transmutations of real property between spouses (1994 Family Code, 23 Cal. Law Revision Commission Report (November 1993)), the doctrine of partial performance must be applicable because traditional exceptions are part of the "rules and formalities" referenced by the commission.

The court rejected this argument by stating that it interpreted the commission's reference to rules and formalities as a characterization of the former transmutation rules as offering less protection than the general statute of frauds and that no comment by the commission precludes the conclusion that marital property transactions merit greater protection than ordinary real-property transactions.

Furthermore, the court notes that the husband's argument is unpersuasive in light of the fact that the commission explicitly criticized implied and oral transmutations.

Second, the husband cited *Hall v. Hall*, 222 Cal.App.3d 578 (1990), as authority for the proposition that oral agreements can be enforced despite statutory writing requirements. In *Hall*, the Court of Appeal upheld an oral prenuptial agreement between the decedent husband and plaintiff wife, whereby the wife agreed to take early retirement in exchange for a life estate in the husband's home. The court found that the wife had partially performed the oral agreement by taking retirement and thus, the agreement could be enforced despite Family Code Section 1611, which requires prenuptial agreement to be in writing and signed by both parties.

The husband argued that prenuptial agreements were analogous to transmutation agreements. Unfortunately for the husband, the court rejected the applicability of *Hall* out of hand. Noting that the statutory scheme for prenuptial agreements was intended to enhance enforceability whereas Section 852 was intended to limit same, the court further distinguished the two by observing that the fiduciary duties imposed on spouses to each other warrants greater scrutiny for inter-spousal transactions than for those between unmarried people.

Third, the husband argued that a strict interpretation of Section 852(a) conflicted with Family Code Section 721, which imposes a fiduciary duty on spouses with respect to each other. He contended that the obligation between spouses to "act with the highest good faith and fair dealing" required enforcement of the wife's oral promise because failure to do so would result in the wife's receiving benefit from his deeding the house to the trust although he did not acquire full interest in the retirement benefits.

In denying the argument, the court made two points: (1) Although he raised the question of fiduciary duty, the husband did not try to undo his transmutation of his interest in the marital residence. On the contrary, the husband conceded that his execution of the grant deeds effectuated a transmutation; (2) The court rejected the contention that Sections 852 and 721 are in conflict, because both statutes are intended to deter false claims regarding marital property by requiring that agreements be in writing.

Given that transmutation agreements must be in writing, a party in the position of the husband in *Benson* obviously should try to set aside a written agreement which does not set forth *all* the terms agreed on between the parties (an argument the husband did not want to make because he wanted the transmutation of the house upheld).

The breach-of-fiduciary-duty argument could be advanced differently from the way Mr. Benson used it; instead of trying to have Mrs. Benson's oral promise enforced, it could be used to set aside the transfer deed. Agreements entered into during the marriage in which one spouse gains an advantage over the other are presumed invalid because of undue influence. The party who gained the advantage has the burden of overcoming that presumption.

Mrs. Benson would have had difficulty arguing that the deed was not procured by undue influence without admitting the agreement that Mr. Benson would get all the community interest in the pension plans.

The decision in *Benson* reasserts and elaborates on the court's decision in *MacDonald*, solidly holding again that a transmutation will not be deemed valid without an express declaration by the adversely affected spouse that a change in the character of property is intended. The court, citing the specific intent of the Legislature to give greater protection to marital property, distinguished the writing requirement of Section 852(a) from other statutes by refusing to find that traditional exceptions to writing requirements were applicable.

The court pointedly noted that the Legislature must have considered that inequitable results might occur and declined to dilute statutory intent by upholding anything less than strict enforcement. Given the emphatic language of the *Benson* decision, practitioners should impress on clients the critical need for interspousal transfers of property to be in writing, with an explicit statement acknowledging that the document is intended as a change in the character of the property.

Result-oriented rulings by the trial courts, in cases where the intent of the parties can be credibly gleaned from extrinsic evidence but where there is no requisite writing, will not be countenanced.

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