the statutory obligation to keep those details confidential. Family Code section 3025.5 allows anyone to seek a court order to use the information. I suggest the haphazard use of that information without reviewing the statute is a breath-taking oversight on the part of the lawyer seeking to use it. I cannot find fault with this opinion. We are obligated to follow the law—no matter how inconvenient that might be.

References: California Family Law Practice and Procedure, 2nd ed., § 33.80 (confidentiality of child custody investigation-evaluation and report).

COMMUNITY PROPERTY

Transmutation

"Trust Transfer Deed" in Which Husband Granted His Property Interest to Wife Was Ambiguous and Was Not Valid Transmutation

In re Marriage of Begian & Sarajian
(No. B278316; Ct. App., 2d Dist., Div. 3. 12/20/18, ord. pub. 1/18/19)
31 Cal. App. 5th 506, __ Cal. Rptr. 3d __, 2018 Cal. App. LEXIS 1242
Egerton, J. (Edmon, P. J., Lavin, J., concurring)

A "trust transfer deed" signed by a husband and granting certain property to his wife was ambiguous and therefore did not effect a valid transmutation.

Facts and Procedure. Richard and Ida married in 1993 and separated in 2015.

In April 1996, Ida's mother, Rose, executed a "Quitclaim Deed" transferring a 48 percent undivided interest to a residential property ("Avonoak") to Ida. Rose and Ida executed an "Individual Grant Deed" in 2001, granting their interests in Avonoak to Rose, Ida and Richard, as joint tenants. Subsequently, in 2006, Rose, Ida and Richard executed a "Trust Transfer Deed," which stated: "For no consideration, Grantors Rose Sarajian, a widow, and Ida Sarajian and Richard Begian, Wife and Husband, all as joint tenants, hereby grant to Ida Sarajian, the following real property [legal description of Avonoak]." The deed also stated that it was not subject to a documentary transfer tax because it was a "bona fide gift."

In 2014, Ida created the "Ida Sarajian Separate Property Trust" ("Sarajian Trust"), naming herself as trustee and her children as beneficiaries. The same day, Ida executed another Trust Transfer Deed, granting Avonoak to herself as trustee of the Sarajian Trust.

Richard commenced the marital dissolution proceeding in October 2015 and asked the court to confirm Avonoak as community property. He argued that the 2006 Trust Transfer Deed was prepared in connection with estate planning and did not include an unambiguous declaration of his intention, as the adversely affected spouse, to transmute his community property into Ida's separate property. Because nothing on the face of the document explicitly stated that he was giving up his community property interest, Richard contended, the Trust Transfer Deed did not meet the express declaration requirement of Family Code section 852(a).

Ida argued that the used of the word "grant" unambiguously demonstrated the party's intention to change the characterization and ownership of Avonoak from a joint tenancy into the Ida's separate property. According to Ida, the document's title was irrelevant because it granted the property to her without referring to her capacity as trustee of any trust. The deed also failed to mention the Sarajian trust, which did not exist at the time the Transfer Trust Deed was executed.

The trial court found that the Transfer Trust Deed validly transmuted Richard's community interest in Avonoak into Ida's separate property, reasoning that the parties' use of the word "grant," which is the "historically operative word for transferring interests in real property," satisfied the express declaration requirement. Moreover, the deed's statement that the grant was a "bona fide" gift gave Richard notice that he was making a gift to Ida, thereby changing the ownership of the property. Finally, the court found that the title of the document did not undermine the deed's clear expression of intent, because the deed transferred Avonoak to Ida, not to a trust, and there was no trust identified on the face of the document.

Richard appealed.

Requirements for Valid Transmutation. Married persons may change the character of community property into separate property by a written agreement that includes an "express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected" [Fam. Code § 852(a)]. The express declaration requirement is satisfied if the writing states on its face that the "the characterization or ownership of the property is being changed" [Estate of MacDonald (1990) 51 Cal. 3d 262, 272]. No particular terminology is required, as long as the writing unambiguously indicates a change in the character or ownership of the property.

A writing is ambiguous if it is "fairly susceptible of two or more constructions" [*quoting* Estate of Russell (1968) 69 Cal. 2d 200, 211]. Extrinsic evidence may not be used to prove that an ambiguous writing effected a transmutation [*MacDonald* at 264]. Consequently, there may be situations in which there is extrinsic evidence that the spouses intended to change the character of their property, but the lack of an express declaration prevents the court from finding a transmutation [In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1107].

Trust Transfer Deed Did Not Unambiguously Indicate a Change in Character or Ownership of Avonoak. The appeals court agreed with Richard that the Transfer Trust Deed contained two ambiguities that prevented it from effecting a valid transmutation. First, the title itself suggested that the transfer was made in connection with a trust. Second, the deed did not say what interest in Avonoak was being granted. Richard argued that the language of the deed could reasonably be interpreted to mean that he granted his community interest in Avonoak to Ida to be held in trust, and not to change the marital character or ownership of the property. The appeals court agreed.

The appeals court found *In re Marriage of Barneson* [(1999) 69 Cal. App. 4th 583] to be instructive. In *Barneson,* after suffering a stroke, the husband instructed his stockbroker in writing to "sell, assign, and transfer" stock into his wife's name and to journal stock in his account into his wife's account. Years later, the husband petitioned for dissolution of marriage and sought return of the stock. The appeals court found that the husband's written instructions were ambiguous and did not effect a transmutation, because they did not specify what interest in the stocks was to be transferred. One possible interpretation was that the husband intended to transfer management of the stock to his wife without transferring ownership, so that she could manage his financial affairs for him after the stroke. Moreover, "[n]othing on the face of the documents. . .preclude[d] the possibility the transfer was made in trust" [quoting *Barneson* at 591].

Ida argued that *Barneson* was distinguishable because the Trust Transfer Deed did not merely use the word "transfer," but stated that Richard was "granting" the property to Ida and that the transfer was a "bona fide gift." Ida relied on *Estate of Bibb* [(2001) 87 Cal. App. 4th 461], in which a grant deed executed by the husband was found sufficient to transmute the husband's separate property. The deed stated, "For a valuable consideration. . . E.L. Bibb, as surviving joint tenant hereby grant(s) to E.L. Bibb and Evelyn R. Bibb, his wife as joint tenants the following described real property . . . ." The appeals court found that this language was adequate to satisfy the express declaration requirement, because the *MacDonald* court held that the words "I give to the account holder any interest I have. . ." would have effected a valid transmutation and the word " 'grant' is the historically operative word for transferring interests in real property." The court concluded that the husband's use of the word "grant" to convey the property into joint tenancy satisfied the express declaration requirement.

The appeals court found that the present case was more like *Barneson* than *Bibb*. Unlike *Bibb,* in which the husband used the word "grant" to convey the real property into joint tenancy, the Trust Transfer Deed did not specify what interest in Avonoak was to be transferred. Moreover, the words "Trust Transfer" suggested that the conveyance to Ida may have been for the purpose of placing the property into a trust and not to change its marital character or ownership.

Ida argued that the word "trust" in the title was irrelevant for two reasons: (1) a legal document's title does not control the document's effect, and (2) the body of the deed did not mention any trust. The appeals court disagreed, stating that the characterization of a transfer in a deed's title may be relevant to the express declaration inquiry, when the

body of the writing does not "dictate a definite interpretation." For example, in *In re Marriage of Kushesh & Kushesh-Kaviani* [(2018) 27 Cal. App. 5th 449], the court reasoned that the document's title— "Interspousal Transfer Grant Deed"—indicated that there was a spouse-to-spouse transaction that involved an actual transfer from the grantor's estate. In this case, where the deed did not unambiguously state that the transfer would change the character or ownership of Avonoak, the document's title made it reasonable to assume that the deed was executed for the purpose of making a "trust transfer." "The absence of a named trust or trustee. . .[did] not clarify the ambiguity," which stemmed from the deed's lack of specificity about what interest Richard granted to Ida. The appeals court concluded that the deed, on its face, was "reasonably susceptible" of the interpretation that Richard transferred his interest in Avonoak for the purpose of having it deposited into a trust. The deed's characterization of the transfer as a bona fide gift exempt from the documentary transfer tax did not resolve the issue of whether ownership had been changed, because a transfer to Ida in connection with a trust would also have been a gift that was exempt from the documentary transfer tax.

The court concluded that both Richard and Ida's interpretations were reasonable. However, because no definitive judgment about Richard's intention could be made from the face of the Transfer Trust Deed, and because the court could not consider extrinsic evidence, the default presumption that the interspousal transaction was not a transmutation of Richard's community property interest was controlling.

Commentary

Sandra L. Mayberry

This is a great case for a summary of the Court of Appeal's overall views on transmutation agreements between parties, specifically as it relates to the execution of various deeds by the parties and their family members. The specific deed the Court of Appeal addresses is a "Trust Transfer Deed" signed by the husband and granting certain real property to his wife. Interestingly, the court summarizes a number of deeds signed in this case between 1996 and 2014. Of particular note is that the husband believed, as the title of the document implies, that he was only transferring the property to his wife for estate planning purposes. The deed itself did not state exactly what he transferred.

The Husband effectively argued that the type of deed used in 2006, the "Trust Transfer Deed," did not contain an unambiguous declaration of his intention to transmute the property to his Wife's separate property. The Court of Appeal gives an excellent summary of Family Code section 852 requirements, *MacDonald, Bibb, Barneson* and a number of other cases. Essentially, the trial court heavily relied on the word "grant," which was used in the Trust Transfer Deed. However, the Court goes on to summarize why the use of that word was ambiguous in this particular case. Ultimately, the Court of Appeal reversed the trial court's ruling that the Trust Transfer Deed included an express declaration by the husband that the ownership of the property was being transferred to his wife. The Court of Appeal found that the deed was ambiguous and that there was no valid transmutation.

This case and many others demonstrate how clear the language of a transmutation agreement must be. It is a good lesson to attorneys who are attempting to draft these types of agreements, whether in trust documents, premarital or post-marital agreements. However, one must also keep in mind that the analysis for whether it is a transmutation is only the first step. If it is a valid agreement, divorce counsel must focus on the possibility of unfair advantage or undue influence.

Commentary

Marshall S. Zolla

The unforeseen complexities of Family Law–Estate Planning crossover issues never seem to go away. Transfer documents of many types are prepared "for estate planning purposes," but if the spouses separate the validity of the alleged transmutation becomes the subject of litigation. We saw this years ago in *In re Marriage of Starkman* [(2005) 129 Cal. App. 4th 659], where the appellate court held there was no valid transmutation in a deed prepared in connection with the estate planning process [*see* 2005 Cal. Fam. Law Monthly (July 2005) 155].

We know that Family Code section 852(a) requires an express declaration of an intent to change the

characterization of property. We also know that in *Estate of MacDonald* [(1990) 51 Cal. 3d 262], the Supreme Court held that an express declaration requires that the face of the document must state that "the characterization or ownership of the property is being changed." Further, extrinsic evidence may not be used to prove that an ambiguous writing effected a transmutation.

In this case, the Trust Transfer Deed signed by Husband granted certain real property to his wife. The deed used the words "grant" and "gift." Given the accepted historical meaning of those terms and the title of the document ("Trust Transfer"), the gift seemed clear to everyone involved. When the divorce later occurred, the trial court determined the deed was a valid transmutation, the use of the words "grant" and "gift" being sufficient to satisfy the express declaration requirement and give Husband clear notice that he was changing the property's characterization and ownership. Not so easy, not so clear. Reversed on appeal. No valid transmutation.

The *Sarajian* court, in a *de novo* review following the rationale set forth in *Starkman*, *above*, and *In re Marriage of Lund* [(2009) 174 Cal. App. 4th 40], held that the Trust Transfer Deed did not unambiguously indicate a change of character or ownership of the subject property. The opinion acknowledged that Wife's contention that Husband granted all of his interest in the property to her, thereby transmuting the property into her separate property, was not unreasonable. Husband's position, that he granted only an interest in trust for the couple's estate planning purposes, was also credible. The ambiguity could have been eliminated by including language specifying that he granted all or any interest in the property to his wife, or by stating that the grant was to her sole and separate property. But because no extrinsic evidence was allowed to clarify ambiguity on the face of the deed, the default determination was that the interspousal transaction was not a valid transmutation of his community property interest in the subject property. *In re Marriage of Barneson* [(1999) 69 Cal. App. 4th 583], was found to be instructive. *Barneson* held that *MacDonald*'s interpretation of the "express declaration" language in section 852(a) can be viewed as effectively creating a presumption that transactions between spouses are not transmutations, and that the presumption may be rebutted by evidence that the transaction was documented with a writing containing the requisite language. The *Barneson* court held the transfer document there in question did not create a valid and enforceable transmutation.

Family law practitioners should use this case as a cautionary reminder to carefully check the estate planning documents of the parties. Estate planning counsel (please!) take note that the documents you prepare "for estate planning purposes" (including the ubiquitous General Assignment or Marital Property Agreement (MPA)), customarily used to minimize taxes by characterizing all property as community property to give the surviving spouse a step-up basis on the death of the other spouse, may impact a future divorce. Estate planning attorneys should be mindful of future consequences of the documents they create when they represent both husband and wife. (Please re-read Justice Gilbert's opinion in *Starkman.*)

The purported conflict waiver letter when estate planning counsel represent both husband and wife is often problematic, and deserves careful review and scrutiny. Family law lawyers must be more closely attuned to these crossover issues between family law and estate planning to properly analyze these types of transmutation issues in order to provide proper advice to clients, for whom the ambiguity of these issues can result in unneeded stress, unnecessary expense, unanticipated outcomes and lack of proper professional representation. We can all do better!

Commentary

Stacy D. Phillips and Erica Swensson

There is no magic in magic. It's all in the details.

– Walt Disney

The devil is always in the details.

– Unknown

Estate of MacDonald told us that no magic language is required to affect a transmutation, and that "[a] party does not slip into a transmutation by accident." Yet with each new case that is published on transmutation, the interpretation of what constitutes a transmutation grows more specific. The words

"transfer" and "give" are not enough to transmute the character of property nor is language that the transfer is a "bona fide gift" for tax purposes sufficient.

Transmutations must be interpreted within the "four corners" of the writing, without the use of extrinsic evidence. A valid transmutation requires an express declaration that the character or ownership of the property is being changed, and must state clearly and unequivocally what interest is being granted. The express declaration must be unambiguous and indicate on its face a change in character of ownership of property, without resorting to extrinsic evidence.

In *Bejian,* the Court could not determine from the face of the document what interest the adversely affected spouse—the husband—was transferring to the wife. Therefore, the Court was left with the default presumption that there was no transmutation of Husband's community property into Wife's separate property.

In our practice, we generally don't have the benefit of creating new transmutations out of whole cloth. Instead, we are analyzing past transmutations, which were drafted by someone before us (perhaps by probate counsel), often without the benefit of modern case law. With these, the first step is to identify who has the burden. *Marriage of Barneson* [(1999) 60 Cal. App. 4th 583] instructs practitioners that the burden is on the proponent of the transmutation: "*MacDonald's* interpretation of the 'express declaration' language in *section* 852 *subdivision* (g), can be viewed as effectively creating a 'presumption' that transactions between spouses are not 'transmutations,' rebuttable by evidence the transaction was documented with a writing containing the requisite language." Allocation of the burden has a direct and correlative relationship to the success of the claim. The Appellate Court in *Begian* stated that each party had a reasonable interpretation of the language of the Trust Transfer. Wife likely lost because she had the burden as the proponent of the transmutation and, because there were two possible interpretations of the language, Wife was unable to meet her burden.

The appellate court in *Begian* tells us that a "Trust Transfer Deed" stating that Husband "grants" his interest in the property to Wife was not sufficient to transmute the community's interest in the property to Wife as her separate property. This may come as a surprise to anyone who has relied on *Estate of Bibb*, in which the Court found a transmutation based on the use of the word "grant" in the instrument purporting to transmute the parties' home in Berkeley. In *Begian* there was no statement as to what interest was being transferred. The *Begian* court clarifies that more is needed to transmute property, stating: "The *MacDonald* court did not suggest that mere use of the word 'give,' without more, would have satisfied the express declaration requirement. Rather, in clarifying that no particular language was mandated, the Supreme Court remarked that the transfer documents would have been sufficient had the specified *what* interest was being conveyed—e.g. 'I give to the account holder *any interest I have* in the funds deposited in this account." [Italics in original.] This is the key, not the words "transfer," "give," or gift. Still left open in the caselaw is whether or not a quit claim deed (which states that *any* interest a party has is granted to either the community or the other party's separate interest) is sufficient for a valid transmutation.

Clearly, the safest and surest way to be sure that a document creates a valid transmutation is to specifically identify the character of the property before and after the transmutation, and call the transaction a "transmutation." Given the fiduciary duties imposed on married people, it is also good practice for the parties to exchange financial disclosures prior to executing any documents transmuting property, to avoid a later claim of unfair advantage. While disclosure is not expressly required for transmutations, spouses have a fiduciary duty to one another. Pursuant to Family Code § 721(b), "[t]his confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." This duty has been found to extend to Marital Agreements [Marriage of Fossum (2011) 192 Cal. App. 4th 336].

When drafting transmutation agreements, a practitioner can no longer reasonably rely on the "no magic language required" pronouncement of *MacDonald*. Instead, careful, specific, and clear language stating what interest is being granted will be required to make sure the transmutation agreement has the desired effect.

References: California Family Law Practice and Procedure, 2nd ed., §§ 20.13 (transmutation of property), 210.20 (essential contractual elements), 210.31 (declaration changing character of separate or community property).

TAXATION

Spousal Support

In 2019, the Alimony Tax Deduction Moves (Largely) Into History

By Robert Polevoi, Esq.*

Policy Served by Deduction for Alimony Paid. A federal deduction for alimony paid to a spouse or former spouse was in effect from time immemorial. There were two themes behind a policy that was almost never subject to meaningful debate for generations of tax and family law practitioners. The first was a gut feeling that alimony was, for all intents and purposes, a direct diversion of income from the payor spouse to the payee spouse. It should therefore not be taxed to the payor (who was only a conduit for the income involved), but should rather be taxed directly to the recipient. Thus, a regime whereby the payor initially reported the income used to pay alimony, but was allowed to deduct it to remove it from his/her tax base, and the payee reported the alimony received and was taxed on that amount, was long viewed as a wholly practical reflection of economic reality.

The second policy behind the established alimony tax treatment was the notion that the payor (presumably the husband) was the greater income earner and therefore subject to higher tax rates than the payee (presumably the wife). Thus, the total tax burden on the "couple," conceived as a continuing economic unit, would be cheaper to the extent that the tax on the income used to pay the alimony was shifted to the lower-bracket recipient. This logic was far more persuasive decades back, when alimony was much more common and persistent, tax rates were much higher, and women were much less likely to be earning income comparable to men. But it has remained meaningful.

Planning to best exploit the alimony tax regime consistent with the practical needs of the parties, and to avoid errors in the process, has long been one of the most important tasks in the divorce process.

History in a Nutshell. Prior to 1984 legislation, the big issues in alimony taxation were the following:

1. Playing with the often-confusing distinction between alimony and property settlements, which were not subject to the deduction/inclusion rules applicable to alimony payments, but which in those days could often trigger unanticipated taxation based on the premise of a constructive "sale" of assets to the other spouse.
2. Getting child support payments to be treated as alimony so that they could be deducted by the payor (and made taxable to the other spouse with custody of the children).

Confusion surrounding these two issues generated pressure from the courts and the Internal Revenue Service to enact "bright line" rules in 1984 in Internal Revenue Code sections 71 and 215. These rules went a long way toward clarity and coherence by making sure that only payments that must terminate when a recipient spouse dies could qualify as alimony for tax purposes. Payments that remained payable to the recipient's heirs were logically property settlements. The 1984 reforms also greatly limited the possibility of getting child support treated as alimony for tax purposes, and they eliminated all possibility of taxing property settlements as constructive sales.

It's fair to say that almost no one expected any important changes to the post-1984 alimony tax regime when Congress negotiated in near secrecy all of the major issues at stake in the 2017 tax legislation push generated by the election of Donald Trump. But to the great surprise of most of us, the so-called

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