CALIFORNIA Family Law Monthly

In re Marriage of Sarajian

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;" a subsequent separation/divorce ensues and 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 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, that 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 of Appeal, in a *de novo* review following the rationale set forth in *Starkman, supra,* 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 is 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 rebuttable 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) 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 reread 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!

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