

states "estoppel by contract" and applies to written agreements between spouses although few cases upholding such clauses seem to come right out and cite the statute. In *Marriage of Kieturakis* (2006) 138 Cal. App. 4th 56, 64, 41 Cal. Rptr. 3d 119, the First District held that "the presumption of undue influence should not attach in this case because the parties acknowledged in the MSA that no undue influence was exercised. In the MSA, the parties stated that they were cognizant of the fiduciary duties they owed each other in their financial affairs, had exchanged the requisite disclosures, and were fully aware of the contents, legal effect and consequences of this agreement and its provisions.' They affirmed that they had entered into the MSA voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind.' While such avowals might themselves be the product of undue influence, we think that they should count for something, at least where, as here, the parties' capacity is not in question." At least we know that our hard work in including such provisions in agreements "count for something."

Commentary

Sharon L. Kalemklarian

I would like to shake Judge Ikola's hand—for writing an opinion that made me chuckle, and gives all practitioners very clear warning about the drafting of "postnuptial" agreements.

This case involves a husband and wife who, after 12 years of marriage, drafted a postnuptial agreement. Two years later wife filed for divorce—and claimed that the character of certain separate property of husband had been transmuted to community property in the postnuptial agreement. Husband disagreed—and claimed that such transmutation, if any, only was to occur for estate planning purposes—i.e., the separate property did not become community property unless and until he died and they were still married.

A complex scenario—and the Judge says, "Whoa buddy, not so fast." Here are the lessons from this case.

1. A postnuptial (and I suggest a prenuptial as well) will be interpreted by the court as a contract, using the principles of contract law.

2. The plain meaning of the words will be given effect. As the Judge says in the opinion, the interpretation of words should be as someone "unschooled" in the law. The interpretation given by someone "overschooled" in the law will only confuse things.
3. The mysterious act of "transmutation", where the character of the property changes, occurs at the time of the agreement to transmute, by the terms of that agreement. Whether the transmutation is accomplished in a documentary way will not change its character.
4. And, a big reminder here. Contracts will be interpreted based upon what they say, and upon what evidence is presented if there is any ambiguity. This case is an excellent reminder of what facts should be brought to bear at trial to interpret a contract.

This is a short, little case. But I venture it is going to have a big impact.

Commentary

Stacy D. Phillips & Michael B. Hanasab

This case is a perfect example to illustrate to clients that they must be careful when signing documents, and before doing so, they must understand the legal ramifications of what they are signing. Motivation as to why someone signed a document is irrelevant, so there will be no explanation allowed once the documents are signed if the documents are clear in their intent. Further, parties cannot execute what they intend as transmutation documents only for estate planning purposes and not for divorce purposes. In other words, an asset cannot be a little bit transmuted—it is either transmuted or not.

In this case, husband and wife entered into what the court considered a complex estate planning scheme, that consisted of a property agreement, wills, and a trust. As part of the estate planning scheme, the property agreement stated that husband was "converting" his entire separate property estate to community property to place in the trust. Shortly after the parties entered into this estate planning scheme, a dissolution action was filed and a disagreement arose with respect to the character of husband's "separate property".

In this dissolution action, wife claimed that husband transmuted his separate property to community property by way of the property agreement, and husband countered by stating that he only “conditionally” transmuted his separate property, and only meant to transmute his property if he died. Husband pointed to the fact that all the estate planning documents must be read together to give an understanding of what was being accomplished when he signed the property agreement. Therefore, the court was left to decide the issue of whether husband effectively transmuted his properties from his separate property to community property by way of the estate planning property agreement for purposes of not only estate planning but also in the event of a divorce.

The appellate court held that motivations underlying the documents are irrelevant: the relevant question is whether the documents contain the requisite express, unequivocal declarations of a present transmutation. The appellate court stated that since the property agreement stated that husband was “converting” his separate property to community, a transmutation occurred.

The appellate court was clear that the language of the document ruled. Extrinsic evidence, such as the intent of the parties, did not matter. This lesson is extremely important for family law attorneys to explain to their clients and their colleagues in the estate planning field, as it has been typical for property agreements, such as the one in this case, to be used for tax planning and estate planning purposes. Therefore, if your client “or the other party” creates an estate plan and the estate planning documents transmute assets, these assets will be transmuted for divorce purposes. The language of the document rules. If you sign a document transmuting property, and if the documents signed are clear in their intent (i.e., well-drafted documents), whether the documents are created solely for estate planning purposes or not, your property is transmuted. There is no “conditional” transmutation which only occurs on certain predetermined events. If documents which are part of the estate plan includes the express intent to transmute property, no matter what your actual intent is, your property will be transmuted—both for estate planning purposes and in the case of a dissolution.

Family law practitioners should look at their client’s estate planning documents to see if assets

have been transmuted. Such documents could affect the characterization of the assets and liabilities in your client’s estate—whether to your client’s benefit or detriment.

Commentary

Marshall S. Zolla

Summer is here. Baseball season is here. Like fast balls and curves thrown during batting practice, transmutation cases keep coming at us from the appellate courts. *Starkman*, *Holtemann*, and now *Lund*. We had better read them carefully to keep our timing sharp if we want to play in the big leagues of family law practice.

First came *Starkman* in 2005 [see discussion in 2005 CAL. FAM. LAW MONTHLY 2 (September 2005)], where the court held that language in a revocable trust instrument that provided that the property transferred to the trust is community property unless husband or wife identified it as separate property was insufficient to create a transmutation of husband’s separate property to community property. The estate planning documents and stock brokerage transfer forms taken together did not establish a transmutation.

In re Marriage of Holtemann [see discussion in 2008 CAL. FAM. LAW MONTHLY 1 (July 2008)] went the other way, holding that a Transmutation Agreement did effect a valid transmutation of separate property to community property, notwithstanding language that purported to qualify, limit, or condition the transfer upon the death of either spouse. Note: Both *Starkman* and *Holtemann* came from Division 6 of the Second District.

Now we have *Lund*, following the reasoning and conclusion of *Holtemann* in finding a valid transmutation in the estate planning and trust documents at issue. In *Lund*, the trial court determined that the written instrument did not qualify as a valid transmutation because the Agreement was ambiguous. The Court of Appeal reversed, finding that the Agreement was not ambiguous and constituted a valid transmutation. Section E of the instrument at issue in *Lund* stated that the Agreement “is intended as a document of transfer for estate planning purposes to the extent necessary to conform the record ownership of the