

Stock Exchange

Express Language Required for Transmutation of Securities

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Whether or not a transmutation of property has occurred often becomes an issue in divorce litigation. A transmutation occurs when the characterization of property is changed from community to separate, separate to community or separate of one spouse to separate of the other spouse. Whichever the case, a transmutation of real or personal property is only effective if it is made in writing by an express declaration of the adversely-affected spouse. See Family Code Sections 850 and 852(a).

In *Marriage of Barneson*, 99 Daily Journal D.A.R. 899 (Jan. 26, 1999), the court held that a transmutation of stock from one spouse to another requires express language showing the intent of the adversely affected spouse to change the characterization. This holding has made it clear that both parties must realize what is occurring, and understand and consent to the transmutation, before the court will recognize the change in characterization.

In *Barneson*, the parties were married for approximately three years when Robert Barneson filed a petition for dissolution. At the time of the marriage, Robert was 65 years old and Evelyn Kaiser Barneson was 36 years old. As part of the dissolution proceedings, Robert requested Evelyn return stock to him that he had previously transferred to her while they were married. Robert died before the property issues of the dissolution were final and his executor pursued the case on Robert's behalf.

The securities under dispute had a long history. On Dec. 6, 1990, Robert sent the following letter to Banker's Trust Co.: "This is written instructions as per our phone conversation. I Robert L. Barneson would like to combine these (4) four stock certificates into one, I would like to transfer these same stocks into the name of Evelyn J. Kaiser. Thank you."

Robert also executed the following "irrevocable stock or bond power": "For value received, the undersigned does hereby sell, assign, and transfer" and Evelyn's name then appeared on the signature line.

The stock certificates were combined and issued in the name of "Evelyn J. Kaiser, c/o Robert L. Barneson." Evelyn eventually requested that the "c/o Robert Barneson" be removed and it was. However, dividends were reported under Robert's Social Security number and the journal entry showing the removal of Robert's name listed his Social Security number.

Over the next few months, Robert continued to transfer stock into Evelyn's account. On March 20, 1991, Robert transferred all the stock in his account into Evelyn's account.

The trial court held a separate trial on the issue of whether there had been a transmutation of the stock from Robert's separate property to Evelyn's separate property. On June 23, 1997, the court

issued a statement of decision stating that, in essence, three of the stock transfers were effective. "They do not fail due to the requirements of Family Code Section 852(a) and *Estate of MacDonald* (1990) 51 Cal.3d 262," wrote the court.

The executor filed an appeal on Oct. 14, 1997. The trial court's decision was reversed.

The Court of Appeal in *Barneson* realized that not only did they need to consider whether the stock went through a transmutation, but they also needed to consider whether or not the alleged transfer was in compliance with the fiduciary relationship between the parties. Without

power" that he executed was also not sufficient. The court found no express language that stated Robert's intent to change the characterization of the property or his intent to give up his interest in the stocks. The court held that use of the word "transfer" alone does not show intent to change the characterization of stock because "transfer" has several ambiguous meanings and does not necessarily mean the intent to give up an ownership interest.

The *Barneson* court limited its holding to the use of the word "transfer" as it applies to the *MacDonald* requirement of express language. The court acknowledged that a transmutation may occur as a result of a transfer of property from one party or account to another, but a transfer in itself is not enough. There still must be express language indicating the understanding and consent to the transmutation and intent to change the characterization of the property.

The court also found that although Robert placed the stock in Evelyn's name,

that act does not constitute a transmutation. Although one may argue that it appears from his conduct he intended to give the stock to Evelyn, there could have been many reasons besides transmuting the stocks for Robert to put the stock into Evelyn's name. Robert did not explicitly state his intent to give up ownership of the stock indefinitely.

The holding in *Barneson* seems to be quite narrow and harsh. However, the court is careful to state its belief that the Legislature intended there to be a "bright-line" test in determining whether or not a spouse had intended to change the characterization of property to avoid unconscionable transfers due to undue influence or duress.

In advising clients and drafting letters of intent to transmute property, counsel should use clear and specific language such as "sole and separate property" or "I understand I have a community interest in this property and I intend to give that interest up by changing the title of the ownership in these stocks."

While *Barneson* may arguably only apply to the transmutation of stock ownership, its holding is clearly intended to be more encompassing. A transmutation requires express language of intent to change the characterization of property. It will not be implied by a transfer of possession or change of title. Practitioners should use caution when advising a client that he or she has transmuted property. That may not be the case, and the client may benefit from a careful analysis of the exchange of property.

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going into great detail, the court decided that the stock transfers met the fiduciary duty and thus they could consider whether a transmutation occurred pursuant to Family Code Section 852(a).

Section 852(a) provides: "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." The leading authority in the area of transmutation of personal property is the test set forth in *Estate of MacDonald*, 51 Cal.3d 262 (1993).

According to *MacDonald*, an express declaration as set forth in Section 852(a) requires language that "expressly" states the intent to change the nature of the property from one form to another, for example, separate to community. To meet the *MacDonald* test, the writing itself must refer to the change in the characterization of the property. It cannot be obtained through oral testimony about the intent of the parties (parol evidence rule).

In *MacDonald*, the husband had received money from his pension plan in which there was a community interest. He deposited the funds into an individual retirement account in his name only. The beneficiary of the IRA was a revocable living trust that the husband had set up for the benefit of his children from a prior marriage. His wife signed a form provided by the financial institution acknowledging her consent to the designation of the revocable living trust as the beneficiary.

The *MacDonald* court held that the wife's signature was not sufficient to cause a transmutation of the pension funds because there was no "express language" indicating she was aware she was agreeing to give up her interest in the community funds. The court also specifically stated that "express language" does not mean the writing must contain the word "transmutation." However, it must indicate the party giving up her interest in funds understands this and agrees that she has no future claim to the property.

The *Barneson* court held that Robert's letter stating he wanted to "transfer" the stock certificates into Evelyn's name did not constitute a transmutation. In addition, the "irrevocable stock or bond