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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of DIANE and DOUGLAS BENSON.	2d Civil No. B165252 (Super. Ct. No. 1043139) (Santa Barbara County)
DIANE L. BENSON, Appellant, v. DOUGLAS BENSON, Respondent.	

Diane L. Benson (wife) appeals from the judgment distributing the assets and liabilities of the parties following the dissolution of their marriage. Wife contends the trial court erred by awarding Douglas Benson (husband) all of the retirement funds he earned during their marriage as his separate property based on a disputed oral transmutation in violation of Family Code section 852, subdivision (a).[1] She argues the court erred by ruling that the doctrines of partial performance and estoppel provide an exception to the writing requirement of section 852. We affirm.

[1] All statutory references are to the Family Code unless otherwise stated.

Factual and Procedural Background

In 1983, husband and wife married. In May of 2000, after nearly 17 years of marriage, the parties separated and wife petitioned for dissolution of the marriage. The couple had two children, then ages 16 and 14. A trial was held to resolve issues of child support, child custody, spousal support, property division, and attorney's fees.

During the marriage, husband worked as a truck driver for Jordano's, a wholesale distributor of food, earning about $4,000 monthly. As part of his employment, husband participated in Jordano's Employment Stock Ownership Plan (ESOP) and contributed to a 401k retirement plan. Husband also operated a gumball business at which he earned a nominal amount of income annually. Wife worked part-time (32 hours per week) as a vocational nurse at Santa Barbara Cottage Hospital, earning about $30,000 annually. She had a retirement plan with her employer.

Wife is a beneficiary of an irrevocable trust of which her father is trustee. She made contributions from her salary towards the trust and inherited other property placed into it as well. During the marriage, the parties obtained a 100 percent ownership interest in their residence at 560 Gwyne Avenue in Santa Barbara. Wife explained that, in 1996, her father gave the couple a 72 percent interest in the equity in the residence. In December of 1996, the couple deeded their 72 percent interest in the property to wife's trust. Thereafter, her father gave the couple the remaining 28 percent of the equity in the house. In February of 1997, the couple executed a deed transferring the 28 percent interest in the residence to her trust as well.

Prior to trial, husband filed a motion to join Robert L. Maahs, wife's father and trustee of her trust, as a party to the dissolution proceeding. In his motion, husband claimed a community property interest in the Gwyne Avenue residence. Husband contended that in order to establish and enforce the community property claim to the residence, it was necessary to join the trustee as a party to the action. Husband stated: "The community transferred the property into the Trust for no consideration, and with the understanding that [husband] was not surrendering his interest in the property." On the

morning of trial, the parties reached an agreement that the trust would be dismissed from the action with prejudice. Husband agreed to waive any claim against the trust in exchange for $1,500.

At trial, husband testified that at the time the couple signed the deed granting 72 percent of the equity in the residence to wife's trust, wife agreed she would waive any claim to his retirement funds or gumball business in the event they were to divorce. He stated he was adamant that he did not want to transfer his community property interest in the residence to her separate property trust but, after months of persuasion, agreed to do so only on the condition that she would waive her interest in his retirement funds in the event of a divorce. He testified that, although they had "issues," they were not planning on getting a divorce at that time, and she agreed to sign a document waiving her interest in these items at a later date. He testified that he never sought a writing memorializing the agreement because she had assured him she would sign such an agreement and he trusted her as his wife.

Wife testified that she did not recall any conversation between her and husband wherein they agreed that, in exchange for waiving his community interest in the residence, she would waive her community interest in his retirement funds.

The trial court found husband's testimony credible, ruling that husband agreed to sign the deeds transferring the parties' residence to wife's trust only after wife agreed in return that she would not make any claim to his retirement benefits and gumball business if the marriage failed. The court stated that, in doing so, husband gave up his interest in a $400,000 to $500,000 home (at 1996 values) in return for retirement assets valued at $91,165.50 (at the date of separation, i.e., May of 2000).

In its written statement of decision, the trial court reasoned, "When spouses enter into an interspousal transaction or agreement which works a change in the character of the property, a transmutation of that property has occurred. . . . The agreement to transfer any of her community property interest in [husband's] ESOP and 401(k) was not in writing. Transmutation agreements must be made in writing [Fam. Code § 852(a)], but

if an oral agreement is sufficiently performed, it may be taken out of the statute of frauds. . . . [Husband] substantially changed his position by transferring any interest he may have had in [the residence] in reliance on the oral agreement with [wife] that the ESOP and 401(k) would be his separate property. This transfer of his property interest is substantial performance of the parties' oral agreement which satisfies the proof element otherwise reflected in the requirement of a writing. Further, relief because of the partial or full performance of the contract may be granted in equity on the ground that the party who has so performed has been induced by the other party to irretrievably change his position and that to refuse relief according to the terms of the contract would otherwise amount to a fraud upon his rights. Moreover, equity principles such as estoppel and detrimental reliance are applicable here. Equitable estoppel is a 'firmly rooted legal principle in this state which generally applies to all statute of frauds.'. . . Also, the Comment to Family Code section 852, which requires transmutations to be in writing, states 'the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between the spouses. . . .' . . . Hence, [wife] is estopped from asserting that the transmutation[] is invalid due to a lack of writing, especially since she had benefited from the oral agreement by receiving [husband's] community property interest in [the residence]." (Citations and emphasis omitted.)

Accordingly, the court ruled that husband shall have no community property interest in the residence and wife shall have no community property interest in his retirement funds. The court ordered husband to pay wife $931 per month in child support, $250 per month in spousal support, and to pay wife an equalizing payment of $4,301.59 to offset community debts. Noting that wife was the current beneficiary of a trust with more than $750,000 in assets, she was living in a home owned by the trust costing only $400 per month while husband was renting at market rates, the court ordered the parties to bear their own attorney's fees.

Discussion

Wife contends the trial court erred in (1) allowing husband to present extrinsic evidence of the parties' oral agreement relinquishing her community property interest in his retirement funds, and (2) awarding him the funds as his separate property based on a disputed oral transmutation agreement. She argues that any agreement on her part to relinquish her community property interest in husband's retirement funds is invalid because it was not made in writing accompanied by an express declaration of her intent to transmute the property. She asks that we reverse the judgment and remand with instructions that she be awarded one-half of husband's retirement funds.

Generally, property acquired during the marriage is presumed to be community property. (§ 760.) Section 850 provides, however, that married persons may, by agreement or transfer, with or without consideration, "transmute" community property to the separate property of either spouse. A transmutation is an interspousal transaction or agreement that works a change in the character of real or personal property.

Prior to 1985, a transmutation could be made by oral agreement. No particular formalities were required for an effective transmutation except that the agreement be fair and based on a full disclosure of the relevant facts. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293, fn. 8.) The mutual consent of the spouses constituted sufficient consideration to support the transmutation.

In 1985, the Legislature changed the rules for transmutations of property between spouses. Since then, adherence to statutory formalities, including a writing, has been required for a transmutation. Section 852, subdivision (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 statutory change imposed a special statute of frauds requirement on the transmutation of marital property. In making this change, the Legislature recognized that the former rule of easy transmutation had generated extensive litigation in dissolution proceedings and had encouraged "a spouse,

after the marriage [had] ended, to transform a passing comment into an 'agreement' or even to commit perjury by manufacturing an oral or implied transmutation." (Recommendation Relating to Marital Property Presumptions and Transmutations (Nov. 1983) 17 Cal. Law Revision Com. Rep. (1984) p. 214.) Section 852 "makes it clear that the Legislature chose to balance the various policy concerns (allowance for convenience and informality within marriages, while preventing or minimizing disputes, fraud and perjury) by enacting a clear, bright-line test regarding transmutations of property." (*In Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1466.)

The "express declaration" requirement for a valid transmutation of property under the identically worded predecessor to section 852 was construed by our Supreme Court in *Estate of MacDonald* (1990) 51 Cal.3d 262 (*MacDonald*).[2] The property at issue was a disbursement of $266,557.90 from the husband's community property pension plan. The husband placed those funds into three IRA accounts in his name alone, with the designated beneficiary of each account a revocable living trust that left the bulk of the corpus to his children from a prior marriage. Under "consent paragraphs," the IRA account agreements required the signature of a spouse not designated as the sole primary beneficiary to consent to the designation. The wife signed the consent paragraphs for all three IRA accounts. Following her death, the wife's estate brought a lawsuit to establish her community property interest in the IRA proceeds.

The Supreme Court held that the consent agreements did not effect a transmutation of the community funds to the husband's separate property because they did not contain language characterizing the property being transmuted and it was impossible to tell from the face of the documents whether the decedent was aware that the legal effect of her signature might be to alter the character or ownership of her interest in the pension funds. The court concluded that a writing signed by the adversely affected

[2] For ease of reference and because the statutes are identically worded, we will refer to the predecessor statute, Civil Code section 5110.730, as section 852 in our discussion of *MacDonald*.

spouse is not an "express declaration" for purposes of section 852, subdivision (a), "*unless* it contains language which expressly states that the characterization or ownership of the property is being changed." (*MacDonald*, *supra*, 51 Cal.3d at p. 272.) The court noted its interpretation of section 852 effectuated the intent of the Legislature "to create a writing requirement which enables courts to validate transmutations without resort to extrinsic evidence and, thus, without encouraging perjury and the proliferation of litigation." (*MacDonald*, at p. 272; see also *Marriage of Barneson* (1999) 69 Cal.App.4th 583, 593-594 [written instructions by husband after stroke to transfer stock into his wife's name held insufficient to effect transmutation to wife's separate property]; *Estate of Bibb* (2001) 87 Cal.App.4th 461, 467-468 [husband's execution of deed granting real property to himself and his wife as joint tenants satisfied express declaration requirement of section 852].)

In *In re Marriage of Campbell* (1999) 74 Cal.App.4th 1058, the couple lived in a home owned by the husband prior to their marriage. The wife made loans to the husband's business from her separate property and contributed $66,000 from her separate property to remodel his home. The wife claimed that she spent the money on improvements to the home in reliance on the husband's oral promise to place her name on the title to the property. Her name was never added as a titleholder. At trial of the dissolution action, the wife claimed an ownership interest in the husband's home and the husband denied that an oral transmutation of the property had ever taken place. The trial court permitted evidence of the use of the wife's funds for improvements to the home to show that these expenditures were loans to the husband, but refused to consider extrinsic evidence to show that the home was orally transmuted to community property. The court awarded the husband the home and ordered him to reimburse the wife for loans from her separate property in the amount of $37,779. The wife appealed, contending that the doctrine of estoppel allowed use of extrinsic evidence to show a transmutation under section 852. The Court of Appeal disagreed, holding that section 852 precludes the

admission of extrinsic evidence to prove an oral transmutation of property between spouses. (*Campbell*, at p. 1065.)

Relying on the above authorities, wife argues the trial court applied the incorrect law and disregarded *MacDonald*. In concluding that section 852 did not preclude enforcement of the couple's oral transmutation agreement in this case, the trial court relied upon *Hall v. Hall* (1990) 222 Cal.App.3d 578.

In *Hall,* a decedent's second wife brought an action against the decedent's sons as co-executors of his estate, seeking a determination of her entitlement to a life estate in the marital residence. Prior to meeting his second wife, the husband had transferred his property into a trust in which he was the sole beneficiary and at his death his sons were to share equally in the property. After the husband met his second wife, the couple entered into an oral premarital agreement whereby the wife would contribute $10,000 toward the marriage and the husband would grant her a life estate in his residence. The couple married and the wife terminated her employment, applied for early Social Security benefits, and paid the husband more than $10,000. The husband sought an attorney's help in amending his trust to add the life estate for his wife, but died before executing the amendment. The trial court ruled in favor of the wife, holding that the oral agreement to transfer a life estate was enforceable due to her partial performance of the agreement and substantial change in position in reliance thereon.

On appeal, the issue presented was whether the partial performance exception to the statute of frauds remained viable following the enactment in 1985 of the Uniform Premarital Agreement Act (then Civil Code section 5311), which requires premarital agreements to be in writing. (§ 1611.) The Court of Appeal held that traditional exceptions to the statute of frauds remained applicable, reasoning that the Legislature presumably was aware of the exceptions and did not preclude them in the Uniform Act. The appellate court noted that the wife's actions in paying the husband $10,000, stopping work, and applying for early Social Security benefits irretrievably changed her position in reliance on his promise to provide her a house for the rest of her

life, sufficient to allow enforcement of the oral agreement. (*Hall v. Hall*, *supra*, 222 Cal.App.3d at pp. 586-587.)

Here, the trial court properly allowed extrinsic evidence demonstrating the couple's oral agreement concerning husband's retirement funds. Not only did wife waive her right to challenge admission of husband's testimony concerning the oral transmutation of his retirement funds by failing to raise a timely objection, she was the first to raise the issue at trial when her counsel questioned her about her recollection of the agreement. (See, e.g., *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1260-1261.) In any event, as discussed below, we conclude the doctrine of partial performance exempts the couple's oral transmutation agreement from the writing requirement of section 852. The extrinsic evidence was, therefore, properly considered.

Exceptions have traditionally been recognized as to all statute of frauds provisions. In *Hall*, relief was granted in the context of an oral premarital agreement where the party seeking to enforce the oral agreement had performed her part of the bargain and in so doing had irretrievably changed her position. Similarly, oral contracts between nonmarital, cohabitating partners have also been enforced in similar circumstances. (*E.g.*, *Marvin v. Marvin* (1976) 18 Cal.3d 660, 673-674.) We find the reasoning of *Hall* persuasive here.

Like *Hall*, husband substantially changed his position by transferring his community property interest in the couple's residence to wife's trust in reliance on her oral promise to waive her community property interest in his retirement funds in the event the couple divorced. The value of the property he gave up was significant by comparison to the amount of retirement funds wife agreed to relinquish. The trial court appropriately found that transfer of his interest in the home was substantial performance of the parties' oral agreement and satisfied the evidentiary function of the writing requirement of section 852. To refuse to grant husband relief from section 852 where he has substantially performed the agreement and detrimentally changed his position in

reliance thereon would result in a harsh and unconscionable loss. Following the transfer of his interest in the home, husband's only significant asset was his retirement funds.

Section 852 does not expressly preclude application of the traditional exceptions to the statute of frauds. The legislative comments to section 852 indicate that the ordinary rules and formalities applicable to real property transfers remain applicable to transmutations of real property between spouses. (Cal. Law Revision Com. com., 29C West's Ann. Fam. Code (1994 ed.) foll. § 852, p. 317.) In the absence of a clear legislative direction to the contrary, we conclude the doctrine of partial performance may be applied in proper cases and exempt oral marital transmutation agreements from the application of section 852.[3]

Our holding does not, as wife suggests, undermine the writing requirement of section 852. Prior to 1985, interspousal transmutations of personal and real property were too easy and encouraged perjury in dissolution proceedings as well as controversies between heirs and widowed spouses. California now requires interspousal transmutations to be shown by a higher standard of proof, i.e., clear and convincing proof, which alleviates many problems of perjury. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 486-487.) Section 851 ensures that any agreement between spouses will be carefully scrutinized to ensure creditors' rights are protected. Section 721 requires spouses to be bound by the highest good faith and fair dealing in their transactions with each other, and classifies the relationship as fiduciary, subject to the same rights and duties of nonmarital business partners. Sections 851, 721, and 852 work together to ensure the integrity of interspousal agreements as they relate to the affected spouses, creditors, and third parties. While these code sections indicate an increasing preference for formalities in interspousal contracts, their presence coupled with the higher standard of proof allows for a pragmatic interpretation of section 852 that comports with other

[3] Although the trial court also found the doctrine of estoppel applicable to exempt the couple's oral agreement from section 852, in light of our conclusion above, we need not address that issue.

statutes of frauds. There is, thus, no compelling reason to give different treatment to agreements between married persons and agreements between persons in *Hall* or *Marvin* situations. Applying the traditional exceptions to the statute of frauds to section 852 allows agreements between married persons to be treated identically to those between unmarried persons. It effectuates the intent of the Legislature and recognizes that husbands and wives are not formal in all of their dealings, just as unmarried persons are not always formal or clear in their dealings.

Although *MacDonald* states that the Legislature intended "to invalidate all solely oral transmutations," as husband observes, the couple's oral agreement here does not solely involve an oral transmutation. (*MacDonald*, *supra*, 51 Cal.3d at p. 269.) It involves an express written transmutation with a contemporaneous oral promise to waive wife's interest in community property retirement funds. Additionally, *MacDonald* was decided before the enactment of the provisions of section 721 (formerly section 5103) expressly imposing a fiduciary obligation between spouses. The trial court did not err.

The judgment is affirmed. Costs are awarded to husband.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James W. Brown, Judge

Superior Court County of Santa Barbara

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