

## Comments

# Formalizing Interspousal Transfers of Real and Personal Property in California

*In 1984, California had the simplest laws regarding interspousal transmutations of real and personal property of all community property states. Claiming that one's spouse had always referred to his or her separate property as "ours" could be enough for a court to find that a transmutation from separate to community property had occurred. In 1985, California enacted section 5110.730 of the Civil Code to help rid the courts of litigation spawned by the easy transmutation laws. By 1990, California's transmutation statute was considered the toughest of all community property states that allow interspousal transmutations.*

*This comment examines pre-1985 transmutation case law and the legislative history of section 5110.730 of the California Civil Code. It then focuses on the bright-line test announced by the California Supreme Court in *Estate of MacDonald v. MacDonald* and questions the wisdom of creating a special statute of frauds law for interspousal agreements.*

### I. INTRODUCTION

Classification of real and personal property in a community property state determines rights and liabilities of married persons in that property. Whether property is classified as belonging to the community or as separate property of one spouse determines its distribution upon judicial dissolution of the community or upon death of a spouse.<sup>1</sup> In California, community property is defined as all property

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1. For example, in dissolution proceedings, courts can only divide the community or quasi-community property of the spouses. Gerald E. Lichtig, *Characterization of*

that is not the separate property of the spouses.<sup>2</sup> This definition might imply that community property is more difficult to define than separate property,<sup>3</sup> and helps to explain the general presumption in California that all property acquired during marriage belongs to the community.<sup>4</sup>

The community property presumption is rebuttable by the spouse seeking to establish the separate character of the property in question.<sup>5</sup> One method of showing that property is separate is to prove that, although it may once have been community property, some transaction between the spouses changed the character of the property to separate property.<sup>6</sup> Interspousal transactions have long been

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*Property*, in 1 CALIFORNIA MARITAL DISSOLUTION PRACTICE 185, 187 (Continuing Education of the Bar, 1981). However, upon request of either party, the court can divide separate interests of the parties in real or personal property held as joint tenants or tenants in common. CAL. CIV. CODE § 4800.4 (West 1982 & Supp. 1993). Effective January 1, 1994, § 4800.4 is to be repealed and replaced with an equivalent provision in the Family Code. A.B. 3650, ch. 162, § 3, 1992 Cal. Stat. 1, 76; see CAL. FAM. CODE § 2650 (effective Jan. 1, 1994).

Upon death, if the decedent died intestate, then the intestate share of the surviving spouse is one-half the community property interest. The intestate share of the surviving spouse of decedent's separate property depends on the number of decedent's heirs (other than the surviving spouse). The surviving spouse's share may be either one-third, one-half, or the entire intestate separate estate. CAL. PROB. CODE § 6401(a), (c)(1)-(3) (West 1991 & Supp. 1993).

If the decedent died testate, the surviving spouse is guaranteed the one-half share of the community property that belongs to the surviving spouse (i.e., the testator spouse may dispose of only the one-half community property that belongs to the testator). The entire separate property of the testator is subject to testamentary disposition, which means the surviving spouse is not guaranteed any share of the testator's separate estate. CAL. PROB. CODE § 6101 (West 1991 & Supp. 1993).

2. Community property is defined negatively in California Civil Code Section 5110. It states, in part, that "[e]xcept as provided in Sections 5107, 5108, and 5126, all real property situated in this state and all personal property wherever situated acquired during the marriage . . . is community property . . ." CAL. CIV. CODE § 5110 (West 1983 & Supp. 1993). Effective January 1, 1994, § 5110 is to be repealed and replaced with equivalent provisions in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 25, 27, 29-30; see CAL. FAM. CODE §§ 700, 760, 803 (effective Jan. 1, 1994).

Separate property of the wife and the husband are defined in California Civil Code §§ 5107 and 5108, respectively. The texts of §§ 5107 and 5108 are practically identical, stating that all property of a spouse that was owned by that spouse before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is that spouse's separate property. CAL. CIV. CODE §§ 5107-08 (West 1983 & Supp. 1993). Effective January 1, 1994, §§ 5107 and 5108 are to be repealed and replaced with equivalent provisions in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 28; see CAL. FAM. CODE § 770 (effective Jan. 1, 1994).

3. The California community property system originated with the Spanish ganancial system. Ganancial property was defined as that which is "held in community by husband and wife, having been acquired or gained by them during the marriage." WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1 n.2 (2d ed. 1971). In addition, this property had to be acquired by onerous title (by labor or valuable consideration) rather than by lucrative title (inheritance). *Id.* at 2 n.5.

4. CAL. CIV. CODE § 5110 (West 1983 & Supp. 1993).

5. *Williams v. Williams*, 178 Cal. App. 2d 522, 3 Cal. Rptr. 59 (1960).

6. The statutes that define community and separate property rights are not

recognized in California community property laws.<sup>7</sup> Interspousal agreements, which change the character of personal or real property, are called transmutations. Transmutations are valid not only to convert community property to separate property, but also to convert separate property of one spouse to separate property of the other, or to convert separate property of one spouse to community property.<sup>8</sup> Prior to January 1, 1985, no formal statutory requirements existed to effect a change in character of property.<sup>9</sup> Indeed, courts had inferred agreements to transmute property from the conduct or declarations of the spouses.<sup>10</sup>

In 1984, the Law Revision Commission (the Commission) recommended formalizing interspousal transfers to increase "certainty in the determination whether a transmutation has in fact occurred."<sup>11</sup> This recommendation led to the enactment of sections 5110.710 through 5110.740 of the California Civil Code, which formalized transmutations by requiring an express written declaration to effect an interspousal transmutation.<sup>12</sup> This Comment examines section 5110.730 of the California Civil Code, arguing that as interpreted by the California Supreme Court, section 5110.730 imposes too much formality on interspousal transfers by requiring an express written

mandatory. It is possible to contract out of the system. WILLIAM A. REPPY, JR., COMMUNITY PROPERTY IN CALIFORNIA 29 (2d ed. 1988).

7. CAL. CIV. CODE § 5103 (West 1983 & Supp. 1993) (originally this right to contract was given to spouses in the Act of April 17, 1850, ch. 103, §§ 14-27, 1849-50 Cal. Stat. 255). Effective January 1, 1994, § 5103 is to be repealed and replaced with an equivalent provision in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 25; see CAL. FAM. CODE § 721 (effective Jan. 1, 1994).

8. CAL. CIV. CODE § 5110.710 (West Supp. 1993). Effective January 1, 1994, § 5110.710 is to be repealed and replaced with an equivalent provision in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 30; see CAL. FAM. CODE § 850 (effective Jan. 1, 1994).

9. Prior to January 1, 1985, interspousal transfers of real and personal property were governed by case law precedent. California Civil Code §§ 5110.710-40 were enacted on January 1, 1985. 4 STATUTES OF CALIFORNIA AND DIGEST OF MEASURES 647 (1984) [hereinafter Statutes of California].

10. See e.g., *In re Nelson's Estate*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964). See *infra* notes 35-40 and accompanying text for a discussion of the *Nelson* decision.

11. LAW REVISION COMMISSION, *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 CAL. L. REVISION COMM'N REP. 205, 225 (1984).

12. CAL. CIV. CODE §§ 5110.710-40 (West Supp. 1993). Specifically § 5110.730(a) states: "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." *Id.*

Effective January 1, 1994, sections 5110.710 through 5110.740 are to be repealed and replaced with equivalent provisions in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 30; see CAL. FAM. CODE §§ 850-53 (effective Jan. 1, 1994).

declaration. Section II discusses transmutations of interspousal property prior to the enactment of section 5110.730 of the California Civil Code and demonstrates the necessity of imposing some formalities on interspousal transmutations. Section III discusses section 5110.730 of the California Civil Code and its interpretation by the California Supreme Court in *Estate of MacDonald v. MacDonald*.<sup>13</sup> Section IV discusses some of the problems with the court's rule in *MacDonald* and argues that it is overly burdensome on married persons when compared to formalities required between unmarried parties to real and personal property agreements. Section V compares interspousal transmutation requirements in other community property states, and Section VI suggests an alternative interpretation for section 5110.730 of the California Civil Code.

## II. INTERSPOUSAL TRANSMUTATIONS OF PROPERTY PRIOR TO CALIFORNIA CIVIL CODE SECTION 5110.730

Prior to enactment of section 5110.730 of the California Civil Code, transmutations of real and personal property between spouses were informal and easy. One theory for the evolution of easy transmutations in California is that prior to 1927, the wife had no ownership interest in community property.<sup>14</sup> In an effort to protect the wife and the community, any agreement or conduct by the husband that gave the appearance of changing the character of husband's separate property to community property was enforced.<sup>15</sup>

However, because not all transmutations favored the wife<sup>16</sup> and the community,<sup>17</sup> an alternate theory of freedom of contract arose as

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13. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). *See infra* notes 59-75 and accompanying text for a discussion of the *MacDonald* decision.

14. The Act of 1927 changed a wife's interest in community property from a mere expectancy to one that is present, existing, and equal. CAL. CIV. CODE § 5105 (West 1983 & Supp. 1993) (originally enacted as Act of 1927, § 161a). Effective January 1, 1994, § 5105 is to be repealed and replaced with an equivalent provision in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 26; *see* CAL. FAM. CODE § 751 (effective Jan. 1, 1994).

15. *See e.g.*, *Estate of Raphael*, 91 Cal. App. 2d 931, 206 P.2d 391 (1949) (husband's statement that husband and wife were partners in everything, coupled with filing of joint income tax returns reporting income from his separate property, were sufficient evidence that husband had transmuted his separate property to community property).

16. *Durrell v. Bacon*, 138 Cal. App. 396, 398, 32 P.2d 644, 645 (1934) (wife's statement that "what is mine is yours and what is yours is mine . . . this money will go into a home for us; it is just as much yours as mine" was sufficient to transmute the character of her separate property into property belonging to the community).

17. *See e.g.*, *Wren v. Wren*, 100 Cal. 276, 34 P. 775 (1893) (holding that an oral agreement between spouses that money earned by the wife during marriage would be her separate property was valid to effect a transmutation of her earnings from community property to her separate property).

an explanation for the evolution of easy transmutations in California.<sup>18</sup> The freedom of spouses to contract with each other was first codified in 1872.<sup>19</sup> Such transactions were, and today remain, subject to rules governing the conduct of persons who occupy confidential relations with each other.<sup>20</sup> In 1991, section 5103 of the California Civil Code was amended to further describe the confidential relationship as a fiduciary relationship.<sup>21</sup> Any evidence of overreaching, misrepresentation, or undue influence by one spouse over the other voids the agreement or transaction between the spouses.<sup>22</sup> Though interspousal contracts had to be in writing,<sup>23</sup> case law established that spouses could effect a transmutation of property by either a written agreement or by an executed oral agreement.<sup>24</sup> Even the spouses' conduct could be sufficient to indicate an intent to transmute property.<sup>25</sup> *Woods v. Security-First National Bank*<sup>26</sup> and *In Re Nelson's Estate*<sup>27</sup> exemplify the extent to which California courts were willing to go to find a transmutation of property.

The court in *Woods* declared an oral agreement fully executed upon the utterance of the words.<sup>28</sup> Mr. Woods brought suit to obtain real and personal property that stood in his deceased wife's name.<sup>29</sup> Before marriage, the decedent had stated that when they were wed,

18. WILLIAM A. REPPY JR., *COMMUNITY PROPERTY IN CALIFORNIA* 39 (1980).

19. CAL. CIV. CODE § 5103 (West 1983 & Supp. 1993) (originally enacted in 1872 as § 158).

20. *Id.*

21. *Id.* Section 5103 states: "This 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 confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners . . ." *Id.*

22. *Estate of Cover*, 188 Cal. 133, 204 P. 583 (1922).

23. Act of April 17, 1850, ch. 103, § 16, 1850 Cal. Stat. 255. Section 16 of the Act of 1850 provides, "All marriage contracts shall be in writing, and executed and acknowledged or proved, in like manner as a conveyance of land is required to be executed and acknowledged or proved."

24. *See e.g.*, *Woods v. Security-First Nat'l Bank*, 46 Cal. 2d 697, 299 P.2d 657 (1956); *Carman v. Athearn*, 77 Cal. App. 2d 585, 175 P.2d 926 (1947); *See also*, *Estate of Sill*, 121 Cal. App. 202, 204, 9 P.2d 243, 244 (1932). (The court, in upholding an oral transmutation, stated that "[i]t is well settled that separate property of either or both spouses may be transmuted into community property and this may be done without the necessity of any written agreement providing the agreement or understanding to that effect is fully consummated.")

25. *See e.g.*, *In re Nelson's Estate*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

26. 46 Cal. 2d 697, 299 P.2d 657 (1956).

27. 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

28. *Woods*, 46 Cal. 2d at 701-02, 299 P.2d at 659-60.

29. *Id.* at 699, 299 P.2d at 658.

her considerable separate property would become community property.<sup>30</sup> After they were married, decedent stated to others and to Mr. Woods that “by reason of said marriage the property had become the community property of herself” and Mr. Woods.<sup>31</sup> The court found that the oral statements made by the decedent were sufficient to cause a transmutation of her separate property to community property.<sup>32</sup> It was not necessary to change the way title was held to real property, nor was it necessary to treat the property any differently than before her statements. The court reasoned that the oral agreement was fully executed when Mrs. Woods declared that it had occurred, that “[i]t immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done.”<sup>33</sup> *Woods* also “removed all doubts as to the validity of an oral (or implied) transmutation of real property despite noncompliance with the statute of frauds normally applicable to real property conveyances.”<sup>34</sup>

Less than ten years later, the court in *Nelson* was willing to look at conduct as proof of an oral agreement to transmute separate property to community property.<sup>35</sup> Mr. Nelson owned an apartment house as his separate property.<sup>36</sup> He then married Mrs. Nelson, and she worked as his secretary and managed the apartment building during the marriage.<sup>37</sup> Mr. Nelson filed joint income tax returns in which he listed the income from the apartment house.<sup>38</sup> Mr. Nelson also repeatedly referred to the apartment house as *their* property.<sup>39</sup> The court found that Mr. Nelson’s actions of allowing his wife to manage the apartment building, and filing joint tax returns during a time when only community property income could be reported on joint returns, proved that there was a valid oral agreement to transmute Mr. Nelson’s separate property to property belonging to the community.<sup>40</sup> The court was now willing to find a transmutation based on express and *implied* oral agreements.

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30. *Id.* Prior to marriage, Mr. Woods had been employed by Mrs. Woods as her servant. *Id.* at 700, 299 P.2d at 659.

31. *Id.* at 699, 299 P.2d at 658.

32. *Id.* at 701-02, 299 P.2d at 659-60.

33. *Id.* at 702, 299 P.2d at 659 (quoting Estate of Raphael, 91 Cal. App. 2d 931, 939, 206 P.2d 391, 395 (1949)).

34. William J. Reppy, Jr., *Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 SAN DIEGO L. REV. 143, 157 (1981).

35. 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

36. *Id.* at 142, 36 Cal. Rptr. at 354. Mr. Nelson acquired the property before marriage and completed the apartment building shortly after marriage. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 143-44, 36 Cal. Rptr. at 355.

After cases like *Woods* and *Nelson*, California's law of easy transmutation was criticized as "dangerously easy"<sup>41</sup> and as a law that "invites litigation and tends to encourage perjury."<sup>42</sup> Easy transmutions were also criticized for problems they created in determining creditors' rights against husband or wife debtors.<sup>43</sup> Generally, community property can be used to satisfy separate debts of either husband or wife.<sup>44</sup> However, a wife's separate property is not generally amenable to satisfy a husband's separate debt, nor is a husband's separate property amenable to satisfy a wife's separate debt.<sup>45</sup> Easy transmutions were used, for example, to deny creditors their rights when debtor spouses would claim a transmutation of community personal property to a nondebtor's separate personal property.<sup>46</sup>

In 1984, the Commission recognized there were problems with the existing system and published its recommendations for reform. These recommendations sought to bring the law regarding transmutions of real property into line with requirements for transfers of real property between nonspouses.<sup>47</sup> More importantly, the Commission

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41. WILLIAM J. REPPY, JR. & WILLIAM Q. DE FUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* 421 (1975). Reppy and De Funiak make a comparison of transmutation law among all the community property states. As of 1975, California law was clearly the most lenient, allowing a transmutation anytime a judge or jury was convinced that one had occurred. Washington was as lenient where the transmutation was from separate property to community property. New Mexico and Idaho required clear and convincing evidence to validate a transmutation. Arizona seemed to flip-flop between easy transmutions and the clear and convincing evidence test. But Texas and Louisiana were at the other end of the spectrum from California. By statute, it was never possible to transmute the separate character of inherited property, bequests, or gifts in Texas. In Louisiana, transmutions from separate property to community property per se were not allowed. *Id.* at 409-34.

42. Reppy, Jr., *supra* note 34, at 168.

43. For an extensive treatment of the implications of easy transmutions on debt collections and creditors' rights, see generally Reppy, Jr., *supra* note 34.

44. CAL. CIV. CODE § 5120.110 (West Supp. 1993). Effective January 1, 1994, § 5120.110 is to be repealed and replaced with equivalent provisions in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 31; see CAL. FAM. CODE §§ 910-11 (effective Jan. 1, 1994).

45. *Id.* § 5120.130. Effective January 1, 1994, § 5120.130 is to be repealed and replaced with an equivalent provision in the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1, 31-32; see CAL. FAM. CODE § 913 (effective Jan. 1, 1994).

46. Interspousal transmutions of personal property were subject to immediate delivery and continued change of possession, or else they were held to be ineffective or invalid as to creditors. CAL. CIV. CODE § 3440 (West 1983 & Supp. 1993).

47. California Civil Code Section 1091 requires a writing for all transfers of estates in real property (other than an estate at will or for a term not exceeding one year) that do not transfer by operation of law. CAL. CIV. CODE § 1091 (West 1983 & Supp. 1993).

intended their recommendations to "favor the community and minimize litigation."<sup>48</sup> In particular, the Commission was concerned that the rules favoring easy transmutation had resulted in "excessive litigation in dissolution proceedings."<sup>49</sup> On August 30, 1984, Assembly Member McAlister introduced Assembly Bill 2274 (AB 2274) into the Legislature to effectuate the Commission's recommendations regarding interspousal transmutations. In the 1984 Summary Digest, AB 2274 was described as requiring a "written declaration" to create a valid transmutation.<sup>50</sup> In 1985, California enacted sections 5110.710 through 5110.740 of the Civil Code as remedies to the easy transmutation problem.<sup>51</sup>

### III. CALIFORNIA'S NEW TRANSMUTATION RULE

Sections 5110.710 through 5110.740 of the California Civil Code collectively represent a radical change in the way married persons may conduct transactions between themselves.<sup>52</sup> Section 5110.710 codifies the rule allowing spouses to transmute community or separate property.<sup>53</sup> Section 5110.720 addresses creditors' rights by subjecting transmutations to the Uniform Fraudulent Transfer Act.<sup>54</sup> Subsection 5110.730(a) establishes a writing requirement for transmutations occurring on or after January 1, 1985.<sup>55</sup> Subsection

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48. LAW REVISION COMMISSION, *supra* note 11, at 207.

49. *Id.* at 214. The commission further stated that "[easy transmutations encourage] a spouse, after the marriage has ended, to transform a passing comment into an 'agreement', or even to commit perjury by manufacturing an oral or implied transmutation." *Id.*

50. STATUTES OF CALIFORNIA, *supra* note 9, at 647. The text of the summary provides:

Under existing law, separate property can be transmuted to community property and community property to separate property by oral agreement of the spouses, or can be implied by the conduct of the spouses.

This bill would provide that, subject to specified limitations, married persons may by agreement or transfer, with or without consideration, transmute community property to separate property of either spouse, transmute separate property of either spouse to community property, and transmute separate property of one spouse to separate property of the other spouse.

This bill would require a written declaration, as specified, in order for such a transmutation of real or personal property to be valid, except as to certain gifts of personal property between spouses.

The bill would also specify which law shall apply to a transmutation of marital property made before January 1, 1985, and a transmutation made on or after that date.

51. *See supra* note 12.

52. CAL. CIV. CODE §§ 5110.710-40 (West Supp. 1993).

53. *Id.* § 5110.710.

54. *Id.* § 5110.720. Section 5110.720 is intended to prevent a debtor spouse from transmuted his or her separate property or share of community property to the other spouse where the goal is to deprive creditors of their legal rights. The Uniform Fraudulent Transfer Act is codified in Civil Code §§ 3439 through 3439.12. *Id.* §§ 3439-39.12 (West Supp. 1993).

55. *Id.* § 5110.730(a). Subsection 5110.730(a) states that "[a] transmutation of

5110.730(b) requires that a transmutation of real property be recorded to be effective as to third parties.<sup>56</sup> Subsection 5110.730(c) excludes from the writing requirement gifts of a personal nature that are primarily used by the donee spouse and that have no substantial value in terms of the circumstances of the marriage.<sup>57</sup> Lastly, section 5110.740 prohibits transmutions from occurring by a statement in a will which purports to change the character of property before the death of the testator.<sup>58</sup>

The effects of California's new transmutation statutes were clarified after the 1990 California Supreme Court decision in *MacDonald*.<sup>59</sup> The question presented to the court was whether signatures on standard institutional beneficiary designation forms, upon which consent was given to the designation of someone other than the consenting spouse as beneficiary to community property Individual Retirement Accounts (IRA's), were effective under section 5110.730 to transmute the IRA account to the separate property of the IRA account holder.<sup>60</sup> The court held they were not.<sup>61</sup>

Mrs. MacDonald was dying of cancer and wished to simplify the administration of her estate and avoid any disputes.<sup>62</sup> She and Mr. MacDonald divided their property into separate estates in August of 1984.<sup>63</sup> In 1985, Mr. MacDonald received a disbursement from his

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."

56. *Id.* § 5110.730(b).

57. *Id.* § 5110.730(c).

58. *Id.* § 5110.740. Prior to enactment of § 5110.740, case law had allowed a statement in a will that characterized property to be used to show that a transmutation of property had occurred, even while the person who made the will was still living. *See e.g., In re Marriage of Lotz*, 120 Cal. App. 3d 379, 174 Cal. Rptr. 618 (1981) (wife was precluded from claiming gifts of furs and jewels to be her separate property because of a declaration in companion wills that stated that property in either husband's or wife's name or both was community property). *See infra* notes 112-13 for additions to § 5110.740, which became effective January 1, 1993.

59. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

60. *Id.* Mrs. MacDonald's written consent to the designated beneficiary was obtained in March of 1985, only three months after Civil Code § 5110.730 was enacted.

61. *Id.* at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

62. *Id.* Mrs. MacDonald had four children from a previous marriage to whom she wished to leave her property. During the trial, Ms. Gommel, a certified public accountant in the accounting firm with which Mrs. MacDonald did business, testified that Mrs. MacDonald wanted to separate her assets from her husband's to avoid any difficulties between Mr. MacDonald and her heirs. Appellant's Answer to Petition to Review at 7, *MacDonald* (No. S-012304).

63. 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). Mr. MacDonald's pension plan was not among the property divided at that time. *Id.* at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.

defined pension plan and deposited the funds, which were undisputedly community property, into three IRA accounts at different financial institutions.<sup>64</sup> Mr. MacDonald designated a revocable living trust as the beneficiary, and Mrs. MacDonald signed institutional forms in which she consented to the designation.<sup>65</sup>

After Mrs. MacDonald died, her estate brought a lawsuit to “establish decedent’s community property interest” in the IRA proceeds for inclusion in Mrs. MacDonald’s estate.<sup>66</sup> The executrix of Mrs. MacDonald’s estate argued that the consent forms did not satisfy subsection 5110.730(a) of the Civil Code because they were not written agreements that expressly declared that property was being transmuted.<sup>67</sup> The trial court found that Mrs. MacDonald, being aware that she was terminally ill, sought to order her estate so as to eliminate dissension between her husband and children.<sup>68</sup> The trial court further found that in keeping with her intentions, Mrs. MacDonald signed the IRA consent forms expressly intending to waive her community property interest and transmute that interest into the separate property of her husband.<sup>69</sup> The Appellate Court reversed, finding the consent forms did not satisfy the requirements of section 5110.730 of the Civil Code.<sup>70</sup>

The California Supreme Court, in affirming the Appellate Court decision, relied on its holding in *California Trust Co. v. Bennett*,<sup>71</sup> where the court ruled that in order to create a joint tenancy, section 683 of the California Civil Code requires a writing that expressly

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64. *Id.* at 265, 794 P.2d at 913, 272 Cal. Rptr. at 155.

65. *Id.* The consent forms stated: “If participant’s spouse is not designated as the sole primary beneficiary, spouse must sign consent. Consent of spouse: Being the participant’s spouse, I hereby consent to the above designation.” *Id.* at 272, 794 P.2d at 918, 272 Cal. Rptr. at 160.

66. *Id.* at 266-67, 794 P.2d at 914, 272 Cal. Rptr. at 156.

67. *Id.* The executrix of the estate was Mrs. MacDonald’s daughter from a previous marriage.

68. *Id.* at 281, 794 P.2d at 924, 272 Cal. Rptr. at 166 (Arabian, J., dissenting).

69. *Id.* at 280, 794 P.2d at 924, 272 Cal. Rptr. at 166 (Arabian, J., dissenting).

70. *Id.* at 266, 794 P.2d at 914, 272 Cal. Rptr. at 156. The Appellate Court noted that while § 5110.730 did not provide the specifics a writing must contain to satisfy the statute, the statute, by implication, “requires something more than the skeletal writing before us.” 213 Cal. App. 3d 456, 458, 261 Cal. Rptr. 653, 656 (1989). The Appellate Court opinion has been omitted from California Appellate Reports.

Judge Holmdahl’s dissent was less concerned about the form of the writing. Judge Holmdahl asserted that where a writing indicated on its face that a transfer of property interest occurred, it was only necessary to inquire whether the writing effectuated the intentions of the parties. The language and purpose of § 5110.730 would be fully satisfied if the parties’ intentions could be ascertained *and* there was a writing. *Id.* at 460, 261 Cal. Rptr. at 657.

71. 33 Cal. 2d 694, 204 P.2d 324 (1949).

declares the intent to create a joint tenancy.<sup>72</sup> Similar statutory construction of section 5110.730 of the Civil Code would require a written express declaration that a transmutation of property was intended by the signatures on the IRA beneficiary designation forms. Though Mrs. MacDonald's consent was in writing, the institutional forms did not expressly declare that she was giving up an interest in the IRA proceeds.<sup>73</sup> The Court did not prescribe words that must be used to effect a transmutation, but insisted that the writing, at a minimum, indicate that Mrs. MacDonald no longer claimed an interest in the IRA funds.<sup>74</sup> Further, the Court precluded admission of any extrinsic evidence to prove the parties' intent to transmute property.<sup>75</sup>

In summary, *MacDonald* created a bright-line test to determine whether an interspousal transmutation of property has occurred. Married couples now must have a writing to transmute community

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72. *Id.* In *Bennett*, a rental agreement for a bank safe-deposit box had been signed by husband and wife. It was contended that the rental card, combined with statements made and the circumstances surrounding the rental, created a joint tenancy interest in the contents of the box. The court rejected this argument by construing California Civil Code § 683 to require not only a writing to create a joint tenancy estate, but also requiring an express declaration of the intent to create a joint tenancy. The court's construction merely gave force to the statute's words that a joint tenancy must be "expressly declared . . . to be a joint tenancy" and "created by a written transfer, instrument, or agreement." CAL. CIV. CODE § 683 (West 1982 & Supp. 1993).

However, it should be noted that § 683 applies equally to married and unmarried persons. *Anyone* who wants to create a joint tenancy in real or personal property must expressly declare that a joint tenancy is being created. The rules are the same for creating a joint tenancy whether the parties are married or unmarried. *Id.* The rules, however, are different for married and unmarried persons who seek to contract between themselves under the *MacDonald* court's interpretation of § 5110.730(a). *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911, 272 Cal. Rptr. 153 (1990).

73. 51 Cal. 3d 262, 267 n.4, 794 P.2d 911, 915 n.4, 272 Cal. Rptr. 153, 156 n.4 (1990). The court worried that Mrs. MacDonald might not know that she had any interest in the IRA accounts. Thus she could not transmute an interest in property that she did not know she had. The dissenting opinion points out that even if Mrs. MacDonald did not know she had an interest in these accounts, she was put on notice that she had some interest when the financial institutions required her consent before allowing a beneficiary designation of someone other than she. *Id.* at 280, 794 P.2d at 924, 272 Cal. Rptr. at 166.

74. *Id.* at 267, 794 P.2d at 915, 272 Cal. Rptr. at 157. The court would have upheld a transmutation had the consent form included a sentence that read "I give to the account holder any interest I have in the funds deposited in this account." *Id.* at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161.

75. *Id.* at 273, 794 P.2d at 919, 272 Cal. Rptr. at 161. The majority looked to legislative intent and found that the legislature intended to preclude reliance on extrinsic evidence as proof of a transmutation when it enacted § 5110.730. The legislature's stated intent was to reduce litigation in this area, and the majority believed it could give full force to that intent only by requiring a writing that expressly declared the intent to transmute property.

or separate property between themselves.<sup>76</sup> Oral agreements, even if fully executed, are not sufficient to effect a transmutation. In addition, the writing must be joined in, or consented to, by the spouse whose interest is adversely affected, and it must clearly show that the consenting spouse is giving up an interest in the property. Lastly, the writing must indicate that the character of the property is changing. No longer will the courts look to extrinsic evidence, such as conduct, to support a claim of a transmutation.

#### IV. PROBLEMS WITH THE MACDONALD STANDARD

The *MacDonald* standard poses some problems by interpreting section 5110.730 of the California Civil Code as a "special Statute of Frauds" law.<sup>77</sup> The Commission had criticized California law for permitting transfers of property between spouses "notwithstanding the Statute of Frauds."<sup>78</sup> In the comments accompanying the recommended text of section 5110.730, the Commission stated that "[s]ection 5110.730 makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between spouses" and that case law, which permits the oral transmutation of personal property between spouses, is overruled.<sup>79</sup> It is not clear, however, from the Commission's report that the new transmutation law it was recommending was intended to be anything more than a *regular* Statute of Frauds law.<sup>80</sup> Nor is it clear

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76. This Comment does not deal with the exception stated in California Civil Code § 5110.730(c), which excludes from a writing gifts of a personal nature (jewelry, clothing) that do not have substantial value compared to the circumstances of the marriage. However, it is foreseeable that this exception could foster litigation. When married persons are divorcing, or when a decedent's children from a previous marriage are trying to include as much property in their parent's estate as possible, it is likely that the value of a personal item will be highly contested.

For example, it will be argued that a diamond ring a husband gave to his wife two years ago as a present on their anniversary has substantial value compared to the circumstances of the marriage when the husband and wife seek a divorce. A husband trying to claim the ring as community property will argue that a transmutation to the wife's separate property did not occur because a gift card did not expressly declare that a transmutation was occurring.

Likewise, if a husband gave his wife a diamond ring, the wife's children from her previous marriage will try hard to show that the ring's value was unsubstantial. If the ring's value can be shown to not be substantial, then § 5110.730(a) will not apply. CAL. CIV. CODE § 5110.730(c) (West Supp. 1993).

77. *In re Marriage of Weaver*, 224 Cal. App. 3d 478, 484-85, 273 Cal. Rptr. 696, 699 (1990); *In re Marriage of Hilke*, 8 Cal. App. 4th 1318, 1323, 3 Cal. Rptr. 2d 333, 336 (1992) (quoting *In re Marriage of Weaver*, 224 Cal. App. 3d 478, 484-85, 273 Cal. Rptr. 696, 699 (1990)).

78. LAW REVISION COMMISSION, *supra* note 11, at 213.

79. *Id.* at 225.

80. *MacDonald* interprets § 5110.730(a) more strictly than other statutes that regulate real property transfers. California Civil Code § 1091, which deals with real property conveyances, is a regular Statute of Frauds law. Section 1091 states: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be

that the Commission sought to preclude standard equitable remedies that are available to remove a contract from the Statute of Frauds or to preclude a showing that the Statute of Frauds is inapplicable to the agreement.<sup>81</sup>

For example, in *Hall v. Hall*, the Uniform Premarital Agreement Act (UPAA)<sup>82</sup> was interpreted as a Statute of Frauds law.<sup>83</sup> Premarital agreements, also known as antenuptial agreements, are defined as agreements between persons contemplating marriage which become effective upon marriage.<sup>84</sup> They must also be in writing and signed by both parties.<sup>85</sup> However, in *Hall*, the Court of Appeals upheld the validity of an oral antenuptial agreement where the wife paid the husband \$10,000 and retired, taking early social security benefits in exchange for a life estate in the husband's residence.<sup>86</sup> The court determined that the antenuptial agreement modified the husband's existing trust to create a life estate in his wife.<sup>87</sup> The court then reasoned that "the framers of the uniform act were well versed in the statute of frauds and knew about the exceptions applied to the writing requirement."<sup>88</sup> Here, Mrs. Hall retired and took early social security benefits, providing sufficient part performance for the court

transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." CAL. CIV. CODE § 1091 (West 1983 & Supp. 1993).

81. California Civil Code § 1624 is the California Statute of Frauds provision, which specifies that contracts are "invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent." CAL. CIV. CODE § 1624 (West 1983 & Supp. 1993).

The Statute of Frauds was enacted in England in 1677 to prevent perjury and uncertainty that arose with oral promises. However, it was recognized that situations could arise where equity demanded that a contract be found to exist even where there was no writing. Thus, in order to prevent injustice, the Statute of Frauds does not apply where an oral contract is fully performed. Doctrines of estoppel and part performance, where the conduct unequivocally refers to the existence of a contract, are similarly used to make the Statute of Frauds inapplicable when equity demands that a contract be found to exist. 2A ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 275, §§ 421-422 (1950 & Supp. 1992).

82. CAL. CIV. CODE §§ 5300-17 (West Supp. 1993). The UPAA became effective January 1, 1986, one year after the new interspousal transmutation rule. Effective January 1, 1994, §§ 5300-17 are to be repealed and replaced with equivalent sections of the Family Code. A.B. 2650, ch. 162, § 3, 1992 Cal. Stat. 1-2, 38-40; see CAL. FAM. CODE §§ 1600-01, 1610-17 (effective Jan. 1, 1994).

83. 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773, 777 (1990).

84. CAL. CIV. CODE § 5310(a) (West Supp. 1993).

85. *Id.* § 5311.

86. 222 Cal. App. 3d 578, 271 Cal. Rptr. 773 (1990).

87. *Id.* at 583, 271 Cal. Rptr. at 776. The court found no evidence of a transmutation of property between Mr. and Mrs. Hall. *Id.*

88. *Id.* at 587, 271 Cal. Rptr. at 778-79.

to take the oral contract outside of the scope of the Statute of Frauds.<sup>89</sup>

Another example of contractual relationships that are governed by the Statute of Frauds is agreements between couples living together where neither the man nor the woman believe that they are married.<sup>90</sup> In *Marvin v. Marvin*, Michele Triolo and Lee Marvin orally agreed to share equally all property, whether acquired individually or jointly.<sup>91</sup> Michele gave up her career to become a homemaker, housekeeper, and companion to Lee.<sup>92</sup> When their seven-year relationship ended, Michele sued to enforce the oral contract for half the property acquired during their relationship and for support payments.<sup>93</sup> The Supreme Court of California held that express contracts between unmarried couples should be upheld, and that absent an express contract, "the courts may look to a variety of other remedies in order to protect the parties' lawful expectations. The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract . . . or some other tacit understanding between the parties."<sup>94</sup>

*Hall* and *Marvin* involve contractual relationships between persons either contemplating marriage or living together without the benefit of marriage. Courts have upheld oral agreements based on part performance by a prospective spouse and conduct by a woman cohabitating with a man. They have validated agreements made between unmarried persons where, had they been married, no such validation would have occurred. Unlike married persons, agreements between these unmarried parties are not subject to the strict rules governing the conduct of persons who occupy confidential and fiduciary relations with each other.<sup>95</sup> However, *Marvin* and *Hall* relationships are not so different from marital relationships that they warrant different legal treatment when the parties choose to contract

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89. *Id.* "Her performance constituted detrimental reliance on his promise sufficient to allow enforcement of the contract." *Id.* at 587, 271 Cal. Rptr. at 778.

90. Prior to *Marvin v. Marvin*, these relationships were called meretricious relationships. Today, they are commonly referred to as *Marvin* relationships. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

91. *Id.* The alleged oral contract between Lee and Michele is similar to the community property presumption stated in California Civil Code § 5110. Where Lee and Michele agreed to share equally all property acquired during the period they lived together, § 5110 states the presumption that all real or personal property acquired during the marriage is community property. CAL. CIV. CODE § 5110 (1983 & Supp. 1993).

92. *Id.*

93. *Id.* The trial court granted judgment for Lee based on the pleadings.

94. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. The court was willing to enforce an express or implied contract between unmarried persons, except where consideration for the contract was founded solely on "meretricious sexual services." *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

95. CAL. CIV. CODE § 5103 (West 1983 & Supp. 1993); *See supra* note 20 and accompanying text.

with each other. For example, *Marvin* relationships often resemble marital relationships, and can be, in all respects except legal, indistinguishable from marital relationships. Premarital agreements, like the one in *Hall*, are made between two people contemplating marriage.<sup>96</sup> It is a paradox that the premarital agreement is only valid upon marriage where a confidential and fiduciary relationship exists between the man and woman, though the contract itself is not subject to rules governing people in such a relationship.<sup>97</sup> There seems to be no compelling reason for the different treatment given to agreements between married persons and agreements between persons in *Hall* or *Marvin* situations.

In fact, given the Commission's express intention to bring the law for agreements between spouses into line with agreements between nonspouses, it seems that the transmutation law, as interpreted, has not met that goal.<sup>98</sup> In addition, the Commission expressed concern over extensive litigation generated by oral transmutions.<sup>99</sup> Surely, the special Statute of Frauds interpretation given to section 5110.730 will reduce litigation regarding transmutions. But, should not husbands and wives be treated "neither better nor worse than third parties with contract claims," and does not equity demand that relief be granted where the facts support it?<sup>100</sup>

Another example of a problem created by *MacDonald* involves the creation of joint tenancies and *In re Marriage of Lucas* situations.<sup>101</sup> In *Lucas*, the wife had used separate property as a down payment on the family home. Husband and wife took title as "Gerald E. Lucas and Brenda G. Lucas, Husband and Wife as Joint Tenants", thus satisfying section 683 of the California Civil Code for the creation of a valid joint tenancy.<sup>102</sup> A loan was taken for the balance of the purchase price; payments on the loan were made with community

96. *Id.* § 5310(a).

97. *Id.* §§ 5310(a), 5103.

98. *See supra* notes 78-79 and accompanying text.

99. *See supra* notes 48-49 and accompanying text.

100. Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 229, 262 (1982). Bruch argues that courts exist to resolve disputes, and that husbands and wives should be allowed to disagree as often as other contracting parties do. Where requirements are too strict regarding not only a writing requirement, but also the disallowal of extrinsic evidence to prove the existence of an agreement, only the "disadvantaged" and "unsophisticated" suffer.

101. *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

102. *Id.* at 811, 614 P.2d at 286, 166 Cal. Rptr. at 855.

property.<sup>103</sup> Upon divorce, Brenda sought reimbursement of her separate property contribution to the home.<sup>104</sup> The court ruled that the community property presumption raised by section 5110 of the California Civil Code could not be rebutted absent a contrary agreement between the spouses.<sup>105</sup> This agreement could be oral or written.<sup>106</sup> In effect, absent an agreement, Brenda had effectuated a transmutation of her separate property into the co-ownership form of interest specified by the form of title.

The question that arises now is whether *Lucas*-type transmutions are still viable after *MacDonald*. The deed in *Lucas* which granted title to Gerald and Brenda Lucas as joint tenants did not indicate that Brenda was giving up any interest in her separate property interest (i.e., her down payment). Her signature on the deed was only a consent as to the form of title. This is similar to Mrs. MacDonald's consent to the designation of a beneficiary other than herself, where she, too, did not expressly state that she was giving up her interest in the IRA accounts. After *MacDonald*, it appears that Brenda's down payment would remain her separate property, and no transmutation would occur.

An argument has been forwarded that *MacDonald* will not signal an end to *Lucas*-type transmutions because the agreement that would have to be made for the separate character of the down payment to remain intact would be an agreement "seeking not to achieve a transmutation but to prevent a transmutation."<sup>107</sup> This means that to achieve a transmutation the writing and express declaration requirements of section 5110.730 must be satisfied, but to prevent a transmutation any agreement (oral or written) will suffice. If no agreement to prevent a transmutation can be proved, can this mean that a transmutation has occurred without a section 5110.730 agreement? It is doubtful that is what the Legislature or the Commission intended. Not only did the Commission seek to end easy transmutions, its stated intent was to increase "certainty in determining whether"<sup>108</sup> transmutions had occurred and to "favor the community and minimize litigation."<sup>109</sup> A scheme that treats attempts to achieve and prevent transmutions differently (instead of as opposite sides of a coin) invites litigation by reducing the certainty of whether a transmutation has occurred.

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103. *Id.*

104. *Id.*

105. *Id.* at 814-15, 614 P.2d at 288, 166 Cal. Rptr. at 857.

106. *Id.*

107. William A. Reppy Jr., *Tricky Transmutation Law in California*, DIVORCE LITIG., Nov. 1990, at 1, 2. Reppy argues that agreements entered into to prevent transmutions are not controlled by California Civil Code § 5110.730.

108. LAW REVISION COMMISSION, *supra* note 11, at 225.

109. *Id.* at 207.

In addition, it is worth noting that estate planners, banks, and other businesses were left scrambling to ensure that forms and writings used to transmute property would be sufficient to effectuate a transmutation under the *MacDonald* court's interpretation of the new statute.<sup>110</sup> Persons who had executed will substitutes, such as Totten trusts,<sup>111</sup> where the language is insufficient to satisfy the proper transfer words of section 5110.730, were left in doubt about their efficacy after *MacDonald*. So too, were those who had taken out life insurance policies, whose beneficiary designation forms are similar to the *MacDonald* IRA consent forms.

The California Legislature responded to these issues by introducing Assembly Bill 1719.<sup>112</sup> This bill was approved by the Governor on May 8, 1992 and became effective January 1, 1993. The bill, which amended provisions of the California Civil and Probate Codes, applies to nonprobate transfers made before, on, or after January 1, 1993.<sup>113</sup> Section 5110.740 of the California Civil Code was amended so that a waiver of benefits under the federal Retirement Equity Act of 1984 will not be considered a transmutation of the "community property rights of the person executing the waiver."<sup>114</sup> Further, section 5110.740 was amended to provide that a written consent or joinder to a nonprobate transfer of community property on death is a

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110. This Comment does not specifically deal with nonprobate transfer issues, such as will substitutes, nor does it attempt to address the problems banks and other businesses face in their use of "institutional forms." For a thorough discussion of problems and questions raised by *MacDonald* in the area of life insurance, death benefits, and other will substitutes, see generally, Jerry A. Kasner, *Donative and Interspousal Transfers of Community Property in California: Where We Are (Or Should Be) After MacDonald*, 23 PAC. L.J., 361, 402-42 (1992).

111. A Totten trust is typically a contract between a bank and the depositor. When the depositor dies, the bank will pay all money on deposit in the account to the person for which it was held in trust. The account is listed in the name of the holder as trustee for beneficiary. CAL. PROB. CODE § 80 (West 1991).

112. A.B. 1719, 1991-92 Reg. Sess., California Legislature.

113. *Id.* Assembly Bill 1719 added subsections b and c to California Civil Code § 5110.740. CAL. CIV. CODE § 5110.740(b)-(c) (West 1983 & Supp. 1993). It also amended § 141, and added chapter 2, Nonprobate Transfers of Community Property, to the California Probate Code. CAL. PROB. CODE §§ 141, 5010-5032 (West 1991 & Supp. 1993).

114. CAL. CIV. CODE. § 5110.740(b) (West 1983 & Supp. 1993). A written, notarized waiver of a right to a joint and survivor annuity is effective under the federal Retirement Equity Act of 1984 to preclude the spouse executing the waiver from receiving annuity benefits. Employee Retirement Income Security Act (ERISA), 29 USC § 1055 (1988). Subsection 5110.740(b) was added to be consistent with California treatment of federal pension benefits. Pension benefits are considered community property to the extent that the benefits accrue during marriage, and thus are subject to division upon marital dissolution. 1 WILLIAM W. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 5.04 (1988). If a spouse waives joint and survivor annuity benefits, section 5110.740(b)

transmutation if it satisfies subsection 5110.730(a).<sup>115</sup> Subsection 141(a) of the Probate Code was amended to allow a surviving spouse to waive all or partial interest in "property that is the subject of a non-probate transfer on death"; such property is covered under the Probate Code commencing with section 5000.<sup>116</sup> A new chapter in the Probate Code, commencing at section 5010, was added to address nonprobate transfers of community property, consent, and revocation and modification of consent requirements.<sup>117</sup> In particular, section 5022 reaffirms the holding in *MacDonald* that only written consents to a nonprobate transfer that satisfy section 5110.730 of the California Civil Code will be considered transmutations.<sup>118</sup> However, subsection 5030(c) overrules *MacDonald* by making any written consent irrevocable upon the death of either spouse.<sup>119</sup>

## V. INTERSPOUSAL TRANSMUTATIONS IN OTHER COMMUNITY PROPERTY STATES

Other community property states have varying degrees of formalities required to effectuate an interspousal transmutation of property. States of particular relevance are Idaho, New Mexico, and Nevada. These three States have either codified transmutations, treat transmutations as interspousal agreements subject to the Statute of Frauds, or regulate transmutations in ways similar to pre-1985 California.

Like California, Idaho has codified its rules regarding interspousal transmutations by requiring all contracts between husbands and wives that change the character of property to be in writing, and

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ensures that the waiving spouse's share of community property will not be diminished; rather, other community property will be used to offset the amount waived. CAL. CIV. CODE § 5110.740(b) (West 1983 & Supp. 1993).

115. *Id.* § 5110.740(c). Where the written consent or joinder to the nonprobate transfer does not meet the requirements of a transmutation under § 5110.730, it is governed by §§ 5010-32 of the Probate Code. CAL. PROB. CODE §§ 5010-32 (West 1991 & Supp. 1993).

116. CAL. PROB. CODE § 141(a) (West 1991 & Supp. 1993). Written instruments covered by Probate Code § 5000 include "transfer[s] on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature." CAL. PROB. CODE § 5000 (West 1991 & Supp. 1993).

117. CAL. PROB. CODE §§ 5010-32 (West 1991 & Supp. 1993).

118. *Id.* § 5022 (West 1983 & Supp. 1993). It should be noted, however, that Probate Code § 5011(c) subjects all written consents to nonprobate transfers to the written intent of the consenting party. Thus, it is not clear that a writing must satisfy the language of California Civil Code § 5110.730 before a transmutation of property could be accomplished. *Id.* § 5011(c).

119. *Id.* § 5030(c). Subsection 5030(c) does not apply "to revocation of a written consent given by a spouse who died before January 1, 1993." *Id.* at § 5014(b).

“executed and acknowledged or proved in like manner as conveyances of land.”<sup>120</sup> Idaho’s transmutation statute was recently interpreted in *Wolford v. Wolford*.<sup>121</sup> In *Wolford*, the wife, Kathryn, claimed that David, her husband, had transmuted his separate property interest in CommTek Publishing stock to her when he wrote on a cocktail napkin that Kathryn had a community property interest in the assets and liabilities of CommTek Publishing.<sup>122</sup> However, the Idaho Supreme Court upheld the lower court’s finding that the note did not transmute David’s separate property interest in the stock.<sup>123</sup>

First, the lower court held that the note was “unclear on its face and did not appear to be a bona fide attempt to formally transmute” David’s interest in the stock.<sup>124</sup> Second, the note did not meet the requirements of section 32-917 of the Idaho Code, because it was not acknowledged or proved.<sup>125</sup> Third, the note referred to the assets and liabilities of the company, not the stock; David owned no assets or liabilities of CommTek, thus he could not transfer an interest in them.<sup>126</sup> The court stated that Idaho laws require formalities in effecting interspousal transmutations.<sup>127</sup> The court further found that Kathryn had “failed to sustain her burden of proving a transmutation; neither had she shown that the formalities required” in the Idaho Code had been satisfied.<sup>128</sup> Kathryn unsuccessfully tried to enforce the napkin-note transmutation using the equitable doctrine of quasi-estoppel.<sup>129</sup> The court could find no actions taken by Kathryn in reliance on a belief that there had been a transmutation of property to her.<sup>130</sup>

120. IDAHO CODE § 32-917 (1992).

121. 785 P.2d 625 (Idaho 1990).

122. *Id.* The note was written in a bar and restaurant and stated:  
06/25/82 - I David G. Wolford, being of I hope somewhat sound mind but of broken body acknowledge that Idaho being a community property state, that Kathryn A. Wolford, common [sic] known as Fetch, has an equal community property interest in the assets and liabilities of CommTek Publishing.

David G. Wolford

*Id.* at 628.

123. *Id.* at 630.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* The court declared that for quasi-estoppel to apply, “[a person against whom estoppel is sought] must have gained some advantage for [him]self, produced some disadvantage to [the person seeking estoppel], or induced him to change his position.” (quoting *Dawson v. Mead*, 557 P.2d 595 (Idaho 1976) (alterations in original)). *Id.*

130. *Id.* at 630-31.

Like California, Idaho's transmutation statute requires a writing; unlike California, the statute is a regular Statute of Frauds law. Nothing suggests that extrinsic evidence would not be allowed to support a claim that a transmutation occurred. Likewise, actions by the benefitting party in reliance that a transmutation had occurred will estop the supposed transmutor from denying that a change in the character of property had occurred. It is likely that, had this case arisen in California, the napkin-note would not have effected a transmutation of property. First, because the property that is supposedly the subject of transmutation is questionable (David only owned stock, not assets or liabilities), the note would probably fail to meet the California transmutation statute requirements.<sup>131</sup> Second, while David stated that Kathryn has a community property interest in the property, he did not expressly declare that he was giving up any interest in that property. It may be implicit that for Kathryn to have a community property interest, David cannot own the stock 100 percent as his separate property. But that will not be enough to find an express declaration under *MacDonald*.<sup>132</sup>

Although New Mexico does not have a transmutation statute, *per se* transmutations are governed under its general interspousal contracting statute.<sup>133</sup> In *Allen v. Allen*, the wife took property in her name only when the parties were already married.<sup>134</sup> She later made out a quitclaim deed on that property, transferring title from herself to herself and her husband.<sup>135</sup> During dissolution proceedings, the husband claimed that the quitclaim deed executed by his wife transmuted the property from the wife's separate property to community property.<sup>136</sup> The court stated that "[w]hile transmutation is recognized, the party alleging the transmutation must establish the transmutation . . . by clear, strong and convincing proof."<sup>137</sup> Despite the

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131. According to *MacDonald*, an interest in property cannot be given up unless it was realized in the first place. *Estate of MacDonald*, 51 Cal. 3d 262, 267, 794 P.2d 911, 914, 272 Cal. Rptr. 153, 156 (1990). It follows that an interest in property cannot be given up unless it exists in the first place.

132. See *supra* notes 73-75 and text accompanying *supra* note 76.

133. N.M. STAT. ANN. § 40-2-2 (Michie 1992). The provision is similar to California Civil Code § 5103 prior to the 1992 amendment. The statute states:

Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

*Id.*

134. 651 P.2d 1296, 1297 (N.M. 1982).

135. *Id.* The quitclaim deed did not specify the manner in which title would be held, but stated, in part, "Sandra Allen for consideration paid, quitclaim to W. Ronald Allen and Sandra Allen." *Id.* at 1298.

136. *Id.*

137. *Id.*

quitclaim deed, there was no clear, strong, and convincing proof that Mrs. Allen intended to transmute her separate property to community property.<sup>138</sup> Unfortunately, the court went no further in explaining why it did not find clear, strong, and convincing proof that Mrs. Allen intended to transmute the property. But, from the facts as given, it is highly likely that the quitclaim deed would be sufficient to create a transmutation of property in California under section 5110.730.<sup>139</sup> Whatever evidence was allowed to show that Mrs. Allen did not intend that the quitclaim deed be a transmutation from separate to community property would not have been admissible in California.

In *Bustos v. Bustos*, the court again used the clear, strong, and convincing proof standard in deciding whether a contract between husband and wife was valid to convey the wife's separate real property to husband's separate property.<sup>140</sup> The court ruled that the husband did not meet his burden of proof because there was strong evidence indicating that he had exerted undue influence over his wife when they entered into the contract.<sup>141</sup> A contract for the sale of land that appeared valid on its face would probably effect a transmutation of property in California if it met the requirements of sections 5110.720 and 5103 of the California Civil Code.<sup>142</sup> The California resolution of this case would have been the same.

Nevada, which still has no statute prescribing the method by which interspousal transmutions may be effected, has relied on section 123.220 of the Nevada Revised Statutes in deciding when a transmutation has occurred.<sup>143</sup> In *Verheyden v. Verheyden*, the Nevada Supreme Court stated in a footnote that an agreement between

138. *Id.*

139. Quitclaim deeds convey whatever interest a grantor may have in property to the grantee(s). While it does not guarantee that the grantor has any valid interest, it does assume that any interest the grantor does have is given over to the grantee(s). RAYMOND J. WERNER & ROBERT KRATOVIL, *REAL ESTATE LAW*, 63 (10th ed. 1993).

140. 673 P.2d 1289, 1291 (N.M. 1983).

141. *Id.* Apparently, Mrs. Bustos needed money to help her son make some car payments, and so accepted \$2,000 as consideration for the land. The land, at the time of trial, was worth \$160,000. Additionally, evidence showed that at the time of the sale, Mrs. Bustos was afraid of Mr. Bustos and was emotionally disturbed. *Id.*

142. CAL. CIV. CODE §§ 5110.720, 5103 (West 1983 & Supp. 1993). Section 5110.720 operates to ensure there is no fraud perpetrated against a creditor. Section 5103, as amended in 1991, imposes a duty of highest good faith and fair dealing on married persons and establishes between them a fiduciary relationship. If there is evidence of undue influence or misrepresentation or fraud, the contract will be considered void as between the spouses.

143. NEV. REV. STAT. ANN. § 123.220 (Michie 1986 & Supp. 1991) (defining all property acquired after marriage as community property unless there is an "agreement

spouses to transmute community property to separate property of either spouse must be in writing according to subsection 123.220(1).<sup>144</sup> Mrs. Verheyden was trying to prove that an automobile, purchased during marriage, was actually her separate property because Mr. Verheyden told her it was a gift to her.<sup>145</sup> The court stated that the presumption under which all property acquired during marriage is community property could only be rebutted by "clear and certain proof," and that Mr. Verheyden's oral declarations did not meet this level of proof.<sup>146</sup> The *Verheyden* court leaves us guessing as to which reason was key to its finding that no transmutation had occurred: failing the clear and certain proof test or having no written agreement.

This ambiguity was noted, if not resolved, in *Anderson v. Anderson*, which involved a dispute during judicial dissolution of the community over the classification of money in bank accounts.<sup>147</sup> The Andersons had agreed to divide their joint account into two separate accounts.<sup>148</sup> The division of the money was unequal, with \$54,000 being deposited in Mr. Anderson's account, and \$110,000 being deposited in Mrs. Anderson's account.<sup>149</sup> The Nevada Supreme Court ruled that, had the issue of transmutation been raised formally on appeal, the doctrine of equitable estoppel would permit the unequal distribution of funds to stand.<sup>150</sup> The concurring opinion directly addressed this case as raising an issue of transmutation of property, and stated that section 123.220 of the Nevada Revised Statutes only defined community property, and did not relate to transmutations of community property.<sup>151</sup> The concurring judges believed that the oral agreement between Mr. and Mrs. Anderson that accompanied the division of the joint bank account should be enforced because Nevada law did not require a writing or other formality to transmute

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in writing between the spouses" (this includes provisions under §§ 123.190 (written authorization required by one spouse for other spouse to appropriate and use own earnings as separate property) and 123.259, or there is a court decree of separate maintenance).

144. 757 P.2d 1328, 1331 n.4 (Nev. 1988).

145. *Id.* at 1331. In addition, Mrs. Verheyden stated that the car had always been referred to as her car. However, title was taken in both spouses' names. *Id.*

146. *Id.* at 1331.

147. 816 P.2d 463 (Nev. 1991).

148. *Id.* at 464.

149. *Id.*

150. *Id.* Mr. Anderson admitted that he had misled his wife to believe that the division of money was permanent. There is nothing in the case that reveals that Mrs. Anderson relied to her detriment on Mr. Anderson's declarations regarding the division of the joint bank account.

151. *Id.* at 465 (Springer, J. and Rose, J., concurring). The case was decided by five justices, three of whom joined in the majority opinion, and two of whom concurred. The judges in the concurring opinion believed that Nevada's law of transmutation was in need of clarification after *Verheyden*.

property between spouses.<sup>152</sup> Until the transmutation law is clarified (i.e., whether any formalities are required to transmute property between spouses), it is difficult to predict the outcome of the next interspousal transmutation case in Nevada. However, a California court applying the *MacDonald* standard would have found that the Verheyden and Anderson agreements did not effectuate a transmutation of the subject property because there were no written agreements which expressly declared that a transmutation had occurred.

## VI. AN ALTERNATE INTERPRETATION OF SECTION 5110.730

The *MacDonald* decision has presented various problems: it creates different standards and requirements for persons who contract between themselves based on marital status; it potentially leaves unresolved the *Lucas*-type situation; and it has caused upheaval in businesses that use standard institutional forms. Given these problems and the ways other community property states handle interspousal transmutations, an alternate interpretation of section 5110.730 of the California Civil Code, one which would achieve the court's holding in *MacDonald* that a transmutation did not occur, is possible and workable. The basic writing requirement of section 5110.730 is sound. Requiring a written agreement satisfies the intent of the Commission and legislature by reducing the amount of litigation spawned by the pre-1985 easy transmutations.<sup>153</sup> It also reduces problems associated with contracts between persons who are not transacting at arm's length. Additionally, a writing requirement makes interspousal transactions dealing with real property subject to the same requirements as contracts between unmarried persons.<sup>154</sup>

The problem with section 5110.730 lies in the *MacDonald* court's interpretation of the words "express declaration."<sup>155</sup> By interpreting section 5110.730 as a special Statute of Frauds law that does not allow admission of any extrinsic evidence to prove or disprove the intent of the parties as to transmutation, the court disregards the high likelihood that transactions between spouses will be informal. Husbands and wives rarely put agreements in writing, and when

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152. *Id.* The concurring opinion went on to state that if Nevada wants to formalize requirements for interspousal transmutations, it should follow the lead of California, and leave it to the legislature to enact a statute.

153. See *supra* text accompanying notes 11, 48-49.

154. CAL. CIV. CODE § 1624 (West 1983 & Supp. 1993) (Statute of Frauds).

155. CAL. CIV. CODE § 5110.730(a) (West Supp. 1993).

they do it is often in vague terms.<sup>156</sup> Though some formality in transferring interests in property is necessary and desirable, it should not be more difficult for married persons to create agreements that will be upheld in court than it is for unmarried persons.<sup>157</sup> Allowing arguments such as estoppel and part performance of an agreement to be made may increase the amount of litigation when compared to the *MacDonald* standard, but “disagreements between family members are as deserving of judicial time as are similar claims between strangers,” and “artificial barriers to recovery . . . are inequitable.”<sup>158</sup> The *MacDonald* standard looks out for the court’s interest at a high cost to husbands’ and wives’ freedom to contract.

After the decision in *MacDonald*, the higher partnership standard for married persons was codified in section 5103 of the California Civil Code.<sup>159</sup> It applies to all real and personal property transactions between husbands and wives.<sup>160</sup> Section 5103 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.”<sup>161</sup> This high standard by which spousal dealings are controlled is arguably justified because husbands and wives do not deal at arms-length, and because husbands and wives have historically lacked formality in their agreements. Sections 5103 and 5110.720, and subsection 5110.730(b) work together to ensure the integrity of interspousal agreements as they relate to the spouses and as they

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156. This is particularly true when giving gifts. Any writing that might coincide with a gift of a diamond ring or a new car, which may not fit in the personal gifts exception to § 5110.730, is likely to be in a card that merely says “For You” or “Happy Birthday.” Neither writing satisfies § 5110.730 because neither indicates the object being given nor expressly declares that an interest in property is being transferred to the donee spouse.

157. An argument in favor of creating a different and more difficult standard is that the likelihood of fraud, undue influence, and misrepresentation is higher in transactions between spouses.

158. Carol S. Bruch, *supra* note 100, at 162-63.

159. CAL. CIV. CODE § 5103 (West Supp. 1993). Section 5103 was amended in 1991 to reflect the legislature’s intent to further formalize the marital relationship.

160. *Id.*

161. *Id.* These “rights and duties” include:

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

(2) Rendering upon request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by him or her without consent of the other spouse which concerns the community property.

relate to creditors and third parties.<sup>162</sup> While these code sections indicate an increasing preference for formalities in interspousal contracts, their presence also permits a less strict interpretation of subsection 5110.730(a). In the absence of section 5103, the *MacDonald* court's interpretation of section 5110.730 is required to ensure that no unfair advantage is taken of a spouse. With subsection 5103, the interpretation of subsection 5110.730(a) can be softened, making it a *regular* Statute of Frauds law.

Allowing evidence of intent to transmute property can be governed by standards that would not overly burden a court by inducing excessive litigation. For example, where a writing did not clearly indicate a change in the character of property, an evidentiary standard, like New Mexico's clear, strong, and convincing standard, would have to be satisfied by the person seeking to prove that a transmutation had occurred. California has a similar evidentiary standard in section 662 of the California Evidence Code.<sup>163</sup> The Commission's concern over the amount of perjury prevalent in litigation prior to enactment of section 5110.730<sup>164</sup> would be alleviated by a higher burden of proof required to establish intent to transmute combined with a requirement of highest good faith dealing in section 5103 of the California Civil Code.

Interpreting section 5110.730 as a regular Statute of Frauds law would address all of the concerns of the Commission. First, the court would determine if there was a writing. If the writing expressly states that the spouse is giving up all or a partial interest in the subject property, the court's work is done. However, where the writing is ambiguous or where there is no writing, the agreement would be examined to ensure it complies with the new partnership standards of section 5103 of the Civil Code.<sup>165</sup> Evidence would be admissible to show that full disclosure of property interests was made to the adversely affected spouse, and that there was no undue influence or misrepresentation.<sup>166</sup> That evidence would have to meet the clear and convincing proof standard of section 662 of the Evidence Code.<sup>167</sup> If the writing or oral agreement passed this highest good faith and fair dealing test, then further evidence would be admissible to show whether the intent was present to pass an interest to the

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162. *Id.* §§ 5103, 5110.720, 5110.730(b).

163. CAL. EVID. CODE § 662 (West 1966).

164. LAW REVISION COMMISSION, *supra* note 11, at 214.

165. CAL. CIV. CODE § 5103 (West Supp. 1993).

166. *Id.*

167. CAL. EVID. CODE § 662.

other spouse. When the intent test failed, only where equity demanded, would doctrines of equitable estoppel or part performance operate to make the Statute of Frauds inapplicable to the agreement. If the spouse claiming the transmutation could show, by clear and convincing evidence, that actions were taken in detrimental reliance on the supposed transmutation, then, and only then, would a writing requirement be waived.

In *MacDonald*, there was a writing agreeing to the designated beneficiaries and a signature by the spouse whose interest was adversely affected. However, the writing did not expressly declare that Mrs. MacDonald was giving up any interest in the IRA accounts. In applying section 5103 to this agreement, there was no apparent fraud or undue influence by Mr. MacDonald. Previous attempts to separate their estates would indicate that Mrs. MacDonald knew enough to ask whether she had any interest in the IRA accounts. Assuming that the consent forms would pass the highest good faith dealings test, was there sufficient evidence of a clear and convincing nature to show that Mrs. MacDonald intended to transmute her community property interest in the IRA accounts? This is debatable. First, Mrs. MacDonald could have believed that she was consenting to Mr. MacDonald leaving his community interest to the revocable living trust (i.e., not giving up any present interest). Second, Mrs. MacDonald was deceased and could not express her true intentions. The court may well have determined that the intent to transmute property was not supported by clear and convincing evidence. A decision based on the above reasoning would recognize that husbands and wives are not formal in all their dealings, as courts have recognized that unmarried persons are not always formal or clear in their dealings. But, by requiring clear and convincing proof coupled with the partnership standard for highest good faith and fair dealing, excessive litigation that tends to invite perjury would be avoided.

## VII. CONCLUSION

The writing requirement of section 5110.730 of the California Civil Code is a sound idea. Interspousal transmutations of personal and real property prior to January 1, 1985 were too easy and encouraged perjury in judicial dissolution proceedings as well as controversies between heirs and widowed spouses. However, the California Supreme Court may have gone too far in interpreting the express written declaration statement in section 5110.730 to mean that a special, more strict Statute of Frauds law was intended by the California Legislature.

The strict interpretation of section 5110.730 will continue to cause problems in areas where joint tenancies have been created, where

nonpersonal, substantial interspousal gifts are made, and where fairness demands that an agreement that does not satisfy section 5110.730 be considered a valid transmutation of property. Adopting a more traditional Statute of Frauds law interpretation of section 5110.730, like that given Idaho's transmutation statute, would alleviate some problems without unduly burdening the court with litigation. Requiring a high burden of proof, like New Mexico does with its clear, strong, and convincing standard, would alleviate many problems of perjury. California's new "marriage as a business partnership" rule would further prevent problems caused by insufficient writings where unfair dealings between spouses are possible. Lastly, section 5110.720 already ensures that any agreement between spouses will be carefully scrutinized to ensure creditors' rights are protected. While a different reading of section 5110.730 may render the words "express declaration" superfluous as they were interpreted in *MacDonald*, it would have the benefit of treating agreements between married persons identically to those between unmarried persons.

KIM M. SEAVEY

