Memorandum 89-106

Subject: Study F-641 - Disposition of Community Property (Donative Transfers and Revocation of Consent)

BACKGROUND

Attached to this memorandum is a copy of the fascinating case of Estate of MacDonald, 213 Cal. App. 3d 456 (1989). In this case the husband, on retirement, cashed out his company pension plan (consisting entirely of community property) and rolled it over into a number of IRA accounts in his own name. The husband named as the beneficiary on each account, in the event of his death, a previously established revocable living trust, under which the bulk of the trust estate would go to the husband's children by a previous marriage, subject to a life interest in the wife.

At the time the IRA accounts were created, the wife (who was aware she was then terminally ill) signed an "adoption agreement" for each IRA account in the following form:

> Adoption Agreement and Designation of Beneficiary
> 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.

The wife died three months later, leaving her estate to her children by a previous marriage. The executor sued to establish the estate's community share in the IRA accounts, and the husband argued that the wife had either waived her community interest in the IRAs or had transmuted it to separate property, pointing to the IRA adoption agreement signed by the wife.

The trial court agreed with the husband and found the estate had no rights in the IRAs. The Court of Appeal disagreed and held for the wife, over a strong dissent. The husband is seeking a hearing in the California Supreme Court.

ANALYSIS

Regardless of how this case ultimately is resolved, it raises a number of important issues that we must grapple with. Specifically: (1) Are donative transfers, such as beneficiary designations in IRA accounts, Totten trust accounts, POD bank accounts, United States Savings Bonds, living trusts, pension plans, and insurance policies subject to the community property gift limitations of Civil Code Section 5125? (2) If so, what acts by the nondonor spouse are sufficient to satisfy the consent requirement? (3) After consent is given by the nondonor spouse, is the consent to a such a donative transfer revocable? (4) If so, must the nondonor spouse revoke the consent during lifetime, or may the nondonor spouse's personal representative revoke the consent after the spouse has died?

Are Donative Transfers Subject to Civil Code § 5125?

During marriage the rights of the spouses in community property are "present, existing, and equal", and each spouse must act in good faith with respect to the other in the management and control of the community property. Civil Code §§ 5105, 5125. As a consequence of these principles, neither spouse may deplete the community estate during marriage by mismanagement, gifts, and the like. At termination of the marriage, either by dissolution or death, each spouse is entitled to one half of the community estate. Civil Code § 4800; Probate Code § 100. In case of death of a married person, the decedent has the power of testamentary disposition of the decedent's one-half interest in the community. Probate Code § 6101.

In recent years, nontestamentary dispositions have become more important than testamentary dispositions. Statistics show that most wealth now passes by nonprobate transfers rather than by will or intestate succession. These nonprobate transfers take such forms as trusts, life insurance policies, pension plans, savings bonds, Totten trust accounts, IRAs, and other written instruments with beneficiary designations, not to mention other traditional estate planning devices such as outright gifts and the old standby, joint tenancy title. This trend is accelerating as pay-on-death bank account designations increase in popularity and as the new Uniform TOD (transfer-on-death) Security Registration Act comes into use.

How are these increasingly popular types of nontestamentary dispositions affected by the general community property principles that a spouse may not deplete the community estate during marriage but has a right of testamentary disposition of one-half at death? Because the trend to nontestamentary disposition is relatively new, in terms of the evolution of the law, community property doctrine has been slow to react. However, to the extent there has been development of the law in this area, it is clear that the nontestamentary disposition, which generally takes the form of a revocable lifetime donative transfer, butts up directly against the community property rule that one spouse may not unilaterally deplete the community estate.

Civil Code Section 5125(b) provides:

> A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

Under this section, if a spouse makes a gift without the consent of the other spouse, the nonconsenting spouse may rescind the entire gift during marriage and may rescind the gift as to the nonconsenting spouse's half interest in the community property on termination of the marriage by dissolution or death.

These principles have been applied to estate planning types of donative transfers as well as to outright gifts. For historical reasons (relating to the fact that for many years the husband was the manager of the community property), essentially all the cases involve a beneficiary designation by the husband that is made without the consent of the wife. However, the cases would apply equally well to a beneficiary designation by either spouse without the consent of the other under equal management and control.

Thus cases have imposed the consent requirement for a beneficiary designation under a life insurance policy (see, e.g., Tyre v. Aetna Life Insurance Co., 54 Cal. 2d 399, 353 P. 2d 725, 6 Cal. Rptr. 13 (1960)), bank trust account (see, e.g., In re Marriage of Stallworth, 192 Cal. App. 3d 742, 237 Cal. Rptr. 829 (1987)), and United States Savings Bonds (see, e.g., Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (Washington)). Likewise the consent requirement applies to creation of joint tenancy between one spouse and a third party in a bank account or

savings bond. See, e.g., Estate of Bray, 230 Cal. App. 2d 136, 40 Cal. Rptr. 750 (1964). Nor may a spouse make a gift of community funds under the Uniform Transfers to Minors Act without consent of the other spouse. See, e.g., In re Marriage of Stephenson, 162 Cal. App. 3d 1057, 209 Cal. Rptr. 383 (1984); see also In re Marriage of Hopkins, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977) (community property gift to minor without consent of spouse is revocable, as would be gift made in "irrevocable" trust without consent of spouse).

Under these cases, the community right is paramount notwithstanding other law that purports to make the donative transfer absolute. Thus although the Uniform Transfers to Minors Act states that a custodianship created under the account is "irrevocable and conveys to the minor indefeasibly vested legal title to the custodial property", this rule is subject to the overriding community property interest of a spouse who did not consent to creation of the account. Stephenson, supra, 162 Cal. App. 3d at 1071; Hopkins, supra, 74 Cal. App. 3d at 602, n.7. And federal law declaring coownership of United States Savings Bonds to be absolute is subject to state community property rights. Bray, supra, 230 Cal. App. 2d at 143.

It may be that some statutes specifically supersede the gift limitations. This may be particularly true in the area of employee rights, where there is a tendency to allow the employee spouse to manage and control employment benefits to the exclusion of the nonemployee spouse (but not to the exclusion of the nonemployee spouse's one-half interest in those benefits). See Memorandum 89-55. This in fact became an issue in the MacDonald case, where the husband pointed out that the IRA accounts were derived from his interest in the company pension plan. However, in that case the pension plan had been cashed out into straight community property, and the ordinary community property rules were held to apply:

> Here, the pension plan itself had been terminated and the benefits disbursed. Mr. MacDonald and decedent had complete control over the funds. They chose to place the funds in tax-deferred IRA accounts. The funds were still under the respondent's control. No interference with contractual rights between an employer--private or public--and its employee could have occurred.
> 213 Cal. App. 3d at 463.

The staff is aware of pending litigation on this issue in the Ninth Circuit of the United States Court of Appeals involving a conflict between the employee spouse and nonemployee spouse over the employee spouse's retirement plan. In Ablamis v. Roper the nonemployee wife died leaving all her property to her children from a previous marriage. The surviving employee husband has a large interest in two retirement plans (in the form of profit sharing trusts), substantial amounts of which are community property. The wife's executor is seeking to recover for the estate the wife's one-half interest in the community property in the retirement plans. The husband argues that ERISA and other governing federal legislation requires that the retirement fund be dedicated exclusively for the benefit of the surviving spouse. A key issue in the case is whether the federal legislation preempts California community property laws and the right of testamentary disposition of one-half the community property. The briefs have just been filed in the case.

Satisfaction of Consent Requirement by Nondonor Spouse

Civil Code Section 5125(b) precludes a spouse from making a donative transfer "without the written consent of the other spouse". The MacDonald case described above is unique among the reported cases in that the nondonor spouse actually gave a written consent to the beneficiary designation on the IRAs. The other cases invalidating donative transfers involve arguments that despite the failure of the nondonor spouse to give written consent, either consent should not be required or oral consent should be sufficient or there was a transmutation or an estoppel or a waiver of rights or a ratification of the gift. Professor Bruch, in her study for the Commission on this matter, observes that "A court faced with an objection to customary transfers might find a ratification of the gift or sale or an implied waiver of the writing requirement, but there seems no sound reason to require such doctrinal machinations." Bruch, Management Powers and Duties Under California's Community Property Law: Recommendations for Reform, 34 Hastings L.J. 227, 239 (1982).

The courts in the cases, however, have been relatively unsympathetic to arguments that failure of written consent should be excused, in light of the clear statutory requirement. This is true

even though in many cases there is evidence that the nondonor spouse was aware of the transfers and did not object. The Stephenson case, for example, involved a number of community property savings accounts opened for the couples' minor children under the Uniform Gifts to Minors Act, with the husband named as custodian. The evidence showed that the accounts were opened with the knowledge, consent, approval, and participation of both spouses, but there was no evidence of the wife's written consent. The court found no waiver or estoppel due to the absence of detrimental reliance by the children or potential unjust enrichment of the wife, and held the gifts were voidable, stating:

> The amendments to section 5125, subdivision (b) clearly demonstrate the Legislature's desire to strictly regulate one spouse's ability to give away community property. This is evidenced by the 1975-1978 version of that subdivision under which a spouse was precluded from making any gift of community personal property. The reenactment of the provision allowing for gifts of community personal property with the *written* consent of the other spouse in 1978 must be interpreted to require something more than the tacit approval of the gift by the nondonor spouse. A different interpretation would entirely vitiate the writing requirement. We decline to engage in such "doctrinal machinations." (See Bruch, *Management Powers and Duties Under California's Community Property Law: Recommendations for Reform* (1982) 34 Hastings L.J. 227, 239-240.) While the application of this rule may be harsh in the case at bench, any change in this scheme is for the Legislature and not this court to make.
> 162 Cal. App. 3d at 107.

Another illustrative case is Stallworth, in which the wife was named as trustee of a savings account for the benefit of the couple's minor child, the account consisting in part of community property from the couple's earnings during marriage. There was conflicting testimony as to the husband's knowledge of or participation in the gift, and the court held the gift was voidable for lack of the husband's written consent. Justice Haning in dissent remarks:

> With regard to the child's trust account, if we follow the majority's reasoning to its ultimate conclusion, the trial court must also order the child's bicycle, teddy bear and other toys and personal possessions sold or distributed between husband and wife. I am not sure this is what the Legislature had in mind when it enacted Civil Code section 5125, subdivision (b), but neither do I find it necessary to address that issue in light of the record before us. It is

> simply inadequate to enlighten us sufficiently to rule. We know that some of the money in the trust account consisted of birthday and Christmas gifts. We do not know who made the various gifts, nor the manner in which they were made. We also know that the parties met with a financial advisor for purposes of estate planning, and that pursuant to his suggestion an account was opened to provide for the future education of their child. I would remand to the trial court with instructions to take further evidence and make a new finding on the status of the trust account.
> 192 Cal. App. 3d at 757-58.

These concerns are a result of the inflexibility of Section 5125(b), which is clearly in need of revision. Among the suggested improvements are that small or moderate gifts be allowed without written consent and that oral consent be permitted, with the burden of proof of oral consent on the donor spouse. See Memorandum 89-55.

Is the nondonor spouse's consent to a donative transfer revocable?

In the MacDonald case the nondonor wife gave written consent to the beneficiary designations on the husband's IRAs. Is the consent irrevocable once given, or is a consent to a beneficiary designation different in kind from consent to an outright gift, which presumably is irrevocable?

There is little or no law on the revocability of a spouse's consent to a gift. A gift for which no consent is required (e.g. a gift of separate property) is irrevocable by the donor once it is made, assuming it is a completed gift (i.e., there has been delivery of the gift to the donee and not merely a promise to make a gift). Civil Code §§ 1146-48. However, even a completed gift is revocable by the donor if made in view of death (a gift causa mortis), except that the rights of a bona fide purchaser from the donee may not be affected. Civil Code §§ 1149-51.

Would parallel rules apply to a gift for which the consent of the nondonor spouse is required and given? If so the nondonor's consent would not be revocable in the case of a completed gift (i.e., there has been delivery). If the gift is not a completed gift (i.e., there has been no delivery because the gift is to take effect in the future), the nondonor's consent would be revocable until such a time as the gift was completed.

These principles would become important when applied to donative transfers of the types we are concerned with here. The distinguishing feature of the key estate planning devices, whether a will or a will substitute, is that they make gifts intended to take effect at the donor's death. Until the donor's death they are uniformly subject to revocation. Thus a will is ambulatory and can be changed at any time until death; a devisee acquires no rights by virtue simply of being named in a will. And it is self-evident that a revocable living trust is revocable. Likewise beneficiary designations under life insurance policies, POD accounts, pension plans, IRAs, and the like can be changed freely until the time of death. A Totten trust is by its nature tentative and revocable until the death of trustee. The Wilson court, in analogizing Totten trusts to other donative transfers, observed:

> While these cases did not involve Totten trusts, they dealt with analogous situations. Each concerned an inter vivos gift to someone other than the surviving spouse of community property which became a testamentary disposition upon the donor's death. Similarly, a Totten trust is created during the decedent's life and is a gift to the same extent that any revocable trust is a gift. [In both *Odone* and *Tyre* the gifts were revocable. In *Odone*, the gift of $5,400 was conditional on the wife's death and also on the amount of money she would need during her illness. In *Tyre*, the insured husband could have changed the named insurance beneficiary from his wife to a third party at any time before he died.] At the donor's death the Totten trust becomes a testamentary disposition of the assets contained within it. Because a Totten trust is indistinguishable from the cases examined above, the same treatment should apply.
> 183 Cal. App. 3d at 72.

Thus, although there is no law directly on point, the MacDonald court may be correct in its assumption (without discussion) that the nondonor wife may revoke her consent to the husband's IRA beneficiary designations before the husband dies and the IRA gifts become absolute. As the court observes, the wife's consents were given on standard form "adoption agreements", and "Nowhere in their perfunctory terms do we find any indication that the beneficiary designation is intended to be irrevocable." 213 Cal. App. 3d at 456.

Until the donative transfer becomes final and as long as it is revocable, the nondonor spouse is probably entitled to revoke the consent given to the donative transfer. This rule makes legal (if not practical) sense, since the wife agreed only to the specific beneficiary designations the husband had made on the IRAs, which would benefit his children. But the children and their circumstances may change over time and, with the gift still not completed, the wife may no longer wish her share of the community property to go to them. Or perhaps the husband changes the beneficiary designations to name new beneficiaries the wife does not approve. Shouldn't the wife in these situations have the right to revoke her consent to the beneficiary designations, just as the husband has the right to change the beneficiary designations, before the gift is completed?

These principles would not apply, however, to donative transfers that by their terms, or by the terms of the law under which they are made, are irrevocable. If the donor spouse is unable to revoke the gifts, parity requires that the nondonor spouse be unable to revoke the consent to the gifts. This would also prevent collusion between the spouses to revoke a gift the donor alone could not revoke. Thus the nondonor spouse's consent to a gift under the Uniform Transfers to Minors Act would be irrevocable to the same extent that the gift itself is irrevocable. See Probate Code § 3911(b) (transfer irrevocable). Likewise, the nondonor spouse's consent to a trust expressly made irrevocable by the trust instrument would be irrevocable to the same extent the trust itself is irrevocable. See Probate Code § 15400 (presumption of revocability).

Is the Right to Revoke Consent Personal to Nondonor Spouse?

Assuming the nondonor spouse has the right to revoke consent given to a donative transfer of community property up until the time the transfer becomes final, the MacDonald case presents one more twist. Where the nondonor spouse dies before the transfer becomes final, may the decedent's personal representative revoke the previously given consent or does the revocation right die with the nondonor spouse? A related question is whether before death the nondonor spouse's conservator may exercise the revocation right.

Obviously there is no law on these issues, but the MacDonald case assumes without discussion that the decedent's personal representative may exercise the revocation right. This assumption is presumably by analogy to the rule that the right of a nonconsenting spouse to avoid a community property gift is not personal to the nonconsenting spouse but may be exercised by the nonconsenting spouse's personal representative. See Harris v. Harris, 57 Cal. 2d 367, 370, 19 Cal. Rptr. 793, 369 P.2d 481 (1962) ("The present interest of a wife in community property and her right to dispose of one-half by will are property rights that are invaded by a husband's gift without her consent. Thus the right to set aside such gifts survives the death of the wife and may be exercised by her personal representative.").

It is not so clear, however, that just because a nonconsenting spouse's personal representative may avoid a community property gift, a consenting spouse's personal representative should be able to revoke consent to an incomplete gift. It is one thing to act to vindicate a property right of which the spouse was deprived without the spouse's consent; it is another to act to reverse a clear decision of a spouse to make a disposition of the spouse's rights in property. To allow the deceased spouse's personal representative or successors to revoke the spouse's consent to a donative transfer is in effect to allow beneficiaries disfavored by the spouse's decision during lifetime to alter the spouse's community property disposition in favor of themselves after the spouse's death.

An analogy to conservatorship law may be instructive. If a disposition of community property is made without the consent of a spouse who later becomes incompetent, the nondonor spouse's conservator may avoid the gift on behalf of the conservatorship estate. Probate Code §§ 2520, 3057. But in making a determination whether to authorize the conservator to make or consent to a gift out of the conservatorship estate, the court must take into account such matters as the past donative declarations, practices, and conduct of the conservatee, the relationship and intimacy of the prospective donees with the conservatee and the extent to which they would be natural objects of the conservatee's bounty, the wishes of the conservatee, any known estate plan (including any will, trust, or donative transfer made by

the conservatee), tax and estate planning considerations, and the likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so. Probate Code § 2583. These factors are equally apt for a determination whether to revoke consent to a donative transfer made by a spouse as they are for a determination whether to originate a donative transfer out of the spouse's conservatorship estate.

Rights of Creditors

Although not an issue in the MacDonald case, there is another relevant consideration in the matter of consent and revocation of consent to a donative transfer: rights of creditors of the donor spouse, the nondonor spouse, and third persons to whom the donative transfer is made.

There is obviously a myriad of unsettled creditor rights problems involved with nonprobate transfers and the interrelation of various common law and statutory doctrines. The Commission has long believed that this whole matter requires clarification and codification. However, for present purposes, the intriguing issues are: If a consenting spouse retains the power to revoke the consent, should the spouse's creditors be able to force the revocation in order to reach either the spouse's one-half interest or, for that matter, the entire community interest in the property (if the marriage has not terminated by dissolution or death)? If a deceased spouse's personal representative has the right to revoke the consent and recover the deceased spouse's share of a community property gift, may a creditor require the personal representative to do so if necessary to satisfy the decedent's debts?

By analogy to the statute governing rights of creditors of the settlor of a revocable trust to reach trust property, the answer to both these questions should be yes. See Probate Code §§ 18200, 18201:

> 18200. If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor.

> 18201. Upon the death of a settlor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the decedent settlor's estate and to the expenses of administration of the estate to the extent that the decedent settlor's estate is inadequate to satisfy those claims and expenses.

There appears to be no reported case, however, where a creditor has sought to exercise either a nonconsenting spouse's right to avoid a gift or to revoke a consenting spouse's consent to a gift.

A general principle of creditors' remedies is that any property that is assignable (i.e., that is not personal to the debtor) may be reached by a creditor. Since the nonconsenting spouse's right to avoid a community property gift is not personal to the spouse but is a property right that may be exercised by the spouse's personal representative, a creditor should in theory be able to force avoidance of the gift.

This reasoning is buttressed by the general principle that if a debtor has an interest in property in the possession or control of a third person, the creditor may bring an action to have the interest applied to the debt. Code Civ. Proc. § 708.210. The interest of a nondonor spouse in the form of an unexercised rescission right would be classified as a "thing in action" or "general intangible".

An added factor that makes donative transfers perhaps more vulnerable to creditor action than outright gifts is that donative transfers often are not completed gifts but are intended to take effect at death. Whereas the general rule is that a completed gift passes free of creditor claims unless the gift is fraudulent as to creditors (made while insolvent or to avoid creditors), a gift that is not completed is inherently suspect and remains revocable and subject to creditor claims. See, e.g., Civil Code § 3440 (transfer without immediate delivery and change of possession is presumed fraudulent).

How these various considerations would affect the right of a creditor of the nondonor spouse, whether consenting or unconsenting, in a community property gift made by the other spouse depends on the nature of the particular donative transfer. A single rule as to creditor rights cannot be generalized from the various applicable principles.

RECOMMENDATIONS

The legal principles governing donative transfers of community property are not clear. However, the area is rapidly expanding in importance and will indubitably be the subject of increased litigation. It would be worthwhile to codify some of the basic rules, perhaps in connection with the Commission's larger recodification of the law governing limitations on disposition of community property.

The law should state clearly that a donative transfer of community property is subject to the consent requirement. However, the consent requirement should be modified so that consent is not required for small gifts, and oral consent or joinder is sufficient if the donor spouse satisfies the burden of proof of consent or joinder.

The law may be that if the nondonor spouse gives written consent, the consent is revocable so long as the donative transfer remains revocable by the donor spouse (including the right to change beneficiaries). Any codification of the law should omit such a provision, however. To permit a consenting spouse to revoke the consent will tremendously complicate the law and create serious practical difficulties.

As to complication of the law, two issues have been addressed at length. The right of the nondonor spouse's legal representative to revoke a consent previously given by the spouse is a far from simple matter. And the ability of creditors to reach the revocation right of the nonconsenting spouse presents complexities better left alone.

There are practical, as well as legal, problems in permitting revocation of consent by the nondonor spouse. Must the revocation be in writing? When is it effective, and how will the time of execution be proved? Must it be delivered to be effective? To whom? If to the donor spouse or the named beneficiary, suppose they claim nonreceipt of the revocation? If to a third party fiduciary such as a bank, trustee, or custodian, suppose there is none, or suppose the donor spouse is the fiduciary? What is the effect of revocation on a third party fiduciary--may it still pay out to the named beneficiary or must it return the property to the donor or to the nonconsenting spouse or to both, or must it hold the property until it receives a court order directing disposition of the property?

Can the nondonor spouse revoke a previously given consent by will? If so, is it sufficient to dispose of the nonconsenting spouse's share of the community property, or must there be a specific devise of the property that is the subject of the previously-consented-to donative transfer? If the nonprobate transfer was consented to as part of a mutual estate plan of the spouses, does revocation of consent by one spouse amount to a breach of contract that allows changes by the other spouse? Suppose changes by the other spouse are not possible because irrevocable dispositions have already been made pursuant to the mutual estate plan or because the other spouse now lacks legal capacity or is simply unaware of the changes made by the nondonor spouse?

The nondonor spouse who consents to a donative transfer of community property needs protection from the donor spouse's revocation or change of beneficiaries or terms of the transfer. But giving the nondonor spouse a revocation right creates too many legal and practical problems. A preferable approach might be to provide that, so long as the donative transfer consented to remains unchanged, the nondonor's consent is irrevocable. A revocation or change in the terms of the donative transfer by the donor spouse without the consent of the nondonor spouse is effective only as to the donor's one-half interest, and permits the nondonor spouse to revoke the gift as to remaining half.

This approach, while simpler than the revocability of consent concept, has problems of its own, but they are somewhat more manageable. Suppose the donor spouse wishes to make a beneficiary change but the nondonor spouse now lacks legal capacity to consent? There is already a mechanism in place for this: The spouse's conservator, or the court, could authorize the change under Probate Code Sections 3000-3154. In many cases, in fact, the donor spouse will be the nondonor spouse's conservator. See, e.g., Harris, 57 Cal. 2d at 370-71.

Should termination of marriage by dissolution or death affect the donative transfer? Division of the community property that is the subject of the donative transfer between the donor spouse and the nondonor spouse at dissolution would in effect allow the nondonor spouse to revoke consent to the donative transfer. But if the donative transfer is not a completed gift and remains revocable, it is only fair

to allow this. Dissolution of marriage may involve substantial changes in the estate plans of both spouses, and each should have the right to retrieve and reallocate property not irrevocably committed.

Termination of marriage by death of the donor spouse has the effect of making a donative transfer that is revocable until death irrevocable. If the nondonor spouse consented to the donative transfer before death of the donor spouse, the gift should be absolute and any rights of the nondonor spouse in the community property should be terminated by the donor spouse's death.

What about termination of marriage by death of the nondonor spouse? This likewise should not affect the donative transfer, which should remain in place and ultimately take effect according to the estate plan of the spouses. It is only when the surviving donor spouse wishes to revoke or make a beneficiary change thereafter that problems arise.

Suppose the nondonor spouse is dead at the time the donor spouse wishes to make a beneficiary change? A procrustean approach would be that the change revokes the donative transfer as to the deceased spouse's one-half interest in the community. The property would pass as part of the deceased spouse's estate; if the estate were already closed at the time of the revocation, the property would be treated as after-acquired or -discovered property and administered as provided in Probate Code Section 11642. A more rational scheme would be to use the substituted judgment standard of the guardianship and conservatorship law (Probate Code § 2583) to determine whether the donative transfer should be revoked as to the decedent's one-half interest. This would require appointment or reappointment of a personal representative in every case, however, to exercise the substitution of judgment.

A statute along the lines described above would look something like this, with changes from the Memorandum 89-55 draft shown in strikeout and underscore:

§ 5125.110. Definitions

5125.110. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Disposition" includes, but is not limited to, a transfer, conveyance, sale, gift, encumbrance, lease, or exchange.

(b) "Gift" means a donative transfer of property and includes the designation of a beneficiary in a trust, deed, or other writing.

(c) "Management and control" includes disposition.

~~(e)~~ (d) "Property" means real and personal property and any interest therein.

~~(d)~~ (e) "Record title", as it relates to personal property, means:

(1) Documentary evidence of title, the delivery of which is necessary to transfer title to the property.

(2) In the case of an uncertificated security, registration of the security as reflected in the records of the issuer.

Comment. Subdivision (a) of Section 5125.110 makes clear that the term "disposition" is used in a broad sense and is not limited to a sale of the property.

Subdivision (b) has the effect of codifying the case law development that the statutory gift limitations of this chapter apply to "donative transfers" such as custodianships and beneficiary designations in trusts and accounts, as well as outright gifts. See, e.g., Estate of MacDonald, 213 Cal. App. 3d 456, Cal. Rptr. (1989) (beneficiary designation in IRA account); Tyre v. Aetna Life Insurance Co., 54 Cal. 2d 399, 353 P. 2d 725, 6 Cal. Rptr. 13 (1960) (beneficiary designation in life insurance policy); In re Marriage of Stallworth, 192 Cal. App. 3d 742, 237 Cal. Rptr. 829 (1987) (beneficiary designation in bank trust account); Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (beneficiary designation under United States Savings Bonds); Estate of Bray, 230 Cal. App. 2d 136, 40 Cal. Rptr. 750 (1964) (creation of joint tenancy bank account or savings bond); In re Marriage of Stephenson, 162 Cal. App. 3d 1057, 209 Cal. Rptr. 383 (1984) (transfer under Uniform Transfers to Minors Act); In re Marriage of Hopkins, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977) (gift to minor).

Subdivision ~~(b)~~ (c) is included for drafting convenience.

Subdivision ~~(e)~~ (d) reflects the fact that real and personal property are treated the same in this chapter, except in special cases. A reference to community property means any interest in the property, including the interests of either spouse in the property.

The reference in subdivision ~~(d)(1)~~ (e)(1) to documentary evidence of title, the delivery of which is necessary to transfer legal title to property, includes (1) a certificated security and (2) a certificate of title or registration issued by a governmental agency, such as for a motor vehicle, vessel, or aircraft.

§ 5125.240. Gifts

5125.240. (a) Except as provided in subdivision (b), a spouse may not make a gift of community personal property or make a disposition of the property without a valuable consideration, without the written consent of the other spouse.

(b) A spouse may make a gift of community personal property, or make a disposition of community personal

property without a valuable consideration, without the written consent of the other spouse, if ~~the~~ any of the following conditions is satisfied:

(1) The gift or disposition is usual or moderate, taking into account the circumstances of the marriage.

(2) The spouse that makes the gift shows by clear and convincing evidence that the gift was joined in by the other spouse or was made with the unwritten consent of the other spouse.

Comment. Subdivision (a) of Section 5125.240 continues the substance of former Section 5125(b).

Subdivision (b) is new. ~~It~~ Paragraph (1) is drawn from comparable provisions in other jurisdictions and is consistent with the traditional community property rule applicable in California prior to 1891. See, e.g., La. Civ. Code Ann. art. 2349 (West Supp. 1983) (usual or moderate gifts of value commensurate with economic status of spouses); Lord v. Hough, 43 Cal. 581 (1872) (manager spouse may without consent of the other make reasonable gifts of community property). In making a determination after the death of the donor spouse whether a gift is usual or moderate the court should take into account such factors as amounts received by the other spouse by will, succession, gift, or other disposition, including insurance proceeds, joint tenancy, and inter vivos and testamentary trusts, and any special or unique character of the community personal property given.

Subdivision (b)(2) excuses the requirement of written consent in cases where the donor spouse is able to satisfy a high burden of proof of joinder or unwritten consent. This reverses cases such as In re Marriage of Stephenson, 162 Cal. App. 3d 1057, 209 Cal. Rptr. 383 (1984), which adhere to the statutory requirement of written consent notwithstanding evidence showing the knowledge, consent, approval, and participation of both spouses. Joinder or unwritten consent may be shown by application of such doctrines as waiver, estoppel, or ratification.

§ 5125.280. Revocable gifts

5125.280. (a) This section applies to a gift of community property made by a spouse with the joinder or consent of the other spouse required by this chapter if the gift, by its terms or by the governing law, remains revocable or subject to designation of a different beneficiary or election of a different benefit or payment option by the spouse that made the gift.

(b) A spouse that has joined in or consented to a gift described in subdivision (a) made by the other spouse may not revoke the joinder or consent unless the joinder or consent is by its terms revocable.

(c) A spouse that has made a gift described in subdivision (a) may revoke the gift or designate a different beneficiary or elect a different benefit or payment option with the joinder or consent of the other spouse. If the

other spouse lacks legal capacity or is deceased, the joinder or consent may be made by the spouse's conservator, attorney in fact under a durable power of attorney, or personal representative, on order of the court having jurisdiction over the fiduciary. In determining whether to authorize joinder or consent, the court shall take into consideration all relevant circumstances, including but not limited to the matters referred to in Section 2583 of the Probate Code (considerations for exercise of substituted judgment).

(d) If a spouse that has made a gift described in subdivision (a) revokes the gift or designates a different beneficiary or elects a different benefit or payment option without the joinder or consent of the other spouse, the revocation, designation, or election (i) is effective as to the interest in the community property of the spouse that makes the revocation, designation, or election and (ii) terminates the gift as to the interest in the community property of the other spouse, and the interest reverts to the estate of the other spouse.

(e) Notwithstanding any other provision of this section, a gift described in subdivision (a) may be revoked and the community property divided between the spouses as part of a division of the community estate under Section 4800.

Comment. Section 5125.280 is new. Once a spouse joins in or consents to a gift, the joinder or consent is irrevocable, subject to specified exceptions. Subdivision (b). This overrules Estate of MacDonald, 213 Cal. App. 3d 456, Cal. Rptr. (1989).

The exceptions specified in this section are:

(1) The joinder or consent by its terms is revocable. Subdivision (b).

(2) The joinder or consent is revocable on division of the property at dissolution of marriage. Subdivision (e).

(3) The joinder or consent is revoked on a change in the terms of the gift made by the donor spouse. Subdivision (d).

The ability to join in or consent to a change in the gift is not personal to the spouse but may be exercised by the spouse's legal representative. Subdivision (c). This is consistent with the law governing the right of a personal representative to avoid a gift not consented to by the deceased spouse. See, e.g., Harris v. Harris, 57 Cal. 2d 367, 19 Cal. Rptr. 793, 369 P. 2d 481 (1962). However, the legal representative's right to join or consent to the gift is subject to court control, using the standards for substituted judgment prescribed in the guardianship and conservatorship law. See Prob. Code § 2583.

If the Commission approves this approach we will incorporate the draft in the tentative recommendation on disposition of community

property, to be circulated for comment. An edited version of this memorandum would be included as relevant discussion in the preliminary part of the tentative recommendation.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

[No. A040498. First Dist., Div. One. Aug. 24, 1989.]

Estate of MARGERY M. MacDONALD, Deceased.
JUDITH BOLTON, Petitioner and Appellant, v.
ROBERT F. MacDONALD, Respondent.

SUMMARY

An executrix filed a petition pursuant to Prob. Code, § 851.5, to determine title to personal property. She sought to establish the decedent's community property interest in funds held in the individual retirement accounts of the decedent's husband. The funds in the accounts had been received by the husband when his company pension plan was terminated. They were community property funds at that time. The husband placed the funds in his individual retirement accounts, and the decedent signed adoption agreements indicating her consent to his designation of beneficiary. The trial court found that the funds had been transmuted into the husband's separate property. (Superior Court of San Mateo County, No. 80393, Rosemary Pfeiffer, Temporary Judge.*)

The Court of Appeal reversed, holding that the trial court erred in determining that the funds had been transmuted into the husband's separate property. The adoption agreements signed by the wife were merely standard forms used by financial institutions and contained no reference to the character of funds deposited, and thus the requirement of Civ. Code, § 5110.730 (transmutation of community property), of an express written declaration was not satisfied. The court held that the trial court properly refused to apply the terminable interest rule in making its determination as to the character of the funds, since that rule has been abolished in all contexts. (Opinion by Newsom, J., with Racanelli, P. J., concurring. Separate dissenting opinion by Holmdahl, J.)

* Pursuant to California Constitution, article VI, section 21.

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) **Husband and Wife § 20—Agreements to Alter Character of Property—Transmutation by Deposit Into Individual Retirement Accounts.**—Civ. Code, § 5110.730 (transmutation of community property must be made in writing by an express declaration), was enacted to obviate ambiguity and uncertainty in the transmutation of marital property. Thus, in a proceeding pursuant to Prob. Code, § 851.5, to determine title to personal property, the trial court erred in determining that the decedent's community property interest in funds held in her husband's individual retirement accounts had been transmuted into the husband's separate property, notwithstanding that she had signed adoption agreements indicating her consent to her husband's designation of beneficiary. The agreements were merely standard forms used by financial institutions and contained no reference to the character of the funds deposited. Further, the trial court erred in viewing the decedent's execution of the agreements as a waiver of her interest, since this would allow circumvention of the requirements of § 5110.730 and the return to pre-1985 law allowing transmutations by oral agreement or conduct.

[See **Am.Jur.2d**, Community Property, § 72.]

(2) **Husband and Wife § 20—Agreements to Alter Character of Property—Presumptions.**—Before January 1, 1985, the form-of-title presumption as to the character of marital property could be rebutted by showing the character of the property had been changed by oral or written agreement or common understanding between the spouses. Agreement could also be inferred from the conduct or declarations of the parties. Whether the presumption was rebutted was a question of fact. Civ. Code, § 5110.730, applicable to transmutations made after January 1, 1985, overruled existing case law that permitted oral transmutation of marital property. Henceforth only an express written declaration would successfully rebut the form-of-title presumption. The determination of whether an agreement is an express written declaration within the meaning of § 5110.730 is one of law, requiring an independent review by the appellate court.

[See **Cal.Jur.3d**, Family Law, § 508.]

(3) **Husband and Wife § 20—Agreements to Alter Character of Property—Written Declaration.**—Civ. Code, § 5110.710 (agreements by spouses to transmute property), is subject to Civ. Code, § 5110.730

(transmutation of community property must be made in writing by an express declaration). A transmutation may occur by transfer if all other requirements are met, but one such requirement is an express written declaration.

(4) **Husband and Wife § 20—Agreements to Alter Character of Property—Terminable Interest Rule.**—The terminable interest rule has been abolished by legislation (Stats. 1986, ch. 686, § 2) and subsequent case law, and it is abolished in all contexts. Thus in a proceeding pursuant to Prob. Code, § 851.5, to determine title to personal property, the trial court properly refused to apply the rule in determining whether pension funds received by the decedent's husband and deposited into his individual retirement accounts had been transmuted into his separate property. Further, even prior to abolition of the rule, it did not apply to private pension plans that would provide benefits to any beneficiary designated by the employee, since the reason for the rule was to prohibit interference with the contractual mandates and policy considerations of public employment retirement plans. Here, the husband's private pension plan had been terminated and the benefits disbursed, the husband and the decedent had complete control over the funds, and no interference with contractual rights between an employer and its employee could have occurred.

COUNSEL

Jill Hersh, Dan Bolton, Hersh & Hersh and Philip D. Humphreys for Petitioner and Appellant.

Gordon E. McClintock, Brent A. Babow and McClintock & Quadros for Respondent.

OPINION

NEWSOM, J.—The instant appeal is from a trial court ruling that decedent's community property interest in funds held in an IRA account had been transmuted into the separate property of her spouse. The factual background may be summarized in relevant part as follows.

Decedent Margery M. MacDonald married respondent Robert MacDonald in 1973. At the time, he was president of R.F. MacDonald Company,

where he participated through the business in a defined benefit pension plan. Decedent worked as a bookkeeper for an accounting firm that provided services for R.F. MacDonald Company when she met respondent; from 1978 through 1980, she worked directly as a bookkeeper for the MacDonald company.

In August of 1984, decedent learned that she had terminal cancer, and she and respondent made plans to divide their property into separate estates. Wishing to leave her property to her own four children, decedent divided the couple's stock holdings, sold her half, and placed the proceeds in her separate account. The MacDonalds thereafter consulted with their personal accountant and attorney regarding the division of their real property holdings. The real properties were appraised and divided, and respondent paid decedent $33,000 to equalize the division.

Around the same time, in November 1984, respondent turned 65 and the company pension plan was terminated: it is undisputed that the plan's benefits were community property. On March 21, 1985, respondent received his pension disbursement of $266,577.90, and the proceeds were immediately deposited into IRA accounts at three separate financial institutions. So far as the evidence establishes, the pension funds were not divided or otherwise accounted for in the couple's previous division of their holdings, although both parties were aware of their existence.

The IRA accounts were opened solely in respondent's name, the designated beneficiary being a revocable living trust he had established in 1982. The three form documents prepared by the financial institutions, entitled "Adoption Agreement and Designation of Beneficiary" (hereafter adoption agreements), provided space for the signature of a spouse not designated as the sole primary beneficiary, to indicate his or her consent to the designation.[1] Decedent signed the consent portions of these documents.

Decedent died on June 17, 1985, leaving a will which bequeathed the residue of her estate to her four children.[2] The procedural history of the case is as follows.

Judith Bolton, as executrix, filed a petition to determine title to personal property (Prob. Code, § 851.5) in San Mateo County Superior Court.

[1] The documents provided: "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."

[2] The parties stipulated to most of the relevant facts. Respondent presented his own testimony and that of decedent's accountant, in order to establish decedent's state of mind when she signed the adoption agreements.

Bolton sought to establish decedent's community property interest in the funds held in the IRA accounts.

At trial, in June 1987, respondent contended the IRA funds were his separate property by virtue of decedent's informed consent to transmute them into his separate property, as evidenced by the signed adoption agreements. He argued also that the "terminable interest rule" precluded any testamentary control by decedent over the IRA funds.

The trial court made the following factual findings, which were incorporated in its judgment: "1. Decedent Margery MacDonald, both because of her occupation and as a result of advice received from professionals was both competent to and sophisticated in the administration of her estate assets;

"2. That Decedent was active in the business of Respondent Robert F. MacDonald and was aware of the financial decisions being made in that business, particularly in terms of the pension plan itself;

"3. Decedent was aware of the terms of the Living Trust which left the bulk of Respondent's estate to Respondent's children and left Decedent a life interest in the estate;

"4. Decedent made conscious and substantial choices regarding her assets and sought to put her estate in order to eliminate the possibility of any dissension between her children and her spouse;

"5. Decedent, in executing the Adoption Agreement for the three IRA's, intended to waive any community property right she had in those IRA's and in fact to transmute her share of that community property asset to the separate property of Respondent."

Based on these factual findings, the trial court concluded decedent waived any community property rights in the IRA funds when she executed the adoption agreements, "or, in the alternative," transmuted her community property share of those funds into the separate property of respondent. The court denied Bolton's petition.

Civil Code section 5110.730, 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." (Italics added.)[1]

[1]All statutory references are to the Civil Code.

(1a) Our task is to determine whether the "consent" given by decedent qualifies as such an "express declaration."

(2) As stated in *Estate of Blair* (1988) 199 Cal.App.3d 161 [244 Cal.Rptr. 627], "[b]efore January 1, 1985, the form of title presumption could be rebutted by showing the character of the property had been changed by oral or written 'agreement or common understanding between the spouses.' [Citation.] Agreement could also be inferred from the conduct or declarations of the parties. [Citation.] Whether the presumption was rebutted was a question of fact. [Citation.] [¶] Section 5110.730, applicable to transmutation of property made *after* January 1, 1985, overruled existing case law which permitted oral transmutation of marital property. [See 17 Cal. Law Revision Com. Rep. (Sept. 1983) pp. 213-215, 224-225.]" (*Id.* at p. 167.) "[O]nly an express written declaration . . . will successfully rebut the form of title presumption." (*Id.* at p. 168.)

The determination of whether the adoption agreements are express written declarations within the meaning of section 5110.730, is one of law, requiring an independent review by this court. (See *Cox Cable San Diego, Inc.* v. *City of San Diego* (1987) 188 Cal.App.3d 952, 958 [233 Cal.Rptr. 735].)

The California Law Revision Commission in its report on the subject states: "Section 5110.730 imposes formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred." (17 Cal. Law Revision Com. Rep. (Sept. 1983) pp. 224-225.)

Bolton cites the definition of "express" given in Black's Law Dictionary. "Express" means: "Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Directly and distinctly stated." (Black's Law Dict. (5th ed. 1979) p. 521.) Hogoboom & King, in their practice guide, suggest "the 'express declaration' called for by CC § 5110.730(a) must *clearly show* the party's *agreement* to change the affected property interests." (1 Hogoboom & King, Cal. Practice Guide: Family Law (1989) ¶ 9:212.1, p. 9-52, italics in original.)

(1b) Respondent argues that section 5110.730 does not impose any specific requirement concerning the type of writing necessary to satisfy the statute, and notes that under section 5110.710, married persons may transmute property by "agreement or transfer."[4]

[4]Section 5110.710 provides: "Subject to Sections 5110.720 to 5110.740, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following: (a) Transmute community property to separate property of either spouse. (b) Transmute

We note, however, from the California Law Revision Commission's report on the subject that it was precisely to obviate ambiguity and uncertainty in the transmutation of marital property that section 5110.730 was enacted: ". . . for the purpose of increasing certainty" are words used in 17 California Law Revision Commission Report (Sept. 1983) pages 224-225.

Here, however, the adoption agreements are merely standard forms used by financial institutions to open IRA accounts. They contain no reference to the character of the funds so deposited, nor any statement of intent to change the parties' interest therein. Nowhere in their perfunctory terms do we find any indication that the beneficiary designation is intended to be irrevocable. In sum, we are unable to conclude that the form provides the clear and positive declaration now required by statute.

(3) We also think it clear that section 5110.710 is subject to section 5110.730. As respondent acknowledges, a transmutation may occur by transfer "if all other requirements . . . are met." But one such requirement is an express written declaration (*Estate of Blair, supra,* 199 Cal.App.3d 161, 168), and while section 5110.730 provides no specifics relative to the contents of the form, by clear implication it requires something more than the skeletal writing before us.

(1c) We view respondent's alternative argument, that decedent *waived* her interest in the IRA funds, as merely another means of circumventing the requirements of section 5110.730 and returning to pre-1985 law (cf. *Estate of Levine* (1981) 125 Cal.App.3d 701, 705 [178 Cal.Rptr. 275]) allowing transmutations by oral agreement or conduct.[5] The trial court erred in finding a waiver.

(4) As yet another ground for terminating decedent's interest in the IRA funds, respondent urges us to apply the so-called "terminable interest rule." The argument was rejected by the trial court, which found that the funds were "not 'pension funds' in the classic community property definition," and were thus not subject to the terminable interest rule.

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separate property of either spouse to community property. (c) Transmute separate property of one spouse to separate property of the other spouse."

[5]The same reasoning applies to Mr. MacDonald's argument that the adoption agreements created an interest analogous to a general power of appointment. A writing is required to create a power of appointment (§ 1381.1, subd. (f)), though no particular form of words is necessary (*Estate of Rosecrans* (1971) 4 Cal.3d 34, 38 [92 Cal.Rptr. 680, 480 P.2d 296]). No intent to create a power appears in the adoption agreement, and again the requirements of section 5110.730 would be circumvented by finding such an intent in this case. It is also doubtful that Mr. MacDonald should be allowed to pursue this theory on appeal. He mentioned this theory in his trial brief, but it appears the theory was not pursued at trial, and the trial court made no mention of the theory in its ruling. (See *Richmond* v. *Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874, 879 [242 Cal.Rptr. 184].)

As petitioner asserts, the much criticized terminable interest rule has itself been terminated by legislation and subsequent case law. "It is the intent of the Legislature to abolish the terminable interest rule . . . ." (Stats. 1986, ch. 686, § 2, No. 4 Deering's Adv. Legis. Service, p. 471.) The section applies retroactively (*In re Marriage of Taylor* (1987) 189 Cal.App.3d 435, 443 [234 Cal.Rptr. 486]).

Respondent argues, however, that the rule has been abolished only with respect to pension benefits payable upon dissolution, not death. However, in the very recent case of *Estate of Austin* (1988) 206 Cal.App.3d 1249, 1253 [254 Cal.Rptr. 372]—a proceeding to fix inheritance tax—the court treated the terminable interest rule as if abolished in all contexts. Given the explicit language of the uncodified section cited above, this conclusion seems to us correct.

Prior to its abolition, the terminable interest rule was held not to apply to a private pension plan which would provide benefits to any beneficiary designated by the employee. (*Bowman* v. *Bowman* (1985) 171 Cal.App.3d 148, 155-156 [217 Cal.Rptr. 174].) "The reason for the rule was to prohibit interference with the contractual mandates and policy considerations of public employment retirement plans." (*Id.* at p. 155.)[6]

Here, the pension plan itself had been terminated and the benefits disbursed. Mr. MacDonald and decedent had complete control over the funds. They chose to place the funds in tax-deferred IRA accounts. The funds were still under the respondent's control. No interference with contractual rights between an employer—private or public—and its employee could have occurred.

The matter is reversed and the court directed to enter judgment for petitioner.

Racanelli, P. J., concurred.

OLMDAHL, J., Dissenting.—Civil Code section 5110.730, subdivision), provides no guidance as to the form or content of a satisfactory written xpress declaration." The statute was enacted in order to overrule "existg case law which permitted *oral* transmutation of marital property," as ted in *Estate of Blair* (1988) 199 Cal.App.3d 161, 167 [244 Cal.Rptr. 627] d "*for the purpose of increasing certainty* in the determination whether a nsmutation has in fact occurred," as reported by the California Law

[6] We are aware, however, that an opinion from this district did apply the rule to a private ion plan where the benefits were nonassignable, inalienable, and nontransferable. (*Estate n* (1980) 108 Cal.App.3d 614, 616, 620 [166 Cal.Rptr. 653].)

Review Commission (17 Cal. Law Revision Com. Rep. (Sept. 1983) pp. 224-225). (Italics added.)

In the present case, there was no claimed "oral transmutation." There *was,* however, an accomplished "transfer," and decedent had consented in writing to that disposition of the funds (i.e., the designation of the trust beneficiaries). Though the adoption agreements were contracts between respondent and the financial institutions, they were also binding on decedent.[1] There was no uncertainty of purpose or intent and, thus, no room for "increasing certainty" as to whether a transmutation had in fact occurred.

The statute does not require use of the term "transmutation" or prescribe other magic words. A transmutation is the result of actions, or at least effectuated intentions of the parties concerned. I perceive no action any more specific, clear, and final that decedent and respondent here could have taken to accomplish both the transfer and a consequent transmutation. The language and purpose of the statutory requirement were fully satisfied. I believe the trial court correctly found decedent transmuted her community property share of the IRA funds to the separate property of respondent, when she executed the adoption agreements.

[1] Although decedent thereby relinquished control of her interest in the pension funds, I note that respondent's designations did include her as a potential beneficiary of part of the trusts created.