SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re the Marriage of: JAMIE McCOURT, Petitioner, and FRANK McCOURT, Respondent	Case No.: BD514309 STATEMENT OF DECISION **RE: VALIDITY OF POST-MARITAL AGREEMENTS**

RULING ON SUBMITTED MATTER

STATEMENT OF DECISION

On December 9, 2009, the Court, the Hon. Scott M. Gordon, Judge of the Superior Court, presiding, ordered pursuant to the parties' Stipulation, that the issue of the validity and enforceability of the parties' three post-nuptial agreements be severed and tried separately from, and prior to, all other issues. The three post-nuptial agreements at issue are as follows: (1) the March 31, 2004 Marital Property Agreement ("MPA")[i], (2) the May 10, 2004 Charing Cross Marital Property Agreement ("First Supplemental MPA"), and (3) the October 28, 2004 Second Supplemental Marital Property Agreement ("Second Supplemental MPA").

Trial on the bifurcated issue of the validity and enforceability of three post-nuptial agreements commenced on August 30, 2010, and ended on September 29, 2010. Petitioner appeared in person and was represented by Dennis Wasser, Bruce Cooperman, David Boies, James Fox Miller, Michael Kump, and Suann MacIsaac, and Respondent appeared in person and was represented by Sorrell Trope, Stephen Susman, Marc Seltzer, Victoria Cook, Ryan Kirkpatrick and Matthew Berry.

Both oral and documentary evidence was received on the bifurcated issue; the matter was argued and submitted for decision, and the Court now makes the following Statement of Decision. In making the findings below, the Court has considered all the evidence, the testimony, the demeanor and credibility of the witnesses, the written and oral arguments of counsel, the materials and authorities submitted by the parties, and the pleadings, papers and other documents filed with the Court. Pursuant to Code of Civil Procedure §632 and California Rules of Court 3.1590 and 3.1591, this Statement of Decision is intended to explain the legal and factual basis for the decision as to each of the principal controverted issues at trial. Section 632 has been interpreted to call for findings as to ultimate—rather than evidentiary—facts.

It must be noted that this Statement of Decision is confined to the issues related to the validity and enforceability of the parties' three post-nuptial agreements in this matter. Any and all discussion, findings and holdings in this Statement of Decision are limited to the instant issues related to the validity and enforceability the post-nuptial agreements. The Court does not by way of this Statement of Decision explicitly or implicitly make any findings related to the remaining issues in this matter. The Court

explicitly does not make any findings with regard to the characterization of the parties' property or interest in any property within this Statement of Decision.

The Court HEREBY FINDS AND CONCLUDES as follows:

SUMMARY OF FINDINGS

The Court has considered the evidence and arguments submitted by the parties in this matter. The Court's detailed findings and discussion of the issues is found below. The Court provides the following summary of findings regarding the primary issues presented by the parties in the instant bifurcated proceeding:

The Court finds that the Marital Property Agreement [hereinafter "MPA"] executed by Petitioner, Jamie McCourt and Respondent, Frank McCourt is not an agreement as defined by Family Code §§721 and 1500, but a transmutation agreement subject to standards articulated in Family Code Section §§850 - 852.

The Court finds that the MPA was not a valid transmutation as defined by Family Code §850.

The Court finds that there is no evidence within the MPA, or within the testimony of the witnesses in this matter, of any waiver of the parties' rights of equitable distribution as described in Massachusetts law.

The Court finds that there was no mutual assent or meeting of the minds between Petitioner and Respondent when they executed the agreement on March 31,

2004. The Court further finds that there was no mutual assent or meeting of the minds regarding the content of the version of the MPA Petitioner and Respondent signed on March 31, 2004 in Massachusetts and the version Respondent signed on April 14, 2004 in California.

The Court finds that the conditional terms of the MPA do not make the agreement invalid.

The Court finds that the MPA was created at the behest of the Petitioner. The Court further finds that the MPA did not bestow an unfair advantage on the Respondent. The Court finds that the execution of the MPA was not a result undue influence exerted on Petitioner. Further, the Court finds that the Respondent introduced a sufficient quantum of evidence to rebut any applicable presumption of undue influence.

The Court finds that the material provisions of the MPA are to be interpreted as a single whole. The Court finds that "the consummation of [a] bargain" between Petitioner and Respondent was dependent upon inclusion of Paragraph 4 of the MPA and thus all material provisions of the MPA are inextricably intertwined. As a result, portions of the MPA cannot be severed from an otherwise unenforceable transmutation.

The Court does not find that the MPA is invalid based on a theory of constructive fraud.

The Court finds that the MPA did not constitute a valid waiver of the parties' respective interests as described in *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp v. Van Camp* (1921) 53 Cal. App. 17.

The Court finds that the Marital Property Agreement is not a valid and enforceable agreement. The Court orders that the Marital Property Agreement is set aside.

The Court rules that the First Supplemental Marital Property Agreement and the Second Supplemental Marital Property Agreement are set aside.

The Court does not find sufficient evidence to support Respondent's contention that Petitioner is barred from challenging the validity of the MPA on the basis of the doctrines of laches, ratification, and estoppel.

SUMARY OF FACTS

On October 27, 2009 Jamie McCourt [hereinafter "Petitioner] filed a petition for dissolution of the parties' marriage. On October 27, 2009, Frank McCourt [hereinafter "Respondent"] filed a motion to bifurcate the issues of validity and enforceability of three post marital agreement in this matter [hereinafter "MPA].[1] On December 3, 2009, the parties stipulated to bifurcate for separate trial the issues regarding the validity of the MPA.

Petitioner and Respondent married on November 3, 1979, and separated July 7, 2009. The parties have no minor children. A Stipulated Judgment regarding Marital Status has been entered.

[1] The three post marital agreements involved in this matter include: Document entitled "Marital Property Agreement," dated March 31, 2004; a document entitled "Charing Cross Marital Property Agreement," dated May 4, 2004 ("Charing Cross Agreement); a document entitled "Second Supplementary Marital Property Agreement" dated October 28, 2004 ("Second Supplementary Agreement).

Both parties are 1975 graduates of Georgetown University. Petitioner attended law school at the University of Maryland, where she obtained a J.D. degree in 1978. Petitioner later completed studies and received an M.S. degree from the Sloan School of Business at M.I.T. After they were married, the parties established residence in Massachusetts and remained there until 2004, when they moved to California. The evidence produced at trial indicates that both parties are very sophisticated and intelligent individuals.

After their marriage, Respondent worked on real estate related matters in the Boston, Massachusetts area. Petitioner practiced Family law for a period of time[2] prior to becoming general counsel for the McCourt Company. The evidence produced at trial shows that the Petitioner is a legally and financially sophisticated woman with a law degree and an advanced business degree from the Massachusetts Institute of Technology.

The parties amassed a substantial marital estate, including significant residential and commercial real estate holdings. During the time they resided in Massachusetts, the parties put title to their residences solely in Petitioner's name and title to their business interests solely in Respondent's name. The parties understood that under Massachusetts law this practice insulated the residences from claims by business creditors but preserved for each of them an equitable distribution interest in all of their marital assets regardless of who held title. The parties never entered into any pre-marital or post-marital agreements under Massachusetts law.

[2] Petitioner testified that she practiced Family Law for approximately five years. It was customarily her practice to prepare MSA agreements, however evidence shows that Petitioner also worked on post nuptial agreements.

In 2003, the parties pursued the opportunity to purchase the Los Angeles Dodgers franchise, which was then owned by News Corp. The Dodger franchise included the Los Angeles Dodgers, Dodger Stadium and the 276 acres of Chavez Ravine property which surround the stadium [hereinafter "Dodgers"].[3]

In October of 2003, an agreement was reached to purchase the Dodgers from News Corp. The agreement was approved by Major League Baseball (MLB) in January 2004, and the Dodger acquisition formally closed on or about February 13, 2004.

In anticipation of moving from Massachusetts to California in conjunction with the purchase of the Dodgers, Petitioner and Respondent signed three copies of the MPA on March 31, 2004. The three copies signed in Massachusetts are referred to as the "Massachusetts version of the MPA."[4] Three additional copies signed by Petitioner on March 31, 2004. Respondent signed these three copies of the MPA on April 14, 2004 in California. The three copies signed by Respondent in California are referred to as the "California Version" of the MPA.[5] The Massachusetts version and California version are virtually identical except for the text of a schedule attached to each of the MPA's described as "Exhibit A."[6]

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[3] It must be noted that the parties are at odds with regard to many issues related to the acquisition of the Dodgers and associated assets. Nothing in this Statement of Decision reflects a ruling with regard to the issue of characterization of these assets.

[4] See Court Exhibits 1-3.

[5] See Court Exhibit 7-9.

[6] The two different versions of Exhibit A of the MPA are worded as follows:

Exhibit A ("MASSUCHESTS VERSION")
Frank's Separate Property Assets

1. Bank Accounts- all accounts currently listed solely in Frank's name.

2. Stocks, Bonds, Mutual Funds – all securities and securities accounts currently listed solely in Frank's name inclusive of the following: Frank's stock interest in the McCourt –Broderick Limited Partnership ("MBLP") including all real estate and other assets owned directly or through

The exhibits attached to the Massachusetts versions of the MPA ***included*** as Respondent's separate property: his stock interest in the McCourt Company, Inc., as well as all real estate and other assets owned directly or through subsidiary entities by McCourt Broderick Limited Partnership which include (1) the Seaport Property; (2) Los Angeles Dodgers; and (3) land located in Chavez Ravine. The exhibits attached to the California version of the MPA ***excluded*** as Respondent's separate property his stock interest in the McCourt Company and his interest as a limited partner of the McCourt Broderick Limited Partnership. The California versions of the MPA further described the exclusion of property as: "including within this exclusion" (1) Seaport; (2) Los Angeles Dodgers; and (3) Chavez Ravine.

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subsidiary entities by MBLP including without limitation (1) approximately 25 acres of land in Seaport District of Boston, Massachusetts; (2) all assets of the Loa Angeles Dodgers baseball team owned by Los Angeles Dodgers LLC and (3) 276 acres of land located in Chavez Ravine, Los Angeles, California.

3. Personal Property- personal jewelry and clothing and boats and vehicles as to which Frank is the record owner.

4. Liabilities- all liabilities as to which Frank is the maker and as to which Jamie is not the maker.

Exhibit A ("CALIFORNIA VERSION")
Frank's Separate Property Assets

1. Bank Accounts- all accounts currently listed solely in Frank's name.

2. Stocks, Bonds, Mutual Funds – all securities and securities accounts currently listed solely in Frank's name exclusive of the following: Frank's stock interest in the McCourt –Broderick Limited Partnership ("MBLP") including within this exclusion all real estate and other assets owned directly or through subsidiary entities by MBLP including without limitation (1) approximately 25 acres of land in Seaport District of Boston, Massachusetts; (2) all assets of the Loa Angeles Dodgers baseball team owned by Los Angeles Dodgers LLC and (3) 276 acres of land located in Chavez Ravine, Los Angeles, California.

3. Personal Property- personal jewelry and clothing and boats and vehicles as to which Frank is the record owner.

4. Liabilities- all liabilities as to which Frank is the maker and as to which Jamie is not the maker.

The different versions and drafts of Exhibit A attached to the MPA are significant to note. Evidence produced at the trial indicates that the first draft of the MPA was prepared on March 22, 2004. This draft included Exhibit A as a blank form attached to the MPA.[7]

The second draft of the MPA, sometimes referred to as the "Internal Draft" during the trial, was prepared on either March 24th or 25th. The Exhibit A included in this draft did not use the terms "inclusive" or "exclusive," however, the Dodgers were listed as Respondent's separate property.[8]

On March 29, 2004, the third draft was prepared. The Exhibit A attached to this draft excluded the Dodgers from the description of Respondent's separate property.[9]

The fourth draft of the MPA was created on March 30, 2004. The Exhibit A attached to this version of the MPA used the term "exclusive" when describing the Dodgers in relation to Respondent's separate assets.[10]

Later on March 30, 2004, a fifth draft of the MPA was prepared. This was the only draft not prepared on the law firm's word processing system. In this version of the MPA, Exhibit A used the word "inclusive" to describe the Dodger assets as being Respondent's separate property.[11]

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[7] Petitioner's Exhibit 45.
[8] Respondent's Exhibit 1434.
[9] Petitioner's Exhibit 53.
[10] Petitioner's Exhibit 55.
[11] Petitioner's Exhibit 10.
It must be noted that this 5th draft of the MPA was the first draft to use the word "inclusive" to describe the Dodger assets in relation to the Respondent's assets. Neither party was furnished a copy of this 5th draft until the time of execution of the MPA at the parties' home on March 31, 2004. It is also important to note, that other than the executed copies of this version of the MPA, no other copies of this draft exist.

At the time the MPA's were drafted and executed, the Petitioner and Respondent were jointly represented by Lawrence Silverstein [hereinafter "Silverstein"][12] of Bingham McCutchen LLP [hereinafter Bingham"]. Silverstein was assisted in drafting the MPA's by Reynolds Cafferata [hereinafter "Cafferata"] who was a partner in the estate planning department of Bingham in Los Angeles. Cafferata was primarily involved in drafting the MPA.

Silverstein was present when the parties signed the Massachusetts version of the MPA on March 31, 2004; Silverstein was also present when Respondent signed the California version on April 14, 2004. Silverstein notarized all signed copies.

Petitioner testified that Silverstein was initially hired in 2001 to do estate work for the parties. Petitioner testified she believed that Silverstein and the Bingham firm were representing both of the parties in the acquisition of the Dodgers[13] as well as other estate planning and personal finance matters.

Petitioner testified that during the acquisition of the Dodgers, she spoke to Silverstein about buying a home in California. She told him that it was important to her to keep the homes safe from business creditors.[14] She further testified that it had been the parties' practice while living in Massachusetts to keep the business assets titled in the Respondent's name and personal assets tilted in the Petitioner's name in order to protect personal assets from the reach of creditors.

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[12] Within this Statement of Decision, the Court refers to witnesses by their last names. This is meant only for clarity.

[13] Petitioner's testified that she met with Silverstein on many occasions regarding the acquisition of the Dodgers.

[14] Petitioner testified that in 2001 the parties were sued by a contractor for work on the Cottage Street residence and that during the course of this litigation an issue arose involving the manner in which the parties titled their property. She testified that there were allegations of fraudulent transfer involving the titling of properties.

The Petitioner testified that Silverstein told her that in order to protect the homes in the same manner in which they were protected in Massachusetts, the parties would need to enter into an agreement. Petitioner testified that the MPA which was subsequently drafted was intended to protect the homes from business risks, but it was her understanding that entering into the agreement would not change her rights in any of the property in the event of dissolution of the marriage. Although Petitioner wanted to protect the homes from business creditors and risky transactions, she testified that the Dodgers were a less risky transaction than other ventures that Respondent had been involved in and that she was not adverse to becoming an owner of the team.

Petitioner testified that she was not told that by signing the MPA, she would be giving up her then existing rights, if any, in the Dodgers or her marital rights with regard to the "equitable division" of the assets in the event of dissolution of the marriage. Petitioner testified she understood that separately titled property in Massachusetts was subject to equitable distribution. She also testified that she believed that the MPA would not affect her rights of equitable distribution of the property. Petitioner further testified that despite the fact that their assets were separately titled, the parties lived their lives in a manner whereby all of the property whether separately titled or not, was "theirs."

Evidence produced at the trial shows that prior to the execution of the agreement; she met with or talked with Silverstein about the MPA on February 13, 2004, March 3, 2004, March 22, 2004, and March 29, 2004. Petitioner testified that she does not remember what was discussed at the meeting held on February 13, 2004. She further testified that she does not remember if she spoke with or met with Silverstein at all on March 3, 2004. Petitioner testified that although she had an agenda

for the conversation which took place on March 22, 2004, she does not remember what was discussed.

On March 31, 2004, Silverstein brought six original copies of the MPA to the parties' residence in Massachusetts. Petitioner testified that prior to March 31, 2004 she had not seen a complete copy of the MPA with the exhibits attached. Petitioner also testified that she did not completely and fully read a draft of the agreement, and that she does not remember seeing the cover letter to the MPA prepared by Silverstein before she signed the agreement.[15]

Both Petitioner and Respondent signed three copies of the MPA in Massachusetts on March 31, 2004. Petitioner signed three additional copies of the MPA at this meeting. Petitioner testified that she did not read the agreement at that time because she trusted Silverstein and Respondent. She testified that she often signed documents put in front of her without reading them because she trusted the people who were advising and assisting her.

Petitioner testified that Respondent did not coerce her into signing the documents. She signed the MPA freely based on what she was told by Silverstein.

In California on April 14, 2004, Respondent signed the three MPA's he had not previously signed in Massachusetts (which had already been signed by the Petitioner).[16] Evidence produced at the trial shows that there were in fact different copies of Exhibit A attached to the MPA at different times. Petitioner testified that she does not remember

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[15] Silverstein testified (discussed below) that he discussed the MPA with the parties along with the cover letter.

[16] Silverstein testified that he instructed the parties to sign two sets of original MPA's, one set in California and one set in Massachusetts to avoid what he described as a "nexus issue."

what was contained within the Exhibits to the MPA's when she signed the respective agreements.

Petitioner testified that she does not understand what a transmutation is, she does not understand what a Family Code §2640 waiver is, and does not understand the effect of Family Code §721 on a transaction similar to the issues at bar, or in terms of California Family Law, what fiduciary duty means.

Petitioner testified that she is not sure what constitutes adequate disclosure of assets under California law. Further, she does not understand the Family Code §852(b) recording requirement language and that she does not fully understand the California Family Law concept of quasi-community property.[17] She testified that although she has notes from her conversation with Reynolds Cafferata, she does not fully understand the California Family Law concepts described in her notes.

Petitioner notes that the Massachusetts version of Exhibit A titled "[Respondent's] Separate Property Assets and Liabilities" includes the Los Angeles Dodgers as the Respondent's separate property.[18] Unlike the Massachusetts version, the California version of Exhibit A titled "[Respondent's] Separate Property Assets and

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[17] Family Code §125 provides:

"Quasi-community property" means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:
(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.
(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

It should be noted that the concept of quasi-community property makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him. . .' *Addison v. Addison* (1965) 62 Cal.2d 558, 566.

[18] See Exhibit 10.

Liabilities" excludes the Los Angeles Dodgers from the list of Respondent's separate property assets. Petitioner argues that at some point the MPA signed in California by Respondent, which contained a version of Exhibit A that excludes the Dodgers from Respondent's separate property, was unstapled, removed and replaced with the version of Exhibit A that includes the Los Angeles Dodgers as Respondent's separate property, and stapled back together. The Petitioner testified that she did not know of the switch in the documents until discovery was undertaken in this litigation.[19]

It is Petitioner's position that the Court should not find that any of the signed original MPA's is a valid agreement between the parties because of the patent inconsistency regarding a material term contained in different versions of the signed original MPA's. Petitioner points to the inconsistencies between the two versions of Exhibit A attached to the MPA's: the Massachusetts version including the Dodgers as Respondent's separate property and the California version excluding the Dodgers from Respondents separate property.

The Petitioner argues that, in the event the Court chooses to adopt the "Massachusetts" version of the MPA as the agreement between the parties, there are four reasons why that agreement should be found to be invalid and unenforceable:

1. It was the product of undue influence.
2. It was the product of a unilateral mistake or a mistake on both parts.
3. Respondent participated in constructive fraud to invalidate the Massachusetts MPA thus breaching his fiduciary duty.

[19] In his deposition Silverstein does not recall switching the documents. Silverstein does state that based on logical and practical evidence, the documents must have been switched.

4. The agreement contains a conditional transmutation and such transmutations are prohibited.

The Respondent testified that he acquired the Dodgers in February of 2004. Respondent testified that he purchased the Dodgers for $421 million from an affiliate of Fox Entertainment Group,[20] and that he is the sole owner of the Los Angeles Dodgers and the affiliated assets.

Respondent testified that the source of the funds used in the acquisition of the Dodgers was $125 million derived from financing his separate property asset, a commercial property called Seaport.[21] Respondent argues that the risk associated with the purchase of the Dodgers was evidenced by the EBITDA[22] losses of approximately of $50 million a year suffered by the Dodgers for the three years preceding the acquisition.[23]

Respondent signed $119 million in personal guarantees and agreed to personally indemnify MLB for all losses MLB stemming form the Dodgers.[24] According to Respondent, Petitioner refused to accept any risk of loss associated with the acquisition of the Dodgers.[25]

Respondent testified that prior to the execution of the MPA, Petitioner and Respondent lived in Massachusetts and had a long standing practice of placing their residences in Petitioner's name and any businesses in Respondent's name.

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[20] Id. at 6.
[21] Respondent alleges that the property was purchased through Respondent's business before marriage.
[22] Earnings before interest, taxes, depreciation, and amortization.
[23] The losses were as follows: $29 million in 2000, $46 million in 2001, $47 million in 2002, and $55 million in 2003.
[24] The Respondent testified that this was required by the lenders involved in the acquisition of the Dodger assets.
[25] Id. at 2.

Respondent testified that it was important to Petitioner to protect the residences from creditors and she wished to preserve that protection after the move to California. Respondent asserts that the Petitioner was the driving force behind the execution of the MPA by the parties.

Respondent testified that Petitioner wanted the MPA to be drafted and executed by the parties. Respondent testified that he acquiesced to his wife's wishes relative to the MPA because she said that she wanted to protect herself from a financial risk associated with Respondent's ownership of the Dodgers.[26] Respondent testified that he never considered signing an MPA that would protect the residences from creditors while at the same time preserving Petitioner's right to an interest in the Dodgers upon the event of dissolution of the marriage.

Respondent testified that on March 3, 2004, a meeting which lasted several hours took place with the Petitioner and Silverstein in Respondent's office in Vero Beach, Florida. Respondent testified that topics other than the MPA were covered during the meeting and the MPA was discussed for approximately twenty minutes. Respondent testified that during this meeting, the MPA was described to him as a "transmutation agreement." Respondent does not remember whether Silverstein was on the phone or in person at the meeting.

Respondent testified that again on March 23, 2004, both parties were together in Respondent's office in Vero Beach and Silverstein was on the phone during the meeting. Respondent testified that during the conversation, he received a copy of the

[26] Id. at 2.

MPA that had been sent by Silverstein. However, Respondent does not recall whether Silverstein sent the copy of the MPA while they were meeting or prior to the meeting.

On March 30, 2004, drafts of the MPA and the attached Exhibits were distributed. Karen Letendre [hereinafter "Letendre"], Silverstein's secretary, sent a draft of the MPA to Jeff Ingram [hereinafter "Ingram"], an employee of Respondent, and copy to Silverstein. Exhibit A attached to this draft excluded the Dodgers from Respondent's separate property.[27] Respondent testified that he has no recollection of reviewing the document.

On March 30, 2004, a second draft of the MPA was sent to Tracy Magee [hereinafter "Magee"], a former employee of the McCourt Company and a copy was sent to Silverstein.[28] Exhibit A attached to this draft excluded the Dodgers from Respondent's separate property.[29] Respondent testified that he has no recollection of reviewing this document. On March 30, 2004, a third draft was sent to Magee with copies sent to Silverstein and Ingram. The email that was sent with this copy of the MPA stated "here is the revised version." Exhibit A attached to this draft excluded the Dodgers from Respondent's separate property.[30] Respondent testified that he has no recollection of reviewing this document.

Although Respondent testified that he had no recollection of reviewing the drafts of the MPA sent to him by Silverstein on March 30, 2004, Respondent testified that he had a meeting with Mr. Silverstein later that day where reviewed the MPA and the attached Exhibits.

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[27] See Petitioner's Trial Exhibit 53.
[28] At the time the email was sent, Magee had the title of "office manager."
[29] See Petitioner's Trial Exhibit 54.
[30] See Petitioner's Trial Exhibit 55.

Respondent testified that as originally drafted, the MPA was going to be signed in California. However, Silverstein subsequently informed Respondent that the MPA would be signed in Massachusetts. Respondent first became aware of the "nexus"[31] issue on March 31, 2004. Respondent testified that he was not told why there was a "nexus" issue involved in executed the MPA, but was told by Silverstein that they were going to sign multiple agreements in the two states in order to be "super cautious."

Respondent argues that from March 31, 2004, until 2008, the validity of the MPA and the manner of division of property had not been questioned by Petitioner. Respondent points to the following in support of this contention:

a. Petitioner ratified and reaffirmed the MPA twice in writing by signing supplemental marital property agreements, and accepted benefits therefrom.
b. Petitioner represented that she is the sole owner of all residential real estate excluding the property in Cabo San Lucas.
c. Petitioner did not object to certifications made by lenders and Major League Baseball that Respondent is the sole owner of the Dodgers.
d. Petitioner signed a "Statement of Ownership and Affiliation" in which she certified that Respondent is the sole owner of the Dodgers.
e. In December 2007, Petitioner received reassurances from her estate planning counsel that the MPA was valid.[32]

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[31] During the course of the trial there was a great deal of discussion regarding the "nexus issue." Although never fully explained by the testimony offered at trial, it appears that Silverstein advised the parties that any challenges regarding the validity of the MPA signed in Massachusetts could be cured by having one of the parties sign additional original versions of the MPA in California. No authority to support this contention or theory was ever produced by either party or any witness during the course of the trial.

[32] Id. at 3.

Respondent argues that Petitioner proposed that the parties sign a new MPA in mid-2008. Respondent alleges that the new MPA would have converted the parties separate property into community property. Respondent declined to modify the original 2004 MPA.

Respondent argues that both Petitioner and Respondent knowingly and voluntarily executed the MPA, which was reaffirmed twice thereafter as a result of the execution of the supplemental marital property agreements and that the MPA divides the property as the parties had intended. Respondent argues that (1) three copies of the MPA were signed by Petitioner and Respondent on March 31, 2004 in Massachusetts; (2) three additional copies were signed at the same time by Petitioner; and (3) three copies were signed by Respondent in California on April 14, 2004.[33] Respondent further argues that an earlier and incorrect draft of Exhibit A had been erroneously attached to the three additional copies of the original MPA which were signed by Petitioner on March 31, 2004 as well as the three copies of the MPA signed by Respondent in California.[34]

Leah M. Bishop [hereinafter "Bishop"], an estate planning attorney and a partner at Loeb &Loeb, LLP, testified to the following:

Bishop met with Petitioner and Respondent on December 12, 2007, when they discussed estate planning matters. Shortly after that meeting Bishop reviewed the MPA for compliance with California law. In an email she explained that she believed that the MPA was "sufficient to accomplish [the parties'] goals of ensuring that the residential properties are [Petitioner's] separate property and that the other assets are

[33] Id. at. 11.
[34] Id.

[Respondent's] separate property." The MPA was discussed in two contexts, potential liability to third parties and dissolution of marriage.[35]

Bishop testified the first time she realized that Petitioner was confused regarding the March 31, 2004 MPA and what it sought to accomplish was when she received an email from Petitioner in which Petitioner stated that, aside from her separate property, "all other property is joint property."[36] Bishop testified that until that time, she was working with Petitioner and Respondent under the assumption that the MPA was correct and valid.[37]

On June 30, 2008, Bishop met with Petitioner and Respondent. Bishop testified that she discussed the MPA and explained California law and "how it works."[38] Bishop testified that after she explained the effect and meaning of the MPA, Respondent said "fix it."

After the June 30, 2008 meeting, it was her understanding she would prepare a new MPA that would reflect what was described to her as the original intentions of the parties[39] [i.e. that the property identified as Respondent's separate was intended to be held "jointly"] as well as estate documents that would reflect the new agreement.

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[35] See Petitioner's Trial Exhibit 105, which is an email from Bishop to Petitioner and Silverstein in which Bishop confirms the compliance of the MPA with California law with two caveats of issues related to: martial context and creditors.

[36] See Petitioner's Trial Exhibit 120 which is the "Clarity" email.

[37] See Respondent's Exhibit 1984 (email from Ginger); See also Exhibit 452 which is a letter from Leah Bishop "Re: Revised Estate Planning Documents," in which she opined that the 2004 MPA was valid.

[38] See Petitioner's Exhibit 124 which is an outline of items discussed at the meeting.

[39] See Petitioner's trial Exhibit 412 which is a letter from Silverstein to Respondent in which Silverstein states: "Rather than go through all the matters involved…of putting all assets into community property status, what if we simply signed a short agreement reflecting that the transmutation agreements were intended to keep property separated between you and [Petitioner] the way property was separated before you moved to California [and] the agreement would then provide that nothing in the transmutation agreements were intended to change the rights that either of you had in Massachusetts to equitable distribution."

The first version of the modified "Community Property and Transmutation Agreement" was prepared by Bishop and sent to the parties on August 6, 2008.[40] Pursuant to this agreement all property would become the parties' community property with the exception of two Malibu homes, two Holmby homes, and certain investments listed in Paragraph 5 of the revised agreement which would remain Petitioner's separate property.

Bishop testified that the first version of the "Community Property and Transmutation Agreement" had to be redrafted because Respondent believed that if the parties were changing the character of some of their assets, the assets held as separate property by Petitioner also had to be changed to community property. A second "Community Property Transmutation Agreement" was drafted shortly thereafter making all property previously excluded in the first "Community Property Transmutation Agreement" as Petitioner's separate property, the community property of both parties.[41] Neither one of the "Community Property and Transmutation" agreements were signed by the parties.

On July 22, 2009, Bishop met with the Respondent. During this meeting Respondent notified Bishop that he was not going to sign the revised transmutation documents that she had prepared.[42] At that meeting, Bishop did not disclose to Respondent that she had given the names of five family law attorneys to Petitioner.

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[40] See Petitioner's Trial Exhibit 128.

[41] See Petitioner's Exhibit 136, "Under the new plan, all of your assets will be Community Property. The personal assets will be held in the Boys Are Us Trust; the business assets will be held in the McCourt Trust."

[42] See Petitioner's Trial Exhibit 176, handwritten notes prepared by Bishop during her meeting with Petitioner.

On August 4, 2009, Bishop ceased her joint representation of Petitioner and Respondent, and began representing only the Petitioner.

Silverstein, an estate planning attorney employed by Bingham, testified to the following:

There was an issue as to whether the parties were represented jointly by Silverstein and Cafferata regarding the drafting and execution of the MPA. Silverstein testified that he represented both parties in estate planning matters. However, Silverstein testified that only he represented Respondent in the acquisition of the Los Angeles Dodgers. Silverstein never told Petitioner that that the only person he was representing in the Dodger acquisition was Respondent.

Although Silverstein advised both parties that a potential conflict might arise in his joint representation of the parties, he did not tell them that there would be an actual conflict. Silverstein testified that he advised both parties that they should have separate counsel.

Silverstein testified he did not know whether the property subject to the MPA would become community or quasi-community property upon the parties move to California. Silverstein did not discuss the issue of financial disclosure with the parties within the process of drafting and executing the MPA. The only discussion of disclosure

of assets between the parties occurred when he read the cover letter and discussed the MPA with the parties at the time of the initial execution in Massachusetts.[43]

Silverstein testified that he did not speak to family law experts in either Massachusetts or California during the period time the MPA was drafted. Silverstein consulted with Cafferata; however, he understood that Cafferata was an estate planning attorney. Silverstein testified that he had a sufficient understanding of California law to adequately explain the agreement to the parties. Silverstein never expressly asked the parties whether they wished to alter their respective rights of equitable distribution under Massachusetts law through the execution of the MPA.

On February 20, 2004, Cafferata prepared a draft of the agreement and a cover letter which he emailed to Aaftab Esmail [hereinafter "Esmail"], another Bingham lawyer, who later sent the email to Silverstein.[44] Cafferata explained in the email that the discussion in the documents regarding the community property system and the parties' representation during the process is "fairly important" to help ensure that the agreement would be upheld against any challenges.

Silverstein testified that he met with Petitioner and Respondent on March 3, 2004, in Vero Beach and discussed variety of topics. Silverstein prepared an agenda for the meeting that day. The MPA was listed under the topic "Transmutations" in the agenda. [45]

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[43] Note that the "Internal Copy" of the MPA had financial disclosures in Exhibit A and Exhibit B however the final version did not have financial disclosures in Exhibit A.

[44] See Petitioner's Trial Exhibit 31. In this email Cafferata states: "the explanation of the community property system and the discussion in the letter regarding representation are fairly important to help insure that the agreement will be upheld – it's not just language for the firm's benefit."

[45] See Exhibit 1761; see also Exhibit 1501 which contains Petitioner's notes regarding the meeting: listed as item #9, is "transmutation agreement."

Silverstein's next conversation relevant to the MPA was with the Petitioner on March 22, 2004. Silverstein subsequently prepared a draft of the MPA (this was actually a draft that Cafferata sent with Silverstein's edits).[46] Silverstein testified that he spoke with the parties again on March 23, 2004. Silverstein testified that during this conversation he told the parties how separate and community property would be divided under California law.

Silverstein testified that he first started drafting Exhibits A and B of the MPA on either March 23, 2004 or March 24, 2004. Silverstein prepared a second draft of the MPA on March 25, 2004.[47] The Exhibit A attached to this draft of the MPA was different from what is now known as the Massachusetts version as well as the California version. It did not use 'exclusive" or "inclusive" language. Instead it listed Respondent's assets as his separate property.

On March 29, 2004, Silverstein discussed a draft of the MPA with Petitioner. The draft in place before and during the discussion had been a draft that did not use the words "inclusive" or "exclusive" in Exhibit A.[48] After his conversation with Petitioner, Silverstein marked the draft to include language that excluded the Dodgers from the property listed in Exhibit A, noting in the margin to add the language: "including within this exclusion."[49]

Silverstein testified that he edited the MPA to remove the values that had been listed for the assets in earlier drafts of the agreement. He testified that he made this edit

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[46] See Exhibit 40.
[47] See Exhibit 1434.
[48] See Exhibit 1434.
[49] See Petitioner's Trial Exhibit 465 which is a copy of the edited exhibit made after the meeting with Petitioner which noted inserting the words "including within this exclusion." See also Exhibit 1435 (marked up Exhibit A and B) and Exhibit 1436 (Edited Exhibit A).

because the agreement did not require a specific disclosure of assets and further that he relied on paragraph 2C of the MPA as being sufficient to meet any disclosure requirements.[50]

On March 30, 2004, Silverstein's secretary sent a third draft of the MPA to Ingram and forwarded a copy to Silverstein.[51] This third draft of the MPA was also sent to Magee and a copy was also sent to Silverstein.[52]

Silverstein testified that he sent that the email to the McCourt office because he was scheduled to have a meeting with the Respondent that day and wanted Respondent to review the MPA prior to the meeting.[53] Silverstein testified he met with Respondent around noon. However, he did not remember whether Respondent instructed him to make any changes to the MPA at this meeting.[54] On March 30, 2004, a fourth draft was created and once again it was sent to Magee and copies were sent to Ingram and Silverstein.[55] In all three emails described above, Exhibit A attached to the drafts of the MPA excluded the Dodgers from the Respondent's separate property.

Silverstein prepared a fifth draft of the MPA on March 30, 2004. This draft included changes to Exhibit A. This fifth draft was not prepared on Bingham's word

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[50] Paragraph 2C states: "The foregoing disclosures are for courtesy only and not an inducement for either to enter into this Agreement. FRANK and JAMIE acknowledge and agree that each is willing to enter into this agreement regardless of the nature or extent of the present or future assets, liabilities, income or expenses of the other. FRANK and JAMIE each waive any right which either of them may have to disclosure of the property or financial obligations of the other party beyond the disclosure provided in this Agreement."

[51] See Exhibit 53.

[52] See Exhibit 54; note: that in his deposition Silverstein testified that he assumed that Petitioner and Respondent would share the documents however, at trial he testified that he did not assume that Respondent would share the draft with Petitioner.

[53] Note that in his deposition, Silverstein testified that he was with Respondent when he asked the MPA to be sent to the McCourt office.

[54] Silverstein has changed his deposition testimony regarding the need to revise the exclusion language on Exhibit A.

[55] See Exhibit 55.

processing system. The testimony indicates that Silverstein prepared the changes to this draft, which would be the copies initially signed by the parties, on his personal computer and word processing system.

A change to Exhibit A was made in this, the fifth draft of the MPA. This edit represented the first time the word "inclusive" was used in Exhibit A to describe Dodgers as Respondent's separate property subject to the MPA. Other than the copies given to the parties to sign on March 31, 2004, at the time of the execution of the agreement, the evidence produced at trial in this matter shows that no one sent the unsigned version of the final draft of the MPA to either of the parties prior to the meeting held at this parties' Massachusetts home.

During the course of his trial testimony, Silverstein testified that he understood the Petitioner's goal, with regard to the MPA, was to protect the houses and certain other assets from creditors. Silverstein testified that it was Respondent's intent to have the businesses placed in his name and that he did not believe that Respondent had the intent to obtain any rights that he did not have in Massachusetts. Silverstein said that he did not "specifically" think that Respondent had any objective to gain any further property rights upon moving to California.

Silverstein testified that on March 31, 2004, he went to the parties' residence with six identical copies[56] of the MPA.[57] Silverstein testified that once at the parties' residence, he put copies of the MPA and a cover letter in front of both Petitioner and

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[56] Silverstein's trial testimony and his deposition testimony are inconsistent as to when he decided to make the additional three copies of the MPA so that there would be six copies total.

[57] Note that when Silverstein left his office on March 30, 2004 he left with three copies (he was going to keep one for himself, give a copy to Petitioner, and another copy to Respondent). It was his testimony during his deposition that he made photocopies of the three originals to make six copies.

Respondent. Silverstein testified he reviewed the cover letter and then the substantive paragraphs of the MPA with the parties.[58] Silverstein testified that he reviewed the final copy of Exhibit A (which contained the word "inclusive") as well as Exhibit B, with the parties before the execution of the agreement.[59]

While he testified that he understood California law sufficiently to explain agreement to the parties, Silverstein also testified that he is not familiar with California law regarding: *Epstein* reimbursement rights,[60] *Watts* reimbursement and credit issues,[61] *Moore/Marsden* issues[62], that he was not familiar with the issues discussed in *Beam v. Bank of America,*[63] did not know whether the Dodgers would become community or quasi-community property after the move to California and was not familiar with Family Code §721 regarding fiduciary duties owed between parties in a marriage.

On March 31, 2004, the Petitioner and Respondent signed three copies of the MPA. Silverstein notarized the three signed originals of the MPA. Silverstein then produced three additional copies of the MPA and told the parties that there was an issue of "nexus" with California and that they would have to sign three additional originals. He told the Petitioner to sign additional original copies of the MPA on March

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[58] See Petitioner's Exhibit 1 which is the cover letter used by Silverstein when he talked to the parties before they signed the MPA. Silverstein gave inconsistent testimony at trial and during his deposition regarding whether he went over every paragraph of the MPA on March 31, 2004 or just the substantive paragraphs as testified to during trial testimony.

[59] Testimony introduced at the trial indicated that March 31, 2004, was the day that the parties and their children were flying to California as part of their move.

[60] *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

[61] *In re Marriage of Watts* (1985) 171 Cal.App.3d 366.

[62] *In re Marriage of Moore* (1980) 28 Cal.3d 366 and *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.

[63] *Beam v. Bank of America* (1971) 6 Cal.3d 12 [discussing criterion or fixed standard used to make apportionment between separate and community property interests in a parties' separate property business owned and operated during the marriage. These issues are generally described as "*Pereira/ Van Camp*" issues.]

31, 2004, and advised Respondent to subsequently sign the additional original MPA's in California.

On March 31, 2004, Petitioner signed all six copies of the MPA and Respondent signed three. The three documents that were signed by only by the Petitioner in Massachusetts were later signed in California by Respondent on April 14, 2004.

As indicated above, evidence produced at trial shows that the six copies of the MPA as fully executed were not identical. The difference in the documents is contained in what during the trial was referred to as the Massachusetts version of Exhibit A and the California version of Exhibit A.

Silverstein testified that all but the last draft version of the MPA was saved as a word processing document in his law firm's computer system. When Silverstein's secretary sent the March 30, 2004, email to Magee,[64] the version of Exhibit A that used the "exclusive" language was in the firm's computer. This version, also known as the "California" version, was still saved on the firm's computer at the time the parties signed the "Massachusetts" version. Silverstein testified that after Respondent signed the MPA on April 14, 2004, the word processing version containing the "exclusive" language was changed to reflect the "Massachusetts" version of the language contained in Exhibit A. Although Silverstein does not remember doing so, he testified that he was the person who switched the "California" version of Exhibit A. He further testified that he deduced this from the law firm records management system and the copies of the "California" version that were in his file.

[64] See Silverstein's Exhibit 55.

On or about April 20, 2004, the California version of Exhibit A was removed and replaced with the Massachusetts version of Exhibit A. Silverstein testified that the exhibits were switched with the assistance of his secretary who was given a copy of the Massachusetts version of Exhibit A and whom he told to replace the California version.[65] He did not ask the parties whether he could switch out the pages because he felt that he had "implicit permission" to switch the inconsistent copies of the exhibits to bring all six signed copies of the MPA into accord.

Cafferata, an estate planning attorney and a former partner at the Bingham firm, testified to the following:

He was contacted by Silverstein in November of 2003 regarding clients who were planning to move to California and needed some information and assistance with regard to their finances and property. Cafferata spoke with Petitioner over the phone on January 15, 2004, regarding California community property issues.[66]

Cafferata testified that while he was not an expert in Massachusetts family law and had limited experience with equitable distribution issues, he considered himself an expert on transmutation agreements under California law.

On February 13, 2004, Cafferata met with the Petitioner at Dodger Stadium [67] where they discussed Petitioner's concerns regarding shielding the residential real property assets from business creditors. This meeting took place at a banquet table

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[65] Silverstein's secretary testified in her deposition that Silverstein never told her to replace any pages.
[66] See Exhibit 1458 which are Cafferata's notes indicating "[Respondent]-business/[Petitioner]-personal"
[67] Respondent was not involved in this discussion.

during a celebration held after the acquisition of the Dodgers. Cafferata testified he told the Petitioner that when the parties became residents of California, some part of their estate would be treated at quasi-community property in California because it was acquired during their marriage.

He explained issues related to transmutation agreements to the Petitioner and told her that it would be possible to transmute quasi-community property into separate property.[68] During this conversation, he did not ask Petitioner whether she wanted to retain a right to equitable distribution in the parties' property, he did not advise her that the MPA would change the status quo is Massachusetts and he testified that he did not advise her regarding her property rights under equitable distribution.

Cafferata testified that Petitioner wanted him to prepare the MPA agreement quickly and that when he drafted the initial version of the transmutation agreement he did not consult with any family law specialists within the Bingham firm nor did he consult with any independent California family law attorneys. He testified that he used a "premarital agreement" form as the template for the instant MPA. Cafferata testified that he had never prepared a financial disclosure [69] with regard to a transmutation agreement. In drafting the MPA, Cafferata believed that the parties did not have to characterize their property in the agreement. He testified that he drafted the agreement with this belief in mind.

Cafferata and Petitioner did not meet or speak after the February 13, 2004, meeting at Dodger stadium with the exception of one telephone call which occurred on

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[68] Id. p.151.

[69] Cafferata testified that he opted for partial disclosure because most couples preferred that to full disclosure in order to avoid the cost of appraisal of the assets.

February 16, 2004. During the thirty minute conversation with Petitioner, Cafferata confirmed that the parties did not have an agreement at that time, went over the default rules and explained that property which would have otherwise been community property would become quasi community property upon their relocation to California. Cafferata testified Petitioner's main concern during this call was protection of assets from creditors. He further testified he believed that upon the parties' relocation to California, the parties' property may become quasi-community property and that the MPA would prevent this from occurring.[70]

Aaftab Esmail was a partner at the Bingham firm from 2003 until 2006. Esmail was involved in the acquisition of the Dodgers.

Esmail testified he first became aware of the existence of the MPA in early 2004, after speaking with Silverstein who told him that the residential properties were to be held by Petitioner as her sole and separate property and that the businesses were to be held by Respondent as his sole and separate property.

Esmail testified that although he saw a version of the transmutation agreement sent to him by Silverstein, he does not remember which version of the MPA he reviewed. He further testified that he was never told that two different versions of the

[70] See Volume III p. 635 of Cafferata's deposition. Cafferata used the term 'legal instant" to describe transmutation and believed more or less that when the parties became residents of California their property would become quasi community property and in a legal instant transmuted into their separate property. See also Volume II p. 493, where Cafferata testified during the deposition that "the purpose of the agreement was, at the moment their property could become quasi community property, it was transmuted into the separate property into each of them."

executed MPA existed. Esmail always thought that there was only one version of the agreement until several weeks before his testimony.

In referring to the MPA as a transmutation agreement, Esmail testified that the first time he has ever heard the documents referred to as anything other than a "transmutation agreement" was in the instant proceeding.

Discussion

In most circumstances under California's community property law, the characterization of property determines its distribution upon dissolution of marriage. The characterization of property is anchored by the presumption that all property acquired by a spouse during marriage while domiciled in the state is community property. Family Code §760. Both spouses have equal interest in their community property (Family Code §751) and such community property is generally divided equally upon dissolution. Family Code §2550; see also §§2600–2604. In contrast, separate property,[71] is in most circumstances, awarded to the spouse who owns it and is not divided upon dissolution. Family Code §752.

The community may also acquire an interest in the separate property business of one spouse. Compare *Pereira v. Pereira* (1909) 156 Cal. 1, 7 (endorsing method of calculating community interest in separate property business by allowing a reasonable return on the separate property investment and allocating excess gains to the

[71] Family Code §770(a) defines separate property as "(1) All property owned by the person before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3) The rents, issues, and profits of the property described in this section." See also Family Code §771 (earnings and accumulations acquired during separation are that spouses separate property).

community) with *Van Camp v. Van Camp* (1921) 53 Cal. App. 17 (rejecting application of *Pereira* instead holding that the community received an interest only in the reasonable value of the husband's services while the remaining value of the company was the husband's separate property).

Subject to general rules governing the actions of persons standing in a confidential relationship, "spouses in an ongoing marriage may enter into any transaction or agreement with each other as they might if unmarried." See Family Code §721(a) & (b). As long as the subject of the parties' agreement is "lawful," spouses may make enforceable marital agreements for a variety of reasons. A common purpose of marital agreements is to modify or prevent the application of California community property law to all or some portion of the spouses' property or income or to change the character of their property from community property to separate property or vice versa; this is most commonly referred to as a "transmutation" agreement. See Family Code §1500; see also Family Code §850; and See *Balkema v. Deiches* (1949) 90 Cal.App.2d 427, 430; *Tompkins v. Bishop* (1949) 94 Cal.App.2d 546, 550.

The characterization of an asset may be subsequently affected by certain actions or agreements by or between the spouses. Both before and during marriage, spouses may agree to change the status of any or all of their property presently owned or thereafter acquired. Family Code §§850(a),(b) & (c); see also Family Code §1500 [spouse's property rights prescribed by statute may be altered by premarital agreement or marital property agreement.] The process of changing the characterization of property though an agreement is commonly referred to as "transmutation." Family Code §850 *et seq.*; *Marriage of Saslow* (1985) 40 Cal.3d 848, 863; see *Marriage of Campbell*

(1999) 74 Cal.App.4th 1058,—"transmutation is an interspousal transaction or agreement that works a change in the character of the property."

However, an agreement between spouses is invalid if a spouse breaches their fiduciary duty toward the other spouse as codified in Family Code §721.[72] Further, in order to effect a change in the character of the property, or transfer an interest in property between spouses, spouses must comply with the statutory requirements of Family Code §§850 through 853.

As indicated, all interspousal property transactions and transmutations are subject to the fiduciary duties and obligations as defined by Family Code §721(b). Thus, even if a transmutation is evidenced by the requisite writing, its validity depends on the parties' compliance with the standards of disclosure with respect to marital property that arises out of their confidential and fiduciary relationship. See Family Code §§721(b), 1100; see *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293; *Marriage of Barneson* (1999) 69 Cal.App.4th at 588.

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[72] Family Code §721 provides:

(a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.
(b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. 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, as provided in Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:
(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 one spouse without the consent of the other spouse which concerns the community property.

Family Code §850 specifies the types of changes in property characterization that can be validly accomplished through transmutation. This statute permits spouses to "(a) [t]ransmute community property to separate property of either spouse; (b) [t]ransmute separate property of either spouse to community property; or (c)[t]ransmute separate property of one spouse to separate property of the other spouse." However, Family Code §§851 - 853 limit the scope of this contractual ability.[73] Family Code §852 provides guidance in determining the validity of a purported transmutation.

Except for gifts of personal property items of limited value, a transmutation of real or personal property made on or after January 1, 1985, is valid only if 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." See Family Code §852m (a) & (c); *Estate of MacDonald* (1990) 51 Cal.3d 262, 272 [adversely-affected spouse's "express declaration" must contain language that expressly states characterization or ownership of the property is being changed]; see also *Marriage of Benson* (2005) 36 Cal.4th 1096, 1104–1110; *Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1172–1173.

In *Estate of MacDonald* (1990) 51 Cal.3d 262 the Supreme Court set forth the test to determine whether a writing meets the express declaration requirement of Family §852.[74] In *MacDonald,* the wife signed a consent form naming the husband's living trust as beneficiary to husband's IRA in which wife had a community property interest. *Id.* at

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[73] Family Code §851 expressly declares that the law regarding fraudulent transfers applies to transmutation agreements. Family Code §853 sets forth some specific rules regarding purported transmutations in wills, survivor annuity or benefits, and non-probate transfers.

[74] *MacDonald* was decided before the separate codification of the Family Code and at the time of its enactment, former Civil Code § 5110.730 was codified as Family Code §852. However, the language of the statutes remains the same.

265–66. The trial court found that in signing the consent form, she intended to waive any community property interest in the IRA and to transmute her community property share of those funds into the husband's separate property. *Id.* at 266. The trial court, relying on the wife's signature to satisfy the writing requirement of Family Code §852, found the transmutation valid. *Id.*

The Supreme Court held that even if the wife had intended to transmute her community property to her husband's separate property, the consent form did not meet the "express declaration" requirement of Family Code §852(a). The purported transmutation was therefore invalid. *Id.* at 267.

In determining what meaning should be given to the "express declaration" requirement of the transmutation statutes, the Court first considered the historical circumstances and legislative history of the statues. *Id.* Family Code §852(a) was enacted to impose "formalities on interspousal transmutations for the purpose of increasing certainty in the determination of whether a transmutation has in fact occurred." *Id.* (citing Recommendation Relating to Marital Property Presumptions and Transmutations, 17 Cal. Law Revision Com. Rep. (1984) pp.224–225). The revisions were deemed necessary to overrule prior case law that had liberally allowed transmutations, sometimes based only on oral statements. This prior approach had generated extensive litigation in dissolution proceedings. *Id.* at 268–269. This more relaxed standard encouraged parties to "transform a passing comment into an 'agreement' or even to commit perjury by manufacturing an oral or implied transmutation." *Id.* at 269 (citation and quotation omitted). In this context, Family Code §852 "was intended to remedy problems which arose when courts found valid

transmutations on the basis of evidence the Legislature considered unreliable. To remedy these problems the Legislature decided that proof of transmutation should henceforth be in writing." *Id.*

In giving effect to the "express declaration" requirement, the Court held that the signed writing must "contain words indicating an intent to transfer such interest [being transmuted], and in the absence of words which could be interpreted to show such intent, no parol evidence will be admitted." *Id.* at 271 (*quoting: California Trust Co. v. Bennett* (1949) 33 Cal.2d 694).[75]

A signed writing does not create a valid transmutation "*unless* it contains language which expressly states that the characterization or ownership of the property is being changed." *Id.* at 272. As the Court later noted in *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1104, *McDonald* emphasized that the test is "framed in the negative, as though all intendments weigh against finding compliance in the usual case." Perhaps even more importantly, the *MacDonald* Court stated that its test "enables courts to validate transmutations without resort to extrinsic evidence" thus discouraging "perjury and proliferation of litigation." *MacDonald*, 51 Cal.3d at 272.

In cases following *MacDonald*, courts have steadfastly held to the prohibition on extrinsic evidence being used to prove the existence of a transmutation. See, e.g., *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1100 ("MacDonald made clear that . . . section 852(a) precludes the use of 'extrinsic evidence' to prove that the writing effected

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[75] In *Bennett,* the Court construed the requirements of a statute regarding the creation of a joint tenancy between spouses. The statute in question required an express declaration that indicating that a transfer was creating a joint tenancy. See Civil Code §683(a). The court held that a rental agreement card signed by both husband and wife that only related to rights of possession and access could not be supplemented by evidence of surrounding circumstances to show that a joint tenancy was created. *Bennett*, 33 Cal.2d at 699.

a transmutation. *MacDonald* explained that the Legislature, in enacting these requirements and abrogating prior case law, sought to increase certainty and honesty in marital property disputes, and to decrease the burden on the courts in resolving such matters.") (citation omitted); *In re Marriage of Barneson* (1999) 69 Cal. App.4th 583, 588 ("The determination whether the language of a writing purporting to transmute property meets the *MacDonald* test must be made by reference to the writing itself, without resort to parol evidence").

Courts have rejected writings that contain language that does not clearly state the change in character being made, but from which the intent to transmute property could be inferred from the writing and the surrounding circumstances. In *Barneson* the court found that a valid transmutation did not occur when the husband transferred stock into an account in his wife's name. The husband gave written instructions to combine and transfer stock certificates into the name of his wife. *Id.* at 585. The husband also executed an "Irrevocable Stock or Bond Power" which purported to "sell, assign, and transfer" the stock to wife. *Id.* The husband later transferred additional stock into an account in his wife's name eventually signing a request to transfer all remaining stock into his wife's account. *Id.* at 586. Upon filing for dissolution of marriage the husband sought return of the stock transferred to his wife. *Id.* at 587.

In overturning the trial court's finding that these transfers met the requirements of Family Code §852(a), the court clarified *MacDonald* stating that its "interpretation of the 'express declaration' language in section 852, subdivision (a), can be viewed as effectively creating a 'presumption' that transactions between spouses are not 'transmutations,' rebuttable by evidence the transaction was documented with a writing

containing the requisite language." *Id.* at 593 (citing *MacDonald*, 51 Cal.3d at 273). The court found because the husband only directed the "transfer" of stocks to his wife, "without specifying what interest was to be transferred," the writing did not expressly state a change in characterization or ownership under the *MacDonald* test. *Id.* at 590.

In re Marriage of Starkman (2005) 129 Cal. App.4th 659 provides further support for holding parties to a high standard of clarity in fulfilling the "express declaration" requirement. In *Starkman*, the husband and wife established a revocable trust as part of their estate planning. *Id.* at 661. A provision of the trust stated that "Settlors agree that any property transferred by either of them to the trust . . . is the community property of both of them unless such property is identified as the separate property of either Settlor." *Id.* In addition to the trust, the couple also executed a "General Assignment" which conveyed "any asset, whether real, personal, or mixed . . . [they] now own or which [they] may own in the future" to the trust. *Id.* Although the husband conveyed various separate property assets to the trust, he did not identify the any of the assets as separate property. *Id.*

The court held that this language was not sufficient to establish that the husband had effected a change in ownership in the trust assets. *Id.* at 665. Although the agreement stated that any property transferred to the trust was community property, it did not expressly state that characterization or ownership was being changed. The court, however, noted that the trust could have stated that the husband was "transmuting the entirety of his separate estate to community property" and this would have been sufficient to satisfy the *MacDonald* test. *Id.* at 665.

Estate of Bibb (2001) 87 Cal. App.4th 461, however, seems to provide some authority for a more relaxed view of the express declaration requirement. In *Bibb* the court considered whether either the re-registration of a Rolls Royce or the signing of a grant deed for real property effected a valid transmutation. *Id.* at 463–464. In holding that the grant deed effected a valid transmutation the court emphasized that "[s]ince the *MacDonald* court held that the consent paragraphs would have been adequate for a valid transmutation had they said, 'I *give* to the account holder any interest I have,' and since 'grant' is the historically operative word for transferring interests in real property, there is no doubt that Everett's use of the word 'grant' to convey the real property into joint tenancy satisfied the express declaration requirement of *section 853, subdivision (a).*" *Id.* at 468–469.

Although, at first blush, this seems to conflict with the seemingly high bar set by *Barneson* and *Starkman*, this holding can be interpreted as an exception based merely upon the historical significance of deeds in the conveyance of real property. Thus, although the *Bibb* court found a valid transmutation in the grant deed, the change in registration for the couples' Rolls Royce failed, in part, because it did not contain a "clear and unambiguous expression of intent to transfer an interest in the property." *Id.* at 420–421. This rationale has not been questioned and courts have consistently found that a quitclaim or grant deed can satisfy the express declaration requirements of Family Code §852(a).

In *Barneson*, 69 Cal. App.4th at 593, after finding that the husband's transfer of stock to the wife did not effect a valid transmutation, the court rejected the wife's attempt to circumvent the "express declaration" requirement by application of the

presumption of ownership in title found in Evidence Code §662. The wife argued that the title presumption should control and the burden should thus be placed on the husband to rebut the title presumption. *Id.* In rejecting wife's argument the court stated that the holding in "*MacDonald* was based in part on a policy of 'assuring that a spouse's community property entitlements are not improperly undermined." *Id.* (citing *MacDonald*, 51 Cal. 3d at 273). Because application of the title presumption of Evidence Code §662 could undermine the purpose of Family Code §852, the court held that "[w]here the transaction purportedly resulting in a transmutation of property falls short of the *MacDonald* test, the section 662 presumption should not be applied." *Id.*

The Supreme Court followed a similar line of logic in *Benson* (2005) 36 Cal.4th 1096, rejecting attempts to circumvent Family Code §852 and *MacDonald* through the use of exceptions to the statute of frauds. In *Benson,* the husband claimed that he conveyed his community property interest in the family residence after his wife had "orally promised to waive, in writing, her community property interest in Husband's retirement accounts. No such writing was ever made." *Id.* at 1100. The lower courts had allowed the husband to prevail on a theory of part performance. *Id.* at 1100.

In rejecting the husband's theory of part performance, the Supreme Court held that Family Code §852(a) "does not operate like the general statute of frauds in which the requirement of a basic writing is subject to an implied exception for 'part performance' of the contract's terms." *Id.* at 1100. Because the statute does not contain an exception to the "express declaration" requirement, "the Legislature envisioned a standard from which married couples could not freely depart." *Id.* at 1104. In particular, "the writing must reflect a transmutation on its face, and must eliminate the

need to consider other evidence in divining this intent. *MacDonald* observed that this construction of the statute achieves the stated aims of reducing litigation and discouraging perjury." *Id.* at 1106–1107(citing *MacDonald* at 272). The Court noted that decisions subsequent to *MacDonald* have correctly adhered to the prohibition on extrinsic evidence because "[a] contrary view would threaten to resurrect the 'easy transmutation' rule that the Legislature repudiated when it enacted *section 852*." *Id.* at 1107.

In rejecting the husband's attempt to apply a theory of part performance, the Court emphasized the purpose for which Family Code §852(a) was enacted:

> [S]ection 852(a) makes a valid transmutation much more difficult to accomplish than prior law allowed. The transaction requires a written document expressly acknowledging that it changes the character of marital property, and that the adversely affected spouse understands and accepts this result. As made clear in *MacDonald*, "extrinsic evidence," such as inferences drawn from oral statements and conduct, is not a reliable substitute for the express writing that the statute demands. *Id.* at 1111.

When construing Family Code §852(a) courts have consistently emphasized that the statute requires a writing evincing a clear intent to change the character of the property that can be shown without resort to extrinsic evidence in order to fulfill its purpose of eliminating "easy transmutations."

Even when a transmutation meets the requirements of Family Code §852, it may still be held invalid if it was procured by undue influence in violation of Family Code §721. This statute does provide that married persons may enter into transactions regarding property as they would if they were unmarried. However, this ability to contract is qualified by Family Code §721(b) which codifies the common law principle that a husband and wife owe each other certain fiduciary duties due to the nature of the

marital relationship. See, e.g., *Estate of Cover* (1922) 188 Cal.133, 143 ("Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed in one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation. [citation] Confidential relations are presumed to exist between husband and wife . . . ."). Section 721(b) states that married couples are subject to the general rules governing fiduciary relationships which "impose[] a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."

In determining the validity of transactions between a husband and wife, a presumption of undue influence may apply that must be rebutted for the transaction to be deemed valid. *Estate of Cover* (1922) 188 Cal.133 is the seminal case regarding the application of the presumption of undue influence.

In *Cover*, a widow had signed a marriage settlement agreement relinquishing all claims to her husband's estate. *Id.* at 136–137. The wife argued that the agreement was procured through actual undue influence relying in part upon a theory of presumptive undue influence. *Id.* at 137.

In applying a presumption of undue influence to the transaction, the Court first noted that "in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and failing in this, he must bear

the burden of showing that the transaction was fair and just and fully understood by the party from whom advantage was obtained." *Id.* at 143.

> Of course, the mere existence of the marriage relation alone will not, in and of itself, suffice to initiate and support the presumption of undue influence where the transaction between husband and wife is *prima facie*, or from all of the circumstances thereof, shown to be fair and free from any material advantage to the husband from and over the wife. But in those transactions between husband from [sic] and wife, where admittedly the husband secures an advantage over the wife, the confidential relation existing between them may be invoked to bring into operation the presumption of the use and abuse of the relation. *Id.* at 144.

The Court found the presumption of undue influence was properly applied because "the widow executed [the agreement] in ignorance of her rights and without independent advice as to its meaning and effect; [] she thereby released her expectancy to a substantial portion of a two hundred thousand dollar estate in return for a consideration obviously inadequate; and [] the agreement was drafted at the direction of the [husband] . . . without any disclosure by him to her of the then value and character of his estate or of the rights which she was called upon to surrender by the agreement." *Id.* at 145.[76]

In re Marriage of Burkle (2006) 139 Cal.App.4th 712 clarifies this test, stating that the advantage gained by a spouse must be "unfair" in order to trigger the presumption of undue influence. In *Burkle*, the husband and wife, after separating and in attempt to reconcile, entered into a post-marital agreement resolving "all present and future financial issues between them." *Id.* at 718. Although the agreement was substantial and extremely comprehensive, see *Id.* at 719 (detailing key provisions of the PMA), in

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[76] Subsequent cases make clear that the application of the presumption of undue influence does not require the extensive findings described *Cover* which would arguably be sufficient to demonstrate actual undue influence. See, e.g., *In re Marriage of Balcof* (2006) 141 Cal. App. 4th 1509, 1519 (applying the presumption were the wife obtained a 20 percent interest in her husband's separate property corporation as well as his share of the marital residence without consideration); *In re Marriage of Haines* (1995) 33 Cal. App.4th 277, 296 (holding that clear inadequacy of consideration was enough to trigger the presumption of undue influence).

essence it provided the wife with substantial financial security and allowed the husband to pursue high-risk business venture without risking that security. *Id.* at 734.

In dismissing the wife's argument that a presumption of undue influence arose because the husband obtained an advantage in the agreement, the Court examined the prior case law and held that "both Family Code section 721 and case precedents support the conclusion that in a contractual exchange between spouses, a presumption of undue influence arises only if one of the spouses has obtained an *unfair* advantage over the other." *Id.* at 732. The Court found that both the husband and wife obtained mutual advantages, the husband obtained freedom to pursue his high-risk business ventures and the wife obtained financial security. *Id.* at 734.

Once a court has found that the presumption of undue influence applies to a transaction, "the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action 'was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of' the transaction." *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 739 (quoting *Delaney*, 111 Cal. App.4th at 1000. See also *In re Marriage of Mathews* (2005) 133 Cal.App.4th 624, 631; *Haines*, 33 Cal.App.4th at 296. A party "may overcome the presumption of undue influence by a preponderance of the evidence." *Mathews*, 133 Cal.App.4th at 631.

Cases have also dealt with the interplay of the Family Code §721 with other statutorily defined presumptions. In the case of *In re Marriage of Haines* (1995) 33 Cal. App.4th 277, 287 it was held that "where there is a conflict between the common law 721 presumption with other statutory presumptions such as that in favor of title as

codified in section 662 and the presumption that a husband and wife must deal fairly with each other, application of section 662 is improper."

In *Haines* the wife signed a quitclaim deed relinquishing her interest in the family residence to her husband who later conveyed the residence back to the couple as joint tenants. *Id.* at 282–283. In the dissolution of the marriage, the trial court awarded the husband reimbursement for his separate property contribution to the residence. *Id.* at 283. The trial court applied Evidence Code §662, holding wife to the burden of clear and convincing evidence in her attempt to show that the original quitclaim deed was procured through undue influence. *Id.* at 282. The trial court found that although the wife had shown undue influence by a preponderance of the evidence, she had failed to rebut the title presumption under Evidence Code §662 by clear and convincing evidence. *Id.* at 286.

After detailing the history and policy behind California's community property system, the *Haines* Court rejected this application of Evidence Code §662. The Court noted "where two presumptions are in conflict, the more specific presumption will control over the more general one." *Id.* at 301. (citing *Rader v. Thrasher* (1962) 57 Cal.2d 244, 252). Further, "application of *section 662* in such situations can significantly weaken protection the Legislature intended to provide for spouses who are taken advantage of in interspousal transaction. This cannot be in keeping with the intent of the Legislature . . ." *Id.* at 301.

In the instant matter, Petitioner argues that the MPA is a transmutation agreement. However, she argues that because it does not comply with the requirements of Family Code §850 and 852, the transmutation agreement is not valid or enforceable.

Respondent argues that the agreement executed by the parties is a marital property agreement governed by Family Code §§721(a) and 1500. Respondent further argues that "the principal effect of the MPA was not to change the character of their respective property from one form of property characterization under California law to another form of property characterization under California law (i.e., separate to separate, or community to separate, or separate to community), but rather to (a) define the [parties'] property rights under California law and to confirm that property titled in their respective names was and would thereafter remain their separate property, and (b) to waive all marital rights that they might otherwise acquire in the property of the other (including income and appreciation."[77]

The Court finds that the evidence produced at the trial in this matter shows that the MPA attempts to establish a transmutation in providing that property articulated in Exhibit A shall become the sole and separate property of Respondent "on and after the Effective Time" and that property Articulated in Exhibit B shall become the sole and separate property of Petitioner "on and after the Effective Time."

In furtherance of the parties intent to execute a transmutation of property the agreement states "The foregoing characterization of the property owned by each of [Respondent] and [Petitioner] at the Effective Time as the separate property of [Respondent] and [Petitioner], respectively, on and after the Effective Time is intended to and shall constitute a transmutation into separate property of property that would have otherwise become at the Effective Time quasi community property or community

[77] See Respondent's Supplemental Trial Brief, p. 6.

property, ***as provided under California Family Code section 850(a)***(emphasis added)." [78]

Paragraph 4 of the MPA is a key provision in determining which "type" [79] of agreement the MPA in this case is for purposes of this proceeding.[80]

Petitioner argues Respondent cannot avoid the application of the specific provisions of Family Code §852(a) by relying on the general provisions of Family Code

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[78] See MPA ¶ 4.

[79] An agreement pursuant to Family Code §§850 – 853 as argued by the Petitioner or an agreement pursuant to Family Code §§1500 and 721 as argued by the Respondent.

[80] Paragraph 4 of the MPA provides:

1. Transmutation of Property Owned Upon Obtaining California Residence

A. FRANK and JAMIE agree that, except as provided in Paragraph 7 and 8, below, all property, including the property set forth in Exhibit A, belonging to FRANK at Effective Time, shall be his sole and separate property on and after the Effective Time. FRANK shall have sole management and control over the property, and the property shall be subject to his disposition in all respects as his separate property. JAMIE shall not have any rights of management or control over FRANK's separate property by virtue of either of them obtaining California residence.

B. FRANK and JAMIE agree that, except as provided in paragraph 7 and 8 below, all property, including the property set forth in Exhibit B, belonging to JAMIE at Effective Time, shall be her sole and separate property on and after the Effective Time. JAMIE shall have sole management and control over the property, and the property shall be subject to her disposition in all respects as her separate property. FRANK shall not have any rights of management or control over JAMIE's separate property by virtue of either of them obtaining California residence.

C. The foregoing characterization of the property owned by each of FRANK and JAMIE at the Effective Time as the separate property of FRANK and JAMIE, respectively, on and after the Effective Time is intended to and shall constitute a transmutation into separate property of property that would have otherwise become at the Effective Time quasi community property or community property, as provided under California Family Code section 850(a). Said transmutation was freely entered into by both FRANK and JAMIE, without compulsion or duress of any kind. FRANK and JAMIE each waive any right to reimbursement under California Family Code Section 2640 with respect to said transmutation.

D. For purposes of this Paragraph 4, property titled in FRANK's name shall be FRANK's property, and property titled in JAMIE's name shall be JAMIE's property, provided however all property on exhibit A is FRANK's property, and all property on exhibit B is JAMIE's property.

§§721(a) and 1500.[81] Petitioner cites *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857 for the proposition that "[u]nder well-established principles of statutory interpretation, the more specific provision takes precedence over the more general one." Petitioner further argues that because the Respondent construes the MPA to deprive Petitioner of "all of her . . . property rights under California law," it is an attempt to "work[] a change in the character of the property" and is thus a transmutation.[82]

Respondent argues that Paragraph 4 of the MPA is not a transmutation but is merely intended to prevent common law separate property from being treated as quasi-community property for purposes of creditor claims, dissolution, or succession rights upon death.[83] Respondent argues that Family Code §850 does not state that quasi-community property can be transmuted because quasi-community property "is not a presently existing character of property, but rather a potential future treatment of property [if the parties are subject to creditor claims, dissolution, or probate]." [84]

Respondent argues that Paragraph 4 of the MPA is "simply a failsafe provision," which was added to avoid "uncertainty." [85] Respondent further claims that "the wisdom of including this 'failsafe' provision is demonstrated by Petitioner's current argument that, notwithstanding the form of title in which property was held in Massachusetts, it was actually 'joint' property." [86] "The transmutation language prevents this attempted perversion of the parties' intent if, for any reason, the clear language providing that property in Respondent's name would be his property and property in Petitioner's name

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[81] Petitioner's Brief Re: Law Applicable to the Purported MPAs, filed Sept. 20, 2010 at 3.
[82] *Id.* at 7 (quoting *In re Marriage of Campbell* (1999) 74 Cal. App.4th 1058, 1062).
[83] *Id.* at 8.
[84] *Id.* at 9.
[85] See Respondent's Supplemental Trial Brief, filed September 20, 2010, p. 14.
[86] See Petitioner's trial brief p. 6.

would be her separate property were to be challenged by Respondent, Petitioner or a business creditor." [87]

Respondent further argues that the MPA was not intended to be a transmutation agreement but was instead intended to "(a) 'define' the parties property rights before they became subject to California community property law, (b) memorialize and confirm which assets belonged to each party, and (c) prevent either party from acquiring an interest in the property of the other by waiving marital rights in the property of the other."[88] Respondent argues that Paragraph 4 of the MPA was intended to insure that each party's "common law separate property" would be characterized as that party's separate property under California law, therefore no transmutation occurred because "the assets were already separate." [89]

However, separate property cannot become quasi-community property upon operation of Family Code §125. This statute allows California courts to divide property that was acquired while domiciled elsewhere under community property principles. The language of the statute provides that separate property retains its separate character, even upon becoming subject to creditor claims, dissolution, or probate proceedings.

The evidence produced at the trial indicated that the MPA was clearly an attempt by the parties to enter into a transmutation agreement. The Court notes that Section 4 of the MPA is labeled "Transmutation of Property Owned Upon Obtaining California

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[87] See Respondent's Supplemental Trial Brief, p 14.
[88] Respondent's Supplemental Trial Brief Requested by the Court, filed September 17, 2010 at 5. Respondent had not argued that the PMA was not a transmutation agreement until filling its supplemental brief. See Respondent's Trial Brief at 19.
[89] Respondent's Supplemental Trial Brief Requested by the Court, filed September 17, 2010 at 7.

Residence" and that paragraph 4(C) states that it is "intended to and shall constitute a transmutation."

The testimony of all of the lawyers involved in drafting the agreement indicates that they were clearly attempting to fashion an agreement to prevent the property from becoming "quasi-community property" through transmutation and to transmute Petitioner's separate property into her separate property and Respondent's separate property into his separate property. Although it is clear that in drafting the agreement, the authors attempted to execute a transmutation, their goals as described above, are not the type of transactions provided for in Family Code §850, which specifically describes the permissible actions under the statutes permitting transmutations of property. The fact that the drafters of the agreement attempted to fashion a transmutation not contemplated by the applicable statutes, does not alter the nature or type of agreement that the parties signed.

On September 23, 2010, Silverstein testified in pertinent part as follows:

"**Q**. It is a substantive provision. But do you know whether the substance here is simply boilerplate for these kinds of agreements?

A. It may be similar to other agreements, but it is the substance and the heart of the agreement.

The Court: Paragraph 4?

The Witness: Yes

Q. By Mr. Boise: And when you were describing this to Mr. and Mrs. McCourt on March 31st, did you describe paragraph 4 as the heart of the agreement?

A. I don't know if I used that word, but I certainly described paragraph 4.

Q. Did you in substance describe it as the heart of the agreement?

A. In substance, I would have described it as a very important provision of the agreement."[90]

On September 21, 2010, Cafferata testified that after speaking with Petitioner he concluded that there was a possibility that "some part of what they had, because so much was acquired by marriage, would be treated as quasi-community property in California, it was certainly possible that some part of it would be separate property." [91] When asked "under what circumstances could the parties sign the agreement and have their separate property never become quasi-community property," Cafferata answered "the purpose of the agreement was, at the moment the moment their property could become quasi-community property, it was transmuted into the separate property of each of them." [92] Cafferata also testified that on February 13, 2004, when he met with Petitioner at the Dodger Stadium, he explained to her that "we can transmute the quasi-community property into the separate property of each of you." [93]

Esmail testified that the first time he has ever heard the documents referred to as anything other than a "transmutation agreement" was in the instant proceeding.[94]

The Court has considered the substantial evidence produced by the parties. The evidence makes it clear that the parties intended to and in fact attempted to enter into a transmutation agreement in the form of the MPA subject to these proceedings. The

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[90] See Silverstein's Trial Testimony on September 23, 2010 pgs. 81-89.
[91] See Cafferata's trial testimony on September 21, 2010.
[92] See Cafferata's deposition Volume II p. 493; see also Cafferata's trial testimony on September 21, 2010 p. 140.
[93] See Cafferata's trial testimony on September 21, 2010 p. 151.
[94] See Esmail's trial testimony on September 27, 2010 p. 82-83.

evidence presented at trial clearly shows that Paragraph 4 entitled "Transmutation of Property Owned Upon Obtaining California Residence," was the central and core provision of the MPA. The Respondent forcefully argued that mere titling of the key provision as a transmutation did not make the agreement a transmutation. The Court has considered this argument. The title of Paragraph 4 is just one part of the evidence that establishes that the MPA was in fact an attempt by the parties to enter into a transmutation agreement. As indicted by the discussion herein, the evidence shows that the MPA in this case is the type of agreement contemplated and controlled by Family Code §§850 – 852.

For the aforementioned reasons, the Court finds that the MPA executed by Petitioner and Respondent is not a martial agreement as defined by Family Code §§721 and 1500, but a transmutation agreement subject to standards articulated in Family Code Sections §850, 852.

The issues regarding the validity of the agreement as construed under the applicable provisions of the Family Code must be considered. In deciding whether a valid transmutation occurred, the Court must interpret the written document independently without resort to extrinsic evidence. As indicated above, it is well-settled that extrinsic evidence of the parties' intent may not be considered in determining whether a transmutation has taken place. See *In re Marriage of Benson* (2005) 36 Cal.App.4th 1096, 1100 ("section 852(a) precludes the use of 'extrinsic evidence' to prove that the writing effected a transmutation"); *In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 51 ("In deciding whether a transmutation has occurred, we interpret the written instruments independently, without resort to extrinsic evidence."); *In re Marriage*

of Leni (2006) 144 Cal.App.4th 1087, 1096 (section 852(a) "precludes the courts from considering" extrinsic evidence as to whether documents constituted a transmutation); *In re Marriage of Starkman* (2004) 129 Cal.App.4th 659, 664 ("In deciding whether a transmutation has occurred, we interpret the written instruments independently, without resort to extrinsic evidence."); *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 588 ("The determination whether the language of a writing purporting to transmute property meets the *MacDonald* test must be made by reference to the writing itself, without resort to parole evidence"); *Falk v. Falk* (N.D. Cal. 2008) 2008 WL 4814072, *2 ("[T]he [*MacDonald*] court construed section 852(a) to preclude reference to extrinsic evidence in the proof of transmutations"); *In re Cecconi* (Bankr. N.D. Cal. 2007) 366 B.R. 83, 129 n.20 ("This Court will look only to the . . . Trust to determine whether that document transmutes the Property").[95]

The type of express declaration required for a valid transmutation to exist "is language expressly stating that a change in the characterization of ownership of property is being made." *Estate of MacDonald* (1990) 51 Cal.3d 262, 272. Although the express declaration does not require language such as "I transmute," "community

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[95] For reference, the text of Family Code §852 is provided:

(a) 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.
(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.
(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.
(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.
(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply."

property" or "separate property," an express declaration must indicate unambiguously a change in the character of the property.

The agreement in this case purports to "confirm" the parties' assets as follows: Petitioner's separate assets as articulated in Exhibit B and Respondent's separate assets as articulated in Exhibit A. The agreement states the parties agree that the assets listed in Exhibit A and Exhibit B are the separate property of each spouse "on and after the Effective Time."

As indicated above, Family Code §850 provides that through a transmutation married persons may accomplish any of the following: transmute community property to separate property of either spouse; transmute separate property of either spouse to community property or transmute separate property of one spouse to separate property of the other spouse. By the terms of the instant agreement and under either of the parties' theories with regard to the effect of the MPA, the agreement seeks to accomplish a purpose other than those described in Family Code §850. The Court finds that the MPA did not accomplish a valid transmutation as defined by Family Code §850.

A great deal of evidence was introduced at trial with regard to the possible effect the MPA might have on the parties' respective rights under equitable distribution. However, the text of any version of the MPA introduced as evidence at the trial does not expressly or explicitly reference any change with regard to the parties' rights under equitable distribution.

The parties were domiciled in Massachusetts at the time they acquired their martial assets. Had the dissolution action been heard in Massachusetts, the law of

equitable distribution would have applied which would have resulted in not necessarily equal, but equitable distribution of **all** assets acquired during marriage, before marriage, or inherited so long as the court found that the party had an interest in the marital assets during the marriage. See *Davidson v. Davidson* (1985) 19 Mass.App.Ct. 363.

Although not controlling here, the Massachusetts case of *Ansin v. Ansin* (2010) 457 Mass. 283 is illuminating with regard to the issues argued by the parties with regard to a waiver or change in the parties' rights under equitable distribution effected by the MPA. In *Ansin* the Supreme Judicial Court of Massachusetts considered for the first time the enforceability of postmarital agreements and fashioned a rule for lower courts to follow in determining their validity. In constructing this rule, the Court drew on precedent regarding both premarital agreements and separation agreements, but applied a heightened standard of scrutiny because of fundamental differences in the nature of postmarital agreements,[96] adjusting rules accordingly.

The Court thus constructed a five-factor test for lower courts to apply in determining the validity of postmarital agreements. *Id.* at 291.[97] Of particular relevance

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[96] The Court noted that postmarital agreements fundamentally differ from premarital agreements in that "[b]efore marriage, the parties have a greater freedom to reject an unsatisfactory premarital contract." *Id.* at 289. Similarly, postmarital agreements differ from separation agreements in that the parties in a separation agreement "intend a permanent separation or marital dissolution." *Id.* at 290 (quoting American Law Institute, Principles of Family Dissolution: Analysis and Recommendation § 7.01(1)(c) (2002)). Because of this difference, the parties in a separation agreement are more likely to be concerned about their own economic self-interests than they would in a postmarital agreement when dissolution may not even be contemplated. *Id.*

[97] Specifically, the Court provided that

> [b]efore a marital agreement is sanctioned by a court, careful scrutiny by the judge should determine at a minimum whether (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce. Where one spouse challenges the enforceability of

here are the standards imposed for determining whether each spouse "knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the even of a divorce." *Id.* The Court noted that this factor is particularly "important because it underscores that each party is exercising a meaningful choice when he or she agrees to give up certain rights." *Id.* 296. The Court held that "[i]n determining whether there was a meaningful waiver of rights, a judge should consider whether each party was represented by independent counsel, the *adequacy of the time to review the agreement*, the parties' understanding of the terms of the agreement and their effect, and *a party's understanding of his or her rights in the absence of an agreement.*" *Id.* at 296 (quotations and citations omitted) (emphasis added).

The Court's reasons for deviating from standards used in evaluating the reasonableness of premarital and separation agreements are also revealing. The Court declined to apply the standards applicable to premarital agreements because spouses "owe absolute fidelity to each other," and "[t]he statutory rights and obligations conferred by marriage are not potential benefits for a divorcing spouse but an integral aspect of the marriage itself." *Id.* at 296–297. The Court instead applied the same standards used in evaluating separation agreements, because "parties to a [post]marital agreement do not bargain as freely as separating spouses" a "heightened scrutiny" was applied. *Id* at 297.[98]

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the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria. *Id.* at 291.

[98] Massachusetts Courts look to the reasonableness of separation agreements—and now postmarital agreements—at both the time of formation and the time of enforcement. The Supreme Court thus held:

In this matter, the parties' retention or waiver of their rights under equitable distribution in the property subject to the MPA is, from the evidence and arguments of the parties, a major, if not *the* major contention and issue between the parties. However, there is no evidence that the issues of the effect, waiver, or alteration of these rights was ever discussed by the parties or addressed by counsel during the drafting of the MPA.

Although Silverstein was counsel most involved in the drafting of the MPA in this matter and he testified that he has a limited knowledge of California Family Law issues, he testified that he has a great deal of experience practicing under Massachusetts law. The Court's language in *Ansin* requiring that parties "knowingly and explicitly agree[d] in writing to waive the right to a judicial equitable division of assets and all marital rights in the even of a divorce," *Id.* at 291 is similar to California's requirements with regard to the need for an express declaration between the parties in order to find a valid transmutation has occurred. The Court finds that there is no evidence within the MPA, or within the

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> In evaluating whether a marital agreement is fair and reasonable at the time of execution, a judge should accordingly consider the entire context in which the agreement was reached, allowing greater latitude for agreements reached where each party is represented by separate counsel of their own choosing. A judge may consider the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing legal principles, whether the purpose of the agreement was to benefit or protect the interests of third parties (such as the children from a prior relationship), and the impact of the agreement's enforcement upon the children of the parties. Other factors may include the length of the marriage, the motives of the contracting spouses, their respective bargaining positions, the circumstances giving rise to the marital agreement, the degree of the pressure, if any, experienced by the contesting spouse, and other circumstances the judge finds relevant. *Id.* at 297.
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> In determining the reasonableness at the time of enforcement a judge may consider, among other factors, (1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) [other statutory factors]. *Id.* at 298.

testimony of the witnesses in this matter, of any waiver of the parties' rights of equitable distribution as described in Massachusetts law.

The multiple versions of the MPA that were introduced into evidence in the trial of this matter raise a number of issues. The existence of two materially inconsistent and contradictory exhibits to the MPA detailing what property is included or excluded within Respondent's separate property assets contributes to the ambiguity of the terms of this agreement and presents that issue of having two executed materially inconsistent agreements. The MPA's, as written do not provide a clearly discernable description of the property and the character of that property that the parties are attempting to affect with the MPA.

In this matter, absent an express declaration describing the preexisting nature of assets and unambiguously changing the character of those assets, the Court finds that the MPA does not satisfy the requirement of Family Code §852(a) by failing to state an expression of intent to transfer a property interest of the type described in Family Code §850.

As indicated above, a transmutation of 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. See Family Code §852(a). Likewise, subject to certain exceptions and special considerations, general principles of contract law apply to make any marital contract voidable for fraud, duress, undue influence, etc., or because otherwise lacking the minimum requirements for a valid contract. In this matter, the parties have each raised several issues relating to these principals of contract law as related to the instant MPA.

As contracts, enforceable premarital, marital and marital settlement agreements must comply with general principles of contract law: i.e., (a) "contractual capacity"; (b) valid consent; (c) a "lawful object"; and (d) subject to specified exceptions, a proper "consideration." See generally, Civil Code §1550. An agreement will be found to lack valid consent where one party uses confidence or authority over the other to procure an unfair advantage, or takes unfair advantage of the other party's weakness of mind or distress. As in cases of "menace" or "duress", the exertion of such "undue influence" deprives the other party of the ability to exercise "free will." Civil Code §1575; *Marriage of Saslow* (1985) 40 Cal.3d 848, 864.

A contract requires a meeting of the minds on essential elements of the agreement. *Kim v. Servosnax, Inc.* (1992) 10 Cal.App.4th 1346, 1362. For a contract to be formed there must be a meeting of the minds between the parties on all material terms. *Id.* Without mutual assent, a contract does not exist. Civil Code §1500, subd. (2); *see also: Chakmak v. H.J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124, 129; *Merced County Sheriff's Employee's Association v. County of Merced* (1987) 188 Cal.App.3d 662, 670. The existence of mutual consent is determined by objective and not by subjective criteria, by looking at what the outward manifestations of consent would lead a reasonable person to believe. Furthermore, the determination of whether mutual consent exists is focused upon the acts of the parties involved. *Meyer v. Banko* (1976) 55 Cal.App.3d 977, 942-943. "[T]he manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act." Rest.2d Contracts, §19.

"There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other; and (b) each party knows or each party has reason to know the meaning attached by the other." Rest.2d. Contracts §20.

The law states that a person has reason to know a fact, present or future, if he or she has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence. Reason to know is to be distinguished from knowledge and from "should know." Knowledge means conscious belief in the truth of a fact; reason to know need not be conscious. "Should know" imports a duty to others to ascertain facts; the words "reason to know" are used both where the actor has a duty to another[99] and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know. Restatement 2d Agency §9; Restatement 2d Torts, § 12; Uniform Commercial Code §1-201(25).

Similarly, as in general contract principles, neither a marital property agreement nor a transmutation agreement can be validly "consented to or accepted by" both parties on different terms than those contained in the actual writing. This becomes an even more compelling issue when two actual versions of the writing exist each

[99] For example, a fiduciary duty between husband and wife.

expressing "different meanings of manifestations" of the parties' intent with regard to the agreement.

Petitioner testified that the intent of the parties was not to change or confirm the assets articulated in Exhibit A attached to the MPA. It is her contention that the mere purpose of the MPA was to provide protection from creditors. Petitioner testified that she believed that it was possible to accomplish creditor protection while simultaneously preserving equitable distribution rights and that the agreement was executed for those purposes.[100] It must be noted that there are profound issues raised by the Respondent with regard to the credibility of the Petitioner in this regard.

Petitioner testified that because she never read the agreement on March 31, 2004, she did not know that the version she signed relinquished her rights to the Dodgers. She indicated that her confusion was exacerbated by discovering that in fact two versions of the transmutation agreement existed; one which included the Dodgers as Respondent's separate property (also referred to as "the Massachusetts version") and one which excluded the Dodger's from Respondent's separate property (also referred to as "the California version"). Petitioner testified that she did not know which version of Exhibit A she signed on March 31, 2004. The Respondent also testified that he did not closely read the MPA before the execution of the agreements in either Massachusetts or California.

The parties argued at great length and presented a great deal of evidence with regard to the credibility of the other. The Court finds that both of the parties are very sophisticated individuals who were both very involved with their business and personal

[100] See Petitioner's Trial Exhibit 412, which expresses an admission by Silverstein that protecting the homes from business creditors is possible while simultaneously preserving equitable distribution rights.

finances. Both of the parties by education, training and vocation, were experienced and used to reviewing and executing complex and significant legal documents. Yet the testimony in this matter, as offered by each of the respective parties, paints a picture of two people who had no involvement in the drafting or execution of the MPA and related documents and further that they so entrusted all matters regarding the MPA to their lawyers, that they did not closely read or did not read at all, the drafts or final copies of the various MPA's involved in this case. This testimony as offered by both parties does not reconcile with the sophisticated business people who testified at the trial and who were well versed on all of the details of the issues and their very complex business affairs.

The credibility issues raised by the parties in this case are not new to the courts or to family law litigation. In 1908, a dispute arose between Jackson Creamer and Rosalie Bivert, a brother and sister, regarding the conveyance of one hundred acres of land in Gentry County, Missouri. The case rested on the contradictory testimony of the parties and the witnesses they each presented.

In discussing the issues related to a trial court's challenges in determining credibility, the court said: "Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson or the itching

over-eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light and yet not a soul who heard it, *nisi*, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print and yet there was that about the witness that carried conviction of truth to every soul who heard him testify". *Creamer v. Bivert* (1908) 214 Mo. 473, 481.

In this case there are credibility challenges with the testimony of both parties with regard to the attention, or lack thereof, they paid to the language used in the MPA. The testimony of both parties as to their lack of knowledge and attention to the details of the MPA is not credible.

However, the issues of credibility in this portion of the case are not confined to the Petitioner *or* the Respondent. The testimony of both parties, in that they paid little attention to the details of the MPA, is not credible.

When met with a similar situation in *Creamer* in which there were credibility issues with the evidence presented by both parties, the court said the following of the party that does not come to a court of equity with clean hands: "He is confronted with the related maxim that where the fault is mutual the law will leave the case as it finds it (*In pari delicto potior est conditio*, etc.)." *Creamer v. Bivert* (1908) 214 Mo. 473, 485-486.

In this matter neither party has produced credible evidence that both parties or either party fully and completely read or understood the MPA before it was executed on the respective dates in Massachusetts and California. The Court does find that based on the evidence presented at trial, neither party was presented with a full and complete

final copy of the MPA until it was signed by the parties on March 31, 2004. The major change in the MPA, the use of the word "inclusive" as opposed to "exclusive" with regard to the Dodgers, was not in any of the drafts of the MPA presented to the parties to review prior to the meeting at the parties' home on March 31, 2004.

One of the greatest challenges presented in this case is the existence of two materially different versions of the executed MPA. Respondent has advanced a theory of "scrivener's error" in attempt to reform the California version of the MPA to match the Massachusetts version of the MPA. Respondent argues that the California version of Exhibit A is an obvious drafting error when viewed in the context of the agreement as a whole, without resort to extrinsic evidence, and attempts to support this position with extrinsic evidence.[101]

California has long recognized the theory of reformation based on a "scrivener's error" which is a type of relief for "mutual mistake" addressed by Civil *Code* §3399.[102] See, e.g., *Mills v. Schulba* (1950) 95 Cal. App. 2d 559, 562. As the Supreme Court stated in *Bailard v. Marden* (1951) 36 Cal. 2d 703, 708–709,

> The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute, it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no

[101] Respondent's Trial Brief at 33–35.

[102] "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Civil Code §3399.

agreement was reached, there would be no standard to which the writing could be reformed.

Otherwise stated, inasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties had met must have pre-existed the instrument in question. [*Civil Code section 3399*] adopts the principle of law in terms of a single intention which is entertained by both of the parties. Courts of equity have no power to make new contracts for the parties, Nor can they reform an instrument according to the terms in which one of the parties understood it, unless it appears that the other party also had the same understanding. (citations and quotations omitted).

By its very terms, resort to extrinsic evidence is necessary to determine what the intent of the parties truly was in determining whether reformation for scrivener's error is warranted.

However, assuming that either the true intent of the parties could be divined from the body of the agreement or that this Court was permitted to consider extrinsic evidence to support a finding that a transmutation has occurred, the Respondent must carry the burden of proving this error by clear and convincing evidence. See, e.g., *Schulba*, 95 Cal. App. 2d at 564 ("In reformation cases the evidence must be clear and convincing 'or something more than a preponderance.'") (quoting *Moore v. Vandermast*, Inc. (1941) 19 Cal.2d 94, 96–97). As Respondent notes in arguing against Petitioner's theory of mutual mistake, "[w]here so solemn an instrument as a written contract is

sought to be reformed for mistake, 'evidence of the mistake must be clear and convincing, and not loose, equivocal, or contradictory leaving the mistake open to doubt.'" [103] The Court finds that in this matter, the Respondent has not met this "strict test." See *Schulba*, 95 Cal. App. 2d at 564. The Court finds that there has not been sufficient evidence presented to indicate which of the two materially inconsistent MPA's represented the actual intent of the parties.

The Court finds that for the reasons described above, there was no mutual assent or meeting of the minds between Petitioner and Respondent when they executed the agreement on March 31, 2004. The parties had mistaken belief and no agreement as to the meaning of the agreement, the content of the agreement, and the effect of the MPA on their property and property rights. Evidence presented at the trial shows that there was not a meeting of the minds between Petitioner and Respondent on material terms of the contract as articulated in the two materially contradictory versions of Exhibit A of the MPA. The Court further finds that there was no mutual assent or meeting of the minds regarding the content of the version of the MPA Petitioner signed on March 31, 2004, in Massachusetts and the version Respondent signed on April 14, 2004, in California.

The Petitioner argues that the MPA is not valid as it constitutes a conditional transmutation. A present, existing, and equal interest is the antithesis of a conditional future transmutation; as a result the notion that parties may execute conditional transmutations has been rejected by case law. See *In re Marriage of Lund* (2009) 174 Cal.App.4th 40; see also *Holtemann, supra*, at 1171. Certain conditional transmutations,

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[103] Respondent's Trial Brief at 29 (quoting *Burt v. Los Angeles Olive Growers Assoc.* (1917) 175 Cal. 668, 675).

or as described by the court as a situation in which parties" cross their fingers while signing the agreement," was rejected both by *Holtemann* and *Lund.*

In the instant case, Paragraph 1 of the MPA states: "This agreement shall become effective upon either or both of [Petitioner] and [Respondent] becoming residents of California and subject to California law with respect to the division of their assets for any reason. The rights of [Petitioner] and [Respondent] with respect to their property owned by either of them at the Effective Time or acquired after the Effective time shall be subject to the terms of this agreement. If for any reason neither party becomes a resident of California or subject to California law with respect to the division of their assets, then this agreement shall not be effective for any purpose."

Silverstein testified that although the agreement was binding when signed, it did not have legal effect until a later time which is identified in the aforementioned paragraph as "Effective Time." Furthermore, Silverstein's testified that the agreement was written in such a way as to have it go into effect only *if* the parties moved to California.

Cafferata also testified that the agreement was drafted in contemplation of the parties becoming residents of California. Cafferata testified that on February 13th, 2004 Petitioner asked him to start drafting the MPA. Because Petitioner told Cafferata to prepare it quickly, he told her that he would start drafting the agreement. However Cafferata also testified that he raised the issue with Petitioner that the parties were "doing things under California law and they were not yet California residents." [104]

[104] Note that in his deposition Cafferata stated that before he told Petitioner that he would begin drafting the MPA, he would need to do some research to answer the question whether a transmutation using a California statute would be possible since the parties were not yet residents of California.

In *In re Marriage of Holtemann* (2008) 162 Cal. App.4th 1175 the husband and wife executed a "Spousal Property Transmutation Agreement" and "Holtemann Community Property Trust" as part of their estate plan. *Id.* at 1178. The introductory paragraph of the Transmutation Agreement stated that it was "not made in contemplation of a separation or marital dissolution and is made solely for the purpose of interpreting how property shall be disposed of on the deaths of the parties." *Id.*

The court stated that they were "not aware of any authority for the proposition that a transmutation can be conditional or temporary" and gave effect to the transmutation disregarding the conditional language. *Id.* at 1182. In that case the condition did not invalidate the transmutation but the condition was ignored. In essence, as the trial court stated, the condition demonstrated that the husband "wishes to have his cake and eat it too. He argues that, in the event of either his or [his wife's] death, the survivor would be able to use the Transmutation Agreement to claim the property as community property, thus obtaining a full step up in basis to the fair market value of the property at date of death, while at the same time denying the validity of the Transmutation Agreement as an instrument which created community property. Thus, when it would benefit [the husband] or his estate, [the husband] wishes to characterize the property as community. However, when it would be detrimental to [the husband], he wishes to ignore the transmutation and call the property separate." *Id.* at 1182. This case is better read, not as a bar on conditional transmutations but as granting authority to the court to not consider a condition in an agreement that would allow spouses to rescind their agreement in violation of public policy and most likely fraudulently.

In re Marriage of Lund (2009) 174 Cal. App. 4th 40 follows a similar line of logic. There the husband made an express declaration in writing of his intent to transmute all of his separate property to community property "for estate planning purposes." *Id.* at 45. The transmutation agreement was executed simultaneously with a Trust which provided: "Upon the filing of a petition for the dissolution of the marriage and/or separation by either Settlor, this Agreement is automatically terminated without further notice to third parties and either Trustee shall return to each Settlor the separate property they contributed to this Agreement not previously disposed of, together with each Settlor's share of the Trust Estate which is community property." *Id.* at 48.

The trial court had found because the transmutation agreement stated it was for estate planning purposes only (and when read in conjunction with the trust could most plausibly be read as intending to change separate property to community property only if they were married when one spouse died) the transmutation was ambiguous and thus failed the *MacDonald* test. *Id.* at 49. In overruling the trial court, the Court of Appeals relied on *Holtemann* for the proposition that parties may not execute a "conditional" transmutation. *Id.* at 54. However, instead of finding this conditional transmutation invalid, the court ignored this conditional language and upheld the agreement as valid. *Id.* Like *Holtemann* this is better read in the context of preventing parties from creating a transmutation that is effective upon death but not upon divorce.

The term included in the instant MPA conditions the transmutation upon a first condition of upon either or both of the parties becoming residents of California and a second condition stating that the agreement is not valid until the parties are: "subject to California law with respect to the division of their assets for any reason." The meaning

of this term is unclear. Generally, parties do not become subject to the provisions of the California Family Code or California Probate Code with regard to the division of property until the filing of a dissolution of marriage action, nullity of marriage, filing of a request for legal separation or death.[105] The meaning of this term is at best, ambiguous. However, the plain reading of the terms of the MPA would indicate that the "Effective Time" of the MPA was when one of the parties moved to California and filed one of the described actions under the Family Code or Probate Code. This nature of the language in the MPA regarding the "Effective Time" of the agreement does not invalidate the MPA because it is conditional.

The Court does not find that the current state of the law provides for the absolute bar of conditional transmutations as argued by the Petitioner. However, the conditional and ambiguous nature of the term is further evidence that the MPA is not a clear and express writing as required by the applicable provisions of the Family Code. As the "Effective Time" term of the MPA is written, there is no clear meaning and understanding of when the MPA was intended to take effect.

A transmutation of real property is not effective as to third parties without notice thereof unless recorded. Family Code §852(b). Prior to the execution of the MPA, Petitioner and Respondent lived in Massachusetts where they had a long standing practice of the placing the title of residences in Petitioner's name and businesses in Respondent's name. Petitioner testified that it was important to protect the homes from business creditors and she wanted to preserve that protection after the parties moved to California. Petitioner testified that she discussed purchasing a home in California as

[105] See Family Code §2010 and Probate Code §§100-103.

well as the importance of protecting the homes from business risks and business creditors with Silverstein. She understood that the homes in Massachusetts were protected from business creditors and she wanted to preserve this protection in California.

Petitioner testified that she believed that the MPA would provide protection for the homes against business creditors. However, as required by Family Code §852(b), such protection against creditors could not have been achieved without the agreement being recorded. Neither party has offered any evidence that these agreements were recorded as defined in Family Code §852(b). Therefore, the MPA would not achieve the goal of protection of the residential properties from creditors as sought by Petitioner.

As discussed above, pursuant to Family Code §721(b), in interspousal transactions, a "confidential relationship" (i.e., the reposing of trust and confidence in the integrity and fidelity of another) is presumed to exist between husband and wife by reason of the marital relationship. See *Marriage of Baltins* (1989) 212 Cal.App.3d 66; *Estate of Cover* (1922) 188 Cal. 133, 143. Spouses cannot "sever" their statutory confidential relationship and attendant fiduciary obligations simply by separating in anticipation of dissolution or otherwise assuming postures of "arm's length" dealings.

By statute, the intraspousal confidential relationship and Family Code §721(b) fiduciary obligations continue post separation as follows: as to all activities affecting the assets and liabilities of the other party, until distribution of the particular community (or quasi-community) asset or debt, or interest therein—i.e., for so long as one spouse has control over an undistributed asset or liability (Family Code §§1100(e), 2102(a)(1)-(3) &

(b); see *Marriage of Varner* (1997) 55 Cal.App.4th 128, 141–142); and, for so long as the intraspousal confidential relationship continues, it imposes a "duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other." (Family Code §721(b); *Marriage of Burkle* (2006) 139 Cal.App.4th 712, 729; *Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 84; *Marriage of Mathews* (2005) 133 Cal.App.4th 624, 628–629).

By virtue of Family Code §721(b), spouses stand in a fiduciary relationship, subject to the same rights and duties of nonmarital business partners as provided in Corporation Code §§16403, 16404 and 16503 (including, but not limited to, access and inspection rights, full disclosure obligations, accountability obligations, etc.). In particular, they owe each other fiduciary duties of disclosure regarding all material facts and information regarding the existence, characterization and valuation of assets and debts in which the community has or may have an interest; and, upon request, must provide equal access to all information pertaining thereto. See Family Code §§721(b), 1100(e); see also generally, *Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1419–1428.

Petitioner argues that if the Respondent is able to establish the validity of the Massachusetts version of the MPA, the Court should invalidate the agreement based on a finding of presumptive and actual undue influence.

The mere existence of a marriage relationship does not itself create a presumption that a marital contract was procured by undue influence. *Snyder v. Snyder* (1951) 102 Cal.App.2d 489, 492. However, to the extent a marital agreement provides one spouse with an advantage over the other, it is presumptively the product of undue

influence and inadequate consideration. *Marriage of Burkle, supra*, at 729; *Marriage of Balcof, supra*, at 1519.

The "advantage" that raises the presumption of undue influence in a transaction between spouses must be an "unfair advantage." This principle necessarily follows from Family Code §721(b), which prohibits either spouse from taking "any unfair advantage of the other." *Marriage of Burkle, supra*, at 730–734. No undue influence presumption arises from an intraspousal transaction in which the parties **each obtained advantages** [emphasis added] where both were represented by counsel and acknowledged that neither obtained an unfair advantage. *Marriage of Burkle, supra*, at 735–736.

Whether one spouse gained an "unfair" advantage over the other in an intraspousal transaction sufficient to raise the presumption is a question of fact for the court. *Marriage of Burkle, supra*, at 734. The presumption readily arises in many marital transactions where one spouse deeds, transfers or transmutes his or her interest in property to the other spouse for no or clearly inadequate consideration. See *Marriage of Balcof, supra,* at 1519,—undue influence presumption arose where transmutation agreement gave wife a 20% interest in husband's business and all of his interest in residence without consideration to husband; *Marriage of Haines* (1995) 33 Cal.App.4th 277, 296—presumption arose where quitclaim deed from wife to husband was given for plainly inadequate consideration.

In a more comprehensive contractual exchange between spouses, under which both gain different advantages, the party seeking the benefit of the presumption of undue influence must make a sufficient preliminary factual showing of unfair advantage to the other party in order to raise the presumption. *Marriage of Burkle, supra*, at 735–

736—party not entitled to undue influence presumption where no showing that the other party obtained "unfair" advantage from marital agreement that mutually advantaged both parties.

The undue influence presumption is rebuttable. Once it arises, the burden shifts to the advantaged spouse to prove that no undue influence was exercised. *Weil v. Weil* (1951) 37 Cal.2d 770, 788; *Marriage of Burkle*, supra, 738–740; *Marriage of Mathews, supra,* 630–632. The standard of proof in meeting the rebuttal burden is a preponderance of the evidence. *Marriage of Burkle, supra,* at 738, fn. 16 (rejecting higher "clear and convincing evidence" standard of proof); *Marriage of Mathews, supra*, 133 Cal.App.4th at 631.

The presumption may be rebutted by proof that the aggrieved spouse freely and voluntarily entered into the transaction, with full knowledge of all the facts and a complete understanding of the effect of the transaction. *Marriage of Burkle, supra*, at 738–739; *Marriage of Balcof, supra*, at 1519–1520; *Marriage of Mathews, supra*, at 630.

Evidence that the spouse who secured the unfair advantage fully and fairly disclosed all of the relevant facts concerning the nature and effect of the transaction is sufficient rebuttal proof. *Estate of Cover* (1922) 188 Cal.133, 144; *Estate of Brimhall* (1943) 62 Cal.App.2d 30, 34; *Smith v. Lombard* (1927) 201 C.518, 524–525. "Full disclosure" for this purpose refers to both the value and the character of property subject to the agreement; and to the specific rights the aggrieved spouse is purportedly surrendering under the agreement. *Estate of Cover, supra*, at 145–146,—spouse's "wealthy" status not enough to charge other spouse with knowledge of value and

character of property involved in agreement or transaction; *Marriage of Burkle, supra*, at 739; Family Code §§721(b),(1)-(3), 1100(e).

Evidence that the spouse who secured the advantage provided the aggrieved spouse with the opportunity to obtain independent legal advice as to his or her rights in the premises of the transaction may be persuasive in overcoming the undue influence presumption. *Estate of Cover, supra*, at 144; *Marriage of Burkle, supra*, at 739; see also *Weil v. Weil, supra*, at 789. While probative, proof that the aggrieved spouse had separate legal counsel, or the opportunity to obtain such advice, is not essential to a rebuttal of the undue influence presumption. *Estate of Brimhall, supra*, at 34—full disclosure of material facts rebuts presumption even where contestant spouse did not receive independent advice; *Smith v. Lombard, supra*, at 524–; *Combs v. Combs* (1946) 75 Cal.App.2d 903, 904–905. Even when the aggrieved spouse has the benefit of independent legal counsel, the advantaged spouse is not relieved of his or her fiduciary obligations in the negotiations. Family Code §§721(b), 1100(e); *Vai v. Bank of America Nat'l Trust & Sav. Ass'n* (1961) 56 Cal.2d 329, 339–340; *Haseltine v. Haseltine* (1962) 203 Cal.App.2d 48, 57.

Any other proof that the contestant spouse voluntarily and knowingly negotiated the transaction, without instigation or pressure by the other (or at the other's direction) can likewise be sufficient evidence for rebuttal. *Marriage of Friedman* (2002) 100 Cal.App.4th 65, 72–73; *Marriage of Mathews* (2005) 133 Cal.App.4th 624, 631–632; *Weil v. Weil*, supra, at 788–789. The parties' acknowledgments in their marital agreement, along with certifications of their separate counsel, that they understand the agreement's provisions and its legal effect and that neither has obtained an unfair

advantage over the other, is persuasive evidence in rebuttal of a presumption of undue influence. *Marriage of Burkle, supra*, at 736; see also *Marriage of Kieturakis, supra*, at 90–91.

A marital agreement made in breach of the confidential relationship standard of care, or otherwise a product of fraud, duress or undue influence, is voidable and may be rescinded, canceled or set aside by the aggrieved spouse. *Marriage of Balcof, supra,* at 1519–1524—transmutation agreement giving wife 20% interest in husband's separate property business and all of his interest in parties' residence unenforceable due to duress and undue influence*; Marriage of Delaney* (2003) 111 Cal.App.4th 991, 999–1000—grant deed transmuting husband's separate property house to joint tenancy set aside where wife failed to rebut presumption of undue influence; *Marriage of Baltins* (1989) 212 Cal.App.3d 66, 89—husband's threats and misrepresentations in violation of confidential relationship duty constituted "constructive fraud" and duress, entitling wife to equitable set-aside relief.

Petitioner contends that Respondent obtained unfair advantage under the MPA, giving rise to a presumption of undue influence pursuant to Family Code §721, which Respondent has not rebutted. Petitioner primarily relies on the argument that under the MPA, Respondent receives an approximate 85% of the assets whereas Petitioner receives an approximate 15% of the assets.

Ample evidence produced at the trial establishes that both parties received advantages under the MPA. In fact, the evidence makes it clear that the Petitioner was the party who wanted the MPA. Petitioner received an advantage under the MPA by receiving $70 million dollars worth of assets as a direct result of insulating herself from

Respondent's business risks. Respondent testified that he is the sole owner of the Dodgers. Assuming, *arguendo*, this is true, the Los Angeles Dodgers are worth significantly more than $70 million dollars which is the amount of assets allotted to Petitioner pursuant to the MPA. However, Respondent's interest in those assets must be weighed against his assumption of risk in the acquisition of the team. A risk, that evidence shows, toward which the Petitioner had a great aversion.

Respondent testified that in the month of February of 2004, he acquired the Los Angeles Dodgers. Respondent testified that he purchased the Dodgers for $421 million from an affiliate of Fox Entertainment Group. The purchase of the Dodgers was made through a Limited Partnership as well as LLC's and a corporation, which, according the Respondent's testimony were also his separate property. Respondent's equity used in the acquisition of the Dodgers was $125 million from financing on a commercial property called Seaport which Respondent argues, is his separate property. Respondent further testified that the Dodger organization suffered EBITDA looses of approximately of $50 million a year for three years preceding the acquisition. Nevertheless, Respondent signed $119 million dollars in personal guarantees and agreed to personally indemnify MLB for all losses MLB incurred as a result of the Dodgers. According to Respondent, Petitioner refused to accept any risk of loss.

Evidence shows that Petitioner is a very sophisticated person who has degree from Georgetown University, a Juris Doctorate from the University of Maryland School of Law, and an MBA from the Sloan School of Business at M.I.T. Petitioner practiced family law during which time she executed MSA's as well as postnuptial agreements prior to becoming general counsel for the McCourt Company. Evidence also shows that

Petitioner was very involved in the purchase of the Dodgers. Petitioner had knowledge of all aspects of the financing of the Dodgers acquisition.

Assuming, *arguendo*, that the MPA did give rise to a presumption of undue influence, this presumption would be rebutted by the evidence presented at trial by Respondent.

In this case, both parties were advised to seek independent counsel; [106] on one occasion Petitioner was sent an email from Silverstein stating: "Because the two of you may have conflicting interests in dividing up your property and obligations, the Agreement includes your consent to our joint representation. The rules of professional conduct require us to advise that you may wish to review the consent to joint representation and the Agreement with independent counsel. If you proceed with executing the Agreement without seeking independent counsel, we would anticipate that a court would find that the two of you are of sufficient sophistication and bargaining power that the lack of independent counsel is not a reason to invalidate the Agreement."[107]

Evidence shows that Petitioner declined to retain independent counsel. However, Petitioner testified that her consent to joint representation was influenced by her belief that Silverstein and the Bingham firm were representing both parties. However both Silverstein and Cafferata testified that they advised Petitioner that in entering into the MPA, the parties may have conflicting interests and that both parties should seek independent legal counsel.

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[106] See Exhibit 1264, an email from Silverstein to Petitioner
[107] The email was sent on March 22, 2004.

Petitioner testified that Respondent did not coerce, threaten, or persuade her to sign the documents. She signed the MPA freely based on what she was told by Silverstein. Respondent testified that the MPA was Petitioner's idea and that he complied in an effort to make his wife happy.

The evidence shows that the parties are both sophisticated business-people who have both been closely and continuously involved in the operation of the McCourt businesses. The Petitioner and Respondent were both involved in all aspects of the McCourt business before the acquisition of the Dodger assets and both of the parties were very involved in all aspects of the acquisition of the Dodger assets.

The Court finds that the MPA was created at the behest of the Petitioner. The Court further finds that the MPA did not bestow and unfair advantage on the Respondent. The evidence shows that under the terms of the MPA, the Petitioner received assets that were free of the risk of business losses and would shield her from claims by business creditors. While the MPA would have given the Respondent a greater share of assets, he would have also assumed a much greater share of liability and risk. The Court finds that the evidence shows that the MPA was not a product of or gave rise to undue influence. Further, the Court finds that the Respondent introduced a sufficient quantum of evidence to rebut any presumption of undue influence that may have applied.

The Court has considered the evidence introduced by Petitioner with regard to her arguments that that the conduct surrounding the drafting and execution of the MPA constituted constructive fraud. The evidence with regard to the exchange made by Silverstein between the Massachusetts and California versions of the MPA is troubling

and has introduced great challenges in this case. The evidence does not produce a reasonable explanation for Silverstein's exchange of such critical documents without notification or consultation of the parties.

However, there is no evidence that shows that conduct was done at the direction or instruction of the Respondent. Constructive fraud requires an "act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent." [*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562. *In re Marriage of Egedi* (2001) 88 Cal. App. 4th 17, 25 (rejecting wife's attempt to invalidate MSA based upon conduct by attorney after agreement was reached, and stating that a spouse may not "seize upon the subsequent conduct of the attorney to invalidate the MSA")]. The conduct of Silverstein, exchanging pages in the executed agreements to align inconsistent versions of the MPA, did not occur until after the parties had signed the MPA. This cannot serve as the basis of a claim of constructive fraud as argued by Petitioner here. The Court does not find that the MPA is invalid based on a theory of constructive fraud.

The Respondent advances an argument, that although the transmutation portion of the MPA may not meet the requirements of Family Code §§850-853, those provisions of the agreement dealing with transmutation may be severed from the MPA leaving the rest of the agreement intact. Respondent argues that if the transmutation provisions of the MPA are found ineffective, then the Court should consider the remainder of the MPA under Paragraph 14 of the MPA: "If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or

unenforceable, the remainder of the Agreement shall remain in full force and shall in no way be affected."

In *U.S. v. Bethlehem Steel Corp.* (1942) 315 U.S. 289, 298, the Court wrote "Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or a set of promises were struck out." [108]

Without Paragraph 4, the MPA does not provide a description of the assets that are to become subject to California law with respect to the division of property. This becomes especially challenging in the circumstances of the present case in which the parties have executed two contradictory versions of the MPA.

During his deposition, Silverstein testified that the only way to determine which property was the respective parties' separate property was to examine Exhibit A and Exhibit B of the MPA. In determining whose property is separate by only looking to the exhibits, the Court is left with two contradictory terms regarding what property is included in the separate property of Respondent and what property is excluded from the separate property of Respondent. Silverstein later changed his answer and testified at trial that the exhibits are included only as a courtesy.[109]

Respondent heavily relies on Paragraph 4 in arguing that the "Massachusetts" version of the MPA was what the parties originally intended. However if portions of the MPA are severed from an otherwise unenforceable transmutation clause, which is

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[108] Citing Williston on Contracts, Rev.Ed. §863.
[109] See Respondent's opening statement where Mr. Sussman argued that the Exhibits to the MPA are for courtesy only.

Paragraph 4, the Court is again left with two contradictory terms as articulated in the "Massachusetts" version and the "California" version without any evidence of what the parties intended with the execution of this agreement.

In severing portions of the MPA from an unenforceable transmutation, the parties would be eliminating their right to reimbursement under California Family Code §2640 which is discussed in Paragraph 4.

In severing portions of the MPA from an otherwise unenforceable transmutation, Paragraph 5 pursuant to which, the parties waive their marital rights in separate property, will not stand because of the ambiguity which would exist as to what property is included in Respondent's separate property and what property is excluded from Respondent's separate property.

The Court has discussed the evidence shows that the MPA was considered a transmutation agreement by the parties and the lawyers involved in the drafting and execution of the agreement. This was made clear in the evidence presented in the trial in the form of Silverstein's emails,[110] notes,[111] deposition testimony and testimony.[112] In all of this evidence, there is reference to the MPA as a transmutation.[113] As indicated

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[110]See Exhibit 148 which is an email from Silverstein to Petitioner dated September 12, 2008 in which he calls an MPA a transmutation agreement. See also Exhibit 412 in which he called the MPA a "transmutation."

[111] See Exhibit 1761 which is Silverstein's agenda for the March 3, 2004 meeting which placed the MPA under the topic of "transmutation."

[112] See: Silverstein's Trial Testimony on September 23, 2010,p. 126. "I can't recall specifics from that meeting. But it is very possible, given that they were going over the consequences of the transmutation agreement that I went over that issue orally."

[113] See Petitioner's Trial Exhibit 412, email from Larry Silverstein to Frank McCourt "what if we signed a short agreement reflecting that the transmutation agreements were intended to keep property separate between you and Jamie the way property was separated before you moved to California and follow the same separation principles on new assets acquired. The agreement would then provide that nothing in the transmutation agreements were intended to change the rights that either of you had in Massachusetts to equitable distribution."

above, on September 21, 2010, Cafferata testified that the agreement was a transmutation agreement.[114]

The specific importance of Paragraph 4 is evidenced when Silverstein testified that Paragraph 4, the transmutation clause of the MPA, is the heart of the MPA.[115]

The substantive provisions of the MPA rely on Paragraph 4 of the MPA and the inclusion of the Exhibits to the agreement. As discussed above, the Exhibits executed by the parties contain mutually exclusive terms.

Overwhelming evidence shows that the MPA purports to be a transmutation agreement which transmutes property into Petitioner's separate property and Respondent's separate property. Evidence shows and the Court finds that the material provisions of the MPA are a single whole and that the consummation of a bargain between Petitioner and Respondent was dependent upon inclusion of Paragraph 4 and thus all provisions are inextricably intertwined. As a result, portions of the MPA cannot be severed from an otherwise unenforceable transmutation.

Respondent argues that the MPA constituted a waiver of any community interest that had been acquired in the separate property of either party. The waiver provisions are found in Paragraph 5 of the MPA. Paragraph 5(A) states that "each party

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[114] See Cafferata's deposition Volume II p. 493; see also Cafferata's trial testimony on September 21, 2010 p. 140.

[115] On September 23, 2010, Silverstein testified:
"Q. It is a substantive provision. But do you know whether the substance here is simply boilerplate for these kinds of agreements?
A. It may be similar to other agreements, but it is the substance and the heart of the agreement.
The Court: Paragraph 4?
The Witness: Yes

relinquishes all right, claim or interest . . . that either of them may acquire in the separate property of the other."

> Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. There must be actual or constructive knowledge of the existence of the right to which the person is entitled. The burden is on the party claiming a waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. *Moore v. Moore* (1980) 113 Cal. App. 3d 22, 27 (citations omitted).

Further, "no waiver of right can be inferred from a written stipulation except where an intentional relinquishment of the known right is explicit, the terms and scope of the waiver are spelled out and the express reason for the waiver are set forth." *Id.* at 28.

The Court has considered the arguments of the Respondent the general waiver provisions of the MPA constitute a waiver of the parties' respective interests as described in *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp v. Van Camp* (1921) 53 Cal. App. 17. As indicated above, a contract requires a meeting of the minds on essential elements of the agreement.[116] The evidence produced at trial indicates that

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[116] See *Kim v. Servosnax, Inc.* (1992) 10 Cal.App.4th 1346, 1362. For a contract to be formed there must be a meeting of the minds between the parties on all material terms. *Id.* Without mutual assent, a contract does not exist. Civil Code §1500, subd. (2); *see also: Chakmak v. H.J. Lucas Masonry, Inc.* (1976) 55 Cal.App.3d 124, 129; *Merced County Sheriff's Employee's Association v. County of Merced* (1987) 188 Cal.App.3d 662, 670.

neither of the parties or the lawyers who represented them during the drafting of the MPA had any knowledge of the community interests the parties may have under a claim premised on the holdings of *Pereira* and *Van Camp.* The Court finds that the MPA did not constitute a valid waiver of the parties' respective interests as described in *Pereira* and *Van Camp.*

The Respondent has argued that Petitioner contends that the Court should invalidate all three post-nuptial agreements signed by the parties, including the First Supplemental Marital Property Agreement and the Second Supplemental Marital Property Agreement. The Respondent argues that Petitioner has not made any invalidity or enforceability contentions that are specific to the two supplemental agreements. The parties each argue that if the MPA is set aside, any supplements to it should be set aside. The Court accordingly rules that the First Supplemental Marital Property Agreement and the Second Supplemental Marital Property Agreement are set aside pursuant to the Court's rulings in this Statement of Decision. The Court makes no ruling with regard to validity and/or effect of any other documents or deeds executed by the parties.

The Court does not find sufficient evidence to support Respondent's contention that Petitioner is barred from challenging the validity of the MPA on the basis of the doctrines of laches, ratification, and estoppel.

This shall constitute the Court's Statement of Decision pursuant to Code of Civil Procedure §632 and Rule 3.1590 of the California Rules of Court.

The tentative decision does not constitute a judgment and is not binding on the Court. Any party affected by the judgment may, within 15 days after the proposed statement of decision has been served, serve and file objections to the proposed statement of decision or judgment.

The Court will, within 10 days after expiration of the time for filing objections to the proposed judgment or, if a hearing is held, within 10 days after the hearing, sign and file its judgment. The judgment so filed constitutes the decision on which judgment is to be entered under Code of Civil Procedure section 664.

The Petitioner is ordered to prepare and file a judgment in accordance with the above Statement of Decision at the end expiration of the period described above unless otherwise ordered.

Dated this 7st day of December, 2010

JUDGE SCOTT M. GORDON

[i] The text of the March 31, 2004 Marital Property Agreement ("MPA"), excluding the Exhibits, is as follows:

NOTICE TO PARTIES: THIS MARITAL PROPERTY AGREEMENT AFFECTS IMPORTANT PROPERTY RIGHTS. YOU SHOULD SEEK INDEPENDENT LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT.

MARITAL PROPERTY AGREEMENT

This Martial Property Agreement (this "Agreement") is entered into this 1st day of March, 2004, between Frank McCOURT ("Frank") and JAMIE McCOURT ("Jamie"), in the city of Brookline, State of Massachusetts with reference to the following facts:

1. FRANK and JAMIE are contemplating moving to California and desire to define their property rights in California.
2. FRANK and JAMIE are presently married.
3. FRANK has disclosed to JAMIE that he holds directly and as a beneficiary of trusts, substantial property interests and significant income from various sources, including, without limitation, his business and investment interests.
4. JAMIE has disclosed to FRANK that he holds directly and as a beneficiary of trusts, substantial property interests and significant income from various sources, including, without limitation, her business and investment interests.
5. FRANK has been advised to seek separate and independent counsel to advise him of his rights and obligations under this Agreement.

6. JAMIE has been advised to seek separate and independent counsel to advise her of her rights and obligations under this agreement.
7. For good and valuable consideration, including, without limitation, the mutual promises contained in this Agreement, the parties agree to define their respective rights in the income, assets, and liabilities and other property that each of them have or may acquire. The parties intend that, except as may be expressly set forth in this Agreement, all property, real and personal, currently owned by either of them shall be at that party's separate property, and that neither shall acquire any interest or right in any of the property of the other.

FRANK and JAMIE hereby agree as follows:

1. <u>Acquiring California Residence</u>

This agreement shall become effective upon either or both of JAMIE and FRANK becoming residents of California and subject to California law with respect to division of their assets for any reason (the "Effective Time"). The rights of JAMIE AND FRANK with respect to the property owned by either of them at the Effective Time or acquired after the Effective time shall be subject to the terms of this Agreement. If for any reason neither party becomes a resident of California or subject to California law with respect to the division of their assets, then this Agreement shall not be effective for any purpose.

2. Disclosure of Property

A. FRANK discloses that he has substantial assets including the real and personal property set for in Exhibit A.

B. JAMIE discloses that she has substantial assets including the real and personal property set forth in Exhibit B.

C. The foregoing disclosures are for courtesy only and not an inducement for either to enter into this Agreement. FRANK and JAMIE acknowledge and agree that each is willing to enter into this agreement regardless of the nature or extent of the present or future assets, liabilities, income or expenses of the other. FRANK and JAMIE each waive any right which either of them may have to disclosure of the property or financial obligations of the other party beyond the disclosure provided in this Agreement.

3. Representation by Independent Counsel

A. FRANK acknowledges that he has been advised to be represented by independent counsel of his choice. JAMIE acknowledges that she has been advised to be represented by an independent counsel of her choice. FRANK and JAMIE each consent to their joint representation by Bingham McCutchen LLP in the preparation of this Agreement. FRANK and JAMIE each have read this Agreement with care and believe that he or she is fully aware of and understands the contents thereof and their legal effect. FRANK and JAMIE acknowledge that

each of them was advised to seek independent counsel with respect to consenting to their joint representation.

4. Transmutation of Property Owned Upon Obtaining California Residence

A. FRANK and JAMIE agree that, except as provided in Paragraph 7 and 8, below, all property, including the property set forth in Exhibit A, belonging to FRANK at Effective Time, shall be his sole and separate property on and after the Effective Time. FRANK shall have sole management and control over the property, and the property shall be subject to his disposition in all respects as his separate property. JAMIE shall not have any rights of management or control over FRANK's separate property by virtue of either of them obtaining California residence.

B. FRANK and JAMIE agree that, except as provided in paragraph 7 and 8 below, all property, including the property set forth in Exhibit B, belonging to JAMIE at Effective Time, shall be her sole and separate property on and after the Effective Time. JAMIE shall have sole management and control over the property, and the property shall be subject to her disposition in all respects as her separate property. FRANK shall not have any rights of management or control over JAMIE's separate property by virtue of either of them obtaining California residence.

C. The foregoing characterization of the property owned by each of FRANK and JAMIE at the Effective Time as the separate property of FRANK and JAMIE,

respectively, on and after the Effective Time is intended to and shall constitute a transmutation into separate property of property that would have otherwise become at the Effective Time quasi community property or community property, as provided under California Family Code section 850(a). Said transmutation was freely entered into by both FRANK and JAMIE, without compulsion or duress of any kind. FRANK and JAMIE each waive any right to reimbursement under California Family Code Section 2640 with respect to said transmutation.

D. For purposes of this Paragraph 4, property titled in FRANK's name shall be FRANK's property, and property titled in JAMIE's name shall be JAMIE's property, provided however all property on exhibit A is FRANK's property, and all property on exhibit B is JAMIE's property.

5. <u>Mutual Waiver of Marital Rights in Separate Property</u>

A. FRANK and JAMIE agree that each party relinquishes all right, claim or interest, whether actual, inchoate or contingent, in law and in equity, that either of them may acquire in the separate property of the other by reason of marriage, including without limitation, community property rights.

B. Any preexisting will, codicil, declaration of trust or any other instrument which disposes of the estate of the other on death, shall remain in full force and shall not be revoked in whole or in part by the occurrence of FRANK and/or JAMIE obtaining California residence.

C. Nothing contained herein shall constitute a waiver of either party of any bequest or devise which the other party may choose to make him or her by will, codicil, declaration of trust or any other dispositive instrument.

D. All rents, issues, profits, increase, capital gains from the sale of assets, appreciation and income from the separate property of either party shall remain the separate property of that party. A change in the form of the separate property of either party shall not constitute a change in characterization.

E. Any and all gifts received by either party from any third party shall remain the separate property of that party.

F. The occurrence of commingling or otherwise failing to segregate the separate property of separate income of either party shall not constitute a change of characterization of property.

G. Except as provided in Paragraph 8 below, no property may be transmuted absent an agreement in writing executed by both parties. Any purported oral transmutation shall be void.

H. In the event that any community property is invested or is used to acquire, in whole or in part, any property which is separate property of one or both parties, the community shall not thereby acquire an interest in such property. Rather, the community shall be entitled to reimbursement of the amount so invested, without interest or adjustment for change in monetary values.

I. FRANK and JAMIE acknowledge that form time to time either of them may obtain loans to purchase property or loans which are secured by property in which either of them have an interest. The proceeds of any such loan shall be separate

property of the borrower, notwithstanding that the lender may intend that the repayment be made from community property assets or income. Any property purchased with such borrowed funds and any property which secures such a loan shall remain the separate property of the borrower.

6. Separate and Community Obligations

A. All unsecured obligations set forth in exhibit A of this Agreement shall remain the separate obligations of FRANK. JAMIE shall not be liable for those obligations, and FRANK shall indemnify JAMIE from them.

B. The unsecured obligations set forth in Exhibit A shall be paid from FRANK's separate income or separate property funds, at his election.

C. All unsecured obligations set forth in Exhibit B of this Agreement, shall remain the separate property obligations of JAMIE. FRANK shall not be liable for those obligations, and JAMIE shall indemnify FRANK from them.

D. The unsecured obligations set forth in Exhibit B shall be paid form JAMIE's separate income or separate property funds, at her election.

E. All obligations secured by, or incurred for the purchase of, real property set forth in Exhibit A shall remain the separate obligations of FRANK. JAMIE shall not be liable for those obligations, and FRANK shall indemnify JAMIE from them.

F. All obligations secured by, or incurred for the purchase of, real property set forth in Exhibit A shall be paid from FRANK's separate income or separate property funds, at his election.

G. All obligations secured by, or incurred for the purchase of, real property set forth in Exhibit B shall remain the separate obligations of JAMIE. FRANK shall not be liable for those obligations, and JAMIE shall indemnify FRANK from them.

H. All obligations secured by, or incurred for the purchase of, real property set forth in Exhibit B shall be paid from JAMIE's separate income or separate property funds, at her election.

I. Except as provided for in Paragraph 6.A. through 6.H., above, 6.J., below, and unless FRANK and JAMIE shall first agree in writing, obligations incurred during marriage other than obligations incurred for the joint benefit of the parties shall be separate obligations of the party incurring the obligation.

J. Joint living expenses shall be paid from separate income or from separate property funds of either FRANK or JAMIE without the right of reimbursement therefore.

K. The term "joint living expenses" as used in this Agreement, includes: food; household supplies; real property taxes, maintenance expenses and repairs on such property which the parties may occupy as their principal place of residence; utilities; telephone; laundry; cleaning; clothing; medical and dental expenses; medical, life, accidental, and auto insurance; gasoline, oil and auto repairs; entertainment; travel; and joint gifts.

7. <u>Limitations on Community Property</u>

A. All property transmuted into community property by an agreement in writing executed by both parties shall be community property.

B. All property, other than additions to either party's separate property that is acquired with community property shall be community property.

C. All rents, issues, profits, increase, capital gains from the sale of assets, appreciation and income from community property shall be community property.

D. In the event that FRANK and JAMIE use community property funds to purchase real property, and in the event that FRANK and JAMIE take title to such real property as husband and wife as their community property, and in the event that they obtain a loan or finance or refinance such real property, then the proceeds of such a loan shall be an obligations for which their community property is liable.

E. There shall be no source of community property except as provided in Paragraphs 7.A. through 7.D., above.

8. <u>Gifts between FRANK and JAMIE</u>

FRANK and JAMIE shall be entitled to make gifts to each other of items which are of personal nature, such as jewelry, clothing, art and furniture and similar items. In the event that one transfers any such item with the value exceeding $10,000 to the other, but the transferor does not intend the transfer to be a gift, it shall be the responsibility of the transferor to give a contemporaneous written statement that the transfer is not intended as a gift, but rather is intended to retain its original character. With the limited exception of gifts of personal nature, as provided in this Paragraph

8, all purported transfers between the parties shall be governed strictly by Paragraph 5.G., above.

9. Income Tax Returns

A. The election, if any, of the parties to file Federal or State income tax returns on a joint return shall not constitute a creation of any community property or other right or interest in contravention of this Agreement.

B. In the event FRANK and JAMIE elect to file joint Federal and State income tax returns, any tax liability shall be paid as follows: FRANK's separate property shall pay his tax liability, if any, attributable to his separate property; JAMIE's separate property shall pay her tax liability, if any attributable to her separate property, and the community shall pay any tax liability attributable to community property, if any. All tax refunds shall be shared in the same fashion as above. In the event of an audit resulting in the imposition of additional taxes, penalties, and/or assessments, FRANK's separate property, JAMIE's separate property, and the community shall pay any additional taxes, penalties and assessments and costs of audits in proportion to how their respective incomes bear to the entire amount of additional taxes, penalties and/or assessments. Costs shall include accountant's fees, attorney's fees, and other related costs.

10. Further Assurances

Each party shall, on the request of the other, take all steps, and execute, acknowledge and deliver to the other party all further instruments necessary or

expedient to effectuate the purpose of this Agreement or to confirm the separate property character of any asset which is the separate property of one of the parties. This may include the execution, acknowledgement and delivery of such deeds and other instruments as may be necessary or expedient to confirm the parties' respective interests in real property.

11. Parties Bound

This agreement shall bind and insure to the benefit of the parties to it, and of their respective heirs, executors, administrators, personal representatives, successors and assigns.

12. No Other Agreements; Modifications

A. This Agreement contains the entire understanding and agreement of the parties, and there have been no promises, representations, agreements, warranties or undertakings by either party to the other, either oral or written, of any character or nature, except as set forth in this Agreement. This Agreement may be altered, amended, or modified only by an instrument in writing, executed and acknowledged by the parties to this agreement and by no other means. Each party waives any right to claim that this Agreement was modified, cancelled, superseded or changed by an oral agreement, course of conduct or estoppel.

B. The parties acknowledge that they occasionally may use expressions such as "our property," "our company" or "our bank account" when referring to property which by the terms of this Agreement is separate property. The parties further acknowledge that form time to time they may commingle separate and

community property, or that they may make statement or actions which are or appear to be inconsistent with the terms of this Agreement. None of the above shall alter, amend or modify the terms of this agreement.

13. Applicable Law

This Agreement shall be subject to and interpreted under the laws of the State of California. The parties agree that it is their intent that this Agreement cover all rights in property, whether the property is situated within or without the State of California.

14. Separability

If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the Agreement shall remain in full force and shall in no way be affected.

15. Captions

The captions of the various sections in this Agreement are for convenience only, and none of them is intended to be any part of the text of this Agreement or intended to be referred to in construing any provision of it.

16. No Waiver of Privilege

Notwithstanding that the respective attorneys of the parties have attached their certifications to this Agreement, nothing contained in this Agreement shall be deemed to be a waiver of the lawyer client privilege or the attorney work product

rule. All confidential communications between the parties and their respective attorneys shall remain subject to the lawyer-client privilege.

17. Counterparts

This Agreement may be executed in counterparts, and so executed, shall constitute one agreement, binding on each of the parties, notwithstanding that all parties are signatories to the same counterpart.

IN WITNESS WHEREOF, FRANK McCOURT and JAMIE McCOURT have executed this MARITAL PROPERTY AGREEMENT on the date first written above.