

Daily Journal

Even Santa Needs a Lawyer — Gift Giving Raises Knotty Issues

By Peter M. Walzer

Long ago, the Scrooge of the law of transmutation intruded into the sanctity of gift giving, but few knew about it. Whether you are giving or receiving that special holiday gift, you should think twice about what it really means. In this day and age, it is not just the thought that counts. To make a gift really mean something, you better transmute it.

Consider the law relating to gifts from your spouse. Your spouse may give you clothing, jewelry or other tangible articles of a personal nature that have a nominal value, but gifts that are of substantial value will remain either the donor's community or separate property unless there is a writing to the contrary. (Family Code Section 852(c)). This law was not enacted by popular acclaim.

To add insult to injury, you will not know if your gift has strings attached until you divorce. Only at that time will a judicial officer determine whether that gift is of substantial value. The judicial officer will make the determination after reviewing whether the gift was substantial in light of your financial circumstances. Don't even think that special gift — such as a car, boat or valuable jewelry — is yours to keep unless you get it in writing.

The writing must be "an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." (Family Code, Section 852(a); *Marriage of Steinberger*, 91 Cal.App.4th 1449 (2001)). If you really want to give a valid gift, I recommend you execute a greeting card that will be signed by both you and your spouse. It can say something like, "I love you. I am transmuting our community property (One-carat diamond solitaire with white gold ring that was bought at Costco with my earnings) to your separate property. Love Bob, _____ accepted by Janet _____, Dated: Dec. 25, 2006."

To avoid a claim of forgery, you may want to have the signatures notarized.

If you are not as careful as Bob and Janet, your gift may be set aside by your friendly judicial officer. If the gift is given by Bob to Janet and it was purchased with Bob's separate property and it is of substantial value, Bob will be awarded the diamond in the divorce. Janet will not be happy. If the gift is community property, Bob will be awarded half the value of the ring. Janet will still not be happy.

Holiday Gifts on Credit

Let's say Bob buys the ring on credit, but he purchases the ring with a credit card that was issued by the brokerage firm where Bob deposits his separate property trust funds. The creditor relies on Bob's trust funds as collateral for the credit card (as the loan officer will presumably testify to at trial). Bob will be awarded the ring in the divorce. On the other hand, if Bob uses a



community credit card, Bob will get only half the value of the ring back.

It is unlikely there will be many spouses signing transmutation agreements, so these issues are going to be an unpleasant surprise to deal with in divorce court. The well off may avoid these problems by executing a premarital agreement that covers gift-giving. A typical clause provides that gifts under a certain amount of money may be given without a writing. The amount the parties choose is entirely up to them.

Presents to Others

If you think giving gifts to your spouse is difficult, giving gifts to others may create even greater difficulty. You will be penalized for giving gifts without spousal consent. Family Code Section 1100(b) provides that "A spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse."

The lesson here is that if you wish to make a gift to a third party (without being subject to a claim for reimbursement and attorney fees and costs), you must have your spouse give his or her written consent to the gift. Otherwise, you may be breaching your fiduciary duty to your spouse. In the usual case, your spouse will have a claim for one-half of the cost of the gift and for his or her attorneys fees in pursuing the claim.

In extraordinary cases, such as where there is oppression, fraud or malice, the damages "shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty." (Section 1101(f)). Your spouse must raise his or her claim for reimbursement either at the time of divorce or your death, or "within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred." (Section 1101(d)).

You can petition the court to relieve you of the spousal consent requirement if the proposed transaction is in the best interest of the community or where consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity, or prolonged absence of the non-consenting spouse. (Section 1101(e)).

So if this is the year you received that special trinket from Tiffany or that Porsche Carrera you have always been longing for, make sure you dot your "i"s and cross your "t"s, because if you don't, you may have to pay that "gift" back when you can least afford it.

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