Missouri Law Review

Volume 43
Issue 4 *Fall 1978*

Article 10

Fall 1978

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a defendant may require that the laboratory technician who made the report testify in person.[35] This method is even more impractical than a requirement of actual unavailability, because defense counsel could selectively block the introduction of important evidence when the laboratory technician is unavailable.

Although the dissent in *Rhone* addressed the issue of admissibility of business records against criminal defendants under the confrontation clause, the issue was neither briefed nor argued in the Missouri Supreme Court. If this constitutional issue is properly raised on appeal, the result in *Rhone* should be avoided. Unless the requirements for admission are more stringent than those in *Rhone*, the court should find that the admission against a criminal defendant of an evaluative report under the business records hearsay exception violates the defendant's confrontation rights.[36]

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MARITAL PROPERTY AND TRANSMUTATION IN A NONCOMMUNITY PROPERTY STATE—CONVERSION FROM SEPARATE TO MARITAL PROPERTY

Daniels v. Daniels[1]

Prior to the dissolution of their marriage on July 8, 1976, Lawrence and Constance Daniels had participated in two marriage ceremonies. The first ceremony in 1967 was invalid. Constance, unware of this invalidity, transferred her savings account into joint names and relinquished control to Lawrence. The savings account funds were subsequently used to make $5,800 in mortgage payments and repairs on Lawrence's house, and $200 was used to establish a savings account in Lawrence's name.

35. IOWA CODE ANN. § 749A.2 (West Supp. 1977).

36. The question whether a laboratory report may be used in a criminal prosecution if Federal court may have been resolved in *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977) holding such a report inadmissible under the Federal Rules of Evidence.

1. 557 S.W.2d 702 (Mo. App., D.K.C. 1977).

Lawrence and Constance were validly married in 1973. After this second ceremony, Lawrence brought home a card for Constance to sign authorizing her to act as his agent to withdraw funds from the account. Constance signed the card assuming the account would thereby be converted into joint names. For the duration of the marriage, Constance thought of the savings account as "ours," and deposited her earnings into the account. However, Lawrence did not change the account into joint names. He retained total control of the account and made all disbursements. Apparently there was no express or oral agreement by Lawrence to convert the account into joint names,[2] but he did spend some of the funds for joint purposes. After the parties had separated but prior to the dissolution, Lawrence withdrew $9,455 from the account, leaving a balance of $469.

The circuit court ordered Lawrence to pay $3,700 to Constance "in order to accomplish an equitable division of the marital property."[3] Lawrence appealed, claiming the circuit court erred in dividing the funds in the savings account because the account was his separate property. The Kansas City District of the Missouri Court of Appeals affirmed and held that even if the savings account had been separate property originally, the entire account had been converted into marital property by the principle of transmutation. The court stated that the "principle is that a spouse may by agreement, either express or implied, or by gift, transmute an item of separate property into marital property."[4]

Since the enactment of the Dissolution of Marriage Act, Missouri courts have been confronted on several occasions with claims that the separate property of a spouse has been converted or "transmuted" into marital property in the course of the marriage. Missouri courts have assumed that such a conversion is permissible and have created, on a case by case basis, an incomplete set of rules.[5] First, if property acquired by one spouse prior to marriage remains titled solely in his name during the marriage, the property is separate in the absence of a clear showing

2. The appellate decision does not mention the existence of an express agreement. There might have been a verbal agreement, found inadmissible due to the husband-wife confidential communication privilege. There are exceptions to this privilege recognized for the division of marital property pursuant to dissolution that have almost eliminated the privilege in this area. Therefore, if such statements were made, they should have been admissible. *See* Triplett, *Confidential Communications Privilege of Husband and Wife: Application Under the Missouri Dissolution Statute,* 43 Mo. L. Rev. 235 (1978).

3. 557 S.W.2d at 703. It is not clear whether the circuit court actually considered the credit union account as marital property. Section 452.330.1(2), RSMo (Supp. 1975) would permit the court to consider the account in dividing the marital property even if it were separate property. The court of appeals, however, assumed that the circuit court had found the savings account to be marital property.

4. 557 S.W.2d at 704.

5. *See* Krauskopf, *Marital Property at Marriage Dissolution,* 43 Mo. L. Rev. 157 (1978).

of intent to convert the property into marital property.[6] Second, separate property placed in joint legal title during the marriage is presumed to be a gift to the marital partnership unless clear and convincing evidence shows the transfer was not intended as a gift.[7] Third, property purchased during the marriage and jointly titled is presumed to be marital property unless the property is acquired in exchange for separate property and "it is shown by clear and convincing evidence that it was not intended as a . . .settlement. . .or a gift to the other spouse."[8] Fourth, property purchased during the marriage but not placed in joint names is presumed to be marital property unless the property was acquired in exchange for separate property and "there is an absence of evidence that such property was intended as a contribution to, or a gift to the other spouse."[9] Fifth, if both separate and marital property is sold during the marriage and the proceeds commingled for the purpose of buying new property, that new property, regardless of the form of its legal title, is marital property.[10]

The *Daniels* decision is the latest opinion concerning the post-marital conversion of separate property into marital property. Because the savings account in *Daniels* was acquired by Lawrence prior to his marriage and legal title to the account remained in his sole name during the marriage, the account was presumptively his separate property under prior Missouri case law, and only a clear intent to convert the account into marital property could overcome this presumption. The *Daniels* decision, however, differs from prior Missouri cases involving similar facts because it expressly adopts the community property concept of "transmutation" as a justification for finding that separately-titled property acquired before marriage can be converted into marital property.[11] Prior Missouri cases recognized that such conversions are possible, but did not establish a real justification for the rule. In *Conrad v. Bowers* the court merely assumed that this type of conversion was permissible because "[t]he Missouri act does not prohibit one spouse during the marriage from making a contribution or a gift of any property . . . to the [marital com-

6. Jaeger v. Jaeger, 547 S.W.2d 207 (Mo. App., D. St. L. 1977) (stocks and bonds); Davis v. Davis, 544 S.W.2d 259 (Mo. App., D.K.C. 1976) (closely held corporate stock); Stark v. Stark, 539 S.W.2d 779 (Mo. App., D.K.C. 1976) (farm and residence); Cain v. Cain, 536 S.W.2d 866 (Mo. App., D. Spr. 1976) (farm); Conrad v. Bowers, 533 S.W.2d 614 (Mo. App., D. St. L. 1975) (residence).

7. Smith v. Smith, 561 S.W.2d 714, 717 (Mo. App., D.K.C. 1978); Vadnais v. Vadnais, 558 S.W.2d 249 (Mo. App., D.K.C. 1977).

8. Conrad v. Bowers, 533 S.W.2d 614, 624 (Mo. App., D. St. L. 1975). *Cf.* Forsythe v. Forsythe, 558 S.W.2d 675 (Mo. App., D.K.C. 1977) (parental gift during marriage to husband and wife is marital property).

9. Conrad v. Bowers, 533 S.W.2d 614, 624 (Mo. App., D. St. L. 1975).

10. Jaeger v. Jaeger, 547 S.W.2d 207, 211 (Mo. App., D. St. L. 1977).

11. A second distinguishing factor is that *Daniels* is the first Missouri case to actually hold that separately-titled property acquired before marriage was in fact

munity]."[12] Subsequent Missouri cases have relied on *Conrad* as the justification for the existence of the rule in Missouri.[13]

In an effort to substantiate the Missouri position on converting separately-titled property acquired before marriage into marital property, the court in *Daniels* relied on community property law to justify its decision. There are two reasons for this reliance. First, the Missouri Dissolution Act is a modified version of the Uniform Marriage and Divorce Act.[14] The Commissioners of the Uniform Act have stated that the separate-marital property distinction is based on the separate-community property concept of community property law.[15] Second, the noncommunity property states which have enacted the original version of the Uniform Marriage and Divorce Act have been reluctant to take a position on transmutation.[16] Noncommunity property states enacting the later versions of the Uniform Marriage and Divorce Act have dropped the separate-marital distinction and put all property of the spouses into a hotchpot.[17] As a result, Uniform Marriage and Divorce Act states have failed to provide sufficient precedent for resolution of this issue.

There are two major problems with relying on community property theory to validate the conversion of separate property into marital property in Missouri. First, community property states are not in agreement on the legality of converting property from separate to community status.[18] California law, upon which the court in *Daniels* relied, is the most liberal in finding that property may have been converted.[19] In California, separate property can be converted to community property by written or oral agreement, either express or implied, based on a preponderance of the evidence.[20] Merely calling the property "ours" has been held sufficient to transmute property in California.[21] In New Mexico, property can be converted from separate to community only

converted to marital property. All prior Missouri cases in which the issue was raised had found that a conversion had not occurred.

12. 533 S.W.2d 614, 621 n.10 (Mo. App., D. St. L. 1975).

13. See cases cited note 6 *supra.*

14. *See* Krauskopf, *supra* note 5.

15. FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (1974).

16. *See* Gaskie v. Gaskie, 188 Colo. 239, 244, 534 P.2d 629, 632 (1975) (it was found against the weight of the evidence that "the ranch ... somehow lost its separate identity ... and merged into a family asset"); Young v. Young, 329 A.2d 386, 390 (Me. 1974) (court expressly declined to decide whether transmutation is possible in Maine).

17. Uniform Marriage and Divorce Act § 307 (Alternative A), *reprinted in* 9 UNIFORM LAWS ANN. 371 (Supp. 1978).

18. Annot., 120 A.L.R. 264, 265 (1939).

19. Krauskopf, *supra* note 5, at 192.

20. *In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483, 490 (1973); Kenney v. Kenney, 128 Cal. App. 2d 128, 274 P.2d 951 (1954).

21. W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 421 (1975); Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

upon "clear, strong and convincing" proof.[22] The positions in Washington,[23] Arizona,[24] and Nevada[25] fall somewhere between those of California and New Mexico. In Louisiana, oral and implied conversion is not recognized, and a spouse can transfer property to the community only after legal separation or in settlement of dowry promised before the marriage.[26] In Texas, it is not permitted under any circumstances to convert property from separate to community.[27] Idaho has not decided whether separate property can be converted into community property.[28]

Because California is not representative of any other community property state on the issue of transmutation, reliance on California precedent without analyzing the different rules of transmutation and without considering the various justifications for these differences is a questionable application of community property theory as embodied in the Uniform Marriage and Divorce Act. The Missouri courts should rely on a particular state's community property concepts only after careful consideration of all alternatives.

The second problem is that an agreement to convert separate property into marital property might be technically against public policy in Missouri. In the community property states which permit separate to community transmutation, the conversion of separate property into community property converts the property for all purposes. In Missouri, however, such an act converts the property only for the purpose of dissolution. It has long been held in Missouri that a combined separation and property agreement made in the absence of a pending divorce is against public policy.[29] A property agreement contingent upon divorce is unenforceable as against public policy in Missouri. Consequently, an agreement that converts property only for the purpose of dissolution is of questionable validity in Missouri.

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22. Burlingham v. Burlingham, 72 N.M. 393, 397, 244 P.2d 781, 783 (1952).

23. *In re* Shea's Estate, 60 Wash. 2d 810, 816, 376 P.2d 147, 150-51 (1962); Volz v. Zang, 113 Wash. 378, 194 P. 409 (1920).

24. Noble v. Noble, 26 Ariz. App. 89, 546 P.2d 358 (1976); Myrland v. Myrland, 19 Ariz. App. 498, 508 P.2d 757 (1973); Davis v. Davis, 9 Ariz. App. 49, 449 P.2d 66 (1969).

25. Williams v. Williams, 86 Nev. 47, 48, 464 P.2d 466, 467 (1970); Mullikin v. Jones, 71 Nev. 14, 25-30, 278 P.2d 876, 881-83 (1955).

26. Succession of Lewis, 157 So. 2d 321 (Ct. of App. 1963); LA. CIV. CODE ANN. art. 2446 (West 1952).

27. Tittle v. Tittle, 148 Tex. 102, 220 S.W.2d 637 (1949); Higgins v. Higgins, 458 S.W.2d 498 (Tex. Ct. App. 1970).

28. Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1973) (expressly declining to decide whether transmutation is possible in Idaho).

29. Harrison v. Harrison, 201 Mo. App. 465, 211 S.W. 708 (K.C. Ct. App. 1919).

There is nothing in the new Dissolution Act to indicate a legislative modification of this public policy.[30] In fact, the Act may lend support to the policy. The Act permits separation agreements only in contemplation of a pending separation or dissolution.[31] A strong argument can be made that this limited statutory exception excludes by negative implication all other forms of property agreements contingent on dissolution. However, such a rule is a needless anachronism. The prohibition against such agreements is a carryover from the days when divorce was considered a crime. In modern society there is no reason why spouses should not be able to provide for the division of property in the event of dissolution prior to actual separation. Nor is there any reason to deny a spouse the right to convert his separate property into marital property if he so desires.

Another problem not addressed by the *Daniels* court is the apparent inconsistency between the principle of transmutation on the one hand, and gift and contract law on the other. The principle of transmutation stands for nothing more than the proposition that a spouse can convert his separate property into marital property by gift or contract.[32] Nevertheless, such conversions are rarely analyzed in terms of the substantive requirements of gift and contract law.

A gift requires donative intent, delivery, and relinquishment of dominion.[33] Missouri gift law holds that "when the [spouse] denies *any* title was conveyed to the [other spouse], the burden is on [the donee] clearly to prove the gift . . ."[34] The court in *Daniels* found clear intent on the basis of three factors. First, the wife thought of the property as "ours" and assumed it was in joint names. Second, the wife made contributions to the account. Third, the husband had her sign a card which made her his agent with respect to the account.[35] None of these factors, nor all of them combined, would appear to demonstrate a clear intent by the *husband* to make a gift of any part of his separate account to his wife in the event they should be divorced in the future.

The other two requirements for a valid gift, delivery and clear relinquishment of dominion, were not even discussed in *Daniels*. If a spouse

30. Sections 452.300-.415, RSMo (Supp. 1975), do not contain language permitting preseparation property agreements.

31. § 452.325(1), RSMo (Supp. 1975).

32. No community property case was found which claimed that transmutation was a *sui generis* concept free of gift or contract law. As with many principles, however, the community property states frequently use this principle as a justification for finding a conversion without determining if a valid gift or contract has occurred. Thus, the principle becomes the justification and the original purpose behind the principle is forgotten.

33. Cartall v. St. Louis Union Trust Co., 348 Mo. 372, 153 S.W.2d 370 (1941).

34. State v. Bland, 353 Mo. 1073, 1079, 186 S.W.2d 443, 446 (1945).

35. 557 S.W.2d at 703.

invests funds in property and takes title in joint names with the other spouse, under Missouri gift law a gift is presumed and no delivery is required.[36] Absent a showing of joint legal title, however, proof of delivery is still required. There was no clear delivery of the savings account in *Daniels*. Nor was there a clear relinquishment of dominion by the husband of the account. Therefore, the husband could not have been found to have gifted the account to the marital community. If a conversion to marital property did occur, it had to be by contract.

The two primary requirements of a contract are mutual assent and consideration.[37] A showing of intent to enter a contract is easier than a showing of intent to make a gift. Nevertheless, the court's finding in *Daniels* that the husband demonstrated a clear intent to convert his property into marital property is suspect.

The court did not discuss whether consideration was present. If the husband purportedly contracted to convey the account in return for love and affection, then no valuable consideration existed at law.[38] Similarly, the husband's moral obligation to transfer his savings account because his wife made a past gift of her savings account is not sufficient consideration for a contract.[39] There was no evidence that the husband agreed to transfer the account in consideration of the wife making future deposits into the accounts. Consequently, it is unlikely that there was a valid contract to convey the husband's separate account to the marital community.

The Statute of Frauds poses still another problem in analyzing transmutation by contract. It basicly requires a written contract whenever real property, tangible personal property worth five hundred dollars, or intangible personal property worth five thousand dollars is to be conveyed.[40] The Missouri courts have completely ignored this problem in the past; it was not considered in *Daniels*.[41] Community property states, however, have addressed the issue. There is a split of authority whether the conveyance of property to the marital community is excepted from compliance with the Statute of Frauds. The issue is moot in Texas and Idaho because neither state has ever permitted conversion of property from separate to marital status. Louisiana requires a writing in the few

36. Napier v. Eigel, 350 Mo. 111, 116, 164 S.W.2d 908, 911 (1942).
37. RESTATEMENT (SECOND) OF CONTRACTS §§ 19-21, 75-84 (1973).
38. 1 A. CORBIN, CONTRACTS, 560-62 (1963).
39. RESTATEMENT (SECOND) OF CONTRACTS § 89A(e) (1973).
40. Agreements upon consideration of marriage, contracts for the sale of land, tenements, and hereditaments or any interest therein, the sale of goods over $500, the sale of securities, and the sale of personal property in excess of $5,000 that is not either goods or securities all are within the Statute of Frauds. §§ 432.010, 400.1-206, .2-201, .8-319, RSMo 1969.
41. In *Daniels* the exact balance of the account at the time of the purported conveyance is unclear. For purposes of this note it is assumed the conveyance was in excess of $5,000 and therefore within the Statute of Frauds.

instances it recognizes transmutation.[42] Washington requires a written document whenever separate real property is to be conveyed.[43] New Mexico law is unclear, but due to the high burden of proof, a writing appears to be a practical requirement.[44] Arizona has avoided the issue by not distinguishing gifts from contracts.[45] Only California and Nevada clearly do not require a writing.[46]

California and Nevada take the position that transmutation conveyances are excepted from the Statute of Frauds because such agreements are "executed" or fully performed upon inception.[47] This justification is nothing more than a fiction to circumvent the Statute of Frauds. The main purpose of the Statute of Frauds is to supply proof of the existence and terms of a contract. In the absence of a writing, the terms of a contract are very difficult to ascertain. If the terms of a contract are uncertain, a court cannot determine whether those terms have been fully performed.

A more plausible exception to the Statute of Frauds in transmutation cases is the principle of part performance.[48] The theory behind this exception is that the parties' reliance and subsequent actions prove the existence of the contract. The part performance, however, must be "in some degree evidential of the existence of a contract and not readily explainable on any other ground."[49] The wife's contribution to her husband's savings account in *Daniels,* for example, would be evidential of the existence of a contract. However, her behavior is explainable on other grounds; the investing of marital funds into the separate property of one spouse is a common occurrence. Thus if a contract had existed in *Daniels*, it should not have been excused from compliance with the Statute of Frauds by part performance,[50] and in the absence of a conveyance of separate property into joint legal title, courts should find part performance only in the rarest of circumstances.

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42. LA. CIV. CODE ANN. art. 2446 (West 1952).

43. Leroux v. Knoll, 28 Wash. 2d 964, 968, 184 P.2d 564, 566 (1947); *cf. In re* Janssen's Estate, 56 Wash. 2d 150, 351 P.2d 510 (1960) (discussion of various permissible and prohibited forms of oral transmutation agreements).

44. *See* Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963).

45. Schock v. Schock, 11 Ariz. App. 53, 461 P.2d 697 (1970), raised the validity of oral contracts but avoided express approval.

46. Estate of Bernatas, 162 Cal. App. 2d 693, 328 P.2d 539 (1958); Williams v. Williams, 86 Nev. 47, 48, 464 P.2d 466, 467 (1970).

47. Woods v. Security-First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956).

48. 2 A. CORBIN, *supra* note 38, § 420.

49. *Id.,* § 425.

50. Another reason for strict adherence to part performance requirements is that the atmosphere surrounding a dissolution is highly susceptible to perjured testimony. Because the Statute of Frauds was enacted to avoid the creation of contracts by perjury, it should not be easily avoided by characterizing transmutation conveyances as "partly performed."

The adoption of the transmutation principle in *Daniels* was unnecessary. The court apparently believed that the wife had a right to the contributions she made to her husband's account, and that transmutation was the easiest means to this end. The better method of achieving this result would have been to follow prior Missouri cases which denied transmutation but permitted the spouse to recover her contributions. In *Stark v. Stark,*[51] *Cain v. Cain,*[52] and *Conrad v. Bowers,*[53] a husband acquired inceptive title to real estate and subsequent to the marriage marital funds were used to pay off the balance of the mortgage on the property. In these cases, all three districts of the Missouri Court of Appeals agreed the property remained separate, but the spouse's contribution subsequent to the marriage was a factor to consider in dividing the marital property.[54] If there was not sufficient marital property to compensate the spouse, then an equitable remedy could have been requested to insure that the spouse would receive her monetary contribution to the separate property.[55] Thus, the holding in *Daniels* should have been that the savings account was Lawrence's separate property. The judge might have divided the marital property in light of the fact that Constance had contributed a considerable amount to Lawrence's separate account. If there were insufficient marital funds to cover Constance's contribution, the judge could have either repudiated the partial separation agreement between the parties[56] and used that property to make an equitable division or imposed a lien or trust in Constance's favor on the separate property going to Lawrence.

It is not clear whether *Daniels* will be followed by Missouri courts. There are serious problems with the principle of transmutation if it stands for the proposition that a spouse can convert separate property to marital status solely by intent. There is nothing wrong with the principle if it merely stands for the truism that a spouse may convert separate property to marital property by fully complying with either gift or contract law. If transmutation is properly used, the courts are most likely to find that conversion to marital property has occurred when a writing is

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51. 539 S.W.2d 779 (Mo. App., D.K.C. 1976).
52. 536 S.W.2d 866 (Mo. App., D. Spr. 1976).
53. 533 S.W.2d 614 (Mo. App., D. St. L. 1975).
54. Stark v. Stark, 539 S.W.2d 779, 783 (Mo. App., D.K.C. 1976); Cain v. Cain, 536 S.W.2d 866, 872-76 (Mo. App., D. Spr. 1976); Conrad v. Bowers, 533 S.W.2d 614, 624 (Mo. App., D. St. L. 1975).
55. In the event insufficient marital property exists to compensate the contributing spouse, an equitable lien, resulting trust, or constructive trust might be obtainable depending on the facts of a particular case. Cain v. Cain, 536 S.W.2d 866, 871 (Mo. App., D. Spr. 1976); Fulton v. Fulton, 528 S.W.2d 146 (Mo. App., D. Spr. 1975); Singleton v. Singleton, 525 S.W.2d 642 (Mo. App., D.K.C. 1975); Krauskopf, *supra* note 5, at 181-82.
56. The parties in *Daniels* divided $9,800 in property prior to the dissolution. The circuit court ratified the distributions.