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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHANNON M FALK,

C 08-1109 VRW

ORDER

Appellee,

v

MICHAEL T FALK,

Appellant.

_____ /

This case arises from a petition for relief filed in bankruptcy court by appellee Shannon Falk on July 20, 2007 pursuant to Chapter 11 of Title 11 of the United States Code. Doc #11 at 2. The petition sought declaratory relief to prevent foreclosure on marital property which was the subject of a pending marital dissolution proceeding. Id. Appellee filed a motion for summary judgment in which she asserted that certain partnership interests were transmuted in character from separate property into community property. Doc #11 at 3. Appellant Michael Falk filed a cross motion for summary judgment seeking a determination that the partnership interests were not community property. Doc #9 at 1. The United States Bankruptcy Court granted appellee's motion and

1 denied appellant's cross motion, holding that the partnership
2 interests were transmuted into community property. Doc #12, ER 10
3 at 1. Appellant filed a timely notice of appeal in this court.
4 Doc #8.

6 I

7 Appellant and appellee were married on September 9, 1989.
8 Doc #9 at 2. On June 2, 2004, they executed three separate marital
9 documents: an amendment to the Michael T and Shannon M Falk Marital
10 Trust (the "amendment"), the Property Agreement (the "agreement"),
11 and the Assignment of Interest in Limited Partnerships (the
12 "assignment"). Id. On January 1, 2006, appellee filed for a legal
13 separation in the Sonoma County superior court which was later
14 amended to a dissolution of marriage. Id.

15 Within the Chapter 11 bankruptcy proceedings that began
16 in 2007, appellee argued that the 2004 marital documents had
17 transmuted the partnership interests from appellant's separate
18 property to the community property of the parties. Doc #9 at 2-3.
19 The disputed interests are a 1.5% limited partnership interest in
20 110 West 40, LLC and a 3% limited partnership interest in Ten West
21 Thirty-Third Joint Venture. Id at 1.

22 The bankruptcy judge agreed with appellant that extrinsic
23 evidence should be excluded and that the purported transmutation of
24 the partnership interests into community property should be
25 determined by the marital documents alone. Doc #12, ER 6 at 1.
26 Looking to the agreement, the judge found an express declaration of
27 transmutation and on this basis granted appellee's motion for
28 summary judgment. Id at 2.

1 Appellant argues that the bankruptcy judge erred in
2 finding that the partnership interests were transmuted into
3 community property. Doc #9 at 5. In addition to disputing the
4 bankruptcy judge's interpretation of the agreement, appellant
5 contends that even if there was a transmutation, he should have the
6 opportunity to assert a defense of undue influence. Id at 6.

7
8 II

9 As a preliminary matter, appellee filed a motion to
10 augment the record in response to appellant's argument — made for
11 the first time on appeal (Doc #9 at 6) — that his wife had
12 subjected him to undue influence. Doc #10.

13 Specifically, appellee moves to include in the record
14 appellant's answer to the complaint for declaratory relief in the
15 bankruptcy court. Doc #10 at 1. Appellee argues that appellant's
16 answer was not initially designated as part of the record because
17 it was not relevant to the summary judgment proceedings in the
18 bankruptcy court. Id.

19 Federal Rule of Appellate Procedure 10 governs the
20 introduction of evidence in appellate proceedings. FRAP 10(e)(2)
21 expressly allows for correction or modification of the record,
22 stating that "[i]f anything material to either party is omitted
23 from or misstated in the record by error or accident, the omission
24 or misstatement may be corrected and a supplemental record may be
25 certified and forwarded."

26 It is within the court's discretion to consider matters
27 raised for the first time on appeal. In re Wind Power Systems,
28 Inc, 841 F2d 288, 290 n1 (9th Cir 1988). Appellee seeks to augment

1 the record with appellant's bankruptcy court pleading to establish
2 that the undue influence argument is, in fact, a newly-raised issue
3 on appeal. Appellant does not oppose the motion. Accordingly, the
4 motion to augment the record is GRANTED.

5
6 III

7 This appeal presents two issues: (1) whether the
8 bankruptcy court erred in finding that the partnership interests
9 were transmuted in character into community property and (2)
10 whether appellant may avail himself of a presumption under
11 California law under which a spouse may be presumed to exert undue
12 influence in connection with transactions.

13
14 A

15 Marital property in California is governed by California
16 Family Code section 760 which provides, "[e]xcept as otherwise
17 provided by statute, all property, real or personal, wherever
18 situated, acquired by a married person during the marriage while
19 domiciled in this state is community property." California law
20 governs the determination whether marital property is community
21 property or separate property.

22 California Family Code section 852(a) governs
23 transmutations of property: "A transmutation of real or personal
24 property is not valid unless made in writing by an express
25 declaration that is made, joined in, consented to, or accepted by
26 the spouse whose interest in the property is adversely affected."

27 The seminal case interpreting section 852(a) (formerly
28 California Civil Code § 5110.730) is In re Estate of MacDonald, 51

1 Cal 3d 262 (1990), under which an "express declaration" must
2 contain language that expressly states that the characterization or
3 ownership of the property is being changed. Id at 264. Also, the
4 court construed section 852(a) to preclude reference to extrinsic
5 evidence in the proof of transmutations. Id.

6 The interpretation of a contract without reference to
7 extrinsic evidence is a question of law. Kassbaum v Steppenwolf
8 Productions, Inc, 236 F3d 487, 490 (9th Cir 2000). A reviewing
9 court reviews a bankruptcy court's decisions on questions of law de
10 novo. See Diamant v Kasparian, 165 F3d 1243, 1245 (9th Cir 1999).
11 Because the finding of a transmutation here was based on the
12 marital documents alone, this court will review the bankruptcy
13 court's determination de novo.

14
15 B

16 In this case, the bankruptcy court found that the
17 agreement transmuted appellant's separate property interests in the
18 partnerships to community property. Doc #12, ER 6 at 2.
19 Specifically, the bankruptcy judge identified paragraph one of the
20 agreement as the instrument effecting the transmutation. Doc #12,
21 ER 6 at 2. That paragraph provided:

22 Except as otherwise provided in this Agreement, we
23 declare that all property owned by us on the date of
24 this Agreement, or hereafter acquired by us, title
25 to which is held (i) in both our names, including
26 property held in joint tenancy form, or (ii) titled
27 in the MICHAEL T AND SHANNON M FALK MARITAL TRUST
28 dated December 1, 2001, (unless specifically
designated as the separate property of either of
us), is our community property. We hereby agree to
change the character of any such joint property to
community property if it is not already titled as
community property.

1 Id at 2. The bankruptcy judge pointed to "we hereby agree to
2 change the character" as the express declaration of an intent to
3 transmute property. Id.

4 On the same day that the agreement was executed,
5 appellant and appellee also executed the amendment and the
6 assignment, which transferred the partnership interests to the
7 marital trust. Exhibit A to the amendment, entitled COMMUNITY
8 PROPERTY TRANSFERRED TO THE TRUST, listed the partnerships among
9 the transferred properties. Doc #12, ER 2 at 30. Nowhere among
10 these documents were the partnership interests listed as separate
11 property. The bankruptcy judge found that these three documents
12 read together satisfied section 852(a)'s requirements for
13 transmutation. Doc #12, ER 6 at 2.

14 Appellant contends that there was no express declaration
15 that he intended to transmute his separate property to community
16 property. Appellant points to a section of the amendment under the
17 heading "Character of Trust Property." Doc #9 at 2 (citing Doc
18 #12, ER 2 at 9). This section provides that "[a]ny property
19 transferred to or withdrawn from the trust shall retain its
20 character as community property or separate property after its
21 transfer or withdrawal." Id. Appellant argues that this language
22 belies any intention to transmute his separate property interest in
23 the partnerships to community property.

24 Appellant further argues that the agreement contains
25 conflicting provisions which cannot constitute an express
26 declaration, as required by section 852(a). Doc # 9 at 5. While
27 paragraph one of the agreement states the parties' intention to
28 change any joint property to community property, paragraph two

1 states: "We declare that any property, or interest in property,
2 owned by either of us * * * and that is registered or otherwise
3 held in either of our names alone or that is designated as separate
4 property under our Trust is the separate property of that spouse."
5 Doc #12, ER 2 at 8. Also, appellant contends that because
6 paragraph three states that the purpose of the agreement is to
7 determine the character of the described property "upon the death
8 of either of us," the agreement is not effective upon the
9 dissolution of the marriage. Doc #9 at 5.

10 Appellant's arguments are unavailing. While the
11 amendment does provide that property transferred to the trust will
12 retain its character as community or separate property, appellant
13 ignores the effect of the agreement. While the assignment itself
14 is not sufficient to transmute the partnership interests, the
15 agreement executed on the same day as the assignment effected the
16 transmutation to community property. The agreement expressly
17 states that property held in the marital trust is community
18 property and that any such joint or community property is changed
19 in character to community property if it was not already so titled.
20 Doc #12, ER 2 at 8.

21 The other provisions of the agreement do not conflict
22 with the transmutation. The second paragraph dealt with
23 separately-acquired property and property designated as separate
24 under the marital trust. Id. The partnership interests were not
25 designated as separate property; on the contrary, they were listed
26 in Exhibit A to the amendment as "community property." Doc #12, ER
27 2 at 30.

28 \\

1 Appellant's contention that the agreement is only
2 effective upon the death of either of the parties also fails. That
3 reading would render the agreement without effect. A more
4 reasonable reading of the provision is that the agreement
5 effectively transmutes the property as of the day that it was
6 executed; in the event of the death of either party, his or her
7 property would then be determined according to the effect of the
8 agreement.

9 The court agrees with the bankruptcy judge's
10 determination that the agreement, coupled with the assignment,
11 effectively transmuted the property into community property.

12
13 IV

14 Next, the court turns to appellant's late-raised argument
15 that he should be given the benefit of a presumption that he was
16 subject to his wife's undue influence in executing the marital
17 documents. Doc #9 at 6. Appellant claims that he was not given
18 the opportunity to address the affirmative defense in the
19 bankruptcy court proceedings because the court entered judgment on
20 appellee's motion for summary judgment. Id. Appellant seeks
21 reversal of the bankruptcy court's entry of summary judgment in
22 appellee's favor and a remand for further hearing on the undue
23 influence issue. Id at 7.

24
25 A

26 A reviewing court will not "ordinarily consider
27 arguments advanced for the first time on appeal." In re Hansen,
28 368 BR 868, 880 (9th Cir BAP 2007) (citing Stewart v US Bancorp,

1 presumption of undue influence to apply: (1) an interspousal
2 transaction under which (2) one spouse obtains an advantage over
3 the other. In re Marriage of Matthews, 133 Cal App 4th 624, 629
4 (4th Dist 2005). This presumption is implicit in California Family
5 Code section 721(b), which requires that the rules governing
6 fiduciary relationships apply to transactions between spouses. *Id*
7 at 628-29.

8 Here, appellant baldly asserts that the execution of the
9 marital documents constituted a "transaction" and that appellee
10 gained an "advantage," but offers no specifics to support these
11 assertions. Appellant fails to identify what in or about the
12 marital documents effected a transaction, and does not explain how
13 appellee gained an advantage over him.

14 Appellant cites In re Marriage of Matthews to support his
15 undue influence claim, but Matthews is inapposite. Mathhews had to
16 do with one spouse executing a quitclaim deed to property bought
17 jointly. *Id* at 627. The execution of the quitclaim deed by the
18 spouse was unquestionably a "transaction" and the "advantage" was
19 that the other spouse thereafter held sole title to the property.
20 *Id* at 632. Here, appellant fails to make a parallel showing of the
21 elements necessary for the undue influence presumption.

22 There is no basis for this court to consider the undue
23 influence issue in connection with this appeal.

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For the foregoing reasons, appellee's motion to augment the record (Doc #10) is GRANTED. The bankruptcy court's order granting summary judgment in favor of appellee is AFFIRMED. The clerk is directed to close the file.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge