Clarifying the Concepts of Transmutation and Commingling
by Joel R. Brandes

The terms “transmutation” and “commingling” are frequently referred to with regard to marital property and separate property determinations in a matrimonial action. They are often used together in the same sentence, which can be confusing. Yet, there is a distinct difference between the two terms, which we will discuss in this article.

Under Domestic Relations Law § 236(B)(1)(c) “marital property” means all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held. There is a presumption that such property is marital property subject to equitable distribution, unless proven to be separate property. Separate property is:(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; and (4) property described as separate property by written agreement of the parties.[1]

In determining whether property is separate or marital, it has been held that the court should construe the term "marital property" broadly and the term "separate property" narrowly.[2]

Transmutation and commingling are distinct concepts. Transmutation is a change in the nature of something. In family law it has been defined as the transformation of separate property into marital property, or of marital property into separate property. [3] In some other states the doctrine of transmutation has been adopted. Under this doctrine, comingling separate property with marital property automatically converts the separate property to marital property, at least in some instances. New York's emphasis on the product of the marital partnership led to a rejection of the automatic transmutation doctrine.

The closest thing to the doctrine of transmutation that we have in New York is the rebuttable presumption that arises under the Banking Law. Under Banking Law §675 (a) a deposit of cash, securities or other property in a joint account with rights of

[1] Domestic Relations Law § 236(B)(1)(c)

[2] Sarafian v. Sarafian, 140 AD2d 801, 528 NYS2d 192 (3rd Dept., 1989); Helen A.S. v. Werner R.S. 166 AD2d 595, 560 NYS2d 707 (2nd Dept., 1990).

[3] Black's Law Dictionary (10th ed. 2014).

survivorship (payable to either or the survivor) creates a moiety for the co-depositor and becomes the property of such persons as joint tenants. Unless it is clearly shown that there was no donative intent, as for example where the deposit was a matter of convenience, the joint account is marital property for distribution purposes in the event of a dissolution of the marriage. In this instance a comingling of separate with marital property may be said to convert separate property into marital property.

In New York, the use of funds from an account that is separate property to pay marital expenses does not change the character of the account to marital property.[4] The use of marital property or funds to improve separate property does not transmute the separate property into marital property.[5] Nor can real property that is separate property be transformed or transmuted into marital property by the efforts and contributions of the nontitled spouse. [6] The use of separate property by a nontitled spouse toward the acquisition or improvement of pre-marital separate property cannot serve to transform the separate property into marital property.[7]

However, separate property contributions by a nontitled spouse to the titled spouses separate property could result in an appreciation of the value of the titled spouse's separate property during the marriage, which appreciation would be subject to equitable distribution. [8]

Commingling is defined as a mixing together. [9] In matrimonial law it generally occurs when separate funds are deposited in a marital account through a deliberate act by the separate property holder, which is presumed to be a gift to the marriage, with the deposited funds losing their character as separate property. [10] By putting separate property in a joint account during the marriage, it is presumed that the party doing so intended to make a gift of the separate property to the other spouse. [11]

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[4] See Giannuzzi v Kearney, 160 AD3d 1079, 1081, 74 NYS3d 123 [3d Dept 2018].

[5] Ceravolo v DeSantis, 125 AD3d 113, 1 NYS3d 468 [3d Dept 2015].

[6] Macaluso v Macaluso, 124 AD3d 959, 1 NYS3d 464 [3d Dept 2015], 961–62, (3 Dept, 2015)

[7] Ceravolo v. DeSantis, supra.

[8] See Domestic Relations Law § 236[B][1][d][3].

[9] Black's Law Dictionary (10th ed. 2014)

[10] See Ceravolo v DeSantis, supra.

[11] DiNardo v DiNardo, 144 AD2d 906, 534 NYS2d 25 [4th Dept 1988]; Lischynsky v Lischynsky, 120 AD2d 824, 501 NYS2d 938 [3d Dept 1986])

Commingling separate property with marital property will transmute the separate property into marital property, unless it is established that there was no intention to make it marital property. Separate property can be transmuted into marital property where the actions of the titled spouse demonstrate his intent to transform the character of the property from separate to marital.[12]

The presumption that separate funds are transmuted into marital property when commingled with marital property may be rebutted by establishing by clear and convincing evidence that the account was created or deposit made only as a matter of convenience.[13] The party seeking to rebut the presumption that deposit of funds into a joint account was intended as a gift must adequately trace the source of the funds to his or her separate property, and demonstrate that the deposit was made only as a matter of convenience.[14] A court is not bound by one's own account of his finances, and where a party fails to trace the source of deposits claimed to be separate property, the court is justified in treating them as marital property.[15]

In Belilos v Rivera, [16] the presumption was successfully rebutted. There, the Appellate Division found that plaintiff established through her own testimony, the defendant's testimony, and copies of checks from her uncle's estate, that during the marriage, she inherited $150,000 from her uncle. The plaintiff deposited the inheritance monies into one of the parties' joint accounts because she did not have any bank accounts titled solely in her name. The defendant admitted at the trial that, at his deposition, he testified that he intended to return the plaintiff's inheritance monies to her when the litigation settled, and that he intended to make things "right" with respect to the plaintiff's inheritance. Thus, contrary to the defendant's contentions, he recognized the separate character of the inheritance monies, such that the presumption that the commingled funds were marital was overcome by clear and convincing evidence that it was done for purposes of convenience and that a gift was not intended.

However, in DiNardo v. DiNardo, [17] it was not rebutted. There, the Appellate

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[12] Spera v Spera, 71 AD3d 661, 898 NYS2d 548 [2d Dept 2010]

[13] Crescimanno v Crescimanno, 33 AD3d 649, 649, 822 NYS2d 310, 311 [2d Dept 2006]

[14] Helen A.S. v Werner R.S., 166 AD2d 515, 560 NYS2d 797 [2d Dept 1990]

[15] Lischynsky v Lischynsky, 120 AD2d 824, 826, 501 NYS2d 938 [3d Dept 1986]; Hymowitz v Hymowitz, 119 AD3d 736, 991 NYS2d 57 [2d Dept 2014].

[16] 164 AD3d 1411, 84 NYS3d 536 [2d Dept 2018]

[17] 144 A.D.2d 906, 534 N.Y.S.2d 25 (4th Dep't 1988)

Division held that a $32,214.00 check received by the husband from his mother's estate, plus accrued interest, was converted to marital property by comingling it with other assets in a joint account where it remained for a period of seven years. By placing this check in a joint account, a presumption arose that the parties were entitled to equal shares of the account. Defendant's proof failed to overcome the rebuttable presumption.

There is a presumption that a spouse’s conveyance of inherited property, which is separate property, to himself and his spouse, as tenants by the entirety, is marital property.[18] In order to rebut this presumption, the party making the conveyance is required to come forward with clear and convincing proof that he did not intend his spouse to have an ownership interest in the property, but merely placed his or her name on the deed for the sole purpose of convenience.[19]

Popowich v Korman[20] is an interesting case because the opinion of the Appellate Division, First Department could be construed as holding that a separate account is transmuted into marital property when a spouse deposits marital funds into that separate account. However, that is not what it held. The Supreme Court found that the value of plaintiff’s brokerage account as of the commencement of the action was $1,691,673.51 and that the increase in value of the account during the marriage, $528,022, was marital property. Without explanation, it failed to make any equitable distribution of this marital asset to defendant. The Appellate Division agreed with defendant that, because of the commingling of plaintiff’s separate property in the brokerage account with other property acquired during the marriage, the entire account should be deemed marital property. The dissent contended that plaintiff’s ability to value the brokerage account as of the commencement date was sufficient to entitle her to retain as her separate property an amount equal to that commencement date value. The majority pointed out that the dissent ignored the trading activity that occurred during the course of the marriage and the deposits of substantial sums representing marital property during the marriage as well as the fungibility of money. Plaintiff did not make any efforts to trace, over the course of the marriage the property, in the account at the commencement date. The Court held that the brokerage account was marital property for the same reason the bank account in Fields v Fields [21] was marital property - because the husband commingled numerous marital funds in this account and failed to trace them sufficiently to delineate what might have been separate property.

Commingling only a part of separate property with marital property does not

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[18] Arnold v Arnold, 309 AD2d 1043, 1044, 765 NYS2d 686 [3d Dept 2003]; Rosenkranse v Rosenkranse, 290 AD2d 685, 686, 736 NYS2d 453 [3d Dept 2002].

[19] Currie v McTague, 83 AD3d 1184, 1185, 921 NYS2d 364 [3d Dept 2011]

[20] 73 A.D.3d 515, 900 N.Y.S.2d 297 (1st Dept.,2010)

[21] 65 A.D.3d 297, 882 N.Y.S.2d 67 (2009)

necessarily result in other separate property that has not been commingled being transmuted to marital property. [22]

Conclusion

Banking Law §678 allows depositors to establish accounts "for the convenience" of the depositor, and avoid the potential problem that could arise in the event of a divorce, where separate funds have been deposited into a joint account during the marriage. The making of a deposit of cash, securities or other property into such an account does not affect the title to the deposit, and the depositor is not considered to have made a gift of one half of the deposit or any additions or accruals thereon to the other person, and on the death of the depositor the other person does not have a right of survivorship in the account.[23]

Counsel should advise a spouse who seeks to keep his or her separate property separate, in the event of a divorce, to take advantage of this provision, when opening a joint account with separate property. Evidence that a spouse failed to deposit separate funds into such an account may be fatal to his argument that his deposit of funds into a joint account was done solely for purposes of convenience.

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[22] See Chernoff v. Chernoff, 31 A.D.3d 900, 903, 821 N.Y.S.2d 276 (2006)

[23] Banking Law §678