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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

Estate of FRANK JUNE KNOX, Deceased.

SHIRLEY J. KNOX,  
Petitioner and Respondent,

v.

MAVIS KNOX  
Objector and Appellant.

A144514

(Alameda County  
Super. Ct. No. RP13703075)

In this probate proceeding, Mavis Knox appeals from a January 5, 2015, judgment in favor of her step-mother Shirley J. Knox<sup>1</sup> on a petition to determine heirship.<sup>2</sup> The trial court found, in pertinent part, that (1) a certain annuity was community property of Shirley and her deceased spouse Frank; and (2) the legal characterization of the annuity

<sup>1</sup> Because all of the named persons in this proceeding share the same last name, we shall hereafter refer to them by their first names for clarity.

<sup>2</sup> Although the document filed on January 5, 2015, is entitled, “Final Statement of Decision,” the court granted “Judgment” in favor of Shirley in its decision. (See *Estate of Lock* (1981) 122 Cal.App.3d 892, 896 [“[a] memorandum of decision may be treated as an appealable order or judgment when it is signed and filed, and when it constitutes the trial judge’s determination on the merits”].) “By its terms,” the Final Statement of Decision issued in this case “constitutes a final determination on the petition and contemplates no further judicial action to give it vitality as [a judgment]. It is couched in terms of [a judgment], as signed, filed and entered: in our view, it should be treated as final and appealable, notwithstanding its label.” (*Id.* at p. 897.)

was not altered from community property to Frank's separate property when the beneficiary of the annuity was lawfully changed from Shirley to Frank's estate. On appeal Mavis argues the trial court erred in finding that the annuity remained community property after the change of the annuity beneficiary. We disagree, and accordingly, affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Shirley and Frank were married on August 16, 2005, and remained so until Frank's death on March 10, 2013. Mavis is one of several children born to Frank during a prior marriage.

In 2007, Frank sustained personal injuries in an automobile accident and received a monetary settlement. On October 3, 2008, he used the settlement moneys to fund a contract with Aviva Life Insurance Company, which provided him with an annuity of \$10,000, payable monthly for 15 years (hereafter referred to as the annuity). When originally issued the annuity listed Shirley as the sole beneficiary. However, before Frank's death, Shirley initiated a process to withdraw funds from the principal of the annuity. The funds were used for repairs on a marital residence and for other expenses necessary for both Shirley and Frank. As a result of Shirley's action, the annuity was reduced to \$8,235, payable monthly, and the annuity holder, Aviva Life Insurance Company, changed the beneficiary from Shirley to Frank's estate.<sup>3</sup>

Following Frank's death intestate, Shirley petitioned for letters of administration. She alleged that the sole asset of the estate consisted of community property in the form of the annuity.<sup>4</sup> Mavis filed both an objection to Shirley's petition and a competing

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<sup>3</sup> According to Shirley, and not disputed by Mavis, Clearwater, Inc., the company to which a portion of the annuity was sold, needed court approval for the transaction. Clearwater "obtained court approval in a Virginia court," for its purchase, and the beneficiary of the annuity was changed to the "Estate of Frank June Knox," at the direction of the Virginia court in accordance with Virginia law.

<sup>4</sup> Both the marital residence and certain rental property were owned by Shirley and Frank as joint tenants, and therefore those properties were not part of Frank's estate.

petition for letters of administration. On April 1, 2014, Shirley was appointed administrator of the estate and Mavis's petition for appointment was denied.

Thereafter, on June 27, 2014, Shirley filed a petition to determine heirship. Specifically, she asked the court to determine that she was entitled to inherit in its entirety the sole asset of the estate, the community-owned annuity. (See Fam. Code, § 780<sup>5</sup>; see also Prob. Code, §§ 100, subd. (a); 6401, subd. (a) <sup>6</sup>) Mavis opposed the petition, arguing that the court should treat the annuity as Frank's separate property as the parties might have been living separate and apart at the time of Frank's death, and, therefore, the court should award at least one-half of the annuity to the estate as Frank's separate property. (See Fam. Code, §§ 781, 2603, subd. (b) <sup>7</sup>; see also Prob. Code, § 6401, subd. (c)(3)(A).<sup>8</sup>)

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<sup>5</sup> Family Code section 780 reads: "Except as provided in Section 781 and subject to the rules of allocation set forth in Section 2603, money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage.

<sup>6</sup> Probate Code section 100, subdivision (a), reads: "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent."

Probate Code section 6401, subdivision (a), reads: "As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100."

<sup>7</sup> Family Code section 781 reads, in pertinent part: "(a) Money or other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is the separate property of the injured person if the cause of action for the damages arose as follows: [¶] (1) After the entry of a judgment of dissolution of a marriage or legal separation of the parties. [¶] (2) While either spouse, if he or she is the injured person, is living separate and apart from the other spouse."

Family Code section 2603 reads: "(a) 'Community estate personal injury damages' as used in this section means all money or other property received or to be received by a person in satisfaction of a judgment for damages for the person's personal injuries or pursuant to an agreement for the settlement or compromise of a claim for the damages, if the cause of action for the damages arose during the marriage but is not separate property as described in Section 781, unless the money or other property has been commingled with other assets of the community estate. [¶] (b) Community estate personal injury

A contested hearing was held on Shirley's petition to determine heirship, during which the trial court heard testimony from several witnesses including Shirley and Mavis and admitted into evidence certain documents. In its final statement of decision the court granted judgment in favor of Shirley. The court made the following specific findings: (1) Shirley and Frank were lawfully married on August 16, 2005, and there was no evidence presented that they were divorced or legally separated at any time relevant to the proceeding; (2) the personal injury settlement received due to the personal injuries sustained by Frank on June 16, 2007, was a community property asset, and no exceptions to that designation in Family Code section 781 were applicable; (3) the beneficiary of the annuity was lawfully changed from Shirley to Frank's estate; (4) Frank died intestate; and (5) "[b]ecause the proceeds of the annuity were community property pursuant to Family Code Section 780, and the legal characterization of those proceeds was not altered by the change of beneficiary, Probate Code section 6401(a) applie[d] to their ultimate distribution and *not* Probate Code Section 6401(c) as argued by [Mavis]." Mavis's timely appeal ensued.<sup>9</sup>

## DISCUSSION

In her opening brief, Mavis argues that the annuity's change of beneficiary from Shirley to Frank's estate sufficed as an agreement between the spouses to a non pro rata

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damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries."

<sup>8</sup> Probate Code section 6401, subdivision (c)(3)(A), reads, in pertinent part: "As to separate property, the intestate share of the surviving spouse is [¶] . . . [¶] [o]ne-third of the intestate estate . . . [¶] [w]here the decedent leaves more than one child."

<sup>9</sup> Mavis elected to proceed without providing this court with a record of the trial proceedings. She acknowledged that without such a record, this court will not be able to consider what was said during those proceedings in determining whether an error was made in the trial court.

division of their community property upon the death of Frank, within the meaning of Probate Code section 100, subdivision (b).<sup>10</sup> However, we agree with Shirley that the record before us does not reflect that the specific issue Mavis raises on appeal was presented in the trial court – namely whether the change of beneficiary constituted an agreement in writing or was evidence of an oral agreement to divide community property within the meaning of Probate Code section 100, subdivision (b). Consequently, we do not further address Mavis’s arguments based on Probate Code section 100, subdivision (b).

In her reply brief, Mavis clarifies that by her argument in her opening brief, she seeks reversal on the ground that there was a transmutation of the annuity from community property to Frank’s separate property, pursuant to Family Code sections 850, subdivision (a), and 852, subdivision (a). We see no basis for reversal. Although “married persons may by agreement or transfer, with or without consideration, . . . [¶] [t]ransmute community property to separate property of either spouse” (Fam. Code, § 850, subd. (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” (Fam. Code, § 852, subd. (a)). It is well settled that “a writing signed by the adversely affected spouse is not an ‘express declaration’ for the purposes of [Family Code section 852, subdivision (a)] *unless* it contains language which expressly states that the characterization or ownership of the property is being changed.” (*Estate of MacDonald* (1990) 51 Cal.3d 262 (*MacDonald*) [decided under Civ. Code former § 5110.730 predecessor statute to Fam.

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<sup>10</sup> As noted, Probate Code, section 100, subdivision (a), reads: “Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.” Subdivision (b) reads: “Notwithstanding subdivision (a), a husband and wife may agree in writing to divide their community property on the basis of a non pro rata division of the aggregate value of the community property or on the basis of a division of each individual item or asset of community property, or partly on each basis. Nothing in this subdivision shall be construed to require this written agreement in order to permit or recognize a non pro rata division of community property.”

Code § 852 containing same language]; see *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1400 (*Valli*), citing *MacDonald, supra*, 51 Cal.3d 262, with approval].) Thus, in *MacDonald, supra*, 51 Cal.3d 262, the court held that the wife’s signed consent to designate husband’s revocable living trust as sole beneficiary of husband’s individual retirement account, standing alone, was neither a valid transmutation of the account from community property to the husband’s separate property nor a will substitute for the wife so as to eliminate the requirement that she sign a writing expressly consenting to transmutation of the funds in the account from community property to the husband’s separate property. (*Id.* at pp. 265, 267, fn. 5, 272-273.) Similar to the situation in *MacDonald, supra*, 51 Cal.3d 262, which we find to be both instructive and dispositive, there was no transmutation in this case as the record contains no evidence demonstrating that at any time Shirley “expressly declared in writing that [she] gave up [her] community interest” in the annuity. (*Valli, supra*, 58 Cal.4th at p. 1406; see *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1107 (*Benson*).) We are not persuaded by Mavis’s claim that a transmutation occurred when Shirley consented to the sale of a portion of the annuity and the change in beneficiary to acquire funds to make repairs on a marital residence. According to Mavis, Shirley’s conduct “has to be considered an acknowledgement that the annuity was now the separate property of decedent and to be used for his debts.” Not so. The written declaration requirement of Family Code section 852, subdivision (a), “cannot be satisfied . . . where a transmutation would have to be inferred from acts surrounding” the change of beneficiary. (*Benson, supra*, at p. 1107, citing to *MacDonald, supra*, 51 Cal.3d 262.)

Accordingly, we must uphold the trial court’s findings that “the proceeds of the annuity were community property pursuant to Family Code 780, and the legal characterization of those proceeds was not altered by the change of beneficiary.”

#### **DISPOSITION**

The January 5, 2015, judgment is affirmed. Respondent Shirley J. Knox is awarded costs on this appeal.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

*Estate of Frank June Knox, Deceased, A144514*