It's a gift…..or, maybe not!?

Ok, so the holidays are upon you, and you are wandering the streets contemplating the perfect gift for your spouse…The question I have is, do you really *want* it to be a gift???

Assuming you *really* intend to make a lasting gift to your spouse, you will need to know what it is you can gift, or how you can gift, so that gift will outlast any litigation that may come your way…

First, the rules of gifting to live by. Under California Family Code Section 852(a), a transmutation of community property to separate property generally requires a writing which expressly states the intent to gift and "is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."

Hence, be clear in your writing that you intend to gift that asset and SIGN the document! No clear declaration or no clear signature, means no gift!

Does this rule apply to all your gifts?? No! Generously, FC Section 852 subdivision (c) provides for an exception to the writing requirement if your gifts are of "tangible articles of a personal nature" that are "not substantial in value, taking into account the circumstances of the marriage". Hmmm. Exactly what does this mean?

In the recent case of In re Marriage of Neighbors (2009), Cal. App. 4th {No. Do53925. Fourth Dist., Div. One. Dec. 1, 2009}, the Court looked at the very essence of what FC Section 852 subdivision (c) means and concluded that both prongs of 852 (c) must be met in order for the exception under 852 to apply.

First, the facts. Husband purchased a $60,000 Porsche with a check drawn on Wife's separate property bank account which was funded with proceeds derived from the sale of Wife's separate property residence. The source of the funds were never in dispute and Husband claimed that because this purchase occurred shortly before his birthday, it was a birthday gift from his Wife.

At the Trial Court level, the family court ruled that the Porsche was a gift from Wife to Husband, focusing only on the issue of whether the gift was "not substantial in value taking into account the circumstances of the marriage." However, the trial court did not address whether the Porsche was a "tangible article of a personal nature", the second prong of the equation under FC 852 subdivision (c).

And this was why the Court of Appeals said not so fast Husband….

Looking into the legislative intent of the words used in the statute, the Court concluded that the gift of an automobile does not fall within the exception set forth in section 852, subdivision (c) because it is not a "tangible article of a personal nature." The Court relied on legislative history which revealed that the types of gifts this was intended to encompass were "clothing, wearing apparel, jewelry, and other tangible articles of a personal nature, used solely or principally by the person."

Accordingly, the Court ruled the trial court erred in relying on only one prong of 852(c) and holding that the Porsche was husband's separate property as a result of a gift.

Not a gift?? Now what?

Because the Court held the asset was not the separate property of Husband by virtue of a gift, that asset was considered to be an asset of the community subject to a substantive right of reimbursement by the Wife. Yes, don't forget your reimbursement rights!

Section 2640, subdivision (b) of the Family Code, provides for the reimbursement of separate property funds when they are used to purchase community property assets provided there has been no written waiver of the reimbursement, regardless of the donor's intent.

On this issue, the Court concluded that no written waiver existed and the Porsche was bought entirely with Wife's separate property funds. Hence, because a full tracing to separate property funds was able to be performed, Wife was entitled to receive full reimbursement from the community.