

DEC 07 2010

JOHN A. CLARKE, CLERK  
BY: [Signature] / JACOB REBITZ

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

In re the Marriage of:	)	Case No.: BD514309
JAMIE McCOURT,	)	
Petitioner,	)	STATEMENT OF DECISION
and	)	RE: VALIDITY OF POST-MARITAL
FRANK McCOURT,	)	AGREEMENTS
Respondent	)	

**RULING ON SUBMITTED MATTER**

**STATEMENT OF DECISION**

On December 9, 2009, the Court, the Hon. Scott M. Gordon, Judge of the Superior Court, presiding, ordered pursuant to the parties' Stipulation, that the issue of the validity and enforceability of the parties' three post-nuptial agreements be severed and tried separately from, and prior to, all other issues. The three post-nuptial agreements at issue are as follows: (1) the March 31, 2004 Marital Property Agreement ("MPA")<sup>i</sup>, (2) the May 10, 2004 Charing Cross Marital Property Agreement ("First Supplemental MPA"), and (3) the October 28, 2004 Second Supplemental Marital Property Agreement ("Second Supplemental MPA").

1 Trial on the bifurcated issue of the validity and enforceability of three post-nuptial  
2 agreements commenced on August 30, 2010, and ended on September 29, 2010.

3 Petitioner appeared in person and was represented by Dennis Wasser, Bruce  
4 Cooperman, David Boies, James Fox Miller, Michael Kump, and Suann Maclsaac, and  
5 Respondent appeared in person and was represented by Sorrell Trope, Stephen  
6 Susman, Marc Seltzer, Victoria Cook, Ryan Kirkpatrick and Matthew Berry.

7 Both oral and documentary evidence was received on the bifurcated issue; the  
8 matter was argued and submitted for decision, and the Court now makes the following  
9 Statement of Decision. In making the findings below, the Court has considered all the  
10 evidence, the testimony, the demeanor and credibility of the witnesses, the written and  
11 oral arguments of counsel, the materials and authorities submitted by the parties, and  
12 the pleadings, papers and other documents filed with the Court. Pursuant to Code of  
13 Civil Procedure §632 and California Rules of Court 3.1590 and 3.1591, this Statement  
14 of Decision is intended to explain the legal and factual basis for the decision as to each  
15 of the principal controverted issues at trial. Section 632 has been interpreted to call for  
16 findings as to ultimate—rather than evidentiary—facts.

17  
18 It must be noted that this Statement of Decision is confined to the issues related  
19 to the validity and enforceability of the parties' three post-nuptial agreements in this  
20 matter. Any and all discussion, findings and holdings in this Statement of Decision are  
21 limited to the instant issues related to the validity and enforceability the post-nuptial  
22 agreements. The Court does not by way of this Statement of Decision explicitly or  
23 implicitly make any findings related to the remaining issues in this matter. The Court  
24  
25

1 explicitly does not make any findings with regard to the characterization of the parties'  
2 property or interest in any property within this Statement of Decision.

3  
4 The Court HEREBY FINDS AND CONCLUDES as follows:

5  
6 **SUMMARY OF FINDINGS**

7  
8 The Court has considered the evidence and arguments submitted by the parties  
9 in this matter. The Court's detailed findings and discussion of the issues is found below.  
10 The Court provides the following summary of findings regarding the primary issues  
11 presented by the parties in the instant bifurcated proceeding:  
12

13  
14 The Court finds that the Marital Property Agreement [hereinafter "MPA"]  
15 executed by Petitioner, Jamie McCourt and Respondent, Frank McCourt is not an  
16 agreement as defined by Family Code §§721 and 1500, but a transmutation agreement  
17 subject to standards articulated in Family Code Section §§850 - 852.

18 The Court finds that the MPA was not a valid transmutation as defined by Family  
19 Code §850.

20 The Court finds that there is no evidence within the MPA, or within the testimony  
21 of the witnesses in this matter, of any waiver of the parties' rights of equitable  
22 distribution as described in Massachusetts law.

23 The Court finds that there was no mutual assent or meeting of the minds  
24 between Petitioner and Respondent when they executed the agreement on March 31,  
25

1 2004. The Court further finds that there was no mutual assent or meeting of the minds  
2 regarding the content of the version of the MPA Petitioner and Respondent signed on  
3 March 31, 2004 in Massachusetts and the version Respondent signed on April 14, 2004  
4 in California.

5 The Court finds that the conditional terms of the MPA do not make the  
6 agreement invalid.

7 The Court finds that the MPA was created at the behest of the Petitioner. The  
8 Court further finds that the MPA did not bestow an unfair advantage on the Respondent.  
9 The Court finds that the execution of the MPA was not a result undue influence exerted  
10 on Petitioner. Further, the Court finds that the Respondent introduced a sufficient  
11 quantum of evidence to rebut any applicable presumption of undue influence.  
12

13 The Court finds that the material provisions of the MPA are to be interpreted as a  
14 single whole. The Court finds that "the consummation of [a] bargain" between Petitioner  
15 and Respondent was dependent upon inclusion of Paragraph 4 of the MPA and thus all  
16 material provisions of the MPA are inextricably intertwined. As a result, portions of the  
17 MPA cannot be severed from an otherwise unenforceable transmutation.

18 The Court does not find that the MPA is invalid based on a theory of constructive  
19 fraud.

20 The Court finds that the MPA did not constitute a valid waiver of the parties'  
21 respective interests as described in *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp*  
22 *v. Van Camp* (1921) 53 Cal. App. 17.  
23  
24  
25

1 The Court finds that the Marital Property Agreement is not a valid and  
2 enforceable agreement. The Court orders that the Marital Property Agreement is set  
3 aside.

4 The Court rules that the First Supplemental Marital Property Agreement and the  
5 Second Supplemental Marital Property Agreement are set aside.

6 The Court does not find sufficient evidence to support Respondent's contention  
7 that Petitioner is barred from challenging the validity of the MPA on the basis of the  
8 doctrines of laches, ratification, and estoppel.

9  
10  
11 **SUMMARY OF FACTS**

12  
13 On October 27, 2009 Jamie McCourt [hereinafter "Petitioner] filed a petition for  
14 dissolution of the parties' marriage. On October 27, 2009, Frank McCourt [hereinafter  
15 "Respondent"] filed a motion to bifurcate the issues of validity and enforceability of three  
16 post marital agreement in this matter [hereinafter "MPA"].<sup>1</sup> On December 3, 2009, the  
17 parties stipulated to bifurcate for separate trial the issues regarding the validity of the  
18 MPA.

19 Petitioner and Respondent married on November 3, 1979, and separated July 7,  
20 2009. The parties have no minor children. A Stipulated Judgment regarding Marital  
21 Status has been entered.

22  
23  
24  
25 <sup>1</sup> The three post marital agreements involved in this matter include: Document entitled "Marital Property Agreement," dated March 31, 2004; a document entitled "Charing Cross Marital Property Agreement," dated May 4, 2004 ("Charing Cross Agreement"); a document entitled "Second Supplementary Marital Property Agreement" dated October 28, 2004 ("Second Supplementary Agreement").

1 Both parties are 1975 graduates of Georgetown University. Petitioner attended  
2 law school at the University of Maryland, where she obtained a J.D. degree in 1978.  
3 Petitioner later completed studies and received an M.S. degree from the Sloan School  
4 of Business at M.I.T. After they were married, the parties established residence in  
5 Massachusetts and remained there until 2004, when they moved to California. The  
6 evidence produced at trial indicates that both parties are very sophisticated and  
7 intelligent individuals.

8 After their marriage, Respondent worked on real estate related matters in the  
9 Boston, Massachusetts area. Petitioner practiced Family law for a period of time<sup>2</sup> prior  
10 to becoming general counsel for the McCourt Company. The evidence produced at trial  
11 shows that the Petitioner is a legally and financially sophisticated woman with a law  
12 degree and an advanced business degree from the Massachusetts Institute of  
13 Technology.

14  
15 The parties amassed a substantial marital estate, including significant residential  
16 and commercial real estate holdings. During the time they resided in Massachusetts,  
17 the parties put title to their residences solely in Petitioner's name and title to their  
18 business interests solely in Respondent's name. The parties understood that under  
19 Massachusetts law this practice insulated the residences from claims by business  
20 creditors but preserved for each of them an equitable distribution interest in all of their  
21 marital assets regardless of who held title. The parties never entered into any pre-  
22 marital or post-marital agreements under Massachusetts law.

23  
24  
25 <sup>2</sup> Petitioner testified that she practiced Family Law for approximately five years. It was customarily her  
practice to prepare MSA agreements, however evidence shows that Petitioner also worked on post  
nuptial agreements.

1 In 2003, the parties pursued the opportunity to purchase the Los Angeles  
2 Dodgers franchise, which was then owned by News Corp. The Dodger franchise  
3 included the Los Angeles Dodgers, Dodger Stadium and the 276 acres of Chavez  
4 Ravine property which surround the stadium [hereinafter "Dodgers"].<sup>3</sup>

5 In October of 2003, an agreement was reached to purchase the Dodgers from  
6 News Corp. The agreement was approved by Major League Baseball (MLB) in January  
7 2004, and the Dodger acquisition formally closed on or about February 13, 2004.

8 In anticipation of moving from Massachusetts to California in conjunction with the  
9 purchase of the Dodgers, Petitioner and Respondent signed three copies of the MPA on  
10 March 31, 2004. The three copies signed in Massachusetts are referred to as the  
11 "Massachusetts version of the MPA."<sup>4</sup> Three additional copies signed by Petitioner on  
12 March 31, 2004. Respondent signed these three copies of the MPA on April 14, 2004 in  
13 California. The three copies signed by Respondent in California are referred to as the  
14 "California Version" of the MPA.<sup>5</sup> The Massachusetts version and California version are  
15 virtually identical except for the text of a schedule attached to each of the MPA's  
16 described as "Exhibit A."<sup>6</sup>

17  
18  
19  
20 <sup>3</sup> It must be noted that the parties are at odds with regard to many issues related to the acquisition of the  
Dodgers and associated assets. Nothing in this Statement of Decision reflects a ruling with regard to the  
issue of characterization of these assets.

21 <sup>4</sup> See Court Exhibits 1-3.

22 <sup>5</sup> See Court Exhibit 7-9.

23 <sup>6</sup> The two different versions of Exhibit A of the MPA are worded as follows:

24  
25  
**Exhibit A ("MASSUCHESTS VERSION")**  
**Frank's Separate Property Assets**

1. Bank Accounts- all accounts currently listed solely in Frank's name.
2. Stocks, Bonds, Mutual Funds – all securities and securities accounts currently listed solely in Frank's name inclusive of the following: Frank's stock interest in the McCourt –Broderick Limited Partnership ("MBLP") including all real estate and other assets owned directly or through

1 The exhibits attached to the Massachusetts versions of the MPA *included* as  
2 Respondent's separate property: his stock interest in the McCourt Company, Inc., as  
3 well as all real estate and other assets owned directly or through subsidiary entities by  
4 McCourt Broderick Limited Partnership which include (1) the Seaport Property; (2) Los  
5 Angeles Dodgers; and (3) land located in Chavez Ravine. The exhibits attached to the  
6 California version of the MPA *excluded* as Respondent's separate property his stock  
7 interest in the McCourt Company and his interest as a limited partner of the McCourt  
8 Broderick Limited Partnership. The California versions of the MPA further described the  
9 exclusion of property as: "including within this exclusion" (1) Seaport; (2) Los Angeles  
10 Dodgers; and (3) Chavez Ravine.  
11

12 subsidiary entities by MBLP including without limitation (1) approximately 25 acres of land in  
13 Seaport District of Boston, Massachusetts; (2) all assets of the Los Angeles Dodgers baseball  
14 team owned by Los Angeles Dodgers LLC and (3) 276 acres of land located in Chavez Ravine,  
Los Angeles, California.

- 15 3. Personal Property- personal jewelry and clothing and boats and vehicles as to which Frank is the  
record owner.
- 16 4. Liabilities- all liabilities as to which Frank is the maker and as to which Jamie is not the maker.

17 **Exhibit A ("CALIFORNIA VERSION")**  
18 **Frank's Separate Property Assets**

- 19 1. Bank Accounts- all accounts currently listed solely in Frank's name.
- 20 2. Stocks, Bonds, Mutual Funds – all securities and securities accounts currently listed solely in  
21 Frank's name exclusive of the following: Frank's stock interest in the McCourt –Broderick Limited  
22 Partnership ("MBLP") including within this exclusion all real estate and other assets owned  
23 directly or through subsidiary entities by MBLP including without limitation (1) approximately 25  
24 acres of land in Seaport District of Boston, Massachusetts; (2) all assets of the Los Angeles  
25 Dodgers baseball team owned by Los Angeles Dodgers LLC and (3) 276 acres of land located in  
Chavez Ravine, Los Angeles, California.
3. Personal Property- personal jewelry and clothing and boats and vehicles as to which Frank is the  
record owner.
4. Liabilities- all liabilities as to which Frank is the maker and as to which Jamie is not the maker.

1 The different versions and drafts of Exhibit A attached to the MPA are significant  
2 to note. Evidence produced at the trial indicates that the first draft of the MPA was  
3 prepared on March 22, 2004. This draft included Exhibit A as a blank form attached to  
4 the MPA.<sup>7</sup>

5 The second draft of the MPA, sometimes referred to as the "Internal Draft" during  
6 the trial, was prepared on either March 24<sup>th</sup> or 25<sup>th</sup>. The Exhibit A included in this draft  
7 did not use the terms "inclusive" or "exclusive," however, the Dodgers were listed as  
8 Respondent's separate property.<sup>8</sup>

9 On March 29, 2004, the third draft was prepared. The Exhibit A attached to this  
10 draft excluded the Dodgers from the description of Respondent's separate property.<sup>9</sup>

11 The fourth draft of the MPA was created on March 30, 2004. The Exhibit A  
12 attached to this version of the MPA used the term "exclusive" when describing the  
13 Dodgers in relation to Respondent's separate assets.<sup>10</sup>

14 Later on March 30, 2004, a fifth draft of the MPA was prepared. This was the  
15 only draft not prepared on the law firm's word processing system. In this version of the  
16 MPA, Exhibit A used the word "inclusive" to describe the Dodger assets as being  
17 Respondent's separate property.<sup>11</sup>

22 <sup>7</sup> Petitioner's Exhibit 45.

23 <sup>8</sup> Respondent's Exhibit 1434.

24 <sup>9</sup> Petitioner's Exhibit 53.

25 <sup>10</sup> Petitioner's Exhibit 55.

<sup>11</sup> Petitioner's Exhibit 10.

It must be noted that this 5<sup>th</sup> draft of the MPA was the first draft to use the word "inclusive" to describe the Dodger assets in relation to the Respondent's assets. Neither party was furnished a copy of this 5<sup>th</sup> draft until the time of execution of the MPA at the parties' home on March 31, 2004. It is also important to note, that other than the executed copies of this version of the MPA, no other copies of this draft exist.

1 At the time the MPA's were drafted and executed, the Petitioner and Respondent  
2 were jointly represented by Lawrence Silverstein [hereinafter "Silverstein"]<sup>12</sup> of Bingham  
3 McCutchen LLP [hereinafter Bingham"]. Silverstein was assisted in drafting the MPA's  
4 by Reynolds Cafferata [hereinafter "Cafferata"] who was a partner in the estate planning  
5 department of Bingham in Los Angeles. Cafferata was primarily involved in drafting the  
6 MPA.

7 Silverstein was present when the parties signed the Massachusetts version of  
8 the MPA on March 31, 2004; Silverstein was also present when Respondent signed the  
9 California version on April 14, 2004. Silverstein notarized all signed copies.

10 Petitioner testified that Silverstein was initially hired in 2001 to do estate work for the  
11 parties. Petitioner testified she believed that Silverstein and the Bingham firm were  
12 representing both of the parties in the acquisition of the Dodgers<sup>13</sup> as well as other  
13 estate planning and personal finance matters.  
14

15 Petitioner testified that during the acquisition of the Dodgers, she spoke to  
16 Silverstein about buying a home in California. She told him that it was important to her  
17 to keep the homes safe from business creditors.<sup>14</sup> She further testified that it had been  
18 the parties' practice while living in Massachusetts to keep the business assets titled in  
19 the Respondent's name and personal assets titled in the Petitioner's name in order to  
20 protect personal assets from the reach of creditors.  
21

22 \_\_\_\_\_  
23 <sup>12</sup> Within this Statement of Decision, the Court refers to witnesses by their last names. This is meant only  
24 for clarity.

25 <sup>13</sup> Petitioner's testified that she met with Silverstein on many occasions regarding the acquisition of the  
Dodgers.

<sup>14</sup> Petitioner testified that in 2001 the parties were sued by a contractor for work on the Cottage Street  
residence and that during the course of this litigation an issue arose involving the manner in which the  
parties titled their property. She testified that there were allegations of fraudulent transfer involving the  
titing of properties.

1 The Petitioner testified that Silverstein told her that in order to protect the homes  
2 in the same manner in which they were protected in Massachusetts, the parties would  
3 need to enter into an agreement. Petitioner testified that the MPA which was  
4 subsequently drafted was intended to protect the homes from business risks, but it was  
5 her understanding that entering into the agreement would not change her rights in any  
6 of the property in the event of dissolution of the marriage. Although Petitioner wanted to  
7 protect the homes from business creditors and risky transactions, she testified that the  
8 Dodgers were a less risky transaction than other ventures that Respondent had been  
9 involved in and that she was not adverse to becoming an owner of the team.

10 Petitioner testified that she was not told that by signing the MPA, she would be  
11 giving up her then existing rights, if any, in the Dodgers or her marital rights with regard  
12 to the "equitable division" of the assets in the event of dissolution of the marriage.  
13 Petitioner testified she understood that separately titled property in Massachusetts was  
14 subject to equitable distribution. She also testified that she believed that the MPA would  
15 not affect her rights of equitable distribution of the property. Petitioner further testified  
16 that despite the fact that their assets were separately titled, the parties lived their lives in  
17 a manner whereby all of the property whether separately titled or not, was "theirs."  
18

19 Evidence produced at the trial shows that prior to the execution of the  
20 agreement; she met with or talked with Silverstein about the MPA on February 13,  
21 2004, March 3, 2004, March 22, 2004, and March 29, 2004. Petitioner testified that she  
22 does not remember what was discussed at the meeting held on February 13, 2004.  
23 She further testified that she does not remember if she spoke with or met with  
24 Silverstein at all on March 3, 2004. Petitioner testified that although she had an agenda  
25

1 for the conversation which took place on March 22, 2004, she does not remember what  
2 was discussed.

3 On March 31, 2004, Silverstein brought six original copies of the MPA to the  
4 parties' residence in Massachusetts. Petitioner testified that prior to March 31, 2004 she  
5 had not seen a complete copy of the MPA with the exhibits attached. Petitioner also  
6 testified that she did not completely and fully read a draft of the agreement, and that she  
7 does not remember seeing the cover letter to the MPA prepared by Silverstein before  
8 she signed the agreement.<sup>15</sup>

9 Both Petitioner and Respondent signed three copies of the MPA in  
10 Massachusetts on March 31, 2004. Petitioner signed three additional copies of the  
11 MPA at this meeting. Petitioner testified that she did not read the agreement at that time  
12 because she trusted Silverstein and Respondent. She testified that she often signed  
13 documents put in front of her without reading them because she trusted the people who  
14 were advising and assisting her.

15  
16 Petitioner testified that Respondent did not coerce her into signing the  
17 documents. She signed the MPA freely based on what she was told by Silverstein.

18 In California on April 14, 2004, Respondent signed the three MPA's he had not  
19 previously signed in Massachusetts (which had already been signed by the Petitioner).<sup>16</sup>  
20 Evidence produced at the trial shows that there were in fact different copies of Exhibit A  
21 attached to the MPA at different times. Petitioner testified that she does not remember  
22  
23

24 <sup>15</sup> Silverstein testified (discussed below) that he discussed the MPA with the parties along with the cover  
25 letter.

<sup>16</sup> Silverstein testified that he instructed the parties to sign two sets of original MPA's, one set in California  
and one set in Massachusetts to avoid what he described as a "nexus issue."

1 what was contained within the Exhibits to the MPA's when she signed the respective  
2 agreements.

3 Petitioner testified that she does not understand what a transmutation is, she  
4 does not understand what a Family Code §2640 waiver is, and does not understand the  
5 effect of Family Code §721 on a transaction similar to the issues at bar, or in terms of  
6 California Family Law, what fiduciary duty means.

7 Petitioner testified that she is not sure what constitutes adequate disclosure of  
8 assets under California law. Further, she does not understand the Family Code §852(b)  
9 recording requirement language and that she does not fully understand the California  
10 Family Law concept of quasi-community property.<sup>17</sup> She testified that although she has  
11 notes from her conversation with Reynolds Cafferata, she does not fully understand the  
12 California Family Law concepts described in her notes.

13  
14 Petitioner notes that the Massachusetts version of Exhibit A titled  
15 "[Respondent's] Separate Property Assets and Liabilities" includes the Los Angeles  
16 Dodgers as the Respondent's separate property.<sup>18</sup> Unlike the Massachusetts version,  
17 the California version of Exhibit A titled "[Respondent's] Separate Property Assets and  
18

19 <sup>17</sup> Family Code §125 provides:

20 "Quasi-community property" means all real or personal property, wherever situated, acquired before or  
21 after the operative date of this code in any of the following ways:

22 (a) By either spouse while domiciled elsewhere which would have been community property if the  
23 spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community  
24 property if the spouse who acquired the property so exchanged had been domiciled in this state at the  
25 time of its acquisition.

It should be noted that the concept of quasi-community property makes no attempt to alter property rights  
merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen  
of another state, who chances to transfer his domicile to this state, bringing his property with him. . .'  
*Addison v. Addison* (1965) 62 Cal.2d 558, 566.

<sup>18</sup> See Exhibit 10.

1 Liabilities” excludes the Los Angeles Dodgers from the list of Respondent’s separate  
2 property assets. Petitioner argues that at some point the MPA signed in California by  
3 Respondent, which contained a version of Exhibit A that excludes the Dodgers from  
4 Respondent’s separate property, was unstapled, removed and replaced with the version  
5 of Exhibit A that includes the Los Angeles Dodgers as Respondent’s separate property,  
6 and stapled back together. The Petitioner testified that she did not know of the switch in  
7 the documents until discovery was undertaken in this litigation.<sup>19</sup>

8 It is Petitioner’s position that the Court should not find that any of the signed  
9 original MPA’s is a valid agreement between the parties because of the patent  
10 inconsistency regarding a material term contained in different versions of the signed  
11 original MPA’s. Petitioner points to the inconsistencies between the two versions of  
12 Exhibit A attached to the MPA’s: the Massachusetts version including the Dodgers as  
13 Respondent’s separate property and the California version excluding the Dodgers from  
14 Respondents separate property.  
15

16 The Petitioner argues that, in the event the Court chooses to adopt the  
17 “Massachusetts” version of the MPA as the agreement between the parties, there are  
18 four reasons why that agreement should be found to be invalid and unenforceable:

- 19 1. It was the product of undue influence.
- 20 2. It was the product of a unilateral mistake or a mistake on both parts.
- 21 3. Respondent participated in constructive fraud to invalidate the Massachusetts  
22 MPA thus breaching his fiduciary duty.

23  
24  
25 <sup>19</sup> In his deposition Silverstein does not recall switching the documents. Silverstein does state that based on logical and practical evidence, the documents must have been switched.

1 4. The agreement contains a conditional transmutation and such transmutations are  
2 prohibited.

3 The Respondent testified that he acquired the Dodgers in February of 2004.  
4 Respondent testified that he purchased the Dodgers for \$421 million from an affiliate of  
5 Fox Entertainment Group,<sup>20</sup> and that he is the sole owner of the Los Angeles Dodgers  
6 and the affiliated assets.

7 Respondent testified that the source of the funds used in the acquisition of the  
8 Dodgers was \$125 million derived from financing his separate property asset, a  
9 commercial property called Seaport.<sup>21</sup> Respondent argues that the risk associated with  
10 the purchase of the Dodgers was evidenced by the EBITDA<sup>22</sup> losses of approximately of  
11 \$50 million a year suffered by the Dodgers for the three years preceding the acquisition.  
12

13 <sup>23</sup>

14 Respondent signed \$119 million in personal guarantees and agreed to personally  
15 indemnify MLB for all losses MLB stemming from the Dodgers.<sup>24</sup> According to  
16 Respondent, Petitioner refused to accept any risk of loss associated with the acquisition  
17 of the Dodgers.<sup>25</sup>

18 Respondent testified that prior to the execution of the MPA, Petitioner and  
19 Respondent lived in Massachusetts and had a long standing practice of placing their  
20 residences in Petitioner's name and any businesses in Respondent's name.  
21

22 \_\_\_\_\_  
<sup>20</sup> Id. at 6.

23 <sup>21</sup> Respondent alleges that the property was purchased through Respondent's business before marriage.

24 <sup>22</sup> Earnings before interest, taxes, depreciation, and amortization.

25 <sup>23</sup> The losses were as follows: \$29 million in 2000, \$46 million in 2001, \$47 million in 2002, and \$55 million in 2003.

<sup>24</sup> The Respondent testified that this was required by the lenders involved in the acquisition of the Dodger assets.

<sup>25</sup> Id. at 2.

1 Respondent testified that it was important to Petitioner to protect the residences from  
2 creditors and she wished to preserve that protection after the move to California.

3 Respondent asserts that the Petitioner was the driving force behind the execution of the  
4 MPA by the parties.

5 Respondent testified that Petitioner wanted the MPA to be drafted and executed  
6 by the parties. Respondent testified that he acquiesced to his wife's wishes relative to  
7 the MPA because she said that she wanted to protect herself from a financial risk  
8 associated with Respondent's ownership of the Dodgers.<sup>26</sup> Respondent testified that he  
9 never considered signing an MPA that would protect the residences from creditors while  
10 at the same time preserving Petitioner's right to an interest in the Dodgers upon the  
11 event of dissolution of the marriage.

12 Respondent testified that on March 3, 2004, a meeting which lasted several  
13 hours took place with the Petitioner and Silverstein in Respondent's office in Vero  
14 Beach, Florida. Respondent testified that topics other than the MPA were covered  
15 during the meeting and the MPA was discussed for approximately twenty minutes.  
16 Respondent testified that during this meeting, the MPA was described to him as a  
17 "transmutation agreement." Respondent does not remember whether Silverstein was on  
18 the phone or in person at the meeting.

19 Respondent testified that again on March 23, 2004, both parties were together in  
20 Respondent's office in Vero Beach and Silverstein was on the phone during the  
21 meeting. Respondent testified that during the conversation, he received a copy of the  
22  
23  
24

25 \_\_\_\_\_  
<sup>26</sup> Id. at 2.

1 MPA that had been sent by Silverstein. However, Respondent does not recall whether  
2 Silverstein sent the copy of the MPA while they were meeting or prior to the meeting.

3 On March 30, 2004, drafts of the MPA and the attached Exhibits were distributed.  
4 Karen Letendre [hereinafter "Letendre"], Silverstein's secretary, sent a draft of the MPA  
5 to Jeff Ingram [hereinafter "Ingram"], an employee of Respondent, and copy to  
6 Silverstein. Exhibit A attached to this draft excluded the Dodgers from Respondent's  
7 separate property.<sup>27</sup> Respondent testified that he has no recollection of reviewing the  
8 document.

9 On March 30, 2004, a second draft of the MPA was sent to Tracy Magee  
10 [hereinafter "Magee"], a former employee of the McCourt Company and a copy was  
11 sent to Silverstein.<sup>28</sup> Exhibit A attached to this draft excluded the Dodgers from  
12 Respondent's separate property.<sup>29</sup> Respondent testified that he has no recollection of  
13 reviewing this document. On March 30, 2004, a third draft was sent to Magee with  
14 copies sent to Silverstein and Ingram. The email that was sent with this copy of the  
15 MPA stated "here is the revised version." Exhibit A attached to this draft excluded the  
16 Dodgers from Respondent's separate property.<sup>30</sup> Respondent testified that he has no  
17 recollection of reviewing this document.  
18

19 Although Respondent testified that he had no recollection of reviewing the drafts  
20 of the MPA sent to him by Silverstein on March 30, 2004, Respondent testified that he  
21 had a meeting with Mr. Silverstein later that day where reviewed the MPA and the  
22 attached Exhibits.  
23

24 <sup>27</sup> See Petitioner's Trial Exhibit 53.

25 <sup>28</sup> At the time the email was sent, Magee had the title of "office manager."

<sup>29</sup> See Petitioner's Trial Exhibit 54.

<sup>30</sup> See Petitioner's Trial Exhibit 55.

1 Respondent testified that as originally drafted, the MPA was going to be signed in  
2 California. However, Silverstein subsequently informed Respondent that the MPA would  
3 be signed in Massachusetts. Respondent first became aware of the “nexus”<sup>31</sup> issue on  
4 March 31, 2004. Respondent testified that he was not told why there was a “nexus”  
5 issue involved in executed the MPA, but was told by Silverstein that they were going to  
6 sign multiple agreements in the two states in order to be “super cautious.”

7 Respondent argues that from March 31, 2004, until 2008, the validity of the MPA  
8 and the manner of division of property had not been questioned by Petitioner.

9 Respondent points to the following in support of this contention:

- 10 a. Petitioner ratified and reaffirmed the MPA twice in writing by signing  
11 supplemental marital property agreements, and accepted benefits therefrom.
- 12 b. Petitioner represented that she is the sole owner of all residential real estate  
13 excluding the property in Cabo San Lucas.
- 14 c. Petitioner did not object to certifications made by lenders and Major League  
15 Baseball that Respondent is the sole owner of the Dodgers.
- 16 d. Petitioner signed a “Statement of Ownership and Affiliation” in which she certified  
17 that Respondent is the sole owner of the Dodgers.
- 18 e. In December 2007, Petitioner received reassurances from her estate planning  
19 counsel that the MPA was valid.<sup>32</sup>

20  
21 //

22  
23 <sup>31</sup> During the course of the trial there was a great deal of discussion regarding the “nexus issue.”  
24 Although never fully explained by the testimony offered at trial, it appears that Silverstein advised the  
25 parties that any challenges regarding the validity of the MPA signed in Massachusetts could be cured by  
having one of the parties sign additional original versions of the MPA in California. No authority to  
support this contention or theory was ever produced by either party or any witness during the course of  
the trial.

<sup>32</sup> Id. at 3.

1 Respondent argues that Petitioner proposed that the parties sign a new MPA in  
2 mid-2008. Respondent alleges that the new MPA would have converted the parties  
3 separate property into community property. Respondent declined to modify the original  
4 2004 MPA.

5 Respondent argues that both Petitioner and Respondent knowingly and  
6 voluntarily executed the MPA, which was reaffirmed twice thereafter as a result of the  
7 execution of the supplemental marital property agreements and that the MPA divides  
8 the property as the parties had intended. Respondent argues that (1) three copies of the  
9 MPA were signed by Petitioner and Respondent on March 31, 2004 in Massachusetts;  
10 (2) three additional copies were signed at the same time by Petitioner; and (3) three  
11 copies were signed by Respondent in California on April 14, 2004.<sup>33</sup> Respondent further  
12 argues that an earlier and incorrect draft of Exhibit A had been erroneously attached to  
13 the three additional copies of the original MPA which were signed by Petitioner on  
14 March 31, 2004 as well as the three copies of the MPA signed by Respondent in  
15 California.<sup>34</sup>

17 Leah M. Bishop [hereinafter "Bishop"], an estate planning attorney and a partner  
18 at Loeb &Loeb, LLP, testified to the following:

19 Bishop met with Petitioner and Respondent on December 12, 2007, when they  
20 discussed estate planning matters. Shortly after that meeting Bishop reviewed the MPA  
21 for compliance with California law. In an email she explained that she believed that the  
22 MPA was "sufficient to accomplish [the parties'] goals of ensuring that the residential  
23 properties are [Petitioner's] separate property and that the other assets are  
24

---

25 <sup>33</sup> Id. at. 11.

<sup>34</sup> Id.

1 [Respondent's] separate property." The MPA was discussed in two contexts, potential  
2 liability to third parties and dissolution of marriage.<sup>35</sup>

3 Bishop testified the first time she realized that Petitioner was confused regarding  
4 the March 31, 2004 MPA and what it sought to accomplish was when she received an  
5 email from Petitioner in which Petitioner stated that, aside from her separate property,  
6 "all other property is joint property."<sup>36</sup> Bishop testified that until that time, she was  
7 working with Petitioner and Respondent under the assumption that the MPA was correct  
8 and valid.<sup>37</sup>

9 On June 30, 2008, Bishop met with Petitioner and Respondent. Bishop testified  
10 that she discussed the MPA and explained California law and "how it works."<sup>38</sup> Bishop  
11 testified that after she explained the effect and meaning of the MPA, Respondent said  
12 "fix it."  
13

14 After the June 30, 2008 meeting, it was her understanding she would prepare a  
15 new MPA that would reflect what was described to her as the original intentions of the  
16 parties<sup>39</sup> [i.e. that the property identified as Respondent's separate was intended to be  
17 held "jointly"] as well as estate documents that would reflect the new agreement.  
18  
19

20 <sup>35</sup> See Petitioner's Trial Exhibit 105, which is an email from Bishop to Petitioner and Silverstein in which  
21 Bishop confirms the compliance of the MPA with California law with two caveats of issues related to:  
22 martial context and creditors.

23 <sup>36</sup> See Petitioner's Trial Exhibit 120 which is the "Clarity" email.

24 <sup>37</sup> See Respondent's Exhibit 1984 (email from Ginger); See also Exhibit 452 which is a letter from Leah  
25 Bishop "Re: Revised Estate Planning Documents," in which she opined that the 2004 MPA was valid.

<sup>38</sup> See Petitioner's Exhibit 124 which is an outline of items discussed at the meeting.

<sup>39</sup> See Petitioner's trial Exhibit 412 which is a letter from Silverstein to Respondent in which Silverstein  
states: "Rather than go through all the matters involved... of putting all assets into community property  
status, what if we simply signed a short agreement reflecting that the transmutation agreements were  
intended to keep property separated between you and [Petitioner] the way property was separated before  
you moved to California [and] the agreement would then provide that nothing in the transmutation  
agreements were intended to change the rights that either of you had in Massachusetts to equitable  
distribution."

1 The first version of the modified "Community Property and Transmutation  
2 Agreement" was prepared by Bishop and sent to the parties on August 6, 2008.<sup>40</sup>  
3 Pursuant to this agreement all property would become the parties' community property  
4 with the exception of two Malibu homes, two Holmby homes, and certain investments  
5 listed in Paragraph 5 of the revised agreement which would remain Petitioner's separate  
6 property.

7 Bishop testified that the first version of the "Community Property and  
8 Transmutation Agreement" had to be redrafted because Respondent believed that if the  
9 parties were changing the character of some of their assets, the assets held as  
10 separate property by Petitioner also had to be changed to community property. A  
11 second "Community Property Transmutation Agreement" was drafted shortly thereafter  
12 making all property previously excluded in the first "Community Property Transmutation  
13 Agreement" as Petitioner's separate property, the community property of both parties.<sup>41</sup>  
14 Neither one of the "Community Property and Transmutation" agreements were signed  
15 by the parties.  
16

17 On July 22, 2009, Bishop met with the Respondent. During this meeting  
18 Respondent notified Bishop that he was not going to sign the revised transmutation  
19 documents that she had prepared.<sup>42</sup> At that meeting, Bishop did not disclose to  
20 Respondent that she had given the names of five family law attorneys to Petitioner.  
21  
22

23 <sup>40</sup> See Petitioner's Trial Exhibit 128.

24 <sup>41</sup> See Petitioner's Exhibit 136, "Under the new plan, all of your assets will be Community Property. The  
25 personal assets will be held in the Boys Are Us Trust; the business assets will be held in the McCourt  
Trust."

<sup>42</sup> See Petitioner's Trial Exhibit 176, handwritten notes prepared by Bishop during her meeting with  
Petitioner.

1 On August 4, 2009, Bishop ceased her joint representation of Petitioner and  
2 Respondent, and began representing only the Petitioner.

3  
4 Silverstein, an estate planning attorney employed by Bingham, testified to the  
5 following:

6  
7 There was an issue as to whether the parties were represented jointly by  
8 Silverstein and Cafferata regarding the drafting and execution of the MPA. Silverstein  
9 testified that he represented both parties in estate planning matters. However,  
10 Silverstein testified that only he represented Respondent in the acquisition of the Los  
11 Angeles Dodgers. Silverstein never told Petitioner that that the only person he was  
12 representing in the Dodger acquisition was Respondent.

13  
14 Although Silverstein advised both parties that a potential conflict might arise in  
15 his joint representation of the parties, he did not tell them that there would be an actual  
16 conflict. Silverstein testified that he advised both parties that they should have separate  
17 counsel.

18 Silverstein testified he did not know whether the property subject to the MPA  
19 would become community or quasi-community property upon the parties move to  
20 California. Silverstein did not discuss the issue of financial disclosure with the parties  
21 within the process of drafting and executing the MPA. The only discussion of disclosure  
22  
23  
24  
25

1 of assets between the parties occurred when he read the cover letter and discussed the  
2 MPA with the parties at the time of the initial execution in Massachusetts.<sup>43</sup>

3 Silverstein testified that he did not speak to family law experts in either  
4 Massachusetts or California during the period time the MPA was drafted. Silverstein  
5 consulted with Cafferata; however, he understood that Cafferata was an estate planning  
6 attorney. Silverstein testified that he had a sufficient understanding of California law to  
7 adequately explain the agreement to the parties. Silverstein never expressly asked the  
8 parties whether they wished to alter their respective rights of equitable distribution under  
9 Massachusetts law through the execution of the MPA.

10 On February 20, 2004, Cafferata prepared a draft of the agreement and a cover  
11 letter which he emailed to Aaftab Esmail [hereinafter "Esmail"], another Bingham lawyer,  
12 who later sent the email to Silverstein.<sup>44</sup> Cafferata explained in the email that the  
13 discussion in the documents regarding the community property system and the parties'  
14 representation during the process is "fairly important" to help ensure that the agreement  
15 would be upheld against any challenges.

16  
17 Silverstein testified that he met with Petitioner and Respondent on March 3,  
18 2004, in Vero Beach and discussed variety of topics. Silverstein prepared an agenda for  
19 the meeting that day. The MPA was listed under the topic "Transmutations" in the  
20 agenda.<sup>45</sup>

21  
22  
23 <sup>43</sup> Note that the "Internal Copy" of the MPA had financial disclosures in Exhibit A and Exhibit B however  
the final version did not have financial disclosures in Exhibit A.

24 <sup>44</sup> See Petitioner's Trial Exhibit 31. In this email Cafferata states: "the explanation of the community  
property system and the discussion in the letter regarding representation are fairly important to help  
insure that the agreement will be upheld – it's not just language for the firm's benefit."

25 <sup>45</sup> See Exhibit 1761; see also Exhibit 1501 which contains Petitioner's notes regarding the meeting: listed  
as item #9, is "transmutation agreement."

1 Silverstein's next conversation relevant to the MPA was with the Petitioner on  
2 March 22, 2004. Silverstein subsequently prepared a draft of the MPA (this was actually  
3 a draft that Cafferata sent with Silverstein's edits).<sup>46</sup> Silverstein testified that he spoke  
4 with the parties again on March 23, 2004. Silverstein testified that during this  
5 conversation he told the parties how separate and community property would be divided  
6 under California law.

7 Silverstein testified that he first started drafting Exhibits A and B of the MPA on  
8 either March 23, 2004 or March 24, 2004. Silverstein prepared a second draft of the  
9 MPA on March 25, 2004.<sup>47</sup> The Exhibit A attached to this draft of the MPA was different  
10 from what is now known as the Massachusetts version as well as the California version.  
11 It did not use "exclusive" or "inclusive" language. Instead it listed Respondent's assets  
12 as his separate property.

13 On March 29, 2004, Silverstein discussed a draft of the MPA with Petitioner. The  
14 draft in place before and during the discussion had been a draft that did not use the  
15 words "inclusive" or "exclusive" in Exhibit A.<sup>48</sup> After his conversation with Petitioner,  
16 Silverstein marked the draft to include language that excluded the Dodgers from the  
17 property listed in Exhibit A, noting in the margin to add the language: "including within  
18 this exclusion."<sup>49</sup>

19 Silverstein testified that he edited the MPA to remove the values that had been  
20 listed for the assets in earlier drafts of the agreement. He testified that he made this edit  
21  
22

---

23 <sup>46</sup> See Exhibit 40.

24 <sup>47</sup> See Exhibit 1434.

24 <sup>48</sup> See Exhibit 1434.

25 <sup>49</sup> See Petitioner's Trial Exhibit 465 which is a copy of the edited exhibit made after the meeting with  
Petitioner which noted inserting the words "including within this exclusion." See also Exhibit 1435 (marked  
up Exhibit A and B) and Exhibit 1436 (Edited Exhibit A).

1 because the agreement did not require a specific disclosure of assets and further that  
2 he relied on paragraph 2C of the MPA as being sufficient to meet any disclosure  
3 requirements.<sup>50</sup>

4 On March 30, 2004, Silverstein's secretary sent a third draft of the MPA to  
5 Ingram and forwarded a copy to Silverstein.<sup>51</sup> This third draft of the MPA was also sent  
6 to Magee and a copy was also sent to Silverstein.<sup>52</sup>

7 Silverstein testified that he sent that the email to the McCourt office because he  
8 was scheduled to have a meeting with the Respondent that day and wanted  
9 Respondent to review the MPA prior to the meeting.<sup>53</sup> Silverstein testified he met with  
10 Respondent around noon. However, he did not remember whether Respondent  
11 instructed him to make any changes to the MPA at this meeting.<sup>54</sup> On March 30, 2004, a  
12 fourth draft was created and once again it was sent to Magee and copies were sent to  
13 Ingram and Silverstein.<sup>55</sup> In all three emails described above, Exhibit A attached to the  
14 drafts of the MPA excluded the Dodgers from the Respondent's separate property.  
15

16 Silverstein prepared a fifth draft of the MPA on March 30, 2004. This draft  
17 included changes to Exhibit A. This fifth draft was not prepared on Bingham's word  
18

---

19 <sup>50</sup> Paragraph 2C states: "The foregoing disclosures are for courtesy only and not an inducement for either  
20 to enter into this Agreement. FRANK and JAMIE acknowledge and agree that each is willing to enter into  
21 this agreement regardless of the nature or extent of the present or future assets, liabilities, income or  
22 expenses of the other. FRANK and JAMIE each waive any right which either of them may have to  
23 disclosure of the property or financial obligations of the other party beyond the disclosure provided in this  
24 Agreement."

25 <sup>51</sup> See Exhibit 53.

<sup>52</sup> See Exhibit 54; note: that in his deposition Silverstein testified that he assumed that Petitioner and  
Respondent would share the documents however, at trial he testified that he did not assume that  
Respondent would share the draft with Petitioner.

<sup>53</sup> Note that in his deposition, Silverstein testified that he was with Respondent when he asked the MPA to  
be sent to the McCourt office.

<sup>54</sup> Silverstein has changed his deposition testimony regarding the need to revise the exclusion language  
on Exhibit A.

<sup>55</sup> See Exhibit 55.

1 processing system. The testimony indicates that Silverstein prepared the changes to  
2 this draft, which would be the copies initially signed by the parties, on his personal  
3 computer and word processing system.

4 A change to Exhibit A was made in this, the fifth draft of the MPA. This edit  
5 represented the first time the word "inclusive" was used in Exhibit A to describe Dodgers  
6 as Respondent's separate property subject to the MPA. Other than the copies given to  
7 the parties to sign on March 31, 2004, at the time of the execution of the agreement, the  
8 evidence produced at trial in this matter shows that no one sent the unsigned version of  
9 the final draft of the MPA to either of the parties prior to the meeting held at this parties'  
10 Massachusetts home.

11 During the course of his trial testimony, Silverstein testified that he understood  
12 the Petitioner's goal, with regard to the MPA, was to protect the houses and certain  
13 other assets from creditors. Silverstein testified that it was Respondent's intent to have  
14 the businesses placed in his name and that he did not believe that Respondent had the  
15 intent to obtain any rights that he did not have in Massachusetts. Silverstein said that  
16 he did not "specifically" think that Respondent had any objective to gain any further  
17 property rights upon moving to California.

18  
19 Silverstein testified that on March 31, 2004, he went to the parties' residence with  
20 six identical copies<sup>56</sup> of the MPA.<sup>57</sup> Silverstein testified that once at the parties'  
21 residence, he put copies of the MPA and a cover letter in front of both Petitioner and  
22

23  
24 <sup>56</sup> Silverstein's trial testimony and his deposition testimony are inconsistent as to when he decided to  
make the additional three copies of the MPA so that there would be six copies total.

25 <sup>57</sup> Note that when Silverstein left his office on March 30, 2004 he left with three copies (he was going to  
keep one for himself, give a copy to Petitioner, and another copy to Respondent). It was his testimony  
during his deposition that he made photocopies of the three originals to make six copies.

1 Respondent. Silverstein testified he reviewed the cover letter and then the substantive  
2 paragraphs of the MPA with the parties.<sup>58</sup> Silverstein testified that he reviewed the final  
3 copy of Exhibit A (which contained the word “inclusive”) as well as Exhibit B, with the  
4 parties before the execution of the agreement.<sup>59</sup>

5 While he testified that he understood California law sufficiently to explain  
6 agreement to the parties, Silverstein also testified that he is not familiar with California  
7 law regarding: *Epstein* reimbursement rights,<sup>60</sup> *Watts* reimbursement and credit  
8 issues,<sup>61</sup> *Moore/Marsden* issues<sup>62</sup>, that he was not familiar with the issues discussed in  
9 *Beam v. Bank of America*,<sup>63</sup> did not know whether the Dodgers would become  
10 community or quasi-community property after the move to California and was not  
11 familiar with Family Code §721 regarding fiduciary duties owed between parties in a  
12 marriage.

13  
14 On March 31, 2004, the Petitioner and Respondent signed three copies of the  
15 MPA. Silverstein notarized the three signed originals of the MPA. Silverstein then  
16 produced three additional copies of the MPA and told the parties that there was an  
17 issue of “nexus” with California and that they would have to sign three additional  
18 originals. He told the Petitioner to sign additional original copies of the MPA on March

19  
20 <sup>58</sup> See Petitioner’s Exhibit 1 which is the cover letter used by Silverstein when he talked to the parties  
21 before they signed the MPA. Silverstein gave inconsistent testimony at trial and during his deposition  
22 regarding whether he went over every paragraph of the MPA on March 31, 2004 or just the substantive  
23 paragraphs as testified to during trial testimony.

24 <sup>59</sup> Testimony introduced at the trial indicated that March 31, 2004, was the day that the parties and their  
25 children were flying to California as part of their move.

<sup>60</sup> *In re Marriage of Epstein* (1979) 24 Cal.3d 76.

<sup>61</sup> *In re Marriage of Watts* (1985) 171 Cal.App.3d 366.

<sup>62</sup> *In re Marriage of Moore* (1980) 28 Cal.3d 366 and *In re Marriage of Marsden* (1982) 130 Cal.App.3d  
426.

<sup>63</sup> *Beam v. Bank of America* (1971) 6 Cal.3d 12 [discussing criterion or fixed standard used to make  
apportionment between separate and community property interests in a parties’ separate property  
business owned and operated during the marriage. These issues are generally described as “*Pereira/*  
*Van Camp*” issues.]

1 31, 2004, and advised Respondent to subsequently sign the additional original MPA's in  
2 California.

3 On March 31, 2004, Petitioner signed all six copies of the MPA and Respondent  
4 signed three. The three documents that were signed by only by the Petitioner in  
5 Massachusetts were later signed in California by Respondent on April 14, 2004.

6 As indicated above, evidence produced at trial shows that the six copies of the  
7 MPA as fully executed were not identical. The difference in the documents is contained  
8 in what during the trial was referred to as the Massachusetts version of Exhibit A and  
9 the California version of Exhibit A.

10 Silverstein testified that all but the last draft version of the MPA was saved as a  
11 word processing document in his law firm's computer system. When Silverstein's  
12 secretary sent the March 30, 2004, email to Magee,<sup>64</sup> the version of Exhibit A that used  
13 the "exclusive" language was in the firm's computer. This version, also known as the  
14 "California" version, was still saved on the firm's computer at the time the parties signed  
15 the "Massachusetts" version. Silverstein testified that after Respondent signed the MPA  
16 on April 14, 2004, the word processing version containing the "exclusive" language was  
17 changed to reflect the "Massachusetts" version of the language contained in Exhibit A.  
18 Although Silverstein does not remember doing so, he testified that he was the person  
19 who switched the "California" version of Exhibit A. He further testified that he deduced  
20 this from the law firm records management system and the copies of the "California"  
21 version that were in his file.  
22  
23  
24  
25

---

<sup>64</sup> See Silverstein's Exhibit 55.

1 On or about April 20, 2004, the California version of Exhibit A was removed and  
2 replaced with the Massachusetts version of Exhibit A. Silverstein testified that the  
3 exhibits were switched with the assistance of his secretary who was given a copy of the  
4 Massachusetts version of Exhibit A and whom he told to replace the California  
5 version.<sup>65</sup> He did not ask the parties whether he could switch out the pages because he  
6 felt that he had "implicit permission" to switch the inconsistent copies of the exhibits to  
7 bring all six signed copies of the MPA into accord.

8  
9 Cafferata, an estate planning attorney and a former partner at the Bingham firm,  
10 testified to the following:

11  
12 He was contacted by Silverstein in November of 2003 regarding clients who were  
13 planning to move to California and needed some information and assistance with regard  
14 to their finances and property. Cafferata spoke with Petitioner over the phone on  
15 January 15, 2004, regarding California community property issues.<sup>66</sup>

16  
17 Cafferata testified that while he was not an expert in Massachusetts family law  
18 and had limited experience with equitable distribution issues, he considered himself an  
19 expert on transmutation agreements under California law.

20 On February 13, 2004, Cafferata met with the Petitioner at Dodger Stadium<sup>67</sup>  
21 where they discussed Petitioner's concerns regarding shielding the residential real  
22 property assets from business creditors. This meeting took place at a banquet table  
23

24  
25 <sup>65</sup> Silverstein's secretary testified in her deposition that Silverstein never told her to replace any pages.

<sup>66</sup> See Exhibit 1458 which are Cafferata's notes indicating "[Respondent]-business/[Petitioner]-personal"

<sup>67</sup> Respondent was not involved in this discussion.

1 during a celebration held after the acquisition of the Dodgers. Cafferata testified he told  
2 the Petitioner that when the parties became residents of California, some part of their  
3 estate would be treated at quasi-community property in California because it was  
4 acquired during their marriage.

5 He explained issues related to transmutation agreements to the Petitioner and  
6 told her that it would be possible to transmute quasi-community property into separate  
7 property.<sup>68</sup> During this conversation, he did not ask Petitioner whether she wanted to  
8 retain a right to equitable distribution in the parties' property, he did not advise her that  
9 the MPA would change the status quo in Massachusetts and he testified that he did not  
10 advise her regarding her property rights under equitable distribution.

11 Cafferata testified that Petitioner wanted him to prepare the MPA agreement  
12 quickly and that when he drafted the initial version of the transmutation agreement he  
13 did not consult with any family law specialists within the Bingham firm nor did he consult  
14 with any independent California family law attorneys. He testified that he used a  
15 "premarital agreement" form as the template for the instant MPA. Cafferata testified that  
16 he had never prepared a financial disclosure<sup>69</sup> with regard to a transmutation  
17 agreement. In drafting the MPA, Cafferata believed that the parties did not have to  
18 characterize their property in the agreement. He testified that he drafted the agreement  
19 with this belief in mind.  
20

21 Cafferata and Petitioner did not meet or speak after the February 13, 2004,  
22 meeting at Dodger stadium with the exception of one telephone call which occurred on  
23

24  
25 <sup>68</sup> Id. p.151.

<sup>69</sup> Cafferata testified that he opted for partial disclosure because most couples preferred that to full disclosure in order to avoid the cost of appraisal of the assets.

1 February 16, 2004. During the thirty minute conversation with Petitioner, Cafferata  
2 confirmed that the parties did not have an agreement at that time, went over the default  
3 rules and explained that property which would have otherwise been community property  
4 would become quasi community property upon their relocation to California. Cafferata  
5 testified Petitioner's main concern during this call was protection of assets from  
6 creditors. He further testified he believed that upon the parties' relocation to California,  
7 the parties' property may become quasi-community property and that the MPA would  
8 prevent this from occurring.<sup>70</sup>

9  
10 Aaftab Esmail was a partner at the Bingham firm from 2003 until 2006. Esmail  
11 was involved in the acquisition of the Dodgers.

12  
13  
14 Esmail testified he first became aware of the existence of the MPA in early 2004,  
15 after speaking with Silverstein who told him that the residential properties were to be  
16 held by Petitioner as her sole and separate property and that the businesses were to be  
17 held by Respondent as his sole and separate property.

18 Esmail testified that although he saw a version of the transmutation agreement  
19 sent to him by Silverstein, he does not remember which version of the MPA he  
20 reviewed. He further testified that he was never told that two different versions of the  
21

22  
23  
24 <sup>70</sup> See Volume III p. 635 of Cafferata's deposition. Cafferata used the term 'legal instant' to describe  
25 transmutation and believed more or less that when the parties became residents of California their  
property would become quasi community property and in a legal instant transmuted into their separate  
property. See also Volume II p. 493, where Cafferata testified during the deposition that "the purpose of  
the agreement was, at the moment their property could become quasi community property, it was  
transmuted into the separate property into each of them."

1 executed MPA existed. Esmail always thought that there was only one version of the  
2 agreement until several weeks before his testimony.

3 In referring to the MPA as a transmutation agreement, Esmail testified that the  
4 first time he has ever heard the documents referred to as anything other than a  
5 “transmutation agreement” was in the instant proceeding.

### 7 Discussion

9 In most circumstances under California’s community property law, the  
10 characterization of property determines its distribution upon dissolution of marriage.  
11 The characterization of property is anchored by the presumption that all property  
12 acquired by a spouse during marriage while domiciled in the state is community  
13 property. Family Code §760. Both spouses have equal interest in their community  
14 property (Family Code §751) and such community property is generally divided equally  
15 upon dissolution. Family Code §2550; see also §§2600–2604. In contrast, separate  
16 property,<sup>71</sup> is in most circumstances, awarded to the spouse who owns it and is not  
17 divided upon dissolution. Family Code §752.

19 The community may also acquire an interest in the separate property business of  
20 one spouse. Compare *Pereira v. Pereira* (1909) 156 Cal. 1, 7 (endorsing method of  
21 calculating community interest in separate property business by allowing a reasonable  
22 return on the separate property investment and allocating excess gains to the  
23

---

24 <sup>71</sup> Family Code §770(a) defines separate property as “(1) All property owned by the person before  
25 marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3)  
The rents, issues, and profits of the property described in this section.” See also Family Code §771  
(earnings and accumulations acquired during separation are that spouses separate property).

1 community) with *Van Camp v. Van Camp* (1921) 53 Cal. App. 17 (rejecting application  
2 of *Pereira* instead holding that the community received an interest only in the  
3 reasonable value of the husband's services while the remaining value of the company  
4 was the husband's separate property).

5 Subject to general rules governing the actions of persons standing in a  
6 confidential relationship, "spouses in an ongoing marriage may enter into any  
7 transaction or agreement with each other as they might if unmarried." See Family Code  
8 §721(a) & (b). As long as the subject of the parties' agreement is "lawful," spouses may  
9 make enforceable marital agreements for a variety of reasons. A common purpose of  
10 marital agreements is to modify or prevent the application of California community  
11 property law to all or some portion of the spouses' property or income or to change the  
12 character of their property from community property to separate property or vice versa;  
13 this is most commonly referred to as a "transmutation" agreement. See Family Code  
14 §1500; see also Family Code §850; and See *Balkema v. Deiches* (1949) 90 Cal.App.2d  
15 427, 430; *Tompkins v. Bishop* (1949) 94 Cal.App.2d 546, 550.

17 The characterization of an asset may be subsequently affected by certain actions  
18 or agreements by or between the spouses. Both before and during marriage, spouses  
19 may agree to change the status of any or all of their property presently owned or  
20 thereafter acquired. Family Code §§850(a),(b) & (c); see also Family Code §1500  
21 [spouse's property rights prescribed by statute may be altered by premarital agreement  
22 or marital property agreement.] The process of changing the characterization of  
23 property though an agreement is commonly referred to as "transmutation." Family Code  
24 §850 *et seq.*; *Marriage of Saslow* (1985) 40 Cal.3d 848, 863; see *Marriage of Campbell*  
25

1 (1999) 74 Cal.App.4th 1058,—“transmutation is an interspousal transaction or  
2 agreement that works a change in the character of the property.”

3 However, an agreement between spouses is invalid if a spouse breaches their  
4 fiduciary duty toward the other spouse as codified in Family Code §721.<sup>72</sup> Further, in  
5 order to effect a change in the character of the property, or transfer an interest in  
6 property between spouses, spouses must comply with the statutory requirements of  
7 Family Code §§850 through 853.

8 As indicated, all interspousal property transactions and transmutations are  
9 subject to the fiduciary duties and obligations as defined by Family Code §721(b). Thus,  
10 even if a transmutation is evidenced by the requisite writing, its validity depends on the  
11 parties' compliance with the standards of disclosure with respect to marital property that  
12 arises out of their confidential and fiduciary relationship. See Family Code §§721(b),  
13 1100; see *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 293; *Marriage of*  
14 *Barneson* (1999) 69 Cal.App.4th at 588.

15  
16  
17  
18 <sup>72</sup> Family Code §721 provides:

19 (a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with  
any other person, respecting property, which either might if unmarried.

20 (b) Except as provided in Sections 143, 144, 146, 16040, and 16047 of the Probate Code, in transactions  
21 between themselves, a husband and wife are subject to the general rules governing fiduciary  
relationships which control the actions of persons occupying confidential relations with each other. This  
22 confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and  
neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary  
relationship subject to the same rights and duties of nonmarital business partners, as provided in  
Sections 16403, 16404, and 16503 of the Corporations Code, including, but not limited to, the following:

23 (1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes  
of inspection and copying.

24 (2) Rendering upon request, true and full information of all things affecting any transaction which  
concerns the community property. Nothing in this section is intended to impose a duty for either spouse to  
keep detailed books and records of community property transactions.

25 (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction  
by one spouse without the consent of the other spouse which concerns the community property.

1 Family Code §850 specifies the types of changes in property characterization  
2 that can be validly accomplished through transmutation. This statute permits spouses to  
3 “(a) [t]ransmute community property to separate property of either spouse; (b)  
4 [t]ransmute separate property of either spouse to community property; or (c)[t]ransmute  
5 separate property of one spouse to separate property of the other spouse.” However,  
6 Family Code §§851 - 853 limit the scope of this contractual ability.<sup>73</sup> Family Code §852  
7 provides guidance in determining the validity of a purported transmutation.

8 Except for gifts of personal property items of limited value, a transmutation of real  
9 or personal property made on or after January 1, 1985, is valid only if made “in writing  
10 by an express declaration that is made, joined in, consented to, or accepted by the  
11 spouse whose interest in the property is adversely affected.” See Family Code §852m  
12 (a) & (c); *Estate of MacDonald* (1990) 51 Cal.3d 262, 272 [adversely-affected spouse's  
13 “express declaration” must contain language that expressly states characterization or  
14 ownership of the property is being changed]; see also *Marriage of Benson* (2005) 36  
15 Cal.4th 1096, 1104–1110; *Marriage of Holtemann* (2008) 166 Cal.App.4th 1166, 1172–  
16 1173.

17  
18 In *Estate of MacDonald* (1990) 51 Cal.3d 262 the Supreme Court set forth the  
19 test to determine whether a writing meets the express declaration requirement of Family  
20 §852.<sup>74</sup> In *MacDonald*, the wife signed a consent form naming the husband's living trust  
21 as beneficiary to husband's IRA in which wife had a community property interest. *Id.* at  
22

23 <sup>73</sup> Family Code §851 expressly declares that the law regarding fraudulent transfers applies to  
24 transmutation agreements. Family Code §853 sets forth some specific rules regarding purported  
transmutations in wills, survivor annuity or benefits, and non-probate transfers.

25 <sup>74</sup> *MacDonald* was decided before the separate codification of the Family Code and at the time of its  
enactment, former Civil Code § 5110.730 was codified as Family Code §852. However, the language of  
the statutes remains the same.

1 265–66. The trial court found that in signing the consent form, she intended to waive  
2 any community property interest in the IRA and to transmute her community property  
3 share of those funds into the husband’s separate property. *Id.* at 266. The trial court,  
4 relying on the wife’s signature to satisfy the writing requirement of Family Code §852,  
5 found the transmutation valid. *Id.*

6 The Supreme Court held that even if the wife had intended to transmute her  
7 community property to her husband’s separate property, the consent form did not meet  
8 the “express declaration” requirement of Family Code §852(a). The purported  
9 transmutation was therefore invalid. *Id.* at 267.

10 In determining what meaning should be given to the “express declaration”  
11 requirement of the transmutation statutes, the Court first considered the historical  
12 circumstances and legislative history of the statutes. *Id.* Family Code §852(a) was  
13 enacted to impose “formalities on interspousal transmutations for the purpose of  
14 increasing certainty in the determination of whether a transmutation has in fact  
15 occurred.” *Id.* (citing Recommendation Relating to Marital Property Presumptions and  
16 Transmutations, 17 Cal. Law Revision Com. Rep. (1984) pp.224–225). The revisions  
17 were deemed necessary to overrule prior case law that had liberally allowed  
18 transmutations, sometimes based only on oral statements. This prior approach had  
19 generated extensive litigation in dissolution proceedings. *Id.* at 268–269. This more  
20 relaxed standard encouraged parties to “transform a passing comment into an  
21 ‘agreement’ or even to commit perjury by manufacturing an oral or implied  
22 transmutation.” *Id.* at 269 (citation and quotation omitted). In this context, Family Code  
23 §852 “was intended to remedy problems which arose when courts found valid  
24  
25

1 transmutations on the basis of evidence the Legislature considered unreliable. To  
2 remedy these problems the Legislature decided that proof of transmutation should  
3 henceforth be in writing.” *Id.*

4 In giving effect to the “express declaration” requirement, the Court held that the  
5 signed writing must “contain words indicating an intent to transfer such interest [being  
6 transmuted], and in the absence of words which could be interpreted to show such  
7 intent, no parol evidence will be admitted.” *Id.* at 271 (*quoting: California Trust Co. v.*  
8 *Bennett* (1949) 33 Cal.2d 694).<sup>75</sup>

9 A signed writing does not create a valid transmutation “*unless* it contains  
10 language which expressly states that the characterization or ownership of the property  
11 is being changed.” *Id.* at 272. As the Court later noted in *In re Marriage of Benson*  
12 (2005) 36 Cal.4th 1096, 1104, *McDonald* emphasized that the test is “framed in the  
13 negative, as though all intendments weigh against finding compliance in the usual  
14 case.” Perhaps even more importantly, the *MacDonald* Court stated that its test  
15 “enables courts to validate transmutations without resort to extrinsic evidence” thus  
16 discouraging “perjury and proliferation of litigation.” *MacDonald*, 51 Cal.3d at 272.

17 In cases following *MacDonald*, courts have steadfastly held to the prohibition on  
18 extrinsic evidence being used to prove the existence of a transmutation. See, e.g., *In re*  
19 *Marriage of Benson* (2005) 36 Cal.4th 1096, 1100 (“*MacDonald* made clear that . . .  
20 section 852(a) precludes the use of ‘extrinsic evidence’ to prove that the writing effected  
21

22  
23  
24 <sup>75</sup> In *Bennett*, the Court construed the requirements of a statute regarding the creation of a joint tenancy  
25 between spouses. The statute in question required an express declaration that indicating that a transfer  
was creating a joint tenancy. See Civil Code §683(a). The court held that a rental agreement card  
signed by both husband and wife that only related to rights of possession and access could not be  
supplemented by evidence of surrounding circumstances to show that a joint tenancy was created.  
*Bennett*, 33 Cal.2d at 699.

