New Mexico Law Review

11 N.M. L. Rev. 421 (Summer 1981 1981)

Summer 1981

Community Property - Trasmutation of Community Property: A Preference for Joint Tenancy in New Mexico

Dorothy Kay Carter

COMMUNITY PROPERTY–TRANSMUTATION OF COMMUNITY PROPERTY: A PREFERENCE FOR JOINT TENANCY IN NEW MEXICO? *Estate of Fletcher v. Jackson*, 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980).

The Community Property Act of 1973[1] incorporates changes in the former New Mexico law which the legislature believed were mandated by the passage of the Equal Rights Amendment to the New Mexico Constitution.[2] Although the stated purpose of the Act was to make "the provisions of the community property law of New Mexico apply equally to all persons regardless of sex,"[3] commentary on the Act indicates that the drafters also sought to clear up long-standing and difficult questions about New Mexico's community property law.[4]

Transmutation of community property is one area which presents such questions. One of the most difficult of these questions arises after the death of one member of the marital community: whether or not the inter vivos acts of the husband and wife were sufficient to transmute community property into another form of tenancy, such as joint tenancy with right of survivorship. This was the question before the New Mexico Court of Appeals in *Estate of Fletcher v. Jackson.*[5] If the community property in question had been transmuted into joint tenancy, the surviving spouse became the sole owner through the built-in testamentary disposition of that tenancy.[6] If the property had not been transmuted, the decedent's one-half interest

---

1. N.M. Stat. Ann. § § 40-3-6 to -17 (1978).

2. The Equal Rights Amendment, N.M. Const. art. 2, § 18, was passed November 7, 1972, and became effective July 1, 1973, the effective date of the Community Property Act of 1973. For a detailed discussion of the Act, *see* Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. Rev. 1 (1974) [hereinafter cited as Bingaman].

3. N.M. Stat. Ann. § 40-3-7 (1978).

4. Bingaman, *supra* note 2, at 51.

5. 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980).

6. Although joint tenancy is denominated as one of the legal estates by which persons may hold property in New Mexico, it is not defined by New Mexico statute. *See* N.M. Stat. Ann. § 40-3-8(A)(6) (1978).

> The most important characteristic of a joint tenancy is the right of survivorship or *jus accrescendi.* On the death of one of the joint tenants his interest does not descend to his heirs or pass under his will; the entire ownership remains in the surviving joint tenants. The interest of the deceased joint tenant disappears and the whole estate continues in the surviving tenants or tenant.

C. Moynihan, Introduction to the Law of Real Property 220 (1962).

in the community property was properly includable in the probate estate, and, in the case of *Estate of Fletcher*, was distributable under the decedent's will.[7]

Notwithstanding the long history of litigation on the question of when a transmutation of community property has occurred, the court of appeals faced a difficult task in *Estate of Fletcher*. The precise questions presented in *Estate of Fletcher* had not been considered in any prior case. Existing case law provides some insight into what acts may be sufficient to effect a transmutation and how they may be proved; however, no statutory provision states expressly which acts are required,[8] despite the intent of the drafters of the Community Property Act of 1973 to require a writing between spouses to transmute community property. The drafters believed that such a requirement was established by the Act in what is now section 40-3-8(A)(5) of the New Mexico statutes, which provides that "separate property" means "property designated as separate property by a written agreement between the spouses."[9]

---

7. N.M. Stat. Ann. § 45-2-804(A) (1978) provides: "Upon the death of either spouse, one-half of the community property belongs to the surviving spouse and the other half is subject to the testamentary disposition of the decedent."

This has not always been the case in New Mexico, as explained in Bingaman, *The Impact of the Equal Rights Amendment on Married Women's Financial Individual Rights*, 3 Pepperdine L. Rev. 26, 36 n. 26 (1975):

> Wives in New Mexico acquired this right only after passage of an Equal Rights Amendment to the State Constitution, effective July 1, 1973. The Amendment required repeal of former N.M. Stat. Ann. § 29-1-8 (1953), which denied wives the right to will their halves of the community upon predeceasing their husbands while N.M. Stat. Ann. § 29-1-9 (1953) gave husbands such a right. New Mexico was the only community property state which *ever* had such a provision.

(Emphasis added).

8. N.M. Stat. Ann. § 40-3-8(A)(5) (1978). For a discussion of this statute, *see* note 8, *infra*. *See also* N.M. Stat. Ann. § 40-2-2 (1978), which provides:

> Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

N.M. Stat. Ann. § 47-1-16 (1978), also provides that:

> An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship, shall be prima facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.

9. N.M. Stat. Ann. § 40-3-8(A)(5) (1978). Such was the express intent of the drafters according to Bingaman, who said this new section of the Act modified N.M. Stat. Ann. § § 57-2-6, -12 (1953) (current version at N.M. Stat. Ann. § § 40-2-2, -8 (1978)), which re-

The result in *Estate of Fletcher* and the analysis and reasoning of the court of appeals significantly affect the resolution of issues of transmutation in New Mexico.[10] For example, identification of the property to be included in or excluded from the probate estates of New Mexico citizens is affected. Of even greater consequence may be the impact of the case on the strength of the community property presumption in New Mexico.[11] This Note examines the litigation in *Estate of Fletcher,* provides an historical context in which to analyze the reasoning of the court of appeals, and discusses the inconsistency of New Mexico statutory provisions and case law in light of the result in *Fletcher.*

STATEMENT OF THE CASE

When Neutie Fletcher died on July 4, 1977, she had been married to John J. Fletcher, Jr. for almost thirty-eight years.[12] There were no children of this long marriage, but Neutie had two sons from her previous marriage.[13] Neutie made a specific bequest to John (Appel-

main in effect otherwise, by requiring that for transmutation of property between spouses, that:

> such agreements between the spouses must be in writing, a requirement which was added to prevent misunderstandings and the possibility of fraud. If an agreement to transmute community property into the separate property [which by definition includes joint tenancy, *see* N.M. Stat. Ann. § 40-3-8(A)(6) (1978)] of one or both spouses was not written at the time it was made, the spouses are free to reduce the agreement to writing at a later time. If they subsequently cannot agree either as to the existence of the agreement or to its terms, this subsection leaves the property in question as community property. Such a result seems fairer to both spouses than does placing on one of them the risk of losing all interest in the property in a later court test, the outcome of which could depend only upon testimony involving differing recollections of a past oral agreement.

Bingaman, *supra* note 1, at 5-6. Bingaman was a member of the State Bar Committee which provided the first proposed draft of the new Act to the legislature.

10. This is particularly true because the supreme court denied certiorari.

11. New Mexico statutes provide that community property is any property acquired during marriage by either or both spouses which is not separate property. N.M. Stat. Ann. § 40-3-8(B) (1978).

New Mexico case law has established a rebuttable presumption that all property acquired during marriage is community property of that marriage, including income received by the husband alone. *See* Moore v. Moore, 71 N.M. 495, 379 P.2d 784 (1963); Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957) (both decided under former law, prior to the Community Property Act of 1973). The characterization of pension rights and retirement benefits as community property has also been upheld. *See* Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99 (1978).

12. 94 N.M. at 573, 613 P.2d at 715. Neutie and John were married in 1939 in Texas, a community property state, where they continued to live until 1961, when they moved to New Mexico. *See* Transcript of Proceedings, at 2, Estate of Fletcher v. Jackson, 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

13. John also had a son by a previous marriage, but this son's interests did not present any issue in this litigation. *See* Transcript of Proceedings, at 92.

lee) in her will executed February 19, 1977, but bequeathed and devised the residue of her estate to her two sons, William R. and Robert T. Jackson (Appellants).[14] Although Neutie and John had extensive holdings in stocks and securities,[15] Neutie's will was "devoid of any mention of [specific] disposition" of these assets.[16] Most of the stock owned by Neutie and John was held as community property with John as the only owner of record, but a small portion of their extensive holdings had been held in joint tenancy.[17]

The ensuing dispute between Neutie's two sons and John involved the characterization of ownership for 1718 shares of Standard Oil Co. of Indiana, which Neutie and John had "accumulated as part of a 'savings' or 'retirement' program with his employer."[18] When originally issued, the certificates for these shares bore only John's name; nonetheless, they were indisputably community property at the time

14. The existence of this will and the nature of the specific bequest, "$10 and a life estate in the house and furnishings," was apparently something of a shock to John. He did not know of the existence of the February 1977 will until after Neutie died. 94 N.M. at 575-76, 580, 613 P.2d at 717-18, 722. However, John was aware of the contents of Neutie's prior will, executed in 1964, in which she had devised and bequeathed all of her property "real, personal and mixed, and of every description whatsoever, and wherever situated," to her sons. Transcript of Proceedings, at 87. In a 1976 codicil, Neutie modified this 1964 will to leave John "all my equity of our house, being our home, and all furnishings . . . ," but everything else still went to her sons. *Id.* at 85.

15. The Transcript of the Record, at 36-40, Estate of Fletcher v. Jackson, 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980), shows holdings of over 9,000 shares of assorted stocks and securities, including the contested 1,718 shares of Standard Oil of Indiana.

16. 94 N.M. at 580, 613 P.2d at 722 (Sutin, J., dissenting). The attorney who drafted the 1977 will was never called as a witness. This will can be found in the Transcript of the Record, at 4-6.

A 1964 letter from Neutie to her daughter-in-law may provide some insight into Neutie's acceptance of a will so obviously lacking in necessary detail; writing about her 1964 will, she said, it was "too much and too expensive to itemize each little thing." Transcript of Proceedings, at 80.

17. The Transcript of the Record, at 36-40, indicates that 1,918 shares of Standard Oil of Indiana, including the disputed 1,718 shares, were recorded as joint tenancy stock when Neutie died. Approximately 7,826 other less valuable shares, recorded in the name of John, were identified as community property. The inventory and accounting made by Neutie's executor shows division of these latter shares, or the proceeds of their sale, one-half to John and one-half to Neutie's sons. Transcript of the Record, at 45-60.

It is difficult for this writer to agree that John's 1976 will and Neutie's 1976 codicil to her 1964 will were "consistent with joint tenancy estate planning." 94 N.M. at 576, 613 P.2d at 718. In these wills, John and Neutie each left nearly all of their respective estates to Neutie's sons. In addition, John and Neutie's stock and security dealings for over thirty-five years seem inconsistent with joint tenancy estate planning. They always held the majority of their stock and securities as community property. Indeed, John testified that other than the Standard Oil of Indiana stock, he and Neutie had *never* put any stock into joint tenancy. Transcript of Proceedings, at 20.

18. 94 N.M. at 574, 613 P.2d at 716. John received the accumulated 1,718 shares from his employer in a two-part disposition, some on May 9, 1973 and some on December 16, 1974. *Id.* at 580, 613 P.2d at 722 (Sutin, J., dissenting).

they were issued.[19] Neutie's one-half interest in these shares would have passed to her sons under the residuary provisions of her probated will.[20] However, John claimed that the shares were actually held in joint tenancy and therefore were now his sole and separate property. Indeed, newly issued certificates in John's possession bore the names of Neutie and John as joint tenants. Eight months before her death, John had sent the old certificates to transfer agents and requested that the certificates be reissued as shares held in joint tenancy.[21] Only John endorsed the old certificates;[22] only he signed the letters of request.[23]

John testified to both Neutie's prior oral agreement and her subsequent oral ratification of his actions in having the shares reissued in joint tenancy.[24] He said that joint tenancy in these 1718 shares was part of their marital estate plan.[25] In support of his statements, John presented two dividend checks on the reissued shares, both showing Neutie and John as joint tenants. Neutie had co-endorsed both checks.[26]

---

19. 94 N.M. at 574, 613 P.2d at 716.

20. The shares would also have passed to Neutie's sons under the provision of her prior will. *See* note 16 *supra.*

21. John was aware that Neutie was dying of cancer before November 5, 1976, the day he sent the first certificates to the First National Bank of Chicago, transfer agent for Standard Oil of Indiana. He sent the last certificate on November 15, 1976. Transcript of Proceedings, at 111-12.

22. Under U.C.C. § 8-404 (1972 version), the transfer agent was under no duty to inquire into the possible existence of claims adverse to the requested transfer because the certificated security was appropriately endorsed and the instruction to transfer came from an appropriate person, here the registered owner.

23. *See* Transcript of Proceedings, at 111-12.

24. The trial court's letter decision said that these alleged conversations were not considered in reaching its holding. 94 N.M. at 575, 613 P.2d at 717. *See also* Transcript of Proceedings, at 21-23.

25. John testified that he and Neutie had put their savings, their checking accounts, their home and the Standard Oil of Indiana stock into joint tenancy as a "base rock of financial stability" for the survivor of them. Transcript of Proceedings, at 13. Compare this testimony to Neutie's 1977 will in which she expressly reserved and granted a life estate in their home to John, remainder to her sons. Transcript of the Record, at 4. Then consider that the 1967 deed to the house reflected a joint tenancy. At least two conclusions follow: (1) The attorney who drafted Neutie's 1977 will did not know that the house was held in joint tenancy; or (2) Neutie did not know that the house was held in joint tenancy, or if she did, she did not understand that joint tenancy precluded her testmantary disposition of her interest in the property.

26. Neutie co-endorsed only the larger two of four dividend checks on the Standard Oil of Indiana stock (two dated December 10, 1976 for $735.43 and $389.28, and two dated March 10, 1977 for $1,246.70 and $24.70). The larger checks were drawn to Neutie and John as joint tenants; the smaller were drawn only in John's name. Transcript of Proceedings, at 114-17.

If the checks were accompanied by documents detailing the number of shares that each check represented, such documents are not in the record. Before John transferred the disputed 1,718 shares into joint tenancy, he and Neutie had held 200 shares of Standard Oil of

Neutie's sons testified that past correspondence and discussions with Neutie and John had led them to believe that Neutie's interest in these shares was to pass to them.[27] The sons further contended that transmutation of community property into separate property, including property held in joint tenancy, could not legally be effected under the Community Property Act of 1973 absent a written agreement between the spouses.[28] Rejecting that argument, the trial court found that transmutation had been established by "clear, strong and convincing evidence."[29] The court of appeals affirmed.

CONTEXT FOR ANALYSIS: A BRIEF HISTORY OF TRANSMUTATION IN NEW MEXICO

Transmutation is "a broad term used to describe arrangements between spouses which change the character of their property."[30] Once the initial legal status of any property held by married persons is determined, any attempt to change that legal status raises a transmutation question.[31]

Section 40-2-2 of the New Mexico statutes, which provides, in pertinent part, that "[e]ither husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried,"[32] made its appearance early in the history of New Mexico. Enacted in 1907,[33] this provision has never been amended. Except in two cases subsequently overruled by the New Mexico Supreme Court,[34] this statute consistently has been interpreted as recognizing the power of spouses

---

Indiana as joint tenants and 1,756 shares as community property. After the transfers initiated by John there were still 38 shares held as community property. While Neutie's co-endorsements indicate that she knew or should have known that some shares were held in joint tenancy, they do not necessarily indicate that she knew how many shares were so held.

27. Transcript of Proceedings, at 52-54.

28. 94 N.M. at 579, 613 P.2d at 721. Appellants' Brief in Chief, at 6-7, Estate of Fletcher v. Jackson, 94 N.M. 572, 613 P.2d 714 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980).

29. 94 N.M. at 574-75, 613 P.2d at 716-17.

30. W. Reppy, Jr., & W. de Funiak, Community Property in the United States 421 (1975).

31. *See* Gillespie v. Gillespie, 84 N.M. 618, 506 P.2d 775 (1973) (cited in 94 N.M. at 578, 613 P.2d at 720).

32. N.M. Stat. Ann. § 40-2-2 (1978).

33. 1907 N.M. Laws, ch. 37, § 4. Such provisions were "largely taken from California." Beals v. Ares, 25 N.M. 459, 491, 185 P. 780, 790 (1919). In fact, N.M. Stat. Ann. § 40-2-2 (1978) is still virtually identical to the California provision, Cal. Civ. Code § 5103 (West 1970).

34. Newton v. Wilson, 53 N.M. 480, 211 P.2d 776 (1949); MacDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938). Both were overruled by Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952). *See* text accompanying notes 35-44 *infra*.

to agree to change the legal status by which they hold their property.[35]

In *Estate of Fletcher,* therefore, the issue is not one of power, but one of proof: whether a writing signed by both spouses is required to transmute community property. In 1907, when section 40-2-2 was enacted, the answer clearly would have been yes. The 1907 statute provided:

> The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate: *provided, however, that he cannot make a gift of such community property, or convey the same without valuable consideration, unless the wife, in writing, consent thereto . . .*[36]

The issue of how transmutation should be proved was first considered by the New Mexico Supreme Court in *MacDonald v. Lambert,*[37] which has been charitably characterized as "severely limit-[ing] the power of husband and wife to transmute property."[38] The decision in *MacDonald* seems to have been a reaction against contemporary California cases extending proof of transmutation to include oral agreements between spouses. However, instead of merely finding that a writing was required to transmute property between spouses, the *MacDonald* court went on to consider the question of the power of spouses to transmute their property, a question not presented by the case on appeal.[39] Justice Sadler, the lone dissenter in *MacDonald,* characterized the majority opinion as holding that

---

35. Gillespie v. Gillespie, 84 N.M. 618, 506 P.2d 775 (1973); Wiggins v. Rush, 83 N.M. 133, 489 P.2d 641 (1971); Le Clert v. Le Clert, 80 N.M. 235, 453 P.2d 755 (1969); Thaxton v. Thaxton, 75 N.M. 450, 405 P.2d 932 (1965); Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963); Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957); Shanafelt v. Holloman, 61 N.M. 147, 296 P.2d 752 (1956); *In re* Trimble's Estate, 57 N.M. 51, 253 P.2d 805 (1953); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952); Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919). This power has been recognized by the general body of community property law for approximately thirteen centuries. *See* Vaughn, *The Policy of Community Property and Inter-Spousal Transactions,* 19 Baylor L. Rev. 20, at 29-30 (1967).

36. 1907 N.M. Laws, ch. 37, § 16 (emphasis added). Substantial rewording in 1915 resulted in an aggrandizement of the power of the husband with respect to the personal property of the community, making his sole power of disposition facially absolute. 1915 N.M. Code, § 2766; 1915 N.M. Laws, ch. 84, § 1. 1927 N.M. Laws, ch. 84, § 1 added a final clause, "except, that the husband may convey directly to the wife or the wife to the husband without the other joining in the conveyance."

37. 43 N.M. 27, 85 P.2d 78 (1938).

38. 94 N.M. at 574, 613 P.2d at 716.

39. For insight into the conflicting characterizations of the issue on appeal, *compare* the majority opinion, 43 N.M. at 33, 85 P.2d at 80, *with* the dissent of Justice Sadler, 43 N.M. at 40-41, 85 P.2d at 85.

> there is no law in New Mexico authorizing husband and wife, either orally or in writing, to transmute separate estate into community property, or vice versa; that the law fixes immutably the status of such property tested by the means of its acquisition and that the parties are powerless to change it.[40]

This characterization of *MacDonald* was adopted by the supreme court in the later case of *Newton v. Wilson,*[41] which expressly held that spouses had no power to transmute their property, even if they executed a written contract. Justice Sadler again dissented.

In *MacDonald* and *Newton,* the supreme court confused the fundamental issues of power and proof in transmutation questions. This confusion was not substantially alleviated by *Chavez v. Chavez,*[42] in which the supreme court expressly overruled those two cases.[43] The *Chavez* court simply adopted Justice Sadler's dissents from *MacDonald* and *Newton* and restated the statutory text of what is now section 40-2-2.[44] The court did not, unfortunately, clear up the critical question of whether a writing is required to effect a transmutation of community property. The court merely established that "[p]roof to support . . . transmutation must be clear, strong and convincing; a mere preponderance of the evidence will not suffice to effect it."[45]

The *Chavez* evidentiary standard was subsequently applied in the better-known case *In re Trimble's Estate*[46] and has, therefore, become known as the Trimble Rule. In *Trimble* the court held that a deed alone was not clear, strong and convincing proof that real property was to be held in joint tenancy when the decedent's widow testified that she had always believed that the realty was community property.[47]

---

40. 43 N.M. at 38, 85 P.2d at 83.

41. 53 N.M. 480, 211 P.2d 776 (1949).

42. 56 N.M. 393, 244 P.2d 781 (1952). Justice McGhee, author for the majority, wrote for the majority in *Newton.* He was the trial court judge in *MacDonald.*

43. 56 N.M. at 396, 244 P.2d at 782.

44. The holding reads:

> We adopt the dissenting opinions of Mr. Justice Sadler in each case so far as they state his construction of the statute, Sec. 65-206, N.M.S.A. 1941 Comp. [current version at N.M. Stat. Ann. § 40-2-2 (1978)], declaring either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried, subject, in transactions between themselves to the general rules of common law which control the actions of persons occupying confidential relations with each other.

56 N.M. at 396-97, 244 P.2d at 783. *See* text of section at note 7 *supra.* The wording remains unchanged.

45. 56 N.M. at 397, 244 P.2d at 783.

46. 57 N.M. 51, 253 P.2d 805 (1953).

47. *Id.* at 55-56, 63-64, 253 P.2d at 809.

ANALYSIS OF THE OPINION IN *ESTATE OF FLETCHER*

Not surprisingly, the court of appeals in *Estate of Fletcher* held that the Community Property Act of 1973 did not impose any prohibition on the power of spouses to transmute their property.[48] However, the court also held that the Act did not impose any additional requirements to effect a transmutation; specifically, the court held that the Act did not establish the requirement of a writing by both spouses.[49]

Additionally, the court held that the Act did not affect the evidentiary requirements set forth in section 47-1-16, which provides that:

---

48. No New Mexico statutory provision has ever been construed as completely prohibiting transmutation. In MacDonald v. Lambert, 43 N.M. 27, 85 P.2d 78 (1938), the trial court held the oral contract void because a statutory provision required a writing to support a marriage settlement agreement, but the supreme court affirmed on the grounds that the conversations between the spouses were too indefinite to support a contract. Only the dissent of Justice Sadler characterized the decision as completely prohibiting transmutation. *See* text accompanying notes 36-44 *supra*. On the other hand, there was a written contract in Newton v. Wilson, 53 N.M. 480, 211 P.2d 776 (1949), but in *Newton*, the supreme court found that the wife had signed the contract without the benefit of independent legal advice. Again the lone dissenter, Justice Sadler said that the *Newton* decision "upholds the power to transmute commingled separate estate into community property, irrespective of the intent on the part of the spouses, and yet denies their right under our statute to accomplish the same result, absent the element of commingling." *Id.* at 487, 211 P.2d at 780.

49. The court of appeals ignored Bingaman's commentary on legislative intent, Bingaman, *supra* note 1, at 5-6, reaching a result which perforce indulges in some judicial slight of hand. 94 N.M. at 580, 613 P.2d at 722. The court of appeals reasoned as follows:

> The heading of § 40-3-8, supra, is "Classes of property" and this heading was enacted by the Legislature. . . . Section 40-3-8 . . . by its terms, deals with classes of property and not with how property may be changed to a different class. If as Bingaman . . . contends, an agreement between spouses, to transmute property "must be in writing" then, absent such a writing, a gift of separate property, from one spouse to the other, or a gift by the community to one spouse would not be effective. The gift provision, § 40-3-8(A)(4) . . . makes no reference to a writing. The cotenancy provision, § 40-3-8(A)(6) . . . which declares as separate property each spouse's undivided interest as a joint tenant or tenant in common, does not state that such cotenancies, as between spouses, may only be established by their written agreement. Section 40-3-8 (D) . . . states that the right to hold property, as joint tenants, is not altered by the Community Property Act of 1973 except as provided in sections not applicable to this case.
>
> Section 40-3-8(A) . . . defines separate property; § 40-3-8(A)(5) . . . permits spouses to agree in writing that certain property is separate property. Such an agreement might affect a transmutation, but this is no more than an indirect consequence of the statutory definition; § 40-3-8 . . . does not deal directly with the transmutation issue, as Bingaman . . . recognizes at page 24 (note 50) and page 51.

Bingaman, *supra* note 1, wrote at note 50:

> Not affected by the new act is the question of the quantum of evidence necessary to establish that property which was held by the spouses as community property has been transmuted by them to a joint tenancy, a separate property interest of each under § 57-4A-2(A)(6) [now N.M. Stat. Ann. § 40-3-8(A)

> An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants . . . shall be prima facie evidence that such property is held in a joint tenancy. . . . In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.[50]

The court concluded that this statute "[b]y its wording, applies in determining whether the initial legal status of property was joint tenancy *and* in determining whether the original legal status has been changed to joint tenancy."[51] The effect of this holding is that the *Chavez-Trimble* requirement of clear, strong and convincing evidence is applicable to all transmutations of property except transmutations into joint tenancy.

The court took no credit for changing the scope of application of the *Chavez-Trimble* evidentiary standard, even though the court had itself characterized the issue in *Estate of Fletcher* as primarily one of proof and not of power. The court found that the enactment of section 47-1-16 was intended to change the applicability of the *Chavez-Trimble* evidentiary standard for transmutation of property into joint tenancy.[52] Without pausing, the court then expressly held that the Community Property Act of 1973 did not legislatively change "the *Trimble* requirement applicable to transmutations not covered by § 47-1-16."[53]

To summarize, the court of appeals found that the New Mexico statutes and case law combine to create a confusing state of affairs. Transmutations from community to joint tenancy can be established by a preponderance of the evidence, while transmutation from joint

---

(6)] . . . . *see also* Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963), which held that "clear and convincing" evidence, not a "mere preponderance," was necessary to establish that a wife's separate property had been transmuted to community property.

The difficult question presented by these decisions are not dealt with in the new act. Whatever quantum of proof was necessary under former case law to establish transmutation will also be necessary under the new act.

In concluding her commentary on the Act, Bingaman wrote that: "Obviously, many problems were left untouched: the transmutation question in New Mexico." Bingaman, *supra* note 1, at 51. This writer believes that this comment refers to quantum of proof problems and other problems, such as transmutations by commingling, and not to the issue of whether a writing between the spouses is required to transmute their property whose original legal status is identifiable.

Further, the gift provision of the Act need not be construed as inconsistent with the requirement of a writing between the spouses. The gift provision is consistent if it is construed to concern gifts from third parties and not gifts between spouses, which are transmutations of property.

50. N.M. Stat. Ann. § 47-1-16 (1978).

51. 94 N.M. at 578, 613 P.2d at 720 (emphasis added).

52. *Id.*

53. *Id.* at 580, 613 P.2d at 722.

tenancy to community property, from community to separate property other than joint tenancy property, and from separate to community property must still be "established by clear, strong and convincing proof–more than a mere preponderance of the evidence."[54]

The ease with which property may be transmuted from community property into joint tenancy does not stem from a preference for joint tenancy over community property in the laws of New Mexico; quite the contrary, the prevailing presumption has been one of community ownership.[55] If the ease of transmuting property into joint tenancy which the court of appeals found in section 47-1-16 stems from a policy of freedom to contract,[56] then it is reasonable to criticize both the court and the legislature for not advocating and implementing that policy by making transmutation to and from other types of tenancies as easy to accomplish.[57]

It is significant that the fiduciary obligations of spouses to each other apparently were not considered by the court of appeals in reaching its holding in *Estate of Fletcher.* Section 40-2-2, the statute providing or acknowledging the power of spouses to transmute their property, is not an unlimited franchise for husband and wife to enter into such agreements; rather, the statute expressly subjects their transactions "to the general rules of common law which control the actions of persons occupying confidential relations with each other."[58] Yet in *Estate of Fletcher* the court of appeals initially stated that it was "not concerned" with these rules.[59] Later, in dismissing the notion

---

54. This is the *Chavez-Trimble* requirement. *See* text accompanying notes 43 and 44, *supra.*

55. *See* note 10 *supra.*

56. *See* note 32 and accompanying text *supra.*

57. Reppy & de Funiak, *supra* note 29, at 421. At least one early California case held that a joint tenancy in personal property could be created by oral agreement transferring title to two persons as joint tenants, and that husband and wife might enter into a binding agreement that any certain property shall thereafter be held in joint tenancy. Young v. Young, 126 Cal. App. 306, 14 P.2d 580 (1932) (decided prior to a 1935 amendment to the California Civil Code expressly requiring a writing to transmute property into joint tenancy). Recent California cases hold, however, that a joint tenancy in either realty or personalty *cannot* be created by oral agreement. *See* Donovan v. Donovan, 223 Cal. App. 2d 691, 36 Cal. Rptr. 225 (1963). Previously, in Berl v. Rosenberg, 169 Cal. App. 2d 125, 336 P.2d 975 (1959), a case involving the creation of a joint tenancy in securities, the court of appeals held:

> The method of creating a joint tenancy is set forth in section 683 of the Civil Code. In interpreting that section it has been held that a joint tenancy in personal property can only be created by a writing (California Trust Co. v. Bennett, 33 Cal.2d 694, 204 P.2d 324) and that the intention to create a joint tenancy must be specifically set forth in the writing.

Id. at ____, 336 P.2d at 980.

58. N.M. Stat. Ann. § 40-2-2 (1978). *See* note 7 *supra.*

59. 94 N.M. at 574, 613 P.2d at 716.

that a written agreement should be required, the court stated that "the protection against fraud is in the requirement of § 40-2-2 . . . subjecting transactions between spouses to common law rules controlling actions of persons occupying confidential relations with each other."[60]

In the first half of this century, in *Trigg v. Trigg*,[61] the New Mexico Supreme Court examined the rules of common law which it found applicable to actions of persons in confidential relations, and the effect of equity upon the burden of proof when considering conveyances of property between husband and wife. The supreme court stated the rule as follows:

> While neither equity nor law denies the possibility of valid conveyances between husband and wife, yet whenever one of the parties obtains a possible benefit thereby, equity raises a presumption against its validity, and casts upon the one asserting it the burden of proving affirmatively his compliance with the equitable requisites in order to overcome the presumption.[62]

In the more recent case of *Trujillo v. Padilla*,[63] such an equitable presumption against the validity of the transaction between the spouses was raised because "the wife did not have competent and independent legal advice in conferring benefits upon the husband."[64] The supreme court found that the very nature and existence of a fiduciary relationship between the spouses affected the burden of proof to be applied. It said:

> * * * We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption.[65]

---

60. *Id.* at 579, 613 P.2d at 721.

61. 37 N.M. 296, 22 P.2d 119 (1933).

62. *Id.* at 299-300, 22 P.2d at 121, *quoting* 3 Thompson on Real Property, § 2823 (1923).

63. 79 N.M. 245, 442 P.2d 203 (1968).

64. *Id.* at 248, 442 P.2d at 206.

65. *Id.* at 248-49, 442 P.2d at 206-07, *quoting* 3 Pomeroy, Equity Jurisprudence § 956 (5th ed. 1971).

In light of these equitable notions applicable to conveyances of property between husband and wife, and without regard to whether section 40-3-8(A)(5) of the Act requires a writing to transmute community property, the court of appeals erred in *Estate of Fletcher* when it placed the burden of persuasion on Neutie's two sons rather than on her husband. The sons should not have had to disprove the alleged oral agreement and ratification between Neutie and John, notwithstanding the fact that the documents evidencing transfer of the stock into joint tenancy were acceptable as prima facie evidence under section 47-1-16. This statute should be construed to apply to the initial legal status of property but not to transmutations of the initial legal status to another status by husbands and wives. If it is not read in this way, the general rules of common law which the supreme court has found applicable to control the actions between persons occupying confidential relations with each other will offer little or no protection in transactions between spouses. The dissent in *Estate of Fletcher* was correct; the reissued stock certificates should not have been considered a muniment of title sufficient to establish a transmutation of community property into joint tenancy.[66]

CONCLUSION

The cardinal precept of the community property system is equality.[67] Embodying this precept,

> the community property system shows two essential characteristics: (1) the transmissability of the wife's interest to her heirs, so if the wife dies first, her heirs take the share to which she would have been entitled if she had survived; and (2) during the existence of the marital relationship the spouses are joint owners, or partners.[68]

The creation of inequality or inequity between spouses, even at death, is inconsistent with the fundamental notions of community property.

The decision of the court of appeals in *Estate of Fletcher* illustrates how specific inequalities and inequities can arise in the face of documented conscious legislative efforts to preclude them. The Community Property Act of 1973 represents changes in the former law of New Mexico which the legislature believed were mandated by the Equal Rights Amendment. Commentary shows that the drafters of the Act expressly sought to require a written agreement between

66. 94 N.M. at 583, 613 P.2d at 725.

67. De Funiak & Vaughn, *Why Community Property is so Misunderstood–Knowing its Origins is the Key*, 1 Comm. Prop. J. 97, 98 (1974).

68. *Id.*

spouses to transmute community property to separate property.[69] The court of appeals could have found the requirement of a writing in section 40-3-8(A)(5) consistent with section 47-1-16 by holding that the latter provision applies in determining questions of initial legal status of property, but not in determining questions of transmutation of property status between spouses. The court of appeals ignored legislative intent when it said that the Act created the impression of requiring a writing only as an indirect and unintended consequence of statutory definition.[70] It seems implausible to conclude that section 47-1-16, passed eighteen years before the Act, precluded a finding that the legislature meant to establish that requirement of a writing when it passed the Community Property Act of 1973. The issue of transmutation must be squarely resolved. The New Mexico Bar Association and others should encourage the legislature to address the transmutation questions in a comprehensive manner, to clarify policy issues, and to amend the Community Property Act of 1973.

DOROTHY KAY CARTER

69. *See* Bingaman, *supra* note 1, at 3-4.
70. 94 N.M. at 580, 613 P.2d at 722.