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Mixed Community/Separate Property or Transmutation Issues In New Mexico Divorce Cases

Just to make the community property versus separate property distinction even more complicated, sometimes the different types of property can be so intermingled that the property that was once separate becomes community or property that was community can become separate property (although this second example is very rare). This process of mixing property is often comingling or transmutation, which was described in a 1982 case from the Second Judicial Court in Albuquerque, called *Allen v. Allen*.

The most common way that property is comingled or transmuted is by gift. For instance, in the *Allen* case, the wife owned a piece of property prior to the marriage, which she later deeded to herself and her husband jointly. The Court ruled that the deed was evidence of the wife's intent to gift the property to the community, which changed the property from separate to community.

However, property can also be transmuted without a document specifically designating a gift, but rather through the actions of the parties. This situation commonly arises with a home owned by one spouse prior to the marriage. Under the basic rules of community property, the marital home would be the separate property of the spouse who owned the home prior to the marriage. However, what often happens is that the mortgage payments for that home are made from the parties' community funds (remember that all income earned during the marriage constitute community funds, even if the parties have separate bank accounts).

The donative intent of the spouse giving the separate property to the community is the key to evaluating whether or not the property was gifted. And without a document specifically identifying a gift, it can be very difficult to prove that intent. These cases may require hiring an outside expert to trace all of the funds applied toward the property, which can be a very expensive process. As with any divorce settlement process, the spouses arguing over possible transmuted property need to balance the value of the property in question against the potentially high cost of proving transmutation.

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