When Title Matters: Transmutation and the Joint Title Gift Presumption

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I. Introduction: Title is Irrelevant. Or is It?

The mantra of property division law is that “title is irrelevant.”¹ Up until the 1970s with the advent of no-fault divorce²


The notable exception to this article of faith is Arkansas, which requires that property held as tenants by the entireties must be divided by legal title. Crowder v. Crowder, 798 S.W.2d 425 (Ark. 1990).

² No-fault divorce statutes were a first response by legislatures to conform the law of divorce to contemporary social and economic realities, particularly women’s participation in the labor force and their correspondingly increased autonomy. Those statutes were far from
and the theory of marriage as partnership, 3 however, title was not irrelevant. Under the title system, the courts were required to award property to the spouse who held title to the property during the marriage. 4 One scholar described the effect of the title system of distribution of property on divorce:

This title system viewed marriage as a union of economically separate individuals, with each acquiring property for themselves, and not for the marital unit. It was only after passage of the Married Women’s Property Acts that women were even permitted to hold title to real perfect, and it cannot be disputed that many women have suffered disastrous financial consequences that they might have been spared but for no-fault.


By 1986, with the passage by the South Dakota legislature of no-fault divorce provisions, all fifty states had adopted some form of no-fault divorce. Doris Jonas Freed & Timothy B. Walker, Family Law in the Fifty States: An Overview, 19 Fam. L.Q. 331, 335 (1986).


4 Leslie Harris et al., Family Law 329 (Little Brown & Co. 1996); Turner, supra note 1, § 1.02 at 4.
property. These Acts, however, only affected a woman’s right to her separate property, acquired by gift or by her own efforts and titled in her name. The Acts did not create any property right in assets titled in her husband’s name. The strict rule against title transfer applied even if the wife was a wage-earner or worked in the husband’s business. If the wife’s salary went to disposable purchases while the husband’s income was used to acquire assets, the title system awarded the assets to the husband nonetheless. Not surprisingly, under this system the husband, as the primary wage-earner and title holder, usually left the marriage with most of the property.5

As a result of the title system, a husband would retain all property titled in his name, and a wife would keep the property titled in her name. The court would divide equally the property held jointly between the divorcing spouses. Generally, if a wife had insufficient property or earning potential to support herself after divorce, courts would award permanent alimony. The alimony was usually a set monthly amount for an indefinite period, until either party died or the wife remarried. Awards of alimony in the title system were closely related to fault-based notions of divorce.6

The title system was first supplanted by community property laws, where the states derived their principles of property ownership, and property ownership during marriage, not from English common law but from the laws of Spain and France.7 Simply stated, the community property system treats the married couple as a distinct economic unit, the marital community. Upon divorce, the court divides equally all property and income acquired during the marriage that composes the marital community. A party’s title to the property is irrelevant; each spouse owns one-half of all property obtained during the marriage. Property that either spouse received through gift, inheritance, or which was owned before the marriage, is separate property.8

8 See generally De Funiak & Vaughn, supra note 7. The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington (although Washington permits division of separate prop-
The title system was then completely replaced in the remainder of the states by equitable distribution laws adopted largely in the 1970s and 1980s as a result of the influence of the Uniform Marriage and Divorce Act. Under the “dual classification” system of equitable distribution law as adopted by a majority of states, property acquired during the marriage, with some well-defined exceptions, is classified as marital property, to which both partners are entitled to share in the event of divorce. Property that is not marital property is separate property, awarded to the owning spouse; the court has no jurisdiction to divide separate property. Again, title is irrelevant.

As a result of the demise of the title system, title theoretically became meaningless in divorce proceedings. The focus of the initial inquiry in a property division case is on the classification of property as marital or separate, not on title.

Classification is crucial to the division of property in divorce. Oldham, supra note 1, § 3.03[6] at 3-17. Thus, it is error as a matter of law for a court not to classify assets. E.g., Lagstrom v. Lagstrom, 662 So.2d 756 (Fla. Dist. Ct. App. 1995); Weeks v. Weeks, 650 A.2d 945 (Me. 1994); Wilkerson v. Wilkerson, 50
Title, however, is not irrelevant in one important instance: when title to property has changed. A change in title from one spouse solely to both spouses jointly, from both spouses jointly to one spouse solely, from one spouse solely to the other spouse solely, or from a third party to a spouse solely or both spouses jointly, can have great significance. The change in title can signify an intent to make a gift from one estate to another, and thus change the classification of the property. As they say in jazz, it’s not the notes, it’s the changes that make the music; in property division law, it’s not the title, it’s the changes in title that make the classification.

When title has changed from one estate to another, the parties may have intended to make a gift from the one estate to the other, and thus “transmutation” from one classification to another. This article will discuss transmutation resulting from a change in title. In particular, this article will first discuss transmutation in general in Part IIA. Next, in Part IIB, this article will discuss transmutation by change in title and the law’s special emphasis on the joint title gift presumption. Finally, in Part III, this article will conclude that any presumption that a change in title effects transmutation should either be abolished or be only the softest of presumptions. The party seeking to prove the gift should have the burden of production; when that burden is satisfied, the presumption should then vanish. If community property and equitable distribution are to truly adhere to the doctrine that “title is irrelevant,” a change in title should only be one piece of evidence regarding the intent to change the classification of property. The presumption has become so heavy handed in its application in many states that courts have been ignoring the facts concerning donative intent and have looked only to the


14 As observed in note 1, Arkansas excludes from distribution property held as tenants by the entireties, which must be divided equally. In Arizona and the District of Columbia, all conveyances into joint title automatically make the conveyed assets marital property, and this presumption cannot be defeated. See Toth v. Toth, 946 P.2d 900 (Ariz. 1997); Hackes v. Hackes, 446 A.2d 396 (D.C. 1982). Maine applies this rule to real property, Long v. Long, 697 A.2d 1317 (Me. 1996), and Maryland applies this rule to tenancy by the entireties. Golden v. Golden, 695 A.2d 1231 (Md. App. 1997).
change in title.\textsuperscript{15} Stated more simply, change in title is relevant as one possible means to an end – determining the intent of the donor.

II. The Doctrine of Transmutation

A. Transmutation in General

Transmutation is most often defined as the conversion of separate property into marital property during the marriage by express or implied acts, although there is no reason property cannot be transmuted from marital property to separate property as well.\textsuperscript{16}

Transmutation may be effected in a number of different ways. First, when marital property and separate property are mixed together so that it is impossible to discern the marital and separate components, the entire mixture is deemed marital property. This is transmutation by commingling.\textsuperscript{17} Second, the parties

\textsuperscript{15} It is possible that courts are too quick to find transmutation from separate to marital property because they believe it furthers an important public interest goal. For example, in \textit{In re Marriage of Brown}, 443 N.E.2d 11, 13-14 (Ill. App. Ct. 1982), the court stated,

Presuming transmutation of non-marital property gives further recognition to the equal partnership theory of the Act and to the contribution of the homemaker. Further, the court found that transmutation promotes the statutory preference for classifying property as marital which, even when the contribution of the spouse is insignificant, allows for more equitable distribution of property because the pool of marital property is greater.

\textit{Accord Turner, supra note 4, § 5.18 at 253 (“[Courts] are placing a judicial thumb on the side of the scale which favors marital property, thereby allowing their neutral assessment of the facts to be influenced by their policy belief as to what the facts should be.”).}

\textsuperscript{16} The doctrine of transmutation provides that under certain circumstances, an existing separate asset may change its character and become marital property. A small body of case law also applies the doctrine in reverse, so that an initially marital asset may become separate property.

\textit{Turner, supra note 1, § 5.24 at 274-75.}

may enter into an express agreement to change the character of
property, or there may be an express gift from one estate to an-
other. This is transmutation by express agreement or express
gift.\textsuperscript{18} Third, a party’s actions and statements may imply a gift to
the other spouse or to the marital estate. This is transmutation by
implied gift.\textsuperscript{19} It is under the doctrine of transmutation by ex-
press or implied gift that the joint title gift presumption comes
into play,\textsuperscript{20} and which will be discussed in particular in Part IIB.

1. Transmutation by Commingling

Very often, spouses will mix together marital and separate
property.\textsuperscript{21} If the marital and separate interests can be deter-
mined through tracing, then without commingling or the pres-
ence of a gift, or other doctrines that would cause transmutation,
the asset is part marital and part separate.\textsuperscript{22} Sometimes, however,
tracing is impossible. When separate property and marital prop-
erty are mixed to such a degree that the elements cannot be dis-
tinguished, i.e., that the separate element cannot be traced, then
the entire property is considered marital property: the separate
property has transmuted by commingling into marital property.\textsuperscript{23}

\textsuperscript{18} See Cathy C. Hadden, Note, Interspousal Gifts: Separate or Marital

\textsuperscript{19} Professor Oldham also adds the category of “transmutation by implied
agreement,” which is transmutation by use. Oldham, supra note 16 at 235. Most
of these cases however, can be analyzed under the rubric of transmutation by
implied gift, because Prof. Oldham makes the point that there must be an intent
to transmute. This intent is no more than donative intent in an implied gift case.
See discussion infra, Section IIA.

\textsuperscript{20} The distinction between an agreement and a gift may be important, how-
ever, in those states where an interspousal gift is marital property, and thus the
distinction should be kept in mind.

\textsuperscript{21} The most common instance of transmutation by commingling is a bank
account. OLDHAM, supra note 1, at § 11.03. See Brett R. Turner, Tracing Sepa-
rate Property Through a Commingled Bank Account, 12 DIVORCE LITIG. 229
(2000).

\textsuperscript{22} E.g., Reed v. Reed, 749 S.W.2d 335 (Ark. Ct. App. 1988); Stahl v.
Stahl, 430 P.2d 685 (Idaho 1967); Curtis v. Curtis, 403 So.2d 56 (La. 1981);

This is not true, of course, in states that follow the unitary theory of prop-
erty, in which property must be entirely marital or entirely separate.

\textsuperscript{23} E.g., Kemp v. Kemp, 485 N.E.2d 663 (Ind. Ct. App. 1985); Allen v.
Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979); Roel v. Roel, 406 N.W.2d 619
Consequently, the key to determining whether there has been transmutation by commingling is whether the marital and separate interests can be identified, i.e., can be traced. Tracing has generated a number of rules. Some courts assume that separate funds are withdrawn first, while other courts assume that marital funds are withdrawn first. The “family purpose doctrine” holds that when funds are removed from a commingled account, the law may presume the funds were marital if they were used for a family purpose. The “total recapitulation” method examines family income and expenses over the term of the marriage. If expenses exceed or equal income, all remaining funds are deemed to be separate. In other instances, courts have looked to the intent of the withdrawing spouse.

2. Transmutation by Express Agreement and Express Gift
   a. Transmutation by Express Agreement (Contract)

In most community property states, the parties can enter into an agreement to change the character of property, either from separate to marital or marital to separate. In equitable


24 E.g., Allen v. Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979); Harris v. Ventura, 582 S.W.2d 853 (Tex. Ct. App. 1979); see also Chenault v. Chenault, 799 S.W.2d 575, 581 (Ky. 1990) (Vance, J., concurring) (stating presumption that separate property which commingles with marital property remains separate if total balance remains above amount of separate property).


distribution states, case law has also held that parties can change the character of property by express agreement.\textsuperscript{29} Indeed, in many equitable distribution states, the statute specifically provides that parties can exclude otherwise marital property by an agreement, classifying such property as separate.\textsuperscript{30}

The burden of proving the agreement is on the party who asserts it.\textsuperscript{31} There must be an offer and acceptance of the offer to reclassify the property, founded upon consideration.\textsuperscript{32} The contract must not be the result of fraud, duress, or undue influence, and may not be unconscionable.\textsuperscript{33}

\textsuperscript{29} \textit{E.g.}, Chotiner v. Chotiner, 829 P.2d 829 (Alaska 1992) (holding that agreements, written or oral, may demonstrate owner’s intent, or lack of intent, to convert separate property to marital property); Husband T.R.G. v. Wife G.K.G., 410 A.2d 155 (Del. 1979) (finding that interspousal transfer can be evidence of midnuptial agreement); Brice v. Brice, 411 A.2d 3410 (D. C. 1980) (considering an antenuptial agreement); Hylton v. Hylton, 716 S.W.2d 850 (Mo. Ct. App. 1986) (finding that wife made an express agreement with husband that in exchange for husband’s help with the note payment, wife would transfer an interest in the property to husband); Johnson v. Johnson, 372 S.E.2d 107 (S.C. Ct. App. 1988) (considering an antenuptial agreement); McDavid v. McDavid, 451 S.E.2d 713 (Va. Ct. App. 1994) (finding that language in deed of trust whereby wife relinquished “her interest in the property to the lender” was insufficient to transmute marital property into separate property); Stainback v. Stainback, 396 S.E.2d 686 (Va. Ct. App. 1990) (finding there was no agreement between the parties to transmute shares of separate stock); Westbrook v. Westbrook, 364 S.E.2d 523 (Va. Ct. App. 1988) (finding an agreement between the parties as evidenced by a deed of trust). \textit{Cf.} Wolford v. Wolford, 785 P.2d 625 (Idaho 1990) (determining that an agreement written on a restaurant napkin was insufficient).


\textsuperscript{31} Shenk v. Shenk, 571 S.E.2d 896 (2002).


\textsuperscript{33} In re Marriage of Haines, 39 Cal. Rptr. 2d 673 (Cal. Ct. App. 1995); Crosby v. Crosby, 960 S.W.2d 5 (Mo. Ct. App. 1997); In re Marriage of Gochanour, 4 P.3d 643 (Mont. 2000).
The courts are likely to find an agreement when the parties have engaged in actual negotiation. The courts also appear likely to find that an agreement changes the character of property when the conveyance was made during a period in which the parties were experiencing marital problems. These agreements are, essentially, reconciliation agreements whereby otherwise separate property becomes marital property in consideration for continuation of the marriage, or marital property becomes the separate property of one spouse for that same consideration.

Reverse transmutation, i.e., transmutation of marital property to separate property, is often accomplished by a midnuptial agreement. For example, in *Barner v. Barner*, the husband confronted the wife about her extramarital affair. In return for the husband’s forgiveness, the wife agreed that certain marital assets would be the husband’s sole property. The court found that the parties had intended not only to convey title to the assets to the husband alone, but also that in the event of divorce, the conveyed assets were the husband’s separate property. Thus, where an unambiguous document shows the intent of the parties to transfer marital property to one party only, the midnuptial gift is proven, and the transmutation by express gift is complete.

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36 See Laura W. Morgan & Brett R. Turner, Attacking and Defending Marital Agreements ch. 16 (ABA 2001).
37 Midnuptial agreements, like antenuptial agreements, must be scrutinized to ensure the terms are fair and just, both when they are executed and when they are enforced. Of course, midnuptial agreements need not necessarily occur when the marriage is experiencing stress. See Pacelli v. Pacelli, 725 A.2d 56 (N.J. Super.App. Div. 1999). See generally Morgan & Turner, supra note 36.
b. Transmutation by Express Gift

Transmutation may also take place when one spouse makes an express gift to the other spouse, but this rule concerning interspousal gifts is by no means universal. In some states, interspousal gifts are treated like gifts from third parties: if the gift is purchased by one spouse with marital funds but given to the other spouse exclusively, the property is the separate property of the recipient. In other states, a gift purchased by one spouse with marital funds but given to the other spouse remains marital property. In these states, it is therefore important to distinguish between transmutation by express agreement or by express gift; a gift will not cause transmutation from marital to separate property.

A transfer into the sole title of one spouse may or may not cause transmutation to sole property, depending on the intent of the donor. The clearest evidence of an intent to transmute marital property into separate property by express gift is a deed

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42 Compare Ruiz v. Ruiz, 548 So.2d 699 (Fla. Dist. Ct. App. 1989) (finding that where marital funds were used to purchase jewelry for wife, no gift occurred, because jewelry was an investment); McDowell v. McDowell, 670 S.W.2d 518 (Mo. Ct. App. 1984) (finding no gift where stock was purchased with marital funds and registered in wife’s name only); O’Neill v. O’Neill, 600 S.W.2d 493 (Ky. Ct. App. 1980) (finding that jewelry bought by husband for wife was not gift), with Olson v. Olson, 294 S.E.2d 425 (S.C. 1982) (finding that jewelry bought by husband for wife was gift to wife); Hanover v. Hanover, 775 S.W.2d 612 (Tenn. Ct. App. 1989) (finding that jewelry that the husband admitted purchasing for special occasions was gift to the wife).
whereby both parties convey property to one party as his or her “separate property.”

A finding of express gift may be defeated by evidence of lack of donative intent. For example, when a transfer is made strictly for estate planning purposes, there is no gift. Further, when the donor retains ownership by placing restrictions on the donee, then delivery is incomplete, and, again, there is no gift.

3. Transmutation by Implied Gift

Sometimes, without an express agreement or express gift, the parties will undertake actions that imply a gift from one estate to another. The line between an “express gift” and an “implied gift” is hazy, indeed, and one author has stated that “transmutation by implied gift is a specific application of the general law of express interspousal gifts.” For purposes of this dis-

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43 E.g., Bliss v. Bliss, 898 P.2d 1081 (Idaho 1995) (finding that community asset conveyed to wife by deed which referred to asset as wife’s separate property was wife’s separate property); Pettry v. Pettry, 610 N.E.2d 443 (Ohio Ct. App. 1991) (finding that where husband quitclaimed half interest in marital home to wife, and quitclaim gave up husband’s equitable distribution rights, at least 50% of home was wife’s separate property); Roberts v. Roberts, 999 S.W.2d 424 (Tex. Ct. App. 1999) (finding that where deed stated that spouse took property as “separate” property, property was separate); McDavid v. McDavid, 451 S.E.2d 713 (Va. Ct. App. 1994) (determining that where husband and wife jointly conveyed real estate and stock into sole name of husband, and real estate conveyance indicated property would be husband’s separate estate, property was husband’s separate property).

44 Brady v. Brady, 39 S.W.3d 557 (Mo. Ct. App. 2001) (finding that wife’s quitclaim to husband in sole title was part of estate planning); Kelln v. Kelln, 515 S.E.2d 789 (Va. Ct. App. 1999) (holding that where marital property was conveyed into revocable trusts, one for each spouse, the entire property remained marital).


47 Turner, supra note 1, § 5.24 at 278.
Discussion, however, express gifts and agreements are described above, implied gifts without a change in title are described herein, but change in title to joint title, which can be either the result of an express gift or implied gift, will be treated together in Section IIB.

Transmutation by implied gift, without a change in title, must be proven like any other gift. The spouse claiming a gift has the burden of proof.48 There must be proof of donative intent and delivery of the property. Donative intent, or the lack thereof, may be proven by statements of the donor,49 and how the property was treated during the marriage.50 Some courts have also considered the length of the marriage.51

Most often, the action that “implies” a gift without any other express indication of a gift is changing the title of the property. More specifically, one spouse may take property titled in his or her name only, and retitle the property in the names of both parties jointly. In this case, the law presumes that the joint titling of

48 E.g., Sprenger v. Sprenger, 878 P.2d 284 (Nev. 1994); Hatfield v. Hatfield, 878 P.2d 284 (S.C. Ct. App. 1997). See also Holden v. Holden, 667 So. 2d 867 (Fla. Dist. Ct. App. 1996) (holding that burden of proving gift was not met when husband “assumed” and “guessed” that the property was used for marital purpose).


Turner notes in his treatise that cases are reaching widely disparate results on whether the use of a separate property home as the marital home will transmute the property into marital property. “The results of the cases are so inconsistent that the law in at least some states can be fairly be called arbitrary.” TURNER, supra note 1, § 5.24 at 358 (Supp. 2003).

the property signifies a gift from the separate estate to the marital estate. The authors question whether such a presumption should be made.

B. The Joint Title Gift Presumption

1. Evolution of the Presumption

The law does not presume that when marital funds are used to purchase property and that property is taken in sole title, then the property is the separate property of the sole title holder. In a majority of states, however, the law does presume that when separate property is used to purchase property taken into joint title, or when separate property is transferred into the joint names of both spouses, the property has been gifted to the marital estate. Under this joint title gift presumption, the party seeking to claim that the property is still separate, despite the change in title, has the burden of proving there was no gift to the marital estate. Moreover, in some states, the presumption that

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53 The joint title gift presumption also applies to property acquired before marriage, such that property acquired before marriage in the joint names of the spouses is marital property rather than 50% to each spouse. E.g., Booth v. Greene, 75 S.W.3d 864 (Mo. Ct. App. 2002); Koehler v. Koehler, 697 N.Y.S.2d 478 (N.Y. Sup. Ct. 1999).

property titled jointly is marital property is irrebuttable. Some states also apply this presumption to personal property, while other states have held that the presumption applies to real property only.

If title is irrelevant in property division, the question arises why any presumption exists that titling property jointly converts the property into marital property. Many cases answer this question by holding that a deliberate conveyance into joint title must be a gift to both spouses because both spouses receive a legal interest in the property. Other states, however, hold that the donor must have an intent to transfer not only a legal interest,
but also a beneficial interest. Therefore, if the donor did not intend that both spouses have a real, beneficial interest, then the property does not transmute to marital property.

2. Rebutting the Presumption

The best evidence a spouse could have to rebut the joint title gift presumption is a written instrument signed by both parties with an express provision stating that no gift is intended. Most people, however, do not have such a document, and lack of donative intent must be proven otherwise.

A lack of consent to the conveyance will negate the necessary donative intent. Thus, a conveyance from a third person to the spouses in joint title may be the separate property of one spouse if the donor did not intend both spouses to share, but made the conveyance into joint title on the advice of counsel.

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62 King v. King, 760 S.E.2d 830 (Miss. Ct. App. 2000) (finding that the wife forged husband’s signature on joint title, thus negating the husband’s donative intent); Kinsey-Geujen v. Geujen, 984 S.W.2d 577 (Mo. Ct. App. 1999) (finding that where the bank mistakenly deposited the wife’s separate funds into a joint account, contrary to the wife’s instructions, there was no transmutation); In re Strobel, 821 S.W.2d 579 (Mo. Ct. App. 1992) (finding no transmutation where a third party inadvertently added the wife’s name to a jointly titled note without the husband’s knowledge or consent). Cf. Rapp v. Rapp, 789 S.W.2d 148 (Mo. Ct. App. 1990) (finding that although the husband claimed lack of knowledge as to the transfer, he had signed various documents relating to the conveyance, thereby giving him constructive knowledge).
63 In re Marriage of Liebich, 547 N.W.2d 844 (Iowa Ct. App. 1996); In re Marriage of Martens, 406 N.W.2d 819 (Iowa Ct. App. 1987); Mims v. Mims, 286 S.E.2d 779 (N.C. 1982); Willyard v. Willyard, 719 S.W.2d 91 (Mo. Ct. App. 1986).
Similarly, consent obtained by fraud, duress, or undue influence will negate donative intent. An invalid deed will also negate donative intent. A conditional gift that fails for the condition will also rebut the presumption of gift; in this case, the donative intent is missing because the condition is not fulfilled. Similarly, evidence that despite the conveyance into joint title, the parties continued to treat the asset as separate property may be good evidence to rebut the gift presumption. These cases where the spouse making the conveyance retains control over the

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64 Spence v. Spence, 669 So.2d 1110 (Fla. Dist. Ct. App. 1996) (presumption rebutted by evidence of fraud); Mochida v. Mochida, 691 P.2d 771 (Haw. Ct. App. 1984); In re Marriage of Benz, 518 N.E.2d 1316 (Ill. Ct. App. 1988) (wife transferred asset to avoid husband’s verbal abuse); Peterson v. Peterson, 595 S.W.2d 889 (Tex. Ct. App. 1980) (wife refused to move into home unless her name was added to title; court found title change was the result of duress); Charlton v. Charlton, 413 S.E.2d 911 (W. Va. 1991) (husband’s dominance over wife negated wife’s intent). Cf. Myrick v. Myrick, 2 S.W.3d 90 (Ark. 1999) (merertime by one spouse the other does not demonstrate duress or undue influence); In re Marriage of Marriott, 636 N.E.2d 1141 (Ill. Ct. App. 1994) (husband’s transfer to joint title to avoid wife’s nagging did not rebut presumption); McClellan v. McClellan, 873 S.W.2d 350 (Tenn. Ct. App. 1993) (threat of divorce not duress).


66 Cole v. Cole, 920 S.W.2d 32 (Ark. Ct. App. 1996) (transfer to joint title by wife made on condition that husband make new will, new will never made; gift fails); In re Marriage of Voight, 444 N.E.2d 694 (Ill. Ct. App. 1982) (condition that wife make new will not fulfilled); Devore v. Devore, 725 So.2d 193 (Miss. 1998) (husband transferred marital residence into joint title on condition wife live with him, she left him two months later). See also Larman v. Larman, 991 P.2d 536 (Okla. 1999) (holding that joint title gift presumption applies only to unconditional transfers into joint title).

jointly titled property can be seen as rebutting the gift presumption for lack of delivery of a gift.68

Some courts have held that the fact that the marriage was of short duration supports proof of lack of intent to make a gift,69 although this does not make sense: at the time of the gift, the duration of the marriage could not be known, and present intent to make a gift is determinative of donative intent.70

The most commonly stated reason to negate donative intent is that the conveyance into joint title was made for estate planning purposes, to avoid probate or taxes. In many states, this reason has been held simply insufficient, because the party actually intended to transfer legal title. The reason for that transfer is irrelevant.71 Indeed, at least one case has held that the desire to avoid probate is affirmative proof of donative intent.72 The same reasoning has been applied in those cases where the donor claims the reason for the conveyance was “convenience.”73 In other

68 But see Kettler v. Kettler, 884 S.W.2d 729 (Mo. Ct. App. 1994) (holding that the gift presumption was not rebutted by proof that the donor spouse had sole control over the asset).


70 “The donor must intend to relinquish the right of dominion on the one hand, and to create it on the other, and this intention to make a gift must be a present intention; a mere intention to give in the future will not suffice.” 38 Am.Jur.2d Gifts § 17 (1968) (emphasis added) (collecting cases).

71 E.g., In re Marriage of Finer, 920 P.2d 325 (Colo. Ct. App. 1996); Lynam v. Gallagher, 526 A.2d 878 (Del. 1987) (holding that a transfer to increase the allowable tax deduction for dividends did not rebut presumption); In re Marriage of Smith, 638 N.E.2d 384 (Ill. Ct. App. 1994) (holding that the mere desire to avoid probate does not rebut the joint title gift presumption); In re Marriage of Siddens, 588 N.E.2d 321 (Ill. Ct. App. 1992) (holding that the husband’s transfer on his deathbed to provide for the wife in event of his death did not rebut presumption); Stevenson v. Stevenson, 612 A.2d 852 (Me. 1992); Coffey v. Coffey, 501 N.Y.S.2d 74 (N.Y. App. Div. 1986); Brown v. Brown, 507 A.2d 1223 (Pa. Super. Ct. 1986); Burnside v. Burnside, 460 S.W.2d 264 (W. Va. 1995). See also Coleberd v. Coleberd, 933 S.W.2d 863 (Mo. Ct. App. 1996) (holding that the desire to avoid creditors does not rebut the presumption).


73 Quinn v. Quinn, 512 A.2d 848 (R.I. 1986); In re Marriage of Sokolowski, 597 N.E.2d 675 (Ill. Ct. App. 1992). See also Cattaneo v. Cattaneo, 803 So. 2d 889 (Fla. Dist. Ct. App. 2002) (holding that a conveyance into joint title to demonstrate to the INS that the marriage was not sham did not rebut the presumption). But see In re Rink, 483 N.E.2d 216 (Ill. Ct. App. 1985) (holding that
Vol. 18, 2003 Transmutation 353


A similar dichotomy has arisen when the reason for the conveyance into joint title is ease of obtaining financing. In some states, a bank’s or other creditor’s insistence that property be taken in joint title does not rebut the gift presumption, because legal title was deliberately conveyed into both parties’ names.\footnote{Weeks v. Weeks, 650 A.2d 945 (Me. 1994); Lalime v. Lalime, 629 A.2d 59 (Me. 1993); Daisernia v. Daisernia, 591 N.Y.S.2d 890 (N.Y. App. Div. 1992).} In other states, however, the courts take the position that the presumption is rebutted where title is taken jointly only to obtain financing, where the donor has no intent that the donee have a present beneficial interest.\footnote{Gardner v. Harris, 923 P.2d 96 (Alaska 1996); Hoffay v. Hoffay, 555 So. 2d 1309 (Fla. Dist. Ct. App. 1990); In re Marriage of Nagel, 478 N.E.2d 1188 (Ill. Ct. App. 1985); Berry v. Breslain, 352 N.W.2d 516 (Minn. Ct. App. 1984); Tubbs v. Tubbs, 755 S.W.2d 423 (Mo. Ct. App. 1988); DeCabrera v. Cabrera-Rosete, 524 N.Y.S.2d 176 (N.Y. 1987); Larman v. Larman, 991 P.2d 536 (Okla. 1999). See also Giuffre v. Giuffre, 612 N.Y.S.2d 439 (N.Y. App. Div. 1994) (finding the presumption was rebutted where the title to a bank account was taken jointly to double FDIC coverage).}

Just as a document stating that the transfer is not a gift is good evidence rebutting the presumption, a document stating that the transfer is a gift is good evidence supporting the presumption.\footnote{E.g., Theissmann v. Theissmann, 471 S.E.2d 809, aff’d 479 S.E.2d 534 (Va. Ct. App. en banc 1996); Kinard v. Kinard, 986 S.W.2d 220 (Tenn. Ct. App. 1998).} Likewise, when a party states that the purpose of the transfer was rebutted when funds were placed in a joint account for convenience).

\footnote{Case have held that a deed of gift is conclusive evidence of donative intent that cannot be disproved by parol evidence. Hall v. Hall, 734 P.2d 666 (Idaho Ct. App. 1987); Utsch v. Utsch, 581 S.E.2d 507 (Va. 2003).}
transfer is to provide a gift, donative intent is present.\textsuperscript{78} Rebutting the presumption is also difficult when the parties have used and treated the jointly titled property as marital property.\textsuperscript{79}

III. Should the Joint Title Gift Presumption be Abandoned?

As noted above, many states have taken the position that the reason for conveyance into joint title is irrelevant; if there is an intent to make such a conveyance, then the joint title gift presumption operates to transmute the property titled jointly into marital property regardless of the reason for the conveyance. The focus has shifted away from whether an intent to \textit{make a gift} existed to whether an intent to \textit{make a conveyance into joint title} existed. If these states were honest, they would not call this the joint title gift presumption; they would call it the joint title marital property presumption. Some states have taken the presump-

\textsuperscript{78} Clark v. Clark, 919 S.W.2d 253 (Mo. Ct. App. 1996) (the wife testified a gift was intended); Rosenkranse v. Rosenkranse, 736 N.Y.S.2d 453 (N.Y. App. Div. 2002) (the husband conceded at trial that the purpose of the conveyance was to make a gift to the wife).

\textsuperscript{79} Leis v. Hustad, 22 P.3d 885 (Alaska 2001) (where each party placed separate funds into a joint account with the intention of using the joint account to build marital home, the account was marital); Davila v. Davila, 908 P.2d 1027 (Alaska 1995) (where wife’s separate funds were placed in a joint account managed by husband, the wife’s funds were marital); In re Marriage of Rogers, 422 N.E.2d 635 (Ill. 1981) (where jointly titled separate asset were used by both spouses, but other separate assets were carefully segregated, the jointly titled asset was marital); In re Marriage of Gattone, 739 N.E.2d 998 (Ill. Ct. App. 2000) (a separate property home placed in joint title, with the wife given unlimited access, was marital); Schroeder v. Schroeder, 924 S.W.2d 22 (Mo. Ct. App. 1996) (property used as a marital home and improved with marital funds was marital); In re Marriage of Salisbury, 643 S.W.2d 821 (Mo. Ct. App. 1982) (jointly titled home used as marital home for 14 years was marital); Dunn v. Dunn, 638 N.Y.S.2d 238 (N.Y. App. Div. 1996) (the presumption not rebutted when a separate asset was conveyed into a series of jointly titled assets); Gundlach v. Gundlach, 636 N.Y.S.2d 914 (N.Y. App. Div. 1996) (where funds from a joint account were regularly commingled with other marital property, the presumption not rebutted); Quinn v. Quinn, 512 A.2d 848 (R.I. 1986); Kincaid v. Kincaid, 912 S.W.2d 140 (Tenn. Ct. App. 1995).

A transfer into joint title for the purpose of benefitting the parties’ children supports the finding of a gift, since support of children is a family purpose. Williams v. Williams, 965 S.W.2d 451 (Mo. Ct. App. 1998).
Vol. 18, 2003

Transmutation 355

tion so far as to make it irrebuttable, although the cases do not state the presumption is irrebuttable. 80

Perhaps recognizing that an almost automatic transmutation to marital property occurs upon a conveyance into joint title, courts in these states have been more than willing to then divide the marital property unequally, essentially awarding to the donor his or her separate contribution. 81

The remainder of the states either refuse to recognize the joint title gift presumption, or if they do, they focus on the elements of a gift: is there donative intent, and has there been delivery. By focusing on the elements of a gift, the majority of states that still recognize the presumption have made the joint title gift presumption less of a presumption, and more of a bubble to be burst: so long as any evidence exists to negate the presumption, the court ignores the presumption and focuses on all the elements of a gift. 82

80 For example, in Creson v. Creson, 917 S.W.2d 553 (Ark. Ct. App. 1996), the husband contributed separate property to the jointly titled marital home. The husband stated that he did not intend to make a gift, and the wife admitted that she had promised to repay the husband for his contributions. Despite the testimony of both the husband and the wife that no gift was intended, the court found the presumption not rebutted. See also McKay v. McKay, 989 S.W.2d 560 (Ark. Ct. App. 1999) (holding that a person’s donative intent does not control whether the property conveyed into joint title is marital or separate).


82 A similar approach was taken in Larman v. Larman, 991 P.2d 536 (Okla. 1999). In that case, the court held that where the donor articulates a
To be consistent with practice, courts should either abandon the joint title gift presumption, or label it an evidentiary burden to be met. Community property law and equitable distribution law should adhere to the stated principle that “title is irrelevant” and analyze the conveyance in terms of a gift, without any legal presumptions of transmutation.

Courts adopted the joint title gift presumption as a way to further the public policy of classifying property as marital as a default. This joint title gift presumption, however, does real damage to two more important tenets of property distribution law: title is irrelevant; and the source of funds used to acquire the asset should be the initial classification of the property, with the burden of transmutation on the party asserting it. In the case of an express agreement, express gift, or implied gift without a transfer into joint title, the agreement or gift must be proven by affirmative proof. The same should be true of gifts into joint title; the gift should be affirmatively proven, and title should be irrelevant.

The joint title gift presumption also ignores the reality of how married couples operate their financial affairs. As stated by one authority,

An unacceptably large number of married couples simply place no great importance to the form in which legal title is held. The number of couples who disregard joint title is probably less than the number of couples who disregard sole title, but there are still a substantial number of instances in which the parties transfer an asset into joint title without any intention to change beneficial ownership.

Abandoning the joint title gift presumption would also free courts from the hypocrisy of finding an asset to be “marital,” but then awarding all the asset to the contributing party. This kind of division is reminiscent of inception of title/reimbursement rules, which the law long ago renounced.

valid reason for the transfer other than to make a gift, the presumption is rebutted, and the burden shifts to the transferee to prove the elements of a gift.

83 See note 14, supra.

84 TURNER, supra note 4, § 5.18 at 252 (Supp. 2003). See also Lofton v. Lofton, 745 S.W.2d 635, 640 (Ark. Ct. App. 1988) (placing assets in joint title is “typically done as a matter of convenience”).