When Title Matters: Transmutation and the Joint Title Gift Presumption

by
Laura W. Morgan*
Edward S. Snyder**

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 divorce[2]

---

* Laura W. Morgan is the owner and operator of Family Law Consulting in Charlottesville, Virginia,

** Edward S. Snyder is a principal partner in the firm of Weinstein Snyder Lindemann in Roseland, New Jersey.

[1] J. Thomas Oldham, Divorce, Separation, and the Distribution of Property § 3.03[1] at 3-7 (2001) ("Title is not determinative"); Brett R. Turner, Equitable Distribution of Property § 5.05 at 127 (2d ed. 1994) ("legal title is irrelevant to classification of property"); *id.*, § 5.24 at 382 (Supp. 2003) ("A fundamental principle of equitable distribution law provides that the classification of property does not depend on legal title). *See, e.g.*, De Liedekerke v. De Liedekerke, 635 A.2d 339, 343 (D.C. 1993); Farah v. Farah, 424 So.2d 960, 961 (Fla. Dist. Ct. App. 1983); Albert v. Albert, 298 S.E.2d 612, 613 (Ga. 1982); In re Marriage of Hegge, 674 N.E.2d 124, 128 (Ill. App. Ct. 1996); Stassen v. Stassen, 351 N.W.2d 20, 23 (Minn. Ct. App 1984) (citing Minn. Stat. § 518.54); Hemsley v. Hemsley, 639 So.2d 909, 914 (Miss. 1999); Bashmore v. Bashmore, 685 S.W.2d 579, 593 (Mo. Ct. App. 1985); Schultz v. Schultz, 649 P.2d 1268, 1272 (Mont. 1982) (citing MCA 40-4-202); David v. Davis, 513 N.Y.S.2d 405 (N.Y. App. Div. 1987) (citing Dom. Rel. Law § 236B(1)(c)); McLean v. McLean, 363 S.E.2d 95, 102 (N.C. Ct. App. 1987); Modon v. Modon, 686 N.E.2d 355, 358 (Ohio Ct. App. 1996) (citing Ohio Rev. Code Ann. § 3105.171(H)); Drake v. Drake, 725 A.2d 71, 721 (Pa. 1999) (outlining history of title theory and its evolution into equitable distribution); Corbett v. Corbett, 437 S.E.2d 136, 138 (S.C. 1993); Mondelli v. Howard, 780 S.W.2d 769, 774 (Tenn. Ct. App. 1989) ("In the final analysis, the status of property depends not on the state of its record title, but on the conduct of the parties").

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

\\server05\productn\M\MAT\18-2\MAT203.txt unknown Seq: 2 9-JUL-04 12:30

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.

Barbara Stark, *Burning Down the House: Toward a Theory of More Equitable Distribution*, 40 RUTGERS L. REV. 1176, 1197 (1988). *See also* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAWS IN THE UNITED STATES 104-106 (1988) (outlining the history of no-fault divorce).

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).

[3] The theory of marriage as partnership completely suffuses divorce law. *See* UNIF. MARRIAGE AND DIVORCE ACT, prefatory note, 9A U.L.A 161 (1998) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."); UNIF. MARITAL PROPERTY ACT, prefatory note, 9A U.L.A. 104 (1988) ("Marriage is a partnership to which each spouse makes a different but equally important contribution."); UNIF. PROBATE CODE § 2-202 comment (amended 1993), 8 U.L.A. 103 (1998) (revised code assumes that a longer marriage creates the full partnership interest in half of a decedent's estate, while a shorter marriage may not justify such a large share). *See generally* TURNER, *supra* note 1, § 1.02 at 16 ("the marital partnership theory, which was rarely mentioned before 1970 . . . is mentioned in almost every case today"); Sanford N. Katz, *Propter Honoris Respectum: Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251 (1998) (outlining the history of the ideal of marriage as partnership). Indeed, the marital partnership ideal has given rise to the imposition of fiduciary duty in both community property states and equitable distribution state. *See* Edward K. Green, *A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?*, 18 CAMPBELL L. REV. 203, 223 (1996); Laura W. Morgan, *Breach of Fiduciary Duty: Applying the Theory in Equitable Distribution States*, 15 DIVORCE LITIG. 153 (2003); Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367 (1997).

[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]

---

5 Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 119 (1997).

6 *See generally* Max Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413 (1976).

7 WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 62 at 157 (ed. 1971).

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.[9] Under the "dual classification" system of equitable distribution law as adopted by a majority of states,[10] property acquired during the marriage, with some well-defined exceptions,[11] 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.[12] 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.[13]

---

erty on divorce, making it more like an all-property equitable distribution state).

9 TURNER, *supra* note 1, § 1.02 at 11-12.

10 The "dual classification" states which classify property as marital or separate are: Alabama, Alaska, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin.

In the remainder of the equitable distribution states, all property, however and whenever derived, is subject to equitable distribution. The "hotchpot" states which provide that all property is subject to division are: Connecticut, Hawaii, Indiana, Massachusetts, Montana, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Wyoming.

11 Generally, property acquired during the marriage is separate property if it is acquired in exchange for separate property or can otherwise be traced to separate property (the source of funds rule), or if it is acquired by gift or inheritance.

12 In a few dual property states, the court can divide separate property to avoid undue hardship. ALA. CODE ANN. § 30-2-51 (1995); ALASKA STAT. § 25.24.160(4) (2002); ARK. CODE ANN. § 9-12-315(a)(2) (2002); IOWA CODE ANN. § 598.21(2) (2001); MICH. COMP. L. ANN. § 552.23(1) (Supp. 2003); MINN. STAT. ANN. § 518.58(2) (2002); OHIO REV. CODE ANN. § 3105.171(D) (2000); WIS. STAT. ANN. § 767.255 (2002).

13 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.[14] 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

S.W.2d 281 (Mo. Ct. App. 2000); McDonald v. McDonald, 713 N.Y.S.2d 379 (N.Y. App. Div. 2000).

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.[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.[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.[17] Second, the parties

---

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 *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.

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.").

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.

Turner, *supra* note 1, § 5.24 at 274-75.

17 *See* Joan F. Kessler, Allan R. Koritzinsky, Marta T. Meyers, *Tracing to Avoid Transmutation*, 17 J. Am. Acad. Matrim. Law. 371 (2001); David Melton, *Establishing Separate Property Through Asset Tracing After* Burford, 28 Colo. Law. 55 (Jan. 1999); J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 28 Fam. L.Q. 219 (1989).

may enter into an express agreement to change the character of property, or there may be an express gift from one estate to another. This is transmutation by express agreement or express gift.[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.[19] It is under the doctrine of transmutation by express or implied gift that the joint title gift presumption comes into play,[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.[21] If the marital and separate interests can be determined through tracing, then without commingling or the presence of a gift, or other doctrines that would cause transmutation, the asset is part marital and part separate.[22] Sometimes, however, tracing is impossible. When separate property and marital property are mixed to such a degree that the elements cannot be distinguished, 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.[23]

---

[18] *See* Cathy C. Hadden, Note, *Interspousal Gifts: Separate or Marital Property*, 32 U. LOUISVILLE J. FAM. L. 635 (1993-94).

[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.

The distinction between an agreement and a gift may be important, however, in those states where an interspousal gift is marital property, and thus the distinction should be kept in mind.

[20] *See* Oldham, *supra* note 16.

[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 Separate Property Through a Commingled Bank Account*, 12 DIVORCE LITIG. 229 (2000).

[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); Coughlin v. Coughlin, 823 S.W.2d 73 (Mo. Ct. App. 1991).

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

[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.[24] 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.[25] 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.[26] In other instances, courts have looked to the intent of the withdrawing spouse.[27]

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.[28] In equitable

---

(Minn. Ct. App. 1987); Henderson v. Henderson, 703 So.2d 262 (Miss. 1997); Brown v. Brown, 324 S.E.2d 287 (N.C. Ct. App. 1985); Langschmidt v. Langschmidt, 81 S.W.3d 741 (Tenn. 2002); Price v. Price, 355 S.E.2d 905 (Va. Ct. App. 1987); Brandt v. Brandt, 427 N.W.2d 126 (Wis. Ct. App. 1988).

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).

25 *E.g.*, Beam v. Bank of America, 490 P.2d 257, 263 (Cal. 1971); Josephson v. Josephson, 772 P.2d 1236 (Idaho Ct. App. 1989).

26 The doctrine of total recapitulation is an extension of the family purpose doctrine. *See* Richard J. Armstrong, Comment, *Rebutting the Pro-Community Presumption by Way of Total Recapitulation:* Zemke v. Zemke, 31 IDAHO L. REV. 1123 (1995).

27 *See* Wadlow v. Wadlow, 491 A.2d 757, 762 (N.J. Super. Ct. App. Div. 1985) (holding that there existed unequivocal intent that commingled funds belonged to wife and would ultimately be returned to her).

28 *E.g.*, Moser v. Moser, 572 P.2d 446 (Ariz. Ct. App. 1977); Bliss v. Bliss, 898 P.2d 1081 (Idaho 1995); O'Krepki v. O'Krepki, 529 So.2d 1317 (La. Ct. App. 1988); Roberts v. Roberts, 999 S.W.2d 424 (Tex. Ct. App. 1999); In re Marriage of Schweitzer, 937 P.2d 1062 (Wash. Ct. App. 1997). *See also* CAL. CIV. CODE § 5110.710 (1997).

distribution states, case law has also held that parties can change the character of property by express agreement.[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.[30]

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

---

29 *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). *Cf.* Wolford v. Wolford, 785 P.2d 625 (Idaho 1990) (determining that an agreement written on a restaurant napkin was insufficient).

30 *E.g.*, ARK. STAT. ANN. § 9-12-315 (2001); COL. REV. STAT. § 14-10-113 (Supp. 2003); 13 DEL. CODE ANN. § 1513 (Supp. 2003); KY. REV. STAT. ANN. § 403.190 (1995); 19-A ME. REV. STAT. ANN. § 953 (2002); MINN. STAT. ANN. § 518.54 (2002); MO. ANN. STAT. § 452.330 (2000); N.Y. DOM. REL. L. § 236B (2000); WIS. STAT. ANN. § 766.31 (2002).

31 Shenk v. Shenk, 571 S.E.2d 896 (2002).

32 In re Marriage of McCadam, 910 P.2d 98 (Colo. Ct. App. 1995); Bardino v. Bardino, 670 So. 2d 183 (Fla. DCA 1996); In re Marriage of Gurda, 711 N.E.2d 339 (Ill. Ct. App. 1999); Myers v. Myers, 741 So. 2d 274 (Miss. Ct. App. 1998).

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.[34] 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.[35] 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.[36]

Reverse transmutation, i.e., transmutation of marital property to separate property, is often accomplished by a midnuptial agreement.[37] For example, in *Barner v. Barner*,[38] 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.[39]

---

34 Damone v. Damone, 782 A.2d 1208 (Vt. 2001).

35 *E.g.*, In re Bartolo, 971 P.2d 699 (Colo. Ct. App. 1998); Mica v. Mica, 713 N.Y.S.2d 545 (N.Y. App. Div. 2000); Manhart v. Manhart, 725 P.2d 1234 (Okla. 1987); Barner v. Barner, 527 A.2d 122 (Pa. Super. Ct. 1987); Shenk v. Shenk, 571 S.E.2d 896 (Va. Ct. App. 2002).

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.

38 527 A.2d 122 (Pa. Super. Ct. 1987).

39 *Accord* In re Marriage of Bartolo, 971 P.2d 699 (Colo. Ct. App. 1998) (husband quitclaimed home to wife under deed of gift as condition of reconciliation). *See also* Mica v. Mica, 713 N.Y.S.2d 545 (N.Y. App. Div. 2d Dep't 2000); Manhart v. Manhart, 725 P.2d 1234 (Okla. 1986); Shenk v. Shenk, 571 S.E.2d 896 (Va. Ct. App. 2002).

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.[40] In other states, a gift purchased by one spouse with marital funds but given to the other spouse remains marital property.[41] 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.[42] The clearest evidence of an intent to transmute marital property into separate property by express gift is a deed

40 *E.g.*, Moser v. Moser, 572 P.2d 446 (Ariz. Ct. App. 1977); Potter v. Potter, 655 S.W.2d 382 (Ark. 1983); In re Weinstein, 470 N.E.2d 551 (Ill. Ct. App. 1984); Smith v. Smith, 472 A.2d 943 (Me. 1984); Townsend v. Townsend, 705 S.W.2d 595 (Mo. Ct. App. 1986); Lewis v. Lewis, 739 S.W.2d 974 (N.M. Ct. App. 1987); Semasek v. Semasek, 502 A.2d 109 (Pa. 1985); Quinn v. Quinn, 512 A.2d 848 (R.I. 1986); Hanover v. Hanover, 775 S.W.2d 612 (Tenn. Ct. App. 1989); Dewey v. Dewey, 745 S.W.2d 514 (Tex. Ct. App. 1988); Roig v. Roig, 364 S.W.2d 794 (W. Va. 1987).

41 *E.g.*, Hemily v. Hemily, 403 A.2d 1139 (D.C. 1979); Ruiz v. Ruiz, 548 So. 2d 699 (Fla. Dist. Ct. App. 1989); McArthur v. McArthur, 353 S.E.2d 4386 (Ga. 1987). *See also* Fla. Stat. Ann. § 61.075 (2002); Minn. Stat. Ann. § 518.54 (2002); N.J. Stat. Ann. § 2A:34-23 (2002); N.Y. Dom. Rel. L. § 236 (2000) S.C. Code Ann. § 20-7-473 (Supp. 2003); Va. Code Ann. § 20-107.3 (Supp. 2003).

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 where jewelry was purchased on the parties' honeymoon, the husband had no knowledge of its value, and only the wife had access to it, the jewelry 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."[43]

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.[44] Further, when the donor retains ownership by placing restrictions on the donee, then delivery is incomplete, and, again, there is no gift.[45]

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.[46] 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."[47] For purposes of this dis-

---

[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).

[45] Anderson v. Anderson, 731 N.Y.S.2d 108 (N.Y. App. Div. 4th Dep't 2001).

[46] *E.g.*, Chotiner v. Chotiner, 829 P.2d 829 (Alaska 1992); In re Marriage of Tatham, 527 N.E.2d 1351 (Ill. Ct. App. 1988); Tracy v. Tracy, 791 S.W.2d 924 (Mo. Ct. App. 1990); Coney v. Coney, 503 A.2d 912 (N.J. Super. Ct. App. Div. 1985); Kuehn v. Kuehn, 564 N.E.2d 97 (Ohio Ct. App. 1988); Johnson v. Johnson, 372 S.E.2d 107 (S.C. Ct. App. 1988); Langschmidt v. Langschmidt, 81 S.W.3d 741 (Tenn. 2002); Westbrook v. Westbrook, 364 S.E.2d 523 (Va. Ct. App. 1988); Brandt v. Brandt, 427 N.W.2d 126 (Wis. Ct. App. 1988); Miller v. Miller, 428 S.E.2d 547 (W. Va. 1993).

[47] TURNER, *supra* note 1, § 5.24 at 278.

cussion, 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).

49 *E.g.*, Sampson v. Sampson, 14 P.3d 272 (Alaska 2000); James v. James, 108 S.W.3d 1 (Mo. Ct. App. 2002); Coney v. Coney, 503 A.2d 912, 918 (N.J. Super. App. Div. 1985); Westbrook v. Westbrook, 364 S.E.2d 523, 528 (Va. Ct. App. 1988).

50 Green v. Green, 29 P.3d 854 (Alaska 2001) (finding that separate plane transmuted when it was used regularly in the family business); Dunn v. Dunn, 952 P.2d 268 (Alaska 1998) (finding family van transmuted); Adams v. Adams, 604 So.2d 494 (Fla. Dist. Ct. App. 1992) (finding separate margin account transmuted); In re Tatham, 527 N.E.2d 1351 (Ill. Ct. App. 1988) (finding sailboat transmuted); Boyce v. Boyce, 694 S.W.2d 288 (Mo. Ct. App. 1985) (finding car transmuted); Clark v. Clark, 683 N.Y.S.2d 255 (N.Y. App. Div. 1999) (finding furniture from husband's mother's home transmuted). *Cf.* Greene v. Greene, 569 S.E.2d 393 (S.C. Ct. App. 2002) (holding that treating separate property as separate is evidence of no intent to transmute).

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).

51 In re Marriage of Humphrey, 448 N.W.2d 709 (Iowa Ct. App. 1989); Leathem v. Leathem, 640 N.E.2d 1210 (Ohio Ct. App. 1994).

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,[52] 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.[53] 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.[54] Moreover, in some states, the presumption that

---

[52] A number of states have explicitly rejected the joint title gift presumption. OHIO REV. CODE ANN. § 3105(H) (2000); VA. CODE ANN. § 20-107.3(A)(3)(g) (2002); Wong v. Wong, 960 P.2d 145 (Haw. Ct. App. 1998); In re Hoffman, 493 N.W.2d 84 (Iowa Ct. App. 1993); Grant v. Zich, 477 A.2d 1163 (Md. 1984); Pearson v. Pearson, 761 So.2d 157 (Miss. 2000); In re Marriage of Engen, 961 P.2d 738 (Mont. 1998); Schuman v. Schuman, 658 N.W.2d 30 (Neb. 2003); Celso v. Celso, 864 S.E.2d 652 (Tex. Ct. App. 1993).

[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).

[54] Hartzell v. Hartzell, 623 So.2d 323 (Ala. Ct. App. 1993); Lewis v. Lewis, 785 P.2d 550 (Alaska 1990); Lofton v. Lofton, 745 S.W.2d 635 (Ark. Ct. App. 1988); In re Martinez, 202 Cal. Rptr. 646 (Cal. Ct. App. 1984); In re Marriage of Stumpf, 932 P.2d 845 (Colo. Ct. App. 1996); Husband T.N.S. v. Wife A.M.S., 407 A.2d 1045 (Del. 1975); Burwell v. Burwell, 700 A.2d 219 (D.C. 1997); Robertson v. Robertson, 593 So.2d 491 (Fla. 1991); In re Marriage of Johns, 724 N.E.2d 1045 (Ill. Ct. App. 2000); In re Butler, 346 N.W.2d 45 (Iowa Ct. App. 1984); Conrad v. Bowers, 533 S.W.2d 614 (Mo. Ct. App. 1975); Gerard-Ley v. Ley, 558 N.W.2d 63 (Neb. Ct. App. 1996); Schmanski v. Schmanski, 984 P.2d 752 (Nev. 1999); Pascarella v. Pascarella, 398 A.2d 921 (N.J. Super. Ct. App. Div. 1979); Hughes v. Hughes, 678 P.2d 702 (N.M. 1984); Parsons v. Parson, 476 N.Y.S.2d 708 (N.Y. App. Div. 1984); Loving v. Loving, 455 S.E.2d 885 (N.C. Ct. App. 1995); Larman v. Larman, 991 P.2d 536 (Okla. 1999); Madden v. Madden, 486 A.2d 401 (Pa. Super. Ct. 1984); Quinn v. Quinn, 512 A.2d 848

property titled jointly is marital property is irrebuttable.[55] Some states also apply this presumption to personal property,[56] while other states have held that the presumption applies to real property only.[57]

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.[58] Other states, however, hold that the donor must have an intent to transfer not only a legal interest,

---

(R.I. 1986); Trimnal v. Trimnal, 339 S.E.2d 869 (S.C. 1986); Batson v. Batson, 769 S.W.2d 849 (Tenn. Ct. App. 1988); Roberts v. Roberts, 999 S.W.2d 424 (Tex. Ct. App. 1999); Bradford v. Bradford, 993 P.2d 887 (Utah Ct. App. 1999); In re Marriage of Hurd, 848 P.2d 185 (Wash. Ct. App. 1993); Whiting v. Whiting, 396 S.E.2d 413 (W. Va. 1990); Trattles v. Trattles, 376 N.W.2d 379 (Wis. Ct. App. 1985).

The presumption also applies when separate funds are used to improve an asset which has already been conveyed into joint title. Ray v. Ray, 624 So.2d 1146 (Fla. Dist. Ct. App. 1993).

The joint title gift presumption does not apply to property the parties erroneously believe was conveyed into joint title. Gilliland v. Gilliland, 751 A.2d 1169 (Pa. Super. Ct. 2000).

55 Toth v. Toth, 946 P.2d 900 (Ariz. 1990); De Liederkerke v. De Liederkerke, 635 A.2d 339 (D.C. 1993); Bonnell v. Bonnell, 344 N.W.2d 123 (Wis. 1984). Maine applies this rule to real property only, Chamberlin v. Chamberlin, 785 A.2d 1247 (Me. 2001), and Maryland applies this rule to real property titled in tenancy by the entirety. Karmand v. Karmand, 802 A.2d 1106 (Md. 2002).

56 Johns v. Johns, 945 P.2d 1222 (Alaska 1997); Jablonski v. Jablonski, 25 S.W.3d 433 (Ark. Ct. App. 2000); Robinson v. Robinson, 655 So.2d 123 (Fla. Dist. Ct. App. 1995); In re Cecil, 560 N.E.2d 374 (Ill. Ct. App. 1990); Holsman v. Holsman, 49 S.W.3d 795 (Mo. Ct. App. 2001); In re Marriage of Patroske, 888 S.W.2d 374 (Mo. Ct. App. 1994); Dotsko v. Dotsko, 583 A.2d 395 (N.J. Super. Ct. App. Div. 1990); Chambers v. Chambers, 686 N.Y.S.2d 199 (N.Y. App. Div. 1999); Carney v. Carney, 673 A.2d 367 (Pa. Super. Ct. 1996); Holstein v. Holstein, 412 S.E.2d 786 (W. Va. 1991).

57 Spielberger v. Spielberger, 712 So. 2d 835 (Fla. Dist. Ct. App. 1998); Chamberlin v. Chamberlin, 785 A.2d 1275 (Me. 2001); LaBenz v. LaBenz, 575 N.W.2d 161 (Neb. 1998); Friend-Novorska v. Novorska, 507 S.E.2d 900 (N.C. Ct. App. 1998); In re Marriage of Case, 28 S.W.3d 154 (Tex. Ct. App. 2000).

58 *E.g.*, McDonough v. McDonough, 762 S.W.2d 827 (Mo. Ct. App. 1988); Coffey v. Coffey, 501 N.Y.S.2d 74 (N.Y. App. Div. 1986); Sutliff v. Sutliff, 543 A.2d 534 (Pa. 1988).

but also a beneficial interest.[59] Thus, if the donor did not intend that both spouses have a real, beneficial interest, then the property does not transmute to marital property.[60]

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.[61] 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.[62] 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.[63]

---

[59] *See* Giuffre v. Giuffre, 612 N.Y.S.2d 439 (N.Y. App. Div. 1994) (containing policy discussion).

[60] *See* Brett R. Turner, *The Effect of Interspousal Transfers Upon Classification of Separate Property: A 2003 Update*, 15 DIVORCE LITIG. 61, 70 (2003).

[61] Burnside v. Burnside, 460 S.E.2d 264, 273 (W. Va. 1995). *See also* Connealy v. Connealy, 578 N.W.2d 912 (Neb. Ct. App. 1998) (an unsigned prenuptial agreement was evidence of the husband's lack of donative intent); Parkinson v. Parkinson, 744 N.Y.S.2d 101 (N.Y. App. Div. 2002) (a document signed by both parties, though not meeting requirements of an enforceable contract, was sufficient to show evidence of intent).

[62] King v. King, 760 So.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.[64] An invalid deed will also negate donative intent.[65] 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.[66] 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.[67] These cases where the spouse making the conveyance retains control over the

---

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 60 (Ark. 1999) (mere dominance by one spouse over 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).

65 Mann v. Mann, 677 So.2d 62 (Fla. Dist. Ct. App. DCA 1996).

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).

67 Brown v. Brown, 947 P.2d 307 (Alaska 1997); McKay v. McKay, 989 S.W.2d 560 (Ark. Ct. App. 1999); Dennis v. Dennis, 13 S.W.2d 909 (Ark. Ct. App. 2000); Cole v. Cole, 920 S.W.2d 32 (Ark. Ct. App. 1996); In re Marriage of Gilmore, 943 S.W.2d 866 (Mo. Ct. App. 1997); Lagena v. Lagena, 626 N.Y.S.2d 542 (N.Y. App. Div. 1995). *Cf.* Mathis v. Mathis, 916 S.W.2d 131 (Ark. Ct. App. 1996) (where husband's separate property retirement benefits were deposited into joint account, but then moved to separate account shortly thereafter, the presumption was not rebutted). One court held that delivery is also incomplete if the donee is unaware of the joint title designation. In re Pate, 591 S.W.2d 384 (Mo. Ct. App. 1979).

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).

[69] In re Wojcicki, 440 N.E.2d 1028 (Ill. Ct. App. 1982); Alwell v. Alwell, 471 N.Y.S.2d 899 (N.Y. App. Div. 1984).

[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).

[72] Hippely v. Hippely, 2002 WL 1370795 (Ohio Ct. App. 2002).

[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

states, however, the desire to avoid probate will rebut the presumption of a gift, because the donor has no intent to transfer a beneficial interest before death.[74]

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.[75] 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.[76]

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.[77] Likewise, when a party states that the purpose of the

---

the presumption was rebutted when funds were placed in a joint account for convenience).

74 Matson v. Lewis, 755 P.2d 1126 (Alaska 1988); Cole v. Cole, 920 S.W.2d 32 (Ark. Ct. App. 1996); Lyons v. Lyons, 687 So. 2d 837 (Fla. Dist. Ct. App. 1996); Hill v. Hill, 675 So.2d 168 (Fla. Dist. Ct. App. 1996); Shepherd v. Shepherd, 526 So.2d 95 (Fla. Dist. Ct. App. 1987); In re Marriage of Davis, 576 N.E.2d 44 (Ill. Ct. App. 1991); In re Wojcicki, 440 N.E.2d 1028 (Ill. Ct. App. 1982); Sarver v. Sarver, 687 So.2d 749 (Miss. 1997); Hughes v. Hughes, 678 P.2d 702 (N.M. 1984); Koehler v. Koehler, 697 N.Y.S.2d 478 (N.Y. Sup. Ct. 1999); Stephenson v. Stephenson, 811 A.2d 1138 (R.I. 2002); Weberg v. Weberg, 463 N.W.2d 382 (Wis. Ct. App. 1990).

75 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).

76 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 11982 (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).

77 *E.g.*, Theismann v. Theismann, 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).

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.[78] Rebutting the presumption is also difficult when the parties have used and treated the jointly titled property as marital property.[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 *make a gift* existed to whether an intent to *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-

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).

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).

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).

[81] Toth v. Toth, 946 P.2d 900 (Ariz. 1997); In re Marriage of Stumpf, 932 P.2d 845 (Colo. Ct. App. 1996); In re Marriage of Johns, 724 N.E.2d 1045 (Ill. Ct. App. 2000); In re Marriage of Marriott, 636 N.E.2d 1141 (Ill. Ct. App. 1994); In re Marriage of Olson, 585 N.E.2d 1082 (Ill. Ct. App. 1992); Kruy v. Kruy, 789 A.2d 99 (Me. 2002); Anderson v. Anderson, 591 A.2d 872 (Me. 1991); In re Marriage of Peterson, 22 S.W.3d 760 (Mo. Ct. App. 2000); Robertson v. Robertson, 3 S.W.3d 383 (Mo. Ct. App. 1999); Kinsey-Geujen v. Geujen, 984 S.W.2d 577 (Mo. Ct. App. 1999); Lance v. Lance, 979 S.W.2d 245 (Mo. Ct. App. 1998); In re Marriage of Jennings, 910 S.W.2d 760 (Mo. Ct. App. 1995); Gremaud v. Gremaud, 860 S.W.2d 354 (Mo. Ct. App. 1993); Casey v. Casey, 734 N.Y.S.2d 228 (N.Y. App. Div. 2001); Lynch v. King, 725 N.Y.S.2d 391 (N.Y. App. Div. 2001); Rando-Quillin v. Rando-Quillin, 599 N.Y.S.2d 705 (N.Y. App. Div. 1993); Diaco v. Diaco, 717 N.Y.S.2d 635 (N.Y. App. Div. 2000); Wood v. Wood, 403 S.E.2d 761 (W. Va. 1999). *See* Turner, *supra* note 58 at 80-83 (collecting cases on dividing jointly titled property).

[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.[83] 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.[84]

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").