

And Was Not a Gift

by

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On the day that Mary and John were married, Mary had \$20,000 in her own bank account. Shortly after they married, Mary and John purchased a house as tenants by the entirety using Mary's \$20,000 as the down payment. It is undisputed that the \$20,000 was Mary's separate property until the jointly titled marital home was purchased, and that her contribution is easily traceable from the house equity.

The Virginia Code states, “[w]hen separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence *and was not a gift*, the retitled property shall retain its original classification.” Va. Code Ann. §20-107.3(A)(3)(f) (emphasis added). The issue that many domestic relations attorneys face is whether the down payment and any passive appreciation remains Mary's separate property or if during the course of the marriage she "gifted" the down payment to the marital estate or to John individually. Of course, Mary claims the money was not a gift, while John argues that it most certainly was.

The Virginia Court of Appeals set forth a three-prong test to determine whether a gift was made. *See, e.g., Theismann v. Theismann*, 22 Va. App. 557, 471 S.E.2d 809 (1996), *aff'd* 23 Va. App. 697 (1996). For John to persuade the court that a gift was made, he must prove by clear and convincing evidence that: (1) Mary had a donative intent; (2) she delivered or transferred the gift; and (3) John accepted the gift. *See, e.g., Rust v. Phillips*, 208 Va. 573, 159 S.E.2d 628 (1968); *Lightburn v. Lightburn*, 22 Va. App. 612, 471 S.E.2d 281 (1996).

The mere fact that Mary and John signed the Deed as tenants by the entirety typically is sufficient to satisfy the second and third prongs, delivery and acceptance.

By far, John's biggest hurdle is proving Mary's donative intent by clear and convincing evidence. Courts have looked at a variety of facts when evaluating whether a gift has been made. Unfortunately, the courts have not been very consistent in the facts they have considered or the weight they have placed upon these facts when making the determination of a gift. The following cases illustrate some facts that courts have found important to the final determination on the issue of donative intent.

If Mary had written notes to John stating the \$20,000 was a gift to him or to the marriage, John would have a strong argument that the money was indeed a gift. However, she did not, and like most married couples, Mary and John did not sign a contract indicating her intent when she made the down payment. In Theismann v. Theismann, after the parties were married, Mr. Theismann retitled his farm in his and his wife's names as tenants by the entirety and titled two investment accounts in the parties' joint names. He then wrote several cards to Mrs. Theismann telling her that the farm was now their home, he had made her a millionaire, and the money was hers to spend. Theismann, 23 Va. App. at 563. These cards established Mr. Theismann's donative intent.

In fact, any unambiguous writing in which Mary expressed a donative intent would likely be sufficient to support John's claim. Virginia courts have held that a Deed of Gift, in which the husband unambiguously transferred title to his separate property to himself and his wife as tenants by the entirety established that he had gifted the property to the marital estate. See Utsch v. Utsch, 266 Va. 124, 581 S.E.2d 507 (2003); Underwood v. Angle, No. 2591-98-3 (Va. Ct.

App. Aug. 31, 1999); Foreman v. Ketchum, No. 2092-98-4 (Va. Ct. App. July 27, 1999); Lightburn v. Lightburn, 22 Va. App. 512, 472 S.E.2d 281 (1996).

Mr. Utsch executed a Deed of Gift to transfer title of the marital residence to him and Mrs. Utsch as tenants by the entirety. The consideration for the transfer of title was listed as “love and affection.” Utsch, 266 Va. at 126. The Supreme Court of Virginia held that the Deed of Gift, coupled with the reference to consideration of “love and affection,” clearly and unambiguously demonstrated Mr. Utsch’s donative intent. Id. at 129.

The Court of Appeals in Underwood v. Angle, Foreman v. Ketchum, and Lightburn v. Lightburn gave considerable weight to the existence of Deeds of Gift; however, neither donee relied solely on the existence of the Deed of Gift to prove that a gift had been made. Underwood v. Angle, No. 2591-98-3 (Va. Ct. App. Aug. 31, 1999); Foreman v. Ketchum, No. 2092-98-4 (Va. Ct. App. July 27, 1999). In Underwood v. Angle, Ms. Underwood executed a Deed of Gift to Mr. Angle, her husband, titling property jointly as tenants by the entirety. At trial, Ms. Underwood responded affirmatively when asked “Was that kind of like a, just a gift from the heart kind of feeling?” Based on her testimony, the court held that Ms. Underwood intended to make an unconditional gift to her husband. In Foreman v. Ketchum, Ms. Ketchum testified that she and her husband agreed to title the marital home jointly if she deferred her career, raised the parties’ children, deferred retirement and assisted in maintaining the home. The Court of Appeals held that her testimony was sufficient evidence that her husband had gifted the house to the marital estate in exchange for these things.

The Court of Appeals in Lightburn v. Lightburn affirmed the trial court’s holding that Mr. Lightburn intended to give his wife an interest in his separate property. Mr. Lightburn

transferred the title to himself and his wife jointly by a Deed of Gift and testified that he had wanted to assure his wife that she would receive the property if he died. Lightburn, 22 Va. App. at 617.

Returning to our scenario, since Mary did not execute a Deed of Gift, but instead simply signed a Deed creating a tenancy by the entirety, John has a more difficult, but not impossible, challenge. No restrictions were placed on the Deed, nor did Mary retain the right to change the Deed or property ownership, thus John can argue that her act constituted a gift. *See* Rowe v. Rowe, 24 Va. App. 123, 480 S.E.2d 760 (1997). In Rowe, the Court held the husband made a gift from the sale of his separate property by using the proceeds to fund the marital residence and placing no restrictions on the transfer of title.

Suppose Mary and John used the house as their marital residence for many years. This fact alone is not sufficient to demonstrate that Mary intended to gift the down payment to the marital estate. Virginia courts have held that contribution of separate property to the acquisition or maintenance of a marital residence by itself is not enough to presume a gift to the marital estate. *See, e.g.,* Beck v. Beck, No. 1082-99-2 (Va. Ct. App. Sept. 19, 2000). In Beck, the Court of Appeals held that the husband did not prove by clear and convincing evidence that his wife had expressed by “words, acts or conduct” that she intended her contribution of separate property to the acquisition of the marital home to be a gift. Determining the intended use of the transferred property is worthwhile, but not dispositive. In Becker v. Hale, the Court of Appeals ruled that the wife's inheritance, which she deposited in a joint account and intended to use as a marital resource, was marital property. Becker v. Hale, No. 1029-93-4 (Va. Ct. App. June 21, 1994).

The fact that property is jointly titled must be considered by the trial court in determining if a gift was made, but alone, it is insufficient proof of a gift. Rowe v. Rowe, 24 Va. App. 123, 480 S.E.2d 760 (1997). In addition to titling the property jointly and not placing any restrictions on the transfer of title, Mr. Rowe stated, "[h]is property was also her property." Rowe, 24 Va. App. at 137. After considering all of the circumstances, the Court of Appeals determined that Mr. Rowe had gifted the property to the marital estate. Virginia courts have a track record of classifying property transfers as a gift when the donor acknowledged that the transfer was made out of love for the donee. *See, e.g.*, Watts v. Watts, 40 Va. App. 685, 581 S.E.2d 224 (2003) (Wife used inheritance to buy a bed and stock because she thought it "was something nice ... to do for her family"); Smith v. Smith, No. CH97-642 (Va. Cir. Ct. March 20, 2000) (Husband spoke of a gift for love and affection and in recognition of [wife's] contributions to construction of the home); Underwood v. Angle, No. 2591-98-3 (Va. Ct. App. Aug. 31, 1999) ("just a gift from the heart kind of feeling"); McClanahan v. McClanahan, 19 Va. App. 399, 451 S.E.2d 691 (1995) ("It came from my heart, the way I felt it should be done").

On the other hand, what if Mary admitted that she contributed the \$20,000 to the purchase of the marital residence to pacify John? In Apelt v. Apelt, the husband admitted that he revoked a prenuptial agreement and titled the marital residence jointly to stop his wife from nagging him to do so. Apelt v. Apelt, No. 0081-97-1 (Va. Ct. App. Sept 9, 1997). Mr. Apelt testified that his wife woke him in the middle of the night to discuss the prenuptial agreement; she accused him of both poisoning his previous wife and of feeding her ground glass. The court ruled that no donative intent existed when the assets were retitled under duress, and Mr. Apelt was allowed to trace his separate property.

The Lightburn and Rowe Courts considered the purpose for retitling the property in determining whether a gift was made. The Lightburn Court concluded that Mr. Lightburn did intend for Mrs. Lightburn to receive the property at his death. Thus, the retitling of the property to the parties' joint names was a gift. Lightburn, 22 Va. App. at 617. The Rowe Court also considered the fact that the parties purchased a new house to accommodate their growing family when determining that Mr. Rowe gifted his separate property to his wife. Rowe v. Rowe, 24 Va. App. 123, 137, 480 S.E.2d 760, 766 (1997).

On the other hand, the Beck Court stated, “[n]o presumption of gift arises solely from the fact that the property, which was acquired in part with wife’s separate funds, was jointly titled to husband and wife.” Beck, No. 1082-99-2 (Va. Ct. App. Sept. 19, 2000). This statement combined with the Court’s analysis in Lightburn and Rowe indicates that the mere retitling of a property so that it may be refinanced is not sufficient to establish a gift. Of course, when refinancing, the language in the Deed remains critical. In Parish v. Parish, the Deed transferring the property from husband’s sole ownership to a tenancy by the entireties during a refinance stated, “that for and in consideration of a gift pursuant to . . . .” Parish v. Parish, No. 1294-04-2 (Va. Ct. App. May 31, 2005). The Parish Court held that this language established husband’s intent to gift the property; and finding that the deed’s language was unambiguous, the Court refused to consider husband’s parole evidence.

Even if retitling the asset benefits the alleged donor in some way, the benefit alone may not be sufficient to prove that a gift was made. *See, e.g.*, Cirrito v. Cirrito, 44 Va. App. 287 (2004); Moses v. Moses, No. 1426-97-2 (Va. Ct. App. March 3, 1998). In Cirrito v. Cirrito, the husband testified that he titled his homes jointly to protect his assets and to prevent seizure by

creditors. Mrs. Cirrito testified that the retitling of each property represented gifts to her. The Court of Appeals affirmed the trial court's ruling that Mrs. Cirrito did not meet the burden of proof to demonstrate her husband's donative intent. In Moses v. Moses, Mr. Moses presented undisputed testimony that he retitled his premarital property jointly for estate planning purposes only. The Court of Appeals agreed with his position that his behavior did not constitute a gift.

The type of benefit received by the alleged donor by retitling the asset might be important to the determination of whether a gift was made. *See, e.g., Dean v. Dean*, 8 Va. App. 143, 379 S.E.2d 742 (1989). In Dean v. Dean, Mr. Dean purchased stocks with separate funds, but registered the certificates in his and his wife's name so she would have immediate liquidity if he died. Also, jointly titling the stocks enabled Mr. Dean to deduct both of their travel expenses on their taxes for their trips to the annual shareholder's meeting. The Court of Appeals stated that Mr. Dean possessed the requisite donative intent when he titled the stock jointly and held that the stock had been gifted to the marital estate. Although this case was decided before the current equitable distribution statute was enacted, it still provides a helpful analysis of what constitutes a gift.

What if Mary's \$20,000 contribution was used to purchase materials that John used to personally build an addition on the house? For example, testimony that John designed and built an addition that he and Mary agreed upon would give John a strong argument that Mary had gifted those funds to the marital estate. In Beck, the Court of Appeals ruled that the wife's separate property became marital property when she deposited the funds in a joint account, the husband did investment research and the parties made joint investment decisions. Beck v. Beck, No. 1082-99-2 (Va. Ct. App. Sept. 19, 2000).

It is also important to examine what happened to the asset after the parties separated. In Blevins v. Blevins, Mrs. Blevins' parents purchased a certificate of deposit in her name prior to the marriage. Mrs. Blevins retitled the certificate of deposit jointly during the marriage, but when the parties separated, Mr. Blevins removed his own name from the certificate of deposit and Mrs. Blevins deposited it in her own account. Evidence of Mrs. Blevins' actions combined with the fact that Mr. Blevins had never used any of the money persuaded the court that she never intended to give the certificate of deposit to the marital estate. Blevins v. Blevins, No. 2297-01-3 (Va. Ct. App. May 7, 2002).

Let's assume that John is successful in proving that Mary gifted the \$20,000 to the marital estate. He has won the battle, but will he win the war? In other words, how much of the \$20,000 will he receive when the Court equitably distributes John and Mary's property?

Even if the \$20,000 is classified as marital property, its origin is relevant to the equitable distribution determination under Virginia Code §§ 20-107.3(E)(6) and (E)(11). Section 20-107.3(E)(6) permits the court to consider "how and when" the marital property was acquired and § 20-107.3(E)(11) permits the court to take into account "other factors deemed appropriate." These statutes may give the Court the basis to award Mary a greater percentage of the \$20,000, however, the Court of Appeals has held that a court cannot revoke an unconditional gift by giving the donor a greater portion of the gift. *See* Theismann v. Theismann, 22 Va. App. 557; 471 S.E.2d 809 (1996); McClanahan v. McClanahan, 19 Va. App. 399, 451 S.E.2d 691 (1994). In this scenario, it is not clear to what extent the Court may consider the origin of the \$20,000 when making its decision.

An interesting question is whether Mary could have given her \$20,000 to John in a manner that made it John's separate property. In Kelln v. Kelln, the Court of Appeals was faced with a question of first impression: whether the conveyance of marital property to a revocable living trust created during the marriage transforms said property to the separate property of the trustee. Kelln v. Kelln, 30 Va. App. 113, 515 S.E.2d 789 (1999). Mr. and Mrs. Kelln stated in trust documents that they intended to give the property to the other party as his or her separate property. The Court held that the trust agreement only showed a clear intent to use the trust to take advantage of federal estate tax provisions and no clear donative intent was expressed by the terms of the agreement. Kelln, 30 Va. App. at 126, 515 S.E.2d 795. The Court further stated that to find marital property had been gifted to one as his or her separate property, there must be evidence to "clearly and unambiguously support the conclusion that one of the parties has relinquished all right and interest in marital property and has transferred those rights unconditionally to the other to the exclusion of the donor's continuing claim upon the property as a marital asset." Kelln, 30 Va. App. at 122-23, 515 S.E.2d 793-94.

In McDavid v. McDavid, the Court of Appeals found that the Deed of Gift was sufficient to establish that the transferred property had become the separate property of the husband. McDavid v. McDavid, 19 Va. App. 406, 451 S.E.2d 713 (1994). Mrs. McDavid transferred her interest in marital property to Mr. McDavid in a manner that established her intent to make the residence his separate property. Together they executed a Deed of Gift transferring Mrs. McDavid's interest to Mr. McDavid immediately after closing. The deed stated that Mr. McDavid would hold the property "in his own right as his separate and equitable estate as if he were an unmarried man ... free from the control and marital rights of his present ... spouse."

McDavid, 19 Va. App. at 411. The Court of Appeals held that the language of the deed was clear and unambiguous.

In an unpublished opinion, the Court of Appeals seemed to contradict itself. *See Silberblatt v. Silberblatt*, No. 1793-97-3 (Va. Ct. App. July 13, 1999). The Silberblatt Court, applying Virginia Code § 20-107.3(A)(1), ruled that interspousal gifts are marital and cannot be separate property. Mrs. Silberblatt claimed that the furs and jewelry given to her by her husband during the marriage were her separate property. The Court disagreed and held § 20-107.3(A)(1) expressly excludes from the definition of separate property gifts from the other party.

In our scenario, any claim by John that the \$20,000 was gifted to him as his separate property would be rejected. Even if the Court found that Mary's actions constituted a gift, the fact that she titled the property jointly would be enough to defend against a claim from John that she had relinquished all right to the property.

As in virtually all aspects of family law, the determination of whether or not a gift was made is a fact based issue. The most reliable indicator that a gift was or was not made is a document stating the party's intent. However when the document relates to estate planning, it is not nearly as reliable in the Court's eyes. The Courts have given considerable weight to evidence that the transfer was made out of love or affection when ruling on the issue, taking into consideration both writings and oral testimony. In some cases, the Courts have considered the parties' behavior towards the asset both during the marriage and after the separation. In reality, there are no bright line rules in determining the existence of a gift, and the court will consider any piece of evidence that may shed light on the parties' intent. The Courts have considered a variety of factors and different courts have given these factors different weight. Practitioners

must present any and all evidence that relates to the donative intent.