Characterization: Gifts, House Refinancing & Family "Loans"

The Ultimate Property Division Seminar 2011
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This paper addresses three nagging issues that arise very often in divorces: gifts from family, the effect of refinancing a separate property home and deciding if money transferred to one or both spouses was a gift from family or a loan that is still owed.

1. Gifts from Family

Gifts are separate property. Tex. Fam. Code 3.001(2). A party to a divorce who asserts that a property is his or her separate property because it is a gift must overcome the presumption that all property at divorce is community and prove that the item was a gift by clear and convincing evidence. Tex. Fam. Code Sec. § 3.003(a)(b). *McKinley v. McKinley*, 496 S.W.2d 540, 532 (Tex. 1973).

A gift is a voluntary transfer of property to another made gratuitously and without consideration. *Hilley v. Hilley*, 161 Tex. 569, 575, 342 S.W.2d 565, 569 (1961).

The elements of a gift are:

(1) the intent to make a gift;
(2) delivery of the property; and
(3) acceptance of the property.

Roberts v. Roberts, 999 S.W.2d 424, 432 (Tex. App.—El Paso 1999, no pet.).

A spouse may make a gift to the other spouse during the marriage. *Roberts*, 999 S.W.2d at 432. However, spouses may not make a gift of their separate property to the community estate, *Tittle v. Tittle*, 148 Tex. 102, 220 S.W.2d 637, 642 (1949); *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.—Tyler 1993, no writ)

In divorces, spouses frequently assert, "that property was given to me by my family as a gift and is my separate property." Such claims should be analyzed as follows:

1. A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

2. A gift made by a third party to both spouses creates jointly owned separate property. *Roosth v. Roosth*, 889 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (engagement and wedding gifts). A deed to a house or a title to a car may specify that a gift was made to both spouses, but how do you prove that a couch was gifted to both spouses as opposed to just on of them? Such an argument could only be resolved by the evidence, presumably the testimony of the person giving the gift ("I did not even know his wife and I clearly said I was giving the couch to Tom") and the spouses. It would be rare for there to be a letter, card or e-mail that confirms the gift was given to just one or both of the spouses.

3. If consideration was paid for the property, then it is not a gift.

4. The spouse asserting that an item is a gift has to present clear and convincing evidence to rebut the presumption that the item is community. Some cases say that the testimony of a spouse is enough (see below) and some say that the testimony of the spouse has to be corroborated. A spouse's uncorroborated testimony that is contradicted "may not meet the clear and convincing standard." *Pace v. Pace*, 160 S.W.3d 706, 714 (Tex. App.—Dallas 2005, pet. denied). A spouse's uncorroborated but uncontradicted testimony is sufficient to constitute clear and convincing evidence. See *id*.

An appeal from a Galveston County divorce decided this year involved the alleged family gifts of two automobiles and applied the above principles:

> *This dispute concerns a 1997 Oldsmobile and a 2001 Mercury Marquis that Joseph received from his parents. Joseph testified that the Oldsmobile was a gift from his parents. No other evidence regarding the Oldsmobile was offered. Joseph testified at trial that the Mercury "was partially a gift." He explained that he agreed to pay his father $1,000 for the car and one of Joseph's sons agreed to pay another $1,000. Joseph valued the car at $4,500.*
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> *The only testimony regarding the Oldsmobile was Joseph's testimony that it was a gift from his parents. We hold that this is sufficient to establish that the car was a gift.* [Joseph's testimony was not corroborated but it was not contradicted, so it was good enough to overcome the community property presumption.]
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> *The very fact that Joseph's father agreed to and received consideration in exchange for the Mercury, however, establishes that it was not given as a gift. We hold Joseph failed to establish by clear and convincing evidence that the Mercury was a gift.*

Zoller v. Zoller, (Tex. App.—Houston [1st Dist.] 2011, no pet. hist.)(01-09-00992-CV)(April 21, 2011).

2. Refinancing a Separate Property House

The court in *In re Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex. App. —Waco 2008, no pet.) said:

> *The fact that the home was refinanced during the marriage does not change its character as separate property although the refinancing may give rise to a claim for economic contribution or reimbursement of any community funds paid toward the refinanced debt.*

Clients often insist that their spouse's separate property house is now community property because, "we refinanced and my name is on the deed." The client is almost certainly partially correct because his or her name is probably on the deed of trust which allows the mortgage company to foreclose, but that is required in almost all refinances because Texas is a community property state. However, the deed of trust does not transfer ownership like a general warranty deed, it just allows for foreclosure. In the typical refinance situation, the owner of the separate property real estate would testify he or she certainly did not intend to make a gift, it was just that the mortgage company requires both spouses to sign the deed of trust since we are in a community property state. Most importantly, the clear language of the deed of trust does not transfer ownership from one spouse to the other.

However, there might be a few unusual situations where a refinance <u>does</u> transfer ownership. A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption the grantee spouse

received the property as separate property by gift. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Roberts*, 999 S.W.2d at 432. The presumption may be rebutted by proof the deed was procured by fraud, accident, or mistake. *Raymond*, 190 S.W.3d at 81; *Roberts*, 999 S.W.2d at 431. There are two cases where these principles and the wording of deeds signed during the refinancing resulted in one spouse's separate property being converted into jointly owned separate property with the other spouse owning 50%!

In re Marriage of Skarda, 2011 WL 2502946 (Tex.App.—Amarillo 2011)(No. 07-09-00191-CV)(June 23, 2011) involved a husband who bought a property in 2002, got married in 2004 and refinanced in 2006. In addition to the usual joint deed of trust, the closing on this refinance also involved the husband and wife signing as grantees a warranty deed conveying the property to themselves as "joint tenants with right of survivorship." Despite that the fact that the wife at the time of refinancing apparently did not have any ownership of the property, the deed's granting clause identified the grantor as "Gregory Skarda, a married man and joined by his spouse Vicki Skarda, " and its grantee as "Gregory Skarda and Vicki Skarda, husband and wife as joint tenants with right of survivorship." The husband testified he did not intend to make a gift to his wife and the wife asserted the land was now community property.

The Amarillo Court of Appeals said:

> *Here, trial began with the presumption that the FM 1264 property was community property. Without dispute from Vicki, inception of title in Gregory before marriage was established. The January 17 deed created a joint tenancy in the FM 1264 property in Gregory and Vicki. Otherwise, evidence of characterization was meager. Gregory testified he intended only to refinance the property and not give a half interest to Vicki. Vicki agreed she received a one-half interest in the property by gift "or otherwise" but also agreed the property was community in which she owned a one-half interest by deed. There was no evidence the January 17 deed was procured by fraud, accident, or mistake. By its nature, the joint tenancy created in Vicki by the January 17 deed was her separate property. On this record, we are unable to say the trial court abused its discretion in finding Vicki received a one-half interest in the FM 1264 property by gift.*

Magness v. Magness, 241 S.W.3d 910 (Tex. App.—Dallas 2007, pet. denied) also involved a refinance, but this time it was the wife who owned the house prior to marriage. The house was refinanced five years into the marriage and the wife signed a deed showing both spouses as grantees transferring a one-half interest in the house to the husband. The wife testified that she signed the deed as a condition of the refinancing and she did not intend to make a gift. The husband never testified about the transaction. The trial court found that each spouse owned 50% of the house as his and her separate property and the court of appeals affirmed.

The cases on the refinancing of separate property homes during a marriage can be summarized as follows: the house is still separate property after a refinance unless more than just the usual deed of trust is signed by both spouses. Ownership changes only if the owner spouse signs a deed that transfers ownership to the other spouse and most refinances do not involve such a deed.

3. Family Loans

Divorces often involve the transfer of money to the spouses from the parents of one of the spouses. For example, Tom's parents provide $10,000 for Tom and his wife Sue to buy their first new car shortly after marriage. At the time, no one really cares how the $10,000 is characterized. But, a year later after Tom finds Sue cheating on him and he files for divorce. Tom is calling the $10,000 a loan that is owed to his parents. Sue would presumably say the $10,000 was a gift to both of them. The reason for the disagreement

is that Tom wants to show on his property spreadsheet that he owes his parents a debt of $10,000, which will mean that sue will get less from his small 401k account.

If Tom's parents wrote a check to Tom for $10,000 and he deposited it into the joint checking account the day before the car was purchased, how is the court to analyze Tom's claim that the $10,000 is a loan owed to his parents?

A transfer of ownership from a parent to a child is presumed to be a gift, but the presumption is rebuttable. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). So, the $10,000 which was transferred from parents to their child is presumed to be a gift. How could Tom overcome that presumption if he really wants to show it was a loan? Tom and his parents could testify it was a loan. The check could be introduced into evidence if "loan for car" is written in the memo section of the check. Of course, if a promissory note was signed that would be great evidence. Proof that Tom and Sue made payments to the parents on the "loan" or an e-mail from Sue thanking the in-laws and promising to repay them would clearly help. Evidence showing that Tom's parents listed the $10,000 as a loan owed to them on their personal financial statement or a credit application would also help prove it really was a loan to their child.

Would Tom in this scenario be better off arguing that the $10,000 was a gift to him instead of a loan? He could not make that argument if the check from the parents was payable to both Tom and Sue. But, if the $10,00 check was payable to just Tom, he would then trace the $10,000 into the joint account and out the next day to purchase the new car. If the new car is solely in Tom's name, then he might argue that the car is his separate property because it was bought with separate funds. But if the car was financed with community debt, as it almost surely was, then Sue would say it is community property. Even if the car was Tom's separate property, Sue would assert a reimbursement claim for using community funds to pay on the car loan. If the car was bought in the names of both spouses with Tom's separate money, Sue would argue that Tom had gifted half of the car to her and then the community estate would have a reimbursement claim against both of them! All of this fancy analysis explains why the best bet for Tom is to try to prove the $10,000 was a loan owed to his parents and so Sue would get $5,000 less from his 401k.

My experience in court is that most judges will call money transferred from parents to their children a gift and then forget about it in the division of community property unless there is strong, preferably documentary evidence, that the transfer was really a loan.