

Distinctions Between Marital and Nonmarital Property

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I. Introduction

With the enactment of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) on October 1, 1977, Illinois for the first time adopted the concept of “marital property.” Prior to 1977 Illinois divorce law was governed by the Illinois Divorce

Act (Ill. Rev. Stat. Chapter 40 (1975)). Illinois was a “title property” state which meant that courts in a divorce assigned the asset to the person having legal title. On October 1, 1977, property division in divorce took a dramatic change when Illinois became an “equitable distribution” jurisdiction. Illinois, being an equitable division jurisdiction, does not require an equal division of marital property even though a 50-50 division may in fact be the final result.

II. What is marital property

A. General definition of marital property

Section 503 of the Illinois Marriage and Dissolution of Marriage Act defines marital property by providing:

§503. Disposition of property. (a) For purposes of this Act, “marital property” means all property acquired by either spouse subsequent to the marriage, except the following, which is known as “non-marital property”:

- (1) property acquired by gift, legacy or descent;
- (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;
- (3) property acquired by a spouse after a judgment of legal separation;
- (4) property excluded by valid agreement of the parties;
- (5) any judgment or property obtained by judgment awarded from a spouse to another spouse;
- (6) property acquired before the marriage;
- (7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsections (c) of this Section; and
- (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

B. Background

1. Theory of marital property

The statutory definition of marital property reflects the legislature’s preference toward marital property. This preference is consistent with community property definitional concepts which also establish that property acquired during the marriage is deemed to belong to the marital estate or community and property acquired before the marriage is deemed to belong to the owner-spouse. Although the parties may share in the division of marital property, each party remains entitled to retain his or her separate property, referred to as “nonmarital” property. This nonmarital property includes property acquired before the marriage as well as five additional categories of property acquired during the marriage which are defined by the statute. 750 ILCS 5/503(a).

2. Uniform Marriage and Divorce Act

Section 503 of the IMDMA introduces to Illinois the system of equitable property distribution as derived from section 307 of the Uniform Marriage and Divorce Act, as amended in 1971 and subsequently amended in 1973. Equitable property distribution in Illinois replaced the common law title doctrine whereby the separate property of each spouse was awarded to the spouse having legal title, subject to any claim of the other party to an equitable interest or special equities (Ill.Rev.Stat. ch. 40 sec.18 (1975)) or proof of compelling circumstances warranting a transfer of the other party’s property as alimony in gross (Ill.Rev.Stat. ch. 40 sec.19 (1975)). Without proof of these special factors, Illinois courts under the common law doctrine had no power to order the transfer or division of property based upon marital rights. Therefore, a dependent spouse’s marital rights were limited to the receipt of spousal support.

The majority of American jurisdictions have now adopted the equitable property division system. The equitable property division system incorporates a shared enterprise or partnership theory of marriage, and accordingly authorizes the trial court to divide the marital assets in just proportions upon a termination of marriage. *Smith Hurd Ill.Rev.Stat. ch. 40 sec. 503 Historical and Practice Notes (1991)*.

The Commissioners’ Prefatory Note to the Uniform Act emphasizes the principle: “The distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.” Uniform Marriage and Divorce Act (9A U.L.A.) Commissioners’ Prefatory Note at 93. The Commissioners’ Note to edition 307 of the Uniform Act provides: ‘The court may divide the marital property equally or unequally’ Uniform Marriage and Divorce Act (9 U.L.A.) sec. 307, Commissioners’ Note at 492.

3. Case law definitions

In the landmark case of *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 367, 376 N.E.2d 1382, 1388, 17 Ill. Dec. 801, 807 (1987), the Illinois Supreme Court expressed that “The primary legislative objective (of section 503) is to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in the state. It is evident that the legislature recognized glaring inequities in the earlier law and favored change.”

The Illinois Supreme Court recognized the view of the marital relationship as a shared enterprise/partnership upon which the distribution of marital property should be based. Therefore, property cannot share the characteristics of both marital and nonmarital property. *In re Marriage of Komnick*, 84 Ill. 2d 89, 417 N.E.2d 1305, 49 Ill. Dec. 291 (1981); *Bentley v. Bentley*, 84 Ill. 2d 97, 417 N.E.2d 1309, 49 Ill. Dec. 295 (1981). This has been referred to as the unitary theory of marital property. Marital property, as defined in the Act, is divided without regard to the identity of the spouse holding legal title, and a 50-50 division is not mandated. *Stallings v. Stallings*, 75 Ill. App. 3d 96, 393 N.E.2d 1065, 30 Ill. Dec. 718 (5th Dist. 1979); *Schubert v. Schubert*, 66 Ill. App. 3d 29, 383 N.E.2d 266, 22 Ill. Dec. 790 (3d Dist. 1978).

III. What is nonmarital property?

Section 503 of the Illinois Marriage and Dissolution of Marriage Act distinguishes marital from nonmarital property within the statute itself by describing when property does not fall under the marital umbrella by listing the following eight exceptions:

A. Statutory nonmarital definitions

1. Gift or inheritance

Section 503(a)(1) — Property acquired by gift, legacy or descent.

Because property received by gift, bequest, devise or descent is acquired without any fundamental participation or effort expended by a spouse and involves a voluntary and gratuitous giving of something without any consideration given in return, such property is classified as nonmarital property for the purpose of property adjudications under the IMDMA. *In re Meyer's Estate*, 317 Ill. App. 96, 103, 45 N.E.2d 495, 498 (2nd Dist. 1943); *In re Berbescker's Estate*, 277 Ill. App. 201 (1st Dist. 1934). The burden of proving gift, bequest, devise, or descent is on the spouse asserting the gift, etc. by clear and convincing evidence. *People v. Pohemus*, 367 Ill. 185, 191, 10 N.E.2d 966, 969 (1937); *Bolton v. Bolton*, 306 Ill. 473, 486, 138 N.E.2d 158, 163 (1923).

2. Exchange of nonmarital property

Section 503(a)(2) — Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent.

Since parties cannot be expected to retain nonmarital property in kind for indefinite time periods, section 503(a)(2) excludes from the marital estate property which is acquired by reinvestment, exchange or trade of nonmarital property. However, the new asset should be titled in the name of the same spouse and should not bear the name of the other spouse if it is to be included within this exception. *Smith Hurd Illinois Revised Statutes Historical and Practice Notes* pg. 461. The burden of proving by clear and convincing evidence the exchange of nonmarital property is on the party who seeks to avoid the marital property treatment. *In re Marriage of Smith*, 100 Ill. App. 3d 1126, 427 N.E.2d 1262, 56 Ill. Dec. 716 (2d Dist. 1981); *In re Marriage of Amato*, 80 Ill. App. 3d 395, 399 N.E.2d 1018, 35 Ill. Dec. 729 (2d Dist. 1980); *In re Marriage of Madoch*, 212 Ill. App. 3d 1007, 571 N.E.2d 1029, 157 Ill. Dec. 10 (1st Dist. 1991).

3. Property acquired after legal separation

Section 503(a)(3) — Property acquired by a spouse after a judgment of legal separation.

Since marital property rights accrue only during a valid marriage, marital property rights cannot attach to property acquired after a judgment of legal separation, judgment of dissolution of marriage, or after a non-retroactive judgment of declaration of invalid marriage. This reflects the policy that after such judgments are entered by the court, the marriage partnership ends. This subsection only applies to judgments entered and not upon the mere physical separation of the parties. See *Hollensbe v. Hollensbe*, 165 Ill. App. 3d 522, 519 N.E.2d 40, 44, 116 Ill. Dec. 450 (5th Dist. 1988); *Cooper v. Cooper*, 146 Ill. App. 3d 943, 497 N.E.2d 805, 810, 100 Ill. Dec. 627 (5th Dist. 1986).

4. Exclusion by agreement

Section 503 (a)(4) — Property excluded by valid agreement of the parties.

The parties may contract, based upon sufficient consideration, to treat property as nonmarital property which would

otherwise be treated as marital property. In *Stern v. Stern*, 105 Ill. App. 3d 805, 434 N.E.2d 1164, 61 Ill. Dec. 567 (2d Dist. 1982), the parties executed a post-nuptial agreement which purported to settle their marital and nonmarital property rights without intending to dissolve their marriage. The court held that although such an agreement was not an agreement under section 502 of the IMDMA since it was not incident to a dissolution of marriage, the agreement might be valid and enforceable under section 503(a)(4). In *Re the Marriage of Burgess*, 123 Ill. App. 3d 487, 462 N.E.2d 203, 78 Ill. Dec. 345 (3d Dist. 1984), was one of the first cases in Illinois to rule that an antenuptial agreement entered into by persons competent to contract, may exclude the operation of the law, including the marital property provisions of section 503 of the IMDMA, and determine the rights each person will have in the other's property during the marriage. However, as a matter of law, it is not necessary for an agreement to provide that nonmarital property will remain that party's even after a divorce, as long as the owner keeps the title to the premarital property in his or her own name alone, and spends only nonmarital funds on that property.

5. Judgment against a spouse

Section 503 (a)(5) — Any judgment or property obtained by judgment awarded from a spouse to another spouse.

This section codifies Illinois public policy to prevent a wrongdoer from evading civil liability by ascertaining a marital property interest in a judgment entered against the wrongdoer in favor of the spouse. Since any judgment award is classified nonmarital property, it must be assigned to the spouse who obtained the judgment and it cannot be divided between the spouses as marital property. Public Act 82-569, which amended the Rights of Married Persons Act to allow interspousal suits for intentional torts, added section 503(a)(5) as a category of nonmarital property in 1981. See Ill. Rev. Stat. ch. 40, Section 1001. A subsequent amendment, Public Act 85-625 effective January 1, 1988, eliminated all interspousal tort immunity, thus permitting suits for both negligent and intentional torts which occur during marriage. This section 503(a)(5) is not limited to suits for torts and it applies to any judgment entered in favor of one spouse against the other.

6. Property acquired before marriage

Section 503(a)(6) — Property acquired before the marriage.

Property acquired before the marriage bears no relationship to the marital partnership and is therefore exempt from the treatment of marital property. However, some courts have created an exception to this rule by holding that a family home purchased before the marriage but in contemplation of the marriage was marital property. In *re Marriage of Ohrt*, 154 Ill. App. 3d 738, 507 N.E.2d 160, 107 Ill. Dec. 496 (3d Dist. 1987); In *re Marriage of Malter*, 133 Ill. App. 3d 168, 478 N.E.2d 1068, 88 Ill. Dec. 460 (1st Dist. 1985); In *re Marriage of Stallings*, 75 Ill. App. 3d 96, 393 N.E.2d 1065, 30 Ill. Dec. 718 (5th Dist. 1979).

7. Increase in value of nonmarital property

Section 503(a)(7) — the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, nonmarital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsections (c) of this Section.

Section 503(a)(7) applies to increases in the value of nonmarital property. This subsection 503(a)(7) was established by Public Act 83-129, effective August 19, 1983, to replace subsection 503(a)(6) which previously provided that only increases in the value of property acquired before marriage were treated as nonmarital property. Subsection 503(a)(7) was expanded to include as nonmarital property the increases in the value of all nonmarital property. The increase in the value of the nonmarital property remains nonmarital property regardless of whether the increase results from marital property, nonmarital property, the personal effort of the spouse, or otherwise, subject to the right of reimbursement provided for in subsection 503(c). For example the interest accumulated during marriage on a nonmarital investment account has been classified as nonmarital property. In *re Marriage of Deem*, 123 Ill. App. 3d 1019, 463 N.E.2d 1317, 79 Ill. Dec. 542 (4th Dist. 1984). Section 503(a)(7) as amended by Public Act 83-129 is consistent with the Illinois Supreme Court's decisions which previously categorized the increase in value of nonmarital property acquired during marriage as nonmarital property when the increase resulted solely from economic appreciation. In *re Marriage of Komnick*, 84 Ill. 2d 89, 417 N.E.2d 1305, 49 Ill. Dec. 291 (1981); *Bentley v. Bentley*, 84 Ill. 2d 97, 417 N.E.2d 1309, 49 Ill. Dec. 295 (1981). See *In re Marriage of Jones*, 104 Ill. App. 3d 490, 432 N.E.2d 1113, 60 Ill. Dec. 214 (1st Dist. 1982).

The Illinois Supreme Court in *In re Marriage of Smith*, 86 Ill. 2d 518, 427 N.E.2d 1239, 56 Ill. Dec. 693 (1981), further held that the legislature intended that property be either marital or nonmarital property, a principle established under the *Komnick*

and *Bentley* cases, *supra*. In other words, a given asset must be characterized either as marital or nonmarital and may not have dual characteristics. This is known as the “unitary property” principle and it requires the trial court to classify each item of property owned by the parties as either marital or nonmarital. *In re Marriage of Jones*, 104 Ill. App. 3d 490, 432 N.E.2d 1113, 60 Ill. Dec. 624 (2d Dist. 1981) (where income from a nonmarital stock trust, which was retained and reinvested in the trust, was held to be nonmarital property); *In re Marriage of Parr*, 103 Ill. App. 3d 199, 430 N.E.2d 656, 58 Ill. Dec. 624 (2d Dist. 1981).

Subsection 503(a)(7) further established that neither the source of the increase in value of nonmarital property nor the method or time of acquisition of nonmarital property will affect the classification of its increase in value as nonmarital property. Once the presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 503(a), the marital estate may have a right to reimbursement in certain cases, thereby preserving the unitary property principle. Therefore, although each item of property must be classified as belonging to either the marital or nonmarital estate, the other estate which enhanced the value of that item of property may be entitled to reimbursement for its contributions. It is the responsibility of the parties to establish claims to reimbursement.

8. Income from nonmarital property

Section 503(a)(8) — Income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

Subsection 503(a)(8) was also amended by Public Act 83-129 to provide that the income from property acquired by a method listed in paragraphs (1) through (7) of section 503(a) is nonmarital property so long as the income is not attributable to the personal effort of the spouse during marriage. Before this amendment was enacted, many courts held that income from nonmarital property was marital even if said income was not generated by the efforts of a spouse. See *In re Marriage of Bentivenga*, 109 Ill. App. 3d 967, 441 N.E.2d 336, 65 Ill. Dec. 423 (2d Dist. 1982); *In re Marriage of Reed*, 100 Ill. App. 3d 873, 427 N.E.2d 282, 56 Ill. Dec. 202 (5th Dist. 1981). However, as stated above in *Jones*, contrary holdings also existed. *In re Marriage of Jones*, 104 Ill. App. 3d 490, 432 N.E.2d 1113, 60 Ill. Dec. 624 (2d Dist. 1981). Under this subsection 503(a)(8), the income on nonmarital property that is generated by marital efforts is marital property. This rule is consistent with prior decisions which established that income in the form of employment earnings received during marriage is marital property. *In re Marriage of Fleming*, 80 Ill. App. 3d 1006, 400 N.E.2d 625, 36 Ill. Dec. 205 (2d Dist. 1980). See also *In re Marriage of Brown*, 110 Ill. App. 3d 782, 443 N.E.2d 11, 66 Ill. Dec. 488 (5th Dist. 1982), where the determinative issue in the categorization of income from a nonmarital asset as marital or nonmarital was whether said income resulted from the personal efforts of a spouse.

IV. Special considerations in property classification

A. Property purchased in contemplation of marriage

It seems inevitable that there are always exceptional cases when property which by statutory definition should clearly be marital or nonmarital property is held to be otherwise. The most frequent example is a residence purchased in contemplation of marriage. *In re Marriage of Malters*, 133 Ill. App. 3d 168, 393 N.E.2d 1068, 88 Ill. Dec. 460 (1st Dist. 1985). In *Malters*, before the parties’ marriage, the husband purchased real estate and the title was placed in trust with the husband as the sole beneficiary. The parties had been living together and discussed acquiring a marital residence; they both participated in viewing the property with the real estate agent; they both signed the offer to purchase the property; the wife’s parents provided a \$5,000 loan toward the down payment; an additional \$5,000 came from the parties’ joint funds; and during the marriage all mortgage payments were paid from marital funds. The trial court found that the property was purchased by the parties, although prior to, but in contemplation of their marriage. On appeal, the husband argued that section 503(c) of the IMDMA precluded the court from finding the premarital asset as marital property and should have been categorized as nonmarital subject to the marital estate’s right to reimbursement for marital contribution. The appellate court held:

Although the legislature, by its amendment of subsection (c) of Section 503 of the IMDMA (750 ILCS 5/503(c)), sought to preclude a finding that a home acquired prior to marriage was nevertheless a marital asset. In our opinion the trial court did not err in classifying the Brinker Road residence as a marital asset. *In re the Marriage of Malters*, 133 Ill. App. 3d 168, 393 N.E.2d 1068 (1st Dist. 1985).

In re the Marriage of Ohrt, 154 Ill. App. 3d 738, 507 N.E.2d 160, 107 Ill. Dec. 496 (3d Dist. 1987), followed *Malters* in focusing on the intent element of the “purchased in contemplation of marriage” and stressed the fact that when the residence was purchased, it was intended by the couple that it would be their marital residence.

Courts have rejected the “purchased in contemplation of marriage” argument when the property purchased is something other than a marital residence. For example, *In re Marriage of Tatham*, 173 Ill. App. 3d 1072, 527 N.E.2d 1351, 123 Ill. Dec. 576 (5th Dist. 1988), refused to apply the “purchased in contemplation of marriage” doctrine to a tractor purchased one month before the marriage. *In re Marriage of Click*, 169 Ill. App. 3d 48, 523 N.E.2d 169, 119 Ill. Dec. 701 (2d Dist. 1988), also refused to apply the “purchased in contemplation of marriage” doctrine to a payment of \$10,000 in legal fees, prior to the marriage, to an attorney representing the husband in a criminal appeal as a contribution of nonmarital property to the marital estate.

On the other hand, the presumption of gift in reference to placing title to real estate in joint tenancy was overcome in *In re Marriage of Voight*, 111 Ill. App. 3d 623, 67 Ill. Dec. 458, 444 N.E.2d 694, 67 Ill. Dec. 458 (1st Dist. 1982). In *Voight*, the parties married in December of 1977. In October of 1977, two months before the parties’ marriage, the husband made a down payment of \$7,500 on a residence. The parties moved into the residence a month before the marriage. In August of 1978, the husband changed the title from his name to co-ownership between the parties. The appellate court held the evidence showed the husband transferred the title of the residence into joint ownership to end the wife’s badgering and in reliance upon the wife’s promise to name him as beneficiary in her will. This, along with the fact that the down payment as well as a majority of the funds used for the mortgage payments were nonmarital rebutted the presumption of gift to the marriage. The husband had met his burden of proving that the property was never intended to be a gift to the marriage.

In summary, although the totality of the circumstances are to be considered, the “purchased in contemplation of marriage” doctrine requires the following to be shown: (1) the property involved should be the marital residence; (2) there must be evidence that the parties *intended* prior to their marriage to use the residence as a marital residence; and (3) the property must be purchased a short time before the marriage. *In re Marriage of Ohrt*, 154 Ill. App. 3d 738, 507 N.E.2d 160, 107 Ill. Dec. 496 (3d Dist. 1987); *In re Marriage of Click*, 169 Ill. App. 3d 48, 523 N.E.2d 169, 119 Ill. Dec. 701 (2d Dist. 1988); *In re Marriage of Jacks*, 200 Ill. App. 3d 112, 146 Ill. Dec. 143, 558 N.E.2d 106, 146 Ill. Dec. 143 (2d Dist. 1990).

B. Presumptions

All property acquired during the marriage is presumed to be marital property under Section 503(a) of the IMDMA. Property originally categorized as nonmarital may become marital by placing the title of said property in joint names during the marriage or by commingling marital and nonmarital assets. In these situations, when property becomes co-owned, the common law doctrine of presumption of gift is applicable. It is presumed in some cases that when title to the nonmarital asset was placed into a form of co-ownership, the owner of the nonmarital estate is presumed to have made a gift to the marital estate. *Atkinson v. Atkinson*, 87 Ill. 2d 174, 429 N.E.2d 465, 57 Ill. Dec. 567 (1981). In other cases, it is presumed when title to the nonmarital asset was placed into a form of co-ownership, the owner of the nonmarital asset made a gift of one-half interest. *In re Marriage of Rogers*, 85 Ill. 2d 217, 422 N.E.2d 635, 52 Ill. Dec. 633 (1981). This presumption of gift is rebuttable and can be overcome by clear and convincing evidence that no gift was intended. *In re Marriage of Wojcicki*, 109 Ill. App. 3d 569, 440 N.E.2d 1028, 65 Ill. Dec. 173 (1st Dist. 1982). Once the presumption of gift is overcome by clear and convincing evidence the asset is returned to its original nonmarital status at the time of distribution. Once property is deemed nonmarital, the courts have no choice or discretion but to assign the nonmarital property to the owner. Of course, courts can, and often do, take into consideration the size and extent of one spouse’s nonmarital holdings in the percentage of marital property it awards to the other spouse.

C. Interspousal transfers

All property acquired during the marriage is marital property, and for a spouse to claim a gift, the spouse making the claim has the burden of proving the gift with clear, convincing and unmistakable evidence. In *Severns*, the wife went alone to her attorney’s office and executed a quit claim deed to the jointly owned real estate to her husband. She testified that her husband had harassed her into executing the deed to please him and to save the marriage. The court held that the husband did not sustain his burden of proving a gift. *In re Marriage of Severns*, 93 Ill. App. 3d 122, 416 N.E.2d 1235, 48 Ill. Dec. 713 (4th Dist. 1981). Similarly, *In Re Marriage of Davis*, 215 Ill. App. 3d 763, 576 N.E.2d 44, 159 Ill. Dec. 375 (1st Dist. 1991), involved a husband who transferred his interest in a residence acquired during the marriage to his wife by quit claim deed. The testimony as to whether the husband intended to convey the residence as a gift or for tax purposes was in conflict. The appellate court noted that there was no gift tax return filed and that Illinois courts have expressly rejected the proposition that the transfer of title between spouses is sufficient to rebut the presumption of marital property. The appellate court held that the wife failed to present clear and convincing evidence to rebut the presumption that the residence was marital property. The strength of the presumption of marital property defeated an interspousal transfer during the

marriage. See also *In re Marriage of Wittenauer*, 103 Ill. App. 3d 53, 430 N.E.2d 625, 58 Ill. Dec. 593 (5th Dist. 1981); *In re Marriage of Leff*, 148 Ill. App. 3d 792, 499 N.E.2d 1042, 102 Ill. Dec. 262 (2d Dist. 1986).

D. Transmutation

If marital and nonmarital assets are commingled, the transmutation principles contained in section 503(c) are applied. Section 503(c) provides:

- (c) Commingled marital and nonmarital property shall be treated in the following manner, unless otherwise agreed by the spouses:
- (1) When marital and nonmarital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and nonmarital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

Illinois follows a unified concept of property, in which the property must be construed as either marital or nonmarital. Further, where possible, courts appear to favor characterizing property as marital since it enables the court to exercise its discretion in dividing the assets equitably, versus defining property as nonmarital, where the court has no discretion or choice but to assign the nonmarital property to the spouse who had originally acquired it. 750 ILCS 5/503(d).

E. Transferring property into co-ownership

One of the most frequent and unintentional creations of marital property occurs when a spouse transfers his or her nonmarital property into a form of co-ownership. A typical example is when a spouse places title to a nonmarital residence in joint tenancy. This frequently occurs when a home is refinanced or if the non-titled spouse requests the transfer into joint tenancy as a simple form of estate planning. In making this transfer into joint ownership, the transferor spouse in most instances does not realize the change in title raises a presumption of gift of the property to the marital estate. The presumption of a gift is raised when a spouse places the title to nonmarital property into a form of co-ownership. *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 438 N.E.2d 466, 63 Ill. Dec. 535 (1st Dist. 1982).

The party who made the transfer may rebut the presumption of gift by clear and convincing evidence. *Coates v. Coates*, 64 Ill. App. 3d 914, 381 N.E.2d 1200, 21 Ill. Dec. 656 (3d Dist. 1978), is an example of where the property placed in joint tenancy during the marriage appeared to be marital. However, the appellate court held that the husband adequately rebutted the presumption of gift by testimony that during the marriage, he placed the title to property he owned before the marriage in the names of both spouses as joint tenants because of his fear that the property would be the subject of a potential lawsuit related to his employment or problems with his ex-wife. The court noted that evidence establishing that a conveyance of an interest in real property was made to avoid potential liability is indicative that the conveyance was not a gift. Although *Coates* was decided prior to the passage of the IMDMA, the result is the same and still remains useful as precedent.

Failing to introduce evidence to overcome the presumption of gift could be deadly. In *Zito v. Zito*, 196 Ill. App. 3d 1031, 554 N.E.2d 541, 143 Ill. Dec. 606 (1st Dist. 1990), the wife placed husband's name on the title to her nonmarital property when the parties refinanced the existing mortgage and each signed a new note. Since there was no evidence introduced to support the wife's intent for placing title in both the parties' names, she failed to overcome the presumption of gift and the property was held as marital. It must be noted that in *Zito*, the husband provided consideration and obligated himself when he executed the mortgage note.

Another example of property which appears to be marital property, yet is held to be nonmarital property is shown in *In re Marriage of Rink*, 136 Ill. App. 3d 252, 483 N.E.2d 316, 91 Ill. Dec. 34 (1st Dist. 1985), which involved premarital bank accounts which were placed in joint tenancy during the marriage for convenience only because the husband was blind and could not easily make transactions without the wife's help. The court held that the premarital bank accounts, although held in joint tenancy, were not considered a gift to the marriage and were deemed the husband's nonmarital property. In summary, once property is placed in a form of co-ownership, courts require a definitive showing of intent to overcome the gift presumption.

V. Conclusion

Classification of marital and nonmarital property requires an examination of the exceptions set forth in § 503(a) of the IMDMA, but also involves common-law presumptions and an evaluation of the parties' intent. Once this classification

process is complete, nonmarital property can be assigned to its owner and marital property can be divided between the parties in just proportions. In order for the parties or a court to divide marital property in just proportions the value of the marital property must be determined.

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