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Kentucky Law Journal

Volume 89 | Issue 1

Article 8

2000

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Russell W. Goff
University of Kentucky

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Recommended Citation

Goff, Russell W. (2000) "Title Doesn't Matter, Does It?: An Analysis of Kentucky's Property Disposition Law and Its Treatment of Transmutation," *Kentucky Law Journal*: Vol. 89 : Iss. 1 , Article 8.

Available at: <https://uknowledge.uky.edu/klj/vol89/iss1/8>

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Title Doesn't Matter, Does It?: An Analysis of Kentucky's Property Disposition Law and Its Treatment of Transmutation

BY RUSSELL W GOFF*

I. INTRODUCTION

Imagine a successful, young businesswoman, Jane Doe. Jane has been married for two years, working as an accountant, and living in an average home just outside the city. Jane decides one day to take some money she has been saving and to purchase a new car. She realizes her husband will be the primary user of the car since she usually takes the bus to work. In addition, Jane places her husband's name on the title because of her poor driving record and extremely high insurance rates. A short time later, the marriage ends in a bitter divorce. The issue is ownership of the car. Did Jane relinquish her property rights in the car when her husband was made record owner? Should title even be considered in determining to whom the car belongs?

Now picture another young couple, John Smith and his wife. The couple has been married for a few years when John inherits a sizeable amount of money from his favorite aunt. John, tired of living in a tiny one-bedroom apartment, uses the money to place a down payment on a large house in the country. To avoid probate, John places both his and his wife's names on the title to the home. Within a year of the purchase, the couple finds that the relationship is over and they file for divorce. Ownership of the home is contested. Do both spouses share an interest in the house? Has John forfeited the inherited money that he invested in the home?

Under Kentucky law, title is not determinative of ownership in divorce proceedings.¹ The fact that a party or parties appear as record owner of an

* J.D. expected 2001, University of Kentucky. The author wishes to thank Louise Everett Graham, Wendell H. Ford Professor of Law, University of Kentucky, for her guidance in structuring and composing this Note.

¹ See KY. REV. STAT. ANN. [hereinafter K.R.S.] § 403.190(3) (Michie 1999); *Angel v. Angel*, 562 S.W.2d 661, 665 (Ky. Ct. App. 1978).

asset does not confer property rights upon dissolution.² Currently, all assets belonging to married individuals at the time of dissolution are presumed to be marital property.³ To establish a separate interest in property, a spouse must show, through clear and convincing evidence, his or her non-marital interest in the property.⁴ This process of demonstrating a separate interest in what would otherwise be considered marital property is known as "tracing."⁵

Hence, in the first hypothetical, the car that Jane purchased will likely be considered marital property despite her husband's status as record owner, and she will be awarded an equitable share of that property based on a number of factors.⁶ Furthermore, Jane may be able to recover the money that she earned before marriage and invested in the car.⁷ In the second hypothetical, John should be able to set aside as separate property the contribution made from his inheritance, provided he can produce evidence of its "non-marital" source.⁸ Otherwise, the entire asset will be presumed to be marital property and divided equitably between the parties.⁹

² See K.R.S. § 403.190(3); *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. Ct. App. 1998).

³ *Reeves v. Reeves*, 753 S.W.2d 301, 302 (Ky. Ct. App. 1988).

⁴ See K.R.S. § 403.190(3); *Brosick*, 974 S.W.2d at 502.

⁵ E.g., *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990).

⁶ [The court] shall divide the marital property in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of the children.

K.R.S. § 403.190(1).

⁷ For the purposes of this chapter, marital property means all property acquired by either spouse subsequent to the marriage except:

- (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent.

K.R.S. § 403.190(2); see also *Chenault v. Chenault*, 799 S.W.2d 575, 579 (Ky 1990) (permitting spouse to retain as non-marital property the value of assets brought to the marriage).

⁸ Cf. *Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky. Ct. App. 1978).

⁹ See K.R.S. § 403.190(3).

One must wonder whether this is the most appropriate approach for allocating property. Does "tracing" promote the partnership principles of marriage seemingly embraced in equitable distribution?¹⁰ Certainly one could argue that by taking joint title the owner manifests an intention to relinquish his claim as sole owner and make the asset the property of the marital estate.¹¹ Such a change in the character of property, from non-marital property to marital property, is known as transmutation.¹²

Under transmutation, marital property may be converted to non-marital property, and vice versa.¹³ This concept is not new; it developed under the common law.¹⁴ Kentucky, however, has yet to clearly determine whether principles of transmutation remain unchanged after the inception of equitable distribution. If Kentucky courts decide that common law transmutation principles still apply, they must then determine how those principles co-exist with a spouse's ability to trace.

Kentucky clearly continues to recognize transmutation in certain situations.¹⁵ Recent case law demonstrates that the character of property may be changed through agreement,¹⁶ commingling,¹⁷ and interspousal gift.¹⁸ The courts have not yet determined, however, whether the character of property can be transmuted by a change in title.

This Note analyzes Kentucky law regarding transmutation by an alteration in title. First, the basic principles of transmutation are set forth, including the vehicles through which the character of property may be

¹⁰ See J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3.02[2][c] (1999) (citing Joan M. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165 (1976)); Louise Everett Graham, *Using Formulas to Separate Marital and Nonmarital Property: A Policy Oriented Approach to the Division of Appreciated Property Upon Divorce*, 73 KY. L.J. 41, 42-43 (1984).

¹¹ See, e.g., *McLean v. McLean*, 374 S.E.2d 376, 381 (N.C. 1988).

¹² See, e.g., OLDHAM, *supra* note 10, § 11.01; *Kinsey-Geujen v. Geujen*, 984 S.W.2d 577 (Mo. Ct. App. 1999); *Lilly v. Lilly*, 420 S.E.2d 492 (N.C. Ct. App. 1992).

¹³ See OLDHAM, *supra* note 10, § 11.01[1].

¹⁴ E.g., *Mims v. Mims*, 286 S.E.2d 779, 784 (N.C. 1982).

¹⁵ E.g., *Gentry v. Gentry*, 798 S.W.2d 928, 935 (Ky. 1990); *Bischoff v. Bischoff*, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998), *cert. demed.*, 120 S. Ct. 175 (1999); *O'Neill v. O'Neill*, 600 S.W.2d 493, 495 (Ky. Ct. App. 1980).

¹⁶ *Gentry*, 798 S.W.2d at 934.

¹⁷ *Bischoff*, 987 S.W.2d at 800.

¹⁸ *O'Neill*, 600 S.W.2d at 495.

changed.¹⁹ Within this discussion the current status of transmutation in Kentucky law is also briefly discussed. Next, the Note provides a short history of the law regarding transmutation by a change in title (i.e., the "gift presumption").²⁰ This is followed by an explanation of the evolution of statutorily mandated property distribution in Kentucky.²¹ The Note then analyzes the recognized vehicles of transmutation and their relationship to the current statutory framework.²² The significance of a change in title under the laws of certain other states is included to provide examples of how the common law gift presumption is treated in other jurisdictions.²³ Finally, the policy implications of choosing whether to recognize transmutation by a change in title are discussed.²⁴

II. TRANSMUTATION

Transmutation is simply a change in the characterization of property, from marital property to non-marital property or vice versa.²⁵ Transmutation is primarily based upon a spouse's intent to change the character of property.²⁶ There are a number of ways in which transmutation can occur, including agreements between spouses,²⁷ commingling,²⁸ interspousal gifts,²⁹ and changes in title.³⁰

A. *Transmutation by Agreement*

In Kentucky, as in several other states,³¹ the character of property may be changed or transmuted by an interspousal agreement.³² Kentucky's

¹⁹ See *infra* notes 25-97 and accompanying text.

²⁰ See *infra* notes 98-111 and accompanying text.

²¹ See *infra* notes 112-28 and accompanying text.

²² See *infra* notes 129-37 and accompanying text.

²³ See *infra* notes 138-89 and accompanying text.

²⁴ See *infra* notes 190-205 and accompanying text.

²⁵ See generally OLDHAM, *supra* note 10, §§ 11.01-.04.

²⁶ *Id.* § 11.01[2].

²⁷ *E.g.*, Gentry v. Gentry, 798 S.W.2d 928, 934 (Ky. 1990).

²⁸ *E.g.*, Bischoff v. Bischoff, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998).

²⁹ *E.g.*, O'Neill v. O'Neill, 600 S.W.2d 493, 495 (Ky. Ct. App. 1980).

³⁰ *E.g.*, McLean v. McLean, 374 S.E.2d 376, 382 (N.C. 1988); see also OLDHAM, *supra* note 10, § 11.02 (discussing transmutation by change in title).

³¹ OLDHAM, *supra* note 10, § 11.04.

³² *E.g.*, Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990); Gentry, 798 S.W.2d at 935.

property disposition statute expressly recognizes a spouse's ability to exclude "by valid agreement" property that may otherwise qualify as marital property.³³ Husband and wife may, through agreement, define their property rights upon dissolution, notwithstanding the statutory scheme of characterization in Kentucky.³⁴

The issue of transmutation by agreement was addressed in *Gentry v. Gentry*.³⁵ The parties, through express agreement, effectively designated assets acquired after the marriage as "separate property."³⁶ The parties further agreed that their house would be deemed marital property, regardless of non-marital contributions.³⁷ The court honored their agreed designations.³⁸ This ruling clearly illustrates that parties may mandate the characterization of property through agreement, and they necessarily have the power to change or transmute property's characterization.

This ability to characterize property also affects the ability to trace. Transmutation through a valid express agreement may override all statutorily imposed rights with regard to the disposition of property in divorce proceedings.³⁹ This would likely preclude a spouse's ability to trace the property to non-marital assets.⁴⁰ Thus, transmutation by agreement has survived equitable distribution, and a spouse's ability to trace does not override transmutation by agreement.

B. Transmutation by Commingling

Another way that property is transmuted is through "commingling."⁴¹ Commingling occurs where separate property and marital property become so "mixed up" or jumbled that they cannot be accurately divided for

³³ K.R.S. § 403.190(2)(d) (Michie 1999).

³⁴ [A] husband and wife in Kentucky may define by agreement their rights in each other's property, regardless of any rights which would otherwise have been excluded or conferred by KRS 403.190. Such agreements, provided they are otherwise valid contracts, are entitled to enforcement upon dissolution of the marriage.

Gentry, 798 S.W.2d at 934.

³⁵ *Id.* at 935 (holding that an agreement to allocate the parties' assets by title is valid and classifying a jointly titled home as marital property).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *E.g.*, *Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. Ct. App. 1998).

characterization.⁴² Under Kentucky law, in such a situation the entire sum will be presumed to be marital property.⁴³ This has the effect of transmuting the commingled separate property into marital property. Commingling is likely to be an issue in the disposition of joint bank accounts and other assets acquired with both marital and separate funds.⁴⁴ The apparent rationale for commingling is "to punish the spouse who carelessly mixes separate and marital funds."⁴⁵ Also, transmutation arguably furthers the intentions of spouses to share and be treated as a single unit.⁴⁶

Transmutation through commingling appears to be statutorily mandated in Kentucky.⁴⁷ The statute provides that all property acquired by either spouse after marriage and before separation is presumed to be marital property.⁴⁸ To overcome this presumption a spouse must be able to trace the non-marital share of the property to its non-marital origin.⁴⁹ When a spouse is unable to accurately trace non-marital property to an asset in existence at the time of dissolution, the presumption causes the non-marital share to transmute into marital property.⁵⁰ For example, a husband's disability benefits, although non-marital property, become marital property when commingled with other marital funds and used to purchase a home.⁵¹

Unless non-marital property can be traced into some asset existing at the time of the dissolution of the marriage, it is transmuted into marital property through commingling.⁵² Transmutation by commingling certainly

⁴² See OLDHAM, *supra* note 10, § 11.03.

⁴³ K.R.S. § 403.190(3) (Michie 1999); *see also, e.g.*, *Farmer v. Farmer*, 506 S.W.2d 109, 112 (Ky. 1974) (holding wife had the burden of tracing non-marital contributions to joint bank account in order to exclude the funds from the marital estate).

⁴⁴ *E.g.*, *Bischoff*, 987 S.W.2d at 800; *Farmer*, 506 S.W.2d at 112.

⁴⁵ OLDHAM, *supra* note 10, § 11.03.

⁴⁶ *See Turley v. Turley*, 562 S.W.2d 665, 669 (Ky. Ct. App. 1978) (Vance, J., concurring).

⁴⁷ *See* K.R.S. § 403.190(3).

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, *Farmer*, 506 S.W.2d at 112.

⁵⁰ *E.g.*, *Chenault v. Chenault*, 799 S.W.2d 575, 578-79 (Ky. 1989); *Bischoff v. Bischoff*, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998); *Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky. Ct. App. 1978).

⁵¹ *Bischoff*, 987 S.W.2d at 800.

⁵² *See Chenault*, 799 S.W.2d at 578-79; *Bischoff*, 987 S.W.2d at 800; *Brunson*, 569 S.W.2d at 176.

appears to have survived the inception of equitable distribution. The putative change in character is, however, clearly subject to tracing.⁵³

C. Interspousal Gift

The characterization of property may also be changed through gift.⁵⁴ In Kentucky, an interspousal gift becomes the separate property of the donee.⁵⁵ The donor of the gift loses both his separate and marital interest in the property.⁵⁶

Kentucky courts do not, however, automatically consider all purported gifts to be "gifts" as used in KRS § 403.190.⁵⁷ Whether a change in possession between spouses constitutes a gift is a factual determination for the court.⁵⁸ Four factors are considered in determining whether an interspousal transfer constitutes a gift.⁵⁹ These factors, as announced in *O'Neill v. O'Neill*,⁶⁰ include:

the source of the money with which the "gift" was purchased, the intent of the donor at that time as to intended use of the property, status of the marriage relationship at the time of the transfer, and whether there was any valid agreement that the transferred property was to be excluded from the marital property.⁶¹

In *O'Neill*, the court determined that jewelry given by the husband to his wife on Christmas and birthdays did not fall within the designation of "gift" as contemplated by the statute.⁶² The court explained its decision by pointing out that: 1) the property was purchased with marital property, hence the transfer was merely a change in form; 2) the donor intended the purchase as an investment, reserving future benefits for the marriage

⁵³ See K.R.S. § 403.190(3); *Chenault*, 799 S.W.2d at 578-79.

⁵⁴ *O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. Ct. App. 1980); see *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. Ct. App. 1980).

⁵⁵ *O'Neill*, 600 S.W.2d at 493; see *Ghali*, 596 S.W.2d at 32.

⁵⁶ See *Clark v. Clark* 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990); *O'Neill*, 600 S.W.2d at 495; *Ghali*, 596 S.W.2d at 32.

⁵⁷ *O'Neill*, 600 S.W.2d at 495-96.

⁵⁸ *Id.* at 495.

⁵⁹ *Id.*

⁶⁰ *Id.* at 493.

⁶¹ *Id.* at 495.

⁶² *Id.*

partnership; and 3) the transfer took place while the couple was married and living together.⁶³

Although courts were not originally clear regarding each factor's relative importance, the Kentucky Court of Appeals later stated that "donative intent" is the primary factor to be considered.⁶⁴ In *Clark v. Clark*,⁶⁵ the court ruled that a car given by a husband to his wife on Christmas constituted a gift.⁶⁶ The court announced that donative intent was the decisive consideration, but also gave weight to the fact that the donee was the primary user of the property.⁶⁷

The above cases demonstrate that tracing does not overcome transmutation by gift.⁶⁸ Once the transfer is determined to be a "gift," a donor spouse likely loses his interest in the asset, regardless of his ability to show that the property was once his separate property.⁶⁹ The gift becomes the separate property of the donee spouse.⁷⁰

D. Transmutation by a Change in Title

The most perplexing transmutation questions arise where there is a change in title. Under the common law a change in title created a presumption that the ownership of the property had changed.⁷¹ When an owner of separate property changed the title to reflect joint ownership, he was presumed to have given his spouse one-half interest in the property.⁷² Of course, in Kentucky this was limited by the restoration statute.⁷³ With the inception of equitable distribution, however, the significance of title was diminished greatly, if not completely destroyed.⁷⁴ These circumstances beg the question: Should a change in title still create the presumption that ownership has changed?

There is little doubt that a person may transmute property through a change in title where he intends a gift to the marital estate.⁷⁵ Where a

⁶³ *Id.* at 496.

⁶⁴ *Clark v. Clark*, 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990).

⁶⁵ *Id.* at 56.

⁶⁶ *Id.* at 62-63.

⁶⁷ *Id.*

⁶⁸ *See, e.g., id.*

⁶⁹ *See, e.g., id.*, *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. Ct. App. 1980).

⁷⁰ *See Clark*, 782 S.W.2d at 62-63.

⁷¹ OLDHAM, *supra* note 10, § 11.01[2].

⁷² *Id.*

⁷³ *See* K.R.S. § 403.060 (Michie 1970) (repealed 1972).

⁷⁴ *Id.* § 403.190(3) (Michie 1999).

⁷⁵ *See* OLDHAM, *supra* note 10, § 11.01[2].

spouse desires to relinquish his claim as the sole owner of certain property, choosing rather to make the asset the shared property of the marital partnership, he may change title to the asset effecting his gift to the marriage. This is consistent with Kentucky's treatment of interspousal gifts.⁷⁶ The significance to be attributed to change in record ownership absent evidence of the owner's intent is not as apparent, however.

Transmutation issues often arise where an asset that was once the separate property of a spouse is subsequently titled to reflect joint ownership with his or her spouse.⁷⁷ In these situations, there is often a question of whether the spouse intended to change the character of the property.

Most courts state that when a spouse jointly takes title to a non-marital asset, the spouse is presumed to have made a gift to the marriage partnership.⁷⁸ The same is true with regard to non-marital bank accounts where the name of the non-owning spouse is added as record owner.⁷⁹ In many states, the marital gift presumption may be rebutted with evidence of a contrary intent on the part of the owner spouse.⁸⁰ Other states maintain that a change in title is conclusive evidence that a gift has been made.⁸¹ Still other states have concluded that equitable distribution statutes destroy any gift presumption arising from joint title.⁸² These states use tracing to characterize the assets, notwithstanding the title designation.⁸³

In many instances there is little doubt that the joint title designation serves a non-donative purpose.⁸⁴ Lenders may require that an asset purchased with separate property be titled jointly.⁸⁵ Property may be taken under joint title for probate purposes.⁸⁶ Other times, owners may be advised that the law requires joint title.⁸⁷ The gift presumption does not seem appropriate where these or similar non-donative motives exist.

⁷⁶ See, e.g., *Clark v. Clark*, 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. Ct. App. 1980).

⁷⁷ See, e.g., *Kinsey-Geujen v. Geujen*, 984 S.W.2d 577, 579 (Mo. Ct. App. 1999); *Clark v. Clark*, 919 S.W.2d 253, 255 (Mo. Ct. App. 1996); *McLean v. McLean*, 374 S.E.2d 376, 381 (N.C. 1988).

⁷⁸ OLDHAM, *supra* note 10, § 11.01[2].

⁷⁹ *Id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Kentucky case law offers little guidance with regard to transmutation by change in title. It appears that in certain "interspousal gift" cases, courts have had the opportunity to address the significance of a change in title but have chosen not to do so.⁸⁸ One may argue that the courts' indifference to record ownership indicates that Kentucky does not recognize transmutation through title change. This area of Kentucky law, however, remains unclear.

Kentucky has several alternatives in dealing with the common-law "gift presumption" that arises when a spouse titles his separate property jointly. Kentucky courts may choose to ignore the presumption, giving the change in title no effect at all.⁸⁹ This would allow a literal application of the statute and would be consistent with Kentucky's disregard for title in determining ownership upon dissolution.⁹⁰ The source of the funds used to purchase the property would be determinative in the characterization of the property.⁹¹

By contrast, a change in title may be given significance in the absence of a gift presumption. Instead of presuming an intent to make a gift, courts could require some showing of donative intent before concluding a change in character has occurred. Where a spouse claims that property has been made a gift to the marital partnership, the spouse may be required to show that the donor actually intended to make a gift. It seems logical that an analysis similar to that used in dealing with interspousal gifts should be employed where a spouse has changed title to an asset, given the rationale of the gift presumption.⁹² The Court of Appeals of Kentucky has said that a purported donor's intent is the key consideration in determining whether a gift has been made.⁹³ Perhaps the title-changing spouse should have to intend to relinquish their interest in the property before it is transmuted by a change in title.

Alternatively, courts may choose to preserve the common law gift presumption and apply it concurrently with the statutory provisions.⁹⁴ If the

⁸⁸ See, e.g., *Clark v. Clark*, 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990).

⁸⁹ See *OLDHAM*, *supra* note 10, § 11.01[2].

⁹⁰ See K.R.S. § 403.190(3) (Michie 1999).

⁹¹ See, e.g., *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. Ct. App. 1981); see also *OLDHAM*, *supra* note 10, § 11.01[2] ("Some courts have concluded that the adoption of equitable distribution has abolished the presumption of gift from joint title. In such states, title is disregard [sic]; courts merely consider the type of consideration used to purchase the property present at the time of divorce." (footnotes omitted)).

⁹² See *infra* notes 98-111 and accompanying text.

⁹³ See *Clark*, 782 S.W.2d at 62-63.

⁹⁴ E.g., *Kinsey-Geujen v. Geujen*, 984 S.W.2d 577, 579 (Mo. Ct. App. 1999); *McLean v. McLean*, 374 S.E.2d 376, 381 (N.C. 1988).

gift presumption is preserved, the courts must determine how it co-exists with tracing. The presumption may be applied despite a spouse's ability to trace⁹⁵—where title to separate property is changed to reflect joint ownership, a spouse would be required to overcome the presumption before he is able to preserve his separate interest through tracing.⁹⁶ Alternatively, Kentucky may choose to apply a gift presumption that is submissive to tracing; in other words, the gift presumption could be made subordinate to tracing.

If tracing is allowed to overcome the gift presumption, however, the presumption would have little or no effect on the operation of Kentucky's statute. All property, if not shown to be separate, is considered marital upon dissolution.⁹⁷ A gift presumption would be engulfed by the general marital property presumption that applies to all property regardless of title.

III. HISTORY

A better understanding of the gift presumption is possible when one is familiar with its origins. A closer look at its development allows one to better advocate its survival or champion its demise.

The gift presumption arose under the common law.⁹⁸ Under the common law, title was determinative with regard to ownership.⁹⁹ Marriage had virtually no effect on the parties' property rights.¹⁰⁰ Each spouse accumulated and managed his or her own property and, upon dissolution of the marriage, each spouse's rights regarding individual assets remained unchanged.¹⁰¹ If a spouse held title to property and subsequently changed the property into joint title, he was presumed to have made a gift to his spouse, which gave the spouse a one-half interest in the property.¹⁰² Similarly, if the spouse used property belonging solely to him in exchange for property taken in joint title, it was presumed that the other spouse assumed one-half ownership of the newly acquired property.¹⁰³

The rise of the gift presumption can be explained in two ways. First, under the "title system," record ownership was the prominent considera-

⁹⁵ See, e.g., *Lawrence v. Lawrence*, 394 S.E.2d 267 (N.C. Ct. App. 1990).

⁹⁶ *Id.*

⁹⁷ See *Reeves v. Reeves*, 753 S.W.2d 301, 301-02 (Ky. Ct. App. 1988).

⁹⁸ OLDHAM, *supra* note 10, § 11.01[2].

⁹⁹ See *id.* §§ 3.02[1], 11.01[2].

¹⁰⁰ *Id.* § 3.02[1].

¹⁰¹ *Id.*

¹⁰² *Id.* § 11.01[2].

¹⁰³ *Id.*

tion in dividing property upon dissolution.¹⁰⁴ Accordingly, joint title was strong evidence that the property was held in some form of joint ownership.¹⁰⁵

Second, the gift presumption likely evolved to combat inequitable results upon dissolution.¹⁰⁶ Since record title determined ownership under the common law "title system," property distribution was often unfair upon divorce.¹⁰⁷ Traditionally, husbands were the breadwinners and wives were homemakers.¹⁰⁸ Thus, wives frequently relied solely on their husbands for acquiring property.¹⁰⁹ In light of the resulting injustice, courts probably looked to doctrines such as transmutation to more equitably divide property in dissolution.¹¹⁰ The "gift presumption" provided a vehicle by which to avoid the harsh results of the "title system." Since property that a husband acquired and titled in his own name belonged to him,¹¹¹ one could reasonably presume that he intended to make a gift to his wife anytime he included her as record owner.

The "title system" eventually gave way.¹¹² Kentucky altered the common law rule with its restoration statute, which stated that ownership rights were determined by the origin of the original source of the financial contribution.¹¹³ Where one spouse gained ownership rights in the other's

¹⁰⁴ See *id.* §§ 3.01-3.02[1], 11.01[2].

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* §§ 3.02[2], 11.01[2].

¹⁰⁷ *Id.* § 11.01[2].

¹⁰⁸ See *id.* § 3.02[2][a].

¹⁰⁹ See *id.*

¹¹⁰ See *id.* § 11.01[2].

¹¹¹ See *id.* § 3.02[1].

¹¹² *Id.* § 3.01 ("This 'title' system has been severely criticized, and as a result, no 'common law' state still applies a pure 'title' approach to property division at divorce. All of these states now utilize some version of an 'equitable distribution' approach." (citations omitted)).

¹¹³ K.R.S. § 403.060 (Michie 1970) (repealed 1972).

(1) If the wife does not have sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as the court considers equitable; but no such allowance shall divest the husband of the fee simple title to real estate.

(2) Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage.

Id.

property due to his or her marital status, and not in exchange for valuable consideration, the interest was returned to the other spouse upon dissolution.¹¹⁴

In 1970, however, the Uniform Marriage and Divorce Act was introduced.¹¹⁵ The act eventually provided two approaches to property disposition upon dissolution.¹¹⁶ Kentucky's statute is similar to Alternative B, an approach that provides for both marital and separate property.¹¹⁷ Kentucky's version of the property disposition statute was codified at Kentucky Revised Statutes section 403.190,¹¹⁸ replacing the restoration statute.

Under Kentucky's equitable distribution statute, all property acquired by either spouse during the marriage is presumed to be "marital property"¹¹⁹ This property is to be divided equitably between the divorcing parties.¹²⁰ The marital property presumption can be rebutted with clear and convincing evidence¹²¹ that the property is exempt under one of the exceptions listed in the property disposition statute.¹²² Notwithstanding the statutory language, it appears that all property held by either spouse upon

¹¹⁴ See *Eckhoff v. Eckhoff*, 247 S.W.2d 374, 375 (Ky. 1951).

¹¹⁵ UNIF. MARRIAGE & DIVORCE ACT § 307 (amended 1973), 9A U.L.A. 159 (1998).

¹¹⁶ *Id.* § 307, 9A U.L.A. at 288-89. The earliest draft of the act provided for both marital and non-marital property. 15 LOUISE E. GRAHAM & HON. JAMES E. KELLER, KENTUCKY PRACTICE: DOMESTIC RELATIONS LAW § 15.3 (2d ed. 1997). The Act was later amended to provide states a choice between alternative proposals for disposing of property upon dissolution. Alternative B allows marital property to be divided, but non-marital property is awarded to the individual owner. See UNIF. MARRIAGE & DIVORCE ACT § 307, Alternative B (1973), 9A U.L.A. 288-89 (1998). Kentucky based its statute upon Alternative B, with additional language included in Kentucky Revised Statutes section 403.190(2)(e), regarding division of appreciated non-marital property. GRAHAM & KELLER, *supra*, § 15.3 n.10. Compare K.R.S. § 403.190 (Michie 1999), with UNIF. MARRIAGE & DIVORCE ACT § 307, Alternative B (1973), 9A U.L.A. 288-89 (1998).

¹¹⁷ Graham, *supra* note 10, at 43-44. Compare K.R.S. § 403.190, with UNIF. MARRIAGE & DIVORCE ACT § 307, Alternative B, 9A U.L.A. 288-89.

¹¹⁸ See K.R.S. § 403.190.

¹¹⁹ *Id.* § 403.190(3).

¹²⁰ *Id.* § 403.190(1); see, e.g., *Hollon v. Hollon*, 623 S.W.2d 898, 899 (Ky. 1981); *Wood v. Wood*, 720 S.W.2d 934, 935 (Ky. App. 1986).

¹²¹ *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. Ct. App. 1998).

¹²² K.R.S. § 403.190(3).

dissolution of the marriage is presumed to be marital property.¹²³ A spouse must establish non-marital interest in property in order to have it excluded from the marital estate.¹²⁴

The statute provides its own mechanism for defeating the marital property presumption.¹²⁵ A spouse may be awarded non-marital interest in property if he can show that the property was acquired in one of five ways, which are enumerated in the statute.¹²⁶ As indicated earlier, proving the non-marital origin of property is known as "tracing."¹²⁷

Tracing, at first glance, appears to be incompatible with the concept of transmutation. If a spouse can trace the origin of property to preserve any non-marital interest therein, then the character of the property appears to never really change at all. Transmutation, however, has not been destroyed by a spouse's ability to trace, as indicated in cases decided after the inception of equitable distribution.¹²⁸ Published decisions, however, have not yet reflected transmutation by change in title.

IV. TRACING AND TRANSMUTATION IN KENTUCKY

The relationship between transmutation and tracing is not completely clear. Certainly, tracing overcomes transmutation that would occur through commingling.¹²⁹ Where a spouse can trace his separate property into an asset existing at dissolution he may retain his separate interest.¹³⁰ Conversely, it appears that transmutation by valid interspousal agreement is

¹²³ See *Reeves v. Reeves*, 753 S.W.2d 301, 302 (Ky. Ct. App. 1988) ("Property is presumed to be marital. The presumption is countered by five exceptions ."). See also *Marcum v. Marcum*, 779 S.W.2d 209, 210 (Ky. 1989); *Brunson v. Brunson*, 569 S.W.2d 173 (Ky. Ct. App. 1978); *Turley v. Turley*, 562 S.W.2d 665, 668 (Ky. Ct. App. 1978).

¹²⁴ See, e.g., *Marcum*, 779 S.W.2d at 210-11; *Brunson*, 569 S.W.2d at 176-78; *Turley*, 562 S.W.2d at 667-69.

¹²⁵ See K.R.S. § 403.190(3) ("The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.").

¹²⁶ See *id.*

¹²⁷ E.g., *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990).

¹²⁸ See, e.g., *Gentry v. Gentry*, 798 S.W.2d 928, 935 (Ky. 1990); *Bischoff v. Bischoff*, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998); *O'Neill v. O'Neill*, 600 S.W.2d 493, 495-96 (Ky. Ct. App. 1980).

¹²⁹ See *Brunson*, 569 S.W.2d at 176-77 (awarding Mr. Brunson, as non-marital property, farms owned at the time of separation that were given to him as gifts).

¹³⁰ See *id.*

untouched by tracing.¹³¹ An agreement may validly dictate the character of certain property,¹³² rendering tracing ineffective.

Transmutation by interspousal gift probably defeats a donor's ability to trace a non-marital interest in the property.¹³³ Clearly a spouse loses the marital interest in property if such property is deemed a gift to the other spouse.¹³⁴ The donor is unable to use tracing to preserve any marital interest in the gift since, under the statute, tracing is only available to show non-marital interest in what is otherwise presumed to be marital property.¹³⁵

If the gift comes from the donor's separate property, however, the donor may, arguably, be able to trace the gift to its origin to retain the donor's non-marital interest therein. Still, one must remember that tracing is usually a device to show non-marital interest in what is presumptively *marital property*.¹³⁶ Furthermore, courts have consistently discounted the characterization of property before the gift is made.¹³⁷ This judicial indifference suggests that an interspousal gift becomes the separate property of the donee regardless of its origin. Therefore, in most cases transmutation by gift generally overcomes a spouse's ability to trace.

The way in which transmutation by change in title interacts with tracing is the most perplexing situation. The present status of the doctrine is left unclear, given the inception of equitable distribution in Kentucky. The courts have not yet identified the significance of changing title to separate property to reflect joint ownership.

Whether transmutation survives with equitable distribution is a question which begs resolution. For instance, one is left to wonder whether

¹³¹ See, e.g., *Edwardson v. Edwardson*, 798 S.W.2d 941, 945-46 (Ky. 1990); *Gentry v. Gentry*, 798 S.W.2d 928, 935 (Ky. 1990).

¹³² See *Gentry*, 798 S.W.2d at 935; *Edwardson*, 798 S.W.2d at 941.

¹³³ It is likely that tracing is never available to preserve a marital interest in separate property. Tracing is a statutorily created device used to show a non-marital interest in what is presumed to be marital property. See K.R.S. § 403.190 (Michie 1999); *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). Hence, there is little need to address the use of tracing to preserve a marital interest in property.

¹³⁴ See K.R.S. § 403.190; *Clark v. Clark*, 782 S.W.2d 56, 62-65 (Ky. Ct. App. 1990).

¹³⁵ K.R.S. § 403.190. The statute provides that a spouse may preserve separate property by "showing the property was acquired by a method listed in subsection (2)," or through tracing. *Id.* § 403.190(3). However, there is no such provision for tracing marital property.

¹³⁶ See *id.* § 403.190(3).

¹³⁷ See *Clark v. Clark* 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. Ct. App. 1980).

a spouse who changes title to reflect either joint ownership or sole ownership by the other spouse relinquishes certain ownership rights in his or her property. Presently, Kentucky case law is not determinative of the issue.

V TRACING AND TRANSMUTATION IN OTHER JURISDICTIONS

Kentucky courts may seek guidance by looking to treatment of the issue in other jurisdictions. Individual jurisdictions have treated transmutation and equitable distribution differently. The approaches of three jurisdictions—North Carolina, Missouri, and California—provide special insight.

A. North Carolina

Under North Carolina law, an owner of separate property is presumed to have made a gift of that property when he or she changes title to reflect ownership by the entirety.¹³⁸ Clearly, North Carolina retains the gift presumption in an equitable distribution system.¹³⁹ The Supreme Court of North Carolina has expressly ruled that when separate property is exchanged for property titled as tenancy by the entirety, a spouse is presumed to have had donative intent.¹⁴⁰ The court stated that a gift presumption was to be used in construing the equitable distribution statute.¹⁴¹ This presumption controls the initial determination of whether a gift has been made; however, this presumption may be rebutted by "clear, cogent, and convincing evidence."¹⁴²

North Carolina bases its rule on common-law principles,¹⁴³ and recognizes that the gift presumption is consistent with the "partnership ideal" which underlies its Equitable Distribution Act.¹⁴⁴ The North Carolina Supreme Court also noted that the presumption would most likely carry out the intention of the parties.¹⁴⁵ Accordingly, only clear and convincing evidence of a contrary intent may dispute the gift presumption.¹⁴⁶

¹³⁸ *McLean v. McLean*, 374 S.E.2d 376, 381 (N.C. 1988).

¹³⁹ *See id.* at 378.

¹⁴⁰ *Id.* at 381; *see also* *Lewis v. Lewis*, 389 S.E.2d 638, 640 (N.C. Ct. App. 1990) (presuming a gift to the marital estate where separate property is exchanged for property titled as tenancy by the entirety); *Hunt v. Hunt*, 355 S.E.2d 519, 522 (N.C. Ct. App. 1987) (same).

¹⁴¹ *See McLean*, 374 S.E.2d at 381.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 383.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 381.

North Carolina's gift presumption, however, seems to be narrow in application. The presumption only applies to real property, not jointly held personal property.¹⁴⁷ The courts of appeal have consistently refused to extend the exception beyond transactions involving real property¹⁴⁸ Although the North Carolina Supreme Court did not expressly rule out the possibility of applying the gift presumption to other types of property, in *McLean v. McLean*¹⁴⁹ it held that the presumption would only apply to property "titled by the entireties."¹⁵⁰ Tenancy by the entirety is an estate that rests "upon the doctrine of the unity of person"¹⁵¹ between husband and wife, in which "each is deemed to be seized of the whole, and not of . any undivided portion thereof."¹⁵² In North Carolina, estate by entirety applies *only* to real property.¹⁵³

If the gift presumption is not rebutted, the property is governed under the statute's interspousal gift provision, which dictates that the property retains its separate property character "only if such an intention is stated in the conveyance."¹⁵⁴ Thus, the gift presumption is consistent with the operation of the statute. The presumed change in character is also consistent with the statutory provision governing an exchange of separate property for property titled by the entireties.¹⁵⁵ According to the *McLean*

¹⁴⁷ *McLean v. McLean*, 363 S.E.2d 95, 99 (N.C. Ct. App. 1987), *aff'd*, 374 S.E.2d 376 (N.C. 1988); *Manes v. Harrison-Manes*, 338 S.E.2d 815, 816 (N.C. Ct. App. 1986); *see McLean*, 374 S.E.2d at 381; *McLeod v. McLeod*, 327 S.E.2d 910, 916-17 (N.C. Ct. App. 1985), *overruled on other grounds by Johnson v. Johnson*, 346 S.E.2d 430, 440 n.4 (N.C. 1986).

¹⁴⁸ *E.g.*, *McLean v. McLean*, 363 S.E.2d 95 (N.C. App. 1987), *aff'd*, 374 S.E.2d 376 (N.C. 1988); *Manes*, 338 S.E.2d at 816; *McLeod*, 327 S.E.2d at 916-17

¹⁴⁹ *McLean*, 374 S.E.2d at 376.

¹⁵⁰ *Id.* at 383; *see also Thompson v. Thompson*, 377 S.E.2d 767, 768 (N.C. Ct. App. 1989) (applying gift presumption to real property titled "as entireties property").

¹⁵¹ *Davis v. Bass*, 124 S.E. 566, 567 (N.C. 1924).

¹⁵² *Id.* at 568.

¹⁵³ *In re Foreclosure of Deed of Trust Recorded in Book 911, at Page 512, Catawba County Registry*, 279 S.E.2d 566, 567-68 (N.C. 1981); *see Turlington v. Lucas*, 119 S.E. 366, 367 (N.C. 1923); 41 AM. JUR. 2D, *Husband and Wife* § 37 (1995).

¹⁵⁴ *McLean*, 374 S.E.2d at 382 (quoting N.C. GEN. STAT. § 50-20(b)(2) (1987)).

¹⁵⁵ *See* N.C. GEN. STAT. § 50-20(b)(2) (1999) ("Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property *unless a contrary intention is expressly stated in the conveyance.*" (emphasis added)).

opinion, when a spouse exchanges separate property for property designated as tenancy by the entirety, the conveyance evidences an intent to relinquish his separate interest in the property.¹⁵⁶ Taking title in joint ownership, in other words, is not harmonious with the intent to preserve a separate property interest.¹⁵⁷ In sum, the gift presumption survives equitable distribution in North Carolina, although it is quite limited in scope.

The gift presumption trumps the ability to trace in North Carolina.¹⁵⁸ Under North Carolina's "source of funds" analysis, a spouse retains as separate property any amount contributed, along with the passive appreciation in value.¹⁵⁹ This is the equivalent of Kentucky's tracing doctrine. The North Carolina Court of Appeals has clearly stated, however, that the "source of the funds" analysis is not applicable until the gift presumption has been rebutted by "clear, cogent, and convincing evidence."¹⁶⁰ The ability of a spouse to retain a separate interest in property titled by the entirety is therefore submissive to the presumption of transmutation.

B. Missouri

In Missouri, the common law "gift presumption" survives as well.¹⁶¹ Missouri courts have held that, when a person adds the name of his or her spouse to titled property, that person creates the presumption that the property is a gift to the marital estate.¹⁶² A change in title presumptively transmutes separate property into marital property.¹⁶³ Stated differently,

¹⁵⁶ *McLean*, 374 S.E.2d at 382 (citations omitted); *see also* *Manes v. Harrison-Manes*, 338 S.E.2d 815, 816 (N.C. Ct. App. 1986) (noting that a conveyance of separate property in exchange for property titled by the entireties is indicative of an intent to surrender non-marital interests); *McLeod v. McLeod*, 327 S.E.2d 910, 916-17 (N.C. Ct. App. 1985) (same), *overruled on other grounds by* *Johnson v. Johnson*, 346 S.E.2d 430, 440 n.4 (N.C. 1986).

¹⁵⁷ *McLean*, 374 S.E.2d at 382 (citing *McLeod*, 327 S.E.2d at 918).

¹⁵⁸ *See, e.g., McLeod*, 327 S.E.2d at 916-17

¹⁵⁹ *McLean*, 363 S.E.3d at 98; *see* *McIver v. McIver*, 374 S.E.2d 144, 149-50 (N.C. App. 1988).

¹⁶⁰ *See McLeod*, 327 S.E.2d at 916-17

¹⁶¹ *See Kinsey-Geujen v. Geujen*, 984 S.W.2d 577, 579 (Mo. Ct. App. 1999); *Woolridge v. Woolridge* 915 S.W.2d 372, 376-77 (Mo. Ct. App. 1996); *Clark v. Clark*, 919 S.W.2d 253, 255 (Mo. Ct. App. 1996); *In re Marriage of Jennings*, 910 S.W.2d 760, 763 (Mo. Ct. App. 1995); *Spidle v. Spidle*, 853 S.W.2d 311, 314 (Mo. Ct. App. 1993); *Stephens v. Stephens*, 842 S.W.2d 909, 914 (Mo. Ct. App. 1992).

¹⁶² *Kinsey-Geujen*, 984 S.W.2d at 579.

¹⁶³ *Id.*

where separate property is exchanged for other property, which is titled to both husband and wife jointly, it is presumed that the property is changed to marital property by gift to the marital estate.¹⁶⁴ The presumption is rebuttable only with clear and convincing evidence.¹⁶⁵ The amount of evidence necessary to rebut the gift presumption is unclear; it appears, however, that a donor's own words and testimony (that he or she did not intend a gift) are insufficient.¹⁶⁶

The Missouri gift presumption apparently applies to all property, real or personal, that is titled jointly.¹⁶⁷ Even placing money into a joint bank account is an act sufficient to give rise to the presumption that the spouse intended to transmute the property into marital property.¹⁶⁸ This is distinguished from the North Carolina approach, which applies the gift presumption to real property only.¹⁶⁹

According to Missouri law, separate property retains its status when exchanged for other property.¹⁷⁰ If, however, a spouse changes title to the asset to reflect joint ownership, or exchanges the asset for property he titles jointly, he loses that separate interest unless he can show that he did not intend the gift.¹⁷¹

¹⁶⁴ *Tracy v. Tracy*, 791 S.W.2d 924, 926 (Mo. Ct. App. 1990); *Corbett v. Corbett*, 728 S.W.2d 550, 554 (Mo. Ct. App. 1987).

¹⁶⁵ *Corbett*, 728 S.W.2d at 554; see *Tracy*, 791 S.W.2d at 926.

¹⁶⁶ See *Smith v. Smith (In re Marriage of Smith)*, 892 S.W.2d 767 (Mo. Ct. App. 1995); *Tracy*, 791 S.W.2d at 928-29; cf. *Winter v. Winter* 712 S.W.2d 423, 428 (Mo. Ct. App. 1986) (holding that the gift presumption may be rebutted by self-interested testimony supported by documentation).

¹⁶⁷ See, e.g., *Kinsey-Geujen*, 984 S.W.2d at 579. The Missouri courts have not qualified their decisions, stating simply that "[t]he owner's adding a spouse's name to the property's title creates a presumption." *Id.* (emphasis added).

¹⁶⁸ *Ballay v. Ballay (In re Marriage of Ballay)*, 924 S.W.2d 572, 576 (Mo. Ct. App. 1996); see *Layton v. Layton* 724 S.W.2d 657 (Mo. Ct. App. 1986).

¹⁶⁹ Compare *Manes v. Harrison-Manes*, 338 S.E.2d 815, 816 (N.C. Ct. App. 1986), with *In re Marriage of Ballay*, 924 S.W.2d at 576.

¹⁷⁰ See, e.g., *Sprock v. Sprock*, 882 S.W.2d 183, 186 (Mo. Ct. App. 1994) (stating that property acquired in exchange for pre-marital property remains the separate property of the pre-marital owner.).

¹⁷¹ See, e.g., *Kinsey-Geujen*, 984 S.W.2d at 579; *Clark v. Clark*, 919 S.W.2d 253, 255 (Mo. Ct. App. 1996); *Woolridge v. Woolridge*, 915 S.W.2d 372, 376 (Mo. Ct. App. 1996); *Jennings v. Jennings (In re Marriage of Jennings)*, 910 S.W.2d 760, 763 (Mo. Ct. App. 1995), *Spidle v. Spidle*, 853 S.W.2d 311, 314 (Mo. Ct. App. 1993); *Stephens v. Stephens*, 842 S.W.2d 909, 914 (Mo. Ct. App. 1992) (citing *Tracy v. Tracy*, 791 S.W.2d 924, 926-27 (Mo. Ct. App. 1990)).

C. California

Under California law, a presumption of transmutation by a change in title is statutorily mandated.¹⁷² The relevant statute provides that for purposes of property division, property acquired during the marriage in joint ownership is presumed to be community property.¹⁷³ Community property, like marital property, belongs to the marriage entity.¹⁷⁴ The presumption applies to all property held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property.¹⁷⁵ The presumption is rebuttable only by “[a] clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property”¹⁷⁶ or “[p]roof that the parties have made a written agreement that the property is separate property.”¹⁷⁷ It is clear, therefore, that some type of writing is required to rebut the presumption.¹⁷⁸

The relevant Law Revision Commission Comments¹⁷⁹ clearly state, with regard to the statute, that the presumption also applies to property acquired before marriage where title is taken in joint form or as community property after the parties marry.¹⁸⁰ The courts have reached the same

¹⁷² See CAL. FAM. CODE § 2581 (West 1994).

¹⁷³ *Id.*, see also *Dorn v. Solomon*, 67 Cal. Rptr. 2d 311, 312 (Ct. App. 1997).

¹⁷⁴ See CAL. FAM. CODE § 751 (“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.”); see also *id.* § 2550 (mandating equal division of community property in the absence of special circumstances). Section 2550 reads in part:

Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage, in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally.

Id.

¹⁷⁵ See *id.* § 2581.

¹⁷⁶ *Id.* § 2581(a).

¹⁷⁷ *Id.* § 2581(b).

¹⁷⁸ See *id.* § 2581, *id.* § 2581 Law Revision Comm’n cmt.

¹⁷⁹ *Id.* § 2581 Law Revision Comm’n cmt.

¹⁸⁰ *Id.*

conclusion.¹⁸¹ Separate property is transmuted into community property when title is changed to reflect joint ownership.

Apparently, the gift presumption defeats a spouse's ability to trace a non-marital interest in an asset to its non-marital origin for purposes of characterizing that property.¹⁸² One California appellate court ruled that a husband's separate property funds became community property when deposited in a joint checking account, despite the fact that he could trace the funds to their non-marital origin.¹⁸³ For practical purposes, however, the effects of the presumption may largely be defeated by reimbursement.¹⁸⁴ Upon dissolution, a party will be reimbursed for his separate property contribution to a community asset to the extent he can trace the source of his contribution.¹⁸⁵ This right to reimbursement is lost where the donor of the property signs a waiver or a "writing that has the effect of a waiver."¹⁸⁶ Consequently, an asset, although considered community property, is subject to a spouse's right to reimbursement. Absent a waiver, the spouse can recover the value of his non-marital contribution.¹⁸⁷

Even though California is a community property state, the willingness to preserve transmutation is conceptually relevant to Kentucky's policy in construing its equitable distribution statute. According to one California court, the motive for requiring a writing to rebut the community property presumption is to promote equitable distribution of marital property in

¹⁸¹ Cf. *Heikes v. Heikes (In re Marriage of Heikes)*, 899 P.2d 1349, 1351-52 (Cal. 1995).

¹⁸² See, e.g., *Griffis v. Griffis (In re Marriage of Griffis)*, 231 Cal. Rptr. 510, 516 (Ct. App. 1986).

¹⁸³ *Id.* (finding there was no written agreement that the funds were to remain the separate property of the husband).

¹⁸⁴ See CAL. FAM. CODE § 2640 (West 1994).

¹⁸⁵ This is clear from section 2640(b), which reads:

In the division of the community property estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of division.

Id. § 2640(b).

¹⁸⁶ CAL. FAM. CODE § 2640(b).

¹⁸⁷ See *id.*, *Perkal v. Perkal (In re Marriage of Perkal)*, 250 Cal. Rptr. 296, 298 (Ct. App. 1988).

dissolution.¹⁸⁸ This appears to be consistent with the policy furthered by the Kentucky property distribution system. Still, California has allowed tracing to effectively defeat the presumption through the right to reimbursement.¹⁸⁹ By allowing for reimbursement, the courts have given priority to the welfare of the individual. The existence of the gift presumption, however, still provides limited protection to the marriage partnership.

VI. POLICY ARGUMENTS

There are important policy considerations to be made in choosing how to treat the common law "gift presumption." The courts should analyze the far-reaching consequences of the gift presumption before adopting or rejecting it. First, applying the gift presumption under equitable distribution would likely prove advantageous to non-working spouses upon dissolution. Although the traditional gender roles are no longer as common in modern marriages,¹⁹⁰ the law may have an interest in protecting those persons who forego a career to act as a homemaker. The gift presumption would present another obstacle for the breadwinner spouse who is claiming an asset as his own separate property, and would increase the likelihood that property would be subject to division at dissolution.

The gift presumption would also promote the "partnership" ideal embedded in equitable distribution.¹⁹¹ Application of the presumption would mean that where separate property becomes titled jointly, the asset is presumptively considered to be the property of the marriage union.¹⁹² This places less emphasis on each spouse's individual advancement and promotes the welfare of the union.

Alternatively, the gift presumption would mean that "family" lands would become more susceptible to division upon dissolution. There appears to be a fairly strong public interest in maintaining family ownership of ancestral lands passed down from generation to generation.¹⁹³ Where a

¹⁸⁸ *Buol v. Buol (In re Marriage of Buol)*, 705 P.2d 354, 361 (Cal. 1985).

¹⁸⁹ *Cf. Heikes v. Heikes (In re Marriage of Heikes)*, 899 P.2d 1349, 1352-58 (Cal. 1995) (holding that due process considerations barred the application of the reimbursement statute where husband conveyed title to two lots to himself and his wife in joint tenancy).

¹⁹⁰ See J. Thomas Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263, 275-278 (1983).

¹⁹¹ See Krauskopf, *supra* note 10, at 165-75.

¹⁹² See, e.g., *Kinsey-Geujen v. Geujen*, 984 S.W.2d 577, 579 (Mo. Ct. App. 1999).

¹⁹³ See, e.g., *Abrams v. Abrams*, 516 N.W.2d 348, 351 (S.D. 1994) (In discussing the award of the marital home, the court noted that "[the home] was not

spouse's name is added to the title of such family lands, the wife will presumptively gain a marital interest in the land. All marital property is subject to equitable division upon dissolution of the marriage.¹⁹⁴ The spousal owner would likely be required to present some evidence to rebut the presumption that he intended the gift.¹⁹⁵ Application of the gift presumption will therefore increase the likelihood that real property that has been passed through generations of family will be divided and sold, or even awarded to the non-familial spouse.¹⁹⁶

The gift presumption does little to preserve notions of individualism and personal independence. In order to preserve property that a person brings to the marriage, that person would have to make efforts to ensure that his spouse was never added to the title of the asset, or any property obtained in exchange for that asset. Maintaining sole record ownership may present other problems for a spouse as well. One must remember that there are legal and financial motives that may compel a joint title.¹⁹⁷ A spouse may, for instance, be unable to obtain a loan or mortgage without adding his spouse to the title.¹⁹⁸ Such restrictions serve as penalties on the spouse who intends to retain sole ownership. Of course, some states allow the presumption to be defeated with evidence of a contrary intent.¹⁹⁹ Still, this is arguably an unnecessary burden to preserving one's own property, imposed simply because the owner chooses to marry. One must question whether the law should impose a presumption of donative intent where clearly there is no reason to infer one.

Presuming donative intent on the part of any spouse who allows his or her property to be titled jointly may also encourage selfishness and distrust within the marriage. If a change in title is given effect, then disputes are more likely to arise when new assets are obtained. A spouse may view a mate who exchanges property for a new asset and takes sole record ownership as selfish and untrusting. If the gift presumption is not applied,

ancestral property for which there need be serious concern in regard to keeping it in the family.").

¹⁹⁴ See K.R.S. § 403.190 (Michie 1999).

¹⁹⁵ See, e.g., CAL. FAM. CODE § 2581 (West 1994); *Tracy v. Tracy*, 791 S.W.2d 924, 926 (Mo. Ct. App. 1990); *McLean v. McLean*, 374 S.E.2d 376, 381 (N.C. 1988).

¹⁹⁶ See, e.g., *Lawrence v. Lawrence*, 394 S.E.2d 267, 270 (N.C. Ct. App. 1990) ("[T]he findings that this property was 'ancestral,' are irrelevant to the issue of whether this property is marital property.").

¹⁹⁷ See OLDHAM, *supra* note 10, § 11.01[2].

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., *Mims v. Mims*, 286 S.E.2d 779, 787 (N.C. 1982).

the owner's interest in precluding his spouse's name on the title would be minimal—the origin of the property would control ownership without regard to what the title reflected.²⁰⁰

Application of the gift presumption would likely have a great impact on property distribution upon divorce. A change in record title would likely be an issue with regard to large, valuable assets such as real property and cars.²⁰¹ Characterizing the assets as marital property will likely greatly increase the value of the marital estate. The gift presumption would represent an effort to ensure that these valuable assets are characterized as marital property.

The propriety of giving effect to a change in title in a jurisdiction that otherwise ignores title designation must also be questioned. Kentucky's marital property statute expressly disregards title in determining the characterization of property.²⁰² To presume a change in character due to a title designation seems to run counter to the spirit of Kentucky's equitable distribution statute. The statute's disregard of title arguably indicates the legislature's intent to exclude title from any determination regarding the disposition of property in divorce. On the other hand, it is the act of changing the title—not the title designation itself—that becomes significant when applying the gift presumption.

To employ the gift presumption in all cases is to presume donative intent in a number of situations in which there clearly is none.²⁰³ Rather, the more reasonable alternative appears to involve discerning the intent of the purported donor, changing ownership rights in the property only where the parties so intend. The Court of Appeals of Kentucky has said that the purported donor's intent is the key consideration in determining whether a gift has been given.²⁰⁴ Courts could choose to merely view the change in title as any other purported gift—in other words, they could analyze the purported donor's intent.²⁰⁵ Arguably, the title-changing spouse should be

²⁰⁰ *E.g.*, K.R.S. § 403.190(3) (Michie 1999).

²⁰¹ This is the sort of property where ownership is most likely to be represented by record title. *E.g.*, K.R.S. § 382.100 (Banks-Baldwin 1999); *id.* § 186.020.

²⁰² K.R.S. § 403.190(3) (“All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership . . .” (emphasis added)).

²⁰³ OLDHAM, *supra* note 10, § 11.01[2].

²⁰⁴ *See* Clark v. Clark, 782 S.W.2d 56, 62-63 (Ky. Ct. App. 1990).

²⁰⁵ *Cf. id.* (addressing the characterization of an automobile given to wife by husband, a situation in which the court could have elected to consider the effect of the name of the record title holder in its donative intent analysis).

required to intend relinquishment of any interest in the property before it is transmuted by a change in title.

CONCLUSION

It appears that in Kentucky the concept of transmutation is not dead, at least in instances of commingling, interspousal gifts, and agreement.²⁰⁶ Rather, it seems transmutation survives equitable distribution and tracing principles stemming from Kentucky's property disposition statute.²⁰⁷ Whether transmutation by change in title and the common law "gift presumption" survive in Kentucky are unanswered questions. When addressing the issue, courts should consider the relevant policy considerations and determine how public interests will best be served. There is certainly support for retaining the common law gift presumption in conjunction with equitable distribution principles, as found in other jurisdictions.²⁰⁸ Whether Kentucky chooses to apply the gift presumption in change in title circumstances is an issue that requires immediate judicial attention.

²⁰⁶ See, e.g., *Gentry v. Gentry*, 798 S.W.2d 928, 935 (Ky. 1990); *Bischoff v. Bischoff*, 987 S.W.2d 798, 800 (Ky. Ct. App. 1998); *O'Neill v. O'Neill*, 600 S.W.2d 493, 495 (Ky. Ct. App. 1980).

²⁰⁷ K.R.S. § 403.190(3) (providing that a spouse may preserve separate property by "showing the property was acquired by a method listed in subsection (2)" or through tracing).

²⁰⁸ See *supra* text accompanying notes 138-89.

