# Tenancy by the Entirety in Equitable Distribution: Did the statutory amendment change anything?

S.L. 2013-103 amended the marital property presumption found in G.S. 50-20(b)(1) to specifically include entirety property. As of October 1, 2013, the statute provides:

It is presumed that all property acquired after the date of marriage and before the date of separation is marital except property which is separate property under subdivision (2) of this subsection. *It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either* presumption may be rebutted by the greater weight of the evidence.

## Rebutting the Marital *Property* Presumption

While G.S. 50-20(b)(1) states that the marital property presumption is rebutted by showing the property falls within one of the categories of separate property listed in G.S 50-20(b)(2), the statute does not state how the presumption regarding entirety property is rebutted. However, case law indicates that the presumption that property is marital generally is rebutted by a showing that the property is separate. *See* Brackney v. Brackney, 199 N.C. App. 375 (2009). Therefore, presumably, the new presumption in G.S. 50-20(b)(1) can be rebutted by showing, by the greater weight of the evidence, that the property was acquired in whole or in part with separate property.

However, case law provides that when property is titled as tenants by the entirety, there is a presumption that any separate property used to acquire the property was gifted to the marriage and, according to G.S. 50-20(b)(2), gifts between spouses are marital unless a contrary intention is expressly stated in the conveyance. Romulus v. Romulus, 215 N.C. App. 495 (2011). The property is presumed marital even if one spouse subsequently dissolves the tenancy by the entirety. *See Beroth v. Beroth,* 87 N.C. App. 93 (1987); Davis v. Davis, 360 N.C. 518 (2006). The rationale for the presumption is that the titling of the property as tenants by the entirety supplies the donative intent necessary to find a gift to the marital estate. *McLeod v. McLeod,* 74 N.C. App. 144 (1985). According to the Supreme Court, it is the nature of the conveyance itself which gives rise to the presumption of donative intent. *McLean v. McLean*, 323 N.C. 543, n. 1 (1988).

## Rebutting the Marital *Gift* Presumption

Case law provides that the presumption of a gift to the marriage may be rebutted by evidence that the separate property was not gifted to the marriage, *McLean v. McLean*, 323 N.C. 543 (1988)(presence of donative intent at the time of transfer determines whether gift was made; motivation for making gift is not determinative); **or** by showing that while there was a gift, the intention that the property remain separate was expressly stated in the conveyance creating the

tenancy by the entirety. Romulus v. Romulus, 215 N.C. App. 495 (2011).

Case law consistently has held that the marital gift presumption can be rebutted only by clear, cogent and convincing evidence, but it appears that the 2013 amendment to G.S. 50-20(b)(1) is intended to change that burden of proof to greater weight of the evidence. There is some question about this however, given the fact that the statutory amendment references only the marital *property* presumption and does not reference the marital *gift* presumption. In *McLean,* the Supreme Court noted that the two presumptions are "distinct concepts."

Whether a party succeeds in rebutting the presumption is a matter left to the trial court's discretion for it is the trial court that must find the evidence convincing; Romulus v. Romulus, 215 N.C. App. 495 (2011), but the trial court's finding that a party successfully rebutted the presumption must be supported by evidence. Walter v. Walter, 149 N.C. App. 723 (2002); Stone v. Stone, 181 N.C. App. 688 (2007). There is no North Carolina appellate opinion affirming a trial court determination that the marital gift presumption was successfully rebutted.

There is no rule that the marital gift presumption cannot be rebutted by testimony of the donor spouse alone. Romulus v. Romulus, 215 N.C. App. 495 (2011). However, appellate courts repeatedly have upheld trial court determinations that testimony offered by the grantor spouse alone that no gift was intended was not sufficient to rebut the presumption of a gift in individual cases. Warren v. Warren, 175 N.C. App. 509 (2006). The court of appeals reversed a trial court determination that the presumption had been rebutted where evidence used by trial court to support the separate classification of the property did not relate to husband's donative intent. *See Lawrence v. Lawrence*, 100 N.C. App. 1 (1990)(findings that the property was the "ancestral" property of the donor spouse, the donee spouse did not know the location of the property, and the donee spouse did not testify that the donor spouse intended to make a gift were not sufficient). In *McLean v. McLean*, 323 N.C. 543, fn. 3 (1988), the court noted that while testimony from donor that transfer was made to avoid federal tax consequences established why gift was made, it did not refute that gift was made.

**So where are we now?**

The 2013 amendment makes it clear that all entirety property owned on the date of separation is presumed to be marital. That presumption can be rebutted by the greater weight of the evidence that the property was acquired in exchange for separate property. In addition however, the party seeking to have the property classified as separate property also has the burden of proving that the separate property was not gifted to the marriage or that, while the property was gifted to the marriage, an express statement was made at the time of the conveyance that the separate property would remain separate. All of this was true before the 2013 amendment. While the amendment probably lowered the burden of proof, it seems doubtful the presumption will be rebutted with any greater frequency. While parties have various motivations for making the gift, the transfers generally are in fact gifts.