Not Everybody Loves Raymond: How the Case of Raymond v. Raymond Made a Shambles of Interspousal Gift Presumptions and the Parol Evidence Rule in Matters of Texas Community Property

Pamela E. George  
South Texas College of Law Houston
ARTICLE

NOT EVERYBODY LOVES RAYMOND:¹
HOW THE CASE OF RAYMOND v. RAYMOND²
MADE A SHAMBLES OF INTERSPOUSAL
GIFT PRESUMPTIONS AND THE
PAROL EVIDENCE RULE IN MATTERS
OF TEXAS COMMUNITY PROPERTY

PAMELA E. GEORGE*¹

¹ With apologies to Everybody Loves Raymond, a situation comedy, starring Ray Romano, that ran on American television (CBS) from 1996–2005. Everybody Loves Raymond, IMDb, https://www.imdb.com/title/tt0115167/ [https://perma.cc/C78R-SRLN]. As evidence of the “love” for Raymond, the show has been syndicated and is shown in the United States and several foreign countries and has even spawned a Russian spinoff. Nick Holdsworth & Vladimir Kozlov, ‘Everybody Loves Raymond’ Remake Becomes Longest-Running Russian Version of a U.S. Show, HOLLYWOOD REP. (Sept. 2, 2016, 3:54 AM), https://www.hollywoodreporter.com/news/everybody-loves-raymond-russian-adaptation-925862 [https://perma.cc/P6EX-TPTN]. The television show has absolutely nothing to do with the subject of this article.

² Raymond v. Raymond, 190 S.W.3d 77 (Tex. App. —Houston [1st Dist.] 2005, no pet.). This case has absolutely everything to do with the subject of this article, in that the Raymond opinion gives rise to this article.

* Pamela E. George, Professor of Law, South Texas College of Law Houston, has taught Texas Family Law and Texas Marital Property Rights for more than thirty-five years. Professor George is Board Certified in Family Law and also Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. A case that she was recently involved in, Stearns v. Martens, 476 S.W.3d 541 (Tex. App.—Houston [14th Dist.] 2015, no pet.), gave rise to her interest in the Raymond case. Professor George, lead appellate counsel for James Stearns, was successful in the Stearns case in escaping application of Raymond. The Fourteenth Court of Appeals sitting in Houston specifically declined to follow Raymond in Stearns v. Martens, choosing to “agree with the body of cases in which courts of appeals hold that, if the instrument contains no separate-property recitals, then parol evidence is admissible . . . .” Stearns, 476 S.W.3d at 548 (first citing Reaves v. Reaves, No. 11–11–00026–CV, 2012 WL 3799668, at *6–7 (Tex. App.—Eastland Aug. 31, 2012, no pet.) (mem. op.); Bahr v. Kohr, 809
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980 S.W.2d 723, 726–27 (Tex. App.—San Antonio 1998, no pet.); then citing Magness v. Magness,
241 S.W.3d 910, 912–13 (Tex. App.—Dallas 2007, pet. denied); Raymond v. Raymond, 190 S.W.3d
77, 80–81 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). It was from this practical experience that
Professor George realized the havoc that could be wreaked should the analysis in Raymond be applied
with regularity by Texas courts. Special thanks is offered to Sarah Presas, John Flud, and James Harris,
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I. INTRODUCTION & SCOPE

In 2005, a unanimous panel of the First Court of Appeals sitting in Houston issued the opinion in Raymond v. Raymond, an opinion that denied a divorcing spouse the right to establish separate property by use of parol evidence.3 Surprisingly, Raymond has more often been noticed for its general language regarding standards of review4 and its holding regarding affidavits accompanying new evidence motions for new trial,5 rather than its departure from well-established and long-existing precedent of marital property characterization regarding interspousal gift presumptions, significant recitals, and the parol evidence rule.6

3. Raymond, 190 S.W.3d at 81.


5. The wife in Raymond attempted to introduce evidence at the hearing on her “new evidence” motion for new trial. Raymond, 190 S.W.3d at 82. The trial court barred her from introducing her new evidence because she had not verified her motion for new trial. Id. The First Court of Appeals held, “When a party seeks a new trial based on newly discovered evidence, the motion for new trial must verify that the evidence is true and correct.” Id. Accordingly, the trial court did not abuse its discretion in denying introduction of the testimony offered as new evidence, nor did it err in summarily overruling the portions of wife’s motion for new trial that were based on new evidence. Id.

6. See Messer v. Johnson, 422 S.W.2d 908, 910–12 (Tex. 1968) (declining to overrule a line of cases preventing extrinsic evidence from being admitted to prove property being held in trust instead of being separate property); Lindsay v. Clayman, 254 S.W.2d 777, 780 (Tex. 1952) (“Since the deed states the nature of the estate conferred upon the wife and the consideration being contractual, parol evidence is not admissible to contradict or vary the deed in the absence of allegations of fraud, accident or mistake.”) (citing Goldberg v. Zellner, 235 S.W. 870, 872 (Tex. [Comm’n Op.] 1921); Russell v.
While the Raymond case is, to this author’s mind, a dangerous anomaly, Houston’s First Court of Appeals did not reach their conclusion without precedent and careful analysis, distinguishing (or, more precisely, attempting to distinguish) the Raymond facts from contrary, well-established holdings. In a nutshell, the Raymond case concerns husband’s transfer to wife of an undivided one-half interest in his separate property, husband having owned the property prior to marriage. The Raymond trial court found that the transferred property remained husband’s separate property. The appellate court reversed, deciding the property should be characterized as wife’s separate property as a matter of law and determining that parol evidence could not be introduced to establish the character of the property as husband’s separate property. The basis for the appellate court’s decision is neither clearly enunciated, nor easily understood.

On the one hand, it may be the mode of transfer (i.e., between spouses) upon which the Raymond court depends to explain its approach, treating the gift presumption that arises, if any, as rebuttable by parol evidence only if there is accident, fraud, or mistake. This will be referred to as the interspousal transfer theory, as opposed to a transfer from or involving a third party. The Raymond court does espouse the theory that rebuttal of

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Russell, 120 S.W.2d 793, 794 (Tex. [Comm’n Op.] 1934); Kidd v. Young, 190 S.W.2d 65, 66 (Tex. 1945); Nye v. Bradford, 193 S.W.2d 165, 167 (Tex. 1946); Markum v. Markum, 210 S.W. 835, 840–41 (Tex. App.—Amarillo 1919, writ dism’d)); McKivett v. McKivett 70 S.W.2d 694, 696 (Tex. 1934) (stating parol evidence could not be permitted to contradict the conveyance of separate property); Foster v. Christensen, 67 S.W.2d 246, 253 (Tex. Comm’n App. 1934, holding approved) (recognizing the allowance of parol evidence to show payment of property with separate funds); see also In re Marriage of Moncey, 404 S.W.3d 701, 715 (Tex. App.—Texarkana 2013, no pet.) (noting the trial court allowed a party to enter extrinsic evidence about ownership of separate property).

7. See TEX. CONST. art. XVI, § 15 (providing, in pertinent part, “All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse”); see also TEX. FAM. CODE ANN. § 3.001 (establishing separate property of a spouse “consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage”).

8. Raymond, 190 S.W.3d at 79.

9. Id. at 81.

10. Id.

11. Meaning the separate property transfer between spouses, or an interspousal conveyance, as distinguished from a conveyance to a spouse by a third party. Id.

12. The Raymond court is unclear whether the opinion hinges upon a gift presumption. See generally id. (distinguishing the Raymond case from previous decisions where there was a rebuttable presumption of a gift between spouses).

13. Id.
the interspousal gift presumption by parol evidence is limited to those situations in which husband purchases property from a third party and at time of purchase, and without a significant recital, has the property conveyed wholly or partially to wife.\textsuperscript{14}

Or, on the other hand the \textit{Raymond} court may have considered the conveyancing language found in the \textit{Raymond} deed\textsuperscript{15} to somehow be an express or significant recital, utilizing the significant recital theory.\textsuperscript{16} This being said, the \textit{Raymond} court appears to have paid scant attention to the fact that there was an absence of language\textsuperscript{17} actually establishing the character of the property conveyed within the conveyancing documents. Such an absence of language would, under more prevalent, persuasive, and authoritative precedent, open the door for rebuttal of the gift by parol evidence.\textsuperscript{18} The problem is, neither the interspousal transfer theory, nor the significant recital theory as espoused by the \textit{Raymond} court are anchored in classically accepted legal analysis of interspousal gift transactions.

Although not an entirely renegade opinion, the \textit{Raymond} analysis is so precariously founded as to be contrary to well-set Texas Supreme Court precedent.\textsuperscript{19} Indeed, the First Court’s sister court, Houston’s Fourteenth

\begin{itemize}
\item \textsuperscript{14} See id. (recognizing a line of cases where “a rebuttable presumption [was] raised that the spouse intended to give the other spouse an undivided one-half interest in the property as a gift” (citing Johnson v. Johnson, 584 S.W.2d 307, 308–09 (Tex. App.—Texarkana 1979, no writ))).
\item \textsuperscript{15} “Frank executed a deed to Brenda conveying an undivided one-half interest in the Lake Jackson property.” Id. at 79.
\item \textsuperscript{16} See id. at 81 (“When there has been a conveyance of property by one spouse to another . . . the presumption exists that it was the intention of the grantor spouse to make the property the separate property of the grantee spouse and in the absence of fraud, accident, or mistake, such conveyance cannot be disturbed.” (citing Brothers v. Brothers, No. 14–96–00364–CV, 1997 WL 7012, at *1 (Tex. App.—Houston [14th Dist.] Jan. 9, 1997, no writ) (not designated for publication))).
\item \textsuperscript{17} Such language establishing the character of property is referred to in common parlance as a significant recital or an express recital, which clearly establishes the character as separate, not merely an undivided one-half interest that could arguably be community or separate. See Bahr v. Kohr, 980 S.W.2d 723, 727 (Tex. App.—San Antonio 1998, no pet.) (emphasizing the language used in express deeds that expressly convey property as separate property).
\item \textsuperscript{18} See Peterson v. Peterson, 595 S.W.2d 889, 892 (Tex. App.—Austin 1980, no writ) (recognizing a rebuttable presumption of a gift when a spouse purchases property with separate funds and adds the other spouse on the deed); \textit{Johnson}, 584 S.W.2d at 309 (affirming the trial court’s ruling because “[t]he evidence was sufficient to overcome the presumption of a gift”).
\item \textsuperscript{19} See Messer v. Johnson, 422 S.W.2d 908, 910–12 (Tex. 1968) (following precedent that extrinsic evidence not be admissible when a deed expressly states the property is conveyed as separate property); see also Reaves v. Reaves, No. 11–11–00026–CV, 2012 WL 3799668, at *6–7 (Tex. App.—Eastland Aug. 31, 2012, no pet.) (per curiam) (mem. op.) (discussing, at length, what constitutes significant recital).
\end{itemize}
Court of Appeals, recently declined to follow *Raymond* in *Stearns v. Martens*.

By way of this author’s thinking, the *Raymond* opinion, though well written, is erroneous, being an extension of a scant, few, earlier opinions that also erred in failing to recognize the subtle, but clear, nuances of interspousal gifts that are accompanied by writings, be they deeds or other documents. The *Raymond* case and its ilk have led bench and bar alike to improperly argue and even deny spouses the right to utilize parol evidence to establish the characterization of property conveyed between spouses during marriage.

This article will begin with an in depth analysis of the *Raymond* opinion in an attempt to diagram and dissect the appellate court’s reasoning in reversing the trial court and in disallowing (i.e., ignoring) husband’s evidence explaining why he placed his wife’s name on the deed to property that he owned before marriage—clearly his separate property. This first step will include an analysis of the cases which provided the path for the *Raymond* divergence and just how that divergence came to exist and proliferate.

The analysis of *Raymond* and its precursors will be followed by an explanation of purchase money resulting trusts and the parol evidence rule. This is important because the principles of purchase money resulting trusts, together with the parol evidence rule, provide the foundation for the well-established law governing interspousal gifts and the presumptions arising therefrom; principles skirted, if not ignored by the *Raymond* strain of cases. Once these basic trust and evidentiary principles are understood,
it becomes clear how the long recognized interspousal gift presumptions arose. These same principles underlie the established boundaries for admitting evidence to rebut the interspousal gift presumption when those transactions are accompanied by documents of conveyance.

Accordingly, the third portion of this article will explore those instances when a gift presumption can overcome the ever prevalent community property presumption;\(^{27}\) i.e., when property is acquired by one spouse using their separate property and that property is then placed—in whole or in part—in the name of the non-paying spouse.\(^{28}\) In such situations, the taking of title in the name of or title sharing with the non-paying spouse, without a significant recital, creates a presumption of gift, rebuttable by parol evidence, a rule contrary to Raymond.\(^{29}\) The general rules regarding the use of parol evidence in establishing the character of those properties will be set forth. The rebuttable nature of such conveyances will be explained and evidence that has been utilized in attempts to rebut this presumption will be explored, be such utilization successful or not.

Following exploration of the gift presumption and the use of parol evidence, the fourth part of this article will identify and explore specific words of conveyance and their effect upon the use of parol evidence. If certain words are utilized in a conveyance, the words could be deemed a significant or express recital. A significant recital in a deed is one that clearly establishes “the intent to make the property conveyed the separate property of the wife . . . .”\(^{30}\) Proper significant recitals limit the use of parol evidence.\(^{31}\) The Texas Supreme Court has clearly and vehemently established the limited circumstances when parol evidence may be introduced to vary a deed that contains a significant recital,\(^{32}\) precedent wrongly expanded and misapplied in Raymond.

Finally, the article will culminate in a survey of the deleterious impact that the Raymond case has had and why, from this author’s standpoint, it is critical

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27. See TEX. FAM. CODE ANN. § 3.003(a) (“Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.”).
28. See Messer v. Johnson, 422 S.W.2d 908, 910 (Tex. 1968) (describing a husband deeding land to wife based on fear of his son claiming the property through inheritance).
30. Kahn v. Kahn, 58 S.W. 825, 826 (Tex. 1900). Of course, this would certainly apply to husband as well.
31. Messer, 422 S.W.2d at 910.
32. Id. at 911.
to understand the failure of the Raymond court’s analysis and, if not specifically overruled, why Raymond must be avoided.

II. Raymond v. Raymond, the Opinion and Its Predecessors

In June of 1987, Brenda Raymond and Frank Raymond Jr. married, becoming husband and wife.33 Prior to marriage, husband owned two pieces of property, one being a lot in Lake Jackson,34 clearly his separate property, having been owned by him prior to marriage.35 It was on this separate property lot of husband’s where the couple built a home during their marriage.36

Per wife’s request,37 “Frank executed a deed to Brenda conveying an undivided one-half interest in the Lake Jackson property.”38 Upon divorce, the trial court determined that the Lake Jackson property, encompassing the home, was husband’s separate property and awarded the Lake Jackson property to him, confirming his separate ownership.39 Wife appealed this decision and other aspects of the divorce decree, as well.40

A. Theory One—The Raymond Court Focuses on the Interspousal Transfer in Rejecting the Parties’ Position That Parol Evidence Can Be Used to Rebut the Gift Presumption

That the Raymond transfer was interspousal underlies the appellate court’s first theory in its attempt to distinguish Raymond from those cases that allowed parol evidence of intent as a matter of course.41 As noted in the Introduction, supra Part I, the appellate court in Raymond puts great stock in

33. Raymond, 190 S.W.3d at 79.
34. Id.
35. See TEX. CONST. art. XVI, § 15 (establishing property owned prior to marriage as separate property); see also TEX. FAM. CODE ANN. § 3.001(1) (“[S]eparate property consists of: (1) the property owned or claimed by the spouse before marriage . . . .”).
36. Raymond, 190 S.W.3d at 79.
37. The First Court describes this as “Brenda’s urging” in its opinion. Id.
38. Id.
39. Id.
40. See id. (appealing the trial court “overruling certain points of error in the motion for a new trial because the motion was not verified” and the trial court “not requiring reimbursement to the community estate for funds spent on [husband’s] separate real property”).
41. Id. at 80–81.
the mode of transfer, being interspousal rather than from or involving a
third party.42

Addressing the propriety of the trial court’s characterization of the Lake
Jackson property as husband’s separate property, the appellate court’s analysis
begins with the statement: “Both parties cite to cases holding that evidence
of a gift of separate property from one spouse to another can be rebutted by
evidence that a gift was not intended.”43 While the court recognizes that
appellant and appellee, both parties/sides of the Raymond case, are treating
the conveyance in question as a presumed gift that can be rebutted by
evidence of intent, the court, nonetheless deems the cases the parties’ cite in
support of this premise as inapplicable. Specifically, the Raymond court
attempts to distinguish the parties’ cites of In re Marriage of Morris44 and
Johnson v. Johnson45 by stating, those cases “deal with situations where one
spouse purchases real estate with his or her separate property, but both
spouses’ names appear as grantees on the deed from that sale.”46 The Raymond
court concedes that in such instance, “a rebuttable presumption is raised that
the spouse intended to give the other spouse an undivided one-half interest in
the property as a gift.”47 Yet the court ultimately determines that the
Raymond conveyance whether a presumed gift or not is irrefutably wife’s
separate property.48 While conceding that a rebuttable gift presumption

42. See id. at 81 (“After Frank and Brenda married, Frank executed a separate deed to Brenda
conveying an undivided one-half interest in the Lake Jackson property. Frank was the only grantor,
and Brenda was the only grantee.”).

43. Id. at 80 (citing In re Marriage of Morris, 12 S.W.3d 877, 883 (Tex. App.—Texarkana 2000,
no pet.); Johnson v. Johnson, 584 S.W.2d 307, 308–09 (Tex. App.—Texarkana 1979, no writ)). The
court’s acknowledgment that the parties ascribe to the notion that a gift presumption can be rebutted
is followed in the opinion by a footnote, numbered 1, which explains: “Both parties assume that the
deed, reciting a consideration of $10.00 ‘and other valuable consideration,’ evidenced proof of a gift.
We recognize that there is conflicting case law on whether this is evidence of a gift or of valuable
consideration.” Id. at n.1 (citing Saldana v. Saldana, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi
1990, no writ); Hall v. Barrett, 126 S.W.2d 1045, 1047 (Tex. App.—Fort Worth 1939, no writ)).
Thereafter, the court, within the footnote, cites two cases establishing that conflict—gift versus sale.
Id. The court goes on to explain, “Our holding on appellant’s points of error [in Raymond], however,
is the same regardless of whether the conveyance was a sale or gift. Therefore, we will assume, without
holding, that the conveyance is a gift.” Id. As discussed later, this statement appears to support the
rejected possibility that the Raymond conveyance document was ambiguous and begs the question,
“Why would the holding be the same?”

44. In re Marriage of Morris, 12 S.W.3d 877 (Tex. App.—Texarkana 2000, no pet.).


46. Raymond, 190 S.W.3d at 81 (citing Johnson, 584 S.W.2d at 308).

47. Id. (emphasis added) (citing Johnson, 584 S.W.2d at 308–09).

48. Id.
is raised in *Morris* and *Johnson*, the court does not provide analysis distinguishing those cases, but merely states, “Those are not the facts of the present case.”49 Try as the *Raymond* court does, the cases upon which the parties relied for the rebuttable presumption premise are neither easily nor readily distinguishable from the *Raymond* facts.50

Close consideration of the parties’ cited cases of *Morris* and *Johnson* establishes that the *Raymond* court’s conclusory reasoning is misguided. *Morris* and *Johnson* involve a spouse’s separate property purchase, during marriage, of property from a third party and a contemporaneous placement of the non-purchasing spouse’s name on the deed evidencing the purchase from the third party.51 In *Morris*, real property was purchased during marriage with husband’s separate funds, and wife conceded that husband paid for the property with separate funds while having the names of both husband and wife placed on the deed.52 The *Morris* court recognized that such transaction gives rise to the presumption that husband made a gift of half of the property to the wife.53 However, the *Morris* court also recognized that “[i]n order to rebut this presumption, evidence of the absence of an intent to make a gift must be shown.”54 While the husband in *Morris* failed in his appeal because he did not present proof of his intent, i.e., that he did not intend to make a gift, the *Morris* court nevertheless recognizes husband’s right to present parol evidence regarding his intent as to gift.

*Johnson*55 also cannot be so readily distinguished from *Raymond*.56 Prior to marriage, the *Johnson* husband, without joining future wife, signed a

49. Id.
50. Compare *In re Marriage of Morris*, 12 S.W.3d at 881 (noting the property in question “was purchased . . . during the marriage, but was paid for entirely with [husband’s] separate funds” and the deed was placed in both parties’ names), and *Johnson*, 584 S.W.2d at 308 (detailing that prior to marriage, husband signed a contract to purchase a house in which he alone was named as the purchaser, and shortly after marriage, “a deed was executed naming both husband and wife as grantees . . . [notwithstanding that] husband paid the entire purchase price out of his separate funds”), with *Raymond*, 190 S.W.3d at 79 (summarizing that prior to marriage, husband bought the property in question, and later during marriage, husband “executed a deed to [wife] conveying an undivided one-half interest in the property”).
51. *See In re Marriage of Morris*, 12 S.W.3d at 881 (evidencing the property “was purchased . . . during the marriage, but was paid for entirely with [husband’s] separate funds”).
52. Id.
53. Id.
54. Id. (citing Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975)).
55. *See Johnson*, 584 S.W.2d at 308 (demonstrating a deed executed naming both husband and wife as grantees, even though husband paid the entire purchase price out of his separate funds).
56. *See Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App—Houston [1st Dist.] 2005, no pet.) (showing husband owned property before marriage and was the only grantee identified on the deed).
contract to purchase a home.\textsuperscript{57} The sale on the home closed after marriage, husband paid the entirety of the purchase price, and the deed was placed in the names of both husband and wife.\textsuperscript{58} Without questioning the propriety of considering the parol evidence that was introduced, it was determined that, based on parol evidence, the Johnson husband had no intent to make a gift to the wife.\textsuperscript{59}

The Raymond court attempts to distinguish that matter because husband in Raymond did not make the purchase during marriage, but rather added the wife’s name to a deed on property he already owned.\textsuperscript{60} Specifically, husband in Raymond, conveyed “an undivided one-half interest in the Lake Jackson property. Frank was the only grantor, and Brenda was the only grantee.”\textsuperscript{61} What appears to be the distinguishing factor for the Raymond court is that husband and wife were the only parties involved, an interspousal transfer, rather than a third party transfer to both husband and wife. Perhaps the Raymond court utilized this interspousal transfer to invoke what they consider to be a different presumption, specifically:

When there has been a conveyance of property by one spouse to another and a delivery of the deed, the presumption exists that it was the intention of the grantor spouse to make the property the separate property of the grantee spouse and in the absence of fraud, accident, or mistake, such conveyance cannot be disturbed.\textsuperscript{62}

The foregoing does not reference a gift presumption, but rather simply pronounces that there is a presumption of intent on behalf of the grantor to make the property the separate property of the grantee spouse. The Raymond court’s approach seems to be based on Brothers v. Brothers.\textsuperscript{63} In Brothers, there was an interspousal conveyance of an undivided fifty percent interest in a parcel of real property, and the Brothers court stated:

\begin{itemize}
\item \textsuperscript{57} Johnson, 584 S.W.2d at 308.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 309.
\item \textsuperscript{60} Raymond, 190 S.W.3d at 79, 81 (“Here, it is undisputed that [husband] owned the property before the marriage . . . .”).
\item \textsuperscript{61} Id. at 81.
\item \textsuperscript{62} Id. (emphasis added) (citing Brothers v. Brothers, No. 14–96–00364–CV, 1997 WL 7012, at *1 (Tex. App.—Houston [14th Dist.] Jan. 9, 1997, no writ) (not designated for publication)).
\end{itemize}
It has long been the settled law in Texas that a husband can execute a deed directly to the wife and such conveyance, regardless of whether the property conveyed is the husband’s separate property or community property causes the property to become the wife’s separate property. This is so even though the deed may not recite that the conveyance is for the wife’s sole and separate use. When there has been a conveyance of property from the husband to the wife and a delivery of the deed, the presumption exists that it was his intention to make the property the separate property of the wife either by gift or by purchase, and in the absence of fraud, accident, or mistake, such conveyance cannot be disturbed.64

The Brothers court does not require an express/significant recital for application of the rule regarding the necessity of fraud, accident, or mistake to vary a writing by parol evidence.65 Rather, Brothers and Raymond seem to imply that the interspousal nature of the conveyance itself is enough to establish an irrebuttable presumption that the conveyed property is now the donee spouse’s separate property absent a showing of fraud, accident, or mistake which would allow controverting parol evidence.66 Under this theory borrowed from Brothers, the Raymond court would not allow parol evidence unless threshold evidence of fraud, accident, or mistake was presented.67

There are problems with this somewhat simplistic interspousal conveyance approach. First, the Brothers opinion is an unpublished opinion from the Fourteenth Court of Appeals which the Fourteenth Court itself refused to

64. Id. at *1–2 (emphasis added) (citations omitted) (first citing Tittle v. Tittle, 220 S.W.2d 637, 642 (Tex. 1949); then citing Belkin v. Ray, 176 S.W.2d 162, 165 (Tex. 1943); Taylor v. Hollingsworth, 176 S.W.2d 733, 736 (Tex. 1943); McAdams v. Ogletree, 348 S.W.2d 75, 84 (Tex. App.—Beaumont 1961, writ ref’d n.r.e.); Fitchett v. Bustamente, 329 S.W.2d 920, 922 (Tex. App.—El Paso 1959, writ ref’d n.r.e.); Forman v. Glasgow, 219 S.W.2d 845, 847 (Tex. App.—Waco 1949, no writ); Hartman v. Hartman, 217 S.W.2d 872, 874 (Tex. App.—Austin 1949, writ ref’d n.r.e.); Molloy v. Brower, 171 S.W. 1079, 1079 (Tex. App.—Fort Worth 1914, writ ref’d); Bird v. Lester, 166 S.W. 112, 112 (Tex. App.—Amarillo 1914, writ ref’d); Kin Kaid v. Lee, 119 S.W. 342, 343 (Tex. App.—Houston 1909, writ ref’d); and then citing Dyer v. Dyer, 616 S.W.2d 663, 665 (Tex. App.—Corpus Christi 1981, writ dism’d)).
65. Id. at *2.
66. See Raymond, 190 S.W.3d at 81 (focusing on the parties’ marital relationship in the conveyance, rather than the recitals of deed, to evoke the presumption); Brothers, 1997 WL 7012, at *2 (stating that the direct nature in which the conveyance occurs evokes the presumption).
67. See Raymond, 190 S.W.3d at 81 (“A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.” (citing Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431–32 (Tex. 1970); Massey v. Massey 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied))).
follow in *Stearns v. Marten* stating: “The parties have not cited and research has not revealed any precedent from the Supreme Court of Texas determining this issue. Lisa has cited a 1997 unpublished case from this court, *Brothers v. Brothers* . . . But, that case has no precedential value.”

Moreover, the *Brothers* opinion does not mention anything about the parol evidence rule and does not support the *Raymond* court’s use of the parol evidence rule to prohibit admission of evidence related to intent. While on the one hand seeming to eschew the need for an express recital because *Raymond* presents an interspousal transfer, the *Raymond* court nonetheless recognizes that, “A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the *express recitals* in the deed without first tendering evidence of fraud, accident, or mistake.” This leads to what might be referred to as the *Raymond* court’s second possible theory for denying parol evidence, that the *Raymond* conveyance language was significant.

B. *Theory Two—The Raymond Language of Conveyance Is Significant, Thereby Barring Consideration of Parol Evidence Absent Accident, Fraud, or Mistake*

While the *Raymond* court accepts that fraud, accident, or mistake is needed to contradict *express recitals* in a conveyancing document such as a deed, the court nonetheless fails to grasp the meaning of the very term used in the opinion, *express recitals*. Or, perhaps the *Raymond* court, without specifically saying it, deemed husband’s conveyance by deed, of “an undivided one-half interest in the Lake Jackson property. Frank was the only grantor, and Brenda was the only grantee[.]” to be a significant recital.
Express recitals are sometimes referenced as significant recitals, and will be used interchangeably in this article as it is by the courts. As will be discussed infra at note 232–33, the Raymond language conveyancing an undivided half interest cannot be considered a significant recital and accordingly the Raymond conveyance was devoid of express/significant recitals, just as were the conveyances in Morris and Johnson.

The court attempts to distinguish the Raymond circumstances from Morris and Johnson because the Lake Jackson lot was owned solely by husband prior to marriage and he alone added wife’s name after marriage. Specifically, the Raymond court casts significance upon the fact that “Frank was the only grantor, and Brenda was the only grantee.” This observation is an apparent attempt by the court to distinguish the Raymond facts, because the conveyance was not from a third party as was the situation in Johnson and Morris. The Raymond court then goes on to identify the cases of Massey v. Massey, Coker v. Coker, Henry S. Miller Co. v. Evans, and others referenced therein as controlling because those cases hold that “parol evidence is not admissible to vary the terms of an unambiguous document.” Yes, Massey and Coker do stand for the proposition that parol evidence cannot be used to vary a document that is unambiguous (i.e., if a document is unambiguous, intent is irrelevant).

74. The Raymond court, instead of distinguishing the cases on the existence of express or significant recitals, distinguishes the cases on the fact that husband conveyed separate property owned before the marriage, not property acquired from a third party during marriage. Id.
75. See In re Marriage of Morris, 12 S.W.3d 877, 883 (Tex. App.—Texarkana 2000, no pet.) (“[B]y acknowledging that [husband] intentionally placed the property in both of their names, he had exhibited a specific intent to make a gift to [wife].”)
76. See Johnson v. Johnson, 584 S.W.2d 307, 309 (Tex. App.—Texarkana 1979, no writ) (noting a deed was executed naming both husband and wife as grantees, but the husband paid the entire purchase price from his separate funds)
77. See Raymond, 190 S.W.3d at 81 (“[I]t is undisputed that Frank owned the property before the marriage, and he was the only grantee named on that deed. Therefore, it was his separate property from the inception.”)
78. Id.
79. Id. at 81–82.
82. Henry S. Miller Co. v. Evans, 452 S.W.2d 426 (Tex. 1970).
83. Raymond, 190 S.W.3d at 81 (citing Massey, 807 S.W.2d at 405).
84. See Massey, 807 S.W.2d at 405 (emphasis added) (“Parol evidence is not admissible to vary the terms of an unambiguous document.” (citing Kennedy v. Kennedy, 619 S.W.2d 409, 410 (Tex. App.—Houston [14th Dist.] 1981, no writ)); Coker, 650 S.W.2d at 393 (“In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed..."
In *Massey*, the property in question was two parcels of real property in Colorado County, Texas and some bank stock. Husband asserted these properties were his separate property having been gifts, even though the deeds to the real property recited a sale and were accomplished by an $180,000 promissory note establishing that the property was acquired *via* a purchase during marriage. The sale documents unequivocally established that the subject properties were purchased during the Massey’s marriage. Husband in *Massey* wanted parol evidence introduced to vary the sale terms, to show that the property was gifted to him by his family. *Massey* husband explained that the sale language was incorporated only to escape gift tax consequences. The sale language was deemed by the court to be the “express language of these documents, which recite consideration, the transfers of property, which occurred during the parties’ marriage, were bargained-for exchanges.”

The sale in *Massey* was unambiguously established by documentary evidence. The *Massey* case has exacting, express, language of a sale in the conveyance document. In contrast, the *Raymond* conveyance document specifies neither a gift to the wife nor a sale to the wife. All that exists in the *Raymond* conveyance document is the simple transfer, naming the wife and reciting a symbolic $10 as consideration, giving rise to a rebuttable gift presumption. *Massey* and *Raymond* are not the same thing at all.
While the court in the *Raymond* opinion recognizes that ambiguities within the conveyancing documents are a basis for allowing parol evidence, they reason that such does not control *Raymond* because there is no ambiguity and accordingly, did not allow the use of the parol evidence.96 Your author does not ascribe to the theory that parol evidence should have been allowed in *Raymond* because of an ambiguity; rather, she is of the mind that because there was no significant recital, parol evidence should be allowed.

The *Raymond* court’s reference to ambiguities is additionally perplexing in light of footnote number one, which acknowledges that the *Raymond* parties ascribe to the notion that a gift presumption can be rebutted, going on to explain “[b]oth parties assume that the deed, reciting a consideration of $10.00 ‘and other valuable consideration,’ evidenced proof of a gift. We recognize that there is conflicting case law on whether this [the language evidencing consideration] is evidence of a gift or of valuable consideration.”97 It seems the court itself sets up the very ambiguity it denied. Thereafter, the *Raymond* court elucidates within footnote one, citing two cases establishing that conflict between gift versus sale, explaining that their “holding on appellant’s points of error [in *Raymond*], however, is the same regardless of whether the conveyance was a sale or a gift. Therefore, we will assume, without holding, that the conveyance is a gift.”98 Inexplicably, this statement appears to support the court’s rejected possibility that the *Raymond* conveyance document was ambiguous.

The *Raymond* court cites *National Union Fire Ins. Co., v. CBI Industries Inc.*99 to reiterate the generality that testimony of intent “can be introduced only if there is latent or patent ambiguity.”100 In the *National Union* case, at issue was a clause known as an “absolute pollution exclusion.”101 The Texas

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96. See *Raymond*, 190 S.W.3d at 81 (“[P]arol evidence is not admissible to vary the terms of an unambiguous document.” (citing *Massey*, 807 S.W.2d at 405)).
97. *Id.* at 81 n.1 (citing *Saldana v. Saldana*, 791 S.W.2d 316, 320 (Tex. App.—Corpus Christi 1990, no writ); *Hall v. Barrett*, 126 S.W.2d 1045, 1047 (Tex. App.—Fort Worth 1939, no writ)).
98. *Id.*
100. *Raymond*, 190 S.W.3d at 81 (citing *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 520).
101. See *Nat'l Union Fire Ins. Co.*, 907 S.W.2d at 518–19 (discussing the role of parol evidence in contract disputes and explaining the meaning of an absolute pollution exclusion clause). The *National Union* policy contained the following exclusion:
Supreme Court in *National Union* reversed the intermediate court that had remanded the trial court’s summary judgment for further discovery. The Texas Supreme Court determined that reversal was necessary because all facts relevant to the interpretation of the clause were already in the record thus obviating the need for discovery. The Texas Supreme Court held: “The ambiguity must become evident when the contract is read in context of the surrounding circumstances, not after parol evidence of intent is admitted to create an ambiguity.” In contract construction parol evidence is not permitted to create an ambiguity with this your author has no quarrel. However, immediately after citing *National Union*, the *Raymond* court, concludes that when a spouse fails to establish an ambiguity, fraud, or mistake, the gift presumption must prevail, citing *Dalton v. Pruett*, *Brothers v. Brothers*, and *Dyer v. Dyer*. The *Raymond* court’s leap of logic will be examined.

It is understandable why *Dalton v. Pruett* led the *Raymond* court to reach its conclusion. In *Dalton v. Pruett*, prior to marriage husband owned a lot and constructed a home on it. After marriage, husband, for recited consideration of $8,500.00, conveyed the home to his wife. The deed did not specify whether the $8,500 was from wife’s sole and separate property or that the property was being conveyed for her sole and separate

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This policy does not apply to . . . any Personal Injury or Property Damage arising out of the actual or threatened discharge, dispersal, release or escape of pollutants, anywhere in the world; . . . “Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.

*Id* at 519.

102. *Id.* at 520, 522.

103. *See id.* at 522 (“The language in this pollution exclusion is clear and susceptible of only one possible interpretation in this case. Because there are no latent or patent ambiguities in the policies, there are no fact issues that merit discovery.”).

104. *Id.* at 521.

105. *See id.* at 521. (“[E]xtrinsic evidence is inadmissible to contradict or vary the meaning of the explicit language of the parties’ written agreement.” (citing Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958); Lewis v. E. Tex. Fin. Co., 146 S.W.2d 977, 980 (Tex. 1941))).

106. *See Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (analyzing the presumption created when a spouse conveys real property to the other spouse).


110. *Id.* at 928.
use. The Dalton court, relying on Pevehouse v. Pevehouse and Forman v. Glasgow, concluded the home was wife’s separate property, even without recital in the deed that the property was paid for by wife’s separate funds or was being conveyed as the wife’s separate property or for her separate use. The Dalton court further said that it made no difference whether the property conveyed by husband to wife is community or husband’s separate; it will by conveyance from husband to wife, alone, be considered wife’s separate property. Finally, the Dalton v. Pruett court referenced the presumption that husband, by conveyance, intended to make a gift to wife and then opined that absent fraud or mistake, the presumption could not be rebutted. While the Houston court’s opinion in Raymond can perhaps be understood in the solitary light of Dalton v. Pruett, the cases cited in Dalton v. Pruett and reiterated in Raymond as support do little to sustain their holdings.

Dalton v. Pruett depends on Pevehouse v. Pevehouse, where husband and wife owned community property that was, during marriage, conveyed to the wife as her separate property. As evidenced by the opinion, the Pevehouse conveyance was by significant recital, express language, establishing wife’s ownership, thus:

Originally the appellant and appellee owned as their community property the west one-half (W/2) of Section Ten (10), Block J–S, in Lubbock County, Texas. Long before this divorce proceeding, W. M. Pevehouse deeded this land to Myrtle Pevehouse as her separate property. The deed recited that W. M. Pevehouse for and in consideration of the sum of $500 to him in hand paid by Mrs. Pevehouse out of her separate estate and funds acquired by her from inheritance as follows: “Cash paid, the receipt of which hereby is acknowledged and confessed.” Then it proceeded to grant, sell and convey the property to Mrs. Myrtle Pevehouse in her individual and separate right, and further

111. Id.
114. See Dalton, 483 S.W.2d at 928 (highlighting a long-recognized rule in Texas that a husband’s deed to wife causes the property to become wife’s separate property, regardless of whether the deed recites it as such).
115. See id. at 928–29 (addressing the presumption that property, whether community or husband’s separate property, conveyed from husband to wife becomes wife’s separate property).
116. See id. at 929 (“When there has been a conveyance of property[,] . . . the presumption exists that it was [the spouse’s] intention to make the property the separate property [of the other spouse] . . . .”).
117. Pevehouse, 304 S.W.2d at 771.
provided: “and I do hereby bind myself, my heirs, executors and administrator to Warrant and Forever Defend, all and singular the said premises unto the said Mrs. Myrtle Pevehouse in her separate right, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part hereof.”

The Pevehouse court made clear that when a recital unquestionably establishes that property was meant to be conveyed as separate, such a recital can only be rebutted by establishing the “conveyance was procured by fraud, mistake[,] or undue influence.” The appellate court in Pevehouse determined that the husband’s testimony, the parol evidence, should not have been considered by the trial court as the document including the significant recitals was controlling. The appellate court rendered judgment that the property in question was the separate property of the wife as established in the document of conveyance which could not be varied absent fraud, mistake, or undue influence.

That being said, there are general statements within Pevehouse, emanating from early editions of Texas Jurisprudence.

118. Id. (emphasis added).
119. The court refers to it as a “specific declaration.” See id. at 772 (explaining that specific declarations of this kind create presumptions the court will be unlikely to overturn).
120. Id.
121. The testimony, as related in the opinion, is some of the more colorful in cases such as this. Accordingly, that portion of the opinion is worthy of being quoted:

Appellee was asked by his attorney if he ever gave his wife the farm for love and affection. He did not deny giving the farm for love and affection but stated he had no love and affection for her and never had any love or affection for her although the record reflects they had been man and wife for forty-two years at the time of this separation and had two children that are now grown and married. He was further asked by his attorney if he at any time since 1932 executed a deed of conveyance to his wife for this half section of land intending to convey title to her. His answer was, “No.” He did not remember much about the deed and did not know whether he gave the deed to Mrs. Pevehouse or not. Appellee acknowledged: “If I signed it and if I acknowledged it, why it would have been for the purpose that she could have it.” We think this undisputed record shows appellee signed, acknowledged and delivered the deed in question. This deed cannot be varied simply by the appellee testifying he never executed a deed of conveyance to his wife for this land intending to convey title to her.

122. Id. at 774.
123. See id. at 772 (“Husband's Deed to Wife—There is no reason why the husband may not execute a deed directly to his wife. The validity of such a deed is determined by general principles. There must be present the essentials, such as consideration and delivery.” (citing 23 Tex. Jur., p. 157, § 128 (current version at 39 Tex. Jur. 3d Family Law § 233 (2017)))).
and early cases that do not make the limitation on parol evidence so inextricably tied to the existence of significant recitals. However, it cannot be overlooked that the Texas Supreme Court case cited in support of those general statements in Texas Jurisprudence, Belkin v. Ray, very clearly contains a significant recital in the conveyance from husband to wife; as the Belkin court explained: “Harry Marks conveyed this property to his wife, Ray Marks. This deed recites a cash consideration of $1 and love and affection. It also recites that the property is conveyed to Ray Marks as her separate estate.” The Belkin case belies any assertion that a conveyance without a significant recital, between husband and wife, establishes a gift presumption that cannot be rebutted absent fraud or mistake of other equitable grounds.

The Houston First Court of Appeals, in Raymond, seems to have juxtaposed contract cases dealing with ambiguities with cases regarding significant recitals and interspousal gifts, while ignoring the difference between interspousal conveyances that contain significant recitals and those that do not.

The Raymond court also cites Henry S. Miller Co. v. Evans, along with the previously discussed Massey for the proposition that “[a] spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.” However, it cannot go unnoticed that Henry S. Miller, as other cases cited in Raymond, dealt with a conveyance

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124. See Forman v. Glasgow, 219 S.W.2d 845, 846–47 (Tex. App.—Waco 1949, no writ) (holding property that was clearly community was conveyed for consideration of $5.00 by husband to wife and became part of wife’s separate estate, even though the deed, while mentioning the meager consideration, contained no statement that the funds were separate or that the property was being conveyed either as a gift or to the wife’s separate estate).


126. Id. at 165 (emphasis added). These words, “love and affection,” have been understood as showing intent to make a gift. See generally Pevehouse, 304 S.W.2d at 772 (discussing which declarations within a conveyance create certain presumptions).

127. Belkin, 176 S.W.2d at 165 (emphasis added).

128. See Pevehouse, 304 S.W.2d at 772 (“The effect of the husband’s deed to the wife . . . is to constitute the estate the separate property of the grantee. The instrument could have no other meaning, and this is true whether it recites that the conveyance is for the sole separate use of the grantee or not.”).

including a significant recital.130 Specifically, the *Miller* court noted that the deed “recited a consideration of $1.00 and a vendor’s lien note for $8,000.00, paid and to be paid out of Nancy Shoaf’s ‘sole and separate estate,’ and that this property was conveyed to her as her ‘sole and separate estate.’”131

The foregoing analysis of cases cited by the *Raymond* court belie the court’s refusal to consider parol evidence. This assertion is strengthened by other cases yet to be discussed, and basic trust and evidentiary principles that underlie the well-established rules regarding interspousal conveyances.

### III. The Principles of Resulting Trusts and Parol Evidence Overlap a Spouse’s Right to Offer Proof of Separate Ownership

#### A. Basic Trust Principles Support the Use of Parol Evidence in Circumstances Such As Were Presented in Raymond

While not frequently referenced or discussed, the underpinnings for the rules governing interspousal gifts are the rules governing purchase money resulting trusts.132 It is important to understand these rules not only for the purpose of application, but also to understand and grasp the historical context of and the gravitas attached to presumptions arising from interspousal transfers, so readily used, and occasionally ignored, by bench and bar alike.

1. Restatement of Trusts §§ 440, 441

The general rule governing resulting trusts provides, “Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in [sections] 441, 442 and 444.”133 This rule means that when a person pays (the payor) for property, but legal title is passed to one that has not paid, a trust results to the benefit of the payor who will then hold the beneficial title.134 Pursuant to section 441, such a trust will not result “if the person by whom the purchase price is paid manifests an

131. *Id.* (emphasis added).
132. *See* Restatement (First) of Trusts §§ 440–443 (Am. Law Inst. 1935) (referencing rules applicable to transfers of property where a resulting trust arises).
133. *Id.* § 440.
134. *Id.*
intention that no resulting trust should arise.”

This intention would, of course, be established by parol evidence explaining the payor’s intention at the time of the conveyance.

The foregoing are the general resulting trust rules and are inapplicable to those in a confidential relationship such as husband and wife. The exceptions mentioned in section 440, and quoted in the introduction to this portion of the article, along with sections 442 and 443, provide the base by which interspousal conveyances are analyzed.

2. Restatement of Trusts §§ 442, 443

Husbands and wives, and others within close relationships, are subject to Restatement of Trusts section 442, which provides:

Purchase in the Name of a Relative. Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid,” can give rise to interesting questions within family law cases. However, delving into who might be the natural object of one’s bounty is beyond the scope of this article. For the curious, the comments at section 442 do offer some elucidation, thus:

The rule stated in this Section [442] is applicable where the payor and transferee respectively are in the relation of husband and wife; father and child; mother and child; father-in-law and son-in-law; grandparent and grandchild. It applies to the relation of parent and child although the child is an illegitimate or an adopted child. It is immaterial that the child is an adult. It applies also where the payor stands in loco parentis to the transferee; that is, where the payor whether or not related to the transferee has assumed to act in the place of a parent of the transferee.

It does not apply where the payor and transferee respectively are wife and husband, [to this, your author takes exception as wives/women are, throughout the Texas Family Code, treated without regard to gender in matters of property] or child and parent. It does not apply where the payor does not stand in loco parentis to the transferee merely because the payor and transferee respectively are brothers or sisters, uncle or aunt, or nephew or niece.

It applies where the payor is a man and is engaged to be married to the transferee, but not where the transferee is already married to another person. It does not apply to unmarried persons unlawfully cohabiting.

b) Effect of the rule. The fact that the transferee is a wife, child or other natural object of bounty of the payor is more than merely a circumstance tending to rebut the inference of a resulting trust. It is of itself a circumstance sufficient to raise an inference that a gift was intended, and the burden is upon the payor seeking to enforce a resulting trust to prove that he did not intend to make a gift to the transferee (see [section] 443). If the transferee is related to the payor, but is not in such a relation as to be a natural object of bounty of the payor, this circumstance is not enough to raise
purchase price is paid, \textit{a resulting trust does not arise unless} the latter manifests an intention that the transferee should not have the beneficial interest in the property.\footnote{Id. § 442 cmt. a–b.}

Per the foregoing, application to the wife (or child) is specified, thereby barring a section 440 resulting trust in favor of the payor; rather, a gift to the wife or child is presumed.\footnote{Id. § 442 (emphasis added).}

So, if a spouse pays for property with their separate property and places it in the name of the other spouse, a gift to the named spouse will be presumed. This is inapposite of section 440 establishing a resulting trust, but it is not a rebuttal to section 440 as found in section 441. Rather, section 442 is a presumption unto itself that can only be rebutted by section 443, thus:

\begin{quote}
Rebutting the Presumption of a Gift to a Relative. Where a transfer of property is made to one person and the purchase price is paid by another, and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, and the latter manifests an intention that the transferee should not have the beneficial interest in the property, a resulting trust arises.\footnote{Id. § 443.}
\end{quote}

That is, even if the one holding the beneficial interest is the natural object of the payor’s bounty, a trust could result if such was intended at the time title passed. The payor’s intention at the time of the conveyance would, necessarily, be established by parol evidence.

Section 443 of The Restatement of Trusts makes clear that the presumption of gift may be rebutted in the exact situation that arose in the \textit{Raymond} case.\footnote{See id. (outlining ways to rebut the gift presumption in conveyances to relatives).} However, the \textit{Raymond} case is a departure from the established rule because the parol evidence offered by husband was barred and not considered by the appellate court in making its decision.

While the Restatement of Trusts establishes the basic presumptions which arise when a conveyance is made to one person and the purchase price was paid by another, these sections do not encompass the effect of significant recitals within the conveyancing documents.
IV. MARITAL PROPERTY CHARACTERIZATION AND APPLICATION OF THE COMMUNITY PROPERTY PRESUMPTION IN LIGHT OF RESULTING TRUST PRINCIPLES AND THE PAROL EVIDENCE RULE

The Texas Family Code provides that all “[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property.”142 This is the presumption whether property is held in the name of husband, wife, or both spouses and it applies to all property possessed. This is the beginning point of every divorce case—all property is presumed community.143

A. The Community Property Presumption Can Be Rebutted and in Fact Supplanted by the Facts of a Conveyance

While beginning with the presumption that all property held by the spouses is community, spouses have the right to rebut the community property presumption and prove any property as separate.144 This right was most clearly established, more than eighty-years ago, by the case of Foster v. Christensen.145 In Foster v. Christensen, land was conveyed by wife’s parents to husband and wife, and daughter/wife and her husband executed a promissory note.146 The deed did not reflect by recital or otherwise that wife had a separate interest in the property.147 However, when faced with the possibility that this property would be lost in husband’s bankruptcy, wife asserted that the cash down payment was made, and future payments would be made, from her separate monies.148 At trial, wife was denied the right to present this evidence.149 The Texas Supreme Court held, “The wife’s

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142. TEX. FAM. CODE ANN. § 3.003(a).
143. See id. § 3.003 (establishing the community property presumption).
144. See id. § 3.003(b) (“The degree of proof necessary to establish that property is separate property is clear and convincing evidence.”).
145. Foster v. Christensen, 67 S.W.2d 246 (Tex. Comm’n App. 1934, holding approved). Foster v. Christensen is a complicated case wherein husband’s bankruptcy filing and loss of the property wife claimed as separate also involved wife’s parents, who sought to repossess the property in question because wife had not paid for the property per agreement. Id. at 248. Wife’s right to establish and thereby protect such as separate property, so parents could claim under her right, was recognized. Id. at 249–52.
146. Id. at 248.
147. See id. (“The deed contained no statement that the land was intended to be the separate property of either of the grantees.”).
148. Id. at 249. In Foster, wife’s parents, who were claiming property through their daughter’s separate interest, sought to repossess said property and eliminate it from husband’s bankruptcy estate. Id. at 248.
149. Id. at 249.
separate ownership of property, although standing in the name of her husband or appearing on record to be community property, may be proven as any other fact by any competent evidence, including parol evidence, surrounding circumstances, and declarations of the parties.150 Very simply, if it is established that consideration for such property was paid by a spouse’s separate funds, and no gift to the other spouse was intended,151 the property is the separate property of the paying spouse. While Foster v. Christensen did not resolve the character of the subject property, it did establish a spouse’s right to prove the separate character of property claimed to be separate.152 Even though this case did not involve the dissolution of a marriage, the right to prove the separate character of property recognized therein has been steadily applied by Texas courts in matters of divorce and probate.153

Likewise, when property is from a third party to the spouses, in what appears to be a gift to both rather than a purchase, parol evidence can be used to rebut the gift presumption. In Von Hutchins v. Pope,154 mother deeded the property to her brother, the uncle of mother’s married daughter, with the request that the uncle, after mother’s death, deed the property as a gift to the married daughter.155 The deed from the uncle named daughter’s husband as well as daughter; nonetheless, parol evidence was allowed to


151. In Foster v. Christensen, no presumed gift to husband, by his being named, was asserted. This may have been a result of the era in which the case arose, when gifts from wives to husbands were not given the deference of gifts from husbands to wives, or it may have been that any interest husband might have had would have been subject to claims through the bankruptcy trustee.

152. See id. at 253 (holding that a spouse should be allowed to offer proof of separate property as evidence when the character of the property is at issue).

153. See Nesmith v. Berger, 64 S.W.3d 110, 117 (Tex. App.—Austin 2001, pet. denied) (looking to appellant’s prenuptial and postnuptial agreements, which asserted all property be separate, as sufficient evidence of nonexistent community property); Orr v. Pope, 400 S.W.2d 614, 617 (Tex. App.—Amarillo 1966, no writ) (“It is settled that property acquired during marriage takes its status as separate or community property at the time of its acquisition, and that such status is fixed by the facts or circumstances by its acquisition at that time.” (citing Smith v. Buss, 144 S.W.2d 529, 531–32 (Tex. 1940); Lindsay v. Clayman, 254 S.W.2d 777, 779 (Tex. 1952))).

154. Von Hutchins v. Pope, 351 S.W.2d 642 (Tex. App.—Houston [1st Dist.] 1961, writ ref’d n.r.e.).

155. Id. at 645.
establish the gift was meant for daughter, alone.\textsuperscript{156}

It is well accepted that a spouse may prove the separate character of property when conveyed by a third party to either or both spouses, as was shown in the previously discussed case of Johnson\textsuperscript{157} which was even recognized by the Raymond court.\textsuperscript{158} The problem, in terms of the Raymond opinion, is the court’s divergent view of transfers between the spouses.

B. Deeds From One Spouse to the Other, Transferring the Entirety or a Portion, Give Rise to a Gift Presumption Which, in the Absence of a Significant Recital, Can Be Rebutted

As noted above, if there is property in existence at the dissolution of the marriage, the entirety of the property will be presumed community.\textsuperscript{159} However, in a phenomenon that seems unique to Texas community property cases, the presumption and the accompanying burden of proof can switch by virtue of a simple conveyance.\textsuperscript{160} For example, when a deed is from the husband grantor to the wife as grantee and contains no significant recital, the normal community property presumption is replaced by the presumption that husband is making a gift to wife, whether the deeded property be separate or community,\textsuperscript{161} in the absence of parol evidence to rebut the presumption of gift; and of course, vice versa, be it wife to husband.\textsuperscript{162} If the conveying spouse offers parol evidence disputing

\textsuperscript{156} Id. at 644–45.
\textsuperscript{157} See Johnson v. Johnson, 584 S.W.2d 307, 309 (Tex. App.—Texarkana 1979, no writ) (validating parol evidence indicating that property purchased with separate property assets and thereafter conveyed by deed naming both husband and wife as grantees was in fact separate property).
\textsuperscript{158} Raymond v. Raymond, 190 S.W.3d 77, 80–81 (Tex. App.—Houston [1st Dist.] 2005, no pet).
\textsuperscript{159} See TEX. FAM. CODE ANN. § 3.003 (“Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.”).
\textsuperscript{160} Compare id. § 3.001(2) (stating property acquired by gift during marriage is separate property), with id. § 3.005 (presuming interspousal gifts of property to include all income and property that arise from such property).
\textsuperscript{161} See Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975) (proffering the rebuttable presumption of gift where husband purchases community property in the name of both spouses with separate property assets during marriage); In re Marriage of Morris, 12 S.W.3d 877, 883–84 (Tex. App.—Texarkana 2000, no pet) (affirming the rejection of husband’s argument rebutting presumption of gift); City Nat’l Bank of Eastland v. Kinnebrew, 190 S.W. 536, 538 (Tex. App.—Fort Worth 1916, writ ref’d) (clarifying that husband’s payment on wife’s debt against wife’s separate property and taking of deed to said property in wife’s name constituted evidence of gift).
\textsuperscript{162} See Roberts v. Roberts, 999 S.W.2d 424, 431 (Tex. App.—El Paso 1999, no pet.) (discussing the shifting burdens of proof and the rebuttable presumption of separate property gifted between spouses).
the gift, the conveying spouse has the burden to establish that the property conveyed was not meant as a gift.\textsuperscript{163}

This principle of Texas marital property law has long been recognized. The oft-cited Texas Supreme Court case of Cockerham v. Cockerham\textsuperscript{164} presents most unusual circumstances from whence an assertion of the gift presumption arose. In Cockerham, prior to his marriage, husband owned an undisputed separate property interest in half of a 320-acre tract; the other half belonged to husband’s brother.\textsuperscript{165} During marriage, husband purchased his brother’s share and, through a complicated transaction, the entirety of the property was conveyed to husband and wife.\textsuperscript{166} The trustee in bankruptcy argued that by conveying (or reconveying) the entirety to husband and wife, husband could be presumed to have made a gift to wife of one half of his separate property half.\textsuperscript{167} Nonetheless, the Texas Supreme Court recognized that the gift presumption “can be rebutted by evidence clearly establishing there was no intention to make a gift.”\textsuperscript{168} The conveyance of the entirety of the tract was found by the trial court, and ultimately upheld by the Texas Supreme Court, to be “a means of convenience provided by law to complete the purchase of the whole and secure a loan thereon.”\textsuperscript{169} Half of the 320-acre tract was recognized as husband’s separate property, while the remaining 160-acres was recognized as a community acquisition.\textsuperscript{170}

This holding of the Texas Supreme Court was preceded by a long line of

\begin{itemize}
\item \textsuperscript{163} See id. at 432 (discussing the pleadings filed by wife to rebut the presumption of a gift she made to husband by arguing “she had executed the deed under duress and that she did not intend to make a gift”).
\item \textsuperscript{164} Cockerham v. Cockerham, 527 S.W.2d 162 (Tex. 1975).
\item \textsuperscript{165} Id. at 166–67.
\item \textsuperscript{166} Id. at 167.
\item \textsuperscript{167} See id. at 167–68 (“The trustee alternatively contends that if the husband had a separate property interest . . . he made a gift of an undivided one-half of such separate property interest to his wife . . . . [It is presumed he intended the interest placed in his wife to be a gift.” (citing Smith v. Strahan, 16 Tex. 314, 314–15 (1856); Tucker v. Carr, 39 Tex. 98, 99 (1873); Tate v. Tate, 299 S.W. 310, 311–12 (Tex. App.—Eastland 1927, no writ); Carriere v. Bodungen, 500 S.W.2d 692, 694 (Tex. App.—Corpus Christi 1973, no writ); Hampshire v. Hampshire, 485 S.W.2d 314, 316 (Tex. App.—Fort Worth 1972, no writ); 1 M C C O R M I C K & R A Y, TEXAS LAW OF EVIDENCE § 92 (2d ed. 1956))).
\item \textsuperscript{168} Id. at 168 (citing Strahan, 16 Tex. at 314–15; Dean v. Dean, 214 S.W. 505, 507–08 (Tex. App.—Austin 1919, no writ); Hampshire, 485 S.W.2d at 316; Patterson v. Metzing, 424 S.W.2d 255, 258 (Tex. App.—Corpus Christi 1967, no writ); 1 M C C O R M I C K & R A Y, TEXAS LAW OF EVIDENCE § 92 (2d ed. 1956)).
\item \textsuperscript{169} Id. at 167.
\item \textsuperscript{170} Id. at 168.
\end{itemize}
cases, including, as were cited in Cockerham v. Strahan,171 Dean v. Dean;172 Hampshire v. Hampshire,173 and Paterson v. Metzing.174 Likewise, Cockerham has been followed by a good many cases espousing this same principle, that a gift presumption, when arising from a conveyance that does not include a significant recital, can be rebutted by parol evidence. Including: Roberts v. Roberts;175 Harrison v. Harrison;176 and, Reaves v. Reaves.177

This history brings us to the Raymond case. By way of reminder, the Raymond case involved husband’s placement of wife’s name on the title to a piece of property husband owned prior to marriage and the appellate court’s holding that parol evidence could not be used to show the intent husband had in adding wife’s name to the deed.178 Rather, the appellate court held the conveyance yielded an irrebuttable presumption of gift to the wife and, absent fraud or mistake in the conveyance itself, barred presentment of parol evidence.179

171. Smith v. Strahan, 16 Tex. 314, 322 (1856) (finding the rational foundation of gift presumption when “the purchase is intended as a provision for the [receiving spouse]” and explaining that this presumption is “more easily rebutted than it would be where the [receiving spouse] has no interest in community property, and a very restricted right to separate” property).

172. Dean v. Dean, 214 S.W. 505, 508 (Tex. App.—Austin 1919, no writ) (holding lower court erred by refusing to permit husband to testify that his reason for placing the deed in wife’s name was that his employment as a brakeman was dangerous, and if he died, he wanted wife to be able to sell the property without probate concerns; the court found this testimony material on the issue of whether appellant-husband intended to gift the property to wife).

173. Hampshire v. Hampshire, 485 S.W.2d 314, 316 (holding husband’s testimonial denial of intent to give wife an interest in his house and lot was inconclusive to establish that he did not intend to make a gift and merely raised a question of fact that the trial court resolved in favor of wife—a finding upheld on appeal).

174. Patterson v. Metzing, 424 S.W.2d 255, 260 (Tex. App.—Corpus Christi 1967, no writ) (confirming the gift presumption can be rebutted by evidence clearly establishing an intention to make a gift, but ultimately holding that plaintiff’s evidence was factually insufficient to rebut the presumption) (citing Dean, 214 S.W. at 508).

175. Roberts v. Roberts, 999 S.W.2d 424, 431 (Tex. App.—El Paso 1999, no pet.) (noting gift presumption is rebuttable by parol evidence to establish deed procurement through duress or undue influence).

176. Harrison v. Harrison, 321 S.W.3d 899, 902 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (explaining that after “evidence contradicting the presumption [of gift] has been offered, the presumption disappears and is not weighed or treated as evidence”) (citing Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993)).

177. Reaves v. Reaves, No. 11–11–00026–CV, 2012 WL 3799668, at *7 (Tex. App.—Eastland Aug. 31, 2012, no pet.) (mem. op) (regarding wife’s testimony and other corroborating evidence as sufficient to rebut gift presumption by clearly establishing that wife did not intend to make a gift).


179. Id.

As is obvious, parol evidence, as barred in *Raymond*, is very much the focus of this article. The proper admission of parol evidence in relation to interspousal conveyances must be understood to realize the error of the *Raymond* court. The rules of evidence do not encompass what is known as the parol evidence rule. As explained in *Jarvis v. K&E Re One, L.L.C.*:

“The parol evidence rule is not a rule of evidence, but a rule of substantive contract law.”

The fact that the bar to parol evidence should arise out of contract law makes sense because the viability of contract law hinges upon the dependability of a written agreement (i.e., the parties to a written agreement should be able to depend upon their negotiated, written, and executed document as representing the entirety of their agreement). Indeed, that is what the court seemed to focus on in deciding *Raymond*, that the document in question was not ambiguous, stating:

Frank never presented evidence at trial of fraud, accident, or mistake in entering the agreement; nor did he establish any ambiguity in his deed to Brenda. Absent such evidence, the trial court erred in considering parol evidence of intent. The deed was unambiguous on its face, and, as a matter of law, it effectively transferred an undivided one-half interest in the Lake Jackson property to Brenda.

The *Raymond* court takes a rather myopic view of parol evidence by their limitation of what is deemed the proper circumstance allowing for the use of parol evidence. The *Raymond* court seemingly restricts the use of parol evidence to ambiguous agreements or when the subject agreement, itself, is entered into by fraud, accident or mistake. While it could be argued that the *Raymond* conveyance really is ambiguous, as inferred but not
held by the Raymond court itself, it is nevertheless the law that an interspousal agreement or transfer need not be ambiguous to trigger the allowance of parol evidence. The Raymond court’s strict and limiting use of parol evidence ignores those general civil cases, as well as the interspousal transfer cases, that have approved the admission of parol evidence to “clarify, explain, or give meaning to terms of a contract that are facially incomplete.” Therefore, to the extent parol evidence demonstrates a prior or contemporaneous agreement collateral to and consistent with—that does not vary or contradict—the contract, [parol evidence] can be considered.

For example, in Ward v. Marino, a case not involving an interspousal conveyance, a homeowner and a plumber entered into a contract for plumbing services. However, the contract did not encompass matters such as a description of the entirety of the work to be performed, the charge for the work, or whether the charge would be limited to what could be collected from the insurance company. Recognizing that it is almost universally accepted that the parol evidence rule bars testimony or other extrinsic evidence that would have the effect of altering, expanding, or contradicting an unambiguous document, the Ward court held that the use of parol evidence was properly admitted because “where a writing is incomplete or ambiguous, parol evidence becomes admissible to explain the writing or to assist in the ascertainment of the true intention of the parties.
insofar as the parol evidence does not alter or contradict any part of the written memorandum in question. ”191

Not only did the Raymond court ignore the more lenient, general civil cases, the opinion also failed to recognize that interspousal conveyances also trigger a more lenient approach to parol evidence. Accordingly, another shortcoming of the Raymond court is the failure to recognize that, parol evidence is allowed to explain interspousal transfers because such is consistent with the law of resulting trusts previously discussed192 and can be used to explain a conveyance.

An example of parol evidence being allowed in an interspousal conveyance that was addressed in light of resulting trust law is the case of Bahr v. Kohr.193 Specifically, the Kohrs claimed and the trial court found that property conveyed to husband and wife during their marriage was the separate property of the wife having been purchased with wife’s separate funds.194 The San Antonio Court of Appeals noted that when such a purchase by or through a spouse’s separate funds or property occurs, and title is taken in the name of both spouses, a gift to the non-paying spouse will be presumed.195 In essence, the community property presumption is replaced by the presumption that the paying spouse intended to make a gift to the other spouse.196 As the San Antonio court noted in the Bahr v. Kohr case: “This rule is consistent with the principles of trust law concerning purchase money resulting trusts.”197 Citing Cockerham,198 the San Antonio court opined that parol evidence can be and was properly utilized to rebut the presumption of gift and to establish separate property, because parol

192. See RESTATEMENT (FIRST) OF TRUSTS §§ 440–443 (AM. LAW INST. 1935) (implying the use of parol evidence as a potential means of preventing a resulting trust from forming).
194. Id. at 726.
195. See id. (highlighting the gift presumption that arises when a spouse uses separate property to acquire property that is treated as a part of the community during marriage).
196. See id. (”[A] presumption arises that the purchasing spouse intended to make a gift of one-half of the separate funds to the other spouse.” (citing Cockerham v. Cockerham, 527 S.W.2d 162, 168 (Tex. 1975); In re Thurmond, 888 S.W.2d 269, 273 (Tex. App.—Amarillo 1994, writ denied))).
197. Id. (citing In re Thurmond, 888 S.W.2d at 273).
198. See supra text accompanying notes 164–71 for discussion of the Cockerham case.
evidence would “clarify, explain, or give meaning to terms of a contract that are facially incomplete.”

On appeal, the Bahrs argued that parol evidence should be proscribed, and the Kohr wife should not be able to use parol evidence to establish the questioned property as her separate, citing Massey v. Massey. The San Antonio Court of Appeals recognized that, generally, “When a writing is intended as a completed memorial of a legal transaction, the parol evidence rule excludes other evidence of any prior or contemporaneous expressions of the parties relating to that transaction.” However, the Bahr v. Kohr court analyzed Massey; and as explained earlier, the Massey conveyancing document contained express/significant recitals with an accompanying promissory note establishing the acquisition as a purchase during the marriage and not a gift to Massey husband from his family. Accordingly, the Massey court was correct in determining that parol evidence could not be used to vary a writing establishing purchase by the community unless there had been fraud or accident or mistake in entering into the transaction.

Likewise, the San Antonio court distinguished the Bahr matter from Henry

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199. See Tex–Fin, Inc. v. Ducharme, 492 S.W.3d 430, 443 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“[T]o the extent parol evidence demonstrates a prior or contemporaneous agreement collateral to and consistent with . . . the contract, it can be considered.” (citing David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam); Hua Xu v. Lam, No. 14–13–00730–CV, 2014 WL 5795475, at *11 (Tex. App.—Houston [14th Dist.] Nov. 6, 2014, no pet.)); Bahr, 980 S.W.2d at 726–27 (“[T]he [gift] presumption can be rebutted by evidence of the absence of an intent to make a gift.” (citing Cockerham, 527 S.W.2d at 168)).

200. See Bahr, 980 S.W.2d at 726 (“The Bahrs argue that in cases where the community property is land evidenced by an unambiguous deed, parol evidence will not be admitted to rebut the presumption of community property.” (citing Massey v. Massey, 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied))); see also supra text accompanying notes 84–94 for discussion of the Massey case.

201. Bahr, 980 S.W.2d at 726 (citing Muhm v. Davis, 580 S.W.2d 98, 101 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e)).

202. See id. (noting the Massey court did not allow parol evidence when the documents were unambiguous); Massey, 807 S.W.2d at 405 (recognizing the deeds of trust and promissory notes contained language sufficient to prevent admission of parol evidence).

203. See Bahr, 980 S.W.2d at 725 (“[A] spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.” (internal quotations omitted) (quoting Massey, 807 S.W.2d at 405)); Massey, 807 S.W.2d at 405 (stating the same: “A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake” (citing Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431–32 (Tex. 1970))).
S. Miller, Co. v. Evans204 because the pertinent Miller instruments of conveyance established that the properties were explicitly conveyed to the wife as her separate property.205 The San Antonio court, recognizing that there was no significant recital, ultimately held: “The parol evidence rule does not prevent introduction of evidence to rebut the presumptions of community property and gift.”206 A like outcome should have occurred in Raymond.

While the San Antonio court’s opinion in Bahr v. Kahr is one of the more recent opinions to approach this issue of parol evidence from a scholarly resulting-trust perspective, it is only one of many opinions to reach this result. For example in Carter v. Carter,207 husband testified, in keeping with Peterson v. Peterson,208 that the inclusion of his wife’s name on the deed of the subject property was the doing of the title company and not done at his behest.209 Husband’s testimony so explaining was deemed properly admitted and rebutted the gift presumption.210

Further, in Galvan v. Galvan,211 wife urged that the trial court erred in allowing parol evidence to vary the effect of a deed as a presumed gift from husband’s parents to their son/her husband and to her as his wife.212 The parol evidence was admitted “to rebut prima facie presumptions of a gift to appellant [wife] of an [undivided] one-half interest . . . . From the evidence the court concluded that the tract was the separate property of appellee [husband].”213 The Galvan court recognized that parol evidence could be utilized to establish the true intent of the parties.

204. See supra text accompanying notes 129–31 for discussion of the Henry S. Miller case.
205. See Bahr, 980 S.W.2d at 727 (“In the Miller case, a deed recited that the conveyed property was the separate property of the wife.” (citing Henry S. Miller Co., 452 S.W.2d at 429)).
206. Id.
208. Peterson v. Peterson, 595 S.W.2d 889 (Tex. App.—Austin 1980, writ dism’d w.o.j.).
209. Carter, 736 S.W.2d at 781. The Peterson document did not include any statement as to the character of property or the identity of the funds with which it was acquired or for what purpose it was acquired or that it was a gift; to those the document was silent. See Peterson, 595 S.W.2d at 890–91 (holding the property at issue was separate property by tracing the entire purchase back to the separate funds of the husband).
210. Peterson, 595 S.W.2d at 892.
211. Galvan v. Galvan, 534 S.W.2d 398 (Tex. App.—Austin 1976, writ dism’d w.o.j.).
212. See id. at 399–400 (stating appellant appealed, claiming an undivided one-half interest in a tract of land).
213. Id. at 400.
to vary presumptions arising from non-specific recitals. As the Galvan court explained, while husband’s intention to gift to wife or the intent of a grantor to include wife in a gift may be established by parol evidence, the ultimate determination as to whether the gift presumption has been overcome rests with the finder of fact, be it judge or jury.

A more recent holding, also recognizing the propriety of parol evidence, is the aforementioned case of Stearns v. Martens. The Stearns case involved a company, Stearns Pools and Spas, that husband had founded prior to marriage. After a few years of marriage, the Stearns business was incorporated and of the one million shares issued, forty-nine percent of the shares were placed in husband’s name and fifty-one percent were placed in the name of the wife. There were no significant recitals identifying whether these shares were separate property of the respective spouses, or separately acquired, or gifted, or whether the shares were community; accordingly, the community property presumption would be applied. That is, the shares placed in the names of the respective spouses were presumed community upon issuance.

Not only did the Stearns husband work in the pool business, he was also active in the reserve military which included a deployment to Iraq and later, in 2008, a deployment to Afghanistan. Prior to his deployment, husband and wife signed a stock transfer agreement and husband thereby

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214. See id. (“Recitals of a deed are not conclusive as to consideration, and inquiry by parol evidence may be employed to show the real consideration, if there was any.” (citing Puckett v. Frizzell, 377 S.W.2d 715, 721 (Tex. App.—Tyler 1964, no writ); Kleck v. Kleck, 246 S.W. 720, 723–24 (Tex. App.—San Antonio 1922, no writ))).

215. Id.


217. Id. at 545.

218. Id.

219. See id. at 547–48 (implies no recital took place because husband’s pool company was formed into a corporation and stocks were issued).

220. See id. at 545 (stating husband served in the Army Reserve and was deployed to both Iraq and Afghanistan).
transferred the 490,000 shares in his name to wife.221 As explained by the appellate court:

The Agreement provides, among other things, that “[Jim] hereby sells all of [Jim’s] Stock of [Stearns Pools] to [Lisa] and [Lisa] hereby purchases such Stock from [Jim] in exchange for the payment of Ten and no/100 Dollars and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged.” The Agreement does not contain any statement that any part of its consideration was Jim’s separate property, nor does the Agreement contain the terms “gift,” “partition,” “separate property,” “separate use,” or “separate estate.” After the transaction, Stearns Pools’s corporate records reflected that Lisa owned all of the outstanding shares of common stock.224

Within days after husband returned from Afghanistan,225 wife filed for divorce and claimed that all of the pool company stock was her separate property and while husband disputed this claim, the trial court rendered a directed verdict in favor of wife that the forty-nine percent of stock that husband transferred to wife was wife’s separate property.226 This characterization, among a myriad of other trial court determinations, was appealed by husband.227 Interestingly enough,228 wife did not urge just one theory to support her separate property claim, but as the appellate court explained, she asserted at least three, thus:

Lisa asserted that she had proved as a matter of law that the 490,000 shares in Stearns Pools were her separate property under three theories:

1. By means of the Agreement, Jim made a gift of these shares to Lisa;

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221. Id.
222. James, referred to as Jim in the opinion, is the husband in Stearns. Id.
223. Lisa Martens is the wife in Stearns. Id.
224. Id. at 545. On appeal, Jim urged that the trial court erred in granting Lisa’s request for a directed verdict establishing that the 490,000 shares were Lisa’s separate property as a matter of law, thereby foreclosing Jim’s right to present evidence of his lack of donative intent; the appellate court held that the trial court erred, sustaining Jim’s argument. Id. at 546–47.
225. Within two days of his returning home, Lisa filed for divorce. Id. at 545.
226. Id.
227. Id. at 546.
228. Perhaps if Lisa had remained true to one theory of separate characterization, her claim would have appeared more plausible.
(2) The Agreement is a valid and enforceable partition or exchange agreement under Family Code section 4.102; and

(3) The Agreement is a valid means of making the shares the separate property of Lisa by a sale of the shares from Jim to Lisa.

Lisa also argued that under the Agreement all one million shares of Stearns Pools were made her separate property.229

The Fourteenth Court of Appeals in Houston was very clear in its holding that Lisa did not, as a matter of law, prove her separate property claim, disapproved of the Raymond opinion, and determined that husband had the right to have his parol evidence heard as to his intention in transferring the forty-nine percent of the Stearns Pools and Spas stock before he deployed.230 The Stearns court’s holding is worthy of quotation:

[W]e agree with the body of cases in which courts of appeals hold that, if the instrument contains no separate-property recitals, then parol evidence is admissible regarding the marital-property issue. Because the Agreement contains no separate-property recitals, parol evidence is admissible regarding the marital-property issue, and there is no irrebuttable presumption that the transferred shares are Lisa’s separate property.231

The Stearns conveyance was incomplete in terms of characterizing the property or in providing any facts which would summarily establish the character of the stock. Likewise incomplete was the Raymond agreement, which—as described by the Houston court—was a separate deed executed by husband after marriage, conveying to wife “an undivided one-half interest in the Lake Jackson property. Frank [husband] was the only grantor, and Brenda [wife] was the only grantee.”232 The court further describes the

229. Id. at 545. While the trial court directed a verdict that forty-nine percent of the stock—490,000 shares originally issued in Jim’s name and later conveyed by Jim—were Lisa’s separate property, the character of the remaining fifty-one percent—510,000 shares initially placed in Lisa’s name—was presented as a jury question. Id. The jury found that the initial 510,000 shares placed in Lisa’s name were community property. Id.

230. Id. at 548.


232. Raymond, 190 S.W.3d at 81.
conveyance, thus: “The deed was unambiguous on its face, and, as a matter of law, it effectively transferred an undivided one-half interest in the Lake Jackson property to Brenda.” An undivided one-half interest does not establish separate character. The Raymond conveyance provided no more language of intent than did the conveyancing documents in Stearns which the Stearns court described as having “no separate-property recitals” thereby incapable of creating an irrebuttable presumption of separate property and holding “parol evidence is admissible regarding the marital-property issue.”

As made clear by the Stearns court, the significant or express recital is the deciding factor as to whether parol evidence can be presented to rebut the presumption of a gift. The Raymond court simply glossed over this requisite by the statement, “A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.” The Raymond court never avails the reader of the language that was considered by the court to be the express recital leaving the reader to speculate that perhaps the mere conveyance of “an undivided one-half interest” could perhaps be considered significant.

V. IS A SIGNIFICANT RECITAL ESTABLISHING AN IRREBUTTABLE PRESUMPTION OF GIFT SO EASILY RECOGNIZED?

The seminal case on the use of parol evidence in the face of a significant recital is the Texas Supreme Court opinion in Messer v. Johnson. The Messer court, writing through Justice Walker, introduces their holding regarding the use of parol evidence in an interspousal transfer that employed a significant recital, thus:

233. Id.
234. Stearns, 476 S.W.3d at 548.
235. Id. at 548.
236. Id. at 548 (first citing Reaves, 2012 WI 3799668, at *6–7; Bahr, 980 S.W.2d at 726–27; then citing Magness, 241 S.W.3d at 912–13; Raymond, 190 S.W.3d at 80–81).
238. Raymond, 190 S.W.3d at 81 (emphasis added) (first citing Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431–32 (Tex. 1970); then citing Massey v. Massey, 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).
239. See id. (“The deed was unambiguous on its face, and, as a matter of law, it effectively transferred an undivided one-half interest in the Lake Jackson property to Brenda.”).
Real estate was conveyed to a married woman. Her husband joined in the deed as one of the grantors, and the instrument declared that the land was conveyed to the grantee as her separate estate and to her sole and separate use. The question to be decided is whether parol evidence may be received to show a resulting trust in favor of the community estate. We reaffirm the rule that it may not.

_Messer v. Johnson_, as noted in this article, addresses the underpinnings of proper characterization of marital property subject to interspousal transfers by explaining the principles of resulting trusts. What is of import is that the opinion in _Messer v. Johnson_ was a reiteration of long existing and accepted Texas law.

For example, the _Messer v. Johnson_ opinion cites the 1900 Texas Supreme Court case of _Kahn v. Kahn_, recognizing that when there is a significant recital establishing that wife paid for the property “out of her separate funds and for her separate use and benefit,” that:

without proof of fraud or mistake in the insertion of the recitals in the deed, parol evidence was not admissible to show that the maker of it did not intend to convey the property to his wife as her separate property, and this for the reason that the deed on its face clearly expressed such intent.

This basis for characterizing, in conformance with a separate property recital and such recital’s appurtenant bar to parol evidence, is what the _Raymond_ court ignored, even though the _Raymond_ court offhandedly mentioned “express recitals.” _Messer v. Johnson_ also references like holdings by the Texas Supreme Court, such as _McKivett v. McKivett_.

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241. This is the essence of the _Messer v. Johnson_ significant recital. _Id._ at 909 (emphasis added).
242. _Id._
243. _Id._ at 910–11 (emphasis added) (explaining the results of interspousal transfers by analyzing the characterization of marital property in _Kahn v. Kahn_).
244. _Kahn v. Kahn_, 58 S.W. 825 (Tex. 1900).
245. _Messer_, 422 S.W.2d at 911 (internal quotations omitted) (quoting _Kahn_, 58 S.W. at 825).
246. _Id._ (emphasis added) (internal quotations omitted) (quoting _Kahn_, 58 S.W. at 825).
248. _McKivett v. McKivett_, 70 S.W.2d 694 (Tex. 1934). _See_ _Messer_, 422 S.W.2d at 911 (citing _McKivett_, 70 S.W.2d at 695–96) (reciting the _McKivett_ holding that “[p]arol evidence should not be admitted to prove that [a deed] was conveyed for a different purpose or use” because parol evidence is inadmissible to establish a trust contrary to the plain intention of the grantor expressed in the deed (quoting _McKivett_, 70 S.W.2d at 696)).
and Lindsay v. Clayman.249

Because Messer v. Johnson is the seminal case in this area of marital property characterization, and even though it is a reiteration of the law, the facts that give rise to a case that caused the Texas Supreme Court to revisit a settled question are important. During the Johnson marriage, certain real property was conveyed to wife (Pearl) by a third party; however, husband, who had no ownership interest in the property, chose to join in the conveyance as a grantor.250 This joinder placed husband in privity with the contract establishing that he had express knowledge of and approved the conveyance.251 The property was conveyed to wife as “her sole and separate estate, and to her sole and separate use.”252 The Texas Supreme Court noted that “[t]his recital appears in the granting clause, the habendum clause and the warranty clause, but the deed does not state that the consideration was paid by the grantee out of her separate property.”253

In Messer v. Johnson, wife dies and surviving husband sought to establish that the property so conveyed to his wife was community property.254 At trial, husband was allowed (ultimately deemed in error) to testify that the purchase price of more than $12,000 was paid from his and his deceased wife’s community funds.255 He further testified that the property was placed in wife’s name so that his adult son from a prior marriage would not assert an interest in the property should he have died before his wife.256 Clearly, the Johnson husband was trying to shield his wife from confrontation with his son from a previous marriage should wife survive him. However, best-laid plans can go awry and here, contrary to the obvious plan, wife died

249. Lindsay v. Clayman, 254 S.W.2d 777 (Tex. 1952). See Messer, 422 S.W.2d at 911 (citing Lindsay, 254 S.W.2d 777) (reciting the Lindsay holding that use of parol evidence is impermissible to establish a resulting trust that favors the community where a third party conveys property to wife as her separate property in a transaction that husband partakes in to a degree sufficient to consider him a party to the conveyance instrument).

250. Messer, 422 S.W.2d at 909–10.

251. Id.

252. Id. at 910 (emphasis added) (internal quotations omitted).

253. Id.

254. By wife’s will, husband was devised the entirety of her community estate but was only given a life estate in her separate property. Id. Wife’s niece, Myrtle Messer, was devised the remainder interest. Id. Husband was given the right to sell the separate property if necessary to maintain a comfortable existence, but he had gifted it to his current wife and wanted to establish that he was free to do so, claiming that the subject property was the community of him and his deceased wife. Id.

255. Id.

256. Id.
The jury, having been allowed to hear the parol evidence of husband, was convinced by husband’s story and found that the property was the community of husband and deceased wife.258

The niece, Myrtle Messer, who under certain circumstances was to inherit her aunt’s separate property, properly objected to husband’s testimony because it violated the parol evidence rule; thereafter, the niece appealed.259 The niece urged on appeal that the parol evidence was admitted in error and that the subject property should be recognized as the separate property of the deceased wife, based on significant recitals in the conveyancing documents.260 The Texas Supreme Court agreed with niece and held that the only time that parol evidence could be used to explain or contradict a significant recital would be when equitable allegations of “fraud, duress or mistake”261 regarding the inclusion of the significant recital are made.262 No such equitable arguments were made by husband in Messer v. Johnson.263

The case of Messer v. Johnson also mentions, by way of comparison, the case of Jackson v. Hernandez,264 wherein parol evidence was allowed. In Jackson v. Hernandez, the deed did not include a significant recital and the parol evidence did not alter the deed, but merely explained that while the property was held in the name of her mother, the daughter who paid the purchase price for property should have the reversionary interest (a trust results to her benefit) after the mother died.265 In light of these cases one wonders, what words should have been present for the Raymond court to properly bar parol evidence?

VI. WHAT WORDS ARE RECOGNIZED AS SIGNIFICANT RECITALS?

The aforementioned opinion of Reaves v. Reaves, provided explanation of what is meant by these words of art, “significant recital.”266 Significant recitals are also known as express recitals, and such was the term used by the

257. Id.
258. See id. (finding the conveyance to husband and wife to be community property).
259. Id. at 908.
260. Id. at 912.
261. Id.
262. Id.
263. See generally id. at 908 (mentioning no equitable arguments asserted by the husband).
265. Id. at 189.
Raymond Court\textsuperscript{267} as well as mentioned in Reaves.\textsuperscript{268} While an unpublished, memorandum opinion, the Reaves Court explains that significant/express recitals usually have language establishing a spouse paid for the subject property with separate funds or said property was simply conveyed as the separate property of the named owning spouse.\textsuperscript{269} More particularly, the court noted that significant/express recitals “involve the use of specific terminology... [involving] deeds which expressly state that property is conveyed to grantees as their separate property or for their separate use.”\textsuperscript{270} To further clarify, the Reaves court opined “[t]he decision to exclude parol evidence rests ‘not upon a recital of contractual consideration, but upon the fact that the instrument stipulated, in effect, that the beneficial ownership of the property was conveyed to the [spouse] for [his or her] separate use.’”\textsuperscript{271}

In Reaves, husband’s urging of the irrebuttable gift presumption and his use of the parol evidence rule as a bar to wife’s explanation, is very unusual. In Reaves, the wife, Karen, had purchased an annuity with the proceeds of a life insurance policy that she received upon the death of her first husband who was in the military and who died.\textsuperscript{272} Karen owned this annuity prior to her marriage to her current husband, John, whom she was now divorcing.\textsuperscript{273} During her marriage to John, Karen suffered debilitating physical pain and was on a regimen of high intensity pain relievers, including Vicodin.\textsuperscript{274}

While Karen was undergoing this treatment, John introduced Karen to a financial planner who attended the same church as the couple.\textsuperscript{275} A new financial plan was concocted for the couple and Karen’s annuity, that she

\begin{thebibliography}{99}
\bibitem{267} See Raymond v. Raymond, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet) (“A spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake.” (citing Henry S. Miller Co. v. Evans, 452 S.W.2d 426, 431–32 (Tex. 1970); Massey v. Massey, 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied))).
\bibitem{268} Id.
\bibitem{269} Id. (emphasis in original) (citing Bahr v. Kohr, 980 S.W.2d 723, 727 (Tex. App.—San Antonio 1998, no pet)).
\bibitem{270} Id. (alterations in original) (citing Jackson v. Hernandez, 285 S.W.2d 184, 186 (Tex. 1955)).
\bibitem{271} Id. at *1.
\bibitem{272} Id.
\bibitem{273} See id. at *2 (describing the medications Karen’s doctors prescribed her for pain management).
\bibitem{274} Id.
\end{thebibliography}
owned before marriage, was converted to a different annuity that encompassed a change of owner that had the effect of naming John as a co-owner and stripped Karen of her sole right to make changes to the annuity in the future.\footnote{276}{Id. at *2–3.}

Upon divorce, John argued that parol evidence should not be allowed to rebut the gift presumption that arose by virtue of Karen naming John as a co-owner of what had been her separate property.\footnote{277}{Id. at *6.} John argued that there was a significant recital that barred the use of parol evidence and that Karen should not be allowed to testify to the circumstances surrounding the change of ownership, specifically:\footnote{278}{See id. (pointing to a “separate property recital” in the instrument of conveyance).}

John points to part of the letter of acknowledgment of the Future Annuity II that Karen signed that contains a statement that she “ordered the liquidation and transfer of an investment [she] currently own[s].” This, he says, is a “separate property recital” because it states that the consideration for the Future Annuity II was Karen’s separate property. He also cites the prospectus for the Future Annuity II because it states that “[j]oint owners each own an undivided interest in the contract.”\footnote{279}{Id. (alterations in original).}

Thereafter the Eastland Court of Appeals provides a most eloquent explanation of language that can properly be considered a significant recital. Rather than paraphrasing, the Eastland Court’s analysis is worthy of quotation, thus:

The recitals to which John refers in this case do not state that John purchased his interest in the annuity with his own separate property. Also, the recitals are not that the property will be John’s “separate” or “sole and separate” property or for his “separate use.” The words “separate property” or “separate use” are never used in the contract, letter of acknowledgment, or prospectus. Though the contract uses the term “joint owner,” which is defined in the prospectus as giving joint owners “an undivided interest in the contract,” nothing in the documents indicates that there has been a conveyance from Karen to John or that any sort of transfer in beneficial ownership has occurred. The trial court found that Karen relied upon Dwinell’s\footnote{280}{Dwinell is the financial planner to whom Karen was introduced by John. Id. at *1.} advice in the transaction, but when asked about the meaning of “undivided interest,”
Dwinell testified, “You’re going way back in my memory banks” and “That’s a legal term and I’m sorry.” Because the contract does not expressly recite the character and use of the property, we find that the parol evidence rule does not prevent introduction of evidence to rebut the presumption of a gift.281

The Eastland court’s analysis, taken in conjunction with Karen’s testimony that she never intended to make a gift, rebutted the gift presumption by clear and convincing evidence. If one looks to the language, or lack thereof as to gift, sole or separate use, or purchase by sole or separate funds in the Raymond case, it is clear there was no significant recital.282 Raymond, based upon all case law, is wrong.

VII. WHAT HELL HATH RAYMOND WROUGHT—
THE FAR REACHING EFFECT OF A RENEGADE OPINION

It is clear from the foregoing that the rules governing the use of parol evidence in light of significant recitals are very well established, as are the rules establishing what language is necessary for a recital to be considered significant. If one applies the rules as explained, surely the use of parol evidence should be allowed if a Raymond situation arises. One might easily disregard Raymond as an anomaly. Such complacency, however, should not be the approach taken to this problem because there are some courts and some appellate lawyers that love Raymond.

In the years since the Raymond opinion, nearly fifteen appellate opinions283 have acknowledged Raymond, and some of these opinions appear to be

281. Id. at *6.
expressions of “love” citing Raymond or its progeny to disallow parol evidence, even when there was no significant/express recital, when considering the character of marital property conveyed between spouses. Even more “loving” than these few courts, would be numerous appellate lawyers who cite Raymond in hopes maintaining a gift made to the spouse they represent or, on occasion, who are seeking to have an appellate court render that their spouse did indeed receive a gift via an irrebuttable presumption. Further, one cannot begin to determine the number of trial court cases where the Raymond analysis is proffered and accepted to the detriment of a spouse unable to afford an appeal. For this reason, the cases citing both Raymond and its most visible progeny beg review.

The most current case to cite Raymond regarding the gift presumption and rebuttal by the use of parol evidence is the case that spawned this article, Stearns v. Martens. The Stearns case has been discussed throughout the article and therefore need not be reiterated at this stage, but to say that the Fourteenth Court of Appeals did the right thing. However, other cases that have cited Raymond, will be included in this summative survey.

Magness v. Magness,284 is the most oft cited of the Raymond progeny in opinions addressing the interspousal gift presumption and the use of parol evidence to rebut same. In Magness, there was an interspousal transfer that occurred pursuant to the refinancing of a home.285 The deed evidences that wife as grantor transferred a one-half interest in what had been her separate property home to husband, as grantee.286 The actual language of the deed is not provided and the parol evidence rule is not mentioned in the Magness opinion. While the trial allowed the wife to testify that she had no intention to make a gift of the home to the husband and only signed the deed as a condition of refinancing home, the trial court nonetheless determined that because wife did not establish that the deed was procured by fraud, accident, or mistake, evidence of her intent could not be considered.287 The trial court found that wife had gifted half of her separate property home

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285. See id. at 913 (explaining wife thought the deed was a necessary part of refinancing and did not intend to give husband a gift of interest in the home).
286. Id.
287. See id. (“The trial court was free to disbelieve any of all of [wife]’s testimony.” (citing Cardwell v. Cardwell, 195 S.W.3d 856, 859 (Tex. App.—Dallas 2006, no pet.).)
to husband so that it was half wife’s separate property and half husband’s separate property; this was affirmed on appeal.\textsuperscript{288}

The \textit{Magness} case has been often used to deny a spouse the right to present evidence of intent. However, in the \textit{Moncey} case, the outcome was somewhat different. \textit{In re Marriage of Moncey}\textsuperscript{289} included a deed that provided:

That Pamela Harris Parrish and Becky Lynn Hutto, owning their interest in the property below as their sole and separate property and owning other property as their homestead, for and in consideration of the exchange of the property described herein, has granted, transferred and conveyed and by these presents does grant, transfer and convey unto Tammie Harris Moncey and her Husband John Moncey . . . all of Grantor’s interest in the following described real property . . . .\textsuperscript{290}

The foregoing was a deed conveying twenty-three-acres and a home from a trust corpus to husband and wife.\textsuperscript{291} John Moncey, husband, argued on appeal that the trial court erred in admitting parol evidence to determine the grantor’s intent, urging that the parol evidence rule barred the evidence.\textsuperscript{292} Specifically, the trial court considered affidavits of wife’s sisters and of the husband, each of which addressed the intent of wife’s sisters, the grantor’s in this case.\textsuperscript{293} Husband tried to invoke the \textit{Raymond/Magness} rule to exclude parol evidence in a third party transaction where both spouses were named in the deed conveyancing the disputed property.\textsuperscript{294} The appellate court recognizes the \textit{Raymond/Magness} rule for interspousal transactions, but in apparent keeping with the dicta of \textit{Raymond}, determines that the parol evidence rule does not apply to third party transactions wherein parol evidence can be admitted.\textsuperscript{295} The property was held to be the separate property of the wife, sister of the grantors, and in keeping with the affidavits, parol evidence, of the sisters.\textsuperscript{296}

\begin{itemize}
\item \textsuperscript{288.} \textit{Id.}
\item \textsuperscript{289.} \textit{In re Marriage of Moncey}, 404 S.W.3d 701 (Tex. App.—Texarkana 2013, no pet.).
\item \textsuperscript{290.} \textit{Id.} at 707.
\item \textsuperscript{291.} \textit{Id.}
\item \textsuperscript{292.} \textit{Id.} at 709.
\item \textsuperscript{293.} \textit{See id.} at 708–09 (stating affidavits from wife’s sisters contended it was never their intention for husband to have any ownership of the property).
\item \textsuperscript{294.} \textit{See id.} at 709 (”[Husband] asserts that since he is a named grantee in the deed without ambiguity, no further evidence of intent may be received.” (citing CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co., 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied))).
\item \textsuperscript{295.} \textit{Id.} at 710–11.
\item \textsuperscript{296.} \textit{See id.} at 714 (concluding wife established the property was her separate property).
\end{itemize}
In re Marriage of Skarda,²⁹⁷ is a refinancing case, where husband refinanced his separate property.²⁹⁸ As part of the refinancing, husband and wife signed a warranty deed conveying the property to husband and wife as “joint tenants with right of survivorship.”²⁹⁹ A deed of trust identified husband and wife, jointly, as borrower.³⁰⁰ Husband testified that it was not his intent to gift half of the property to wife.³⁰¹ Wife on the other hand, was not so clear, asserting she owned half of the property by gift or otherwise and even asserting that her interest was community.³⁰² While the evidence of intent was allowed, the court determined that the gift presumption was not rebutted because husband failed to offer evidence of equitable defenses, i.e., fraud, accident, mistake, or undue influence.³⁰³

Leaving the cases that cite Raymond, but instead depend solely on the like holding of Magness, the survey begins with Cardenas v. Cardenas.³⁰⁴ In Cardenas, husband obtained a $30,000 loan and had his wife use those funds to purchase a piece of property from a neighbor.³⁰⁵ The property was deeded to wife as her “sole and separate property,” a classic significant recital.³⁰⁶ The parol evidence rule was not specifically mentioned in the opinion, and both husband and wife testified regarding the circumstances of the transaction and husband testified as to his intent.³⁰⁷ The court never mentions that parol evidence cannot be used when a significant recital is in play, stating only that husband’s “testimony is insufficient to disturb this [gift] presumption.”³⁰⁸ In light of the significant recital in this case, your author has no quarrel with a strict application of the parol evidence rule, even though not mentioned by the court as it should have been.

²⁹⁷. In re Marriage of Skarda, 345 S.W.3d 665 (Tex. App.—Amarillo 2011, no pet.).
²⁹⁸. Id. at 668.
²⁹⁹. Id.
³⁰⁰. Id.
³⁰¹. See id. at 672 (alleging his only intent was to refinance the property).
³⁰². Id.
³⁰³. See id. (holding the joint tenancy created in wife through the deed was her separate property in the absence of evidence of fraud, accident, or mistake).
³⁰⁵. Id. at *2.
³⁰⁶. Id.
³⁰⁷. See generally id. (admitting, although not explicitly, parol evidence at trial).
³⁰⁸. Id.
Pearson v. Pearson is a rather complicated stock transfer case in which parol evidence of intent was allowed. While there is not heavy reliance on the Magness case, it is mentioned. Here the testimony of wife and her mother, the transferors, established that there was no intent to make a gift of the business to the husband. There was also evidence that husband “agreed to pay Mrs. Pearson for her three shares of stock in the event of divorce, casting doubt on its character as a gift,” although gift tax returns were filed and explained away as having been done at husband’s direction. The appellate court affirmed the trial court’s determination that no gift had been made to husband based on the parol evidence rightly allowed.

In re C.E.W. is a case which properly applies the exception to the bar on parol evidence when a significant recital exists. Here, husband as grantor conveyed his entire interest to wife, stating, “[g]rantor grants and conveys the property to Grantee as her sole and separate property.” Husband asserted that the deed was obtained under duress and the trial court viewed the claim of duress, an equitable assertion, in keeping with accident, mistake or fraud. Parol evidence was allowed as to the duress suffered by husband and the gift presumption was overcome and the property was determined to be community.

310. Should a transfer of stock ever be in issue, a reading of the entirety of this case is recommended. See id. at *1 (describing a dispute between husband and wife about an interest in a business husband acquired during the marriage and whether it was separate or community).
311. See id. at *6 (citing the Magness rule that “[a] gift is a voluntary transfer of property to another made gratuitously and without consideration.” (citing Magness v. Magness, 241 S.W.3d 910, 912 (Tex. App.—Dallas 2007, pet. denied))).
312. Id. at *9.
313. Id.
314. See id. (“Assuming [husband] raised the presumption of gift by showing the transfer from his wife and mother-in-law, our review of the evidence reflects that the trial court could find from clear-and-convincing evidence that [wife] and her parents did not intend to make a separate-property gift . . . .”).
316. See id. at *3 (holding trial court properly treated property as community after substantive and probative evidence showed deed was procured by duress).
317. Id. (internal quotations omitted).
318. See id. at *2 (“The parties dispute whether the trial court could have properly concluded the deed was procured by duress, fraud, accident or mistake.”).
319. Id. at *3.
In Gonzalez-Limon v. Gonzalez, the husband and wife purchased property after marriage and some three months after the purchase husband as grantor conveyed his interest to wife. Parol evidence was considered and husband explained that the property was conveyed to wife to take advantage of her disability to gain tax exempt status as to the property. The reason for conveyance did not encompass fraud, accident or mistake and thus could not be used to rebut the gift presumption.

Clay v. Clay concerns a deed of the couple’s homestead property to wife from husband without a significant recital. The trial court allowed both husband and wife to testify as to the initial acquisition of the property—funds from a settlement husband received—and about the conveyance to wife. The only evidence presented to rebut the presumption that the homestead was a gift to wife was husband’s testimony that he only intended it as a temporary transfer to wife, though “[a]t the time, [he] did not have a plan for when [he] would reacquire the property or how it would play out.” The appellate court upheld the trial court’s decision because it was reasonable to conclude that husband failed to show fraud, accident, or mistake. Thus, the trial court rightfully allowed evidence of intent, but wrongfully evaluated the evidence in terms of a gift presumption that could only be rebutted by an equitable defense, not a lack of donative intent.

The Clay case, as Raymond, requires an equitable defense even when there is not a significant recital; it is a prime example of the need for clarification of Raymond and its ilk.

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321. Id. at *1.
322. Id.
323. See id. (“Because the record contains no evidence to rebut the presumption that [wife] received the Property as separate property by gift, the trial court did not err in finding that [husband] gifted his interest in the Property to [wife].” (citing Magness v. Magness, 241 S.W.3d 910, 912–13 (Tex. App.—Dallas 2007, pet. denied); In re Marriage of Skarda, 345 S.W.3d 665, 672 (Tex. App.—Amarillo 2011, no pet.).)
325. Id. at *2.
326. Id. (internal quotations omitted) (alterations in original).
327. See id. at *3 (concluding trial court did not err in holding husband led to rebut the presumption of a gift to wife).
328. See id. (holding that because a presumption of gift may be rebutted by proof of fraud, accident, or mistake, husband’s testimony as to lack of donative intent was insufficient to rebut said presumption).
Mora v. Mora,\textsuperscript{329} entails a deed from husband to wife, thus: “The deed is from Salvador as grantor to Sylvia as grantee and conveys a ‘one-half (½) undivided community interest in and to the property.’”\textsuperscript{330} The question before the court was whether this conveyed half of the property to Sylvia (her name had not appeared on the deed before) or did this convey the entirety to her as separate property?\textsuperscript{331} The most disturbing aspect of the case is the court’s reasoning, thus:

In this case, the testimony of Salvador and the attorney was conflicting; however, the language of the deed from Salvador to Sylvia is unambiguous. Accordingly, the trial judge could have chosen to disbelieve Salvador’s testimony, and the evidence is sufficient to support the trial court’s characterization of the property as Sylvia’s separate property.\textsuperscript{332}

The language is disturbing because it seems to infer, much as did Raymond, that the conveyance of an undivided interest is a significant recital (with which this author takes issues), while at the same time confusing it with testimony that would not have been considered if rules governing significant recital were properly applied. Again, a case that supports the need for further elucidation in this area.

In Motley v. Motley,\textsuperscript{333} the actual language of the deed, entered into as part of a refinancing transaction, was not mentioned, but the deed granted the husband an undivided one-half interest in property that wife asserted had originally been her separate property.\textsuperscript{334} The wife testified that she did not make a gift to her husband and she did not know that by virtue of the refinancing that her husband would obtain an interest in what she thought was her property; indeed, she testified she would not have refinanced if she had known of the resulting effect.\textsuperscript{335} Nonetheless, the appellate court confirmed the decision of the trial court recognizing that the trial court judged the credibility of witnesses.\textsuperscript{336} At least it appears in Motley that the

\begin{flushleft}
\textsuperscript{330} Id. at *7.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at *8 (emphasis added).
\textsuperscript{333} Motley v. Motley, 390 S.W.3d 689 (Tex. App.—Dallas 2012, no pet.).
\textsuperscript{334} Id. at 691, 693.
\textsuperscript{335} Id. at 693.
\textsuperscript{336} See id. (“As fact finder . . . the trial court was free to disbelieve any or all of appellant’s testimony and conclude that appellant failed to rebut the gift presumption.” (citing Magness v. Magness, 241 S.W.3d 910, 913 (Tex. App.—Dallas 2007, pet. denied))).
\end{flushleft}
rules were followed in that there was no significant recital and parol evidence was considered.

_Zoller v. Zoller_337 is somewhat unusual in that it involves an Oldsmobile and a Mercury Marquis that husband claims were gifted from his father and therefore his, husband's,338 separate property.339 Interestingly, while husband claims a gift, he acknowledged that he had agreed to pay for one of the cars, but to pay less than a quarter of its fair market value.340 No other evidence was offered as to the gift from husband's father. The court deemed this insufficient to establish a gift especially in light of the testimony of purchase.341

In _Rosensky v. Rosensky_,342 wife claimed that her husband made a gift to her of $72,000 that was used to purchase the homestead.343 While there was no significant recital in the conveyancing documents, wife did rely on a letter which she asserted husband signed two days before closing acknowledging the gift; husband vehemently denied the authenticity of the letter.344 Husband understood that the property was to be placed in both of the parties names, and it was.345 In this case, an interspousal transfer of funds, any gift presumption could be rebutted by parol evidence in light of the fact that there was no significant recital. Essentially, the question came down to credibility and wife's separate property claim was defeated by testimony of the husband.346 The appellate court denied wife’s separate property claim.

340. Id.
341. _Id_. at *5.
343. _Id_. at *5.
344. _See id._ (chronicling husband’s testimonial attempts to rebut the presumption of donative intent).
345. _Id_.
346. _Id_. at *6.
Ussery v. Ussery is another case where the actual language of the deed is not mentioned, however it is without doubt that there was not a significant recital. The conveyance is described by the court as follows:

Ussery contends and stated in his declaration to the trial court that the real property was community property, but he does not dispute that he signed the deed transferring the real property, and the deed with his signature was an exhibit at trial. Steczkowski also testified that Ussery signed the deed after he was incarcerated and that a sergeant at the prison notarized his signature. This evidence creates a presumption that the real property was Steczkowski’s separate property by gift and, therefore, is some evidence of a substantive and probative character to support a finding that Ussery gave his interest in the real property to Steczkowski.

The appellate court considered that the reason for transferring the property to wife was so that if husband was sued by any of his victims, the property would not be subject to such liability; however this was not considered by the appellate court to be evidence that wife obtained the conveyance by “fraud, accident or mistake.” The fact that the court analyzes this in terms “fraud, accident or mistake” makes cases that encompass conveyances with significant recitals troubling. This is not a significant recital case. Husband’s testimony should have been allowed to rebut the presumed gift and weighed against wife’s assertions that he made a gift to her, it should not have been constrained to a determination of whether it met the elements of “fraud, accident or mistake.” Ussery is yet another case that establishes the need for clarification.

VIII. CONCLUSION

It is indisputable that there are conflicting opinions in the intermediate Texas appellate courts regarding the use of parol evidence to rebut the gift presumption. Of course, this makes the question of parol evidence when an express or significant recital is lacking, ripe for review by the Texas Supreme Court.

348. Steczkowski is Ussery’s wife. Id. at *1.
349. Id. at *3 (citing Magness v. Magness, 241 S.W.3d 910, 912 (Tex. App.—Dallas 2007, pet. denied)).
350. Id.
351. TEX. CONST. art. V, § 3.
We can only hope that this question reaches the Texas Supreme Court so that the court can once again explain to bench and bar resulting trust rules, significant recitals, and parol evidence. However, until that occurs, it is hoped that this article will shine a light on interspousal gifts, resulting trust rules, significant recitals, and parol evidence so that such will find their proper place in the Texas community property compendium once again. If Raymond is overruled, or hopefully ignored, then there is no reason not to love Raymond for what it was, an interesting diversion from longstanding precedent.