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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

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ARTICLE

NOT *EVERYBODY LOVES RAYMOND*:¹ HOW THE CASE OF *RAYMOND V. RAYMOND*² MADE A SHAMBLES OF INTERSPOUSAL GIFT PRESUMPTIONS AND THE PAROL EVIDENCE RULE IN MATTERS OF TEXAS COMMUNITY PROPERTY

PAMELA E. GEORGE*

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/tt01115167/> [<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-TPIN>]. 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.

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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, who, as students at South Texas College of Law Houston (now recent graduates) and members of the Law Review, aided in cite checking, quote checking, and in the expansion of certain footnotes. Mr. Flud also contributed to the analysis of the *Raymond* opinion. Without the generous and brilliant help of these three, the publication of this article would have been much more difficult.

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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.

4. *Raymond* has been cited numerous times and utilized in briefs for the well-established legal tenet that an appellate court reviews a “trial court’s characterization of property under an abuse of discretion standard.” *Id.* at 80 (citing *Robles v. Robles*, 965 S.W.2d 605, 613 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)); see also *Rosensky v. Rosensky*, No. 01–09–01029–CV, 2011 WL 743164 at *3 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.) (“We review the trial court’s characterization of property in a divorce under an abuse of discretion standard.” (citing *Raymond*, 190 S.W.3d at 80; *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied))); Appellee’s Brief at 3, *In re Marriage of Moncey*, 404 S.W.3d 701 (Tex. App.—Texarkana 2012, no pet.) (No. 06–12–0054–CV), 2012 WL 6813549, at *3 (determining abuse of discretion as the standard of review for property characterization in a divorce); Appellee’s Brief at 11, *Jones v. Houston Structural Inc.*, No. 01–05–00834–CV, 2006 WL 2291010 (Tex. App.—Houston [1st Dist.] Aug. 10, 2006, no pet.), 2006 WL 583954, at *11 (“[A] trial court abuses its discretion when it acts in an unreasonable or arbitrary manner, or when it acts without reference to any guiding rules and principles.”).

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.⁷ The *Raymond* trial court found that the transferred property remained husband's separate property.⁸ The appellate court reversed, deciding the property should be characterized as wife's separate property as a matter of law⁹ and determining that parol evidence could not be introduced to establish the character of the property as husband's separate property.¹⁰ 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 transfer¹¹ (i.e., between spouses) upon which the *Raymond* court depends to explain its approach, treating the gift presumption that arises, if any,¹² as rebuttable by parol evidence only if there is accident, fraud, or mistake.¹³ 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

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 dismissed); *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.¹⁴

Or, on the other hand the *Raymond* court may have considered the conveyancing language found in the *Raymond* deed¹⁵ to somehow be an express or significant recital, utilizing the significant recital theory.¹⁶ This being said, the *Raymond* court appears to have paid scant attention to the fact that there was an absence of language¹⁷ 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.¹⁸ The problem is, neither the interspousal transfer theory, nor the significant recital theory as espoused by the *Raymond* court are anchored in classically accepted legal analysis of interspousal gift transactions.

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

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))).

15. “Frank executed a deed to Brenda conveying an undivided one-half interest in the Lake Jackson property.” *Id.* at 79.

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))).

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).

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); *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”).

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).

Court of Appeals, recently declined to follow *Raymond* in *Stearns v. Martens*.²⁰

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 deeds²¹ or other documents.²² 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.²³

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.²⁴ 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 trusts²⁵ and the parol evidence rule.²⁶ 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,

20. *Stearns v. Martens*, 476 S.W.3d 541, 548 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

21. Generally, at issue is real estate deeds. See *Messer*, 422 S.W.2d at 912 (containing a significant recital in the deed); *Peterson*, 595 S.W.2d at 890 (allowing husband to testify when wife's "name was subsequently added to the deed and the sale was consummated"); *Johnson*, 584 S.W.2d at 309 (containing no significant recital in the deed).

22. In the more recent case of *Stearns v. Martens*, the property at issue was the stock in a closely held community corporation that was allegedly gifted to wife; the documents proffered included a letter and a bill of sale. *Stearns*, 476 S.W.3d at 548–50.

23. See, for example, the position taken by wife and accepted by the trial court, but reversed on appeal in *Stearns v. Martens*. *Id.* at 548.

24. See TEX. CONST. art. XVI, § 15 (stating property owned before marriage is the separate property of the spouse with ownership); TEX. FAM. CODE ANN. § 3.001 (codifying the rules for separate property in Texas).

25. RESTATEMENT (THIRD) OF TRUSTS § 9 (AM. LAW INST. 2003).

26. Parol evidence is a contract principle. "The parol evidence rule is not a rule of evidence, but a rule of substantive contract law." *Jarvis v. K & E Re One, LLC*, 390 S.W.3d 631, 638 (Tex. App.—Dallas 2012, no pet.) (citing *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958); *Edascio, L.L.C. v. NextiraOne L.L.C.*, 264 S.W.3d 786, 796 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)).

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

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).

29. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

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 Morris*⁴⁴ and *Johnson v. Johnson*⁴⁵ 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.).

45. *Johnson v. Johnson*, 584 S.W.2d 307 (Tex. App.—Texarkana 1979, no writ).

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.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.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.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.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."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.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*.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:

57. *Johnson*, 584 S.W.2d at 308.

58. *Id.*

59. *Id.* at 309.

60. *Raymond*, 190 S.W.3d at 79, 81 ("Here, it is undisputed that [husband] owned the property before the marriage . . .").

61. *Id.* at 81.

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)).

63. *Brothers v. Brothers*, No. 14-96-00364-CV, 1997 WL 7012 (Tex. App.—Houston [14th Dist.] Jan. 9, 1997, no writ) (not designated for publication).

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.”⁶⁸

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.⁶⁹ 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.”⁷⁰ 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*⁷¹ 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*.⁷² 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.⁷³

68. *Stearns v. Martens*, 476 S.W.3d 541, 548 n.5 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (first citing *Brothers*, 1997 WL 7012; then citing TEX. R. APP. P. 47.7).

69. *See Brothers*, 1997 WL 7012, at *1–2 (relying on “long . . . settled law in Texas” rather than the parol evidence rule).

70. *Raymond*, 190 S.W.3d at 81 (emphasis added) (citing *Henry S. Miller Co.*, 452 S.W.2d at 431–32; *Massey*, 807 S.W.2d at 405).

71. *See id.* (“Absent such evidence [of fraud, accident, or mistake], the trial court erred in considering parol evidence of intent.” (citing *Dalton v. Pruett*, 483 S.W.2d 926, 929 (Tex. App.—Texarkana 1972, no writ))).

72. *See id.* (focusing on “latent or patent ambiguity” with regards to the deed instead of on expressed recitals (citing *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995))).

73. *Id.* (emphasis added).

Express recitals are sometimes referenced as significant recitals,⁷⁴ 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*⁷⁵ and *Johnson*.⁷⁶

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.⁷⁷ Specifically, the *Raymond* court casts significance upon the fact that “Frank was the only grantor, and Brenda was the only grantee.”⁷⁸ 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*.⁷⁹ The *Raymond* court then goes on to identify the cases of *Massey v. Massey*,⁸⁰ *Coker v. Coker*,⁸¹ *Henry S. Miller Co. v. Evans*,⁸² and others referenced therein as controlling because those cases hold that “parol evidence is not admissible to vary the terms of an unambiguous document.”⁸³ 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).⁸⁴

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.

80. *Massey v. Massey*, 807 S.W.2d 391 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

81. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983).

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.⁸⁵ Husband asserted these properties were his separate property having been gifts, even though the deeds to the real property recited a sale and were accompanied by an \$180,000 promissory note establishing that the property was acquired *via* a purchase during marriage.⁸⁶ The sale documents unequivocally established that the subject properties were purchased during the Massey's marriage.⁸⁷ Husband in *Massey* wanted parol evidence introduced to vary the sale terms, to show that the property was gifted to him by his family.⁸⁸ *Massey* husband explained that the sale language was incorporated only to escape gift tax consequences.⁸⁹ 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."⁹⁰

The sale in *Massey* was unambiguously established by documentary evidence.⁹¹ The *Massey* case has exacting, express, language of a sale in the conveyance document.⁹² In contrast, the *Raymond* conveyance document specifies neither a gift to the wife nor a sale to the wife.⁹³ All that exists in the *Raymond* conveyance document is the simple transfer, naming the wife and reciting a symbolic \$10 as consideration,⁹⁴ giving rise to a rebuttable gift presumption.⁹⁵ *Massey* and *Raymond* are not the same thing at all.

in the instrument." (citing *R & P Enter. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968)).

85. *Massey*, 807 S.W.2d at 395.

86. *Id.* at 405.

87. *See id.* (reinforcing the idea that property obtained during marriage through "bargained-for exchanges" rather than by gift is property belonging to the community).

88. *See id.* (finding "appellant offered the testimony" of family members in an attempt to convince the court the transactions "were made to look like credit transactions in order to avoid gift taxes").

89. *Id.*

90. *Id.* (emphasis added).

91. *See id.* ("[T]he trial court correctly excluded the parol evidence and gave effect to the unambiguous terms of the written instruments . . .").

92. *See id.* ("Under the express language of these documents, which recite consideration, the transfers of property, which occurred during the parties' marriage, were bargained-for exchanges.").

93. *See Raymond v. Raymond*, 190 S.W.3d 77, 79 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (outlining the terms of the conveyance).

94. *See id.* (explaining "Frank executed a deed to Brenda conveying an undivided one-half interest in the Lake Jackson property").

95. *See Messer v. Johnson*, 422 S.W.2d 908, 910 (Tex. 1968) (illustrating a husband executing a deed to his wife although not intending it as a gift to her but for other reasons); *Johnson v. Johnson*,

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

584 S.W.2d 307, 308–09 (Tex. App.—Texarkana 1979, no writ) (“[T]he deed named husband and wife as grantees . . . [thus creating] a presumption that the husband intended to give his wife an undivided one-half interest in the residence.” (citing *Hampshire v. Hampshire*, 485 S.W.2d 314, 316 (Tex. App.—Fort Worth 1972, no writ); *Carriere v. Bodungen*, 500 S.W.2d 692, 694 (Tex. App.—Corpus Christi 1973, no writ))).

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.*

99. *Nat'l Union Fire Ins. Co., v. CBI Indus.*, 907 S.W.2d 517 (Tex. 1995).

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.¹⁰² 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.¹⁰³ 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."¹⁰⁴ In contract construction parol evidence is not permitted to create an ambiguity;¹⁰⁵ 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,¹⁰⁶ citing *Dalton v. Pruett*,¹⁰⁷ *Brothers v. Brothers*, and *Dyer v. Dyer*.¹⁰⁸ 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.¹⁰⁹ After marriage, husband, for recited consideration of \$8,500.00, conveyed the home to his wife.¹¹⁰ 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

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).

107. *Dalton v. Pruett*, 483 S.W.2d 926 (Tex. App.—Texarkana 1972, no writ).

108. *Dyer v. Dyer*, 616 S.W.2d 663 (Tex. App.—Corpus Christi 1981, writ dismissed).

109. *Dalton*, 483 S.W.2d at 927–28.

110. *Id.* at 928.

use.¹¹¹ The *Dalton* court, relying on *Pevehouse v. Pevehouse*¹¹² and *Forman v. Glasgow*,¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.*

112. *Pevehouse v. Pevehouse*, 304 S.W.2d 770 (Tex. App.—Amarillo 1957, writ dismissed).

113. *Forman v. Glasgow*, 219 S.W.2d 845 (Tex. App.—Waco 1949, no writ).

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.”¹¹⁸

The *Pevehouse* court made clear that when a recital¹¹⁹ 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.”¹²⁰ 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.¹²¹ 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.¹²²

That being said, there are general statements within *Pevehouse*, emanating from early editions of *Texas Jurisprudence*¹²³

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.

Id. at 773.

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 cases¹²⁴ 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*,¹²⁵ 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*.¹²⁶ It also recites that the property is conveyed to Ray Marks as *her separate estate*.”¹²⁷ 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.¹²⁸

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.”¹²⁹ However, it cannot go unnoticed that *Henry S. Miller*, as other cases cited in *Raymond*, dealt with a conveyance

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).

125. *Belkin v. Ray*, 176 S.W.2d 162 (Tex. 1943).

126. *Id.* at 165 (emphasis added). These words, “love and affection,” have been understood as showing intent to make a gift. See generally *Pevhouse*, 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 *Pevhouse*, 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.”).

129. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (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)).

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

130. *Henry S. Miller Co.*, 452 S.W.2d at 428–29.

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.”¹³⁵ 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 442,¹³⁶ 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 bounty¹³⁷ of the person by whom the

135. *Id.* § 441.

136. *See id.* § 442 (outlining property transfers between relatives or spouses).

137. The phrase “other natural object of bounty of the person by whom 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, *a resulting trust does not arise unless* the latter manifests an intention that the transferee should not have the beneficial interest in the property.¹³⁸

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.¹³⁹

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:

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.¹⁴⁰

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 *Raymond* case.¹⁴¹ However, the *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.

an inference that a gift was intended, but it is a circumstance which can be shown with other circumstances as tending to rebut the inference that a resulting trust arises

Id. § 442 cmt. a–b.

138. *Id.* § 442 (emphasis added).

139. *Id.*

140. *Id.* § 443.

141. *See id.* (outlining ways to rebut the gift presumption in conveyances to relatives).

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

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

150. *Id.* (first citing *McClintic v. Midland Grocery & Dry Goods Co.*, 154 S.W. 1157, 1158–59 (Tex. 1913); *Presidio Mining Co. v. Bullis*, 4 S.W. 860, 863 (Tex. 1887); *Carter v. Bolin*, 30 S.W. 1084, 1085 (Tex. App.—Austin 1895, no writ); *SPEER’S LAW OF MARITAL RIGHTS* (3d ed.) §§ 428–429; then citing *Cummins v. Cummins*, 224 S.W. 903, 905 (Tex. App.—Amarillo 1920, no writ); *SPEER’S LAW OF MARITAL RIGHTS* (3d ed.) §§ 406, 428, 429, 437).

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.c.).

155. *Id.* at 645.

establish the gift was meant for daughter, alone.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*¹⁵⁷ which was even recognized by the *Raymond* court.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.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.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,¹⁶¹ in the absence of parol evidence to rebut the presumption of gift; and of course, vice versa, be it wife to husband.¹⁶² If the conveying spouse offers parol evidence disputing

156. *Id.* at 644–45.

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).

158. *Raymond v. Raymond*, 190 S.W.3d 77, 80–81 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

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.”).

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).

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).

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.¹⁶³

This principle of Texas marital property law has long been recognized. The oft-cited Texas Supreme Court case of *Cockerham v. Cockerham*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.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.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.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."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."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.¹⁷⁰

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

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").

164. *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975).

165. *Id.* at 166–67.

166. *Id.* at 167.

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 [I]t 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 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE § 92 (2d ed. 1956))).

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. Metzger*, 424 S.W.2d 255, 258 (Tex. App.—Corpus Christi 1967, no writ); 1 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE § 92 (2d ed. 1956)).

169. *Id.* at 167.

170. *Id.* at 168.

cases, including, as were cited in *Cockerham: Smith v. Strahan*,¹⁷¹ *Dean v. Dean*,¹⁷² *Hampshire v. Hampshire*,¹⁷³ and *Patterson v. Metzger*.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. Metzger*, 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).

178. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

179. *Id.*

C. *The Question Now Begged: What Is Parol Evidence?*

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.*:¹⁸⁰ “The parol evidence rule is not a rule of evidence, but a rule of substantive contract law.”¹⁸¹ 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.¹⁸²

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 agreements¹⁸³ or when the subject agreement, itself, is entered into by fraud, accident or mistake.¹⁸⁴ While it could be argued that the *Raymond* conveyance really is ambiguous, as inferred but not

180. *Jarvis v. K & E Re One, L.L.C.*, 390 S.W.3d 631 (Tex. App.—Dallas 2012, no pet.).

181. *Id.* at 638 (citing *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (Tex. 1958); *Edascio, L.L.C. v. NextiraOne L.L.C.*, 264 S.W.3d 786, 796 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)).

182. *Raymond*, 190 S.W.3d at 81 (emphasis added) (citation omitted) (citing *Dalton v. Pruett*, 483 S.W.2d 926, 929 (Tex. App.—Texarkana 1972, no writ)).

183. *See id.* (comparing the *Raymond* case to *Massey*, where the court “held that parol evidence is not admissible to vary the terms of an unambiguous document” (citing *Massey v. Massey*, 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied))).

184. *See id.* (“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*, 807 S.W.2d at 405)).

held by the *Raymond* court itself,¹⁸⁵ it is nevertheless the law that an interspousal agreement or transfer need not be ambiguous to trigger the allowance of parol evidence.¹⁸⁶ 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."¹⁸⁷

For example, in *Ward v. Marino*,¹⁸⁸ a case not involving an interspousal conveyance, a home owner 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.¹⁸⁹ 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,¹⁹⁰ 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

185. Arguably, the first footnote in *Raymond* supports the rejected possibility that the *Raymond* conveyance document was ambiguous. *See id.* at 80–81 n.1 ("Our holding on appellant's points of error, however, is the same regardless of whether the conveyance was a sale or gift. Therefore, we will assume, without holding, that the conveyance was a gift.").

186. *See Bahr v. Kohr*, 980 S.W.2d 723, 727 (Tex. App.—San Antonio 1998, no pet.) ("[W]e find that the parol evidence rule does not prevent introduction of evidence to rebut the presumptions of community property and gift.").

187. *Tex–Fin, Inc. v. Ducharme*, 492 S.W.3d 430, 443 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citation omitted) (first quoting *Boondoggles Corp. v. Yancey*, No. 01–05–00185–CV, 2006 WL 2192708, at *10 (Tex. App.—Houston [1st Dist.] Aug. 3, 2006, no pet.); then citing *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 451 (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.)).

188. *Ward v. Marino*, No. 13–00–00784–CV, 2002 WL 253789 (Tex. App.—Corpus Christi Feb. 21, 2002, no pet.) (mem. op., not designated for publication).

189. *Id.* at *1.

190. *See David J. Sacks, P.C.*, 266 S.W.3d at 450 (deeming an attorney's fee contract unambiguous and parol evidence rightly barred even though a total cost, or a cap on cost, for services to be rendered was not included in the contract); *Lewis v. E. Tex. Fin. Co.*, 146 S.W.2d 977, 979–80 (Tex. 1941) (finding a lease for land was unambiguous and thus that the trial court erred in allowing parol evidence).

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

191. *Ward*, 2002 WL 253789, at *1–2 (emphasis added) (citing *First Victoria Nat’l Bank v. Briones*, 788 S.W.2d 632, 635 (Tex. App.—Corpus Christi 1990, writ denied); *Patterson v. Patterson*, 679 S.W.2d 621, 624 (Tex. App.—San Antonio 1984, no writ); *Warren Bros. Co. v. A.A.A. Pipe Cleaning Co.*, 601 S.W.2d 436, 438–39 (Tex. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.)).

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).

193. *Bahr v. Kohr*, 980 S.W.2d 723 (Tex. App.—San Antonio 1998, no pet.).

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[.]”¹⁹⁹

On appeal, the Bahrs argued that parol evidence should be proscribed, and the *Kobr* wife should not be able to use parol evidence to establish the questioned property as her separate, citing *Massey v. Massey*.²⁰⁰ 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.”²⁰¹ However, the *Babr v. Kobr* 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.²⁰² 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.²⁰³

Likewise, the San Antonio court distinguished the *Babr* matter from *Henry*

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.)); *Babr*, 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 *Babr*, 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. *Babr*, 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 *Babr*, 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. Evans*²⁰⁴ 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. Kohr* 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.*

207. *Carter v. Carter*, 736 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1987, no writ).

208. *Peterson v. Peterson*, 595 S.W.2d 889 (Tex. App.—Austin 1980, writ dismissed 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 dismissed 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.²¹⁴ 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.²¹⁵

A more recent holding, also recognizing the propriety of parol evidence, is the aforementioned case of *Stearns v. Martens*.²¹⁶ The *Stearns* case involved a company, Stearns Pools and Spas, that husband had founded prior to marriage.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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.²²⁰ Prior to his deployment, husband and wife signed a stock transfer agreement and husband thereby

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.*

216. *Stearns v. Martens*, 476 S.W.3d 541, 548 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("[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." (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*, 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.))).

217. *Id.* at 545.

218. *Id.*

219. *See id.* at 547–48 (implying 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]²²² hereby sells all of [Jim’s] Stock of [Stearns Pools] to [Lisa]²²³ 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;

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.

231. *Id.* (citations omitted) (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*, 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.).

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.”²³³ 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”²³⁴ thereby incapable of creating an irrebuttable presumption of separate property²³⁵ and holding “parol evidence is admissible regarding the marital-property issue.”²³⁶

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.²³⁷ 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.”²³⁸ 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”²³⁹ 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*.²⁴⁰ 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 WL 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).

237. *Stearns*, 476 S.W.3d at 547–48.

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.”).

240. *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968).

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.²⁴¹ 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.²⁴²

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.²⁴³ 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*,²⁴⁴ 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,”²⁴⁵ 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.²⁴⁶

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.”²⁴⁷ *Messer v. Johnson* also references like holdings by the Texas Supreme Court, such as *McKivett v. McKivett*.²⁴⁸

241. This is the essence of the *Messer v. Johnson* significant recital. *Id.* at 909 (emphasis added).

242. *Id.*

243. See *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).

247. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

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.*

first.²⁵⁷ 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).

264. *Jackson v. Hernandez*, 285 S.W.2d 184 (Tex. 1955).

265. *Id.* at 189.

266. *Reaves v. Reaves*, No. 11-11-00026-CV, 2012 WL 3799668, at *6 (Tex. App.—Eastland Aug. 31, 2012, no pet.) (mem. op.).

Raymond Court²⁶⁷ as well as mentioned in *Reaves*.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.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*.”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.’”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.²⁷² Karen owned this annuity prior to her marriage to her current husband, John, whom she was now divorcing.²⁷³ During her marriage to John, Karen suffered debilitating physical pain and was on a regiment of high intensity pain relievers, including Vicodin.²⁷⁴

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

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)).

268. See *Reaves*, 2012 WL 3799668, at *6 (holding parol evidence is not allowed to contradict any express recitals in a deed).

269. *Id.*

270. *Id.* (emphasis in original) (citing *Bahr v. Kohr*, 980 S.W.2d 723, 727 (Tex. App.—San Antonio 1998, no pet).

271. *Id.* (alterations in original) (citing *Jackson v. Hernandez*, 285 S.W.2d 184, 186 (Tex. 1955)).

272. *Id.* at *1.

273. *Id.*

274. See *id.* at *2 (describing the medications Karen’s doctors prescribed her for pain management).

275. *Id.*

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.²⁷⁶

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.²⁷⁷ 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:²⁷⁸

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.”²⁷⁹

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’s²⁸⁰ advice in the transaction, but when asked about the meaning of “undivided interest,”

276. *Id.* at *2–3.

277. *Id.* at *6.

278. *See id.* (pointing to a “separate property recital” in the instrument of conveyance).

279. *Id.* (alterations in original).

280. Dwinell is the financial planner to whom Karen was introduced by John. *Id.* at *1.

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.

282. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

283. The following cases cite *Raymond* with regard to holdings that address the gift presumption and the use of evidence to rebut same, as follows: *Stearns v. Martens*, 476 S.W. 3d 541, 548 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *In re Marriage of Moncey*, 404 S.W.3d 701, 709 (Tex. App.—Texarkana 2013, no pet.); *In re Marriage of Skarda*, 345 S.W.3d 665, 671 (Tex. App.—Amarillo 2011, no pet.); *Magness v. Magness*, 241 S.W.3d 910, 912–13 (Tex. App.—Dallas 2007, pet. denied). The *Magness* case, is the most oft cited of the *Raymond* progeny, and the cases that cite it while addressing the gift presumption and the use of evidence to rebut same, as follows: *Cardenas v. Cardenas*, No. 13–16–00064–CV, 2017 WL 1089683, at *2 (Tex. App.—Corpus Christi Mar. 23, 2017, no pet.) (mem. op.); *Pearson v. Pearson*, No. 03–13–00802–CV, 2016 WL 240683, at *5 (Tex. App.—Austin Jan. 15, 2016, no pet.) (mem. op.); *In the Interest of C.E.W.*, No. 05–14–00459–CV, 2015 WL 5099336, at *2 (Tex. App.—Dallas Aug. 31, 2015, pet. denied) (mem. op.); *Gonzalez-Limon v. Gonzalez*, No. 04–14–00011–CV, 2014 WL 6475800, at *1 (Tex. App.—San Antonio Nov. 19, 2014, no pet.) (mem. op.); *Clay v. Clay*, No. 05–13–00624–CV, 2014 WL 2993812, at *2 (Tex. App.—Dallas June 30, 2014, no pet.) (mem. op.); *Mora v. Mora*, No. 04–12–00638–CV, 2014 WL 769441, at *7 (Tex. App.—San Antonio Feb. 26, 2014, no pet.) (mem. op.); *Motley v. Motley*, 390 S.W.3d 689, 693–94 (Tex. App.—Dallas 2012, no pet.); *Zoller v. Zoller*, No. 01–09–00992–CV,

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 refinance 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

2011 WL 1587358, at *2 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.); *Rosensky v. Rosensky*, No. 01-09-01029-CV, 2011 WL 743164, at *4 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.); *Ussery v. Ussery*, No. 03-10-00183-CV, 2010 WL 4910049, at *2 (Tex. App.—Austin Dec. 2, 2010, no pet.) (mem. op.).

284. *Magness v. Magness*, 241 S.W.3d 910 (Tex. App.—Dallas 2007, pet. denied).

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.²⁸⁸

The *Magness* case has been often used to deny a spouse the right to present evidence of intent. However, in the *Moncey* case, the outcome was somewhat different. *In re Marriage of Moncey*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 . . .²⁹⁰

The foregoing was a deed conveying twenty-three-acres and a home from a trust corpus to husband and wife.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.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.²⁹³ Husband tried to invoke the *Raymond/Magness* rule to exclude parol evidence in a third party transaction where both spouses were named in the deed conveyancing the disputed property.²⁹⁴ The appellate court recognizes the *Raymond/Magness* rule for interspousal transactions, but in apparent keeping with the dicta of *Raymond*, determines that the parol evidence rule does not apply to third party transactions wherein parol evidence can be admitted.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.²⁹⁶

288. *Id.*

289. *In re Marriage of Moncey*, 404 S.W.3d 701 (Tex. App.—Texarkana 2013, no pet.).

290. *Id.* at 707.

291. *Id.*

292. *Id.* at 709.

293. *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).

294. *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))).

295. *Id.* at 710–11.

296. *See id.* at 714 (concluding wife established the property was her separate property).

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).

304. *Cardenas v. Cardenas*, No. 13–16–00064–CV, 2017 WL 1089683 (Tex. App.—Corpus Christi Mar. 23, 2017, no pet.) (mem. op.).

305. *Id.* at *2.

306. *Id.*

307. *See generally id.* (admitting, although not explicitly, parol evidence at trial).

308. *Id.*

*Pearson v. Pearson*³⁰⁹ is a rather complicated³¹⁰ stock transfer case in which parol evidence of intent was allowed. While there is not heavy reliance on the *Magness* case, it is mentioned.³¹¹ 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.³¹² 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[,]”³¹³ 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.³¹⁴

In re C.E.W.,³¹⁵ is a case which properly applies the exception to the bar on parol evidence when a significant recital exists.³¹⁶ 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.”³¹⁷ 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.³¹⁸ 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.³¹⁹

309. *Pearson v. Pearson*, No. 03–13–00802–CV, 2016 WL 240683 (Tex. App.—Austin Jan. 15, 2016, no pet.) (mem. op.).

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 . . .”).

315. *In re C.E.W.*, No. 05–14–00459–CV, 2015 WL 5099336 (Tex. App.—Dallas Aug. 31, 2015, pet. denied) (mem. op.).

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*,³²⁰ husband and wife purchased property after marriage and some three months after the purchase husband as grantor conveyed his interest to wife.³²¹ 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.³²² The reason for conveyance did not encompass fraud, accident or mistake and thus could not be used to rebut the gift presumption.³²³

Clay v. Clay,³²⁴ 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.³²⁵ 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."³²⁶ The appellate court upheld the trial court's decision because it was reasonable to conclude that husband failed to show fraud, accident, or mistake.³²⁷ 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.³²⁸ 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.

320. *Gonzalez-Limon v. Gonzalez*, No. 04-14-00011-CV, 2014 WL 6475800 (Tex. App.—San Antonio Nov. 19, 2014, no pet.) (mem. op.).

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.)).

324. *Clay v. Clay*, No. 05-13-00624-CV, 2014 WL 2993812 (Tex. App.—Dallas June 30, 2014, pet. denied) (mem. op.).

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,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 (1/2) undivided community interest in and to’ the property.”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.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.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*,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.³³⁴ The wife testified that she did not make a gift to her husband and she did not know that by virtue of the refinance 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.³³⁵ Nonetheless, the appellate court confirmed the decision of the trial court recognizing that the trial court judged the credibility of witnesses.³³⁶ At least it appears in *Motley* that the

329. *Mora v. Mora*, No. 04–12–00638–CV, 2014 WL 769441 (Tex. App.—San Antonio Feb. 26, 2014, no pet.) (mem. op.).

330. *Id.* at *7.

331. *Id.*

332. *Id.* at *8 (emphasis added).

333. *Motley v. Motley*, 390 S.W.3d 689 (Tex. App.—Dallas 2012, no pet.).

334. *Id.* at 691, 693.

335. *Id.* at 693.

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))).

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.

337. *Zoller v. Zoller*, No. 01-09-00992-CV, 2011 WL 1587358 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.) (mem. op.).

338. "This is not your father's Oldsmobile[!]" See generally *Oldsmobile: Victim of Its Own Brand*, SLATE (Dec. 13, 2000, 2:31 PM), <https://slate.com/business/2000/12/oldsmobile-victim-of-its-own-brand.html> [<https://perma.cc/V8M4-W567>] (highlighting an Oldsmobile advertising campaign).

339. *Zoller*, 2011 WL 1587358, at *2.

340. *Id.*

341. See *id.* ("The very fact that [husband]'s father agreed to and received consideration in exchange for the Mercury, however, established that it was not given as a gift." (citing *Magness*, 241 S.W.3d at 912)).

342. *Rosensky v. Rosensky*, No. 01-09-01029-CV, 2011 WL 743164 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.).

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*³⁴⁷ 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. Steczkowski³⁴⁸ 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.³⁴⁹

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."³⁵⁰ 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.³⁵¹

347. *Ussery v. Ussery*, No. 03–10–00183–CV, 2010 WL 4910049 (Tex. App.—Austin Dec. 2, 2010, no pet.) (mem. op.).

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.