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Note: Equitable Distribution: Approaches to Apportionment

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Note

EQUITABLE DISTRIBUTION: APPROACHES TO APPORTIONMENT

I. INTRODUCTION

Until 1983, West Virginia followed a “title theory” of property distribution upon termination of marriage.¹ Under that theory, property was distributed to the party holding title prior to the divorce regardless of the source of funds used to purchase such property. It was not within the court’s discretion to distribute property titled to one spouse unless it could be shown that the property was held in constructive trust.² However, the distribution of marital property upon divorce was radically altered by the 1983 decision of the West Virginia Supreme Court of Appeals in LaRue v. LaRue.³ The court construed the West Virginia Code to allow equitable distribution of marital property and so joined forty-three states and the District of Columbia which have adopted, either judicially or statutorily, the principle of equitable distribution.⁴ West Virginia adopted equitable distribution legislation in the 1984 session.⁵

Statutory language defines marital property as property acquired during marriage regardless of how title is held. Property acquired by gift or inheritance, property excluded by valid agreement, property acquired in exchange for property acquired before marriage, and the increase in value during the marriage of property acquired before marriage usually are classified as separate or nonmarital property. The West Virginia statute distinguishes an increase in value of separate property due to expenditure of marital funds or as a result of marital efforts, which is considered to be marital property, from an increase in value of property due to factors such as inflation, which is considered to be nonmarital property.⁶

¹ Comment, LaRue v. LaRue: Equitable Distribution of Marital Assets Finally Available in West Virginia, 86 W. Va. L. Rev. 251 (1983).
³ LaRue, 304 S.E.2d 312.
⁶ W. VA. CODE § 48-2-1(c)(1) (Supp. 1984) provides:
“Marital property” means:
All property and earnings acquired by either spouse during a marriage, ... whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of co-ownership such as joint tenancy or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership. ...
Under LaRue, the courts have power to equitably divide only the net assets within the marital estate. LaRue, however, excludes from the definition of net assets property acquired prior to marriage or property obtained during the marriage by way of gifts from third parties or inheritance.\(^7\) Thus, the court’s definition of net assets closely approximates the statutory definition of marital property, while the exclusions are analogous to separate property.\(^8\)

The statutes or judicial decisions permitting equitable distribution vary widely from jurisdiction to jurisdiction. Those providing for distribution of marital property generally approach distribution in a three-phase process: (1) determination of which property is subject to equitable distribution; (2) valuation of property subject to distribution; and (3) distribution of the property which has been classified and valued.\(^9\)

With the passage of equitable distribution legislation and with the minimal guidelines provided by LaRue, West Virginia courts are faced with resolving questions arising from an analysis of these three phases. This Note will address the determination of the character of property purchased with both marital and separate funds, the apportionment of marital and nonmarital interests in a single asset, and the apportionment of marital and nonmarital interests in separate property which has increased in value during the marriage.

II. Determination of Character of Property Acquired With Both Marital and Separate Funds

A. Characterization of Funds: Three Approaches

Two examples serve to illustrate the problem with distribution when property is acquired with a combination of funds. In the first example, the husband accumulates substantial savings prior to the marriage and upon marriage uses those funds as a down payment on the marital home which is subsequently paid for from marital assets. The second example poses the same problem in a slightly different context, with the purchase of the property occurring prior to marriage. Here, the wife purchases a home prior to marriage, paying the down payment and mortgage payments. After marriage, the mortgage payments are made from marital funds and marital efforts increase the value of this separately acquired property.

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\(^7\) LaRue, 304 S.E.2d at 321.
\(^8\) W. Va. Code § 48-2-1(c)(2) (Supp. 1984) further defines "marital property" as: The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage.
Generally, courts have taken one of three approaches when confronted with the problem of distributing property which has characteristics of both separate and marital property. All three are derived from community property principles. The first approach is source of funds. Under this approach, the marital interest is determined by finding the ratio of marital and separate investment in the property.\(^\text{10}\) The second approach, inception of title, characterizes property as of the date title is first acquired without considering the use of marital funds to pay for or improve separate property.\(^\text{11}\) While in some inception of title states reimbursement to the marital estate is allowed for any amount paid for separate property from marital assets, in other states, no reimbursement is allowed.\(^\text{12}\) Transmutation is the third approach. Under this doctrine, property changes character from separate to marital when actual intent to transmute is shown.\(^\text{13}\)

1. Source of Funds Rule

Maine applied the source of funds rule in *Tibbetts v. Tibbetts*.\(^\text{14}\) Mrs. Tibbetts invested $5000 of her separate property in real estate held in joint tenancy with her husband. The $5000 was only a portion of the purchase price. The Maine Supreme Court determined that property acquired with part marital and part nonmarital funds does not necessarily become nonmarital property.\(^\text{15}\) The characterization of property would depend on the source of each contribution as payments were made and acquisition was not to be fixed on the date that legal obligation to purchase was created, but rather was to be recognized as the on-going process of making payment for property. Interpreting the “acquired in exchange for” statutory provision,\(^\text{16}\) the court ruled that property is nonmarital only to the extent it is acquired in exchange for property acquired prior to marriage. The court said that since “a single item of property may be to some extent nonmarital and the remainder marital . . . [t]he divorce court must, therefore, separate marital and nonmarital property by tracing from the evidence adduced the contributions each may


\(^{13}\) *Tibbetts*, 406 A.2d at 75.

\(^{14}\) *Id.* at 70.

\(^{15}\) *Id.*

have made to the acquisition of a particular item." The court indicated that such a finding was in keeping with a theory of partnership in marriage. Accordingly, the marital estate was entitled to a proportionate share in the value of property where its equity interest was partially acquired by marital funds.

In 1983, the same court adopted the source of funds rule. In *Hall v. Hall*, the source of funds was traced to determine the marital interest in separate property improved with marital funds. The marital share, according to the *Hall* court, is the amount by which the marital funds enhanced the value of the property, not simply the amount spent on improvements. The court reached this result even though the state statute specifically provides that "the increase in value of property acquired prior to marriage" remains separate.

A similar result was obtained earlier in Maryland in *Harper v. Harper*. There, however, the court did not specify whether the amount of increased value or the amount spent was the marital investment. Reasoning that the Maryland statute indicated no legislative preference for classification of property as marital, the court rejected both the inception of title theory and the transmutation theory. Because the statute actually set forth an exclusive list of nonmarital property, the court found the legislature intended that certain property be exempt from equitable distribution reasoning that transmuting property would deprive a spouse of nonmarital property contrary to that legislative intent.

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18 Id. at 76. Equity interest is usually defined as the market value of the house less the outstanding principal balance on the loan. In other words, it typically consists of the down payment, the total principal payments on the loan, and the appreciation. See Comment, *The Division of the Family Residence Acquired With a Mixture of Separate and Community Funds*, 70 CALIF. L. REV. 1263, 1268 n.29 (1982).
19 Hall, 462 A.2d 1179.
21 294 Md. 54, 448 A.2d 916 (1982) (Husband personally built the marital home on the land, at a cost of $21,000. Wife's name was on the mortgage, however, husband made all payments and paid all expenses for upkeep and repair. Property was titled solely in husband's name. At the time of divorce, an outstanding indebtedness of $8,300 remained on the property which was valued at $65,500.). See also Schweizer v. Schweizer, 55 Md. App. 373, 462 A.2d 562 (1983), where property acquired after the marriage by a corporation of which the husband was sole stockholder was distributed to the husband in liquidation proceedings. The court found acquisition of this property to be directly traceable to the stock which was property acquired prior to the marriage; therefore, it was nonmarital property. However, there were payments to be made after the property was conveyed to husband. While most payments were derived from rental payments (marital property) from the property, the evidence indicated that some portions of those payments may have come from marital funds; thus, the court remedied for determination in accord with *Harper* whether the source of each payment was nonmarital property or property directly traceable to separate property. The source of each payment rather than the time when legal or equitable title is obtained determines whether property is marital or separate.
22 294 Md. at 79, 448 A.2d at 929; MD. CTS. AND JUD. PROC. CODE ANN. § 3-6A-01(e) (1974 & 1984 Repl. Vol.) (providing that "[m]arital property" is all property, however titled, acquired by either or both spouses during their marriage. It does not include property acquired prior to the mar-
Other states apportion marital and nonmarital interests in property but do not label the process as a source of funds approach. A Kentucky court, in Brandenburg v. Brandenburg, held that property owned by the husband at the date of marriage, and on which payments were made after marriage from marital funds was neither totally marital nor totally nonmarital. Rather, a portion of the property was marital and a portion was nonmarital. Building upon the guidelines for apportionment established earlier in Newman v. Newman, the court said:

[T]here is to be established a relationship between the nonmarital contribution and the total contribution, and between the marital contribution and the total contribution. These relationships, reduced to percentages, shall be multiplied by the equity in the property at the time of distribution to establish the value of the nonmarital and marital properties.

Likewise, Arkansas, Minnesota, and New Jersey have adopted apportionment schemes. While Delaware has not adopted the source of funds rule, the Delaware Supreme Court has suggested that, in an appropriate case, the source of funds/apportionment rule would be used. In Preston v. Preston, the Supreme Court of Utah held that where almost one-half of the total cost of construction of a recreational cabin came from the husband's sale of assets he owned prior to the marriage, the husband should be given credit for his contribution "together

riage, property acquired by inheritance or gift from a third party, or property excluded by valid agreement or property directly traceable to any of these sources.

24 597 S.W.2d 137 (Ky. Ct. App. 1980).
25 617 S.W.2d at 872.
26 Arkansas' statute, Ark. STAT. ANN. § 34-1214 (1983), presumes equal division unless the court finds it inequitable. Under the statute separate property is to be returned to the owner unless the court makes some other equitable division. Failure to return separate property requires the court to state its basis in writing. Property acquired after marriage is presumed to be marital property. In Potter v. Potter, the court held that the husband owned a separate interest in the marital home and the lot upon which it was built. This amount was directly traceable to the proceeds of the sale of separate property owned prior to the marriage. 655 S.W.2d 382 (Ark. 1983).
27 Minn. Stat. § 518.58 (1980) creates a presumption that property acquired after marriage is marital property. The nonmarital property definition follows the general pattern of most property distribution statutes. However, in 1981, the Minnesota court adopted an apportionment approach similar to that which the Kentucky court used prior to Brandenburg. In Schmitz v. Schmitz, 309 N.W.2d 748 (Minn. 1981), the court found that the parties' property was part marital and part nonmarital where the downpayment was made with funds from the sale of a nonmarital asset.
28 The New Jersey court held that the wife was entitled to share in the amount of "mortgage principal pay-down" during the marriage on a house owned by the husband prior to marriage. Apportionment of the separate interest can be inferred from this holding. Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1032 (1982).
30 646 P.2d 705 (Utah 1982).
with the proportion of appreciation attributable thereto” before the value of the cabin could be divided.\textsuperscript{31}

Still other states that provide by statute for division of all property also allow or mandate consideration of certain factors in fixing the nature and value of the property to be assigned.\textsuperscript{32} One such factor in Connecticut is the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates.\textsuperscript{33} The North Dakota court, in \textit{Midboe v. Midboe}, also provided a list of factors for courts to consider in distribution of property.\textsuperscript{34}

2. Inception of Title

Missouri has adopted an inception of title approach. In \textit{In re Marriage of Cain},\textsuperscript{35} the Missouri court held that property to which title had been acquired prior to marriage was not marital property within the meaning of Missouri law.\textsuperscript{36} The court

\textsuperscript{31} Id. at 706.

\textsuperscript{32} Seven states allow distribution of all property. These states are Connecticut, Hawaii, Massachusetts, North Dakota, South Dakota, Oregon, and Utah.

\textsuperscript{33} Conn. Gen. Stat. § 46b-81(a) (1984). See Sweet v. Sweet, 190 Conn. 657, 462 A.2d 1031 (1983) (Though husband claimed he made a “major contribution” to acquisition and preservation of family residence, the court found no abuse of discretion where trial court awarded wife over 90% of the family assets. Whether husband made major contribution is a question of fact.); North v. North, 183 Conn. 35, 438 A.2d 807 (1983) (Wife was awarded husband’s interest in jointly owned marital home valued at $90,000 with $30,000 equity. Husband was required to pay certain joint liabilities. He argued that the judgment as to property in effect, was an assignment of his inheritance. The court found that such assignment was authorized under the statute.); Anderson v. Anderson, 191 Conn. 46, 463 A.2d 578 (1983) (Husband purchased land for family home prior to marriage. A home was built on land one year before marriage. Husband supervised and completely paid for construction of home. The court found no contribution by the wife. Title was conveyed to the wife when free from encumbrances. Income from husband’s business carried all expenses to upkeep. Husband suffered heart attack and business started to experience financial difficulties. At time of divorce husband earned only $262/week. Wife was able to sustain gainful employment as nationally known harpist. Court ordered the home sold. Husband received 60% and wife 40%. The supreme court found ample evidence to support awards.); Bieluch v. Bieluch, 190 Conn. 813, 462 A.2d 1060 (1983) (Husband asserted that court erred in its property award because it traced plaintiff’s contribution toward acquisition and upkeep of family home without considering that plaintiff’s contributions were a gift to husband. The court is entitled to take into account cash contributions.).

\textsuperscript{34} 303 N.W.2d 548, 552 (N.D. 1981) (“[A]lges of the parties to the marriage; their earning abilities; the duration of and conduct during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned . . . and whether it was accumulated or acquired before or after the marriage . . . .” are to be considered in distribution of property). See also Briese v. Briese, 325 N.W.2d 245 (N.D. 1982) (Property divided equally, husband appeals. Wife’s role as homemaker and in raising eight children was significant contribution to marriage entitled to consideration in determining equitable division.).

\textsuperscript{35} 536 S.W.2d 866 (Mo. 1976).

\textsuperscript{36} Mo. Rev. Stat. § 452.330 (1981) reads in pertinent part: “1. In a proceeding for . . . dissolution of marriage . . . the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors, including:
rejected the wife’s argument that source of funds should apply and held that the fact some payments on the mortgage were made with money which was marital property did not affect the status of separate property. Basing its holding on real property law, the court concluded that the fact the property was subject to a mortgage during marriage did not per se alter its status as separate property.\textsuperscript{37}

Noting the concern that most marriages would have little property to divide if, indeed, acquisition was construed to require all encumbrances to be removed, the Missouri court construed “acquired” to relate to the inception of title. The court implied that the marital estate may have a claim against a spouse’s separate estate for the amount of its contribution and that such claim may be enforceable by imposing a lien on the separate property.\textsuperscript{38}

In the same year, in \textit{Stark v. Stark},\textsuperscript{39} the same court found that a mortgage on separate property taken as a joint obligation does not alter the character of the separate property unless there is an intent to create a new estate. Thus, since the state statute excluded from marital property “the increase in value of property acquired prior to marriage,” the court held that farm property increased in value by improvements during the marriage remained separate property. Nevertheless, the fact marital funds were used to enhance the value of separate property was a factor to consider in the division phase of the distribution process.\textsuperscript{40}

3. Transmutation

In Illinois, where the statute is similar to Missouri’s,\textsuperscript{41} courts have recognized the principle of transmutation. The courts have found transmutation whenever there has been a commingling of marital and nonmarital assets. Thus, in \textit{In re Marriage of Amato} where nonmarital and marital funds were both used to build the marital home, the residence was characterized as marital.\textsuperscript{42} In \textit{Klingberg v. Klingberg}, placing

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37} A small balance remained due at the time of divorce. Wife argued that since husband’s separate funds had paid only $4,480.33 or 15% of the acquired interest, and marital funds 85% of the acquired interest, the husband should have received 15% and the remaining 85% should be divided equally. Wife’s argument was based on California authorities declaring a pro tanto interest in such property in the ratio that payments on the purchase price made with community funds bears to payments made with separate funds. 536 S.W.2d 866 n.1, \textit{citing}, In Re Marriage of Jafeman, 29 Cal. App. 3d 244, 257, 105 Cal. Rptr. 483, 491 (1972).
\item \textsuperscript{38} 536 S.W.2d at 867.
\item \textsuperscript{39} 539 S.W.2d 779 (Mo. Ct. App. 1976).
\item \textsuperscript{40} \textit{Id. at 783. See also}, Jaeger v. Jaeger, 547 S.W.2d 207 (Mo. Ct. App. 1977) (Exchange provision does not apply where funds derived from both separate and marital property are used to purchase new property during marriage. The separate funds are commingled with marital assets, which indicates an intent to contribute property to the marital estate).
\item \textsuperscript{41} ILL. REV. STAT. ch. 40, § 503 (Supp. 1982).
\item \textsuperscript{42} 80 Ill. App. 3d 395, 399 N.E.2d 1018 (1980).
\end{itemize}
\end{footnotesize}
nonmarital funds into a joint checking account used by both spouses was evidence of intent to treat the property as marital.\textsuperscript{43} In \textit{In re Marriage of Schriner},\textsuperscript{44} property purchased prior to marriage and paid for entirely with separate funds was transmuted to marital property. The court reasoned that the fact the wife helped select the home to be purchased manifested an intent to transmute the property and that the unrestricted use of property by both parties for their mutual benefit resulted in the transmutation. Further, the court held that the husband could not be compensated for his savings acquired prior to marriage since the parties had added to that amount during the marriage. Commingling of the nonmarital with marital savings had transmuted the funds.\textsuperscript{45}

Similarly, Illinois courts have applied transmutation principles where separate property has been increased in value by improvements or otherwise. \textit{In re Marriage of Smith}\textsuperscript{46} involved improvements made with marital funds to the property acquired by the husband in settlement of his mother's estate. The court found an intent to transmute, reasoning that any contribution to either marital or nonmarital property could be considered to be marital property. According to the court, the relevant statute indicated a legislative preference for characterization of property as marital and an implied unitary concept of property. The court held that legislative intent would best be served by presuming intent of the contributors to treat commingled property as marital. The failure to segregate marital property was, therefore, fatal to any claim on nonmarital property. In other words, failure to segregate gave rise to the rebuttable presumption of transmutation regardless of the status of title.\textsuperscript{47}

Applying its holding, the court found that although the husband could trace nonmarital funds to the purchase of the marital home, the home was entirely marital property. This was based on the following facts: the home was purchased after marriage, title was held jointly, marital funds were used to make mortgage payments, and no evidence was presented to rebut the presumption of a gift to the marriage. Since the property had to be classified as either wholly marital or wholly nonmarital, the home was considered marital property despite the tracing of nonmarital funds to the mortgage payments. Once found to be marital property, nonmarital contribution could be considered in the divisional stage.\textsuperscript{48}

The court further held that stock certificates held in the names of both spouses were presumed "in fact" to be marital property even where one spouse had paid

\textsuperscript{43} 68 Ill. App. 3d 513, 386 N.E.2d 517 (1979).
\textsuperscript{44} 88 Ill. App. 3d 380, 410 N.E.2d 572 (1980).
\textsuperscript{45} \textit{But see} Swanson v. Swanson, 100 Ill. App. 3d 824, 427 N.E.2d 574 (1981), \textit{modified}, 103 Ill. App. 3d 498, 431 N.E.2d 690 (1982) (Property purchased by father and son as joint tenants prior to son's marriage was not transmuted to marital property when upon a subsequent mortgage son's wife became potentially liable on the note securing the mortgage.).
\textsuperscript{46} 86 Ill. 2d 518, 427 N.E.2d 1239 (1981).
\textsuperscript{47} \textit{Id.} at 528, 427 N.E.2d at 1245.
\textsuperscript{48} \textit{Id.} at 528, 427 N.E.2d at 1245.
for all of it out of nonmarital funds, although stock splits and stock dividends are to be treated merely as economic appreciation. A rebuttable presumption of marital property was not created where property acquired was the result of economic appreciation alone.

Alaska, like Illinois, seems to adhere to transmutational reasoning although the term has not been used.49

B. Increase in Value

1. Characterization of Property

Some acts simply provide that the increase in value of separate property remains separate.50 Others provide that a distinction should be made between increases due to economic factors and increases due to efforts of the parties or expenditures of marital funds.51 Typically, no problem arises when the increase is unquestionably the result of economic or inflationary factors alone. However, when the increase is due to expenditure of marital funds or due to efforts of the parties, views of how to characterize the increase vary. Under the traditional community property system, an increase in value resulting from contributions of either spouse in the form of labor, industry, or property is deemed to be community property.52 However, this has not been the view in many equitable distribution jurisdictions, where the increase seldom has been deemed to be marital property.

An example of this unusual type of holding is a New York Supreme Court’s decision in Wood v. Wood.53 That court found that an appreciation in separate assets during the marriage constitutes marital property to the extent that such appreciation is due to the direct or indirect contributions or efforts of the nontitled spouse. The court further concluded that the wife’s homemaker services should be considered "indirect" contributions to the appreciation in value of separate assets.54 The Illinois court found intent to transmute where nonmarital and marital property were commingled. Consequently, property was deemed to be marital and the contribution of separate property was a factor which could increase the marital share. By analogy, in Illinois as in New York, nonmonetary contributions which increase the value also would be treated as factors to consider in awarding the property interests.55 In Maryland, the Harper56 court emphasized that monetary and

54 Id. at 1077, 465 N.Y.S.2d at 476.
55 86 Ill. 2d 518, 427 N.E.2d 1239.
56 294 Md. 54, 448 A.2d 916.
nonmonetary contributions are to be considered only after the trial court has characterized the property as either marital or nonmarital. Thus, under the Maryland statutory scheme, a determination of what constitutes marital property is not dependent solely upon consideration of the factors enumerated in the state statute.\footnote{MD. CTS. AND JUD. PROC. CODE ANN. § 3-6A-05 (1974 & 1984 Repl. Vol.).}

The Maine court analyzed the situation differently. Despite the fact Maine’s statute excepts increase in value of property acquired prior to marriage from the marital property definition, the court, in Hall, held that capital improvements to separate property made with marital funds are not excepted.\footnote{462 A.2d 1179.} Building upon the ongoing definition of “acquire” it had adopted in Tibbetts, the court said that improvements to the house were not acquired until after marriage; therefore, they were marital property.\footnote{406 A.2d at 70.} The same rationale should apply for improvements or increase in value due to marital efforts since the increase is not acquired until after marriage. Thus, arguably, the increase is in fact marital property and is not merely a factor for consideration in augmenting an award of marital property.

Interestingly, in Minnesota, where statutorily any increase in the value of nonmarital property during marriage remains nonmarital, the courts have found improvements to separate property due to marital efforts to “constitute” marital property.\footnote{See Faus v. Faus, 319 N.W.2d 408 (Minn. 1982) (making a distinction between an increase due to economic factors and an increase due to efforts).} Florida has rejected the idea that a wife’s contribution to the improvement of assets owned by the husband prior to marriage is a proper basis upon which to award an ownership interest.\footnote{Horton v. Horton, 443 So.2d 1386 (Fla. 1983).} The West Virginia statute defined the increase in value of separate property due to “work performed by either or both of the parties during the marriage” as marital property.\footnote{W. VA. CODE § 48-2-1(c)(2) (emphasis added).} The base property remains a separate interest.\footnote{W. VA. CODE § 48-2-1(d)(1) (Supp. 1984).} Under the distribution section of the statute, marital property which increases in value as a result of a party’s efforts through preservation, maintenance, or other nonmonetary contribution is to be figured into the distribution computation.\footnote{W. VA. CODE § 48-2-32(C)(2).} Therefore, it appears that work performed on separate property encompasses preservation, maintenance, “and other forms of nonmonetary contribution” for purposes of distribution. The West Virginia court in \textit{Patterson v. Patterson}\footnote{277 S.E.2d 709.} labelled this contribution as the “sweat equity” doctrine.

In \textit{Patterson}, the wife’s uncompensated services in the husband’s business led to profits, which in turn were used to purchase realty titled only in the husband’s name. The court found that, under a theory of constructive trust, the wife had made an economic contribution to the purchase of the property acquired and was
entitled to an interest in it, albeit not half. Likewise, uncompensated labor which unquestionably enhances the value of separate property should be considered economic contribution and the laboring spouse should receive some equity. Moreover, the value of the increase rather than the value of the services should be the balancing factor. By using such an approach, as Justice Neely suggested in his concurrence, courts can creatively avail themselves of the opportunities that equitable distribution presents. The West Virginia statute has incorporated the Patterson concept in a somewhat of a confusing manner.

2. What are Marital Efforts?

Usually statutes that refer to marital efforts do not define the term; thus, it is left to the courts to determine its meaning. It seems, however, that courts have been reluctant to recognize any effort beyond direct efforts. Courts are likely to find indirect efforts too tenuous and are likely to attribute a nondirect effort increase in value to economic factors.

In Schweizer v. Schweizer, a 1983 Maryland case, increase in value of separate stock titled in the husband’s name was held not to be marital property. There the wife argued that her husband’s efforts in giving opinions, sharing in business discussions, and voting on corporate matters were marital efforts. The court disagreed saying that the increase in stock value due to the husband’s board position was too tenuous and speculative, and furthermore, the efforts were given as quid pro quo for director fees which were used for marital expenditures. It is unclear whether the wife would have been entitled to an interest if the husband’s efforts had been more direct and if no fees had been paid.

The Schweizer case raises the question whether marital efforts of one spouse will inure to the benefit of the other. Courts generally refuse to allow marital, nonmonetary contributions by the owning spouse to give the nonowning spouse an interest even where he or she has participated in the marriage as a parent, homemaker, or wage earner.

Arguably, under any statute which distinguishes an increase in value of separate property due to spousal efforts from an increase due to economic factors, an increase due to spousal efforts would be shared as marital property, thereby increasing the marital pool. The West Virginia statute provides that an increase in value of separate property due to “work performed by either or both of the parties during the marriage” is marital property. Clearly, the increase in value of separate property resulting from either the owning or nonowning spouse’s efforts should become part of the marital pool subject to division.

66 304 S.E.2d at 330 (Neely, J., concurring).
III. APPORTIONMENT: GUIDELINES AND FORMULAE

Once a court determines which approach it will use to characterize the property, it must then apply a formula to apportion the property. In implementing the source of funds approach, various methods have been suggested by courts and legal commentators.

A. The Tibbetts Guidelines

In Maine, when a single asset is apportioned, the judge is mandated to return the separate portion to the owner.69 What, then, is the separate or marital portion? Though the Tibbetts court did not provide a formula for division, it did give some guidelines for apportionment. The court held that the marital estate is entitled to a proportionate share of the equity interest where the property was partially acquired by marital funds. The source of funds rule awards to each share "a pro tanto interest in the ratio that the payments on the purchase price made with community funds bears to the payments made with separate funds. The community interest is determined by comparing the ratio of community and separate investment in the property."

Accordingly, when property is acquired on credit, its characterization depends upon the nature of the agreement extending the credit. If the credit agreement is not the separate and sole obligation of one spouse, the credit funds are marital property and that portion of the property acquired in exchange becomes marital property. Similarly, that portion acquired on credit and not paid for at the time of the divorce also is marital property.70 Under some circumstances a court may require that nonmarital property be separated by sale or partition, or by the imposition of a lien. However, the court suggested that this need not be done in every case. Instead, in setting apart the nonmarital property, a court could use other assets to make a just division without imposing a lien or ordering sale. This is especially important where property is income-producing and the sale of such property would be disadvantageous to either one or both parties. However, this

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69 406 A.2d at 78.
70 406 A.2d at 76. An example of the tracing and apportioning that is to be done under its source of funds theory was given in Tibbetts:
For $20,000 a husband and wife acquire a parcel of real estate. A down payment of $5,000 is contributed by the wife from property acquired prior to the marriage and the remaining $15,000 is financed through credit. One-quarter of that parcel is the wife's nonmarital property.
If the property appreciates in value to $30,000 and the parties contribute an additional $5,000 of marital property toward its purchase, the following division would be required. One-quarter of the value of the parcel of $7,500 is nonmarital property to be set apart to the wife. Assuming a remaining mortgage of $10,000, since $10,000 in total has been contributed toward purchase of the parcel valued initially at $20,000, there will remain an equity of $12,500 of marital property to be divided.

406 A.2d at 75 n.5.
process of division is entirely within the court’s discretion as long as the disposition is just and equitable.\textsuperscript{72}

B. \textit{Improvements or Increase in Value: Harper/Hall}

In \textit{Harper}, the Maryland court said:

To the extent that the property and the residence are marital, their value is subject to equitable distribution. When making an equitable distribution of the value of the marital property, the contributions, monetary and nonmonetary of each spouse, the value of the property interests of each spouse, and the effort expended by each spouse in accumulating the marital property, among other things, shall be considered.\textsuperscript{73}

The Maryland guidelines are vague at best. It is difficult to determine whether the cost of the improvements or the increase in value is considered to be the marital investment.

In \textit{Hall}, however, the Maine court was more specific. That court found that the marital share is the amount by which the use of marital funds has enhanced the value of the property, not simply the cost of improvements.\textsuperscript{74}

C. \textit{The Brandenburg Formula}

In \textit{Brandenburg v. Brandenburg},\textsuperscript{75} the Kentucky court proposed a formula for apportioning marital and nonmarital interests in a single asset. The formula would divide the value of the nonmarital contribution by the value of the total contribution and then multiply this amount by the equity to determine the nonmarital property. Conversely, the marital property would equal the value of the marital contribution divided by the total contribution multiplied by the equity.\textsuperscript{76}

\begin{footnotesize}
\begin{enumerate}
\item According to the court, the difference "is significant only where the property has so appreciated that the value of the portion acquired on credit exceeds the amount of the credit itself." \textit{Id}. at 77.
\item Phrased in terms of the source of funds rule, the purchase price is $20,000; the ratio that payments on the purchase price made with community funds bears to payments with separate funds is 15,000:5,000 (assuming that the $15,000 mortgage is marital property) or 3:1. The interest in the appreciated value, $30,000, would bear the same ratio, or 22,500:7,500. The separate interest, $7,500, is set apart, the unpaid mortgage balance (marital property) is subtracted, and the remainder is divided. Hence, value less separate property equals marital property; marital property less unpaid mortgage equals marital property subject to division.
\item 448 A.2d at 930.
\item 462 A.2d at 1182.
\item 617 S.W.2d 871 (Ky. App. 1981).
\item \textit{Id}. at 872. The formula would be:
\[ \frac{\text{nmc/tc} \times e}{\text{mp}} = \text{nm} \]
\[ \frac{\text{mc/tc} \times e}{\text{mp}} = \text{mp} \]

where: Nonmarital property is \text{nm} and marital property is \text{mp}.
\end{enumerate}
\end{footnotesize}
Commentators Potter and Ewing\textsuperscript{77} criticized the formula as unjustly favoring the nonmarital interest when applied to mortgaged property that has appreciated in value during the marriage. The authors argue that this happened because, under the \textit{Brandenburg} formula, marital contribution is deemed to be only the amount of mortgage principal reduction occurring during the marriage when the marital estate has the additional expense of paying for the mortgage interest, taxes, repairs, and other expenses. They suggest that a more equitable approach would be to include the entire loan as a marital contribution and require that the marital estate discharge the balance.\textsuperscript{78}

Nonmarital contribution (nmc) is defined as the equity in the property at the time of marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from such nonmarital funds.

Marital contribution (mc) is defined as the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal, plus the value of all improvements made to the property after marriage from other than nonmarital funds.

Total contribution (tc) is defined as the sum of nonmarital and marital contributions.

Equity (e) is defined as the equity in the property at the time of distribution. This may be either at the date of the decree of dissolution, or, if the property has been sold prior thereto and the proceeds may be properly traced, then the date of the sale shall be the time at which the equity is computed.


\textsuperscript{78} Citing the facts from \textit{Brandenburg}, Potter and Ewing made their point:

At the time of the Brandenburgs' marriage in 1968 the husband owned a piece of property having a value of $15,900 with an outstanding mortgage balance of $14,642.20, creating a net value of $1,257.80 [15,900 - 14,642.20 = 1257.80]. The parties kept the property after marriage and made the mortgage payments from marital funds. The parties sold the property in 1975 for $32,500 at which time the mortgage balance had been reduced to $13,471.20 to create a net value of $19,028.80 [32,500 - 13,471.20 = 19,028.80]. In \textit{Brandenburg} the Court was required to apportion the proceeds into marital and non-marital interests. The Court employed a formula that allocated the proceeds by comparing the marital and non-marital contributions to the "equity." Under the formula, the marital contribution was deemed to be only the amount of mortgage principal reduction occurring during the marriage. Therefore, the non-marital contribution was [1257.80] (the equity at marriage) and the marital contribution was $1,175.00 [14,642.20 - 13,471.20 = 1171] (the principal reduction during marriage). Since these amounts were about equal, the $19,028.80 proceeds after payment of the mortgage were divided $9,815.25: $9,213.55 (51.6\%: 48.4\%). This division greatly favored the non-marital share [value - mtg = equity to be divided].

The formula leverages the non-marital share at the expense of the marital estate. For example, the property as a whole appreciated approximately 100\% in 10 years [from 15,900 to 32,500]. Because there was a mortgage on the property the "equity" appreciated approximately 800\%. Under the court's formula, the non-marital share had an 800\% increase without any expenditure of non-marital funds during the marriage. The marital share of the equity was similarly leveraged. However, the marital estate had the great additional expense of the monthly interest payments on the mortgage. If the mortgage rate was 6\%, the marital estate contributed in excess of $8,000.00 in interest payments over the 10 year period. This figure does not include the taxes, repairs, etc. that the marital estate made to maintain the home. When these factors are considered it becomes apparent that the real estate, as an investment, was a losing proposition for the marital estate and a bonanza for the non-marital share.
D. Indebtedness

In Schweizer, the Maryland court addressed the issue of when marital indebtedness should be considered. There, both parties agreed that debt taken during the marriage must be considered in granting a monetary award as an adjustment of the equities and rights of the parties. However, the parties differed as to when in the statutory equitable distribution process this consideration should take place. The husband argued that the debt should be accounted for in the second stage—valuation. Under the husband’s theory, the marital assets minus liabilities would equal the value of the marital property to be divided. The wife, however, contended that marital debts had nothing to do with value and should be used only in considering the fairness of distribution.

The court held the source of funds rule should be applicable in determining the value of marital property acquired during the marriage as well as in determining the character of the property. Therefore, according to the court,

if one of the spouses takes on debt during the marriage to purchase marital property and that debt or a portion thereof is outstanding at the time a monetary award is being considered, then the value of the marital property eligible for equitable distribution must be adjusted downward to reflect the unpaid liability. The value of marital property has not been acquired and therefore, is immune from distribution, to the extent that the source of funds employed to finance the property is an outstanding debt, irrespective of how debt is titled or secured.  

The court expressed its concern that any other approach would lead to possible transmutation of nonmarital property into marital or would put emphasis again on title rather than source. The approach chosen, however, limited monetary award to the equity the parties have built up in marital property after paying off any debts taken on to acquire marital property. While this court held the value of marital property represented by outstanding marital debt not to have been “acquired,” as construed in Harper, for purposes of equitable distribution, it qualified the rule by requiring that the “marital debt must be directly traceable to acquisition of marital property.”

While the Maine court in Tibbetts considered the nature of the credit agreement dispositive, the Maryland court characterized such a consideration as a return to the touchstone of title. In Tibbetts, the court held that a credit obligation, not

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[T]he $32,500.00 sales price would have been split $2,570.97:$29,939.03 ($1,257.80:$14,642.20) with the marital share having to pay the entire $13,471.20 mortgage for a final division of $2,570.97:$16,457.83 (13.5%:86.5%). Such a division gives the person paying the interest on the mortgage the benefit of its leverage. This Potter/Ewing formula appears to be the same as that used by the Maine court in Tibbetts, assuming that the $16,457.83 is the marital share subject to division between the parties. Id. at 15.  
79 55 Md. App. at 373, 462 A.2d at 562.  
80 Id. at 378, 462 A.2d at 565.  
81 Id.
shown to be the separate and sole obligation of one spouse, is presumed to be marital property. The portion of the property acquired in exchange for marital credit which, at the time of divorce has not yet been fully paid for with either marital or nonmarital funds is therefore considered marital property.\(^2\) Thus, in Maine, when the debt is found to be marital property, it is deducted from the total value of the marital property before the remainder is divided, just as in Maryland.

Under *LaRue*, which provides for adjustment for indebtedness by adjusting value, the West Virginia court appears to follow the Maryland reasoning.\(^3\)

E. *Florida*

In Florida, it was held that where one spouse furnished part of the consideration for property held in tenancy by entirety from separate funds, the court should award to the contributing spouse a special equity in the property equal to one-half the ratio which that spouse's contribution bears to the entire consideration. The court rejected the lower court's holding that the contributing spouse should receive a percentage interest in the property equal to the ratio of the cash down payment to the entire purchase price with the remainder divided equally.\(^4\)

F. *Alternative*

An alternative treatment of the home on dissolution of marriage has been proposed.\(^5\) When a home is not classified entirely as community/marital property, the marital interest should equal the principal payments by the couple plus all appreciation in the value of the home since the date of the marriage. Thus, the marital community is reimbursed for all contributions to the equity in the house and would benefit from the appreciation from the time of the marriage or the purchase of the house, whichever came later.\(^6\) The author of the proposal acknowledged that this rule has yet to be adopted by any jurisdiction.

IV. **Further Considerations in Equitable Distribution: Presumption of Gift**

At common law, where one person bought land and took title in the name

\(^2\) 406 A.2d at 77.  
\(^3\) 304 S.E.2d at 321.  
\(^4\) Landay v. Landay, 429 So. 2d 1197, 1199 (Fla. 1983). *But see* McClung v. McClung, 427 So. 2d 350 (Fla. 1983) (expressly approving the husband's separate interest in the property in the form of a percentage of the title equal to the ratio which the original contribution of separate property bore to the total acquisitions cost; decided earlier the same month as *Landay*).  
\(^6\) Id.
of another person, the transaction was presumed a gift only if the actual purchaser was under a moral obligation to support the person in whose name title was taken. Where no obligation to support existed, there arose the presumption of a resulting trust in favor of the person whose funds were spent. Because the husband had the legal obligation to support the wife, a gift was presumed where the husband took title in the wife’s name.

As this area of law evolved, it became necessary for courts to address the question whether a gift was similarly presumed where property was purchased with the wife’s funds, title being taken in the husband’s name. West Virginia chose to acknowledge the presumption as early as 1878 in McGinnis v. Curry\(^7\) where title was taken in the husband’s name with the wife’s consent.

The presumption, however, was rebuttable.\(^8\) Proof of lack of consent or knowledge was one method of rebuttal,\(^9\) and the burden of rebutting the presumption was on the person asserting trust.\(^10\) Where title was taken without the wife’s consent, a resulting trust was presumed.\(^11\)

The statutory embodiment of the common law presumption provided:

Where one spouse purchases real or personal property and pays for the same, but takes title in the name of the other spouse, such transaction shall, in the absence of evidence of a contrary intention, be presumed to be a gift by the spouse so purchasing to the spouse in whose name title is taken.\(^12\)

Though West Virginia case law concerning presumption of gift between spouses is sparse, the authority available continued to support the presumption.\(^13\) In 1981, the court again grappled with questions arising from the presumption in Patterson v. Patterson.\(^14\) There, the court struggled to reconcile the conflicting concepts of constructive trust and presumption of gift and tenaciously defended the foundation upon which the presumption was premised although, in dicta, the court indicated a need for change.\(^15\) Finding the two concepts compatible, the court held that overcoming the presumption was a prerequisite to finding a constructive trust. According to the Patterson court, a presumption of gift could be rebutted by a clear showing of unjust enrichment.\(^16\)

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\(^7\) 13 W. Va. 29 (1878).
\(^8\) Crumrine v. Crumrine, 50 W. Va. 226, 40 S.E. 341 (1901).
\(^12\) W. Va. Code § 48-3-10 (1931).
\(^13\) Davis v. Davis, 137 W. Va. 213, 70 S.E. 2d 889 (1952) (wife’s conveyance of her one-half interest in property previously held jointly was presumed gift); Finance Co. v. Leedy, 112 W. Va. 17, 163 S.E. 626 (1932) (money advanced for improvements of the property of the other spouse is presumed gift even though no title was involved).
\(^14\) 277 S.E. 2d 709.
\(^15\) “[W]e must retain the presumption of gift in order to avoid difficult third party claims.” 277 S.E. 2d at 716.
The majority of the *LaRue* court again refused to change West Virginia's doctrine of presumption of gift. However, in a perceptive concurring opinion, Justice Neely suggested a clarification and limitation of the doctrine:

Our narrow construction that forbade equitable distribution of property acquired by joint efforts included a somewhat perverse presumption that any transfer of property between married persons is a gift. That presumption, obviously, confounds all human experience; it is far more reasonable to presume that the titling of marital property in the name of one spouse is an expedience, and that mutual benefit is intended. The spouse in whose name the property is titled presumably holds the property as if a trustee for the other spouse. It follows, then, that upon the termination of a marriage the circumstances that justified titular ownership in the name of one spouse cease to exist, and the implicit expectations upon which the transfer was made are entirely confounded.97

Justice Neely characterized the marriage as a fiduciary relationship where the spouse was to act in a fiduciary capacity in the management of the family surplus. He suggested that upon termination of the fiduciary relationship, the fiduciary should return the spouse's interest in property titled to the fiduciary. Further, Justice Neely found that the statute plainly authorized courts to restore property to the spouse who originally earned or contributed to the assets.98

The West Virginia Legislature, in 1984, did qualify and limit the presumption of gift between spouses by inserting a proviso that the presumption of gift does not apply where courts are determining which property is marital property subject to division.99 Instead, as the statute now reads, a gift must be affirmatively proved, presumably by the spouse asserting gift.100

The question still remains, however, whether affirmative proof is also required where property is titled jointly. The statute speaks only in terms of property taken in the name of the other spouse. If the statute does not apply to property titled jointly, neither does the proviso, and a common law presumption of gift may still be in effect. Although the statute arguably applies to property held in joint tenancy, clarification by the legislature would eliminate any question.

In 1984, the West Virginia Supreme Court of Appeals, in *Dodd v. Hinton*,101 determined that the presumption of gift under West Virginia law is applicable with respect to real property titled jointly; however, the basis of the holding is unclear. The court merely quoted the statute and went on to rely on old case law and common law presumptions to support its findings. In *Dodd*, the court held that where a husband purchases real property and titles the property to his wife and himself jointly, it is presumed that he intended a gift to his wife and that she should receive

97 304 S.E.2d at 335.
98 Id. at 336.
100 Id.
full legal and equitable title to her half interest, absent clear evidence to the contrary.\textsuperscript{102}

In \textit{Dodd} the couple was married in February 1979. Both owned their own homes, but they purchased a new marital residence in May 1979. The new residence was jointly titled. Savings, together with a jointly-executed demand note and a deed of trust, were used to acquire the new home. Payments during 1979 and 1980 were made from the husband’s separate funds. In March 1980, the husband sold his home, deposited the proceeds in the parties’ joint checking account and paid the balance of the new-home loan with these funds. The wife filed for divorce in May 1980. Because the husband had paid the entire amount of the loan, he sought partition and sale of the property asking for his one-half interest plus one-half of the wife’s interest. The court found that the one-half interest of the wife had been gifted, therefore, the wife held both legal and equitable title. The court refused to acknowledge principles of equitable distribution, explaining that they had not been asserted in the divorce proceedings.\textsuperscript{103}

\textit{Dodd} acccents the inherent unfairness of presuming gift of a one-half interest when property is held in joint tenancy. It also illustrates the need for express abroga- tion of such presumptions in the statute.

The presumption is unfair because, although rebuttable, it is almost impossible to overcome under the \textit{Dodd} standard, where the husband was required to show fraud, duress, undue influence, or other such grounds. Once the husband in \textit{Dodd} proved that his funds paid the entire obligation on the property, he had shown unjust enrichment, the only requirement under \textit{Patterson}. Under the \textit{Patterson} standard, the first step is to rebut the presumption of a gift by showing unjust enrich- ment; a second step is to show entitlement to constructive trust by evidence of fraud, duress, or undue influence. In short, the burden of rebutting presumption of gift under \textit{Patterson} should not have been elevated to the burden for finding constructive trust under \textit{Dodd}. If fraud, duress, or undue influence is required to rebut the presumption of gift, the presumption will rarely be rebutted where title is taken in joint tenancy. The presumption is unfair also because it takes separate property and converts it to a gift of one-half interest with equitable and legal title in the other spouse.

A better rule would be to apply a source of funds approach. Under the source of funds approach, with the \textit{Dodd} facts, the proceeds from the husband’s property sold during the marriage would retain its separate status because it was acquired in exchange for separate property. Furthermore, comingling these funds with marital funds in a joint account would not defeat a claim of separate property so long as the source of funds could be traced. Both the funds used to enhance the value of the joint marital account and the funds used to reduce the indebtedness of the marital property would remain separate.

\textsuperscript{102} Id.
\textsuperscript{103} Id.
The *Dodd* case also highlights the flaw in the 1984 West Virginia statute. Under section 48-2-1(c)(2), if marital funds were added to a separate checking account, the marital funds would retain their identity.\(^{104}\) Where, however, as in *Dodd*, separate funds are added to a marital checking account, the whole account becomes marital property. This is equivalent to either presumption of gift or transmutation. The unfairness is apparent.

West Virginia seems to have taken an enlightened step forward by declaring the presumption of gift void in an action where the court is required to determine what property constitutes marital property and to equitably divide that property. However, the legislature needs to further clarify the joint tenancy presumption of gift. Allowing any question of such a presumption to exist forces West Virginia to remain wedded to the principle of inviolability of title.\(^{105}\)

V. Conclusion

Although West Virginia now has an equitable distribution statute, it has not solved all of the problems raised by the court in *LaRue*. While the 1984 statute attempts to clarify the definition of marital property, it fails to clarify the issue of property purchased with both separate and marital funds. The statute indicates that marital property added to separate property remains marital but that separate property added to marital property becomes essentially marital property. This inconsistency could be remedied by either statutory reform or judicial construction providing for classification of property in line with a source of funds, apportionment approach. Because the legislature presumably intended that only marital property be divided, it is imperative that this classification be accomplished at the initial phase of the distribution process. Portions of property classified as separate should be returned to the owner spouse with the remainder going into the marital pool for division. The presumption of equal division should arise only with respect to the property classified as marital, and this presumption should be explicitly stated in the statute. Further, augmenting and diminishing factors should be considered only in the third or division phase of the distribution process.

Courts should begin now to determine which source of funds approach allows the most equitable and the most realistic division of property. Moreover, a provision for consistent use of a source of funds approach in allocating property in a divorce proceeding is essential to a statute which currently allows judges to divide property equally but does not require the division to be equitable.

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\(^{105}\) See generally Moldave, *The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds*, 70 CATH. L. REV. 1263, 1278-79 (1982).