

Unlikely Partners: The Marital Home and the Concept of Separate Property

by

Brett R. Turner†

I. Overview

In states that differentiate between community or marital property and separate or nonmarital property, should the marital home always constitute marital property? No community property or equitable distribution statute presently in force contains special rules of classification for classifying the marital home. In all American jurisdictions, the marital home is classified under the exact same rules of law which apply to other assets. Yet a minority of decisions continues to suggest that marital homes are somehow special.

This article will examine the current state of American matrimonial law on classification and division of the marital home. It will conclude that the general rule set forth in the case law is correct. The marital home should not always constitute marital property; rather, it should be classified under the same set of rules that apply to other assets.¹ Treating the marital home as marital property will not result in a better division of the marital home between divorcing spouses. It will instead provide a strong incentive for spouses who own separate property to *avoid* investing that property in the marital home—a result which will harm all families, married as well as divorced. When all consequences

† Senior Attorney, National Legal Research Group, Charlottesville, VA. Author, *EQUITABLE DISTRIBUTION OF PROPERTY* (3d ed. 2005); Co-Author (with Laura W. Morgan), *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2001); Editor, *Divorce Litigation*; Editor, *Equitable Distribution Journal*.

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¹ See generally parts II-IV *infra*.

are properly considered, a better policy result is reached by rejecting special rules of classification aimed only at the marital home.

By contrast, when the court *divides* the parties' property, there is a clear basis for giving special treatment to the marital home.² The marital home should normally be awarded to the spouse who has the greatest need for it, including particularly a spouse with custody of minor children. In many cases, this result can be accomplished without any change in the overall division, simply by awarding the home to the proper spouse as part of that spouse's share of the overall marital estate. When the marital estate is not large enough to permit this remedy, a deferred monetary award or an award of exclusive use until the children are emancipated are reasonable remedies. Through use of these measures, it is possible to accommodate special needs for post-divorce possession of the marital home, while encouraging the spouses to invest separate property in ways that benefit the entire family.

This article will also examine several trends in recent case law applying normal principles of classification in the context of the marital home. It will examine how courts have responded to the increased frequency with which the marital home is refinanced, and will suggest that court should consider treating payments of interest on a secured debt as a contribution to the acquisition to the underlying property.

II. Separate Property: Nature and Purpose

Before considering the marital home in particular, it is important to restate several fundamental principles of equitable distribution law. The doctrine of equitable distribution provides that upon divorce, each spouse has a vested right to receive an equitable share of the value created through the active efforts of the spouses during the marriage.³ The definition of equitable is discretionary with the trial court, but there is general agreement upon three principles. First, when determining what division is

² See generally part V *infra*.

³ BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 1:1 (3d ed. 2005).

equitable, the court generally ignores legal title.⁴ Second, under the marital partnership theory, marital property should be divided in approximate proportion to the parties' respective monetary and nonmonetary contributions to the marriage.⁵ Third, the court must also consider factors outside the limits of the marital partnership theory, including most importantly the respective financial needs of the spouses⁶ and, in some states, marital misconduct.⁷

Nothing in the definition of equitable distribution requires *dual classification*—a formal system for classifying assets as marital or separate property. In fact, a significant minority of states have no classification system at all.⁸ In theory, the trial court in these *all-property* states can divide any value owned by the parties, regardless of how and when acquired.⁹ In practice, these states often make an unequal division of value that was not created through the active efforts of the spouses.¹⁰

⁴ *Id.* § 5:6.

⁵ *Id.* § 8:1 at 765-66.

⁶ *Id.* §§ 8:15-8:20.

⁷ *Id.* §§ 8:23-8:26.

⁸ There are fifteen all-property states: Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, Washington and Wyoming. *Id.* § 2:8 at 81 n.7.

⁹ *Id.* § 2:8.

¹⁰ *E.g., id.* § 8:7 (citing long lists of cases from all-property jurisdictions making an unequal division of premarital assets, gifts, inheritances, and other assets which would be separate property in a dual-classification jurisdiction). “In short, there are few proponents of true hotchpot systems, in which no distinction is made between marital and separate property. The real question is whether the distinction is to be drawn by the application of property-classification rules, or through the exercise of trial-court discretion in allocating property from the hotchpot.” AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION § 4.03 comment a (Westlaw 2005) (hereinafter cited as ALI PRINCIPLES)

For representative cases from all-property states stressing that value acquired outside of the marital partnership should be treated differently from value created by the marital partnership, see, e.g., *Williams v. Massa*, 728 N.E.2d 932 (Mass. 2000) (trial court did not err in awarding to husband all of the assets he acquired by gift, where the assets were kept separate during the marriage, the wife did not contribute to their growth in value, and wife was not the sole homemaker); *In re Marriage of Foster*, 102 P.3d 16, 19 (2004) (“[our] precedents counsel us to beware of simply halving preacquired or gifted prop-

At first glance, the all-property system seems to have powerful advantages. It permits the trial court to reach any result that could be reached in a dual-classification state, simply by making a 100-0 unequal division of value acquired outside of the marriage. In addition, because the judge is free to reach other results when equity requires, the all-property system is materially more flexible than the dual-classification system. Finally, and most importantly, courts and parties in all-property states do not have to spend time, effort and money dealing with the troublesome process of classifying property as marital or separate.

Yet despite these substantial advantages, the all-property system is demonstrably the minority rule. A significant majority of jurisdictions *do* distinguish between marital and separate property.¹¹ Moreover, the all-property system is a minority rule in decline, for there is a visible trend in all-property states to adopt dual-classification principles by court decision.¹² Clearly, the dual-classification system must offer advantages powerful enough to offset the greater flexibility and reduced administra-

erty between the spouses”; error to award husband “any of the value of [wife’s premarital] property as it was prior to the marriage”; husband’s interest was limited to an equitable share of the appreciation during the marriage); *France v. France*, 902 P.2d 701, 704 (Wyo. 1995) (“[t]he property which is subject to division under our statute consists of property which is the product of the marital union and was acquired during the course of the marriage by the joint efforts of the parties”).

¹¹ There are 29 dual-classification equitable distribution jurisdictions in the United States: Alaska, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Georgia, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia and Wisconsin. TURNER, *supra* note 3, § 2:9 at 83 n.3. There are seven dual-classification community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Texas. *Id.*

¹² *Id.* § 2:10 at 85-86. For example, Nebraska and Utah have adopted dual-classification systems by court decision, even though the concept of separate property is not expressly recognized by statute. *Meints v. Meints*, 608 N.W.2d 564 (Neb. 2000); *Mortenson v. Mortenson*, 760 P.2d 304 (Utah 1988). Oregon likewise follows dual-classification principles at a level not strictly required by the language of the controlling statute. *See In re Marriage of Kunze*, 92 P.3d 100, 108 (Or. 2004).

tive expense of the all-property system.¹³ What exactly are those advantages? Why have so many states voluntarily embraced a property division system which is less flexible and more expensive to administer?

To begin with, while the all-property system is simpler and more flexible, it is woefully inconsistent. The court is given very broad discretion to reach many different potential results—and then given no guidance as to how that discretion should be applied to the facts. As a result, property divisions under the all-property system vary greatly from case to case and from judge to judge.¹⁴ Cases with similar fact patterns are often treated very differently. This inconsistency contradicts the common-sense notion that a fair system for dividing property should reach similar results in similar cases.

Moreover, beneath the sheer inconsistency of the all-property system lies a deeper problem. There is broad agreement among judges, lawyers and litigants that a fairly negotiated property division is always preferable to a property division imposed by a court.¹⁵ Negotiated settlements lead to greatly reduced attorney's fees for the parties and greatly reduced court costs for the judicial system. They create less acrimony between the parties, and therefore inflict less collateral harm upon third persons, including mostly importantly minor children. They are also materially less likely to generate future litigation.

Because of these advantages, it is obviously good policy to adopt rules of law which encourage the parties to settle. While many factors influence settlement, two of the most important are the difference between the parties' positions and the predictabil-

¹³ See Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 156 (1989) ("saving the nonmarital/marital property dichotomy involves a legislative value judgment that the administrative cost of the system is worth the values it preserves").

¹⁴ See Mary Moers Wenig, *The Marital Property Law of Connecticut*, 1990 WIS. L. REV. 807, 868-71 (noting that property division under Connecticut's all-property system is highly dependent upon the personal policies of the individual trial judges); *Johnston v. Johnston*, 815 P.2d 1145, 1149 (Mont. 1991) (Trieweiler, J., concurring) ("It has been said that consistency is the hobgoblin of small minds. However, it certainly has a place in jurisprudence. If so, it would not be apparent to the average lawyer in Montana who tries to reconcile our two most recent decisions on the division of marital property").

¹⁵ See generally TURNER, *supra* note 3, § 3:13.

ity of the end result. Where the parties' positions are far apart, and the law is so uncertain that each can cite precedent in support of his or her position, the case is unlike to settle.¹⁶ Under the all-property system, the trial court has so much discretion in dividing property, and is given so little guidance in applying that discretion, that settlement of property division cases becomes very difficult.¹⁷

The dual-classification system, by contrast, is much more predictable. By depriving the trial court of power to divide value acquired outside of the marriage, the law ensures that such value will *predictably* be awarded to the owning spouse. When value acquired outside of the marriage is removed from the case, there is a substantial reduction in the need for highly unequal division. This reduction in itself tends to diminish the difference between the parties' contending positions and make the final property division easier to predict in advance. Moreover, once the need for unequal divisions drops to a certain level, it is possible to create even more predictability by adopting some form of preference or presumption in favor of an equal division of the marital estate.

¹⁶ "Reason would seem to dictate, and experience in other states supports the proposition, that the greater the uncertainty in the law, the more likely it is that disputes will be litigated instead of settled." Sally Burnett Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. REV. 2017, 2025 (1998).

¹⁷ See *Schumaker v. Schumaker*, 439 N.W.2d 815, 818 (S.D. 1989) (South Dakota's willingness to permit division of property not created by the marital partnership "might well be fostering litigation that ordinarily would not result in our state, if this Court were more definitive").

Courts and attorneys in all-property states have been slow to recognize the effect of the all-property system upon settlement rates, since most writers practice in only one system, and are therefore not in a position to compare settlement rates. The statement in the text is based partly upon occasional statements such as the one in *Schumaker*, partly upon discussions with a wide variety of attorneys practicing under both types of systems, and partly upon my own experience as a research attorney working with the law in many different jurisdictions.

It is also worth noting that attorneys who practice in dual-classification states with very broad definitions of marital property have specifically complained that a broad definition of marital property makes settlement of cases harder. See *infra* note 40 and accompanying text. The ultimate broad definition of marital property is the all-property system, which does not recognize the concept of separate property at all.

In dual-classification jurisdictions, the trend over the past twenty years has been toward a more equal division of a more precisely-defined marital estate.¹⁸ The practical effect of this trend has been to increase greatly the predictability of the result, and therefore to encourage negotiated settlements. The benefits of greater consistency and predictability, and particularly the sense that cases settle more quickly if the court and parties are given more guidance as to how property should be divided, are the key factors responsible for the popularity of dual-classification principles.

Property division is not the only area of family law that has experienced a trend toward consistency and predictability. Another example, even stronger in some ways, is the law of child support. The amount of child support was traditionally left to the broad discretion of the trial court. This approach gave the judge great flexibility, but resulted in awards that were hard to predict, highly inconsistent between obligors with similar incomes, and difficult to enforce.¹⁹ To address these problems, the federal government effectively required the states to adopt child support guidelines.²⁰ Child support guidelines, like dual-classification equitable distribution systems, are less flexible and more expensive to administer than their primary alternatives. But support awards under the guidelines are more consistent and easier to enforce, and the number of settled child support cases has materially increased.²¹ Once again, a system that provides the trial court with reasonable guidance has reached better results in

¹⁸ TURNER, *supra* note 3, § 1:5.

¹⁹ See generally LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.01 (2005).

²⁰ See generally *id.* § 1.02. Federal law actually provides only that adoption of guidelines is a condition upon certain federal funding, but since no state is willing to lose federal funds, the net effect has been to compel adoption of guidelines. *Id.*

²¹ See generally *id.* § 1.02[f]; Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 242 (1991) (guidelines “have reduced the number of cases litigated; those that the parties do not settle are litigated more quickly and with less expense”). The statement in the text is also based to some extent upon my personal experience discussing child support issues with practitioners in many states under pre-guideline and post-guideline law.

practice than one that gives the trial court broad, unfettered discretion.

While dual-classification equitable distribution and child support guidelines are less flexible than their primary alternatives, they are not by any means inflexible systems. Guidelines are now required, but the guidelines are only presumptive. The trial court still retains discretion to reach a result that differs from the guideline amount, so long as the result is justified by specific findings.²² The concept of separate property is less flexible—most states do not permit any division of separate property²³—but the definition of separate property is narrower than the definition of marital property, and the trial court retains complete discretion in dividing the marital property.²⁴ Because most cases have more marital property than separate property, the amount of property subject to the court's discretion remains large enough to permit equitable results to be reached. In essence, the flexibility lost through recognition of separate property was rarely if ever needed to reach a fair result on the facts, so that the marginal cost of the lost flexibility (reduced predictability and fewer negotiated settlements) greatly exceeded its benefit.

Since predictability and consistency are the key policy advantages of the dual-classification system, dual-classification systems should generally be implemented so that these advantages are maximized. If a state legislature takes the trouble to define separate property, it has necessarily determined that the additional predictability which results from recognition of separate property justifies the not-inconsiderable expense of applying the definition to the facts.²⁵ If the courts then define separate property in an uneven or inconsistent manner, however, the advantage is lost. In fact, the state is left with all of the added administrative difficulty of the dual-classification system, and

²² *Id.* § 4.04.

²³ TURNER, *supra* note 3, § 8.33. A few states permit division of separate property where extraordinary financial need is present, but this power is used only in extreme situations. *Id.*

²⁴ *Id.* § 8.01.

²⁵ See Levy, *supra* note 13, at 156 (“saving the nonmarital/marital property dichotomy involves a legislative value judgment that the administrative cost of the system is worth the values it preserves”).

none of the system's benefits. The dual-classification property division system produces coherent results only if separate property is defined and administered in a consistent and predictable manner.

The nature of separate property as a device to ensure consistency, as a form of equitable distribution guideline, is not always recognized. It is sometimes suggested, directly or indirectly, that separate property is a selfish concept, invented and advocated so that more property can be divided according to legal title, to the benefit of supporting spouses (predominantly male), at the expense of dependent spouses (generally female). Some reported decisions contain overtones of this suggestion, such as case law from New York and West Virginia suggesting that marital property should always be construed broadly.²⁶

An across-the-board preference for a broad definition of marital property makes no more sense than an across-the-board preference for the largest possible guideline amount of child support. In both situations, the legislature has determined the proper balance point between property or income that should or should not be divided or awarded, a determination that should be construed neutrally, without any preconceived preference for either side of the debate.²⁷ The practical effect of a preference for broadness, in both situations, is to increase the amount of value subject to the trial court's discretion, and therefore to reduce the consistency and predictability of the end result—a result inconsistent with the purpose behind the decision to adopt separate property or child support guidelines in the first place.

To restate the conclusions reached so far, it is not necessary or inevitable that separate property exist at all. Separate property has nevertheless been invented, and indeed is the strong current trend, because the benefits of recognizing it exceed the costs. In particular, systems that leave the entire result to the trial court's discretion tend to encourage litigation and reduce

²⁶ Price v. Price, 503 N.E.2d 684, 687 (N.Y. 1986) (marital property should be “construed *broadly*,” while separate property should be “construed *narrowly*”) (emphasis by the court); see also Graham v. Graham, 195 W. Va. 343, 465 S.E.2d 614, 616 (W. Va.1995) (“The Legislature has expressed a marked preference for characterizing property as ‘marital property’”).

²⁷ This theme is developed in more detail in TURNER, *supra* note 3, § 5:5 at 260-64.

settlement. By contrast, systems that provide the trial court with a modest degree of guidance tend to make everyone's job easier. The courts are not left to invent a field of law on their own, the attorneys can give meaningful guidance to their clients, and the clients reach more negotiated settlements. These powerful benefits, which have result in a strong nationwide move toward adoption of dual-classification principles, are attributable mainly to the recognition of separate property. Separate property is therefore not an evil or selfish creature. On the contrary, its presence adds to the law an element of structure and predictability which ultimately benefits everyone.

III. The Marital Home As Separate Property

Keeping in mind the purposes for which separate property was created, this article will now review case law from dual-classification states on classification of the marital home. This section begins by considering whether the marital home can *ever* constitute separate property. It then looks at case law setting forth the circumstances under which marital home *is* separate property.

No American jurisdiction holds expressly that the marital home is always marital property. On the contrary, some states have held directly that a separate property home does not become marital property solely because it is used as the family residence.²⁸ In those states which have not considered the issue

²⁸ See *Drahos v. Rens*, 717 P.2d 927, 928 (Ariz. Ct. App. 1985) ("a residence which is separate property does not change its character because it is used as a family home"); *De Liedekerke v. De Liedekerke*, 635 A.2d 339, 342 (D.C. 1993); *Wilson v. Wilson*, 820 So. 2d 761 (Miss. Ct. App. 2002); *Gutierrez v. Bucci*, 827 So. 2d 27, 37 (Miss. Ct. App. 2002) (under *Wilson*, "even when the marital home was purchased during the marriage with funds attributable to one spouse's pre-marital estate, it may retain its non-marital character at least when the joint use is not long-term"); *Gorelik v. Gorelik*, 757 N.Y.S.2d 67, 69 (N.Y. App. Div. 2003) (home used as marital residence during four month marriage did not transmute into marital property); *Burgio v. Burgio*, 717 N.Y.S.2d 769 (N.Y. App. Div. 2000); *Dubord v. Dubord*, 687 A.2d 647 (Me. 1997); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App. 1985); *Goodman v. Goodman*, 760 N.E.2d 72 (Ohio Ct. App. 2001); *Murray v. Murray*, 439 S.E.2d 312 (S.C. Ct. App. 1993); *State ex rel. Chafing v. Halbritter*, 448 S.E.2d 428, 432 (W. Va.1994) ("the terms 'marital property' and 'marital home' are not synonymous").

directly, there is at least one reported case holding on the facts that the marital home is entirely or partly separate property.²⁹

In *Abood v. Abood*, 119 P.3d 980, 991 (Alaska 2005), a concurring opinion argued that there should be a *rebuttable* presumption that separate property is given to the marital estate when subject to *prolonged* family use. *Id.* at 991 (Matthews, J., concurring). The majority expressly refused to reach the issue, but clearly held that family use is only of a series of factors for determining whether the marital home has been given to the marital estate. Thus, under Alaska law, the marital home is not *automatically* marital property.

The marital home is often marital property under Alabama's very broad and unusual statutory family use doctrine. *See infra* note 43. But the family use doctrine is clearly discretionary with the trial court; the court is not required to divide separate property which has been subject to family use. *Ex parte Drummond*, 785 So.2d 358, 362 (Ala. 2000). Also, Alabama's family use doctrine is so broad that it largely swallows the definition of separate property, so that Alabama is functionally an all-property jurisdiction. TURNER, *supra* note 3, appendix A (Alabama section).

²⁹ *See* *Box v. Box*, 851 S.W.2d 437 (Ark. 1993); *In re Marriage of Cochran*, 87 Cal. App. 4th 1050, 104 Cal. Rptr. 2d 920 (2001); *In re Marriage of Campbell*, 599 P.2d 275 (Colo. Ct. App. 1979); *Battaglia v. Battaglia*, 882 A.2d 761, 2005 WL 2149337 (Del. 2005) (unpublished table opinion; text available on Westlaw); *Parenteau v. Parenteau*, 795 So. 2d 1124 (Fla. Dist. Ct. App. 2001); *Thomas v. Thomas*, 377 S.E.2d 666 (Ga. 1989); *Fisher v. Fisher*, 656 P.2d 129 (Idaho 1982); *In re Marriage of Miller*, 595 N.E.2d 1349 (Ill. App. Ct. 1992); *Schoenbachler v. Minyard*, 110 S.W.3d 776 (Ky. 2003); *Brehm v. Brehm*, 762 So.2d 1259 (La. Ct. App. 2000); *Williams v. Williams*, 645 A.2d 1118 (Me. 1994); *Harper v. Harper*, 448 A.2d 916 (Md. 1982); *Korth v. Korth*, 662 N.W.2d 111 (Mich. Ct. App. 2003); *Stageberg v. Stageberg*, 695 N.W.2d 609, 619 (Minn. Ct. App. 2005) ("Because wife successfully traced a nonmarital contribution to the purchase of the homestead, the district court did not err in finding that she had a nonmarital interest"); *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981); *In re Marriage of Herr*, 705 S.W.2d 619 (Mo. Ct. App. 1986); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001) (home which husband brought into marriage would have been partly separate property if husband had proven value of home on date of marriage); *Smith v. Smith*, 623 N.W.2d 705 (Neb. Ct. App. 2001) (error to treat husband's premarital home as marital property, even though home was used as marital residence); *Malmquist v. Malmquist*, 792 P.2d 372 (Nev. 1990); *Lewis v. Lewis*, 775 N.Y.S.2d 387 (N.Y. App. Div. 2004); *Mol v. Mol*, 370 A.2d 509 (N.J. Super. Ct. App. Div. 1977); *Tozer v. Tozer*, 729 N.Y.S.2d 166 (N.Y. App. Div. 2001) (recognizing distinct separate interests for each spouse); *Trego v. Scott*, 961 P.2d 168, 172 (N.M. Ct. App. 1998); *Crocker v. Crocker*, 824 P.2d 1117, 1124 (Okla. 1991); *In re Marriage of Tibbetts*, 52 P.3d 1067 (Or. Ct. App. 2002); *Mackalica v. Mackalica*, 716 A.2d 653, 656 (Pa. Super. Ct. 1998) ("the parties' marital home is wife's separate property"); *Hurley v. Hurley* 610 A.2d 80 (R.I. 1992) (classifying home as separate property; court did not expressly state that home was the marital residence, but no other marital residence was

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A few scattered decisions state that the marital home is always marital property.³⁰ The law cannot be what these decisions say that is, for in each state involved, at least one *other* decision recognizes a separate interest in the marital home on the facts.³¹

There are two different theories of classification under which the marital home will be treated as marital property in a great majority of cases: unitary property and the family use doctrine.

expressly identified in the opinion); *Greene v. Greene*, 569 S.E.2d 393 (S.C. Ct. App. 2002) (husband's premarital residence used as marital home, but husband deliberately kept his premarital property distinct from marital property, using funds from his separate account to maintain home; no transmutation); *Ellis v. Ellis*, 748 S.W.2d 424 (Tenn. 1988); *Gerami v. Gerami*, 666 S.W.2d 241 (Tex. App. 1984); *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993); *Martin v. Martin*, 501 S.E.2d 450 (Va. Ct. App. 1998); *Miller v. Miller*, 428 S.E.2d 547 (W. Va. 1993); *Schwegler v. Schwegler*, 417 N.W.2d 420 (Wis. Ct. App. 1987).

A line of Oklahoma cases before *Crocker* holds that separate property becomes marital property when used as the marital residence. *E.g.*, *Stevenson v. Stevenson*, 680 P.2d 642, 645 (Okla. Ct. App. 1984). *Crocker* recognized a strong separate interest in the marital home, which was separate property because one spouse acquired it in a previous divorce decree between the same two spouses. The court did not attempt to rationalize its holding with prior law suggesting that the owning spouse gave the home to the marriage by permitting the other spouse to live in it. That law strongly discourages any and all forms of separate investment in the marital residence, and *Crocker* was correct to recede from it. But the exact extent of the recession remains unclear.

Taken together, this and the preceding footnote cite at least one case from every American dual-classification jurisdiction.

³⁰ See *Brown v. Brown*, 784 So. 2d 464 (Fla. Dist. Ct. App. 5th Dist. 2001), *review denied*, 797 So. 2d 584 (Fla. 2001) (home built with marital property on 54 acres, husband's separate land became marital property when used as marital residence; error to limit marital interest to only the home and five acres; entire property was marital); *In re Marriage of Marx*, 667 N.E.2d 734 (Ill. App. Ct. 1996) (husband contributed \$20,000 separate property to marital home; proper to find contribution intended as gift to marriage); *Beckham v. Beckham*, 41 S.W.3d 908 (Mo. Ct. App. 2001) (use as marital home was substantial evidence of transmutation); *Grams v. Grams*, 624 N.W.2d 42 (Neb. Ct. App. 2001) (real property became marital when used as marital home, even though property was actually titled in name of husband's business); *McClellan v. McClellan*, 873 S.W.2d 350 (Tenn. Ct. App. 1993).

³¹ See *supra* notes 28-29.

A. Unitary Property

Two states have in the past adopted a rule that made most marital homes marital property. Under the *unitary theory of property*, each asset must be either 100% marital property or 100% separate property; it cannot have partial marital and separate interests.³² Since 100% marital property can still be divided unequally, unitary property holds that an asset is 100% marital property if any significant marital contributions are made to it. It is very rare to find that the parties made no material marital contributions to the marital home, so the practical effect of the unitary property doctrine is to treat the marital home as marital property in every case. But unitary property is not a special rule applied only to the marital home; the exact same rule of classification applies to every other asset.

Unitary property was adopted by name in two states, Illinois and Virginia.³³ In each state, it was repealed within three years after its adoption.³⁴ The courts discovered that very little separate property is actually kept separate and apart from any marital

³² See generally TURNER, *supra* note 3, § 5:20.

³³ See *In re Marriage of Smith*, 427 N.E.2d 1239 (Ill. 1981); *Smoot v. Smoot*, 357 S.E.2d 728 (Va.1987). As discussed in the following note, both of these cases have been superseded by statute.

³⁴ The Illinois statute can be found at 750 ILL. COMP. STAT. ANN. § 5/503(c) (1993). It facially affirms unitary property, but then qualifies it by recognizing a right to equitable reimbursement. The purpose and effect of the right to reimbursement is to recognize marital interests in separate property and separate interests in marital property, thereby overruling the practical effect of unitary property. See generally *In re Marriage Brown*, 469 N.E.2d 612 (Ill. Ct. App. 1984) (describing the amended statute as a legislative rejection of unitary property); James H. Feldman & Charles J. Fleck, *Taming Transmutation: A Guide to Illinois' New Rules on Property Classification and Division Upon Dissolution of Marriage*, 72 ILL. B.J. 336 (1984) (authoritative article by the drafters of the amendment). The application of this oddly indirect statute is summarized in TURNER, *supra* note 3, appendix A (Illinois section). See also 12 MULLER DAVIS & JODY MEYER YAZICI, ILLINOIS PRACTICE OF FAMILY LAW § 5/503 author's note 18.1 (Westlaw 2005) (Illinois reimbursement system is "stupefying in its complexity, highly unpredictable, and therefore productive of litigation").

The Virginia statute, VA. CODE ANN. § 20-107.3(A)(3) (Westlaw 2005), overrules unitary property by expressly recognizing that a single asset can have both marital and separate interests. For an extended discussion of Virginia's experience under unitary property and the problems which led to its repeal, see Brett R. Turner, *Virginia's Equitable Distribution Law: Active Appreciation and*

contribution. In the real world, most separate property is commingled with at least minor amounts of marital property.³⁵ Since unitary property does not permit tracing, the effect of the doctrine was to destroy a great deal of separate property.³⁶ As noted above, when separate property is not recognized predictably and consistently, it becomes very difficult to predict results and settle cases.³⁷ Classification is very predictable under unitary property, but different judges would make different unequal divisions of commingled property in the same fact situations,³⁸ so that the ultimate property division became highly unpredictable.³⁹ As a result, it became difficult for family law practitioners to settle cases.⁴⁰ In both states, family law practitioners organ-

the Source of Funds Rule, 47 WASH. & LEE L. REV. 879 (1990). This article also reprints the available legislative history of the statute.

³⁵ Feldman & Fleck, *supra* note 34, at 337 (“[a]lmost every item of property brought into a marriage, or acquired by gift or inheritance during marriage, requires some expenditure for its preservation during marriage”).

³⁶ See TURNER, *supra* note 3, § 5:20; Turner, *supra* note 34, at 886-89; Feldman & Fleck, *supra* note 34, at 337 (“[t]he statutory protection given to nonmarital property was seriously threatened . . . [unitary property] jeopardized nearly all nonmarital property”); J. Thomas Oldham, *Tracing, Commingling and Transmutation*, 23 FAM. L.Q. 219, 248 (1989) (unitary property “will dramatically undercut the marital property system”).

³⁷ See note *supra* and accompanying text.

³⁸ For representative cases making unequal divisions under unitary property, see, e.g., *Stewart v. Stewart*, 864 So. 2d 934 (Miss. 2003) (approving an 80-20 division in favor of a husband who lost considerable separate property through commingling); *Smoot v. Smoot*, 357 S.E.2d 728 (Va. 1987) (affirming a trial court decision returning to husband his separate property contribution to marital home and equally dividing rest of home).

³⁹ Feldman & Fleck, *supra* note 34, at 337 (criticizing unitary property for “undermining predictability and inviting inconsistent adjudications by poorly guided lower courts”); DAVIS & YAZICI, *supra* note 34, § 5/503, author’s note 18.1 (even under greatly modified version of unitary property now in force in Illinois, “lawyers have a difficult time predicting how cases will be decided”); Virginia State Bar Family Law Section, Report and Recommendations on the Issue of Transmutation/Classification of Property in Equitable Distribution Proceedings (1990), reprinted in Turner, *supra* note 34, at 948, 949 [hereinafter cited as Virginia Report] (criticizing “[i]nconsistent court results with similar fact situations” under Virginia’s unitary property system).

⁴⁰ Virginia Report, *supra* note 39, at 949 (lamenting the “[i]nability to counsel clients on their reasonable property expectations, even in the most simple of equitable distribution cases[,] due to the complete and broad discretion now vested in the trial court” while Virginia followed unitary property); Law-

ized and complained to the legislature, which responded by repealing unitary property. The doctrine is not currently recognized by name in any state; except possibly for Mississippi,⁴¹ all

rence D. Diehl, *Transmutation in Virginia: Are We Drowning in a Pool of Marital Assets*, J. VA. TRIAL. LAW. A., Sept. 1989, at 27 (“The inability to provide sound legal guidance to our clients as to their ultimate expectations in the division of marital property upon divorce in Virginia repeatedly has been cited as a current problem in prior published articles”); Turner, *supra* note 34, at 888 (unpredictability of unitary property “discouraged settlement and increases costs of litigation”).

⁴¹ Many of the Mississippi cases hold on their face that an asset must be all marital or all separate. See *Stewart v. Stewart*, 864 So. 2d 934 (Miss. 2003); *Henderson v. Henderson*, 703 So. 2d 262 (Miss. 1997); *Bullock v. Bullock*, 699 So. 2d 1205 (Miss. 1997); *Flechas v. Flechas*, 791 So. 2d 295 (Miss. Ct. App. 2001); *James v. James*, 736 So. 2d 492 (Miss. Ct. App. 1999).

Despite these cases, Mississippi has not adopted unitary property by name as a formal doctrine. On the contrary, in a remarkable 2004 decision by the Mississippi Court of Appeals sitting en banc, five of ten justices sitting signed an opinion suggesting that unitary property *not* be the law of Mississippi. *Hankins v. Hankins*, 866 So.2d 508, 513 (Miss. Ct. App. 2004). In addition, scattered Mississippi cases do find marital and separate interest in the same asset, without explaining the departure from the general rule. See, e.g., *Hensarling v. Hensarling*, 824 So. 2d 583 (Miss. 2002) (value added to account after date of separation was separate property, even though balance on date of separation was marital); *Bresnahan v. Bresnahan*, 818 So. 2d 1113, 1118 (Miss. 2002) (husband commingled rents from marital and nonmarital rental property into one account, and used funds from account to pay for improvements and upkeep on both properties; “This co-mingling of rent from the various rental properties does not rise to the level of commingling in” prior cases); *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001) (commingling of marital and separate funds in account, after separation, did not automatically cause transmutation); *Robbins v. Robbins*, 757 So. 2d 1001 (Miss. Ct. App. 1999) (reversing finding that husband premarital home was “solely within Terry’s separate estate”; suggesting that court on remand could perhaps find home to be partly within husband’s separate estate).

The author leans toward the position that Mississippi unitary property in substance if not in form, so that the marital home will be marital property if any significant marital contributions were made to it. Turner, *supra* note 3, § 5:20 and appendix A (Mississippi section). Professor Deborah Bell suggests, however, that the Mississippi unitary property cases can mostly be explained as applications of a very broad family use doctrine. DEBORAH H. BELL, *MISSISSIPPI FAMILY LAW* § 6.04[3][b] at 166-67 (2005). The exact extent to which Mississippi follows unitary property is therefore not entirely clear.

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states hold that a single asset can have both marital and separate interests.⁴²

B. *Family Use Doctrine: Law*

The family use doctrine provides that if separate property is regularly used by the entire family, it loses its separate status and becomes marital property. Only one state clearly follows the rule, Alabama, where a very broad family use limitation is written into the statutory definition of separate property.⁴³ The doc-

⁴² See, e.g., OHIO REV. CODE ANN. § 3105.171(A)(6)(a) (“‘Separate property’ means all real and personal property and any interest in real or personal property” acquired during the marriage) (emphasis added); VA. CODE ANN. § 20-107.3(A)(3) (Supp. 1993) (recognizing marital property, separate property, and property which is part marital and part separate property); *Schmitz v. Schmitz*, 88 P.3d 1116, 1128 (Alaska 2004) (“A spouse’s separate property does not become untraceable to its separate source merely because it is mixed with marital property in the same secondary asset”); *Wright v. Wright*, 779 S.W.2d 183 (Ark. Ct. App. 1989); *Kittinger v. Kittinger*, 582 So. 2d 139 (Fla. Dist. Ct. App. 1991); *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001); *Harper v. Harper*, 448 A.2d 916 (Md. 1982); *Stageberg v. Stageberg*, 695 N.W.2d 609, 619 (Minn. Ct. App. 2005) (“Because wife successfully traced a nonmarital contribution to the purchase of the homestead, the district court did not err in finding that she had a nonmarital interest”); *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. 1984); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App. 1985); *In re Marriage of Kunze*, 92 P.3d 100, 112 (Or. 2004) (“acts of commingling do not mandate in all cases the inclusion of separately acquired property in the property division”); see generally TURNER, *supra* note 3, § 5:20.

⁴³ “[In dividing marital property,] the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage.” ALA. CODE ANN. § 30-2-51(a) (Westlaw 2005). “Nothing in the statute states that if one party’s inheritance or gifts are used for the parties’ common benefit then the trial judge *must* consider the inheritance or gifts when making the property division. In fact, the statute leaves such a determination to the discretion of the trial judge.” Ex parte Drummond, 785 So.2d 358, 362 (Ala. 2000).

Because this statute is so broad, and particularly because it refers to family use of either the property or income from the property, it functionally destroys the statutory definition of separate property in Alabama, so that the state is for all practical purposes an all-property jurisdiction. TURNER, *supra* note 3, appendix A (Alabama section). It is a very rare marriage in which neither separate property nor the income from separate property is ever used for family benefit.

trine may also be followed in Mississippi,⁴⁴ where the equitable distribution system was created by court decision. No other dual-classification jurisdiction follows the family use doctrine, although a rebuttable family use presumption was recently advocated in a concurring opinion from Alaska.⁴⁵

A pure family use doctrine is inconsistent with every statutory definition of separate property outside of Alabama. Assume that one spouse inherits a home into the marriage, fully paid for, and that the home is used as the marital residence. Since the home was acquired by inheritance, it clearly falls within the statutory definition of separate property. No definition of separate property states that inheritances are separate, “except

⁴⁴ For a general discussion of the family use doctrine in Mississippi, see DEBORAH H. BELL, MISSISSIPPI FAMILY LAW § 6.04[1][b] at 163-64 (2005). For specific Mississippi cases holding that the marital home is marital property, see *Bunyard v. Bunyard*, 828 So. 2d 775 (Miss. 2002); *Hankins v. Hankins*, 866 So.2d 508 (Miss. Ct. App. 2004) (although concurring opinion, signed by five justices on a ten-justice court, argued that use of separate property as the marital home should not per se convert it into marital property); *Boutwell v. Boutwell*, 829 So. 2d 1216 (Miss. 2002); *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001); *Selby v. Selby*, 149 S.W.3d 472 (Mo. Ct. App. 2004) (marital home bought with separate property was automatically a gift to the marital estate).

It is difficult to evaluate the extent to which Mississippi follows the family use doctrine, because so much support exists in Mississippi for the unitary theory of property. When a Mississippi case classifies a home as marital property, stating that it was partly acquired with marital funds and served as the family residence, it is difficult to assess the extent to which the court was relying upon each of the two key facts stated. The vague language used in many of the cases makes the assessment even more difficult. As of this writing, the author is more inclined than Professor Bell to doubt whether Mississippi truly accepts the notion that a single asset can have both marital and separate interests. *Contrast* BELL § 6.04[1][b] with *Turner*, *supra* note 3, appendix A (Mississippi section).

⁴⁵ *Abood v. Abood*, 119 P.3d 980, 991 (Alaska 2005) (Matthews, J., concurring). Judge Matthews’ opinion was joined by one other judge of the five judges who heard the case, so the opinion was only one vote short of being adopted by the court.

The majority did not disagree with the concurrence, but rather refused to reach the issue on grounds that donative intent could be found without application of a family use presumption. *Abood*, 119 P.3d at 989. The majority specifically noted that the issue had not been briefed. *Id.* My decision to write this article arose in part because both opinions seemed unaware of the full policy effects of the family use doctrine, including most importantly its powerful tendency to encourage use of separate property in economically and socially undesirable manners. *See infra* note 51 and accompanying text.

where subject to family use during the marriage.” If this language is effectively added to the statute by court decision, the court is impermissibly modifying the statutory definition of separate property.

The Alaska concurring opinion suggested that the doctrine is based not upon the definition of separate property itself, but rather upon the law of implied gift. There is general agreement that separate property becomes marital property if the owning spouse gave the property to the marriage.⁴⁶ The Alaska concurrence argues that when real property serves as the family home, a high degree of likelihood exists that real donative intent was present.

An objective review of the nationwide case law suggests that the concurrence’s argument is mistaken. Every dual-classification state outside of Alaska has held in at least one case that the marital home is partly separate property.⁴⁷ Nationwide, many cases recognize a separate interest in the marital home. These cases necessarily hold on the facts that the marital home was not a gift to the marital estate.

Moreover, why must intent to share *use* of an asset with the other spouse necessarily amount to intent to share *ownership*? Many people share their property with others without intending to make a gift. No one argues that a gift necessarily or presumptively results when an unmarried person invites another person of the opposite sex to share his or her residence. Outside of the marital context, many relatives and even friends live together in a home that only one person owns. People have resided for years in apartments leased from others; no one contends in that context that intent to share necessarily translates into intent to make a gift.

It is also appropriate to ask whether the courts have the authority to adopt a new and important presumption of law with no statutory support. The only strong presumption of gift in modern equitable distribution law is the joint title gift presumption—the presumption that property transferred into joint title was intended as a gift. That presumption is defensible above all be-

⁴⁶ TURNER, *supra* note 3, § 5:43, 5: 68, 5:69.

⁴⁷ See *supra* notes 28-29.

cause the joint title presumption existed at common law,⁴⁸ predating equitable distribution by a period of centuries. Since no equitable distribution statute expressly defines terms such as “gift” or “donative intent,” these terms are normally given their common law definition,⁴⁹ and the joint title gift presumption is part of the common law.

But the common law did not recognize a family use presumption. On the contrary, it is clear that outside of the divorce context, shared use of a home by a family does not raise a presumption of gift. Families live in homes owned by parents or relatives, or in apartments leased from third parties, without triggering any presumption of gift. The family use presumption advocated by the Alaska opinion is a new legal principle, unknown to the common law, not generally followed in other states or in other contexts. Its adoption is an issue of policy for the legislature.

Adoption of the family use doctrine is an issue for the courts in the specific instance of Mississippi, since the courts of that state have adopted equitable distribution by court decision.⁵⁰ Accepting that the courts had the power to adopt equitable distribution in that manner, they have the power to define marital and separate property. In effect, by adopting equitable distribution to begin with, the Mississippi Supreme Court declared that in the absence of statutory authority, it had the power to define and divide marital property. This is not a power that most state courts have assumed.

⁴⁸ See generally *Mims v. Mims*, 286 S.E.2d 779 (N.C. 1982); 41 C.J.S. *Husband & Wife* § 105 (Westlaw 2005). It might be more accurate to observe that the common law had half of a joint title gift presumption, for while transfers by the husband were presumed to be a gift to the wife, transfers by the wife were presumed to leave the husband as a resulting trustee for the wife’s benefit. *E.g.*, *Mims*. This sex-based distinction violates modern notions of equal protection, and most states have chosen to apply the presumption of gift to transfers by both spouses. *E.g.*, *Mims*; see also *In re Estate of Koch*, 697 N.E.2d 931, 933 n.1 (Ill. App. Ct. 1998) (avoiding the issue, but collecting post-*Mims* case law reaching the same result).

⁴⁹ *E.g.*, *In re Marriage of Johnson*, 856 S.W.2d 921 (Mo. Ct. App. 1993); TURNER, *supra* note 3, § 5:33 at 446.

⁵⁰ See *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994); *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994).

C. Family Use Doctrine: Social Policy

Regardless of whether adoption of the family use doctrine is an issue for the legislature or the courts, the family use doctrine should not be adopted. The doctrine is a classic example of a policy with unintended adverse side effects greater than the benefit it provides.

The fundamental social policy problem with the family use doctrine is that it changes the behavior of spouses who own separate property. When the family use doctrine is formally adopted, spouses will be given notice that their separate property will lose its separate status if it is used for family purposes. Once that notice is fully understood, will spouses owning separate property continue to permit use of that property for family purposes? If they have any desire to preserve the separate status of the property, and any measure of competent legal advice, they will almost certainly not do so. They will place the separate property in a clearly identifiable bank account or investment account or trust. In this form, pure and uncommingled, it cannot be reached by any device short of the outright repeal of separate property. Owning spouses will not use their separate property for the beneficial purposes of acquiring a home, furnishing a home or providing any other benefit to the marital estate. This result will be a substantial loss, not only for couples whose marriage ends in divorce, but also for couples who remain happily married.

It is certainly true that some spouses will act against their own financial interest, and use separate property for family purposes despite the presence of a family use doctrine. These spouses are likely to create a substantial problem for the courts. Fundamentally, the decision to use separate property for family benefit is a *good* decision. Spouses who make that decision, especially against their own financial interest, have done something laudable. Their generosity is socially desirable; they should certainly not be penalized. Yet that it is exactly the result compelled by the family use doctrine. Spouses who generously decide to permit family use of their separate property are penalized; the separate status of their property is lost. Spouses who selfishly refuse to permit family use of their separate property are re-

warded; their separate property, carefully kept in identifiable form, is preserved.⁵¹

The reward/penalty issue highlights in stark terms why the family use doctrine is so rarely adopted by state courts. It is socially desirable that married persons act generously and not selfishly. The family use doctrine inflicts financial harm upon spouses who make a generous sacrifice, while allowing spouses who selfishly refuse to make that sacrifice to retain a benefit. The net effect of the doctrine is not only to encourage selfish refusal to share separate property, but indeed to penalize generous sharing of separate property.

The family use doctrine does not provide a sufficient policy benefit to offset its unfortunate tendency to discourage sharing and reward selfishness. The law already provides that separate property of any sort becomes marital when it is expressly given to the marital estate.⁵² Further, a reasonable body of case law holds that prolonged family use of a separate property home is evidence of an implied gift to the marriage.⁵³ When there is no countervailing evidence, and especially when the owner of the separate property home has not positively indicated any desire to retain a separate interest in the home, the cases already find an implied gift on the facts.

In addition, there is already universal acceptance that when marital contributions are made to the marital home, and the

⁵¹ This article is not alone in suggesting that broad transmutational theories discourage married persons from sharing their separate property. For similar suggestions, see *Sexton v. Sexton*, 125 S.W.3d 258, 271 (Ky. 2004) (“transmutation through joint title would cause spouses not to trust each other. Rather than placing property in their joint names for estate planning purposes, they would be careful that their nonmarital property remains solely in their individual names and does not transmute into marital property:); *Brewer v. Brewer*, 846 A.2d 1, 26 (Md. Ct. Spec. App. 2004) (“Simply using inherited household goods as they are intended to be used is not enough to create a presumption that the spouse intended to make a gift of the property to the marital unit . . . [A contrary rule] would require a spouse, who inherits furnishings, to keep them in pointless storage or forbid other family members from making any use of them to avoid a judicial determination that they are jointly owned”); Oldham, *supra* note 36, at 247 (“It would be absurd to require a spouse to place separate property in storage or to bar the other spouse from ever using the property . . . This would reward selfish and antisocial behavior”).

⁵² See *infra* note 77 and accompanying text.

⁵³ See *infra* note 93 and accompanying text.

home has not been given to the marriage, the marital estate thereby acquires an interest in the home.⁵⁴ The strong modern rule is that the marital estate receives not only the marital contributions, but also any growth in the marital contributions after they are made, most often computed through some form of allocation formula.⁵⁵ In other words, when marital and separate contributions are both made to a home, the marital and separate estates are joint *investors* in the home. Each estate is entitled to a fair share of the actual return earned by the investment; neither estate should be compelled to make an interest-free loan to the other.

It is a very rare event for the parties to live in a home for a prolonged period without making any material contributions to its value. In the great majority of cases in which separate property has been used as the marital home for a prolonged period of years, a significant marital interest will arise from contributions of marital funds or efforts, regardless of the intent of the owning spouse.

The question therefore becomes: what benefit does the family use doctrine offer to the marital estate, *over and above* the benefit provided to the marital estate by the law of express and implied gift and the law of partial marital and separate interests? Whenever donative intent is actually proven, the home is already marital property under present law. Prolonged family use is already evidence of donative intent. Whenever donative intent is not proven, the marital estate is already entitled to a partial marital interest proportional to the value added by the marital contributions, including a proportional share of passive growth between contribution and divorce.

The only remaining part of the home which is not marital property is the value attributable to the separate contributions, in situations in which donative intent cannot be proven under existing law. Existing law does a good job locating donative intent where it exists; express and implied gifts are regularly recognized, even in states that refuse to apply the joint title presumption in divorce cases.⁵⁶ Where donative intent is not proven, it probably does not exist. Where true donative intent is not present, depriv-

⁵⁴ See the discussion beginning at note 97 *infra*.

⁵⁵ See *infra* note 111 and accompanying text.

⁵⁶ See TURNER, *supra* note 3, § 5:44

ing the separate estate of its partial separate interest will strongly discourage owners of separate property from investing in the family home. The result will be a significant loss to *all* families.

It is not yet clear whether the application of the family use doctrine results in a division of property more favorable to custodial parents and children. It certainly increases the likelihood that the marital home will be marital property, but classification as marital property is not necessarily always in the interests of custodial parents and children. If the custodial parent would otherwise have a separate property interest in the home, the family use doctrine would destroy that interest, thus harming the custodial parent. Even in cases where the family use doctrine destroys a separate property interest of the noncustodial parent, it is possible that the home might still be divided unequally in favor of the spouse whose separate interest was lost, resulting in little or no net change in how the value of the home is ultimately divided.⁵⁷

Assuming that the family use doctrine does provide a net benefit to custodial parents and children, the benefit is not sufficiently large to overcome the doctrine's adverse side effects. In the majority of all cases, existing law does not unreasonably impoverish custodial parents and children. Situations exist in which current law is not adequate, but these situations tend to involve families with limited incomes and assets. Many of these families do not own their own home at all, or do not own a home which is traceable to one spouse's separate property. The family use doctrine therefore does not apply in the great majority of the situations in which present law does not sufficiently address financial need. In all situations, however, the family use doctrine significantly discourages separate investment in the marital home.

To the extent that present law does not fully address the post-divorce financial needs of custodial parents and children, the best remedy is not the family use doctrine, but rather a renewed emphasis upon spousal support awards. The law of spousal support was designed to address financial need, and on paper it is sufficient to address financial need fully.⁵⁸ Spousal support awards address financial need directly, giving a financial

⁵⁷ See *infra* note 61.

⁵⁸ For a general overview of the modern law of spousal support, see Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14 (Spring 2003).

benefit to all needy spouses, without encouraging selfish hoarding of separate property. Unlike property division awards, which are not subject to modification after the divorce, spousal support awards can rise and fall in amount as financial needs change.

The primary problem with spousal support awards is that their amounts and durations have been woefully inconsistent from one case to the next. The spousal support system is well-designed to address financial need, but it is not being consistently applied to achieve its intended purpose. This problem has received considerable attention, and many jurisdictions are experimenting with reforms to make the system more consistent.⁵⁹ In particular, there is growing interest in adopting some form of spousal support guideline system similar to the guidelines that have so effectively standardized the law of child support.⁶⁰ These reform measures are a better device for addressing financial need than any version of the family use doctrine.

D. Family Use Doctrine: Practical Concerns

Even if the family use doctrine did not discourage sharing of separate property, its widespread adoption would still have a negative impact upon the process for dividing property upon divorce.

The family use doctrine expands the definition of marital property. Like the unitary theory of property, however, it does not insist that the additional marital property be divided equally. On the contrary, cases holding that the marital home became marital property because of use for family purposes have been very willing to divide the marital home unequally in favor a spouse who made greater direct financial contributions, as long as all other factors in the case are equal.⁶¹ The marital home can likewise be divided unequally where it is marital property be-

⁵⁹ See generally Brett R. Turner, *Rehabilitative Alimony Reconsidered: The 'Second Wave' of Spousal Support Reform*, 10 DIV. LITIG. 185 (1998)

⁶⁰ See generally Victoria M. Ho & Jennifer J. Cohen, *Are Alimony Guidelines in Our Future?*, 15 DIV. LITIG. 189 (2003)

⁶¹ In Alabama, where the family use doctrine is required by statute, the state supreme court expressly reversed an intermediate court of appeals decision holding that family use property had to be divided equally. See *Ex Parte Bland*, 796 So. 2d 340 (Ala. 2000). The court reinstated a trial court decision reimbursing the husband for his \$76,000 separate contribution to the marital home.

cause of an express gift into joint title,⁶² because of unitary property,⁶³ because of untraceable uncommingling,⁶⁴ or even simply

In Mississippi, which follows either the unitary theory of property or the family use doctrine, see *supra* note 41, the cases are making unequal divisions of very significant size when substantial separate contributions are made to family use property. See, e.g., *Stewart v. Stewart*, 864 So. 2d 934 (Miss. 2003) (affirming a decision awarding the husband 80% of the marital home, which was originally his separate property); *Singley v. Singley*, 846 So. 2d 1004 (Miss. 2002) (remanding with instructions to consider unequal division of marital home to which husband had made separate contributions); *Lindsey v. Lindsey*, 749 So. 2d 77 (Miss. 1999) (making an unequal division of transmuted property); *Berryman v. Berryman*, 907 So. 2d 958 (Miss. Ct. App. 2004), *aff'd*, 907 So.2d 944 (2005) (even though commingled home was entirely marital property, trial court still did not err in awarding in entirety to wife, where she contributed \$145,000 to its acquisition, and husband contributed nothing); *Bullock v. Bullock*, 699 So. 2d 1205 (Miss. 1997) (error to award husband only \$3,500 more than wife from marital home purchased with commingled marital and separate property; remanding for entry of more substantially unequal division; husband had invested \$30,000 of separate property into the home); *Gutierrez v. Bucci*, 827 So. 2d 27 (Miss. Ct. App. 2002) (treatment of commingled asset as separate property was harmless error, as unequal division was equitable).

⁶² See, e.g., *Toth v. Toth*, 946 P.2d 900, 901-02 (Ariz.1997) (“if we treated ‘gifted’ joint tenancy as requiring an equal, not equitable, division, we would be giving greater property rights to a non-contributing spouse than to a contributing one”); *In re Marriage of Stumpf*, 932 P.2d 845 (Colo. Ct. App. 1996) (husband’s premarital home became marital property when placed in joint title; proper to award husband \$49,471, and wife only \$3,406); *In re Marriage of Olson*, 585 N.E.2d 1082 (Ill. App. Ct. 1992) (giving wife 61% of the marital estate, where her inheritance had transmuted into marital property); *In re Marriage of Petersen*, 22 S.W.3d 760 (Mo. Ct. App. 2000) (error not to consider wife’s separate contributions to marital home as a division factor; remanding with instructions to award wife credit for her contributions); *Heald v. Heald*, 611 N.W.2d 598 (Neb. 2000) (awarding husband credit for separate down payment used to acquire jointly titled marital home).

⁶³ During the unitary property era in Virginia, unequal divisions of property acquired with both marital and separate funds were encouraged by the appellate courts, e.g., *Srinivasan v. Srinivasan*, 396 S.E.2d 675, 678 (Va. Ct. App. 1990) (separate contributions to commingled property are a “particularly significant factor”); *Lambert v. Lambert*, 367 S.E.2d 184 (Va. Ct. App. 1988). Where the separate contributions were substantial in size, the extent of unequal division was sometimes striking. See, e.g., *Barnes v. Barnes*, 428 S.E.2d 294 (Va. Ct. App. 1993), where the wife received only 5% of the husband’s premarital business, which had transmuted by active appreciation into marital property.

⁶⁴ E.g., *In re Marriage of Dall*, 548 N.E.2d 109, 116 (Ill. App. Ct. 1989) (separate property contribution to marital home transmuted into marital property; trial court properly found separate contribution “of great consequence”

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because the state in question does not recognize the concept of separate property.⁶⁵

Because the marital home can be divided unequally, adoption of the family use doctrine will not result in a more equal sharing of the home over a large number of cases. The home would more often be treated as marital property, but in many cases the home would be divided unequally. Since the presence and extent of an unequal division always depends upon the trial court's discretion, division of the marital home would become much less predictable, and the number of negotiated settlements would drop. Under present law, by contrast, because separate contributions to the home create partial separate interests, there is much less need for the value of the home to be divided unequally. The long-term effect of the family use doctrine will therefore be the same as the long-term effect of unitary property:

and awarded the contributing party more than half of the marital estate); *Furnia v. Furnia*, 643 N.Y.S.2d 859 (N.Y. App. Div. 1996) (proper to award 60% of marital home to husband, who contributed separate property to its acquisition).

⁶⁵ *E.g.*, *In re Marriage of Rock*, 850 P.2d 296 (Mont. 1993) (error to divide premarital home equally); *Parley v. Parley*, 807 A.2d 982 (Conn. App. Ct. 2002) (where \$60,000 gift to wife alone was contributed to home, proper to award wife a \$60,000 credit); *Putnam v. Putnam*, 689 A.2d 446 (Vt. 1996) (home given to husband and wife by husband's parents; proper to award wife only one-third of home after eight-year marriage).

In addition, many cases use contributions from traditionally separate property as a basis for dividing an entire marital estate unequally, without stating the parties' specific equitable rights in individual assets. *See, e.g.*, *Richman v. Richman*, 555 N.E.2d 243 (Mass. App. Ct. 1990) (where most assets were husband's premarital property and any appreciation during the marriage was caused by nonmarital forces, proper to award wife \$2 million dollars of estate worth \$16 million dollars); *In re Marriage of Foster*, 102 P.3d 16, 19 (Mont. 2004) ("[our] precedents counsel us to beware of simply halving preacquired or gifted property between the spouses"; error to award husband "any of the value of [wife's premarital] property as it was prior to the marriage"; husband's interest was limited to an equitable share of the appreciation during the marriage); *Anderson v. Anderson*, 655 N.W.2d 104 (S.D. 2002) (affirming trial court order awarding \$1,607,000 to husband and \$914,884 to wife, after marriage of at least 20 years; husband was 72 and wife was only 50, and husband had \$1,230,000 in premarital assets, while wife had only \$10,500, \$10,000 of which was given to her by husband).

For complete discussion of case law from all-property states on the weight given to contributions from traditionally separate sources, see TURNER, *supra* note 3, § 8:7.

to transform comparatively predictable partial separate interests into comparatively unpredictable unequal divisions.

This suggested effect is very consistent with the nature and purpose of separate property. As noted in part II of this article, separate property is not a selfish device invented for the purpose of enriching owning spouses. Over a large number of cases, owners of traditionally separate property are just as enriched by unequal divisions in all-property states as they are by partial separate interests in dual-classification states. Separate property is rather a procedural device for standardizing the amount of the enrichment. This standardizing makes the overall property division process more consistent and more predictable, and has a powerful tendency to encourage negotiated settlements.

By refusing to recognize partial separate interests in the marital home, the family use doctrine loses the benefit of a standardized system for determining the effect of separate contributions. Instead, it makes separate contributions a factor to be considered when the trial court divides the marital estate between the spouses.⁶⁶ This is exactly the same policy trade-off made by unitary property, except that unitary property applies to all assets, while the family use doctrine applies only to the marital home. Because the family use doctrine essentially applies a unitary property concept to the marital home, it is likely that the long-term effects of two theories will be similar. As discussed above, the long-term tendency of unitary property to foster inconsistency and discourage settlement has led to speedy and emphatic legislative rejection in the only two states to adopt it.⁶⁷

The Alaska concurring opinion advocating the family use doctrine suggested that adopting the doctrine would “tend to streamline divorce proceedings by eliminating much wasted effort by counsel and the courts.”⁶⁸ The unitary property experience suggests very strongly that the exact opposite is true. Treating the marital home as entirely marital property at the classification stage does not streamline the case, because a spouse who made separate contributions can still argue those contributions as a factor at the division stage. All of the evidence regarding those contributions and all of the evidence regarding the

⁶⁶ See *supra* note 61.

⁶⁷ See generally *supra* note 33 and accompanying text.

⁶⁸ *Abood*, 119 P.3d at 992.

presence of donative intent must still be heard and ruled upon by the court. The only difference is that the court's ruling is now a division of marital property reviewed only for abuse of discretion, rather than a classification of separate property which is subject to defined rules of law. This difference in review standards makes the result extremely unpredictable, and has a proven tendency to make negotiated settlement harder to reach.⁶⁹

To restate the same point somewhat differently, every equitable distribution case poses various hard issues. When the hard issues are pushed forward into the division stage, they are resolved inconsistently from case to case, the result of litigation becomes unpredictable, and the number of negotiated settlements drops. These consequences can be seen in the failure of unitary property, and by analogy, in the failure of pre-guideline child support law. By contrast, when the hard issues are pulled backward into the classification stage, they are resolved more consistently, because they are governed more by reviewable rules of law and less by unreviewable exercises of discretion. Increased consistency is a benefit in itself, and it also leads to more negotiated settlements. This is why all-property states are increasingly analogizing to dual classification principles,⁷⁰ why child support guidelines have made such a positive difference in the law of child support,⁷¹ and why the overall trend in dual-classification states is toward a more equal division of a more precisely-defined marital estate.⁷² Past a certain point, the marginal cost of increased discretion is greater than its benefit. The family use doctrine pushes the hard issue of dividing the marital home forward into the division stage, and thereby makes the issue more difficult to resolve.

It would be possible to avoid this negative effect if the family use doctrine is construed to be a rule of division as well as classification, so that separate contributions to a marital asset created by the family use doctrine cannot even be used as a division factor. This is very clearly not the law in those few states which

⁶⁹ See *supra* notes 16-21, 39-40.

⁷⁰ See *supra* note 12.

⁷¹ See *supra* note 21.

⁷² See *supra* note 18.

follow the family use doctrine presently.⁷³ Also, in all dual-classification states, separate contributions to marital assets are generally a division factor under present law, even if the marital asset was a gift to the marital estate.⁷⁴ No state currently applies the family use doctrine as a rule of division; it is uniformly a rule of classification only.

If the law on this point were to change, so that separate contributions to family use property were not even a factor at the division stage, the negative social policy effect of the family use doctrine would be greatly multiplied. There would be a highly reliable assurance that any spouse who contributed separate property to the marriage would lose roughly half of that property to the other spouse if the marriage ended in divorce. If this were the law, it is difficult to see why any economically rational spouse would ever use separate property for family benefit—and that would be a loss to all families much greater than any benefit which the family use doctrine might provide. States that desire to encourage socially beneficial separate investment in the marital home should not adopt the family use doctrine.

IV. The Marital Home: Classification

This article has taken a strong stance against the notion that the marital home must necessarily be marital property. It has argued at some length that treating the marital home as marital property will discourage socially desirable investments of separate property, and will discourage negotiated settlements by increasing the number of discretionary unequal divisions of the marital estate.

Present law, by contrast, does not suffer from these problems. It accepts the possibility that separate contributions might be intended as a gift to the marital estate; recognizes a comparatively predictable partial separate interest arising from separate contributions; and limits the need for discretionary unequal divisions. At the same time, it contains a device for recognizing situations in which one of the spouses or the parties' children have a special need to remain in the home after the divorce. The net effect of these rules is to create a better process

⁷³ See *supra* note 61.

⁷⁴ See *supra* note 62.

for dividing the marital home than the result that would obtain if the marital home were always marital property.

Because marital property must be identified before it can be divided, the next section considers present law on classifying the marital home. When classifying marital property, the law technically requires that the court establish the amount of the separate interest before determining whether the separate interest has been lost by gift or contract.⁷⁵ In practice, it is often easier to consider the gift and contract issues first, since the factually difficult process of tracing separate contributions can be avoided if a gift or contract is present. The practical approach will be followed in this article.

A. *Express Gift*

An express gift occurs when legal title to property is transferred with *donative intent*—the intention that the transfer constitute a gift.⁷⁶ While a few cases have involved transfers from one spouse to the other, the overwhelming majority of the cases involve transfers by one spouse into joint title.⁷⁷

All American jurisdictions agree that separate property becomes marital property when the owner makes an express gift to the marital estate.⁷⁸ A majority of American jurisdictions hold that a transfer into joint title is presumed to be a gift.⁷⁹ This joint title gift presumption also existed at common law.⁸⁰ A significant number of American cases apply the presumption to a jointly ti-

⁷⁵ See TURNER, *supra* note 3, § 5:64.

⁷⁶ *Id.* §§ 5:68-5:69.

⁷⁷ Compare *id.* § 5:44 (discussing the joint title cases) with *id.* § 5:68 (discussing the sole title cases).

⁷⁸ *Id.* §§ 5:43, 5:68.

⁷⁹ See, e.g., *Lewis v. Lewis*, 785 P.2d 550 (Alaska 1990); *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991); *In re Marriage of Johns*, 724 N.E.2d 1045 (Ill. App. Ct. 2000); *Spooner v. Spooner*, 850 A.2d 354 (Me. 2004); *Conrad v. Bowers*, 533 S.W.2d 614 (Mo. Ct. App. 1975); *Parsons v. Parsons*, 476 N.Y.S.2d 708 (N.Y. App. Div.1984); *McLean v. McLean*, 374 S.E.2d 376 (N.C. 1988), *approving* *McLeod v. McLeod*, 327 S.E.2d 910 (N.C. Ct. App.1985); *Whiting v. Whiting*, 396 S.E.2d 413 (W. Va.1990); see generally TURNER, *supra* note 3, § 5:43 n.1.

⁸⁰ See *supra* note 48 and accompanying text.

tled marital home, find that it has not been rebutted, and conclude that the marital home is marital property.⁸¹

A minority of American jurisdictions do not apply the joint title gift presumption in divorce cases.⁸² This position has been growing slowly in strength in recent years.⁸³ While a transfer into joint title alone is not a sufficient basis for finding an express gift in these states, an express gift will be found where the transferring spouse represented that the property would be “our” home or otherwise indicated an intention that both spouses have equitable ownership of the home after the transfer.⁸⁴

This article will not delve deeply into the ongoing debate over the wisdom of the joint title gift presumption.⁸⁵ The argument in favor of the presumption is that most married people

⁸¹ See, e.g., *Wimberly v. Wimberly*, 840 So.2d 1114 (Fla. Dist. Ct. App. 2003); *In re Marriage of Johns*, 724 N.E.2d 1045 (Ill. App. Ct. 2000); *In re Marriage of Nicks*, 531 N.E.2d 1069, 1072 (Ill. App. Ct. 1988); *Engeman v. Engeman* 123 S.W.3d 227, 235 (Mo. App. 2003); *McLean v. McLean*, 374 S.E.2d 376 (N.C. 1988); *Osborn v. Osborn*, 2004 WL 2785554 (Ohio Ct. App. 2004); *Kincaid v. Kincaid*, 912 S.W.2d 140 (Tenn. Ct. App. 1995); *Whiting v. Whiting*, 183 W. Va. 451, 396 S.E.2d 413 (W. Va. 1990).

⁸² See OHIO REV. CODE ANN. § 3105.171(H) (Westlaw 2004) (“the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property”); VA. CODE ANN. § 20-107.3(A)(3)(g) (Westlaw 2004) (“[n]o presumption of gift shall arise” where “property is conveyed into joint ownership”); *Wong v. Wong*, 960 P.2d 145 (Haw. Ct. App. 1998); *In re Marriage of Hoffman*, 493 N.W.2d 84 (Iowa Ct. App. 1993); *In re Marriage of Wert*, 492 N.W.2d 711 (Iowa Ct. App. 1992); *Kline v. Kline*, 581 A.2d 1300 (Md. Ct. Spec. App. 1990); *Grant v. Zich*, 477 A.2d 1163 (Md. Ct. Spec. App. 1984); *Pearson v. Pearson*, 761 So. 2d 157 (Miss. 2000); *In re Marriage of Eigen*, 961 P.2d 738 (Mont. 1998); *Schuman v. Schuman*, 658 N.W.2d 30 (Neb. 2003); *Quinn v. Quinn*, 689 N.W.2d 605 (Neb. Ct. App. 2004); *Snyder v. Snyder*, 2002 WL 1252835 (Ohio Ct. App. 2002); *In re Marriage of Cans*, 92 P.3d 100 (Or. 2004) (in determining proper division of separate property placed into joint title, court found existence of donative intent without overtly applying any presumption of gift); *Celso v. Celso*, 864 S.W.2d 652 (Tex. App. 1993); see generally TURNER, *supra* note 3, § 5:43 n.4.

⁸³ TURNER, *supra* note 3, § 5:43 n.5. This conclusion is also evident from the dates of the cases cited in the previous note.

⁸⁴ See, e.g., *Rowe v. Rowe*, 480 S.E.2d 760 (Va. Ct. App. 1997); *Theismann v. Theismann*, 471 S.E.2d 809 (Va. Ct. App. 1996), *aff'd*, 479 S.E.2d 534 (Va. Ct. App. en banc 1996).

⁸⁵ For representative discussions of the joint title gift presumption as an issue of policy, see TURNER, *supra* note 3, § 5:45; Laura W. Morgan & Edward

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understand and believe that jointly titled property is “ours” and not “his” or “hers.”⁸⁶ The argument against the presumption is that transfers into joint title are often made for estate planning purposes, as a convenient device for transferring property upon death without incurring the practical and financial disadvantages of probate.⁸⁷ Some courts also have a tendency to apply the joint title presumption very vigorously, so that rejecting the presumption may be the better way to ensure that the courts make an intellectually honest inquiry into whether real donative intent existed on the facts.⁸⁸

B. *Implied Gift*

An implied gift exists when the owning spouse intends that the home constitute marital property, and implements that intent with some minimum amount of objective conduct short of an actual transfer of title.⁸⁹ The objective conduct clearly includes written⁹⁰ or oral⁹¹ statements that the home is marital property,

S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW. 335 (2003).

⁸⁶ TURNER, *supra* note 3, § 5:45.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ TURNER, *supra* note 3, § 5:69.

⁹⁰ See *Westbrook v. Westbrook*, 364 S.E.2d 523 (Va. Ct. App.1988) (written agreement that “we own the house together,” even though home was never actually conveyed into joint title); *Barth v. Barth*, 790 S.W.2d 246 (Mo. Ct. App. 1990) (property listed as marital property on financial statement).

⁹¹ See *James v. James*, 108 S.W.3d 1 (Mo. Ct. App. 2002) (husband told wife she was co-owner of business, held her out as co-owner, and business paid substantial amount of parties’ personal expenses; business transmuted into marital property).

Admissions at trial by the owning spouse can be particularly useful in proving an implied gift. See *McCulloch v. McCulloch*, 435 N.W.2d 564 (Minn. Ct. App. 1989) (husband testified at trial that he wanted wife to “own the home equally”); *McAllister v. McAllister*, 101 S.W.3d 287, 294 (Mo. Ct. App. 2003) (home titled in husband’s name alone and purchased with separate funds was used as marital property; “[w]ife testified that when Husband told her he was buying a home, he said everything was hers,” that “he wanted to do everything for her,” and “that with everything Husband bought her, he said ‘I’m buying this for you’”); home was marital property); *Cimperman v. Cimperman*, 2003 WL 547814, *2 (Ohio Ct. App. 2003) (husband transferred separate property into joint title, and “testified that he considered the [property] to be joint marital property”; trial court properly so found); *Verholek v. Verholek*, 741 A.2d

even where the statements are fall short of an enforceable deed or agreement, as long as the statement was serious under the circumstances.⁹² The burden of proving an implied gift is always on the spouse who asserts it.⁹³

Some courts have held that a prolonged period of family use is sufficient objective conduct to constitute an implied gift. Many of the cases involve family use for a period of decades, with no mention of separate ownership rights by either spouse.⁹⁴ Where the period of family use is shorter, an implied gift is unlikely.⁹⁵ It

792 (Pa. Super. Ct. 1999), *appeal denied*, 2000 WL 760435 (Pa. 2000) (husband commingled inheritance with marital funds in account titled in husband's sole name, but then testified at trial that he never considered the inheritance to be separate; proper to find transmutation); *Canady v. Canady*, 374 S.E.2d 502 (S.C. Ct. App. 1988) (husband admitted at trial that wife "probably" had an interest in the home); *Watts v. Watts*, 581 S.E.2d 224, 233 (Va. Ct. App. 2003) (wife purchased stock and brass bed with inherited funds, testifying that purchase "'was something [nice she] wanted to do' for her family. She considered the items to be 'gifts for us'"; property purchased transmuted into marital property) (bracketed insertions by the court). *But cf.* *Lundquist v. Lundquist*, 923 P.2d 42 (Alaska 1996) (account did not transmute into marital property merely because marital funds were added to it and husband stated at trial that he "assumed" it was marital property; husband merely restated general marital property presumption, and showed no intent to make a gift).

⁹² See *Wolford v. Wolford*, 785 P.2d 625 (Idaho 1990) (refusing to imply a gift from a note on a restaurant napkin); *Stainback v. Stainback*, 396 S.E.2d 686 (Va. Ct. App. 1990) (error to find implied gift based on alleged oral statement during marriage; no written evidence of donative intent, and property was treated as a separate asset during the marriage); *Farrior v. Farrior*, 712 So. 2d 1154 (Fla. Dist. Ct. App. 1998), *aff'd on other grounds*, 736 So. 2d 1177 (Fla. 1999) (refusing to follow alleged oral agreement that all property would be "ours," and not "his" or "hers," since agreement was extremely informal, and inconsistent with actual conduct of parties during marriage; relying expressly on *Stainback*).

⁹³ See, e.g., *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (Nev.1994); *Jenkins v. Jenkins*, 545 S.E.2d 531, 537 (S.C. Ct. App. 2001) ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage"); *Hatfield v. Hatfield*, 489 S.E.2d 212 (S.C. Ct. App. 1997), *cert. denied*, (1998); *Brandt v. Brandt*, 427 N.W.2d 126 (Wis. Ct. App. 1988).

⁹⁴ See *Leather v. Leather*, 640 N.E.2d 1210 (Ohio Ct. App. 1994) (marital home transmuted after 50-year marriage); *Frost v. Frost*, 618 N.E.2d 198 (Ohio Ct. App. 1992) (stressing 17-year length of marriage).

⁹⁵ "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." *Johnson v. Johnson*, 372 S.E.2d 107, 111

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should be stressed that even the long marriage cases are clearly not holding that family use alone is sufficient to convert the home into marital property. The point is rather that prolonged family use is evidence of donative intent, particularly when the owning spouse has not formally or informally asserted a superior interest in the home for a large number of years. When such an interest is asserted—that is, when it is clear that the owning spouse did *not* intend to make a gift—no implied gift exists on the facts.

It is also worth noting that cases finding an implied gift based upon joint use are largely limited to the marital home. Attempts to apply the doctrine to other assets have often been rejected on the facts.⁹⁶ This pattern of rejection suggests that the implied gift argument is often used as a convenient device for finding the marital home to be marital property, when the court desires for reasons of policy to reach that result. This usage is

(S.C. Ct. App. 1988); *see* *Greene v. Greene*, 569 S.E.2d 393 (S. C. Ct. App. 2002) (husband's premarital residence used as marital home, but husband deliberately kept his premarital property distinct from marital property, using funds from his separate account to maintain home; no transmutation); *Carroll v. Carroll*, 419 S.E.2d 801 (S.C. Ct. App. 1992) (condominium used as marital home for first two years of marriage did not thereby transmute into marital property); *Ray v. Ray*, 372 S.E.2d 910 (S.C. Ct. App. 1988) (property did not transmute merely because parties jointly lived there for nine years).

An exception is Alaska, which is very quick to find that any period of joint residence is sufficient to support an implied gift. *See* *Captor v. Captor*, 84 P.3d 408 (Alaska 2004) (property used as marital home during first two years of marriage, and wife was actively involved in maintaining and managing it; after parties moved away, rent was used for marital purposes).

⁹⁶ *See* *Brewer v. Brewer*, 120, 846 A.2d 1, 26 (Md. Ct. Spec. App. 2004) (“Simply using inherited household goods as they are intended to be used is not enough to create a presumption that the spouse intended to make a gift of the property to the marital unit”); *Gutierrez v. Bocci*, 827 So. 2d 27, 37 (Miss. Ct. App. 2002) (“[we do not find that occasional riding of one of the motorcycles by the nonpurchasing spouse necessarily causes the separate property to lose that classification”).

Even Alaska, which finds an implied gift of the marital home very quickly, is much slower to find an implied gift of other assets. *See* *Martin v. Martin*, 52 P.3d 724, 731 (Alaska 2002) (“consent to use, without more, is not enough to evince an intent to transmute separate premarital property”; separate property camera did not transmute into marital property merely because wife used it during the marriage).

really a form of family use doctrine, and therefore subject to the objections set forth in part II of this article.

C. Contract

A small number of cases exist in which the marital home is marital property because of some enforceable marital agreement between the parties. In addition to the obvious situation in which the parties have a formal agreement, some decisions construe quitclaim deeds, assignments or other documents as evidence of a marital agreement, especially where the document was signed upon or after the date of separation.⁹⁷

D. Partial Marital and Separate Interests

If the facts are not sufficient to show a gift or contract, the marital home is classified according to the source of the funds that acquired it. The strong general rule is that a home is acquired not only by the funds that were used to make the down payment, but also by the funds that were used to reduce the principal balance on the mortgage.⁹⁸ Since many purchasers finance as much as 80% to 90% of a home, a contrary rule would allow the classification of the property to be determined by only a small portion of the funds actually needed to purchase it.

⁹⁷ See *In re Marriage of Bartolo*, 971 P.2d 699 (Colo. Ct. App. 1998) (in period of marital difficulties, husband quitclaimed marital home to wife under a deed as a gift, as an express condition upon reconciliation; home was the wife's separate property); *Roberts v. Roberts*, 999 S.W.2d 424 (Tex. App. 1999) (where deed states that spouse takes title as separate property, the deed is controlling unless invalid); *Troyer v. Troyer*, 341 S.E.2d 182 (Va. 1986) (verbal conveyance of land was contractual transfer; conveyance occurred while divorce was pending, and husband's statement that wife could sell home showed intent to convey equitable ownership; wife relied on finality of transfer by not seeking support); *McDavid v. McDavid*, 451 S.E.2d 713 (Va. Ct. App. 1994) (construing a deed as a marital agreement).

For a general discussion of contractual conveyances, see Turner, *supra* note 3, § 5.67.

⁹⁸ See, e.g., *Gaetani-Slade v. Slade*, 852 So.2d 343 (Fla. Dist. Ct. App. . 2003); *Spence v. Spence*, 669 So. 2d 1110 (Fla. Dist. Ct. App. . 1996); *Thomas v. Thomas*, 377 S.E.2d 666 (Ga.1989); *Harper v. Harper*, 448 A.2d 916 (Md. Ct. Spec. App. 1982); *Selby v. Selby*, 149 S.W.3d 472 (Mo. Ct. App. 2004) *Earnest v. Earnest*, 785 N.E.2d 766 (Ohio Ct. App. 2003); *Gilman v. Gilman*, 526 S.E.2d 763 (Va. Ct. App. 2000).

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Except for Mississippi, where the law is unclear,⁹⁹ all other dual-classification jurisdictions agree that an asset purchased with both marital and separate contributions effectively contains both marital and separate interests.¹⁰⁰ Two states experimented briefly with the rule that all commingled mixtures of marital and separate property become marital; both states abandoned the rule as unworkable within a three-year period.¹⁰¹ Under modern law, it is essentially settled that marital and separate interests can exist in the same asset.

More so than any other type of property, marital homes are acquired with a large number of contributions spread out over a long period of time. It is not surprising to find, therefore, that many of the leading cases on property acquired with both marital and separate contributions involve the marital home.¹⁰²

Widespread agreement exists that the marital and separate interests in a home are equal to the respective amounts of the marital and separate contributions if the home has not changed in value since the contributions were made.¹⁰³ In the real world, of course, homes almost always do change in value during the marriage. The trend in real estate prices has been strongly upward in most of the country for the past five or ten years. The most difficult issue in classifying the marital home is therefore allocating appreciation in value occurring after some or all of the contributions have been made.

The general theory for classifying appreciation is increasingly well-settled. All states agree that market-based appreciation in marital property is marital.¹⁰⁴ Most states agree that market-based *passive appreciation* in separate property remains

⁹⁹ See *supra* note 41 and accompanying text.

¹⁰⁰ “[Recognition of partial marital and separate interests] is thus considerably more compatible with partnership principles, and as a result, virtually all common-law classification based systems have adopted it.” Sally Burnett Sharp, *The Partnership Ideal: the Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 211 (1987). For specific cases holding that a single asset can have both marital and separate interests, see *supra* note 42.

¹⁰¹ See *supra* note 33 and accompanying text.

¹⁰² See, e.g., *Thomas v. Thomas*, 377 S.E.2d 666 (Ga. 1989); *Harper v. Harper*, 448 A.2d 916 (Md. Ct. Spec. App. 1982); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App. 1985); *Martin v. Martin*, 501 S.E.2d 450 (Va. Ct. App. 1998).

¹⁰³ See TURNER, *supra* note 3, § 5:24.

¹⁰⁴ *Id.* § 5:54.

separate.¹⁰⁵ Thus, when property acquired with both marital and separate property increases in value due to passive market forces, the appreciation must be allocated in some way between the marital and separate interests.

To take a simple example, assume that a home is acquired by a single lump sum payment (e.g., without a mortgage) of \$200,000. Of this sum, \$120,000 is marital property, and \$80,000 is separate property. The home then doubles in value because of passive market forces. The marital interest is clearly at least \$120,000, and the separate interest is clearly at least \$80,000. Since the entire home appreciated in value, there is no reason in equity why each estate's interest should not share the good fortune of market-based appreciation. Thus, both interests double in value. The final marital interest is \$240,000, and the final separate interest is \$160,000, for a total value of \$400,000.

The only coherent argument against this sharing of market-based appreciation is that the appreciation occurred during the marriage, and so should be marital property. The strength of this argument does not depend upon whether the asset involved was acquired with a mixture of funds or with separate funds alone; the argument for treating appreciation in 100%-separate property as marital property is conceptually the same as the argument for treating appreciation in 50%-separate property as marital property. Since the vast majority of courts agree that passive appreciation in 100%-separate property remains separate, the settled rule is that passive appreciation in a partial separate interest remains separate.¹⁰⁶

A few courts have argued that all of the appreciation in a partial separate interest should be marital, because it is too difficult to distinguish between appreciation in the separate interest and appreciation in the marital interest.¹⁰⁷ Accepting for sake of

¹⁰⁵ *Id.* § 5:55. Clear exceptions are Colorado and Pennsylvania, where unique statutory provisions state that all appreciation in separate property is marital property, regardless of cause. *See* COLO. REV. STAT. ANN. § 14-10-113(4) (Westlaw 2005); 23 PA. CONSOL. STAT. ANN. § 3501(a) (Westlaw 2005).

¹⁰⁶ *E.g.*, *Moran v. Moran*, 512 S.E.2d 834 (Va. Ct. App.1999) (separate interest receives not only the separate contributions, but also passive appreciation in those contributions).

¹⁰⁷ The effect of this position is to treat all appreciation in separate property as marital if there is any significant contribution to it. Because the effect of the rule is to treat appreciation in separate property as either all separate or all

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argument the premise that allocation of appreciation is difficult in some situations, it is not impossible across the board. The logical remedy is therefore not to treat *all* appreciation as marital because it is difficult in *some* instances, but rather to place upon the owner of the separate interest the burden of making the allocation.¹⁰⁸ The burden is not heavy in most situations, however, since the marital and separate interests are both undivided interests in the whole, so that each appreciates in value at the same rate as the asset itself. Because the burden is so easily met, most states agree that appreciation in dual-interest property is allocated proportionately among the marital and separate interests.¹⁰⁹

marital, it can be called the doctrine of unitary appreciation. It is followed by statute in Tennessee, TENN. CODE ANN. § 36-4-121(b)(1)(B) (Westlaw 2005), and by case law in Michigan. *Reeves v. Reeves*, 575 N.W.2d 1 (Mich. Ct. App. 1997). There is also case law adopting the doctrine in some districts in Florida, although the validity of the case law is open to question. *See infra* note 108.

¹⁰⁸ The clearest example of this point is case law from the Fourth District Court of Appeals in Florida. The Fourth District adopted unitary appreciation in *Robbie v. Robbie*, 654 So. 2d 616 (Fla. Dist. Ct. App. 1995), which was read to adopt the doctrine not only in the Fourth District but in other districts as well. *See Moon v. Moon*, 594 So. 2d 819 (Fla. 1st Dist. Ct. App. 1992); *Dunagan v. Dunagan*, 664 So. 2d 68 (Fla. 3d Dist. Ct. App. 1995); *Vick v. Vick*, 675 So. 2d 714 (Fla. 5th Dist. Ct. App. 1996). But unitary property was criticized and rejected in cases from other Districts, *see, e.g., Belmont v. Belmont*, 761 So. 2d 406 (Fla. Dist. Ct. App. 2d Dist. 2000); *Straley v. Frank*, 612 So. 2d 610 (Fla. 2d DCA 1992); *Anson v. Anson*, 772 So. 2d 52 (Fla. 5th Dist. Ct. App. 2000), as well as in secondary sources. *See TURNER*, *supra* note 3, at appendix A (Florida section). The Fourth District then reinterpreted *Robbie* in *Chapman v. Chapman*, 866 So.2d 118 (Fla. Dist. Ct. App. 2004), holding that *Robbie* meant to say only that appreciation in separate property is presumed to be marital property unless and until the amount of passive appreciation in the separate interest is proven by a preponderance of the evidence.

¹⁰⁹ *See, e.g., TEX. FAM. CODE* § 3.403 (Westlaw 2004); *Frank G.W. v. Carol M.W.*, 457 A.2d 715 (Del. 1983); *Snowden v. Alexander-Snowden*, 587 S.E.2d 54 (Ga. 2003); *Hubby v. Hubby*, 556 S.E.2d 127 (Ga. 2001); *Janelle v. Janelle*, 454 S.E.2d 133 (Ga. 1995); *Thomas v. Thomas*, 377 S.E.2d 666 (Ga.1989); *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004); *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001); *Tibbetts v. Tibbetts*, 406 A.2d 70 (Me. 1979); *Harper v. Harper*, 448 A.2d 916 (Md. Ct. Spec. App. 1982); *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. 1984); *Trego v. Scott*, 961 P.2d 168 (N.M. Ct. App. 1998), *cert. denied*, 961 P.2d 167 (N.M.1998); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App.1985); *Martin v. Martin*, 501 S.E.2d 450 (Va. Ct. App. en banc 1998); *Shank v. Shank*, 387 S.E.2d

Proportional allocation has strong policy advantages. It treats the marital and separate interests in a manner very similar to the manner in which joint ownership interests are treated in other areas of the law. For example, if two unmarried persons own property together, and the property doubles in value, each partner's individual interest likewise doubles in value.¹¹⁰

In addition, proportional allocation gives each estate not only the return of its contributions, but also a fair return on investment. Because a return on investment exists, proportional allocation does not discourage separate investment in marital property. A spouse who invests separate property receives the same return on the separate investment that a third person would receive for making the same investment. Indeed, in the specific context of marital homes, the effect of proportional allocation in recent years has been to greatly *encourage* investment of separate property in homes, since homes have earned a rate of return in recent years that is very competitive with other investments. The result has been to allow families to purchase better homes—a win-win situation for both the marital and separate estates.

1. Total Apportionment

While the theory of proportional allocation is simple and attractive, the practice of proportional allocation poses challenges. Unlike the home in the above hypothetical, most homes are not acquired with a lump sum down payment alone. Rather, most homes are the product of both a down payment and mortgage payments, with each mortgage payment acquiring a small amount

325 (W. Va. 1989); *see generally* TURNER, *supra* note 3, § 5.21; ALI PRINCIPLES, *supra* note 10, § 4.06.

¹¹⁰ This is such a basic and universal principle of joint ownership law that very few reported decisions state it expressly. The best modern authority is probably 20 AM. JUR. 2D Cotenancy and Joint Ownership § 41 (Westlaw 2005), stating that each joint owner is entitled upon partition to “a distinct part [of the while] according to the extent of his or her interest.” *See also* 59A AM. JUR. 2D *Partition* § 148 (Westlaw 2005) (after partition sale, court should give various equitable credits, and then “distribute equal shares to equal interests, or shares in proportion to the ownership interest of each party”). Neither of these passages distinguishes between the value at the time of a party's contribution and value added afterwards due to market forces. They show, therefore, that market-based appreciated is divided proportionally among joint owners under normal property law.

of additional equity. The conceptually purest approach is to compute the market-based appreciation in the home on a monthly or yearly basis, and allocate that appreciation among the contributions made before it occurred.¹¹¹ This *periodic apportionment* approach poses very substantial practical problems, for it would require computation of the value of the home at the end of each month or year of the marriage, plus a detailed accounting of every mortgage payment made. This factual showing is not possible on the facts of ordinary cases, and as of this writing no reported decision exists that has used periodic apportionment.

The cases instead classify the marital home (and other assets as well) using a simpler method called *total apportionment*. Under this method, the total appreciation during the marriage is allocated proportionally among all of the contributions made by the parties. For example, assume that a \$200,000 home is purchased with a \$20,000 separate property down payment and an \$180,000 mortgage. During the marriage, mortgage payments are made with marital funds, and the balance of the mortgage is reduced to \$150,000. Under total apportionment, the law recognizes \$50,000 in real contributions: \$20,000 in separate funds used for the down payment, and \$30,000 in marital funds used to reduce the mortgage lien. The total market-based appreciation is then allocated proportionally between the marital and separate estate,¹¹² *as if all \$50,000 in contributions occurred before any of the market-based appreciation*. This approach is conceptually imperfect, for some of the appreciation occurred before all of the marital mortgage payments were made. The great advantage of total apportionment, however, is that it can be applied on the facts of ordinary divorce cases. The only facts needed are the amount of the down payment, the initial balance of the mortgage, and the amount due on the mortgage as of the date of marriage and the date of classification. Most married persons retain

¹¹¹ See William A. Reppy, Jr., *Apportioning Business Profits Generated by Spousal Labor and Capital Owned Over Time by Shifting Fractional Shares of the Separate and Community/Marital Estates*, 31 FAM. L.Q. 63 (1997); TURNER, *supra* note 3, § 5:25 at 393-396.

¹¹² See, e.g., *Brandenberg v. Brandenberg*, 617 S.W.2d 871 (Ky. Ct. App. 1981); *Selby v. Selby*, 149 S.W.3d 472 (Mo. Ct. App. . 2004); *Moritz v. Moritz*, 844 S.W.2d 109 (Mo. Ct. App. 1992); *Willis v. Willis*, 358 S.E.2d 571 (N.C. Ct. App. 1987); *Hart v. Hart*, 497 S.E.2d 496 (Va. Ct. App.1998).

closing statements and mortgage records which contain this information.

For the purpose of explaining the theoretical basis behind proportional allocation, this article has stressed that the marital and separate interests are entitled to grow in value at the same rate as the asset itself. This notion needs to be applied carefully when allocating appreciation in property acquired subject to a mortgage. In the above hypothetical, for instance, it would be easy to conclude that because the entire home doubled in value due to market forces, the marital and separate interests likewise doubled in value. The separate interest would therefore be \$40,000, and the marital interest would be \$60,000, for a total of \$100,000. But the parties own \$250,000 in equity: \$400,000 value at divorce minus the \$150,000 balance on the mortgage. We have somehow lost \$150,000 in equity.

The missing equity in the above situation arises because there are actually three interests in the value of the home: the marital equity, the separate equity, and the mortgage lien. The former two interests are equitable ownership interests; their value rises and falls along with the value of the property itself. But the bank's lien is merely a debt; its value does not change as the value of the property fluctuates. The \$150,000 in missing equity in the above example is appreciation in the bank \$150,000 lien. Because the bank gets no appreciation in its interest, appreciation attributable to the bank's interest must be allocated among the other owners. As a result, when a mortgage lien exists, total allocation cannot be implemented simply by giving the marital and separate estates the same percentage growth as the entire property.

Fortunately, another method of implementation is almost as easy to apply. When appreciation is allocated proportionally among marital and separate interests, the ratio between the marital appreciation and the separate appreciation is the same as the ratio between the marital and separate contributions. In addition, the marital and separate contributions are obviously proportional to themselves. Since the contributions and the appreciation together equal the equity value of the asset, *proportional allocation is most easily implemented by allocating the entire value of the asset in proportion to the underlying marital and separate contributions.* That is, an estate that makes 25% of the

total contributions is entitled to 25% of the total contributions plus 25% of the appreciation, which is mathematically equal to the 25% of the entire equity value of the asset.¹¹³

Applying this method to the facts of the above hypothetical, there are \$20,000 in separate contributions and \$30,000 in marital contributions, for a total of \$50,000. The separate contributions are 40% of the total (\$20,000 divided by \$50,000); the marital contributions are 60% of the total. The marital interest is therefore 40% of the \$250,000 in equity, or \$100,000. The separate interest is 60% of the equity, or \$150,000. The total of both interests is exactly equal to the equity in the property. The remaining \$150,000 of the home has no net value, as it is exactly offset by the value of the mortgage lien.

When total allocation is applied in this manner, the overall effect is to treat the marital and separate interests not as dollar amounts, but as percentages of the overall value of the property. Courts and attorneys do not need to speak in terms of a marital or separate interest worth a stated number of dollars; they begin thinking of a marital or separate interest worth a certain percentage of the asset's value. Once this conceptual adjustment is made, total allocation is extremely easy to apply.

The allocation method set forth above is used by a significant majority of dual-classification jurisdictions to classify the marital home.¹¹⁴ It by far the most developed method for recognizing both marital and separate interests. States that recognize partial marital and separate interests without applying this method either use less developed versions of the method or have refused to provide any coherent explanation for the method used.¹¹⁵

The net effect of proportional allocation is fair treatment for both the marital and separate estate. The separate estate receives a percentage interest proportional to its contributions to the property, gaining part of any market-based appreciation and sharing in any market-based depreciation. Because separate investment in the marital home is treated just like separate investment in any other property, proportional allocation does not

¹¹³ See *supra* note 112.

¹¹⁴ TURNER, *supra* note 3, §§ 5:24-5:25. Specific cases following the method outlined in the text are cited *supra* in note 112.

¹¹⁵ See TURNER, *supra* note 3, § 5:21.

discourage investment in the marital home. Indeed, since investment in the marital home is economically attractive, it actually encourages such investment. At the same time, the marital estate receives exactly the same percentage-based compensation for its contributions. The result is not only fair treatment for both estates, but also a reasonable incentive to invest separate property in economically and socially useful ways, instead of retaining it in isolated and unproductive storage.

2. Interest

Under any classification method that recognizes marital and separate interests in the same asset, the definition of a marital or separate contribution becomes an important issue. In the context of the marital home, there is general agreement that a contribution includes not only the down payment, but also funds used to reduce the balance due on the mortgage.¹¹⁶ Conversely, there is general agreement that a contribution does not occur when marital funds are used to pay interest¹¹⁷ or taxes,¹¹⁸ as these payments do not directly create equity in the home.

The general rule that interest is not a contribution is somewhat counterintuitive, and it is probably the single greatest potential flaw with the method most commonly used to classify the marital home. A good illustration is *Keeling v. Keeling*,¹¹⁹ where the marital home grew explosively in value due to rising real es-

¹¹⁶ See *supra* note .

¹¹⁷ See , e.g., *Moore v. Moore*, 618 P.2d 208 (Cal. 1980); *Blake v. Blake*, 569 A.2d 724 (Md. Ct. Spec. App. 1990); *In re Marriage of Herr*, 705 S.W.2d 619 (Mo. Ct. App. 1986); *Sewall v. Saritvanich*, 726 A.2d 224, 228-29 (Me. 1999) (“For mortgage payments to generate marital property the payments must actually reduce the mortgage balance”); *Moran v. Moran*, 512 S.E.2d 834, 836 (Va. Ct. App. 1999) (marital interest existed only “to the extent the marital funds reduced the principal of the mortgage”); *Crawford v. Crawford*, 392 S.E.2d 675 (S.C. 1990) (trial court properly refused to consider husband’s contributions to payment of interest on mortgage when dividing marital property; contributions did not increase equity). *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. 2001) (under Texas reimbursement rule, only reduction in principal is treated as a contribution).

¹¹⁸ See , e.g., *Moore v. Moore*, 618 P.2d 208 (Cal. 1980); *Aunger v. Aunger*, 705 So. 2d 957 (Fla. Dist. Ct. App. 1998); *Gravenstine v. Gravenstine*, 472 A.2d 1001 (Md. Ct. Spec. App. 1984); *Trego v. Scott*, 961 P.2d 168 (N.M. Ct. App. 1998), *cert. denied*, 961 P.2d 167 (N.M. 1998).

¹¹⁹ 47 Va. App. 484, 624 S.E.2d 687 (2006).

tate prices. The down payment was made from the husband's separate property, but mortgage payments during the marriage were made partly with marital funds. Because the interest component of mortgage payments can be five or six times as great as the principal component, and because the parties withdrew some of the marital equity through refinancing, traditional allocation principles yielded a marital interest of only just over \$9,000, even though a much larger sum of marital funds had actually been invested in the property. Because the marital contributions were set so low, the traditional allocation formula yielded an unduly small marital interest. The trial court exercised its discretion to use a nontraditional allocation formula, defining the percentage separate interest as the total separate contributions by the total purchase price of the home. This formula is distinctly unwise, as it produces a separate percentage (and therefore a marital percentage) which does not depend at all upon the amount of the marital contributions.¹²⁰ Nevertheless, the formula resulted in a larger marital interest on the facts, and the appellate court affirmed the trial court's decision.

The *Keeling* court blamed the traditional formula for the small size of the marital interest in produced, but the real cause of the problem was elsewhere. Any allocation formula which bases the result upon both the separate and marital contributions was bound to produce a small marital interest on the facts of *Keeling*, so long as only \$9,000 in marital contributions were recognized. The problem in *Keeling* was not the traditional formula itself, but rather the court's restrictive definition of a contribution.

What the court should have done in *Keeling* was to apply the traditional formula, but to treat interest as a contribution. This approach would have resulted a marital interest which was pro-

¹²⁰ Under *Keeling*, the separate interest is always equal to the separate contributions, divided by the total purchase price. This is true regardless of whether the marital contributions paid none, some or all of that portion of the purchase price not paid with separate contributions. While the result of this approach was not grossly unfair on the facts of *Keeling*, it is difficult to see the overall equity in using an allocation formula which places no weight on the marital contributions. See generally Brett R. Turner, *Allocation Formulas, Interest on Mortgages, and Joint Loans: a Critique of Keeling v. Keeling*, 18 DIV. LITIG. 37 (March 2006).

portionate to the actual marital investment in the home, without the need for using a nontraditional formula.¹²¹

Keeling is a good demonstration of the pressures placed upon the traditional allocation system by increasing amounts of debt and rising real estate prices. Both of these factors magnify the dollar effect of flaws in the classification system, including particularly the failure to treat interest as a contribution. The pressure creates a risk not only that the court will reach a bad result on the facts, but also that it will avoid a bad result by adopting a rule of law which poses substantial long-term problems. That is essentially what happened in *Keeling*. The court's allocation method avoided a bad result on the facts, but it defines the marital interest without reference to the total marital contributions—an enormous flaw which will cause very substantial problems if applied in other fact situations.

Keeling stopped short of adopting its nontraditional allocation formula as a mandatory rule of law, holding only that it is one allocation formula which the trial court in its discretion may use in future cases.¹²² The discretionary nature of the court's holding reduces the overall harm which its nontraditional formula will inflict, but it creates a different problem. As noted above, separate property exists because the benefit of consistent and predictable decisions is greater than the administrative cost of the classification process.¹²³ As the difficulty of defining separate property increases, a point will come where the administrative cost of classification exceeds the benefit, so that the fundamental policy justification for recognizing separate property is no longer valid. A system which gives the trial court discretion to choose between two materially different allocation systems comes very close to reaching that point.

Finally, *Keeling* raises the question of whether allocation formulas should be codified. The drafters of the Virginia statute

¹²¹ The exact amount of funds used to pay interest was not stated in *Keeling*, and it may not have been introduced into evidence. Demonstrative calculations, using reasonable approximations based upon normal ratios between principal and interest payments, suggest that the marital interest would have been much larger, although not as large as the interest found by the court. See Turner, *supra* note 120.

¹²² *Keeling*, 47 Va. App. at 491, 624 S.E.2d at 690.

¹²³ See *supra* notes 14-25 and accompanying text.

discussed the traditional formula in the legislative history, but it was not included in the statute. The author has traditionally opposed codification, on the basis that there is not yet a sufficient general consensus as to which allocation formula works best. Codification would tend to make the allocation process unduly rigid, limiting the future development of allocation formulas which might be better than those used now. But cases like *Keeling* remind us that there are some formulas which clearly do not work, and there is always a risk that the courts will adopt them, especially in cases which highlight the limitations of the traditional approach.

The best approach may well be to adopt a rebuttable presumption that the traditional formula should be used. This approach preserves flexibility for unusual cases, while still recognizing a single consistent and predictable formula for use in ordinary situations.

3. *Improvements*

When improvements are made to a home during the marriage, the value added by the improvements is treated as a contribution.¹²⁴ This amount is often less than the total amount spent. In the absence of better evidence, some states will assume that the amount spent equals the value added.¹²⁵ Other states hold that the value spent is not even some evidence of the value added.¹²⁶ Where improvements are paid for with both marital and separate funds, and the value added is less than the total amount spent, it seems logical to prorate the value added between the marital and separate estates in proportion to the amounts spent. This situation has not arisen in any reported decision, but the

¹²⁴ See, e.g., *Scott v. Scott*, 653 A.2d 1017 (Md. Ct. Spec. App. 1995); *Stratman v. Stratman*, 948 S.W.2d 230 (Mo. Ct. App. 1997); *Rice v. Rice*, 584 S.E.2d 317 (N.C. Ct. App. 2003) (contributions to improvement are generally contributions to the acquisition of the property); *In re Marriage of Gill*, 41 S.W.3d 255 (Tex. App. 2001); *Hart v. Hart*, 497 S.E.2d 496 (Va. Ct. App. 1998).

¹²⁵ See, e.g., *In re Marriage of Wolfe*, 91 Cal. App. 4th 962, 110 Cal. Rptr. 2d 921 (3d Dist. 2001); *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1997); *Barkley v. Barkley*, 694 N.E.2d 989 (Ohio Ct. App. 1997).

¹²⁶ See, e.g., *Stratman v. Stratman*, 948 S.W.2d 230 (Mo. Ct. App. 1997); *Connealy v. Connealy*, 578 N.W.2d 912 (Neb. Ct. App. 1998); *Moran v. Moran*, 512 S.E.2d 834 (Va. Ct. App. 1999); *Hart v. Hart*, 497 S.E.2d 496 (Va. Ct. App. 1998).

suggested resolution is similar the method used to allocate losses in value in vehicles and other depreciating assets.¹²⁷

4. Refinancing

In recent years, fluctuations in interest rates have caused many married couples to refinance their mortgage debt during the marriage. The effect of refinancing upon the classification of the home is one of the cutting-edge issues in the large majority of states which recognize both marital and separate interests in the marital home.

General agreement exists that refinancing *per se* does not change the classification of the home.¹²⁸ Thus, where a mortgage is refinanced to change the terms of payment, but all of the loan proceeds are used to acquire the home or reduce principal on prior mortgages, the number of different mortgages is not a relevant fact. The total payments toward the principle balance due are contributions to the acquisition of the home, regardless of how many different mortgages existed during the marriage.

Two hard questions are beginning to arise with some frequency. First, it is not uncommon to see the parties borrowing more money than they need to retire the balance due on the previous mortgage, and using the excess to pay off other debt or to acquire additional property. This sort of refinancing effectively withdraws equity from the marital home, and the cases addressing it consciously analogize to case law on classifying withdrawals from commingled bank accounts.¹²⁹ Since the key issue when

¹²⁷ See, e.g., *Pittman v. Pittman*, 652 So. 2d 1105 (Miss. 1995) (suggesting that depreciated value of car be allocated between marital and separate estates in proportion to their contributions); *Dewitt v. Dewitt*, 1996 WL 437540 at *5 (Va. Ct. App. 1996) (where marital funds provided 37% of the purchase price of car which depreciated during the marriage, and “[n]o evidence proved that the marital portion of the vehicle represented more than thirty-seven percent of the current stipulated value”, error to charge all depreciation to the separate interest; trial court should have distributed the depreciation “pro rata” between the marital and separate interests).

¹²⁸ “Refinancing does not *per se* constitute a transmutational alteration of the parties’ respective interests in real property, or preclude a tracing of those interests.” *Wiese v. Wiese*, 617 S.E.2d 427, 430 (Va. Ct. App. 2005); see also *Hubby v. Hubby*, 556 S.E.2d 127 (Ga. 2001); *Griffin v. Griffin*, 642 P.2d 949 (Idaho 1982).

¹²⁹ See *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002); *Senske v. Senske*, 644 N.W.2d 838 (Minn. Ct. App. 2002).

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tracing withdrawals is the intent of the withdrawing spouse at the time when the withdrawals were made,¹³⁰ and the purpose for a withdrawal is usually good evidence of the underlying intent,¹³¹ withdrawals to reduce marital credit card debt or to acquire assets treated as marital property are generally treated as withdrawals from the marital interest.¹³² Withdrawals for a separate purpose should likewise be treated as withdrawals from separate equity.¹³³

Second, refinancing is a situation in which the limitations of total apportionment are especially easy to see. Assume that the parties contribute \$10,000 in marital funds to reduce the balance due on the mortgage on a separate property home. The marital interest rises in value to \$15,000 due to market forces. The home is then refinanced, with \$15,000 in equity withdrawn to pay for marital credit card debt incurred by both spouses. After the refinancing, the home then doubles in value. In this situation, the appreciated value of the marital contribution was really used to repay the credit card debt, so that the only marital interest would be the appreciated value of marital funds used to reduce the bal-

¹³⁰ See generally TURNER, *supra* note 3, § 5:62; see also *In re Marriage of Wojcik*, 838 N.E.2d 282, 292-93 (Ill. App. Ct. 2005) (“Karen testified that the funds were in the parties’ joint account for only one day and that she had placed the funds in the account merely as a conduit to transfer the money. Based upon such evidence, the trial court could have reasonably concluded that Karen had established by clear and convincing evidence that she had not intended to make a gift to the marital estate of the money her brother had given her”).

¹³¹ See generally TURNER, *supra* note 3, § 5:62; Oldham, *supra* note 36, at 224-26. For specific examples, see *Beam v. Bank of America*, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971); *Richards v. Richards*, 207 A.D.2d 628, 615 N.Y.S.2d 784 (N.Y. App. Div. 1994) (where funds were mixed in investment account, trial court did not err in holding that withdrawals for marital purposes came from the marital portion); *Beard v. Beard*, 49 S.W.3d 40 (Tex. App. 2001) (withdrawals to purchase community property came from community portion of account).

¹³² See *Senske v. Senske*, 644 N.W.2d 838 (Minn. Ct. App. 2002) (finding on the facts that withdrawals of equity for a marital purposes withdrew the marital equity); *Daniels v. Seals*, 2005 WL 3476672 at *4 (Va. Cir. Ct. 2005) (“Because Mr. Seals contributed \$93,240 from the hybrid USAA 4893 account to purchase the Caneel Court home, itself a marital asset, it may reasonably be assumed that the purpose for the withdrawal was a marital one”).

¹³³ The court accepted this position on the law in *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002), but then rejected it on the facts, finding insufficient proof that the withdrawal was actually used for a nonmarital purpose.

ance due on the second mortgage. If the apportionment formula is applied only once for the entire marriage, however, the effect is to give the original \$10,000 marital contribution a share of the post-refinancing appreciation—appreciation which occurred after that contribution had been used for another purpose.¹³⁴

A better result is reached if the apportionment formula is applied twice.¹³⁵ Assume that the initial separate equity in the home was \$20,000, and that the home was worth \$210,000 at the time of refinancing, subject to a mortgage balance of \$165,000. The marital interest is \$10,000 in marital contributions divided by \$30,000 in total contributions, or 1/3, and the marital equity is 1/3 of the \$45,000 total equity, or \$15,000. The refinancing removes \$15,000 in marital equity, reducing the marital interest to zero, and increasing the mortgage balance to \$180,000. After the refinancing, an additional \$10,000 in marital funds are used to reduce the balance due on the second mortgage, and the home increases in value to \$420,000. Applying the formula a second time, post-refinancing, the separate contribution is the \$45,000 in separate equity existing at the time of the first refinancing. The marital contribution is the \$10,000 used to reduce the second mortgage. The marital interest is \$10,000 divided by \$55,000 in total contribution, or 18.18%. The equity at divorce is \$420,000 minus the \$170,000 mortgage balance (\$180,000 minus \$10,000), or \$250,000. The final marital interest is 18.18% of \$250,000, or \$45,454.

¹³⁴ The inequity of applying the formula only once is especially easy to see if we assume that the \$15,000 in withdrawn equity was used to purchase stock in a company, which then increased in value because of market forces. The marital \$15,000 can be given either post-refinancing appreciation in the home or post-refinancing appreciation in the company, but cannot be given both, because its \$15,000 contribution flowed to only one destination.

¹³⁵ Research for this article revealed only one case in which the court was asked to apply the formula more than once to discrete periods of the marriage. That case involved a refinancing situation similar to the hypothetical set forth in the text, and the court applied the formula multiple times. “[U]tilization of the formula during separate periods of a marriage on the basis of identifiable changes in the ratio of separate and marital components in a marital asset should usually arrive at a more accurate and thus a more equitable apportionment than that which would result from the mere application of the formula over the life of the marriage.” *Daniels v. Seals*, 2005 WL 3476672 at *4 n.7 (Va. Cir. Ct. 2005)

On the specific facts of the above example, the second application favors the separate interest. This result is not unreasonable, because the \$250,000 in equity that exists at the time of divorce arises from only \$40,000 in actual contributions (\$20,000 initial separate equity, plus \$10,000 toward the first mortgage and \$10,000 toward the second mortgage). That amount is reduced by the \$15,000 withdrawn and used for marital purposes. Of the \$25,000 net contributions to the home, \$20,000 was separate property—which explains why the final equity was more separate property than marital. If the withdrawn equity had been used for separate purposes, or if the marital contributions had been larger, the final application would have favored the marital interest.

The goal of all allocation formulas is again not to favor either the marital or the separate interest, but rather to reflect as accurately as possible the effect of actual market conditions upon the marital and separate funds invested in the home. This balanced approach makes the final result more predictable, makes negotiated settlement more likely, and encourages investment of separate property in the marital home.

V. The Marital Home: Division

The method used by American courts to classify the marital home does not generally place any weight upon the degree to which one spouse or the children may have a special need to remain in the home after the divorce. The purpose of classification is not to address special need, but rather to determine objectively the extent to which an asset is an actual product of the marital partnership. This determination regularizes one of the most significant reasons for dividing property unequally upon divorce, thus making the property division more predictable, and allowing the marital estate to be divided more equally more often.

By contrast, special need is a major factor in determining how the marital home is divided. Indeed, many equitable distribution statutes expressly require the court to consider, as one factor in dividing marital property, the presence of any special need to remain in possession of the marital home.¹³⁶ Because

¹³⁶ *E.g.*, ALASKA STAT. ANN. § 25.24.169(4)(f) (Westlaw 2005); COLO. REV. STAT. ANN. § 14-10-113(4)(c) (Westlaw 2005); OHIO REV. CODE ANN.

special need is almost always limited to one spouse alone, there is general agreement that the marital home should not be mechanically divided equally between the spouses;¹³⁷ rather, an unequal division of the marital home is often equitable.

The most common practical application of special need as a division factor is the large body of case law awarding the marital home to the custodial parent or to the more dependent spouse.¹³⁸ These cases reason that where the court has flexibility in determining which asset to award to which spouse, it makes considerable sense to award the marital home to the spouse who has the greatest need for it.

It should be noted that in all dual-classification states, the court may transfer title to any asset in which a marital interest exists, regardless of how small that interest may be.¹³⁹ If any sep-

§ 3105.171(F)(3) (Westlaw 2005); S.C. CODE ANN. § 20-7-472(10) (Westlaw 2005); see *Craig v. Craig*, 617 S.E.2d 359, 362 (S.C. 2005) (error to order sale without considering wife's need to remain in home, where wife was custodial parent of minor child and marital property could feasibly be divided by awarding the entire home to the wife); *Wooten v. Wooten*, 615 S.E.2d 98, 104 (S.C. 2005) (trial court properly awarded marital home to wife; "Wife's emotional attachment to the family home and her wish to keep it in the family in order for future generations to enjoy is a factor to be considered in awarding the home to her, as that likely will benefit her emotional and physical health").

¹³⁷ E.g., *Martha F. Davis, The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089, 1112 (1983) ("there is little to recommend absolute equality. The wide discretion available under an equitable division regime avoids the inflexibility inherent in a requirement of equal division"). Even where the entire marital or community estate must be divided equally, an unequal division of individual assets, including the marital home is still permitted. See *In re Marriage of Barnert*, 85 Cal. App. 3d 413, 421, 149 Cal. Rptr. 616, 621 (1978) (while division of community estate must be equal, "each asset need not be divided in half"); *Dombrowski v. Dombrowski*, 559 A.2d 828 (N.H. 1989); *Urtis v. Urtis*, 581 N.Y.S.2d 947 (N.Y. App. Div. 1992).

¹³⁸ See, e.g., *Adams v. Adams*, 589 So. 2d 736 (Ala. Ct. App. 1991); *In re Marriage of Burkle*, 525 N.W.2d 439 (Iowa Ct. App. 1994); *In re Marriage of Fidone*, 462 N.W.2d 710 (Iowa Ct. App. 1990); *Navarre v. Navarre*, 479 N.W.2d 357 (Mich. Ct. App. 1991); *Griffin v. Griffin*, 986 S.W.2d 534 (Mo. Ct. App. 1999); *Barlowe v. Barlowe*, 440 S.E.2d 279 (N.C. Ct. App. 1994); *Ranz v. Ranz*, 554 N.E.2d 142 (Ohio Ct. App. 1988); *Thomas v. Thomas*, 987 P.2d 603 (Utah Ct. App. 1999).

¹³⁹ See *Curtis v. Weston*, 690 A.2d 969 (Me. 1997) (where wife's nonmarital interest in home was less than 6%, proper to award physical possession of home to husband); *Wade v. Wade*, 325 S.E.2d 260 (N.C. Ct. App. 1985); *Trego v. Scott*, 961 P.2d 168 (N.M. Ct. App. 1998), *cert. denied*, 961 P.2d 167

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arate interest exists in the home, the owner is entitled to an award of money or other property equal to the value of his or her separate interest, but the property itself may be assigned to either spouse. The presence of a partial separate interest therefore does not prevent the court from awarding the marital home to the spouse who has the most need for it.

The difficult question in dividing the marital home is what to do when an equitable division cannot be implemented by awarding the marital home outright to the spouse with greatest need for it. For example, assume that the parties own a marital home worth \$200,000, personal property worth \$20,000, and retirement benefits worth \$50,000. Assume further than an equal division is equitable. There is \$270,000 in marital property to divide, so each spouse should receive \$135,000. But the home is worth \$200,000. It is not possible to award the marital home outright to either spouse, and still make an equal division. Because marital homes are so valuable compared to other assets, this problem arises frequently in practice, especially in divorces between parties of modest means.

When an outright award of the marital home is not possible, the court has several options. First, it can award the home to one spouse alone, subject to a monetary award in favor of the other spouse, payable over a period of time, and secured by a lien on home itself.¹⁴⁰ This method works if the spouse who receives the home is able to pay the award. Unfortunately, spouses with special need are most often either older dependent spouses or spouses with custody of young children—the types of spouses who are least likely to have sufficient income to pay a monetary award.

Second, the court can order the home sold.¹⁴¹ An order of sale always carries the risk that the sale will not bring full value—

(N.M. 1998) (court may divide asset of dual character between parties, so long as owning spouse receives full value of separate interest); *Greene v. Greene*, 569 S.E.2d 393 (S.C. Ct. App. 2002) (where wife made separate downpayment on home, proper to award home to husband, with appropriate setoff for wife's separate interest).

¹⁴⁰ *E.g.*, *Tibbetts v. Tibbetts*, 762 A.2d 937 (Me. 2000); *Chirls v. Chirls*, 566 N.Y.S.2d 931 (N.Y. App. Div. 1991); *Hough v. Hough*, 440 S.E.2d 387 (S.C. Ct. App. 1994).

¹⁴¹ *See, e.g.*, *Baldwin v. Baldwin*, 905 S.W.2d 521 (Mo. Ct. App. 1995); *Young v. Young*, 2005 WL 1163023 at *4 (Ohio Ct. App. 2005) (“if the marital

a divorce-related sale, often conducted under some degree of pressure, is not the ideal setting for obtaining a favorable price.¹⁴² Sale also results in loss of the home, and thereby conflicts with the special need that created the problem in the first place. When the home is sufficiently valuable that the spouse with special need can obtain new housing with his or her share of the proceeds, sale may be an option. For example, when the spouse with special need is a dependent former homemaker, the children are grown, and the house is larger than the dependent spouse actually needs, sale is a more attractive option. In most settings, however, an immediate sale of the marital home creates as many problems as it solves.¹⁴³

Third, and probably most commonly, the court can order that one spouse receive exclusive use of the marital home for some period of time after the divorce.¹⁴⁴ When exclusive use is ordered, the spouse with special need is given the right to use the home for a specific period of time. The other spouse's interest is normally represented by imposing a lien upon the home,¹⁴⁵ and there must be a specific date upon which the period of exclusive

residence was not sold, an equitable division of property could not be made"); *Stevenson v. Stevenson*, 368 S.E.2d 901 (S.C. 1988); *see generally* TURNER, *supra* note 3, § 9:12.

¹⁴² *See, e.g.*, *Blanchard v. Blanchard*, 731 So. 2d 175 (La. 1999); *Kellner v. Kellner*, 593 N.W.2d 1 (Neb. Ct. App. 1999); *see generally* TURNER, *supra* note 3, § 9:13. The risk that marital property will not command full value is especially acute when the court orders an auction or other public sale. *See, e.g.*, *Stewart v. Stewart*, 728 So. 2d 473 (La. Ct. App. 1998), *writ denied*, 740 So. 2d 114 (La. 1999) (error to order public sale of all community property; no showing that private sale or division in kind would not accomplish same purpose at lesser cost).

¹⁴³ *See, e.g.*, *Craig v. Craig*, 617 S.E.2d 359, 362 (S.C. 2005) (error to order sale without considering whether equitable division could be made while accommodating wife's need to remain in home).

¹⁴⁴ *See, e.g.*, *Zirngibl v. Zirngibl*, 606 N.E.2d 1 (Ill. App. Ct. 1991); *In re Marriage of McNeely*, 453 N.E.2d 748 (Ill. App. Ct. 1983); *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983); *Poretsky v. Poretsky*, 574 N.Y.S.2d 796 (N.Y. App. Div. 1991); *Johnson v. Johnson*, 329 S.E.2d 443 (S.C. Ct. App. 1985); *Rosendahl v. Rosendahl*, 876 P.2d 870 (Utah Ct. App. 1994); *Sanney v. Sanney*, 511 S.E.2d 865 (W. Va. 1998).

¹⁴⁵ For representative cases securing the nonpossessory spouse's interest with a lien, *see In re Marriage of Sheber*, 459 N.E.2d 1056 (Ill. App. Ct. 1984); *In re Marriage of Cabaj*, 455 N.E.2d 822 (Ill. App. Ct. 1983).

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use ends.¹⁴⁶ After a period of exclusive use terminates, the home is normally sold,¹⁴⁷ although the spouse in possession may be given an option to purchase the other spouse's interest.¹⁴⁸

Exclusive use is an ideal remedy for the most common type of special need, the need of minor children to retain in their existing residence. This sort of special need is by definition time-limited; the children will eventually become emancipated. When this happens, the spouse in possession is left with a home larger than he or she needs. The home can then be sold, the proceeds can be divided in set percentages, and the spouse in possession can purchase another, smaller home with his or her share of the proceeds.

Finally, situations will exist in which the law of property division alone can not accommodate the special need to remain in the marital home. This situation is especially common when financial need is substantial and long-term, such as a former homemaker with no significant employment skills after a long marriage. The law of spousal support was created for the purpose of dealing with this sort of long-term financial need,¹⁴⁹ and must necessarily be the primary remedy for these situations.

Some states take the position that spousal support is disfavored under modern law, and that the court should make an unequal division of the marital property if that will permit a reduction in the ultimate spousal support award.¹⁵⁰ In these

¹⁴⁶ See *Holmes v. Holmes*, 613 So. 2d 571 (Fla. Dist. Ct. App. 1993); *Henderson v. Henderson*, 401 N.E.2d 73 (Ind. Ct. App. 1980); *Tishkevich v. Tishkevich*, 553 A.2d 1324 (N.H. 1989) (award of exclusive use until home sold, without specifying any sale date, awards essentially nothing to nonresident spouse and constitutes an improper unequal division); *Castiglione v. Castiglione*, 686 N.Y.S.2d 486 (N.Y. App. Div. 1999) (error to award wife indefinite lien on husband's nonhome property, with no specific payment date); *Rowe v. Rowe*, 591 N.E.2d 716 (Ohio Ct. App. 1990); *Johnson v. Johnson*, 329 S.E.2d 443 (S.C. Ct. App. 1985).

¹⁴⁷ For representative cases ordering sale after a period of exclusive use, see *Bible v. Bible*, 597 So. 2d 359 (Fla. Dist. Ct. App. 1992); *Claborn v. Claborn*, 673 N.W.2d 533 (Neb. 2004).

¹⁴⁸ E.g., *Gazo v. Gazo*, 697 A.2d 342 (Vt. 1997).

¹⁴⁹ See generally Brett R. Turner, *Spousal Support in Chaos*, 25 FAM. ADVOC. 14 (Spring 2003).

¹⁵⁰ *Hanlon v. Hanlon*, 871 P.2d 229 (Alaska 1994); *In re Marriage of Aud*, 491 N.E.2d 894 (Ill. Ct. App. 1986); *Keen v. Keen*, 407 N.W.2d 643 (Mich. Ct. App. 1987); *Horner v. Horner*, 686 N.W.2d 131, 137 (N.D. 2004).

states, it is possible to award the marital home outright to a spouse with long-term financial needs, thus dividing the marital estate unequally. The supporting spouse is then compensated with a smaller award of spousal support. Other states prefer to draw a clearer line between property division and spousal support.¹⁵¹ In these states, if the home is awarded to the spouse with special need, it must be done subject to a monetary award, which is then repaid with income from spousal support. This result seems needlessly circuitous; the better practice is to permit an unequal division to be exchanged for less spousal support—a tradeoff that is often made in private agreements.

The available methods for dividing the marital home are almost always sufficient to address any special needs that are present on the facts. The only substantial exception is the marriage with a highly dependent spouse and few marital assets other than the home itself. Since no property division system can divide assets that do not exist, this situation requires long-term spousal support. All the law of property division can do is to allow an unequal division to be traded off for less spousal support, and present law mostly permits this step.

The same point can also be stated as a rule of spousal support law. “Alimony following divorce is a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.” *Nemoto v. Nemoto*, 620 A.2d 1216, 1219 (Pa. Super. Ct. 1993). “If an equitable division of marital property, considered with each party’s non-marital assets, leaves a deficit for one party, then alimony should be considered.” *Johnson v. Johnson*, 877 So.2d 485, 489 (Miss. Ct. App. 2003).

¹⁵¹ See *Carstens v. Carstens*, 867 P.2d 805 (Alaska 1994) (failure to make unequal division not error; wife’s smaller earning capacity had been addressed through award of alimony); *Augsburger v. Hudson*, 802 N.E.2d 503, 513 (Ind. Ct. App. 2004) (“the trial court could reasonably determine that an equal division is just and reasonable under the circumstances, despite Wife’s poor health and meager earning ability,” where wife’s financial need was addressed through award of alimony); *M.A.Z. v. F.J.Z.*, 943 S.W.2d 781 (Mo. Ct. App. 1997) (error to award wife 60% of marital estate; wife had support needs, but they were met by alimony award; equal division required).

Florida and Virginia take this point a step further by holding that future support needs are not an equitable distribution factor at all, so that a tradeoff of additional property division for reduced spousal support is error as a matter of law. See *Gil v. Mendelson*, 793 So. 2d 1061 (Fla. Dist. Ct. App. 2001); *Reid v. Reid*, 375 S.E.2d 533 (Va. Ct. App. 1989).

Present property division law also fails to accommodate special need when the marital home is entirely separate property. This situation is rather rare, for as noted above, the marital home can be divided when there is any marital interest in it.¹⁵² There are not many marriages which lasted long enough to create special need, in which the real value of the home is not to some extent a product of the marital partnership. A large majority of married couples use marital funds to make at least one mortgage payment, or use marital funds to add value through improvements. Situations very occasionally arise in which the home was given outright to one spouse, not subject to a mortgage, and not improved during the marriage, but even then exclusive use is often permitted by the law of spousal or child support.¹⁵³ In almost all situations, present law gives the trial court sufficient flexibility to address special need for possession of the marital home.

VI. Conclusion

Present law recognizes the possibility that one spouse might have special need to possess the marital home after divorce. To the extent that any theory of property division can address that special need—that is, within the unavoidable limits of the rule that the court can only divide property that is actually owned by the parties—current law allows that need to control division of the home. Research for this article did not reveal a single re-

¹⁵² See *supra* note 139.

¹⁵³ See *In re Marriage of Braud*, 45 Cal. App. 4th 797, 53 Cal. Rptr. 2d 179 (1st Dist. 1996); *Dyer v. Dyer*, 658 So. 2d 148 (Fla. Dist. Ct. App. 1995); *Graziano v. Graziano*, 727 N.Y.S.2d 473 (N.Y. App. Div. 2001); *Nasser-Moghaddassi v. Moghaddassi*, 198, 612 S.E.2d 707, 715 (S.C. Ct. App. 2005) (“use of the marital home may be granted as an incident of support”); *State ex rel. Chafin v. Halbritter*, 448 S.E.2d 428 (W. Va. 1994) (court can give nonowning spouse exclusive use of separate property home).

Note that where the court awards exclusive use as an incident of child support, it must treat the value of the award as child support under the relevant child support guidelines. Thus, the court must either credit the value against the guideline amount, or make sufficient findings of fact to deviate upward from that amount. *Bryan v. Bryan*, 765 So. 2d 829 (Fla. Dist. Ct. App. 2000); *Edgar v. Edgar*, 668 So. 2d 1059 (Fla. Dist. Ct. App. 1996); see also *Presworsky v. Presworsky*, 637 N.Y.S.2d 487 (N.Y. App. Div. 1996) (error to order husband to pay cost of maintaining home while wife had exclusive use; housing costs were included in guideline amount of child support).

ported appellate decision in which the court felt that present law did not permit it to divide the marital home equitably.

The purpose of American law on classification of the marital home is not to address special need, but to create a standardized remedy for separate contributions. The presence of this standardized remedy makes the result easier to predict and encourages negotiated settlement. In addition, and most importantly, the standardized result assures spouses who own separate property that their contributions will be fairly recognized, and therefore encourages separate investment in marital homes generally. By contrast, if the law were to insist upon a marital interest larger than the proportionate value of the marital contributions, separate contribution to the marital home would quickly become an economically irrational action. The logical consequence would be a significant reduction in the use of separate property for marital purposes—a result that would inflict significant harm upon married as well as divorcing families.

Of course, it is not necessary or inevitable that separate property be recognized at all. It is not unreasonable for a state to conclude that the administrative cost of recognizing separate property exceeds its benefits, and a significant minority of American jurisdictions has in fact so decided. Where separate property exists, however, it exists as a device for standardizing the effect of nonmarital contributions upon division of marital property—an effect that is consistently recognized even where separate property does not exist. If the statutory classification system is not applied consistently and predictably to all marital assets, marital homes included, the state is left with most of the costs and few of the benefits that separate property provides. Where separate property exists, the marital home should be governed by the same predictable rules of classification as any other type of asset.

Other discussions of law on dividing the marital home have not drawn a rigid distinction between the classification and division stage issues, and have generally stressed the unique nature of the marital home.¹⁵⁴ This article suggests that the marital home is not a unique asset at the classification stage, and that it

¹⁵⁴ See, e.g., Martha F. Davis, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089 (1983).

should generally be subject to the same rules of classification as other assets. Indeed, since the marital home is often the most valuable asset owned by the parties, the statutory classification system will be materially and perhaps fatally weakened if it is not applied to the marital home. Classification systems, by their very nature, must be applied to *all* assets owned by the parties.

At the division stage, the powerful interests in favor of awarding the marital home to the custodial parent, or perhaps to a seriously dependent spouse with no minor children, obviously require the application of special rules. Present law recognizes such rules, allowing the home to be given to the spouse with special need for it in the great majority of cases. The cases in which special need is not controlling are mostly cases in which the marital estate is very limited in size. No property division theory can by itself address the financial disparity between the parties in this sort of case, since the parties simply lack sufficient property upon which such a theory can operate. A spousal support remedy is most appropriate for these cases, because it allows transfers of future income and permits modification in response to future changed circumstances.

The marital home is a unique asset, but the factors that favor special treatment are best suited for consideration at the division stage. Allowing those factors to influence classification of the marital home will inflict needless harm upon the consistency and predictability of the classification process. The marital home should not be subject to special rules of classification.