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VIRGINIA'S EQUITABLE DISTRIBUTION LAW: AN OWNER'S MANUAL

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I. INTRODUCTION

Virginia's equitable distribution statute, section 20-107.3 of the Annotated Code of Virginia,¹ has been in effect for more than five years. Although Virginia courts have had multiple opportunities to explain and interpret the new statute, an amazing number of questions remain to be answered. Judge Coleman of the Virginia Court of Appeals recently noted:

Equitable distribution in divorce cases in Virginia is a recent creature of statute. Judicial construction of the statute is in its infancy. The many questions concerning the scope, intention and application of the statute are now only beginning to be answered.²

This article has been written for two separate and somewhat conflicting purposes. First, in the five years since the statute was enacted, courts have resolved some of the statute's key ambiguities. This resolving process unquestionably has been healthy and necessary, but it has made a full understanding of the case law essential to understanding the statute. Moreover, because courts consider questions only as they arise, the newly important case law inevitably is fragmented and disorganized. This article will attempt to remedy the recent fragmentation of Virginia's equitable distribution law by comprehensively outlining and restating both the statute and the case law.

Second, now that the main elements of Virginia's equitable distribution law have been established, the time is ripe to consider whether the law is accomplishing successfully its purpose. Section 20-107.3 was enacted to remedy "the inequity inherent under the common law scheme" for dividing property upon divorce.³ Yet commentators in other states have questioned whether equitable distribution is truly any fairer to dependent spouses than

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1. VA. CODE ANN. § 20-107.3 (Supp. 1989).

2. *Booth v. Booth*, 7 Va. App. 22, 85, 371 S.E.2d 569, 571 (1988).

3. REPORT OF THE SUBCOMMITTEE STUDYING SECTION 20-107 OF THE CODE OF VIRGINIA TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, VA. H. DOC. NO. 21, at 4 (1982).

the prior common law system.⁴ A critical examination of Virginia's experience in comparison with the experience of other states with similar statutes will provide useful suggestions as to how Virginia's equitable distribution law can be refined and improved.

II. PROCEDURE

The Virginia statute, as originally enacted, contained few provisions regarding basic equitable distribution procedures. Not surprisingly, therefore, a disproportionate number of reported cases and statutory amendments have dealt with procedural issues.

A. *Types of Actions*

1. Initial Actions

The Virginia statute allows equitable distribution claims to be raised in two different types of actions. Claims are made most often in initial actions in which no court previously has made any decree relating to any part of the parties' marriage or divorce. The Virginia statute expressly allows a claim for equitable distribution to be made in the most common initial proceedings—actions for divorce and dissolution.⁵

The Virginia courts have not yet considered whether equitable distribution is available in actions to annul a marriage.⁶ Section 20-107.3 expressly refers only to actions for divorce or dissolution. But one can easily imagine situations in which it would be unjust not to allow equitable distribution in annulment actions. For instance, assume that an already married man marries a second wife, telling her that he never has been married. The two live together for many years and accumulate significant amounts of marital property. Then the husband reveals his prior marriage and evicts his second wife from the marital home. Do courts truly have no power to act in such a situation? Under a literal interpretation of section 20-107.3, courts are

4. See *infra* note 355 and accompanying text.

5. VA. CODE ANN. § 20-107.3(A) (Supp. 1989).

6. *But cf.* Pretlow v. Pretlow, 177 Va. 524, 14 S.E.2d 381 (1971) (holding that where marriage annulled for fraud, trial court acted properly by returning to husband gifts made to wife in contemplation of marriage; also proper to award wife temporary alimony). The issue has not arisen in other states, perhaps because many equitable distribution statutes expressly apply to annulment as well as divorce. L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* § 5.10 (1983 & Supp. 1989). Two states that have adopted equitable distribution by court decision, however, have applied it to annulment as well as divorce. See *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984); *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983). Courts and legislatures in other states, therefore, seem to favor allowing equitable distribution upon annulment.

helpless. A court, however, might be strongly tempted in such a situation to read the statute more expansively.⁷

Equitable distribution is probably not available in actions for divorce from bed and board. Although courts have not considered the issue, section 20-107.3 on its face applies only to actions for divorce from matrimony. Moreover, the legislature used almost identical language in sections 20-107.1 and 20-107.2,⁸ except that it added a specific reference to divorces from bed and board. In light of this apparently deliberate omission of divorces from bed and board from section 20.107.3, courts probably will refuse to allow equitable distribution in actions for divorce from bed and board. An equitable distribution claim also cannot be made in a partition proceeding.⁹

2. Subsequent Actions

Equitable distribution obviously is not available if the parties already have been divorced in Virginia. A party gets only one bite at the apple, and if he misses the chance or finds the apple sour, he has no legal remedy.¹⁰

A different situation exists when the parties are divorced in another state. Because a court can divide property located outside its own state only if it has personal jurisdiction over the owner,¹¹ it is important that Virginia be able to divide property over which another state's courts lacked jurisdiction. Section 20-107.3 was amended in 1985 expressly to allow equitable distribution within two years after a Virginia domiciliary is divorced by a court that lacks personal jurisdiction over him.¹² No Virginia

7. Alternatively, the doctrines of estoppel and unclean hands might provide a basis for relief. But what if, rather than deliberately misleading the wife, the husband instead had a good faith mistaken belief that his first wife was dead or that she had divorced him? Where neither party is to blame for a void or voidable marriage, there would seem to be no public policy obstacle to allowing an equitable distribution. The best solution, of course, would be a statutory amendment directly stating whether § 20-107.3 applies to annulments.

8. VA. CODE ANN. §§ 20.107.1, 20-107.2 (Supp. 1989).

9. Thurman v. Thurman, No. 0003-85 (Va. Ct. App. Aug. 29, 1985).

10. See Parra v. Parra, 1 Va. App. 118, 336 S.E.2d 157 (1985). Similarly, a monetary award cannot be modified after it has been made. Court orders can be modified only if there is either express statutory authority to modify or if the court reserves jurisdiction to modify in its initial order. See, e.g., Brinn v. Brinn, 147 Va. 277, 137 S.E. 503 (1927). Modification is not permitted by any Virginia statute, and a statutory requirement that equitable distribution be done "upon" divorce prevents the court from reserving jurisdiction to decide the case at any time after the divorce decree is rendered. Parra, 336 S.E.2d at 157.

11. See *infra* notes 14-24 and accompanying text.

12. VA. CODE ANN. § 20-107.3(A) (Supp. 1989) was amended by 1985 Va. Acts 442 to provide that equitable distribution is available "upon the filing with the court . . . of a certified copy of a final divorce decree obtained without the Commonwealth." The same act added VA. CODE ANN. § 20-107.3(I) (Supp. 1989), which provides:

A court of proper jurisdiction under § 20-96 may exercise the powers conferred by this section after a court of a foreign jurisdiction has decreed a dissolution of a marriage or a divorce from the bond of matrimony, if (i) one of the parties was domiciled in this Commonwealth when the foreign divorce proceedings were commenced, and (ii) the foreign court did not have personal jurisdiction over the party

case has construed the new language.¹³

B. Jurisdiction

Jurisdiction in divorce cases is governed by the familiar rule of "divisible divorce." The divorce itself can be granted by any state in which either spouse is domiciled,¹⁴ but in order to decide support and property issues, the court must have either in personam jurisdiction over both spouses or in rem jurisdiction over the marital assets.¹⁵

Three requirements must be met before personal jurisdiction exists. First, personal jurisdiction must be proper under Virginia's long-arm stat-

domiciled in the Commonwealth, and (iii) the proceeding is initiated within two years of receipt of notice of the foreign decree by the party domiciled in the Commonwealth, and (iv) the court obtains personal jurisdiction over the parties pursuant to § 8.01-328.1 (A) (9), or in any other manner permitted by law.

13. The court of appeals, however, has considered a related alimony case. In *Gibson v. Gibson*, 5 Va. App. 426, 364 S.E.2d 518 (1988), the parties resided in Virginia until the husband left the marital home and moved to Tennessee. He filed an action for divorce in that state, and the court issued a divorce decree that also resolved support issues. Unfortunately, however, the court did so without giving the wife proper notice, and upon the wife's motions, the court vacated the property division for lack of notice. The wife's pending Virginia divorce action then came up for trial, and the Virginia trial court awarded the wife alimony. On appeal, the Virginia Court of Appeals noted that the Tennessee decision re-opening the Tennessee decree was in effect a holding that Tennessee had not met the requirements for personal jurisdiction over the wife at the time of the initial Tennessee decree. Because only a court with personal jurisdiction over both parties can make a binding decision on alimony, see *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), the court found that the re-opened Tennessee decree was not entitled to full faith and credit in Virginia on the question of alimony. While *Gibson* considered only whether the Virginia trial court could make an alimony award, the court recognized that *Vanderbilt* applies to all "[p]ersonal rights, which include property and support rights." *Gibson*, 364 S.E.2d at 519. Thus, if the Virginia trial court had made an equitable distribution award, the court of appeals probably would have affirmed the award on the same basis that the court of appeals affirmed the alimony award.

Even after *Gibson*, attorneys still should exercise caution when responding to out-of-state divorce proceedings. The Supreme Court has held that where the question of jurisdiction is actually litigated, full faith and credit attaches to other states' findings on jurisdiction as well as to findings on the merits. *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948). Thus, if the client contests jurisdiction in the foreign state and loses, the foreign court's finding that it has jurisdiction is binding in Virginia. Accordingly, when sued for divorce in another state, a Virginia resident must either (1) litigate jurisdiction before a foreign court that may well be biased in favor of the plaintiff, or (2) take a default judgment and run the risk that the Virginia courts will decide that the other state really did have jurisdiction. This is probably one of the least attractive decisions family practitioners must help their clients make.

14. *Williams v. North Carolina*, 325 U.S. 226 (1945); *Evans v. Asphalt Roads & Material Co.*, 194 Va. 165, 72 S.E.2d 321 (1952).

15. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948); *Krieger v. Krieger*, 334 U.S. 555 (1948); *Gibson v. Gibson*, 5 Va. App. 426, 364 S.E.2d 518 (1988). Jurisdiction over child custody cases once followed the same rule, but it is now governed by a nationwide uniform statutory standard. See Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982 & Supp. 1986); Uniform Child Custody Jurisdiction Act, VA. CODE ANN. §§ 20-125 to 20-146 (1983).

ute.¹⁶ Second, the defendant must have constitutionally sufficient minimum contacts with Virginia.¹⁷ Where the divorce action arises from the defendant's contacts with Virginia,¹⁸ those contacts need reveal only that the defendant deliberately took advantage of the laws or economy of Virginia.¹⁹ The contacts must be purposeful, and the contacts cannot result from the unilateral action of the other spouse.²⁰ Moreover, while the foreseeability of being sued in Virginia is certainly one relevant factor, foreseeability alone is not a "sufficient benchmark" of contact with the forum.²¹ Where the divorce action does not arise from the defendant's contacts with Virginia, only continuous and systematic general business contacts will be sufficient.²² This difficult jurisdictional standard rarely is met in divorce cases. Third, the exercise of jurisdiction by the Virginia courts must be fair and reasonable under the facts of a specific case.²³ Where the defendant has sufficient contacts with the forum state, it will be a "rare case" in which this third test is not met.²⁴

Virginia never has considered whether in rem jurisdiction is available in divorce cases, but in rem jurisdiction is available in other states.²⁵ A court has in rem jurisdiction to divide any property physically located within the forum state's borders, regardless of whether it has personal jurisdiction

16. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Virginia long-arm statute is codified at VA. CODE ANN. § 8.01-328.1 (Supp. 1989). The statute specifically provides for jurisdiction when Virginia was the last matrimonial domicile if one party to the marriage still resides in Virginia. *Id.* § 8.01-328.1(A)(9).

17. *International Shoe*, 326 U.S. at 310. Note, however, that a much stricter test applies to jurisdiction for the purpose of dividing military retirement pay. *See infra* notes 63-64 and accompanying text.

18. It also may be sufficient if the defendant's contacts are merely "related to" the cause of action. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984) (raising but not answering question); *cf. id.* at 419, 427-28 (Brennan, J., dissenting) (arguing that "arising from" test should be applied where cause of action is only "related to" defendant's contacts).

19. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The most common situation in which a divorce action arises from the defendant's contacts is when the last marital domicile was in the forum state. Courts almost uniformly have upheld jurisdiction in the last marital domicile, even where one spouse has been absent for some time. *See e.g.*, *King v. King*, 513 A.2d 773 (Del. Fam. Ct. 1985); *Robinson v. Robinson*, 56 N.C. App. 737, 289 S.E.2d 612 (1982). Detailed discussion of minimum contacts in divorce cases lies outside the scope of this article. For an examination of minimum contacts in equitable distribution cases nationwide, see Turner, *Jurisdiction and Equitable Distribution*, 4 EQUITABLE DISTRIBUTION JOURNAL 205 (1987).

20. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

21. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

22. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

23. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

24. *Id.* at 116 (Brennan, J., concurring).

25. *See, e.g., In re Breen*, 560 S.W.2d 358 (Mo. Ct. App. 1977); *McCasland v. McCasland*, 68 N.Y.2d 748, 497 N.E.2d 696 (1986); *cf. VA. CODE ANN. § 8.01-328.1(A)(6)* (Supp. 1989) (long-arm provision permitting personal jurisdiction over defendants "[h]aving an interest in, using, or possessing real property in this Commonwealth").

over the owner.²⁶ In effect, the ownership of property in Virginia is a limited form of minimum contact with this state.²⁷

C. Bifurcation

A "bifurcated" divorce trial is one in which the court divorces the parties some time before the court considers questions of support and property division. Given the complexity of equitable distribution cases and the need to value all of the marital assets, bifurcation has obvious practical advantages. There has been some uncertainty, however, as to whether bifurcation is permitted by Virginia law.

The matter first arose in *Parra v. Parra*.²⁸ Neither party in *Parra* actually argued the issue, but the court considered on its own motion whether or not Virginia trial courts have subject matter jurisdiction to consider equitable distribution some time after the parties actually have been divorced. The court first rejected the notion that the statutory authority to consider equitable distribution "upon decreeing the dissolution of a marriage" required that equitable distribution be considered at the same time as divorce.²⁹ Instead, the court interpreted this language as establishing only the *earliest* date on which a monetary award can be made.³⁰ Because the statute neither prohibited nor permitted consideration of equitable distribution after the date of divorce, the question then became whether the divorce decree could reserve jurisdiction to consider equitable distribution at a later date. The court concluded that unless a statute specifies otherwise, a trial court has the inherent equitable power to defer exercise of its own jurisdiction.³¹ The trial court's decree in *Parra*, therefore, was not void for lack of subject matter jurisdiction.

Parra was a logical and definitive opinion, and it should have been the last word on bifurcation in Virginia. Unfortunately, however, the legislature felt a need to codify the *Parra* rule, and its well-meaning attempt to do so created more problems than it solved. The new statute provides:

The court, on motion of both parties, may retain jurisdiction in the final decree of divorce to adjudicate the remedy provided by

26. *In re Breen*, 560 S.W.2d 358, 363 (Mo. Ct. App. 1977). The Virginia courts, of course, do not actually divide property upon divorce, so the argument against *in rem* jurisdiction is somewhat stronger in Virginia. The precise legal questions are: 1) whether there is a sufficient nexus between ownership of property and the monetary award that mere ownership should create jurisdiction for the limited purpose of basing an award on the owned asset, and 2) whether the monetary award is a "claim to property" for purposes of triggering the state's interest in regulating ownership of property within its borders. See generally *Shaffer v. Heitner*, 433 U.S. 186, 207-08 (1977); *Breen*, 560 S.W.2d at 363. This author's guess is that *in rem* jurisdiction would apply, but the question has not arisen in either of the two "monetary award" equitable distribution states (Virginia and Maryland).

27. See *Breen*, 560 S.W.2d at 363.

28. 1 Va. App. 118, 336 S.E.2d 157 (1985).

29. VA. CODE ANN. § 20.107.3(A) (Supp. 1989) (emphasis added).

30. *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157, 161 (1988).

31. *Id.* at 161-62.

this section when the court determines that such action is clearly necessary because of the complexities of the parties' property interests, and all decrees heretofore entered retaining such jurisdiction are validated.³²

The statute essentially codifies the *Parra* rule and adds an additional provision that bifurcation be done only where "clearly necessary." This much of the statutory language is unobjectionable.

By expressly authorizing bifurcation only "on motion of both parties," however, the legislature opened a Pandora's Box of difficult problems. The statute is phrased in the positive by stating only the conditions under which a court *can* bifurcate a divorce trial. Because the appellate courts have not interpreted the new statute, we do not know what will happen when a court purports to bifurcate a divorce case on the motion of one party alone. The *Parra* court held that trial courts have inherent equitable authority to defer exercise of their own jurisdiction, but the court also noted that "there is nothing in the statute to prevent courts from using their inherent powers in equity."³³ The new statute also contains no express restriction on inherent powers, but the mutual consent and "clearly necessary" requirements essentially are superfluous if they do not restrict those powers. Thus, it appears that the trial court has authority to bifurcate *only* where both parties join in the motion. If the court bifurcates a trial on the motion of one party only, the court has exceeded its authority, and all actions more than twenty-one days after the divorce decree are void for lack of subject matter jurisdiction.³⁴ The bottom line is that the dependent spouse loses her right to an equitable distribution if the court improperly bifurcates a divorce case.

Dismissal is an unreasonably harsh sanction for violating the technical conditions under which bifurcation is permitted. The modern trend is to dismiss an action for procedural violation only where the violation causes real and irreparable prejudice to an innocent party.³⁵ Improper bifurcation may be an inconvenience for the nonconsenting party, but in most cases bifurcation will not create prejudice. Whatever prejudice does exist generally can be removed by lesser sanctions such as continuances and orders to pay costs.³⁶ Moreover, where a trial court which is ignorant of the consent

32. VA CODE ANN. § 20-107.3(A) (Supp. 1989).

33. *Parra*, 336 S.E.2d at 161-62.

34. See VA. SUP. CT. R. 1:1 (trial court cannot modify own orders more than 21 days after orders are issued).

35. See, e.g., 23 AM. JUR. 2D *Depositions & Discovery* § 385 (1983) (stating that dismissal of action is sanction of last resort, applicable only in extreme circumstances to most flagrant of discovery abuses); *id.* § 358 (noting courts' reluctance to dismiss client's action because of attorney's negligence).

36. See, e.g., *First Charter Land Corp. v. Middle Atlantic Dredging, Inc.*, 218 Va. 304, 237 S.E.2d 145 (1977) (holding that where plaintiff surprised defendant by introducing unexpected exhibit at trial and failure to notify was inadvertent error causing no irremedial prejudice, trial court properly offered defendant continuance rather than ruling exhibit inadmissible).

requirement improperly bifurcates a divorce case, there is no innocent party because the nonconsenting party is substantially at fault for failing to bring the requirement to the court's attention. Improper bifurcation, therefore, meets none of the generally accepted conditions under which a cause of action can be dismissed for procedural error. The legislature should amend section 20-107.3 to provide for more reasonable sanctions when the court improperly bifurcates a divorce trial.

D. *Burdens of Proof and Presumptions*

Under the Virginia statute, property acquired after marriage and before the last separation of the parties is presumed to be marital property.³⁷ The presumption can be rebutted through introduction of "satisfactory evidence" that the property is separate.³⁸

Interestingly, the marital property presumption does not apply to all property that could be classified as marital. Because marital property includes all property acquired "during the marriage"³⁹ and the marriage does not end until the date of divorce, property acquired between the last separation and the date of divorce could be classified as marital property.⁴⁰ Property acquired between the last separation and the date of divorce, however, would not be subject to the marital property presumption, which applies only to property acquired before the final separation.⁴¹

The burden of proof as to the value of property lies upon the party seeking to have the court consider a particular asset in making the monetary award.⁴² If the court lacks sufficient evidence to determine the value of a particular piece of property, the court will ignore that property for monetary award purposes.⁴³ Finally, once property is classified as marital, the property is presumed to be jointly owned and, therefore, subject to actual division unless there is clear evidence that it is not owned jointly.⁴⁴

37. VA. CODE ANN. § 20-107.3(A)(2) (Supp. 1989). A separation is the "last separation" if one or both parties intend at the time of separation or at some later time that the separation be permanent. *Id.*

38. *Id.*

39. *Id.* § 20-107.3(A)(2)(ii).

40. Classification of such property as marital, although possible, is highly unlikely. Ordinarily, the date of classification will be the date of the last separation, and the presumption will apply to all property. *See Price v. Price*, 4 Va. App. 224, 355 S.E.2d 905, 908 (1987). The court, however, has discretion to classify property as of a later date. *Price*, 355 S.E.2d at 909. Questions relating to the date of classification are discussed in greater detail *infra* notes 116-126 and accompanying text.

41. *Price*, 355 S.E.2d at 909.

42. *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18 (1987); *Bowers v. Bowers*, 4 Va. App. 610, 359 S.E.2d 546 (1987). For example, in *Bowers*, the wife failed to introduce a credible valuation of the husband's pension plan. Accordingly, the court of appeals affirmed the trial court's refusal to consider the practice in setting the monetary award.

43. *Bowers*, 359 S.E.2d at 552.

44. VA. CODE ANN. § 20-107.3(A)(2) (Supp. 1989). *See also infra* note 315 and accompanying text.

III. CLASSIFICATION

Equitable distribution of property in Virginia consists of three separate steps: classification of property, valuation of property, and the setting of the monetary award.⁴⁵ The trial court commits reversible error if it fails to complete any of these three steps.⁴⁶

In classifying marital property, the court first must look to federal law. While federal law does not provide any substantive authority for dividing types of property, it does make certain benefits immune from division by state courts.⁴⁷

If an interest is not immune from division under federal law, the question then becomes whether that interest constitutes marital property under Virginia state law. Virginia courts have not expressly subdivided the classification step in any way. Nevertheless, the statutory rules for classification break down logically into a series of lesser steps. Section 20-107.3(A)(2) provides:

Marital property is (i) all property titled in the names of both parties . . . and (ii) all other property acquired by each party during the marriage which is not separate property as defined above.⁴⁸

The clear language of this section establishes several different requirements that an interest must meet before being classified as "marital property." First, the interest must qualify as "property." Second, the interest must have been acquired by one or both parties. Third, the interest must be titled jointly. Finally, if it is not titled jointly, the interest must have been acquired during the marriage and fall outside the express statutory definition of separate property.

While Virginia case law has not incorporated a step-by-step classification approach such as this one, the rules for classification are much easier to understand if specific steps can be isolated, described, and applied. This article, therefore, will address classification of property by focusing upon the one federal law and five state law classification steps outlined above.

A. Step 1: Federal Preemption

Federal law currently affects equitable distribution only when federal retirement or disability benefits are at issue. Certain types of these benefits may as a matter of federal law be exempt from state laws regarding property division upon divorce.

45. *Kaufman v. Kaufman*, 7 Va. App. 488, 375 S.E.2d 374 (1988). See *Brown v. Brown*, 5 Va. App. 238, 361 S.E.2d 364 (1987) ("the factors bearing on the amount and method of payment of a monetary award . . . are only to be applied after the assets of the parties are classified and evaluated"); *Rexrode v. Rexrode*, 1 Va. App. 385, 339 S.E.2d 544 (1986).

46. *Brown*, 361 S.E.2d at 364; *Rexrode*, 339 S.E.2d at 544.

47. See *infra* notes 49-69 and accompanying text.

48. VA. CODE ANN. § 20-107.3(A)(2) (Supp. 1989).

The divisibility of military retirement pay is among the most complicated issues in family law. Before 1981 state decisions were split on whether such pay could be divided by state courts.⁴⁹ The Supreme Court resolved this conflict in *McCarty v. McCarty*,⁵⁰ holding that military retirement pay could not as a matter of law be divided equitably by state courts. *McCarty* was among the least popular Supreme Court decisions of modern times, and Congress overruled it retroactively in 1983 by enacting the Uniformed Services Former Spouses Protection Act (USFSPA).⁵¹

The USFSPA gives state courts authority to divide military "retired or retainer pay."⁵² "Retired or retainer pay" clearly includes military retirement pay,⁵³ and Virginia has held that there is no federal obstacle to dividing such pay.⁵⁴ The USFSPA is silent concerning whether state courts can divide benefits other than "retired or retainer pay." In *Mansell v. Mansell*,⁵⁵ however, the Supreme Court recently held that state courts cannot divide veterans' disability pay. Because veterans' disability pay is one of the benefits outside the scope of "retired or retainer pay,"⁵⁶ state courts probably now can divide only benefits that are divisible under the USFSPA. In other words, when dividing compensation for military service, preemption apparently is the rule, and divisibility the exception.⁵⁷ This general rule of

49. Compare *Russell v. Russell*, 605 S.W.2d 33 (Ky.) (preemption), *cert. denied*, 453 U.S. 922 (1980) with *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (no preemption), *cert. denied*, 419 U.S. 825 (1984).

50. 453 U.S. 210 (1981).

51. 10 U.S.C. § 1408 (1988).

52. *Id.* § 1408(c)(1) (1988).

53. *Id.* § 1408(a)(4) (1988).

54. *Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (1985). *Accord* *Holmes v. Holmes*, 7 Va. App. 472, 375 S.E.2d 387 (1988). *Sawyer* is discussed in detail *infra* notes 70-73 and accompanying text.

55. 109 S. Ct. 2023 (1989). Interestingly, *Mansell* was a collateral attack upon a 1979 divorce decree incorporating a separation agreement providing that the benefits were divisible. In finding preemption, the Supreme Court noted that California courts had held under California state law that the judgment could be re-opened if preemption existed. *Id.* at 2027 n.5. The Supreme Court might well have reached a different result if the judgment had not been subject to re-opening under the applicable state law.

Also, *Mansell* held only that veterans' disability pay could not be divided under equitable distribution or community property principles. Upon remand, the California courts still might be able to hold the benefits divisible, not under community property law, but under the normal law of contracts. This possibility finds support in the Supreme Court's refusal to consider whether the contractual provision against assignment of veterans' benefits applied to the case. *Id.* at 2027 n.6.

56. 10 U.S.C. § 1408(c)(1) (1988). There are several major types of benefits which fall outside the definition of "retired or retainer pay." The most significant of these are military disability pay and veterans' disability pay. In addition, "retired or retainer pay" incorporates certain deductions from the military spouse's base retired pay, *see id.* 10 U.S.C. § 1408(a)(4)(A-F), and the amount of these deductions—in other words, the excess of gross retired pay over net retired pay—also falls outside the definition.

57. Before *Mansell*, state courts disagreed on whether they could divide benefits other than "retired or retainer pay." For cases permitting division, *see, e.g., Casas v. Thompson*,

preemption almost certainly applies in Virginia, even if the court makes a monetary award rather than dividing the pension outright.⁵⁸

The USFSPA itself contains a number of ambiguous provisions. A provision establishing a minimum marriage length of ten years has been interpreted unanimously to apply only when the non-owning spouse seeks direct payment from the military⁵⁹ and not when the non-owning spouse seeks indirect payments from her ex-spouse.⁶⁰ A provision limiting the former spouse's award to fifty percent of the pension⁶¹ likewise applies only to

42 Cal. 3d 131, 720 P.2d 921 (1986) (excess of gross retired pay over net retired pay); *Campbell v. Campbell*, 474 So. 2d 1339 (La. Ct. App. 1984), *appeal denied*, 478 So. 2d 148 (La. 1985) (veterans' disability pay); *Austin v. Austin*, 103 N.M. 457, 709 P.2d 179 (1985) (military disability pay). For cases finding preemption, see, e.g., *King v. King*, 149 Mich. App. 495, 386 N.W.2d 562 (1986) (military disability pay); *Conroy v. Conroy*, 706 S.W.2d 745 (Tex. Ct. App. 1986) (veterans' disability pay).

The cases dividing benefits other than veterans' disability pay are technically speaking still good law. Nevertheless, it would be difficult to argue after *Mansell* that the USFSPA provides an exclusive list of the benefits that are divisible. In practical effect, therefore, *Mansell* has overruled all of the state cases holding that state courts can divide benefits not expressly made divisible by the USFSPA.

58. The Virginia Court of Appeals suggested that preemption might not apply in *Brinkley v. Brinkley*, 5 Va. App. 132, 361 S.E.2d 139 (1987). The husband in *Brinkley* owned a veterans' disability pension, one of the several types of benefits that do not constitute "retired or retainer pay" under the USFSPA. The court ultimately remanded the case for more factual findings as to the nature and source of the disability pension. *Brinkley*, 361 S.E.2d at 143. The court, however, noted that because Virginia courts issue monetary awards rather than changing legal title to property, the cases finding federal preemption to exist "may be distinguishable." *Id.* In other words, even if federal law prohibits division of military benefits other than "retired or retainer pay," the court suggested that federal law might not prohibit a Virginia court from making a monetary award based on those benefits. *Id.*

Analogous law from other states, however, indicates that the *Brinkley* court's suggestion is probably erroneous. Although the question has not arisen in Maryland, the only other "monetary award" state, Maryland did hold (before the USFSPA's enactment) that *McCarty* prevented division of military retirement pay even under a "monetary award" statute. *Hill v. Hill*, 291 Md. 615, 436 A.2d 67 (1981). Moreover, *McCarty* itself held that federal law prevented not only an actual division of military retirement benefits, but also an award of offsetting property to compensate the non-owning spouse for the nondivisibility of the pension. *McCarty v. McCarty*, 453 U.S. 210, 228-29 n.22 (1981). *Accord In re Smith*, 33 Wash. App. 147, 652 P.2d 391 (1982) (error to award wife property equal to husband's military retirement pay while dividing rest of property equally). Thus, although most courts held that *McCarty* did not prevent state courts from considering the pension in setting the size of the property award, see L. GOLDEN, *supra* note 6, § 6.05, there was general agreement that *McCarty* could not be avoided simply by awarding property of equal value in place of the pension itself. Because Virginia's monetary award system makes precisely such a substitution, a monetary award probably constitutes an improper direct offset if it is based upon a pension immune from distribution under federal law.

59. 10 U.S.C. § 1408(e)(1) (1988).

60. See, e.g., *Stone v. Stone*, 725 S.W.2d 145 (Mo. 1987); *Konzen v. Konzen*, 103 Wash. 2d 470, 693 P.2d 97 (1985); see also *Anderson v. Anderson*, 13 Ohio App. 3d 194, 468 N.E.2d 784 (1984) (holding that where same two parties were married, divorced, remarried, and then divorced again, two marriages could be added together for purposes of ten-year rule).

61. 10 U.S.C. § 1408(e)(1) (1988).

direct payments from the government.⁶² The act allows pensions to be divided only by a state in which the military spouse was a resident or domiciled or to whose jurisdiction the military spouse has consented.⁶³ This restrictive jurisdictional test, moreover, clearly applies to all types of benefits.⁶⁴

An additional thorny issue centers around divorce decrees issued during the brief period between June 1981 and January 1983 when *McCarty* still applied to military retirement pay. Because *McCarty* was overruled retroactively to the date it was decided, some states have permitted decrees issued in this "*McCarty* gap" period to be re-opened for division of a military pension.⁶⁵ These decisions, however, often have relied upon a provision similar to Federal Rule of Civil Procedure 60(b)(6), allowing divorce decrees to be re-opened for general equitable reasons. Those states that, like Virginia, have no such provision, generally have refused to re-open *McCarty* gap decrees.⁶⁶

Federal non-military retirement benefits also generally are subject to division. Often, a federal statute authorizes states to divide these benefits under state law subject to certain conditions.⁶⁷ Finally, after some initial uncertainty, it is now clear that private pensions regulated under the Employee Retirement Income Security Act (ERISA) are subject to division.⁶⁸ The order dividing the pension must meet the technical requirements for a "qualified domestic relations order" (QDRO).⁶⁹

B. Step 2: "Property"

The need for an interest to qualify as "property" was recognized by the Virginia courts early in the statute's history. In *Sawyer v. Sawyer*⁷⁰ the issue was whether military retirement benefits constituted marital property. The court began its opinion by stating: "We must first decide if a military retirement pension is 'personal property' as contemplated by section 20-107.3."⁷¹ Thus, the court recognized that an interest cannot be classified as marital property unless an interest first constitutes property.

62. See *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); *Butcher v. Butcher*, 357 S.E.2d 226 (W. Va. 1987).

63. 10 U.S.C. § 1408(c)(4) (1988).

64. See *Southern v. Glenn*, 677 S.W.2d 576 (Tex. Ct. App. 1984); cf. *Gowins v. Gowins*, 466 So. 2d 32 (La. 1985) (noting that jurisdiction to enforce award of military pension exists as long as court had jurisdiction at time court made original award).

65. See, e.g., *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *In re Habermehl*, 135 Ill. App. 3d 305, 481 N.E.2d 782 (1985); *In re Quintard*, 691 S.W.2d 950 (Mo. Ct. App. 1985). See generally L. GOLDEN, *supra* note 6, § 6.06.

66. See *supra* note 65.

67. See 5 U.S.C. § 8345(j)(1) (1982) (allowing division of civil service retirement benefits); 22 U.S.C. § 4054 (allowing division of foreign service retirement benefits) (Supp. V 1987).

68. 29 U.S.C. § 1056(d)(3)(A) (1982).

69. *Id.* § 1056(d)(3)(B-E) (1982).

70. 1 Va. App. 75, 355 S.E.2d 277 (1985).

71. *Sawyer v. Sawyer*, 1 Va. App. 75, 355 S.E.2d 277, 279 (1985).

The *Sawyer* court, however, did not proceed to define "property" comprehensively or even to consider whether a pension possesses the characteristics ordinarily ascribed to property. Instead, the court looked at whether or not the legislature intended that pensions be subject to division. Although the court realized that "pensions do not have the normal attributes of assets" such as tangible existence or transferability, the court viewed the specific references to pensions in section 20-107.3 as evidence that the legislature intended that pensions constitute property.⁷² The court refused to construe "property" narrowly when such a construction would immunize an asset that the legislature clearly intended to make subject to distribution.⁷³ Accordingly, the *Sawyer* court held that the definition of property was broad enough to include military retirement pensions.

Sawyer is the only Virginia case to discuss the definition of property. *Sawyer*, in many respects, was an easy case, for as the court recognized, the legislature anticipated that pensions would be marital property.

Future cases where the legislative intent is unknown or ambiguous will not be decided so easily. There are two alternate reasoning methods that the court might employ in such a case. *Sawyer* defined property in a result-oriented fashion: the court decided that divisibility of pensions was the "right" result, and it chose a definition of property that allowed this result to be reached. But in *Sawyer*, divisibility was "right" because it clearly had been intended by the legislature. A future court might be hesitant to use the same result-oriented reasoning process where the chosen result is "right" only because the court believes it to be the wiser policy. Instead, the court might use the method advocated by the husband in *Sawyer* and determine whether the interest involved possesses the ordinary characteristics of property. This second method would be more in keeping with Virginia courts' traditional reluctance to emphasize policy views on questions of statutory interpretation.

If the experience of other states is any guideline, Virginia courts soon will have more opportunities to determine what constitutes property. The most controversial issue involving the definition of property is the divisibility of professional degrees and licenses. A large majority of states have held that degrees and licenses are not "property" because they lack such traditional attributes of property as transferability.⁷⁴ Moreover, while intangible benefits such as pensions at least provide some assurance of future benefits, a degree provides only the opportunity to obtain enhanced future benefits through performance of future services.⁷⁵

72. *Sawyer*, 355 S.E.2d at 279-80.

73. *Id.* at 279.

74. See, e.g., *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985); *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Beeler v. Beeler*, 715 S.W.2d 625 (Tenn. Ct. App. 1986). The leading case nationwide is *In re Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

75. See, e.g., *Sweeney v. Sweeney*, 534 A.2d 1290 (Me. 1987); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

New York, however, has reached a contrary result. In *O'Brien v. O'Brien*⁷⁶ the court reasoned that division of professional licenses was "right" as a matter of public policy. The court then chose a definition of property that permitted this result to be reached, holding that "property" as used in the New York statute was broader than the technical meaning of "property" at common law.⁷⁷

Although *O'Brien* uses almost exactly the same reasoning process as *Sawyer*, it is unlikely that *O'Brien* would be followed in Virginia. The Virginia statute neither supports nor prevents treatment of degrees or licenses as property; it is entirely silent on the question. Thus, Virginia could go against the overwhelming trend and treat degrees and licenses as property only if (1) the court had a strong policy preference for divisibility, and (2) the court decided to implement its own policy preference on a controversial issue upon which the statute is silent. As noted above, Virginia courts traditionally have been reluctant to follow the second requirement, and there is little policy consensus favoring divisibility in any state outside of New York. Instead, every state decision to consider the issue after *O'Brien* has rejected the New York court's holding.⁷⁸ The case in favor of divisibility is simply not strong enough to overcome the strong trend against it and the unwillingness of Virginia courts to reach controversial results without legislative guidance.

The definition of property also has been involved in the ongoing dispute over whether the goodwill of a business or professional practice is subject to equitable distribution. Some courts, relying upon the traditional restrictive definition of property, have held that goodwill is a mere expectancy of future benefits rather than currently existing property.⁷⁹ These courts also have noted that because goodwill takes tangible form only as increased future earnings, any attempt to divide goodwill, in effect, would divide improperly those earnings.⁸⁰ Other courts, relying upon a more expansive

76. 66 N.Y.2d 576, 489 N.E.2d 712 (1985). New York is the only state that clearly has held that degrees are property. Several Michigan Court of Appeals cases have reached the same result, but other cases from the same court adopt the majority position. Compare *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (property) with *Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359 (1984) (not property). The Michigan Supreme Court has not resolved this split in authority.

77. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 715. See generally L. GOLDEN, *supra* note 6, § 6.19A (Supp. 1989).

78. See, e.g., *In re Olar*, 747 P.2d 676 (Colo. 1987) (reaffirming *In re Graham*, 574 P.2d 75 and expressly rejecting *O'Brien*); *Sweeney v. Sweeney*, 534 A.2d 1290 (Me. 1987); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986); *Helm v. Helm*, 289 S.C. 169, 345 S.E.2d 720 (1986). See generally L. GOLDEN, *supra* note 6, § 6.19 (Supp. 1989).

79. See, e.g., *Beasley v. Beasley*, 359 Pa. Super. 20, 518 A.2d 545 (1986).

80. See, e.g., *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982); *Holbrook v. Holbrook*, 103 Wis. 2d 327, 309 N.W.2d 343, 354 (1981) ("[t]he concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity"). These courts also have noted that goodwill is difficult to distinguish from professional reputation, which cannot be divided because it does not constitute property. *Holbrook*, 309 N.W.2d at 54.

definition of property and upon the unquestionable existence of goodwill as an economic asset, have held that goodwill can be divided upon divorce.⁸¹

The decisions dividing goodwill appear to have the stronger argument. The intangible asset called goodwill is merely an economist's way of saying that certain future earnings will be caused not by future efforts, but by present efforts in establishing such intangible benefits as a favorable reputation or a good location. If these intangible benefits were acquired during the marriage with marital funds, then some portion of the business' future earnings will be caused by an investment of marital funds rather than the performance of post-marital services. Virginia already has held in other contexts that benefits received after the marriage as compensation for marital efforts are marital property. Pension benefits earned during the marriage, for instance, are marital property even if they are not received until many years after divorce.⁸² Similarly, to the extent a business' future earnings are caused by goodwill acquired during the marriage rather than by post-marital services, the present value of those earnings should constitute marital property under Virginia law.

A final major asset that may or may not be property is a claim for personal injuries arising during the marriage but not yet litigated or settled as of the date of classification. A minority of states have found such causes of action too speculative to constitute property.⁸³ Most states have noted that while an outstanding claim may be hard to value, it is not more speculative than assets such as contingent pensions which are already divisible.⁸⁴

Pensions, degrees, goodwill, and unliquidated personal injury claims are the four major areas in which the definition of property has been at issue. Additional benefits held to be property include remainder interests in trusts,⁸⁵ uncollected judgments,⁸⁶ contingent fee contracts,⁸⁷ and consulting contracts.⁸⁸ Differing results have been reached as to stock options,⁸⁹ ter-

81. *See, e.g., In re Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979) (leading case); *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983); *Taylor v. Taylor*, 736 S.W.2d 388 (Mo. 1987); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985). This is probably the majority position, although the recent trend has been to limit the conditions under which goodwill is marital property. *See, e.g., Taylor*, 736 S.W.2d at 388.

82. *See Sawyer v. Sawyer*, 1 Va. App. 75, 335 S.E.2d 277 (1985).

83. *See, e.g., Murphy v. Murphy*, 510 N.E.2d 235 (Ind. Ct. App. 1987); *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1986).

84. *See, e.g., Richardson v. Richardson*, 139 Wis. 2d 778, 407 N.W.2d 231 (1987). Even if an unliquidated cause of action is property, it may be acquired in exchange for a form of pre-marital "property"—the injured spouse's good health. *See infra* notes 173-78 and accompanying text.

85. *Buxbaum v. Buxbaum*, 214 Mont. 1, 692 P.2d 411 (1984); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33 (1984) (remainder was property even though principal could not be invaded).

86. *Golleher v. Golleher*, 697 S.W.2d 547 (Mo. Ct. App. 1985).

87. *Garrett v. Garrett*, 140 Ariz. 564, 683 P.2d 1166 (1983).

88. *In re Vanderbeek*, 177 Cal. App. 3d 224, 222 Cal. Rptr. 832 (1986) (primary purpose of contract was to retire large debt husband owed to employer).

89. *Compare Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983) (property)

mination benefits,⁹⁰ and chooses in action.⁹¹ Additional benefits held not to be property include patents,⁹² job seniority,⁹³ and the right to engage in a particular profession.⁹⁴

C. *Step 3: "[A]cquired by each party"*

The third classification step states the relatively obvious requirement that marital property must be owned by the husband, the wife, or both jointly. Property owned by third parties is neither marital nor separate property, but something else altogether.⁹⁵ Accordingly, it cannot be considered in setting the monetary award.

Despite the self-evident nature of this step, there are two fact situations in which it poses problems. First, as the parties begin to anticipate the impending breakdown of the marriage, the spouse holding title to most of the assets inevitably will be tempted to spend or convey away property he anticipates losing in the property division. If a dishonest spouse has enough foresight to finish his dissipation of assets before the date of classification, he could claim that the assets are immune from equitable distribution because the assets are owned by a third party.

The Virginia Court of Appeals is aware of this problem and has created several possible remedies for it. In *Booth v. Booth*⁹⁶ the wife lost \$60,000 in a speculative stock market venture during the closing days of the marriage. The wife argued that these funds could not be marital property because they were spent before the date of classification. The court disagreed:

Normally, only property owned by the parties at the time of the last separation is classified as marital property. . . . In the case

with *In re Moody*, 119 Ill. App. 3d 1043, 457 N.E.2d 1023 (1983) (holding that nontransferable option not property where employee was unlikely to live long enough to exercise option). See generally L. GOLDEN, *supra* note 6, § 5.06 (Supp. 1989).

90. One court has held that termination benefits constitute property if the employed spouse loses his job and, therefore, acquires the right to receive the benefits before the date of classification. *Harrell v. Harrell*, 120 A.D.2d 565, 502 N.Y.S.2d 57 (1986). Where the owning spouse is still employed on the date of classification, however, other courts have held that the potential future termination benefits are not property. *Lawyer v. Lawyer*, 288 Ark. 128, 702 S.W.2d 790 (1986); *In Re Bishop*, 46 Wash. App. 198, 729 P.2d 647 (1986).

91. Compare *Moulton v. Moulton*, 485 A.2d 976 (Me. 1984) (holding that money due for services rendered is property) with *Neffle v. Neffle*, 483 N.E.2d 767 (Ind. Ct. App. 1983) (holding that right to repossess home sold during marriage if buyer fails to make conditional sale payments is not property).

92. *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985) (holding that highly speculative patents on artificial skin are not property). A California court reached the opposite result where the patent was susceptible to reasonably accurate valuation. *In re Worth*, 195 Cal. App. 3d 768, 241 Cal. Rptr. 135 (1987) (copyright on popular series of trivia books).

93. *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982).

94. *Ulmer v. Ulmer*, 717 S.W.2d 665 (Tex. Ct. App. 1986).

95. No Virginia court has stated this rule. For supporting decisions from other states, see, e.g., *Addis v. Addis*, 288 Ark. 205, 703 S.W.2d 852 (1986); *Good v. Good*, 458 So. 2d 83 (Fla. Dist. Ct. App. 1984); *In re Reich*, 220 Mont. 192, 720 P.2d 286 (1986).

96. 7 Va. App. 22, 371 S.E.2d 569 (1988).

of assets wasted or dissipated in anticipation of divorce, however, equity can only be accomplished if the party who last had the funds is held accountable for them. The funds must necessarily be considered marital assets held by the party guilty of waste.⁹⁷

Thus, when a spouse dissipates marital assets, those assets should be treated as part of the dissipating spouse's share of the marital estate.⁹⁸

Obviously, every expenditure of money at or around the time of separation is not a dissipation of assets. Although the *Booth* court noted that an "exclusive definition" was not possible, the court generally defined dissipation as expenditures of funds "in anticipation of divorce or separation . . . and in derogation of the marital relationship at a time when the marriage is in jeopardy."⁹⁹ Based on the facts, the court held that funds spent by the wife for legal fees and support expenses for herself and her son were not dissipated. The court was not so certain about the stock market losses and remanded the case back to the trial court for further proceedings.¹⁰⁰

The ability to add dissipated assets back to the marital estate may be of limited use when the dissipating spouse lacks sufficient assets after the dissipation to pay the monetary award. One possible remedy in this situation involves invocation of the relevant fraudulent conveyance statutes.¹⁰¹ While no Virginia court has applied Virginia's fraudulent conveyance statutes in an equitable distribution setting,¹⁰² the court of appeals has held that the

97. *Booth v. Booth*, 7 Va. App. 22, 371 S.E.2d 569 (1988).

98. For other cases adopting a similar policy-based rule that dissipated assets must be added to the marital estate even if dissipated before the date of classification, see, e.g., *In re Posinoff*, 683 P.2d 377 (Colo. Ct. App. 1984); *In re Partyka*, 158 Ill. App. 3d 545, 511 N.E.2d 676 (1987); *Sharp v. Sharp*, 58 Md. App. 386, 473 A.2d 499 (1984); *Harrell v. Harrell*, 120 A.D.2d 565, 502 N.Y.S.2d 57 (1986).

Courts have reached differing results as to who bears the burden of proving that assets were dissipated. See *In re Partyka*, 158 Ill. App. 3d 545, 511 N.E.2d 676 (1987) (spouse liquidating marital assets while the marriage is breaking down must establish by clear and convincing evidence that funds were spent for marital purpose); *Manaker v. Manaker*, 11 Conn. App. 653, 528 A.2d 1170 (1987) (burden on spending party, but preponderance of the evidence is sufficient to meet burden); *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. Ct. App. 1987) (dissipation must be proven affirmatively by the nondissipating spouse).

99. *Booth*, 371 S.E.2d at 572. Expenses for family support universally are held not dissipated. See *In re Sevon*, 117 Ill. App. 3d 313, 453 N.E.2d 866 (1983); *In re Glessner*, 119 Ill. App. 3d 306, 456 N.E.2d 311 (1983); *Willis v. Willis*, 107 A.D.2d 867, 484 N.Y.S.2d 309 (1985); *Roark v. Roark*, 694 S.W.2d 912 (Mo. Ct. App. 1985).

100. *Booth*, 371 S.E.2d at 573. The result of the remand in *Booth* is not available, but the main issue on remand was whether or not the wife's stock investment was made in a good faith attempt to make a profit. Compare *In re Drummond*, 156 Ill. App. 3d 672, 509 N.E.2d 707, cert. denied, 116 Ill. 2d 652, 515 N.E.2d 105 (1987).

101. VA. CODE ANN. §§ 55-80, 55-81 (1986). See, e.g., *Pattee v. Pattee*, 744 P.2d 658 (Alaska 1987); *In re Smith*, 74 Or. App. 656, 705 P.2d 197 (1985). The current owner of the fraudulently conveyed property must be joined as a defendant. See *Slatton v. Slatton*, 289 S.C. 128, 345 S.E.2d 248 (1986).

102. The statutes, however, have been applied in the support setting. In *Crowder v.*

courts' normal inherent equitable powers apply in equitable distribution cases.¹⁰³ These powers arguably include the power to rescind a fraudulent conveyance.

Virginia's fraudulent conveyance statutes are found in sections 55-80 and 55-81 of the Annotated Code of Virginia. Under section 55-81, all transfers without consideration are void as against all prior creditors.¹⁰⁴ A spouse with a potential claim for support and property division is clearly a creditor for fraudulent conveyance purposes.¹⁰⁵ This section is an effective remedy for outright waste of assets, but the section does not apply when property is sold for less than its fair value.

Under section 55-80, a transfer for consideration is void if the transfer was made with actual intent to defraud a creditor.¹⁰⁶ This statute provides a theoretical remedy for sales at less than fair value, but two separate factors limit its effectiveness. First, proving actual intent to defraud is often very difficult.¹⁰⁷ Second, one cannot use the statute to reach property in the hands of innocent third persons.¹⁰⁸ Therefore, the fraudulent conveyance remedy is powerful when it applies, but problems of proof will often restrict its practical utility.

Finally, dissipation of assets is a factor that the court can consider in setting the size of the monetary award. "Just as a court may consider positive contributions to the marriage in making an equitable distribution award, a court can also consider 'negative' contributions in the form of squandering and destroying marital resources."¹⁰⁹

Crowder, 125 Va. 80, 99 S.E. 746 (1919), the court rescinded a conveyance made by the husband before the date of separation in order to prevent his wife from receiving alimony and child support. Similarly, in *Wallace v. Wallace*, 291 S.E.2d 386 (W. Va. 1982), the West Virginia court rescinded a conveyance made in fraud of the wife's right to a potential alimony or property settlement award. The court relied on former W. VA. CODE § 40-101 (1982) (repealed 1986), which is identical to VA. CODE ANN. § 55-80 (1986).

103. *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157 (1985).

104. VA. CODE ANN. § 55-81 (1986).

105. *Crowder v. Crowder*, 125 Va. 80, 99 S.E.746 (1919) (allowing wife to rescind fraudulent conveyance made shortly after husband deserted her but before divorce proceedings were filed; court specifically described conveyance as fraud on wife's support rights). There is no reason why a fraudulent conveyance should not similarly be a fraud on the defrauded spouse's equitable distribution rights.

106. VA. CODE ANN. § 55-80 (1986).

107. The *Crowder* court recognized the difficulty of proving actual intent to defraud and expressly noted: ". . . actions speak louder than words, and the transaction itself often furnishes proof of the fraud that is entirely satisfactory." *Crowder*, 99 S.E. at 748.

108. VA. CODE ANN. § 55-80 (1986) expressly provides that "[t]his section shall not affect the title of a purchaser for valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." Again, the *Crowder* court was aware of this problem and held that once fraud is proven, it is not necessary to prove "positive knowledge of such fraudulent intent. It is sufficient if [the third party] has knowledge of such facts and circumstances as would have excited the suspicion of a man of ordinary care and prudence. . . ." *Crowder*, 99 S.E. at 748. Thus, good faith is negated if the claimant proves facts that would have caused the reasonable man to investigate the situation further.

109. *Booth v. Booth*, 7 Va. App. 22, 371 S.E.2d 569 (1988) (citing *Anstutz v. Anstutz*,

The second area in which property owned by third parties has been an issue is property owned by businesses. When one spouse operates a business as a sole proprietorship, the business is not an independent legal entity, and assets owned by the business are marital property. Conversely, when the business is incorporated, property owned by the corporation cannot be marital property because the property is owned by a third party.¹¹⁰ Courts have reached differing results on whether the spouse's share of partnership assets constitutes marital property.¹¹¹

D. Step 4: Jointly Titled Property

The fourth classification step, like the third, is relatively simple to apply. If an item of property is titled in the joint names of the husband and the wife, then the item is marital property regardless of when and how the couple acquired the item.¹¹² Thus, separate property placed in joint title transmutes into marital property as a matter of law.

112 Wis. 2d 10, 331 N.W.2d 844 (Ct. App. 1983)). See also *Kaply v. Kaply*, 453 N.E.2d 331 (Ind. Ct. App. 1983); *Robinette v. Robinette*, 736 S.W.2d 351 (Ky. Ct. App. 1987); *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985). This result has been reached even in states where fault does not ordinarily affect equitable distribution. See, e.g., *Smith*, 331 S.E.2d at 682.

110. See, e.g., *Good v. Good*, 458 So. 2d 839 (Fla. Dist. Ct. App. 1984). Corporate assets are marital property if the corporation is the sole shareholder's alter ego. *Id.* Of course, if the corporate assets cannot be divided, the spouse's corporate stock would be subject to division.

111. Compare, e.g., *MacDonald v. MacDonald*, 532 A.2d 1046 (Me. 1987) (holding that partner's share of partnership's retained earnings are marital property) with *Addis v. Addis*, 288 Ark. 205, 703 S.W.2d 852 (1986) and *Wilen v. Wilen*, 61 Md. App. 337, 486 A.2d 775 (1985) (holding that partner's interest in partnership is marital property, but court cannot divide individual partnership assets).

These two positions may be reconcilable, at least in Virginia. Partners in Virginia have three statutory property rights: their rights in specific partnership property, their "interest in the partnership," and their right to participate in partnership management. VA. CODE ANN. § 50-25 (1989). An "interest in the partnership" is the partner's share of the partnership's profits and surplus. *Id.* at § 50-26. Because *McDonald* held only that retained earnings are divisible, *McDonald* applies only to the second statutory right, the partner's "interest in the partnership." By contrast, because *Addis* and *Wilen* held only that specific partnership assets other than retained earnings are not directly divisible, *Addis* and *Wilen* apply only to the first of the three statutory interests. The three cases, therefore, can be read together as saying that only the second statutory right and the partner's interest in the partnership property as a whole constitute marital property. This reading would be consistent with VA. CODE ANN. § 50-25, which protects rights in specific partnership property from assignment or attachment, but which contains no such protection for interests in partnership profits.

The divisibility of specific partnership assets is not of purely academic interest. As noted at notes 194-201 *infra* and accompanying text, separate property transmutes into marital property in Virginia upon even small amounts of commingling. If the court can divide only the partnership as a whole, then small marital contributions to one particular asset could cause an entire separate property partnership interest to transmute. This possibility looms especially large under the active appreciation rule, see *infra* notes 202-32 and accompanying text, which permits a small amount of active appreciation to "taint" the entire partnership. Obviously, if the court divides individual partnership assets, a small amount of commingling will cause significantly less transmutation.

112. VA. CODE ANN. § 20-107.3(A)(2)(i) (Supp. 1989).

The jointly titled property rules apply not only when property is titled jointly at the time of divorce, but also when property is titled jointly at any time during the marriage. Thus, if separate property is transferred briefly into joint title during the marriage, the separate property becomes marital property.¹¹³ Because marital property can never turn back into separate property,¹¹⁴ any subsequent change in legal title will not change its classification.

E. Step 5: "[A]cquired . . . during the marriage"

The last two steps are relevant only if the property involved is not titled jointly. The classification process ends at step four with a finding of marital property if the property involved is owned jointly.

Under the fifth step, the property involved must have been acquired during the marriage. The focus here is upon the time rather than the manner of acquisition. The statute defines a time period, "during the marriage," and it requires that a certain "acquisition" must have taken place during that period.¹¹⁵

The relevant time period, "during the marriage," clearly begins on the date of marriage. The date the period ends is generally called the *date of classification*,¹¹⁶ and the Virginia statute does not require the use of any specific date. The court of appeals has held that this deliberate omission shows the General Assembly's "intention to leave such determination to the courts."¹¹⁷ Because property acquired after the final separation is ordinarily not a product of the marital partnership, "in most cases the appropriate date for classification [is] the date of last separation."¹¹⁸ The trial court has the discretion, however, to use a different date if equity so requires.¹¹⁹

The Virginia courts have not given any indication of the circumstances under which the date of final separation should not be the date of classification. In *Price v. Price*¹²⁰ the court of appeals reversed the trial court's decision to classify property as of the date of the commissioner's hearing. The decision was erroneous, the court held, because it "included as marital property that which was acquired by the husband without the exchange or pledge of marital assets after the *de facto* dissolution of the marriage partnership."¹²¹ Therefore, the date of classification apparently should be

113. *Wagner v. Wagner*, 4 Va. App. 397, 358 S.E.2d 407 (1987). *Wagner* is discussed in greater detail *infra* notes 123-126 and accompanying text.

114. *Id.*

115. VA. CODE ANN. § 20-107.3(A)(2)(ii) (Supp. 1989).

116. The date of classification may, but need not be, the same as the date on which the marital assets are valued, the *date of valuation*. Questions concerning the date of valuation are discussed *infra* notes 244-53 and accompanying text.

117. 4 Va. App. 224, 355 S.E.2d 905, 909 (1987).

118. *Price v. Price*, 4 Va. App. 224, 335 S.E.2d 905, 909 (1987).

119. *Price*, 325 S.E.2d at 909.

120. *Id.*

121. *Id.*

as close as possible to the time when the marital partnership actually ends. If the economic side of the marital relationship continues in some meaningful form after the final separation, postponement of the date of classification may well be appropriate.¹²²

In most states the date of classification is the only date as of which property can be classified. In Virginia, however, the date of classification is merely the last date on which the classification of property can change. Property is initially classified at a completely different time—the date of acquisition.

The leading case on initial classification is *Wagner v. Wagner*.¹²³ In *Wagner* the wife's father wanted to give her a certain shopping center, but he also wanted to minimize federal gift taxes. After consulting with a tax expert, the father had the wife purchase the building from him on credit. Six months later, intending to make a gift to the wife alone, the father forgave the debt. When the parties divorced, the wife argued that her father's unmistakable intent had been to make a gift of the shopping center.

The court of appeals agreed that the father intended a gift, but the court, nevertheless, held the property to be marital. Property, the court explained, must be classified as of the date it is initially acquired.¹²⁴ Because the shopping center initially was acquired by purchase, it was initially marital property. Because there is no way under Virginia law in which marital property can change into separate property,¹²⁵ the court felt compelled to hold that the subsequent forgiving of the debt had no effect upon the classification of the property.¹²⁶

Classification of assets, therefore, is a continual process in Virginia. Property is initially classified when it is acquired, but the initial classification can change at any time between the date of acquisition and the date of classification. The potential for change, however, is limited: separate property can become marital, but marital property cannot become separate. Once an asset is classified as marital property the classification process ends and the asset is marital for as long as the parties continue to own the asset.

Virginia law on the definition of "acquisition" is in a state of complete confusion. The confusion stems from a failure to separate the definition of

122. For instance, assume that a husband and wife develop a patent during the marriage. After the separation, the owning spouse conveys the patent to a corporation, which parlays the patent into a valuable business. If the property is classified as of the date of separation, the parties own only a somewhat speculative patent. However, the fact is that the jointly developed patent did prove to be profitable, and as of the date of divorce, the patent is producing significant income. Under these facts, a strong case can be made for classifying the property as of some date after the patent was conveyed to the corporation. *Cf. Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (1986) (error to value property as of date of separation when it had appreciated after date due to success of product developed during marriage).

123. 4 Va. App. 397, 358 S.E.2d 407 (1987).

124. *Wagner v. Wagner*, 4 Va. App. 397, 358 S.E.2d 407, 410 (1987).

125. *Wagner*, 358 S.E.2d at 410.

126. *Id.*

“acquisition” from a completely separate issue: the nature of “marital property.” Because these two issues have been interwoven so closely, they must be considered together.

The debate over the nature of marital property is essentially a dispute over the relationship between marital property and traditional legal title. In most equitable distribution states, marital property is seen as a sort of equitable interest similar to a trust, lien, or easement.¹²⁷ While such an equitable interest may be co-extensive with legal title, it need not be so. For example, if the owner of property obtains a secured loan for less than the full value of the property serving as collateral, the resulting lien does not reach to the full extent of the owner’s legal title. While all parts of the property are subject to the lien, the lienholder’s interest does not extend to the entire property because the amount of the lien is less than the value of the property. If the lien is foreclosed upon, some portion of the property or the proceeds from its sale would be returned to the owner. Marital property in most states is a similar sort of interest that may but need not attach to the full value of the owner’s legal title. For purposes of further discussion, the majority view on the nature of marital property will be called the *mixed theory of property*.

Virginia, however, follows a different rule. In *Smoot v. Smoot*¹²⁸ the parties built a home, using \$20,000 of the husband’s separate property and the proceeds of a \$25,000 construction loan. The loan was paid off during the marriage using marital funds, and upon divorce, the husband claimed that his separate contribution to the purchase price made the home partly separate property. The court disagreed: “Code § 20-107.3 contemplates only two kinds of property—marital property and separate property, each expressly defined. Our statute does not recognize a hybrid species of property.”¹²⁹ Because the only available classifications were either all marital or all separate property, the court next had to decide how to classify property that is acquired with both marital and separate funds. Relying upon the statutory requirement that separate property must be maintained separately, the court concluded that “when, as here, a spouse fails to segregate and instead, commingles separate property with marital property, the court must classify the commingled property as marital property subject to equitable distribution.”¹³⁰ Accordingly, the home was entirely marital property.

In Virginia, therefore, marital property rights are much closer to legal title. While the marital interest and legal title are not at all similar in effect, the two interests have exactly the same size and shape, and the marital

127. For a case adopting the mixed theory of property, although not always by that name, see, e.g., *Frank G.W. v. Carol M.W.*, 457 A.2d 715 (Del. 1983); *Harper v. Harper*, 294 Md. 54, 448 A.2d 916 (1982); *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). See generally L. GOLDEN, *supra* note 6, § 5.07.

128. 233 Va. 435, 357 S.E.2d 728 (1987).

129. *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728, 731 (1987).

130. *Smoot*, 357 S.E.2d at 731.

interest is in essence an equitable shadow of legal title. Because "marital property" and "separate property" are merely two different forms which the equitable shadow of legal title may take, it follows logically that the marital interest in an asset cannot extend to less than the full value of the property. The position that marital property is an equitable shadow of legal title rather than a sort of equitable lien attaching to legal title is called the *unitary theory of property*.¹³¹

In order to understand fully Virginia law on the definition of acquisition, we must first understand the law in other states. There are basically two different ways in which courts have defined the word "acquired." Most community property states follow the "inception of title rule," which provides that property is acquired at the moment the owner obtains legal title to it.¹³² Accordingly, if property is purchased on credit before the marriage, it is property acquired before the marriage even if the overwhelming majority of the mortgage payments are made after the marriage.¹³³

Equitable distribution states generally have rejected the inception of title rule. Instead, most equitable distribution states have held that property is acquired when and as one pays for it.¹³⁴ Under this rule, if property is acquired on credit shortly before the marriage, part of it was acquired before the marriage when the downpayment was made, and part of it was acquired after the marriage as the mortgage payments were made.¹³⁵ States adopting this rule in combination with the mixed theory of marital property have referred to the combination as the "source of funds rule."¹³⁶

The Virginia courts first considered these two conflicting rules in *Smoot v. Smoot*.¹³⁷ The *Smoot* court defined the issue as whether the source of funds rule controls in Virginia, and the *Smoot* court answered this question in the negative.¹³⁸ As noted above, however,¹³⁹ the source of funds rule is a combination of the mixed theory of marital property and a payment-based definition of acquisition. The *Smoot* court rejected the source of funds rule not because the rule defines acquisition incorrectly but because

131. Unitary property is a clear minority rule that has been adopted only in Virginia and Illinois. See *Smoot*, 357 S.E.2d at 728; *In re Smith*, 86 Ill. 2d 518, 529-31, 427 N.E.2d 1239, 1245-46 (1981). Subsequently, the unitary theory of property was overruled in Illinois by ILL. ANN. STAT. ch. 40, ¶ 503(c) (Smith-Hurd Supp. 1987). See *infra* notes 352-54 and accompanying text.

132. See, e.g., *Fisher v. Fisher*, 86 Idaho 131, 383 P.2d 840 (1963). See generally L. GOLDEN, *supra* note 6, § 1.06.

133. See, e.g., *Pringle v. Pringle*, 109 Idaho 1026, 712 P.2d 727 (1985) (reaching result under inception of title rule).

134. See, e.g., *Harper v. Harper*, 294 Md. 54, 448 A.2d 916 (1982); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

135. See, e.g., *Wade*, 325 S.E.2d at 268.

136. See, e.g., *Harper*, 448 A.2d at 916; *Wade*, 325 S.E.2d at 269; *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. 1984). See generally L. GOLDEN, *supra* note 6, § 5.07A.

137. 233 Va. 435, 357 S.E.2d 728 (1987). See also *supra* notes 128-30 and accompanying text.

138. *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728, 730 (1987).

139. See *supra* text accompanying note 136.

the mixed theory of property is inconsistent with Virginia law. Indeed, the *Smoot* court said nothing about when property is acquired for purposes of equitable distribution. Thus, *Smoot* simply did not consider the definition of acquisition, and *Smoot* is not good authority for rejecting any definition of acquisition that is consistent with the unitary theory of property.

The next Virginia case to consider the definition of acquisition was *Booth v. Booth*.¹⁴⁰ The husband in *Booth* started a corporation before the parties were married. The corporation increased in value during the marriage, and the wife claimed that the increased value represented property that had been "acquired" during the marriage. Her claim failed in the trial court, which held that the corporation was entirely the husband's separate property.¹⁴¹

The Virginia Court of Appeals began its decision by discussing the definition of acquisition. The court defined what it saw as two competing approaches: inception of title and source of funds.¹⁴² The court emphatically rejected "the notion that simple inception of title controls our statute" because of the rule's harsh practical effects.¹⁴³ Citing *Smoot* the court also noted that the source of funds rule does not apply.¹⁴⁴ After making these two negative points, however, the court drifted off into a discussion of transmutation. It never returned to the definition of acquisition, and thus made no affirmative holding as to what acquisition is. *Booth* tells us only what acquisition is not: it is not inception of title and not source of funds.

Booth further confused the issue by implying in *dicta* that Virginia is among "those courts rejecting a dynamic [payment based] definition of acquisition."¹⁴⁵ This *dicta* is based upon the court's erroneous definition of the source of funds rule. Like many other courts, the *Booth* court believed that the "source of funds rule" is merely another name for a payment-based definition of acquisition. As noted above, this is untrue because the source of funds rule is a *combination* of the mixed theory of property and a payment-based definition of acquisition.¹⁴⁶ *Smoot* rejected source of funds only because it rejected the mixed theory of property, and *Smoot* said nothing about the definition of acquisition. Thus, contrary to the *Booth dicta*, *Smoot's* rejection of the source of funds rule does not require that

140. No. 0981-86-3, slip op. at 1 (Va. Ct. App. Feb. 2, 1988). The *Booth* opinion subsequently was withdrawn for rehearing. When the opinion was reissued, the court deleted the transmutation discussion on grounds that the issue had not been properly presented by the appellant. Nevertheless, the deleted portion of the opinion is entirely consistent with prior and subsequent cases and provides a valuable insight into the court's thinking on transmutation questions. Accordingly, the slip opinion will be considered and discussed in this article as if it still were good law.

141. *Booth v. Booth*, No. 0981-86-3, slip op. at 5 (Va. Ct. App. Feb. 2, 1988). The trial court's decision is reported in *Booth v. Booth*, 4 Va. Cir. 335 (Campbell County 1985).

142. *Booth*, slip op. at 6-8.

143. *Id.* at 8.

144. *Id.* at 7.

145. *Id.*

146. See *supra* text accompanying note 136.

a payment-based definition of acquisition similarly be rejected. In fact, no Virginia court, including the *Booth* and *Smoot* courts, has considered a payment-based definition of acquisition on its merits.

Moreover, although the *Smoot* court did not expressly define acquisition, the court's reasoning process necessarily may imply a payment-based definition of that term. The *Smoot* decision was based upon the concept that a commingled mixture of marital and separate property becomes marital. The court expressly stated that such commingling had occurred when the parties used marital funds to make mortgage payments on a separate property home.¹⁴⁷ But the parties did not actually take a separate asset in one hand, a marital asset in the other, and mix the two together. Indeed, there was no distinct asset, either separate or marital, that the parties mixed with the marital home in any way.¹⁴⁸ The only way in which a commingling of assets could have occurred is if part of the home itself had been purchased with marital funds—that is, if part of the home was “acquired” as the mortgage payments were made. The *Smoot* court's finding that marital property had been commingled with the separate property home is hard to explain except by assuming that mortgage payments constitute partial acquisitions of property.

Another case relevant to the definition of acquisition is *Trivett v. Trivett*.¹⁴⁹ In *Trivett* the court considered the effect of marital debts upon the valuation of marital property. The court held that when the debt is an encumbrance upon a specific piece of property, the trial court must subtract the amount of the debt in computing the value of the underlying property.¹⁵⁰ Unsecured debts, by contrast, are not subtracted from the value of any property and are considered only as an equitable factor in arriving at the overall monetary award.¹⁵¹ Although *Trivett* spoke in terms of valuation, the case is consistent with a payment-based definition of acquisition because property purchased on secured credit is not acquired until the debt is paid off and the creditor's lien vanishes.

Thus, the definition of acquisition is unclear under Virginia law. Courts have rejected emphatically the rule that inception of title controls in all

147. See *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728, 731 (1987) (“[W]hen, as here, a spouse fails to segregate and instead, commingles, separate property with marital property, the chancellor must classify the commingled property as marital property subject to equitable distribution”) (emphasis added).

148. It is a misleading simplification to argue that the marital funds used to pay the mortgage somehow were commingled directly with the property involved. Money is an intangible asset, and there is no way to commingle money with a tangible physical asset such as a house or car. Spouses can commingle marital funds with separate property physical assets only indirectly by using the funds to purchase other physical assets that are then used for the actual commingling. If marital funds were commingled with the home in *Smoot*, the marital funds must have been used to purchase some physical asset which was then commingled with the home.

149. 7 Va. App. 148, 371 S.E.2d 560 (1988).

150. *Trivett v. Trivett*, 7 Va. App. 148, 371 S.E.2d 560, 562 (1980).

151. *Trivett*, 371 S.E.2d at 562.

cases, but courts have not said what rule controls in its place. A review of the reported cases suggests two different possibilities. First, although inception of title does not control in all cases, nothing in the reported case law would prevent it from controlling in some cases. Virginia, therefore, could follow inception of title as a general principle subject to a number of vague, undefined exceptions to be established by future case law.¹⁵²

Second, because the Virginia cases are applying tacitly a payment-based definition of "acquired," future Virginia cases could hold that property is acquired as one pays for it. Such a rule would not change in any significant way the result in any case that has been decided under the unitary theory of property. In particular, adoption of such a rule would not be fully consistent with *Smoot's* rejection of the source of funds rule because property acquired both before and during the marriage would continue to be marital property under *Smoot*.¹⁵³

There are strong reasons why Virginia should consider a payment-based definition of acquisition. One of the most significant equitable distribution problems Virginia courts and attorneys face is the "authority gap"—the almost complete lack of authority in this state on a vast number of equitable distribution questions. The only factor that makes the authority gap manageable is that on at least some equitable distribution questions, Virginia follows generally recognized nationwide rules. Thus, Virginia courts can use authority from other states that follow the same rules. When Virginia, however, adopts unique rules that generally are not followed, a body of relevant out-of-state authority is lost, and the authority gap problem becomes critical. The resulting confusion on key legal questions causes increased court workloads, increased costs for litigants, and inconsistent trial court decisions. Whenever possible, therefore, Virginia should strive to state

152. For instance, several cases have held that property acquired before the marriage is marital property if it is acquired in contemplation of marriage and the parties are married shortly after its acquisition. *Stallings v. Stallings*, 75 Ill. App. 3d 96, 393 N.E.2d 1065 (1979); *Coney v. Coney*, 207 N.J. Super. 63, 503 A.2d 912 (1985); *Raspa v. Raspa*, 207 N.J. Super. 371, 504 A.2d 683 (Ch. Div. 1985). A similar rule might be one possible equitable exception if Virginia decides to follow inception of title in most cases. Note, however, that other courts have rejected these holdings and held that all property acquired before the marriage is separate. *See, e.g., Wilen v. Wilen*, 61 Md. App. 337, 486 A.2d 775 (1985); *Cummings v. Cummings*, 376 N.W.2d 726 (Minn. Ct. App. 1985); *Mangone v. Mangone*, 202 N.J. Super. 505, 495 A.2d 469 (Ch. Div. 1985).

153. In other words, a payment-based definition of acquisition indicates when property is acquired. The consequences of acquisition, however, depend upon whether the jurisdiction involved follows unitary or mixed property. Thus, in a source of funds state, property paid for both before and after the marriage is acquired partly before and partly after the marriage and, therefore, is both marital and separate property. If Virginia were to define acquisition as payment, property paid for both before and after the marriage would be acquired both before and after the marriage, but under *Smoot*, marital and separate funds would be mixed in the same asset, and the separate funds would transmute into marital property. Adoption of a payment-based definition of acquired in Virginia, therefore, would not constitute adoption of the source of funds rule or be inconsistent in any way with the principles of unitary property.

its law in terms of concepts understood and followed in other states. A properly applied payment-based definition of acquisition is consistent with Virginia's unitary property system and would go far toward reducing the authority gap in Virginia's equitable distribution law.

F. Step 6: "[W]hich is not separate property"

The sixth step, like the fifth step, applies only if the property involved is not jointly titled. Under this step, there are a number of specific types of property acquired during the marriage that are defined expressly as separate property.¹⁵⁴ Any property acquired during the marriage that falls outside these specific definitions must be classified as marital property. One word of caution: it is incorrect to assume that *all* interests are marital property unless an interest falls within a specific definition of separate property. The Virginia statute expressly provides that an interest cannot be marital property unless it constitutes property one or both spouses acquired during the marriage. Interests that do not constitute property, that are not owned by a spouse, or that were not acquired during the marriage are not marital property even though they fall outside all of the specific definitions of separate property.

1. Premarital Property

The Virginia statute expressly defines property acquired before the marriage as separate property.¹⁵⁵ This provision is co-extensive with the general requirement that marital property be acquired during the marriage, and the discussion of the phrase, "acquired during the marriage," in step five above applies here as well.¹⁵⁶

2. Gifts and Inheritances

The statute also defines as separate property "all property acquired during the marriage by bequest, devise, descent, survivorship, or gift from a source other than the other party. . . ."¹⁵⁷ Stripped of excess verbiage, this definition of separate property applies to two types of property: gifts and inheritances. Both the gift and inheritance exclusions apply only to property given to or inherited by one spouse alone.¹⁵⁸ If the donor's intent was to benefit both spouses jointly—to make a gift to the "marital estate"—

154. VA. CODE ANN. § 20-107.3(A)(1)(i-iii) (Supp. 1989).

155. *Id.* § 20-107.3(A)(1)(i).

156. *See generally supra* notes 115-53 and accompanying text.

157. VA. CODE ANN. § 20-107.3(A)(1)(ii) (Supp. 1989).

158. *See* *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985); *Barr v. Barr*, 287 S.C. 13, 336 S.E.2d 481 (1985). Whether the gift is to the parties as joint owners is an important factor in determining the donor's intent, but it does not control the issue. *See Barr*, 336 S.E.2d at 481 (holding that father's forgiveness of mortgage on home was gift to husband alone even though home was titled jointly and mortgage was in both parties' names).

then the property involved constitutes marital property.¹⁵⁹ The general definition of a gift for equitable distribution purposes should be no different from the definition of a gift.¹⁶⁰ Under Virginia law, there are three elements of a valid gift: intent, delivery, and acceptance.¹⁶¹

The most significant of these factors is intent. Donative intent is present when the donor clearly intends to provide some benefit without any expectation of repayment.¹⁶² Whether or not a transaction purports to be a gift is not determinative. Loans to a spouse from a close family member, for example, often are found to be gifts when there is no legitimate expectation of repayment.¹⁶³ A gift is likely to result if the lender forgives all or part of the debt.¹⁶⁴ Conversely, courts have found nominal gifts to be something else altogether if the supposed gift is given in return for some past or future consideration.¹⁶⁵ Transactions that appear to be gifts always should be scrutinized closely to see if donative intent actually existed.

159. See, e.g., *Cronin v. Cronin*, 372 N.W.2d 778 (Minn. Ct. App. 1985).

160. See *Semasek v. Semasek*, 509 Pa. 282, 502 A.2d 109 (1985) (applying pre-equitable distribution definition of gift to determine whether property was acquired by gift for equitable distribution purposes).

161. See *Rust v. Phillips*, 208 Va. 573, 159 S.E.2d 628 (1968); *Payne v. Tobacco Trading Corp.*, 179 Va. 156, 18 S.E.2d 281 (1942).

162. 38 AM. JUR. 2D *Gifts* §§ 1-2 (1968).

163. See, e.g., *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983) (wife bought land using money given to her by mother, then gave mother proceeds from sale of trees harvested from the land; held, loan and repayment); *In re Cook*, 117 Ill. App. 3d 844, 453 N.E.2d 1357 (1983) (wife received money from her father; conflicting evidence over whether father expected repayment; held, gift). Note, however, that when property is purchased with the loan proceeds before the debt is forgiven, the property is marital notwithstanding the subsequent forgiveness. *Wagner v. Wagner*, 4 Va. App. 397, 358 S.E.2d 407 (1987).

164. See *In re Moon*, 378 N.W.2d 49 (Minn. Ct. App. 1985); *Barr v. Barr*, 287 S.C. 13, 336 S.E.2d 481 (Ct. App. 1985).

165. See, e.g., *Campion v. Campion*, 385 N.W.2d 1 (Minn. Ct. App. 1986) (father gave son business on condition that son increase store's yearly sales; held, not gift, but transfer for consideration). A somewhat harder question is presented when one spouse receives an inheritance in exchange for some consideration. For instance, assume that the wife's elderly aunt promises the wife a substantial inheritance if the wife takes care of her until death. The wife agrees and spends substantial time with the aunt, causing the husband to assume a disproportionate share of the housekeeping and child-raising duties. Is the wife's inheritance marital property? The question has not been presented in any equitable distribution jurisdiction. Community property states, however, traditionally have found such contractual bequests to be community property. See, e.g., *Frymire v. Brown*, 94 Cal. App. 2d 334, 210 P.2d 707 (1949). See generally DEFUNIAK & BROWN, *PRINCIPLES OF COMMUNITY PROPERTY* 562 (2d ed. 1971).

The community property rule is consistent with the general concept that the marital estate should include all funds given to either spouse as compensation for marital labors. Ideally, it should not matter whether that compensation takes the form of a salary, a gift, or an inheritance. Conversely, the Virginia statute expressly states that all inheritances are separate property, and if the statute is construed strictly, a Virginia court might be forced to classify contractual bequests as separate property. While the court probably could consider the contractual nature in dividing the other marital property, such a remedy would be of limited effect when the remaining marital property is small. A liberal construction of the inheritance exception that limits it to truly donative inheritances seems most consistent with the Virginia General Assembly's intention to divide equitably all fruits of both parties' marital labors.

Delivery and acceptance are not an issue in many equitable distribution cases. When a close relative gave property to one spouse but maintained significant control over the property, one court found an absence of delivery.¹⁶⁶ Finally, gifts are separate property in Virginia only if the donor is not the recipient's spouse.¹⁶⁷ Interspousal gifts, therefore, are marital property under Virginia law.

3. Exchanges

The Virginia statute also expressly defines as separate property any property acquired in exchange for separate property.¹⁶⁸ Under Virginia's marital property presumption, the burden of proof is upon the party seeking to trace an asset back to an exchange for separate property.¹⁶⁹

Because Virginia follows unitary property¹⁷⁰ and strict transmutation,¹⁷¹ tracing is somewhat different in Virginia than in other states. In most states any part of an asset traceable to separate property is treated as separate property, but in Virginia an asset is marital property if any part of it can be traced to a marital source.¹⁷² Tracing, therefore, has greater consequences in Virginia than in most other states.

One of the most litigated questions involving the exchange exception is the classification of personal injury and workers' compensation awards.¹⁷³ Some states have held that these benefits are separate property to the extent that the awards represent damages for pain and suffering because they are given in rough "exchange" for an asset brought into the marriage—the suffering spouse's good health.¹⁷⁴ Conversely, to the extent that these benefits represent compensation for lost wages, they are marital property if the lost wages would have been marital property had they been received.¹⁷⁵ Other states, noting that there is no specific statutory provision providing that personal injury and workers' compensation awards are separate property, have held that these benefits are marital.¹⁷⁶

166. *In re Agazim*, 147 Ill. App. 3d 646, 498 N.E.2d 742 (1986).

167. VA. CODE ANN. § 20-107.3(A)(1)(ii) (Supp. 1989).

168. *Id.* § 20-107.3(A)(1)(iii).

169. *See supra* notes 37-41 and accompanying text.

170. *See supra* notes 128-31 and accompanying text.

171. *See infra* notes 189-223 and accompanying text.

172. *See supra* notes 196-99 and accompanying text.

173. Some courts have held that a cause of action for personal injury is not *property* if it is still unliquidated on the date of classification. *See supra* notes 83-84 and accompanying text. Whether the personal injury cause of action is property is a completely separate issue from whether it is acquired in exchange for separate property.

174. *See, e.g., Campbell v. Campbell*, 255 Ga. 461, 339 S.E.2d 591 (1986); *Weakley v. Weakley*, 731 S.W.2d 243 (Ky. 1987); *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

175. *See, e.g., Miller v. Miller*, 739 P.2d 163 (Alaska 1987) (compensation for lost wages received during marriage is marital property while compensation for lost wages before or after marriage is separate property).

176. *See, e.g., Gan v. Gan*, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980); *In re McNerney*,

The issue has not arisen in Virginia. The latter position, however, seems more consistent with Virginia law. While a personal injury award may or may not be a single asset for purposes of unitary property, Virginia courts have held in a number of different contexts that an asset is marital property if there is any marital interest in it.¹⁷⁷ Even if part of a personal injury award would be separate property under the exchange exception, in most cases part of the award also would be marital property. Classification of the entire award as marital property, therefore, seems most consistent with the unitary theory of property.¹⁷⁸

4. Income and Appreciation

Under the Virginia statute, separate property includes both income from and appreciation in other separate property.¹⁷⁹ Unlike similar statutes in other states,¹⁸⁰ the Virginia statute applies to all types of appreciation and income regardless of whether the appreciation or income was caused by marital funds or efforts.¹⁸¹ The statutory provision, however, provides only that income and appreciation are initially separate property. Nothing in the statute prevents either income or appreciation from subsequently becoming marital property under the principle of transmutation.¹⁸²

5. Property Excluded by Agreement

The Virginia statute does not expressly state that property which the parties classify by agreement must be classified the same way by the court. Other Virginia statutes, however, provide that separation agreements,¹⁸³ antenuptial agreements,¹⁸⁴ and midnuptial agreements¹⁸⁵ are generally en-

417 N.W.2d 205 (Iowa 1987); *Orszula v. Orszula*, 292 S.C. 264, 356 S.E.2d 114 (1987); *cf.* *Richardson v. Richardson*, 139 Wis. 2d 778, 407 N.W.2d 231 (1987) (medical malpractice award is entirely marital property, but because pain and suffering is unique to injured spouse, there should be a presumption that pain and suffering component of award goes entirely to injured spouse).

177. *See infra* notes 188-222 and accompanying text.

178. Of course, if the award is entirely marital property, there certainly is no requirement that it be divided equally. Absent unusual circumstances, the injured spouse should receive far more than half of the award, especially if the injury will cause continued pain and suffering even after the marriage ends.

179. VA. CODE ANN. § 20-107.3(A)(1)(iii) (Supp. 1989).

180. *See, e.g.,* *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (interpreting almost identical statute to apply only to "passive" appreciation caused by inflation or normal market forces and not to "active" appreciation caused by marital funds or efforts), *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

181. *Booth v. Booth*, No. 0981-86-3, slip op. at 7 (Va. Ct. App. Feb. 2, 1988). Although the *Booth* opinion subsequently was modified after rehearing, the deleted portions of the opinion provide valuable insight into how the court is likely to resolve future cases. *See supra* note 140.

182. *See infra* notes 202-32 and accompanying text.

183. VA. CODE ANN. § 20-107.3(H) (Supp. 1989).

184. *Id.* § 20-150(3) (agreements executed on or after July 1, 1986); *id.* § 20-154 (prior agreements).

185. *Id.* § 20-155.

forceable. Under these statutes, the Virginia courts have held that "to the extent the parties already have stipulated to a particular disposition of their property, the court may not decree an equitable distribution award that is inconsistent with that contract."¹⁸⁶ Thus, courts are likely to respect any valid agreement between the parties that classifies part or all of the property as separate.

Virginia's de facto agreement exclusion also may apply to implied agreements. Such agreements are usually at issue when one spouse transfers certain property to the other spouse shortly before the separation, often as part of an abortive attempt at reconciliation. Courts faced with such transfers have found the transferred property to be separate if the parties mutually intended that the transferee keep the property in the event the marriage failed.¹⁸⁷ Whether such an intent existed is generally a hotly contested issue of fact.¹⁸⁸

6. Transmutation

Property that falls under one of the five preceding categories is initially separate property under Virginia law. Property that is initially separate, however, does not necessarily remain separate. The theory of transmutation provides that under certain circumstances, separate property may "transmute" into marital property.¹⁸⁹

Virginia is one of a very limited number of states whose equitable distribution statute expressly adopts transmutation.¹⁹⁰ The General Assembly expressly provided that property exchanged for separate property remains separate only "if such property acquired during the marriage is maintained as separate property."¹⁹¹ While this provision on its face applies only to property exchanged for separate property, courts have not hesitated to apply the doctrine to all types of separate property.¹⁹²

186. *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157, 162-63 (1985). The parties in *Parra* divided the marital home and several condominiums in a valid separation agreement. The agreement did not dispose of all of the parties' property, but the court held that the trial court was bound by the parties' disposition of all property covered by the contract. *Parra*, 336 S.E.2d at 163. In other words, only those assets not divided in the contract could constitute marital property for monetary award purposes. See also *Bragan v. Bragan*, 4 Va. App. 516, 358 S.E.2d 757 (1987) (stating that general waiver of future claims prevented claim for equitable distribution even though waiver was executed before § 20-107.3 was enacted).

187. *Barner v. Barner*, 246 Pa. Super. 1, 527 A.2d 122 (1987) (finding transferred property to be separate); cf. *In re Rink*, 136 Ill. App. 252, 483 N.E.2d 316 (1985) (holding that bank account transferred into joint names remained husband's separate property where transfer was made only to facilitate withdrawals by blind husband, and there was no intent to give wife any interest enforceable upon divorce).

188. *Barner*, 527 A.2d at 122.

189. See generally L. GOLDEN, *supra* note 6, §§ 5.33-.36.

190. The only other state whose statute expressly recognizes transmutation is Illinois. See ILL. ANN. STAT. ch. 40, para. 503 (Smith-Hurd Supp. 1989).

191. VA. CODE ANN. § 20-107.3(A)(1)(iii) (Supp. 1989).

192. For instance, in *Westbrook v. Westbrook*, 5 Va. App. 446, 364 S.E.2d 523 (1988),

Transmutation is probably one of the most discussed and least understood concepts in modern American law. The doctrine is followed in some form in almost every equitable distribution and community property state,¹⁹³ but courts rarely explain how or why the doctrine is used in any particular case. Instead, like a magician waving a magic wand, when courts utter the mystic phrase "transmutation," separate property suddenly becomes marital.

Making sense of the transmutation cases is especially difficult because transmutation never has been a rigidly defined or applied doctrine. Instead, courts use transmutation to reach a "right" result that cannot be reached by any other means. Although this general equitable use of transmutation has improved the fairness of individual equitable distribution decisions, it has created a general law of transmutation that lacks clarity and consistency. In considering the law of transmutation, we always must keep in mind the fairness of the result were transmutation not applied. If failure to apply the doctrine would lead to an unjust result, the court will be more likely to apply the doctrine than a dispassionate assessment of the facts might otherwise indicate.

Despite the above caveat, transmutation is not by any means completely free from rules or principles. Virginia courts have identified two basic types of transmutation, commingling and implied gift.

a. *Commingling*

The first type of transmutation will be called transmutation by commingling. The first commingling decision in Virginia was *Price v. Price*.¹⁹⁴ The parties in *Price* created a ring by remounting stones from two other rings. One of the rings was separate property while the other ring was marital property. The *Price* court held: "When separate property is combined or commingled with marital property in the manner that these rings were, the separate property loses its character as separate property and the 'new' property created is marital."¹⁹⁵ Thus, under the principle of commingling, an inseparable mixture of separate and marital property becomes marital in its entirety. Any separate property put into such a mixture transmutes and becomes completely marital.

The most crucial part of the doctrine of commingling is determining whether a mixture of marital and separate property is inseparable. This question received detailed consideration in the next transmutation case, *Smoot v. Smoot*.¹⁹⁶ *Smoot* concerned the classification of a house that was purchased with a separate property downpayment. The mortgage payments,

the court of appeals held that property acquired before the marriage transmuted into marital property. The court did not discuss the possibility that transmutation might apply only to property acquired in exchange for other separate property.

193. See generally L. GOLDEN, *supra* note 6, § 5.33.

194. 4 Va. App. 224, 355 S.E.2d 905 (1987).

195. *Price v. Price*, 4 Va. App. 224, 355 S.E.2d 905, 912 (1987).

196. 233 Va. 435, 357 S.E.2d 728 (1987).

however, were made with marital property, and the court assumed without discussion that the mortgage payments were either partial acquisitions of the home or contributions so close to acquisition as to cause commingling. The *Smoot* court addressed the question of whether the mixture of marital and separate property was inseparable. As discussed above, the court held that property must be either all marital or all separate.¹⁹⁷ Accordingly, even though the marital and separate contributions to the home's value could be separate *in fact*, they could not be separated *in law*. Because the mixture was legally inseparable, the court held that the entire home transmuted into marital property.

The difference between legal and factual inseparability is key to understanding Virginia's version of the law of commingling. In states where property can be part marital and part separate, property is commingled only when there is insufficient evidence to prove as a matter of fact how much separate property and how much marital property were placed into the overall mixture. In Virginia, however, the question of factual inseparability is irrelevant. Instead, whenever separate and marital property are mixed together in any way, the entire mixture is automatically marital. The separate portion transmutes into marital property regardless of whether or not the marital and separate contributions reliably can be identified.

The most recent Virginia commingling case, *Booth v. Booth*,¹⁹⁸ shows how far the Virginia courts will go in applying commingling. In *Booth* the husband owned a separate property corporation that encountered financial difficulties. To keep the corporation in business, the husband loaned the corporation over \$12,000 in marital funds, and the wife agreed to guarantee certain corporate debts. Upon divorce, the wife argued that marital funds had been commingled with the corporation, and the husband defended by stressing that the marital property contribution to the corporation was quite small in reference to the corporation's overall value. Although the court recognized the small size of the marital contribution, the *Booth* court held that the entire corporation had transmuted into marital property.¹⁹⁹ If the corporation were marital, the court held that the wife could be awarded only a small interest in it if she contributed slightly to it; however, if the corporation were separate, the wife automatically would receive none of it.²⁰⁰ In order to compensate the marital estate for its admittedly small contribution to the corporation, the corporation had to be classified as marital property.

Booth is quite representative of how Virginia courts are likely to apply the doctrine of transmutation. In states following the mixed theory of property, small marital contributions to a separate asset can yield a small marital interest while the majority of the asset continues to be separate

197. See *supra* notes 128-31 and accompanying text.

198. No. 0981-86-3, slip op. (Va. Ct. App. Feb. 2, 1988).

199. *Booth v. Booth*, No. 0981-86-3, slip op. (Va. Ct. App. Feb. 2, 1988).

200. *Id.* at 10-11.

property. In Virginia, however, such small marital contributions can yield only two results: all separate property or all marital property. Neither of these two results is particularly attractive in a small contribution case, but the all separate property option gives the marital estate no compensation for a relatively small but valuable contribution. While the all marital property option makes the entire property subject to division, courts still retain the power to divide the asset unequally, compensating the marital estate in proportion to the size of the contribution. The all marital property option, therefore, is the least unfavorable of the limited options permitted by unitary property. To preserve at least the possibility of making an equitable distribution, Virginia courts probably will continue to find very small amounts of commingling sufficient to change separate property into marital property.²⁰¹

The Virginia statute is ambiguous as to what happens when the doctrine of commingling collides with the general rule that appreciation in separate property remains separate. The Virginia Court of Appeals addressed this question in *Lambert v. Lambert*.²⁰² The husband in *Lambert* owned a separate property corporation that appreciated during the marriage. The trial court held that all the appreciation was separate property regardless of source, and thus, classified the entire corporation as marital.²⁰³ *Lambert* conceded that under *Smoot* the appreciation could not be classified differently from the underlying property.²⁰⁴ The court, however, saw no reason why sometimes appreciation might not cause the entire property to transmute:

[*Smoot*'s] adoption of both the unitary concept of property and the concept of transmuting separate property . . . necessarily suggest, however, that the [appreciation exclusion] may not apply to all circumstances. Unquestionably, the statute applies to appreciation in value caused by economic factors. However, our belief that *Smoot* embraces the doctrine of transmutation leads us to conclude that the statute may not bar the transmutation of separate property to marital property when there is no appreciation in value of the separate property due to *the efforts of either or both spouses* during the marriage. (emphasis added)²⁰⁵

The court remanded *Lambert* for further consideration in light of *Smoot* and other transmutation decisions.²⁰⁶

201. For recent Virginia commingling cases, see *Lassen v. Lassen*, ____ Va. App. ____, 383 S.E.2d 471 (1989); *Holmes v. Holmes*, 7 Va. App. 472, 375 S.E.2d 387 (1988). Both *Holmes* and *Lassen* involved a very common tracing situation, mixture of marital and separate funds in a joint bank account.

202. 6 Va. App. 94, 367 S.E.2d 184 (1988).

203. *Lambert v. Lambert*, 6 Va. App. 94, 367 S.E.2d 184, 186 (1988).

204. *Lambert*, 367 S.E.2d at 190.

205. *Id.*

206. *Id.* at 191.

A similar situation arose in *Ellington v. Ellington*.²⁰⁷ In *Ellington* the trial court found that the appreciation in certain stock was marital property even though the underlying value of the stock was separate property. The court of appeals reversed this holding for violating unitary property principles,²⁰⁸ but the court did not hold that the entire stock was separate property. Instead, citing *Lambert*,²⁰⁹ the court of appeals remanded the case with instructions to classify the stock as entirely marital if the wife's "affirmative efforts" were "sufficient to transmute the stock into marital property."²¹⁰

Thus, the *Lambert* and *Ellington* courts seemed to draw a distinction between appreciation caused by marital funds or efforts ("active" appreciation) and appreciation caused by inflation or normal market conditions ("passive" appreciation). This distinction also has been drawn by the courts of Illinois, the only other unitary property state. In *In re Lee*²¹¹ the parties owned a home that was the husband's separate property. The home appreciated in value during the marriage as a result of certain improvements made by the parties with marital funds. The wife argued that the improvements caused the entire home to transmute into marital property. The husband argued in opposition that under the Illinois statute appreciation in separate property remains separate. The court summarily rejected this argument, noting that the increase in value "was clearly the result of contribution by the parties."²¹² When contribution exists, the court held that the parties' contributions are sufficient to cause transmutation.²¹³ Accordingly, the home was entirely marital property.

Unfortunately, the *Lee* court did not explain in any detail at all precisely why the appreciation exclusion did not apply when the appreciation was caused by marital contributions. Nevertheless, there are two separate reasons why this result was appropriate. First, the appreciation exclusion does not state that all appreciation in separate property remains separate for all time under all conditions; it states only that separate property does not change in character merely because it appreciates.²¹⁴ In other words, while appreciation by itself does not create marital property, appreciation in separate property can be marital property for some reason other than the fact of appreciation itself. Transmutation, therefore, takes precedence over the strict language of the appreciation exclusion.

Second, other states with similar statutes have applied appreciation exclusion only to "passive" appreciation.²¹⁵ If the exclusion applies to

207. 8 Va. App. 48, 378 S.E.2d 626 (1989).

208. See *supra* notes 128-31 and accompanying text.

209. *Lambert v. Lambert*, 6 Va. App. 94, 367 S.E.2d 184 (1988).

210. *Ellington v. Ellington*, 8 Va. App. 48, 378 S.E.2d, 626, 629 (1989).

211. 87 Ill. 2d 64, 430 N.E.2d 1030 (1981).

212. *In Re Lee*, 87 Ill. 2d 64, 430 N.E.2d 1030, 1031 (1981).

213. *In re Lee*, 430 N.E.2d at 1031.

214. VA. CODE ANN. § 20-107.3(A)(1)(iii) (Supp. 1989).

215. See, e.g., *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. 1984) (adopting active/

“active” appreciation caused by marital contributions, the exclusion would frustrate the legislative purpose by denying the non-owning spouse compensation for marital contributions to separate property. Although unitary property prevents Virginia from classifying active and passive appreciation differently,²¹⁶ there is no reason why the general principles of active and passive appreciation should not be a useful analogy in applying the doctrine of transmutation.²¹⁷

It is important to remember that most active/passive appreciation jurisdictions follow mixed property. Because Virginia follows unitary property,²¹⁸ most active/passive decisions are inconsistent with Virginia law. The difference is one of effect: active appreciation causes dual classification in mixed property states and transmutation in unitary property states. *Lambert*'s definition of active appreciation, however, is very similar to definitions made by courts in mixed property states.²¹⁹ Thus, as long as Virginia courts keep in mind the difference in the effect of active appreciation, there is no reason why mixed property decisions on the definition of active appreciation should not be helpful in defining that term under Virginia law.

A review of active appreciation decisions from other states reveals three key questions on which Virginia has yet to take a position. First, although the *Lambert* court clearly anticipated that active appreciation could be caused by the efforts of either the owning or the non-owning spouse, the court did not attempt to define what it meant by “efforts.” In some states, only uncompensated efforts are relevant, and to the extent the husband received a fair salary, the husband's efforts will not cause active appreciation.²²⁰ In other states, appreciation not caused by inflation or the free

passive rule despite Mo. ANN. STAT. § 452.330(2) (Vernon Supp. 1989), which provides that “‘marital property’ means all property acquired by either spouse subsequent to the marriage except . . . [t]he increase in value of property acquired prior to the marriage”); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (adopting active/passive rule despite N.C. GEN. STAT. § 50-20(2) (1987), which provides that “the increase in value of separate property . . . shall be considered separate property”), *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Indeed, no state with a statute similar to Virginia's has refused to compensate the marital estate in some way when marital contributions cause appreciation in separate property.

216. See *supra* notes 128-31 and accompanying text.

217. The Virginia Supreme Court already has recognized that theories used in mixed property states may be helpful in construing the Virginia statute even if those theories are strictly inconsistent with the unitary theory of property. See *Smoot v. Smoot*, 233 Va. 435, 442, 357 S.E.2d 728, 732 (1987) (holding that trial judge properly considered rationale underlying source of funds rule “as a useful analogy in his construction of Virginia's statutory scheme of equitable distribution,” even though court rejected source of funds rule on merits).

218. See *supra* notes 130-33 and accompanying text.

219. Compare, e.g., *Lambert v. Lambert*, 6 Va. App. 94, 367 S.E.2d 184 (1988) (stating that property may transmute “when there is an appreciation in value of the separate property due to the efforts of either or both of the parties during the marriage”) with *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (stating that marital property includes “active appreciation resulting from the contributions, monetary or otherwise,” by one or both spouses), *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

220. See, e.g., *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. 1984) (finding appreciation passive because husband's salary was fair and reasonable).

market is seen as just another form of income, and the adequacy of the husband's salary is irrelevant.²²¹ The difference is in direction of approach: the first rule requires proof that appreciation resulted from uncompensated efforts, and the second rule assumes that appreciation is active unless proven to come from a passive source.

Second, the *Lambert* court talked only generally about the quantity of efforts required to create active appreciation, requiring that the efforts be "significant to the marital relationship."²²² The court did not explain the meaning of this phrase at all, but Virginia courts have emphasized that classification as marital allows the court to give the non-owning spouse an award proportionate to his or her contributions, while classification as separate property requires that the non-owning spouse receive no share of the property at all.²²³ Given this emphasis, a strong case can be made that *Lambert's* "significant to the marital relationship" test establishes a very low threshold.²²⁴

The subject was discussed further in *Taylor v. Taylor*.²²⁵ The husband in *Taylor* placed his separate property into a joint bank account where he also deposited his weekly salary checks. He then withdrew money from the account to purchase other property. The court held:

We find that the evidence before us mandates a conclusion that the marital property commingled by the husband was significant to the marital relationship. The marital property in question was the husband's salary. It was a major source of the parties' income at the time it was commingled with the [separate property deposits], and therefore represented an amount of money that was significant to the marital relationship at the time.²²⁶

The most interesting thing about *Taylor* is not the answer the court gave, but the question it asked. The court did not compare the size of the original separate property deposit with the amount of marital property placed into the account; indeed, these figures were not given anywhere in the court's opinion. Nor did the court compare the amount of either the separate property or the marital property deposits with the amount of the withdrawal; indeed, the court expressly stated that "our conclusion is not altered by the fact that the [amount of the withdrawals] did not exceed the amount of

221. See, e.g., *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985); *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 (1985).

222. *Lambert*, 367 S.E.2d at 190.

223. See *id.*; *Booth v. Booth*, No. 0981-86-3, slip op. at 10-11 (Va. Ct. App. Feb. 2, 1988).

224. Conversely, when Illinois followed pure unitary property, transmutation occurred only if the amount of commingling was significant. See, e.g., *In re Morse*, 143 Ill. App. 3d 849, 493 N.E.2d 1088 (1986). For mixed property cases adopting the same rule, see *In Re Herr*, 705 S.W.2d 619 (Mo. Ct. App. 1986); *Templeton v. Templeton*, 656 P.2d 250 (Okla. 1982). So far, the Virginia cases seem to be rejecting the Illinois approach.

225. No. 1092-88-4 (Va. Ct. App. Aug. 22, 1989).

226. *Taylor v. Taylor*, No. 1092-88-4, slip op. at 6 (Va. Ct. App. Aug. 22, 1989).

the [separate property deposits].” Instead, the court seemed to compare the amount of the commingled marital funds with the parties’ total income at the time and appeared to conclude that the “significant to the marital relationship” test was met because most of the parties’ income was placed into the account.

It is hard to understand the court’s logic in reaching this result. If two husbands commingle exactly the same amounts of marital property and separate property, the same result on the commingling question should be reached in both cases even if one husband is poor and the other is a millionaire. By suggesting that commingling depends not upon the amount of property commingled, but upon the amount of property *not* commingled, the court has interpreted the “significant to the marital relationship” requirement in a strange way. Conversely, the court may have spoken hastily, and because the court ultimately found that the “significant to the marital relationship” test was met, its comments on when the test would not be met are pure *dicta*. It is certainly possible that the court might adopt a more logical position in subsequent cases and either abandon its significance requirement completely²²⁷ or at least compare the respective sizes of the marital and separate interests commingled.

Finally, *Lambert* also left unclear what types of efforts are sufficient to cause transmutation. Contributions of funds or services directly to the property clearly would be sufficient.²²⁸ Other states, however, have differed on whether services as a homemaker can create active appreciation. Some states have held that performance of homemaker services by one spouse frees the other spouse to spend more time and effort on separate property and, therefore, indirectly creates active appreciation.²²⁹ Other states have held that homemaker services are usual spousal duties that never create active appreciation.²³⁰ A sensible compromise between these two positions might be that homemaker services create active appreciation only when one spouse does more than his or her “fair share” of homemaker services.²³¹ In implementing such a rule, it would be important to define “fair share” in a sexually neutral manner to avoid discrimination against full-time homemaker spouses.²³²

227. The language in *Lambert* that transmutation can occur when the amount commingled is “insubstantial” would suggest this. See *Lambert*, 367 S.E.2d at 190.

228. See *id* at 191; *Booth v. Booth*, No. 0981-86-3, slip op. at 9-11 (Va. Ct. App. Feb. 2, 1988).

229. See, e.g., *Price v. Price*, 69 N.Y.2d 8, 503 N.E.2d 684 (1986).

230. See, e.g., *In re Herr*, 705 S.W.2d 619 (Mo. Ct. App. 1986).

231. This middle approach has not been adopted by any state. In *Price*, 503 N.E.2d at 685-90, the New York court implied that even a small amount of homemaker services could create active appreciation regardless of relative size. Thus, in New York, even a lazy housewife who stays home all day and does only a small amount of the homemaker services apparently benefits from active appreciation. By contrast, in *Herr*, 705 S.W.2d at 623, the court apparently did not believe that homemaker services ever could create active appreciation, even if one spouse did substantially all of the housework in order that the other spouse have time to manage separate property. Neither of these two extremes is particularly attractive.

232. In particular, “fair share” should be defined without reference to whether a spouse

b. Implied Gift

The second type of transmutation will be called transmutation by implied gift. Under this theory, separate property becomes marital when the parties jointly agree that it shall be marital property. In essence, the property involved has been given jointly to the marital estate.

Only one Virginia case, *Westbrook v. Westbrook*,²³³ has considered transmutation by implied gift. In *Westbrook* the parties jointly borrowed money to build a home on the husband's pre-marital real estate. The wife allowed use of her credit only after the husband agreed in writing that "we own the house together."²³⁴ Upon divorce, the husband argued that the property was separate, but the court found the written agreement sufficient to transmute the home and lot into marital property.²³⁵

Westbrook was an easy case to decide because there was clear written evidence of an agreement to transmute. Such evidence rarely exists and most implied gift cases rely on circumstantial evidence. The most common type of circumstantial evidence is a transfer into joint tenancy, and under Virginia law, such a transfer causes transmutation as a matter of law.²³⁶ Another common type of evidence is use of property for marital purposes. One recent case, for example, found that the husband's separate property car transmuted when the husband allowed the wife to use the car daily during the marriage.²³⁷ Conversely, separate property is not given implicitly to the marital estate merely because it produces income that is used for marital purposes.²³⁸

IV. VALUATION

The second phase of equitable distribution requires courts to value the parties' property. All property must be valued regardless of whether it is marital or separate.²³⁹ A court commits reversible error if it fails to value

is a full-time homemaker. Otherwise, two identical indirect contributions of homemaker services to separate property may or may not cause transmutation depending upon whether the contributing spouse was a homemaker. Such discrimination against homemaker spouses violates the basic equitable distribution principle that direct financial contributions and indirect homemaker contributions are roughly equal in value.

233. 5 Va. App. 446, 364 S.E.2d 523 (1988).

234. *Westbrook v. Westbrook*, 5 Va. App. 446, 364 S.E.2d 523, 526 (1988).

235. *Westbrook*, 364 S.E.2d at 528.

236. This is the net effect of VA. CODE ANN. § 20-107.3(A)(2)(i) (Supp. 1989), which defines all jointly titled assets as marital property.

237. *Boyce v. Boyce*, 694 S.W.2d 288 (Mo. Ct. App. 1985). A rule somewhat more inclined toward transmutation was adopted in *Coney v. Coney*, 207 N.J. Super. 63, 503 A.2d 912, 918 (1985), which held that property transmutes when one spouse "represents to the other that property will be shared."

238. *Bizzell v. Bizzell*, 697 S.W.2d 559 (Mo. Ct. App. 1986); *Brooks v. Brooks*, 289 S.C. 352, 345 S.E.2d 510 (1986).

239. *Hodges v. Hodges*, 2 Va. App. 508, 347 S.E.2d 134 (1986). See VA. CODE ANN. § 20-107.3(A) (Supp. 1989) (requiring court to value "all property . . . of the parties" before considering which property is marital and which is separate).

any asset capable of being valued on the evidence before the court.²⁴⁰

Trial courts in all equitable distribution states have great discretion in valuing property.²⁴¹ The first rule of property valuation is that the trial court can use any reasonable valuation method, and the court's decision will be affirmed on appeal unless the decision constitutes an abuse of discretion.²⁴² Nevertheless, Virginia courts have established several absolute rules of law that govern valuation procedure. The burden of proof is clearly upon the party seeking to classify an asset as marital, and a court should ignore for equitable distribution purposes an asset that lacks sufficient evidence to value.²⁴³

There has been some confusion in Virginia as to the date on which property should be valued—the *date of valuation*.²⁴⁴ In *Parra v. Parra*²⁴⁵ the court of appeal stated in *dicta* that trial courts were required to value property as of the date on which the presumption of marital property terminates.²⁴⁶ This was a misreading of the statute, which at the time did not even mention the date of valuation, and the court corrected the error in *Mitchell v. Mitchell*.²⁴⁷ The *Mitchell* court held that because the General Assembly had chosen no statutory valuation date, courts must decide the date of valuation on a case-by-case basis.²⁴⁸

Fortunately, for Virginia trial judges, the *Mitchell* court did give some guidance as to what date of valuation is likely to be most equitable. As a general rule, the court said that the monetary award should be based upon the most current financial information available. Accordingly, in most cases the property should be valued as of the date of the evidentiary hearing.²⁴⁹ This is not an absolute rule, however, and the court indicated that an earlier date would be more equitable in at least two different fact situations. First, when one spouse dissipates marital assets after the date of separation, the property should be classified and valued as of some date before the dissipation.²⁵⁰ Second, when an asset increases or decreases in value after

240. *Bowers v. Bowers*, 4 Va. App. 610, 359 S.E.2d 546 (1987).

241. *See Price v. Price*, 4 Va. App. 224, 355 S.E.2d 905 (1987).

242. *See Price*, 355 S.E.2d at 905 (1987); *see generally* L. GOLDEN, *supra* note 6, § 7.07.

243. *Morris v. Morris*, 3 Va. App. 303, 349 S.E.2d 661 (1986). *See Green v. Green*, 64 Md. 122, 494 A.2d 721 (1985); *Hirschfeld v. Hirschfeld*, 96 A.D.2d 473, 464 N.Y.S.2d 789 (1983).

244. The date of valuation should be distinguished from the date upon which the court classifies property as marital or separate—the *date of classification*. The two dates may but need not be the same. *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18, 20 (1987). Questions involving the date of classification are discussed *supra* notes 116-26 and accompanying text.

245. 1 Va. App. 118, 336 S.E.2d 157 (1985).

246. *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157, 162 (1985).

247. 4 Va. App. 113, 355 S.E.2d 18 (1987).

248. *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18, 21 (1987).

249. *Mitchell*, 355 S.E.2d at 21.

250. *Id.* *See Berish v. Berish*, 69 Ohio St. 2d 318, 432 N.E.2d 183 (1982) (husband removed substantial sum from joint bank account after separation; account valued as of date of separation; dissipated funds constructively awarded to husband).

the separation as a result of one spouse's unassisted efforts, the property also should be valued as of an earlier date to give the owning spouse the benefit or burden of his labors.²⁵¹

The legislature recently codified the *Mitchell* rule by requiring that property be valued as of the evidentiary hearing unless the court orders otherwise "for good cause shown, in order to attain the ends of justice."²⁵² The order must be made pursuant to a motion entered no less than 21 days before the evidentiary hearing.²⁵³

The discretionary review standard makes it very difficult to discover and state rules of law on which valuation method is appropriate in any given case. This article, therefore, does not review the substantive law of valuation in any systematic manner. Instead, we will examine in some depth one particular valuation problem: the valuing of a close corporation or other small business. Because the general principles applied in the close corporation setting are quite representative of the principles which apply when valuing other assets, the following discussion should be helpful in solving many different equitable distribution valuation problems.

The most significant part of a close corporation is its physical assets. Failure to value these assets properly probably constitutes reversible error.²⁵⁴ The assets should be valued in much the same way that assets are valued in other cases: through the testimony of witnesses familiar with the assets and the market for the assets.²⁵⁵ Assets should be given a fair market value and not the value at a dissolution or liquidation sale.²⁵⁶ Expert testimony is not required because the owner is always competent to testify as to the value of his own property.²⁵⁷ The testimony of a non-expert owner, however, is not highly probative if opposed by other evidence.²⁵⁸

The owner's valuation, therefore, should be supported with expert testimony. The expert will be most persuasive if he regularly values similar

251. *Mitchell*, 355 S.E.2d at 21. See *In re Wagner*, 208 Mont. 369, 679 P.2d 753 (1984) (when parties separated, husband took ranch and wife took certain other property with which she bought her own ranch; during separation, wife parlayed her share of property into thriving and successful business while husband managed ranch so poorly that it declined in value; valuation as of date of divorce reversed); *Taylor v. Taylor*, 436 N.E.2d 56 (Ind. 1982) (wife paid all mortgage payments and other expenses on marital home after separation; home valued at date of separation in order to give wife benefit of appreciation occurring after separation).

252. VA. CODE ANN. § 20-107.3 (Supp. 1988).

253. *Id.*

254. *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985); *Weiss v. Weiss*, 122 Wis. 2d 688, 365 N.W.2d 608 (1985).

255. See, e.g., *Bohling*, 683 S.W.2d 661 (Mo. Ct. App. 1984).

256. *Kowalesky v. Kowalesky*, 148 Mich. App. 151, 384 N.W.2d 112 (1986).

257. *Bard v. Bard*, 380 N.W.2d 342 (N.D. 1986); *Berger v. Berger*, 713 P.2d 695 (Utah 1985) (giving business no value in accordance with husband's testimony which was only evidence on issue); *Norman v. Norman*, 604 S.W.2d 680 (Mo. Ct. App. 1980).

258. See *In re Kaplan*, 141 Ill. App. 3d 142, 490 N.E.2d 69 (1986) (trial court erred in accepting husband's testimony which could not be reconciled with relevant financial data); *Bard v. Bard*, 380 N.W.2d 342 (N.D. 1986) (rejecting unsupported testimony of husband and wife and affirming trial court's valuation based upon law practice's gross receipts and net income for past several years).

businesses for non-litigation purposes. The court may be reluctant to rely upon an otherwise qualified expert with little relevant prior experience.²⁵⁹ Conversely, it is unwise to rely too much upon experience. At least one court has rejected testimony based solely upon "experience" and upon "other businesses that I have dealt with" in the past.²⁶⁰ The expert, instead, should base his testimony upon a detailed review of the specific business.²⁶¹

One should note, however, that the firm's value may be less than the sum total of its assets. Failure to offset the firm's liabilities against its assets is generally reversible error.²⁶² Future liabilities should be considered at present and not future value.²⁶³ If the liabilities exceed the assets, then the business has no value,²⁶⁴ but it is error to offset any "negative value" against the value of other marital assets.²⁶⁵

There are several ways other than personal estimates by which the parties can establish the assets and liabilities of a law practice. The firm's balance sheet is certainly some evidence of the firm's worth.²⁶⁶ Some states even have held that the balance sheet is the "starting point" for a court's inquiry, and these states allow deviations from the book value only if the trial court affirmatively finds that the book value is inaccurate.²⁶⁷

The courts also place weight upon arm's length dealings with third parties, especially purchases and sales of the business being valued.²⁶⁸ Even transactions occurring after the valuation date may be admissible to the

259. See, e.g., *Kowalesky v. Kowalesky*, 148 Mich. App. 151, 384 N.W.2d 112 (1986) (husband's expert was involved actively in valuation and sale of dental practices for commercial purposes, while wife's expert was CPA with dentists as clients and who never had valued dental practice before; trial court's acceptance of husband's valuation affirmed).

260. *Bowen v. Bowen*, 96 N.J. 36, 473 A.2d 73, 80 (1984).

261. See *In re Bell*, 220 Mont. 123, 713 P.2d 552 (1986) (affirming trial court's acceptance of valuation testified to by husband and his expert appraiser).

262. *Robison v. Robison*, 100 Nev. 668, 691 P.2d 451 (1984); *Clarkson v. Clarkson*, 116 A.D.2d 824, 496 N.Y.S.2d 854 (1986). See *Kowalesky v. Kowalesky*, 148 Mich. App. 151, 384 N.W.2d 112 (1986). But see *Wehner v. Wehner*, 374 N.W.2d 569 (Minn. Ct. App. 1985) (court may in its discretion give minimal or even no weight to debt when creditor is close family member unlikely to enforce debt through legal action).

263. *Clarkson v. Clarkson*, 116 A.D.2d 824, 496 N.Y.S.2d 854 (1986).

264. *Hodges v. Hodges*, 2 Va. App. 508, 347 S.E.2d 134 (1986). Accord *Green v. Green*, 64 Md. App. 122, 494 A.2d 721 (1984); *Wilbur v. Wilbur*, 116 A.D.2d 953, 498 N.Y.S.2d 525 (1986).

265. *Randolph v. Randolph*, 67 Md. App. 577, 508 A.2d 996 (1986).

266. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986); *Cronin v. Cronin*, 372 N.W.2d 778 (Minn. Ct. App. 1985). See also *Becker v. Becker*, 218 Mont. 229, 707 P.2d 526 (1985) (affirming trial court's valuation of stock as corporation's net assets divided by its total shares).

267. *In re Kaplan*, 141 Ill. App. 3d 142, 490 N.E.2d 69 (1986); *Robison v. Robison*, 100 Nev. 668, 691 P.2d 451 (1984).

268. See *Hoffa v. Hoffa*, 382 N.W.2d 522 (Minn. Ct. App. 1986) (buyout price accepted as value); *Cronin v. Cronin*, 372 N.W.2d 778 (Minn. Ct. App. 1985) (relying in part on price of recent redemption); *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985) (relying in part upon insurance proposal submitted by husband that contained an estimate of the corporation's value), *rev'd on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986).

extent that the transaction reflects the value as of an earlier date.²⁶⁹ If the firm's partnership agreement contains a formula for valuing the interest of a partner who leaves the firm or dies, the formula is some evidence of the corporation's value.²⁷⁰ The formula is not controlling, however, because it may have been created for purposes other than measuring accurately the value of the business.²⁷¹ When more than one formula is contained in the agreement, a court should use the formula most applicable to valuation upon divorce.²⁷²

The court also is allowed to consider the beneficial effects of owning a large majority of the stock in a corporation and the detrimental effect of owning only a small minority interest.²⁷³ The court may reduce the value of the business if the owning spouse is a "key man" who might remain with the business for an indefinite period of time.²⁷⁴ It also is necessary to value the firm's accounts receivable.²⁷⁵ Such accounts usually are taken at face value less a reasonable percentage for bad debts.²⁷⁶

In valuing close corporations, courts have not generally relied upon one source. A possible exception is the Internal Revenue Service guidelines used in valuing close corporations for tax purposes.²⁷⁷ Although distribution based on these guidelines is not mandatory in any state, many different courts have looked to the IRS guidelines as an authoritative source of valuation principles.²⁷⁸

269. See *Litman v. Litman*, 93 A.D.2d 695, 463 N.Y.S.2d 24 (1983), *aff'd mem.*, 61 N.Y.2d 918, 474 N.Y.S.2d 718 (1984).

270. *Bosserman v. Bosserman*, No. 0500-88-3 (Va. Ct. App. Sept. 5, 1989). See *Zipf v. Zipf*, 8 Va. App. 387, 382 S.E.2d 263 (1989). This rule is also common in other states. See *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1984).

271. *Bosserman*, slip op. at 7-8. See *In re Marron*, 170 Cal. App. 3d 151, 215 Cal. Rptr. 894 (1985); *Bowen v. Bowen*, 96 N.J. 36, 473 A.2d 73, 80 (1984) (rejecting formula that had not been revised for several years).

272. *Balogh v. Balogh*, 356 N.W.2d 307 (Minn. Ct. App. 1984). *But see Peddycord v. Peddycord*, 479 N.E.2d 615 (Ind. Ct. App. 1985) (holding that voluntary withdrawal formula controls death formula as matter of law).

273. See *Novick v. Novick*, 366 N.W.2d 330 (Minn. Ct. App. 1985) (control bonus); *Hartman v. Hartman*, 82 N.C. App. 167, 346 S.E.2d 196 (1986) (approving 36% minority discount); *Eyler v. Eyler*, 492 N.E.2d 1071 (Ind. 1986) (rejecting minority discount on facts but conceding validity of concept); cf. *Becker v. Becker*, 218 Mont. 229, 707 P.2d 526 (1985) (rejecting husband's argument that minority position made stock completely worthless).

274. *Eyler v. Eyler*, 492 N.E.2d 1071 (Ind. 1986); *Hoffa v. Hoffa*, 382 N.W.2d 522 (Minn. Ct. App. 1985); *Nemitz v. Nemitz*, 376 N.W.2d 243 (Minn. Ct. App. 1985); *Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980).

275. *Smith v. Smith*, 709 S.W.2d 588 (Tenn. Ct. App. 1985).

276. *In re Bayer*, 687 P.2d 537 (Colo. Ct. App. 1984); *In re Anderson*, 220 Mont. 477, 717 P.2d 11 (1986) (receivables due in less than year discounted by 25% to reflect likelihood that debtor will miss payment). Other states have divided some unusually contingent receivables on a percentage basis if and when received rather than dividing them on a lump sum basis at the time of divorce. *Weiss v. Weiss*, 122 Wis. 2d 688, 365 N.W.2d 608 (1985).

277. *Rev. Rul. 59-60*, 1959-1 C.B. 237.

278. See, e.g., *Kowalesky v. Kowalesky*, 148 Mich. App. 151, 384 N.W.2d 112 (1986).

The most difficult valuation issue involving close corporations is putting a value on the corporation's goodwill. Valuation of goodwill is a factual issue, and trial court valuations are generally not reversed unless there is a manifest abuse of discretion.²⁷⁹ The burden of proof is on the party who asserts that goodwill exists, and if there is insufficient evidence to value goodwill, the court will ignore goodwill for equitable distribution purposes.²⁸⁰ Conversely, if goodwill is marital property and the record does contain sufficient evidence of its value, the trial court commits reversible error by failing to value goodwill or plausibly explain the absence of a valuation.²⁸¹

Despite the clear abuse of discretion review standard, the reported decisions have at least listed several acceptable methods that can be used to evaluate goodwill. In *Dugan v. Dugan*²⁸² the court discussed the excess earnings method of computing goodwill. Under this method, goodwill is the difference between the earnings of the business and the earnings of the "average" or "reasonable" business, multiplied by some number (the "multiplier") between one and five.²⁸³ The "reasonable" attorney's salary is the average salary for attorneys for comparable age and experience. The court in *Dugan* hinted that when a northern New Jersey law practice is involved, the trial court should limit the database to attorneys in New Jersey or even northern New Jersey.²⁸⁴ It is clearly reversible error to base the average salary upon a certain percentage of assets because salary and physical assets are not necessarily related.²⁸⁵ The value of the multiplier generally is established by expert testimony. There is a common value, and the *Dugan* court indicated that "three is the factor regarded as least in need of justification."²⁸⁶ The excess earnings method has been accepted by other courts both inside and outside New Jersey.²⁸⁷

279. See, e.g., *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

280. *Hirschfeld v. Hirschfeld*, 96 A.D.2d 473, 464 N.Y.S.2d 789 (1983); *In re Nordby*, 41 Wash. App. 531, 705 P.2d 277 (1985).

281. *Matsuo v. Matsuo*, 124 A.D.2d 864, 508 N.Y.S.2d 630 (1986); *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

282. 92 N.J. 423, 457 A.2d 1 (1983).

283. *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1, 9-10 (1983). Other courts, instead of multiplying by a factor, divide by a percentage (the "capitalization rate"). See, e.g., *In re Hull*, 219 Mont. 480, 712 P.2d 1317 (1986). This difference is purely a matter of mathematical preference and has no effect upon the final result.

284. *Dugan*, 457 A.2d at 11.

285. *Id.*

286. *Id.* at 11-12.

287. For cases accepting excess earnings, see *Hunt v. Hunt*, 698 P.2d 1168 (Alaska 1985) (husband's expert valued goodwill at \$132,760 under *Dugan*; wife's expert used IRS guidelines to reach valuation of \$766,000; court affirmed trial court acceptance of husband's figures, finding excess earnings acceptable but not mandatory valuation method); *In re White*, 151 Ill. App. 3d 778, 502 N.E.2d 1084 (1986) (affirming valuation based on excess earnings; experts need not demonstrate personal familiarity with geographic area in which practitioner works); *In re Hull*, 219 Mont. 480, 712 P.2d 1317 (1986) (valuing anesthesiology practice by excess earnings). Only one case has held excess earnings to be an insufficient valuation method. See *In re Reiling*, 66 Or. App. 284, 673 P.2d 1360 (1983) (wife's expert used *Dugan* method but

Courts valuing goodwill also have relied upon estimations calculated by expert witnesses without using any particular rigid mathematical method. To be persuasive, these estimates must consider a number of relevant factors. One court listed these factors as the practitioner's age, health, past earning power, reputation, and professional success.²⁸⁸ The value is dependent upon the value of the goodwill to the practitioner and not upon what a willing buyer would pay in a fair exchange.²⁸⁹

The capitalization of earnings method generally has been rejected in the equitable distribution context. Under the capitalization of earnings method, goodwill is valued at some percentage of the present value of the future income reasonably to be expected from the business.²⁹⁰ This is a valid method among economists for valuing goodwill, but courts considering the method have been troubled by its use of future earnings. Because this method defines goodwill as a portion of future earnings, many courts have held that capitalization of earnings impermissibly confuses goodwill with future earnings. Because income earned after the marriage is separate property in every state, most states have rejected the capitalization of earnings method.²⁹¹ Thus, it seems unlikely that a Virginia court would approve the use of the capitalization of earnings method.

wife presented no evidence of husband's health, reputation, or work habits; held, insufficient evidence to support award of goodwill), *cert. denied*, 296 Or. 536, 678 P.2d 738 (1984).

For tax purposes, the IRS follows a version of excess earnings that is somewhat different from the method outlined in *Dugan*. See Rev. Rul. 68-609, 1968-2 C.B. 327. Under the IRS method, the evaluator measures the tangible assets of the business and determines an average rate of return on tangible assets for a business in the same situation as the business being valued. Multiplying the tangible assets by the average rate of return yields the average earnings, which are subtracted from the actual earnings to get the business' excess earnings. If the business is a sole proprietorship, the owner's salary is subtracted further from the excess earnings. The excess earnings then are multiplied by the "factor" discussed in the text to yield the final value.

For additional cases accepting excess earnings as a valuation method but finding it to be incorrectly applied to the case at hand, see *In re Garrity/Bishton*, 181 Cal. App. 3d 675, 226 Cal. Rptr. 485 (1986) (error to conclude that practice had no value because practitioner earned less than average income; business is worth at least net total of tangible assets and receivables; trial court essentially failed to realize that excess earnings is only a method for valuing goodwill and not method for valuing entire practice); *In re Kapusta*, 141 Ill. App. 3d 1010, 491 N.E.2d 48 (1986) (court erred in using excess earnings method because there was no proof that nationwide average income was average income in practitioner's area; court also erred by using husband's income in usual 50 to 70 hour week because average income table was based on 40 hour week; court should have looked to husband's earnings per hour and not total earnings per week); *In re Hall*, 103 Wash. 2d 236, 245, 692 P.2d 175, 180 (1984) (1985) (error to use excess earnings blindly without taking into account surrounding circumstances; excess earnings showed no goodwill, but husband recently had expanded his office and deliberately limited hours of practice; notwithstanding excess earnings, "[c]onsideration of the appellant's reputation, associations, referrals, location and trade name indicate the existence of goodwill"); *cf. Levy v. Levy*, 164 N.J. Super. 542, 397 A.2d 374 (Ch. Div. 1978) (holding that law practice in only fair economic health has no excess earnings to begin with).

288. *In re Nordby*, 41 Wash. App. 531, 705 P.2d 277, 280 (1985).

289. *In re Martin*, 707 P.2d 1035 (Colo. Ct. App. 1985).

290. See, e.g., *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987).

291. See, e.g., *E.E.C. v. E.J.C.*, 457 A.2d 688 (Del. 1983); *In re Frazier*, 125 Ill. App.

V. MAKING THE MONETARY AWARD

Once the trial court has classified and valued the parties' property, it must determine the amount of the monetary award.²⁹² The statute provides remarkably little guidance as to how the award should be computed, stating only that the award should be "[b]ased upon the equities and the rights and interests of each party in the marital property"²⁹³ and that certain specified factors should be considered.²⁹⁴

Despite the statute's facial ambiguity, the Virginia decisions largely agree on how the monetary award process operates. A court begins by computing the amount of marital property to which each spouse equitably is entitled.²⁹⁵ The court then compares this amount with the marital property actually in each spouse's possession, and based on this difference, the court decides whether a monetary award is warranted.²⁹⁶ Finally, if a monetary award is warranted, the court then determines the amount of the award.²⁹⁷ Thus, while Virginia courts cannot divide individually owned marital property between the spouses, the monetary award process is very similar to the distribution of property process in other states.²⁹⁸

A. Statutory Factors

The statute lists eleven factors that the trial court must consider in determining both the amount of the award and the method of payment.²⁹⁹ While the statute does not rank the factors in any way, the first two factors are in practice the most important.³⁰⁰ Under these factors, the trial court must consider the monetary and non-monetary contributions made by each

3d 473, 466 N.E.2d 290 (1984); *In re Weidemann*, 402 N.W.2d 744 (Iowa 1987); *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987); *Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980); *Jondahl v. Jondahl*, 344 N.W.2d 63 (N.D. 1984); *cf.* *Robinson v. Robinson*, 355 N.W.2d 737 (Minn. Ct.App. 1984) (error to capitalize earnings for services performed but not error to capitalize earnings based only upon ownership of property such as investment income, a questionable distinction that most courts probably would reject). The same result also has been reached in community property states on the basis that community property must be acquired during the marriage. *See In re Rives*, 130 Cal. App. 3d 138, 181 Cal. Rptr. 572 (1982); *In re Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1974); *In re Fortier*, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (1973); *In re Hall*, 103 Wash. 2d 236, 692 P.2d 175 (1984).

292. *See Brown v. Brown*, 5 Va. App. 238, 361 S.E.2d 364 (1987) (eleven specific distribution factors become relevant only after trial court has classified and valued parties' property).

293. VA.CODE ANN. § 20-107.3(D) (Supp. 1989).

294. *Id.* § 20-107.3(E)(1-11).

295. *Brinkley v. Brinkley*, 5 Va. App. 132, 361 S.E.2d 139, 140 (1987).

296. *Brinkley*, 361 S.E.2d at 140.

297. *Id.* at 140-41. Presumably, the monetary award should be equal to the difference between the marital property a spouse actually possesses and the marital property to which he or she is equitably entitled. No Virginia case, however, has expressly so stated.

298. *See generally* L. GOLDEN, *supra* note 6, §§ 8.03-.04 (describing division of property and monetary award processes).

299. VA. CODE ANN. § 20-107.3(E)(1-11) (Supp. 1989).

300. *See generally* L. GOLDEN, *supra* note 6, § 8.18.

spouse to "the well-being of the family"³⁰¹ and to the "acquisition and care and maintenance" of the marital property.³⁰² Together, these factors encompass each party's entire contribution to the marriage.

As the statute indicates, neither monetary nor non-monetary contributions are more valuable than the other. The courts have noted several times that intangible contributions to family welfare can be as valuable or even more valuable than each party's tangible financial contributions.³⁰³ This refusal to give direct monetary contributions undue weight is consistent with the general equitable distribution policy that breadwinners and homemakers make on the whole roughly equal contributions to the marital estate.³⁰⁴

One area in which direct financial contributions do carry more weight is in the division of transmuted property. The Virginia courts have emphasized at some length that when small marital contributions cause transmutation, the court should consider an unequal division of the transmuted property.³⁰⁵ For instance, in *Smoot v. Smoot*,³⁰⁶ where a separate property downpayment was made on a marital property home, the court returned the amount of the downpayment to the husband before dividing the rest of the home equally.

The remaining statutory factors are largely self-explanatory, and there is little case law discussing them. The fifth factor requires a court to consider conduct causing the dissolution of the marriage as one relevant factor, but fault need not have a major effect or even any effect at all upon the award if the equities of the case so require.³⁰⁷ The tenth factor requires a court to consider the tax consequences of its actions, and while the issue has not arisen in Virginia, other states have treated tax consequences as relevant only when they are reasonably likely to occur.³⁰⁸ Uncertain or speculative tax consequences have carried little or no weight in other states.³⁰⁹

301. VA. CODE ANN. § 20-107.3(E)(1) (Supp. 1989).

302. *Id.* § 20-107.3(E)(2). A similar point is made by the sixth factor, which requires the court to consider when and how the marital property was acquired. *Id.* § 20-107.3(E)(6); *Brown v. Brown*, 5 Va. App. 238, 361 S.E.2d 364 (1987).

303. *See, e.g.*, *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987); *Bentz v. Bentz*, 2 Va. App. 486, 345 S.E.2d 773 (1986).

304. *See generally* L. GOLDEN, *supra* note 6, § 8.16 ("the desire to ensure that the homemaker would be rewarded is probably the most important reason for equitable distribution legislation"); *id.* §§ 8.16-17.

305. *See Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 729 (1987); *Lambert v. Lambert*, 6 Va. App. 94, 367 S.E.2d 184 (1988).

306. 233 Va. 435, 357 S.E.2d 728 (1987). *See also Pommerenke v. Pommerenke*, 7 Va. App. 241, 372 S.E.2d 630 (1988) (husband made \$95,582 down payment on home with separate funds, but home transmuted because \$15,000 mortgage was paid with marital funds; affirming trial court division awarding husband \$102,500 from home and wife only \$7500).

307. *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728, 732 (1987) (no automatic set reduction in monetary award for fault; trial court properly gave no weight to fault where husband's desertion was grounds for divorce, but his desertion was only symptom of marital breakdown caused by both spouses).

308. *See, e.g.*, *Nolan v. Nolan*, 107 A.D.2d 190, 486 N.Y.S.2d 415 (1985).

309. *See, e.g.*, *Rosenberg v. Rosenberg*, 64 Md. App. 487, 497 A.2d 485 (1985); *Wright*

Courts cannot consider the parties' spousal or child support obligations as a factor in setting the award. Instead, courts should reconsider any pre-existing support awards in light of the parties' post-award financial conditions.³¹⁰ In determining the monetary award, courts should limit its examination of the parties' finances to the period in which they were married.³¹¹ Courts cannot consider the parties' future earning capacity in making the award because this relates to future events that are more appropriately considered in setting spousal support.³¹²

B. Making the Award

1. Monetary Awards Generally

Once a court determines the proper amount of the award, it should order the proper party to pay the award. A monetary award is similar to a money judgment; it is not a court order enforceable by contempt.³¹³ The award may be either a lump sum payable immediately or an installment obligation payable in fixed amounts at specific times.³¹⁴ Courts clearly lack the authority to order conveyance of specific, individually-owned property, and a decree making such an order is certain to be reversed.³¹⁵ A recent amendment to the statute, however, permits courts to divide equitably any property that is jointly titled.³¹⁶ Courts also may authorize a party to satisfy

v. Wright, 471 N.E.2d 1240 (Ind. Ct. App. 1984); *cf.* Olinger v. Olinger, 75 Or. App. 351, 707 P.2d 64 (1985) (in valuing property, error to subtract capital gains tax that would be due upon sale because owner was unlikely to sell property); Bennett v. Bennett, 15 Mass. App. Ct. 999, 448 N.E.2d 77 (1983) (trial court not required to consider tax consequences where neither party introduced evidence as to what those consequences were).

310. VA. CODE ANN. § 20-107.3(F) (Supp. 1989); Williams v. Williams, 4 Va. App. 19, 354 S.E.2d 64 (1987).

311. Reid v. Reid, 7 Va. App. 553, 375 S.E.2d 533 (1989). This is quite an unusual rule because most states affirmatively require the court to consider each party's earning capacity and opportunity for future acquisition of property. *See generally* L. GOLDEN, *supra* note 6, § 8.20 (noting that "[i]n many states a primary goal of equitable distribution is to provide for the future support needs of the parties"). Indeed, many states list earning capacity and opportunity for further acquisition of assets as an equitable distribution factor. *See, e.g.*, ILL. STAT. ANN. ch. 40, para. 503(d)(10) (Supp. 1988). Interestingly, the Reid court did not seem to realize this and described its holding as "axiomatic." Reid, 375 S.E.2d at 540. The court, therefore, apparently was unaware that nationwide the general rule was contrary to its position.

312. Reid, 375 S.E.2d at 540.

313. Brown v. Brown, 5 Va. App. 238, 361 S.E.2d 364 (1987).

314. VA. CODE ANN. § 20-107.3(D) (Supp. 1989).

315. *See, e.g.*, Lowe v. Lowe, 233 Va. 431, 357 S.E.2d 31 (1987); Price v. Price, 4 Va. App. 224, 355 S.E.2d 905 (1987).

316. VA. CODE ANN. § 20-107.3(C) (Supp. 1989). In determining the monetary award, courts must consider any legal title interest either spouse possesses in the marital property. Thus, courts should include in the monetary award only that part of either spouse's interest that exceeds the interest he or she already possesses.

In one recent decision, after determining that an equal division was appropriate, the trial court included as part of the monetary award 50% of the value of an asset to which the wife

part or all of the award by conveying title to property.³¹⁷ The monetary award can be payable only to the other spouse, and courts cannot transfer property or funds to a third person.³¹⁸

2. Retirement Benefits

The Virginia statute contains a number of provisions specifically relevant to division of pensions and retirement benefits. Courts are authorized to direct payment of pension benefits directly to the non-owning spouse. Presumably, such direction can be directed at either the owning spouse or the pension plan itself.³¹⁹ The amount of such payments cannot exceed fifty percent of the pension's "marital share," which is defined as that part of the pension earned during the marriage and before the final separation.³²⁰

In *Mitchell v. Mitchell*³²¹ the Virginia Court of Appeals held that the above restrictions applied to all pension divisions regardless of whether the court ordered direct payment or simply based the monetary award in part upon the existence of the pension. In so holding, the court noted that the statutory language referred to "any monetary award based upon the value of pension or retirement benefits" and that the present value of a pension was a statutory factor for the court to consider at the division stage.³²² The court rejected the position followed in most states that a court can award the owning spouse the entire pension and award the other spouse offsetting property or a monetary award.³²³

In 1988 the legislature modified the statute that now refers to "direct payment of a percentage of the marital share of any pension" and deleted the present value of pension benefits from the list of division factors.³²⁴ The 1988 amendments indirectly codify *Mitchell*. The new language clearly provides that the pension limitations apply only when a court orders direct payment of pension benefits from one spouse to the other.³²⁵ The language

owned complete legal title. Ultimately, therefore, the wife received 150% of this asset—100% legal title plus 50% as part of the monetary award. The court of appeals found this to be error as a matter of law. See *Kaufman v. Kaufman*, 7 Va. App. 488, 375 S.E.2d 374 (1988). The *Kaufman* trial court also awarded the wife 50% of the husband's interest in jointly titled marital property. *Id.* In effect, therefore, the wife received 75% of the property (50% legal interest plus 50% of the husband's 50% interest as monetary award). The court of appeals also reversed this part of the trial court's decision, holding that the wife was entitled to only her 50% legal interest. *Id.*

317. VA. CODE ANN. § 20-107.3(D) (Supp. 1989).

318. *Woolley v. Woolley*, 3 Va. App. 337, 349 S.E.2d 422 (1986).

319. VA. CODE ANN. § 20-107.3(G) (Supp. 1989).

320. *Id.*

321. 4 Va. App. 113, 355 S.E.2d 18 (1987).

322. *Mitchell v. Mitchell*, 4 Va. App. 113, 355 S.E.2d 18, 22 (quoting VA. CODE ANN. § 20-107.3(G) (repealed 1988) and § 20-107.3(E)(8) (repealed 1988)).

323. See generally L. GOLDEN, *supra* note 6, § 6.16.

324. The 1988 amendments are codified primarily at VA. CODE ANN. § 20-107.3(G) (Supp. 1989).

325. VA. CODE ANN. § 20-107.3(G) (Supp. 1989).

relied upon in *Mitchell* that refers to any monetary award based upon a pension is no longer in the statutes. Nevertheless, the legislature also deleted the statutory provision that allows a court to consider the present value of a pension in setting the monetary award, and in light of this express deletion, it seems unlikely that present value can be considered under the catch-all factor.³²⁶ Thus, a court cannot currently consider pension benefits in setting the monetary award. The only way to compensate the non-owning spouse for such benefits is by a direct payment order. Because pensions now can be divided only by direct payment, the statutory pension restrictions apply in all cases just as the *Mitchell* court held.

3. The "One Monetary Award Rule"

The most confusing issue involving the actual making of the award is the "one monetary award rule." The rule, which is relevant mainly to division of retirement benefits, was first stated in *Brinkley v. Brinkley*.³²⁷ In *Brinkley* the trial court gave the wife a \$3000 monetary award and ordered the husband to pay the wife thirty-six percent of his future monthly pension payments.³²⁸ The Virginia Court of Appeals reversed this decision and held:

As we read [the trial court's decision], it effectively grants to the wife two monetary awards. However, Code § 20-107.3 . . . contemplates only one monetary award, the amount of which is determined by the careful consideration of the eleven criteria enumerated in subsection (E). Although Code § 20-107.3(G) as it read prior to its amendment required the trial court to identify that *portion* of the award based upon retirement benefits . . . that portion cannot be construed as authorizing multiple monetary awards.³²⁹

Thus, the court held that by awarding both a set monetary sum and a percentage of the pension, the trial court impermissibly had made two monetary awards. The case was remanded back to the trial court with the following instructions:

Once the amount of the monetary award has been determined by careful consideration of all of the Code § 20-107.3(E) factors, including the present value of percentage of those benefits toward satisfaction of the award. . . . If the court directs payment of a percentage of the pension, profit-sharing, or retirement benefits in satisfaction of the monetary award, such *payments* can be required "only as such benefits are payable."³³⁰

326. *Id.* § 20-107.3(E)(11).

327. 5 Va. App. 132, 361 S.E.2d 139 (1987).

328. *Brinkley v. Brinkley*, 5 Va. App. 132, 361 S.E.2d 139, 142 (1987).

329. *Brinkley*, 361 S.E.2d at 142.

330. *Id.* (quoting VA. CODE ANN. § 20-107.3(G) (Supp. 1989)) (emphasis added).

The trial court, therefore, must determine a single monetary award without reference to the manner in which it will be paid. After the award has been established, the trial court then may order a specific portion of that award to be satisfied by payment of a specific portion of each pension payment.

Brinkley can be interpreted in a number of different ways. Because the trial court in *Brinkley* gave little explanation as to how it arrived at any part of its award, the court of appeals' action was on one level a simple reminder to the trial courts that they must consider all the parties' marital property before arriving at a monetary award. Each spouse's interest in the other spouse's pension must be determined after consideration of all the facts in the case and not merely all the facts relating to the pension itself. In its instructions upon remand, the court properly emphasized that the monetary award is a single sum based on all of the statutory factors and not a series of smaller sums based on facts surrounding individual assets.

At another level, however, *Brinkley* can be interpreted as requiring that pension awards be certain in amount. Because the court specifically required that a pension award satisfy a specifically stated amount of the overall monetary award, some trial courts have held that Virginia law requires all pension awards to be limited to a specific dollar amount. In other words, *Brinkley* can be interpreted as holding that it is error to award a flat percentage of all future pension payments. Instead, the court must award a certain definite dollar amount that is satisfied by paying a specified percentage of all pension payments until the definite dollar amount has been reached.

This potential reading of *Brinkley* was rejected in *Zipf v. Zipf*.³³¹ The trial court in *Zipf* awarded the wife twenty-five percent of the husband's pension, payable at a specified rate until the total payments equalled twenty-five percent of the pension's present value at the time of divorce. The court of appeals reversed, noting that present value is an accurate method of pension valuation only if the non-owning spouse receives that value at the time of divorce. If the receipt of that value is deferred until after the divorce, however, it is wrong to measure the value as of the time of divorce. Instead, the value should be determined as of the time when the value is actually received. The *Zipf* court, therefore, gave the trial court two options on remand: it could either abandon altogether the monetary cap on the total payments the wife would receive³³² or increase the monetary cap to reflect "certain amounts necessary to compensate the spouse for the additional discounting that results."³³³ Because the trial court was given the

331. 8 Va. App. 387, 382 S.E.2d 263 (1989).

332. In other words, the court on remand could award the wife 25% of the husband's pension for life, placing no limit upon the sum total of all payments that the wife could receive.

333. *Zipf v. Zipf*, 8 Va. App. 387, 382 S.E.2d 263, 269. Modifying the cap in accordance with the second alternative is a mathematically difficult process that probably would require expert testimony. The easiest modification would be simply to increase the cap at a reasonable interest rate. Cf. *Cross v. Cross*, 363 S.E.2d 449 (W. Va. 1987). But the court of appeals

option to dispense with the cap completely, any reading of *Brinkley* that would prevent the option is probably no longer valid.

The 1988 amendments to the statute limit the one monetary award rule to pending cases only. Section 20-107.3(G) now provides that the court may make a pension award "in addition to the monetary award made pursuant to subsection D, and upon consideration of the factors set forth in subsection E."³³⁴ Thus, the General Assembly has affirmed the first reading of *Brinkley* discussed above. Trial courts must consider all of the statutory factors relating to all of the parties' property before dividing a pension, but nothing prohibits courts from awarding an unlimited percentage of all future pension payments.

C. Partition

Under the 1988 amendments, a court is allowed to divide jointly owned property equitably between the spouses.³³⁵ Marital property is presumed to be jointly owned unless "there is a deed, title, or other clear indicia that it is not jointly owned."³³⁶

Before 1988, however, a court could divide jointly owned property only by partitioning the property.³³⁷ Partition in marital actions was governed by the same statutes applying to partition proceedings generally.³³⁸ Under the partition statutes, a court was required to divide the property between the spouses if such a partition could be made conveniently.³³⁹ If a partition could not be made conveniently and the interest of the parties would be promoted by an alternate means of division, a court could allow one spouse to purchase the other's interest,³⁴⁰ order the property sold, and divide the proceeds,³⁴¹ or use any combination of these methods.³⁴² Regardless of which method is used, each spouse had to be compensated fairly for his or her legal title interest.³⁴³

already has held that interest cannot be awarded on a deferred pension award. *McLaughlin v. McLaughlin*, 2 Va. App. 463, 346 S.E.2d 535 (1986). Because dispensing with the cap is a much simpler alternative than modifying it, the author expects that *Zipf*, as a practical matter, will cause trial judges to stop placing absolute dollar limits on pension awards.

334. VA. CODE ANN. § 20.107.3(G) (Supp. 1989).

335. *Id.* § 20-107.3(C).

336. *Id.* § 20-107.3(A)(2).

337. *Id.* § 20-107.3(C) (repealed 1988). *See, e.g.*, *Clayberg v. Clayberg*, 4 Va. App. 218, 355 S.E.2d 902 (1987); *see also Morris v. Morris*, 3 Va. App. 303, 349 S.E.2d 661 (1986) (excellent general discussion of how partition principles operate in the equitable distribution setting).

338. *Morris*, 349 S.E.2d at 661. *See* VA. CODE ANN. §§ 8.01-81-.01-93 (1984).

339. VA. CODE ANN. § 8.01-.83 (1984). *See, e.g.*, *Cauthorn v. Cauthorn*, 196 Va. 614, 85 S.E.2d 256 (1955).

340. VA. CODE ANN. § 8.01.83 (1984). *See Sensabaugh v. Sensabaugh*, 232 Va. 250, 349 S.E.2d 141 (1986); *Johnson v. Merritt*, 125 Va. 162, 99 S.E. 785 (1919).

341. VA. CODE ANN. § 8.01-83 (1984). *See Peatross v. Gray*, 181 Va. 847, 27 S.E.2d 203 (1943).

342. VA. CODE ANN. § 8.01-83 (1984).

343. *Morris v. Morris*, 3 Va. App. 303, 349 S.E.2d 661 (1986).

VI. THE FIRST FIVE YEARS: AN EVALUATION

The Virginia courts now have had five years to interpret the Virginia equitable distribution statute and have responded by establishing a coherent and consistent equitable distribution doctrine. Coherence and consistency alone, however, are not enough. Even the worst law would appear wise if measured only against itself. The Virginia statute is based upon similar statutes in many other states, and its enactment was part of a general nationwide movement toward a fairer division of property upon divorce. By comparing Virginia's experience with the experience of other states with similar statutes, we can better understand where Virginia's law is strong and where it might be improved.

The most salient feature of Virginia's equitable distribution law is the Virginia Supreme Court's adoption of unitary property.³⁴⁴ Whether property can be part marital and part separate is a fundamental equitable distribution question, and the Supreme Court's answer to that question has laid the entire conceptual basis for Virginia's equitable distribution law. Indeed, in hindsight, it is amazing that such a fundamental question was left unanswered by the General Assembly when it enacted the statute. Because the nature of marital property is such a basic equitable distribution question, the choice between unitary and mixed property is an ideal subject for legislative action.

Nevertheless, the General Assembly did not specify the nature of marital property and left the question to the Virginia Supreme Court. Because the Supreme Court adopted an answer that has been rejected in almost every other state,³⁴⁵ it is easy to cast a discussion of *Smoot* in terms of whether the court reached the "right" or "wrong" result. Such a discussion serves little purpose other than demonstrating the ideological preferences of the author. A better way of evaluating *Smoot* in particular and unitary property in general is to determine how the ultimate result reached under *Smoot* differs from the result that a mixed property state might reach under similar facts. Fortunately, the leading North Carolina case adopting mixed property, *Wade v. Wade*,³⁴⁶ was decided under facts very similar to the facts on which the *Smoot* court adopted unitary property. A comparison of the ultimate result reached in the two cases yields useful insights into both Virginia and North Carolina law.

For simplicity and consistency, we will use a hypothetical fact situation based on *Smoot* and *Wade* rather than the actual facts of either case. Assume that the husband makes a down payment on a home before the parties are married. Mortgage payments are made on the property during the marriage, and before the mortgage is paid off, the parties are divorced. In Virginia the home would be entirely marital property although it might

344. See *Smoot v. Smoot*, 233 Va. 435, 357 S.E.2d 728 (1987).

345. See, e.g., L. GOLDEN, *supra* note 6, § 5.06A (Supp. 1987).

346. 72 N.C. App. 372, 325 S.E.2d 260, *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

be divided unequally. In North Carolina, by contrast, the home would be part marital and part separate property. The separate portion would be a percentage equal to the total mortgage payments made with separate funds divided by the total mortgage payments made with all funds plus the separate property down payment, and it would be awarded entirely to the husband. The marital portion of the home would be divided equitably, and absent any strong reason to the contrary, it would be divided equally.

The basic difference between the two results is the degree of protection afforded to separate property. In North Carolina, if separate and marital funds are mixed, a proportional amount of the mixture will remain separate property. As a matter of law, a trial judge will be required to measure the separate portion and return it to the husband.³⁴⁷ In Virginia, by contrast, the entire mixture will be marital property, and the ultimate division will be left to the trial court's discretion.³⁴⁸ Although the *Smoot* court affirmed the trial court's decision to award the husband the amount of his down-payment "off the top," the court noted that this result was not required as a matter of law.³⁴⁹ The trial court probably would have been affirmed if it had used the same fractional approach used in North Carolina or if it had divided the property equally without giving the husband any special preference at all.

This uncertainty of result is a basic feature of unitary property. Under unitary property, when all commingled property is marital, the trial court has more flexibility to insure equity based on the facts of the case, but there is also no assurance that a spouse owning commingled separate property will receive any specific part of that property when the parties are divorced. Under mixed property, by contrast, the owner of commingled separate property receives a certain mandatory property award because his commingled property remains separate. Mixed property, therefore, gives the trial court less flexibility, but it makes the result much more predictable. The *Wade* court chose predictability over flexibility; the *Smoot* court made exactly the opposite choice.

The tradeoff between predictability and flexibility also is present in other contexts. For instance, both Virginia and North Carolina have "dual classification" equitable distribution statutes that allow a trial court to divide only certain "marital" property.³⁵⁰ A minority of other states, however, allow trial courts to divide all property owned by the parties, thus giving the trial court even more flexibility than Virginia at the cost of even more uncertainty.³⁵¹ By contrast, before section 20-107.3 was enacted, prop-

347. *Wade v. Wade*, 72 N.C. App. 372, 389, 325 S.E.2d 260, 268-69, *cert. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

348. *Smoot*, 357 S.E.2d at 730-31.

349. *Id.* at 731-32.

350. See N.C. GEN. STAT. § 50-20 (1987); VA. CODE ANN. § 20-107.3 (Supp. 1989).

351. For example, Massachusetts' equitable distribution statute, stripped of excess verbiage, provides simply that "the court may assign to either husband or wife all or any part of the estate of the other." MASS. GEN. LAWS ANN. ch. 208, § 34 (1987).

erty division in Virginia was purely a matter of legal title, and the title theory yielded results that were certain but highly inflexible. In a national and historical context, therefore, Virginia has opted for a middle position between flexibility and certainty. Unitary property is more flexible than either mixed property or pure legal title, but more certain than the "all property" system.

Because *Smoot's* balance between certainty and flexibility is within the mainstream of court decisions nationwide, there is no reason to suspect that unitary property is either too uncertain or too inflexible. Nevertheless, most of the courts and commentators that have addressed this question in recent years have opted for a more certain, less flexible result.

Of special importance to Virginia is Illinois' brief experiment with the unitary theory of property. Illinois adopted unitary property in 1981,³⁵² and the courts followed that theory enthusiastically for several years. The legislature became displeased, however, and in 1984 the Illinois legislature created a statutory right to reimbursement.³⁵³ The statute is complicated and not fully understood even by the Illinois courts, but the statute essentially provides that the owner of transmuted property has a right of reimbursement equal to the amount of separate property that transmuted. Thus, while the statute does not directly overturn unitary property, the net effect of the statute is to make Illinois a mixed property state.

The Illinois reimbursement statute has been described by the Illinois courts as a legislative rejection of unitary property principles.³⁵⁴ The legislature apparently was concerned that too much separate property was transmuting into marital property and that Illinois courts were not dividing transmuted property unequally in favor of the spouse whose separate property transmuted. Because many spouses were not being compensated at either the classification or the division stage for their separate property rights, the very concept of separate property was endangered by unitary property principles. Because in Virginia exactly the same arguments can be made with respect to unitary property, it is certainly possible that the General Assembly might join the Illinois legislature in rejecting unitary property.

There is almost no statistical evidence that bears upon the relative fairness of competing equitable distribution theories. Several recent studies, however, have suggested that women receive on the average between thirty-five and forty percent of the marital estate.³⁵⁵ This figure suggests that

352. See *In re Smith*, 86 Ill. 2d 518, 427 N.E.2d 1239 (1981).

353. See ILL. ANN. STAT. ch. 40, para. 503(c) (Supp. 1987).

354. See *In re Brown*, 127 Ill. App. 3d 831, 469 N.E.2d 612 (1984).

355. See New Jersey Supreme Court Task Force on Women in the Courts, Summary Report, quoted in L. WEITZMAN, *THE DIVORCE REVOLUTION* at 106 (1985) (finding "unofficial standard" in New Jersey that "the wife will receive no more than 35% to 40% of the net marital assets"); Cohen & Hillman, *Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law* (unpublished manuscript 1984), quoted in L. WEITZMAN, *supra*, at 106-07 (concluding after study of reported New York cases that women

notwithstanding general equitable distribution principles, trial judges are in fact favoring men when dividing marital property. If this is true, then the logical remedy is to restrict the trial judge's discretion and make the property division process more certain. In particular, other states have expressed this need for certainty by rejecting unitary property³⁵⁶ and by presuming that an equal division is equitable unless one spouse proves otherwise.³⁵⁷ If the General Assembly desires to make Virginia's statute more predictable and less discretionary, either of these changes would help accomplish that purpose.

Therefore, there is room for improvement in Virginia's equitable distribution law. Virginia's problems, however, pale in comparison to the very real accomplishments made in the past five years. Virginia's courts and the General Assembly have developed a consistent and workable equitable distribution theory that strikes a reasonable balance between consistency and flexibility. While the current system is heavily dependent upon the competence and discretion of local trial judges, Virginia's equitable distribution system fairly compensates both spouses for contributions to the marital partnership. If Virginia's trial judges rise to the occasion by making consistent and wise decisions, Virginia could become a model for other equitable distribution states to follow.

received less than 50% of marital property). A more recent study of divorce cases in New Haven, Connecticut found that women received on the average 68% of the net marital assets. J. McLendon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351, 381 (1987). Connecticut divides all property owned by either spouse upon divorce and has done so for many years. Thus, the New Jersey and New York studies seem more relevant to Virginia than the Connecticut study.

356. See, e.g., ILL. ANN. STAT. ch. 40, para. 503(c) (Supp. 1987).

357. See, e.g., N.C. GEN. STAT. § 50-20(c) (1987).