Missouri Law Review

Volume 43
Issue 2 *Spring 1978*

Article 1

Spring 1978

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Joan M. Krauskopf

MISSOURI
LAW REVIEW

Volume 43 Spring 1978 Number 2

# MARITAL PROPERTY AT MARRIAGE DISSOLUTION*

JOAN M. KRAUSKOPF**

The property division section of the 1970 version of the Uniform Marriage and Divorce Act was the model for the property division provisions in the 1974 Missouri divorce reform act.[1] The concept of "marital property," which is subject to division upon dissolution of marriage, was a strange beast to Missouri attorneys and judges at the time of the passage of the new dissolution law. However, in the four years since the enactment of the statute, there has been significant development of the definition of marital property in Missouri.

Most appellate litigation has involved two issues stemming from the requirement that marital property be divided: the definition of "property," and the effect of variations in the process of "acquiring" property. The purpose of this article is to explore the resolution of these two issues. That exploration should be more instructive after a brief consideration of the statute's theory and the court's role in its implementation.

## PURPOSE AND THEORY

Application of the property division section of the statute to property acquired prior to the Act's passage in 1974 has been held constitutionally permissible because of the reasonable public policy to be served—the elimination of "the patent inequity" and "rancorous aftermath" resulting under the previous law.[2] The court in *Corder v. Corder* pointed out that under the former law, whether property was titled solely in the husband or in both spouses, the contributions of the



** Manley O. Hudson Professor of Law, University of Missouri-Columbia, A.B., Ohio University, 1954; J.D., Ohio State University, 1957.

1. Conrad v. Bowers, 533 S.W.2d 614 (Mo. App., D. St. L. 1975). *Compare* § 452.330, RSMo (Supp. 1975) *with* UNIFORM MARRIAGE AND DIVORCE ACT § 307. Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. REV. 165 (1976); V.M. v. L.M., 526 S.W.2d 947 (Mo. App., D. St. L. 1975); Claunch v. Claunch, 525 S.W.2d 788 (Mo. App., D. Spr. 1975).

2. Corder v. Corder, 546 S.W.2d 798, 804 (Mo. App., D.K.C. 1977).

spouses, including the contribution of the homemaker's services, had been largely ignored. The interests in such property were regimented by operation of law which "due to its inherent inflexibility, made it impossible to accommodate any consideration of what might be a just or fair division."[3] The unity of possession in which the parties were left when property had been titled in both names continued rather than alleviated the acrimony and discord between the parties after dissolution of their marriage. The *Corder* court stated:

> The Dissolution of Marriage Act views the acquisition of 'marital property' as a partnership endeavor, and it enunciates a standard for dividing such property which is flexible enough to weigh and balance the respective contributions of the spouses and to accommodate consideration of manifest justness and fairness. It appears that an additional goal . . . was to eliminate any carryover of the animosity which brought about the severance of the marriage.[4]

That the purpose of the legislation was to allow a fair division of property based on the theory of marriage as a partnership was also clearly enunciated by the court in *In re Marriage of Cornell*.[5] In an earlier article this writer attempted to document that the intention of the Commissioners on Uniform Laws in drafting the property division section was to adopt the partnership theory of the community property states for purposes of division of property at dissolution.[6] The thesis of that article was that the partnership theory should be a guiding principle in determining a "just" division of marital property. Both the statements of the *Corder* and *Cornell* courts and the citation of cases from community property jurisdictions in other Missouri opinions[7] indicates that the Missouri courts also have accepted the Commissioners' adoption of community property theory as a guiding principle for determining the nature of marital property. The instant article will analyze the interests that could be characterized as "marital" property on the basis of that same community property concept—that marriage is a partnership during which the time and industry of both spouses are devoted to the furtherance of the marital unit.

## Obligation, Power, and Discretion

The appellate courts in Missouri have held that the court's obligation to divide marital property upon dissolution of marriage is manda-

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3. *Id.* at 803.
4. *Id.* at 804-05.
5. 550 S.W.2d 823 (Mo. App., D. Spr. 1977).
6. Krauskopf, *supra* note 1, at 166.
7. Stark v. Stark, 539 S.W.2d 779 (Mo. App., D.K.C. 1976); Cain v. Cain, 536 S.W.2d 866 (Mo. App., D. Spr. 1976).

tory.[8] The *Corder* opinion held that to effect a just division and to avoid a carryover of the animosity that caused the dissolution, the statute inexorably commands the trial court in a dissolution proceeding to divide the marital property and to sever all common ownership between the spouses, unless the unusual economics of the situation call for continuation.[9]

Original doubts about the trial court's power to fashion orders to effectuate property division have been dispelled by decisions upholding a wide variety of orders. Those decisions recognize that the legislature was wise to leave unspecified the powers necessary to deal with the great diversity of property interests that must be divided.[10] In *Claunch v. Claunch*[11] the court upheld an order granting all of the couple's meager property to one party and requiring that party to pay half the property's value in cash to the other, even though no cash existed. The court held that the statutory phrase "divide the marital property" includes the powers necessary to render effective the power to divide. In *Beckman v. Beckman*[12] a cash award to one party with deferred payments without interest was approved. A number of decisions have approved orders for sale of the family residence after the children reach majority with a stated percentage of the proceeds to be paid each party.[13] Orders for one party to pay debts owed by the couple also have been approved as proper in connection with division of property.[14]

Numerous appellate opinions have noted that the division of marital property need not be equal[15] and that the theory of partnership or

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8. Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977); Davis v. Davis, 544 S.W.2d 259 (Mo. App., D.K.C. 1976); L.F.H. v. R.L.H., 543 S.W.2d 520 (Mo. App., D. St. L. 1976).

9. Although neither party appealed from the dissolution itself, the trial court had entered a decree that only granted the dissolution. The court of appeals held that "the decree entered by the trial court did not constitute a division of 'marital property' . . . and for that reason was not a final judgment and order, and was not appealable. Appeal dismissed." 546 S.W.2d at 806. The implication was that the marriage is not dissolved until an order is entered which divides the marital property or approves a separation agreement which disposes of the marital property. That result is in keeping with the aim of the divorce reform movement to insure fair economic settlements before granting freedom from the marital state. *See* Krauskopf, *supra* note 1, at 170; Krauskopf, *Maintenance: Theory and Negotiation,* 33 J. Mo. B. 24 (1977).

10. Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977).

11. 525 S.W.2d 788 (Mo. App., D. Spr. 1975).

12. 545 S.W.2d 300 (Mo. App., D. St. L. 1977).

13. Ortmann v. Ortmann, 547 S.W.2d 226 (Mo. App., D. St. L. 1977); *In re* Marriage of Heddy, 535 S.W.2d 276 (Mo. App., D. St. L. 1976).

14. *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976).

15. Ortmann v. Ortmann, 547 S.W.2d 226 (Mo. App., D. St. L. 1977); *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976); Conrad v. Bowers, 533 S.W.2d 614 (Mo. App., D. St. L. 1975); *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., D. St. L. 1975).

"team effort" requires recognition that both partners' efforts contribute to the acquisition of marital property.[16] However, the limited standard of review enunciated in *Murphy v. Carron*[17] has resulted in few reversals for improper division of the property. Apparently, the only decisions which reversed a division of property for abuse of discretion are *In re Marriage of Cornell*,[18] *Cain v. Cain*,[19] *In re Marriage of Schulte*,[20] and *In re Marriage of Carmack*.[21] Each of these cases involved an undervaluation of the wife-homemaker's contribution and economic need. *In re Marriage of Galloway*[22] was reversed for the court's failure to consider physical abuse under the "conduct" factor in section 452.330.1(4), RSMo (Supp. 1975).

## Categories of Property

In holding that a contract for a deed constituted property, the court in *Claunch v. Claunch*[23] noted that the divorce reform act does not define "property," but that Section 1.020, RSMo 1969 provides:

> As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or the context thereof:
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> . . .
>
> (8) 'Personal property' includes money, goods, chattels, things in action, and evidence of debt; . . . (11) 'Property' includes real and personal property; (12) 'Real property' or 'premises' or 'real estate' or 'lands' is coextensive with lands, tenements, and hereditaments; . . .[24]

The court further quoted from *American Jurisprudence:*

> In 63 Am. Jur. 2d 291 Property § 4, it is said: "Thus the term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such, upon which it is practicable to place a money value."[25]

Even under such comprehensive definitions of property, litigation has arisen concerning subtle interests of importance to the parties.

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16. *In re* Marriage of Cornell, 550 S.W.2d 823 (Mo. App., D. Spr. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977); *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977); *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976).
17. 536 S.W.2d 30 (Mo. En Banc 1976).
18. 550 S.W.2d 823 (Mo. App., D. Spr. 1977).
19. 536 S.W.2d 866 (Mo. App., D. Spr. 1976).
20. 546 S.W.2d 41 (Mo. App., D. Spr. 1977).
21. 550 S.W.2d 815 (Mo. App., D. St. L. 1977).
22. 547 S.W.2d 193 (Mo. App., D. Spr. 1977).
23. 525 S.W.2d 788, 790 (Mo. App., D. Spr. 1975).
24. *Id.* at 790.
25. *Id.*

*Tangible Assets, Business Interests, and Valuation*

What one may term the layman's notion of property has been well represented in division of property: cash, bank accounts, real estate, household furniture, tools, farm equipment, and motor vehicles. A just division of even these simple forms of property may be difficult when values have not been established. However, one must recognize that the cost of establishing values utilizing expert witnesses and substantial attorney time often could exceed the value of the interests being litigated. For this reason, it is wise that the Missouri appellate courts have not required trial courts to value all property in litigation. However, attorneys should make a conscientious effort to decide which items warrant detailed evidence of value. For example, in *Cain v. Cain*[26] the wife's evidence indicated that a piece of the husband's separate property which was paid for during marriage was worth about $565,000; the husband presented no countervailing evidence. Because the statute requires consideration of the separate property of each spouse in determining proper division of marital property,[27] this uncontradicted evidence may account for the appellate court's grant of substantially more marital property to the wife.[28] The opinion in *Butcher v. Butcher*[29] implied that the only testimony concerning the value of well over a million dollars worth of property came from the parties themselves. In either case valuations by the best available experts might have resulted in a difference in value of over one hundred thousand dollars.

The Missouri courts easily dispatched decisions which held that shares of stock, including those from employee stock option plans, are property subject to division.[30] Other slightly more sophisticated interests have been determined as property: cash value of life insurance;[31] contract for a deed;[32] interests in trusts and remainders after life interests of others;[33] debts owed to the couple;[34] and debts owed to one of the parties.[35] Missouri courts have not yet ruled on contingent fee contracts, but other jurisdictions have included such contracts in marital property.[36]

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26. 536 S.W.2d 866 (Mo. App., D. Spr. 1976).
27. § 452.330.1(2), RSMo (Supp. 1975).
28. Cain v. Cain, 536 S.W.2d 866 (Mo. App., D. Spr. 1976).
29. 544 S.W.2d 249 (Mo. App., D.K.C. 1977).
30. Jaeger v. Jaeger, 547 S.W.2d 207 (Mo. App., D. St. L. 1977); Ortmann v. Ortmann, 547 S.W.2d 226 (Mo. App., D. St. L. 1977); *In re* Marriage of Dodd, 532 S.W.2d 885 (Mo. App., D. St. L. 1976); *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., D. St. L. 1975).
31. *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977).
32. Claunch v. Claunch, 525 S.W.2d 788 (Mo. App., D. Spr. 1975).
33. Butcher v. Butcher, 544 S.W.2d 249 (Mo. App., D.K.C. 1977).
34. Nixon v. Nixon, 525 S.W.2d 835 (Mo. App., D. St. L. 1975).
35. *Id.*
36. Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (1946); Due v. Due, 331 So. 2d 858 (La. App. 1977). *But see* Lockett v. Lockett, 558 S.W.2d 387 (Mo.

Although one abortive attempt to divide the property of a close corporation was reversed,[37] there seems to have been little difficulty in characterizing most business interests as property subject to division, including sole proprietorships,[38] partnership interests,[39] and shares in a close corporation.[40] The difficulty in these cases is one of valuation. In *In re Marriage of Neubern*[41] no value at all was placed on a liquor business, and in *In re Marriage of Vanet*[42] apparently only the office furniture of a law practice was included in its value. In *Butcher v. Butcher* the husband's interest in a real estate partnership developing land near the Kansas City International Airport was valued unrealistically on the basis of the husband's original investment because no other evidence of value was introduced.[43] Valuation of shares in a close corporation has plagued all three districts of the Missouri Court of Appeals.[44]

A major valuation problem stems from the fact that there is no market from which to establish the value of a sole proprietorship, a partnership interest, or shares in a close corporation. A partnership agreement, the corporation by-laws, or a buy-sell agreement among the shareholders of the close corporation might include a formula for determining the value of a partner's or a shareholder's interest. Such agreements can be conditioned to control at the retirement or death of a shareholder or partner or in case of a sale of the interest. When the condition occurs, courts ordinarily have held that the agreement controls over any other mode of valuation.[45] In *Stern v. Stern*[46] the New Jersey Supreme Court considered the issue of valuing a prominent attorney's

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App., D. St. L. 1977) (amount of retainer contract conditioned on service not income).

37. V.M. v. L.M., 526 S.W.2d 947 (Mo. App., D. St. L. 1975).

38. *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976); *In re* Marriage of Neubern, 535 S.W.2d 499 (Mo. App., D. St. L. 1976).

39. Butcher v. Butcher, 544 S.W.2d 249 (Mo. App., D.K.C. 1977); *In re* Marriage of Simpelo, 542 S.W.2d 558 (Mo. App., D.K.C. 1976); Nixon v. Nixon, 525 S.W.2d 835 (Mo. App., D. St. L. 1975).

40. *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977); Beckman v. Beckman, 545 S.W.2d 300 (Mo. App., D. St. L. 1977); Butcher v. Butcher, 544 S.W.2d 249 (Mo. App., D.K.C. 1977); Naeger v. Naeger, 542 S.W.2d 344 (Mo. App., D. St. L. 1976); Cain v. Cain, 536 S.W.2d 866 (Mo. App., D. Spr. 1976); *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., D. St. L. 1975).

41. 535 S.W.2d 499 (Mo. App., D. St. L. 1976).

42. 544 S.W.2d 236 (Mo. App., D.K.C. 1976).

43. 544 S.W.2d 249 (Mo. App., D.K.C. 1977).

44. *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977); Beckman v. Beckman, 545 S.W.2d 300 (Mo. App., D. St. L. 1977); Butcher v. Butcher, 544 S.W.2d 249 (Mo. App., D.K.C. 1977).

45. Powell v. Kennedy, 463 S.W.2d 802 (Mo. En Banc 1971); 2 F. O'NEAL, CLOSE CORPORATIONS § 7.24 (1971); cases collected in Annot., 54 A.L.R.3d 790 (1974).

46. 66 N.J. 340, 331 A.2d 257 (1975).

interest in his law partnership for purposes of property division at marriage dissolution. Although the court recognized that *any* evidence relevant to value would be admissible, it held that the figure reached by applying the formula in the partnership agreement for calculating a partner's interest payable at death could be used as the presumptive value of his interest.

In the absence of an agreed formula to value such business interests, evidence should be produced from which an estimate of the net value of the assets acquired and the earning power developed during the marriage can be made. A host of evidence is relevant ranging from accepted formulae for taxation purposes to rules of thumb among those who deal in a specific kind of business. From the sparse references to valuation in Missouri cases it is evident that confusion abounds among lawyers and judges as to sound valuation methods.

It is generally agreed that "book value" is not an accurate method of valuing assets; book value simply reflects the particular method that a business and its accountants have chosen to state its financial condition.[47] Most often it reflects acquisition cost of assets less depreciation determined according to a formula for tax purposes. The actual value of assets in the sense of fair market value or what they would bring at sale may be far greater or less than book value.[48] Consequently, use of book value in the valuation of shares is questionable. O'Neal has said that in some respects book value "is one of the most unsatisfactory ways of determining the value of shares. The book value of corporate assets is an unreliable guide to the true worth of a going business, and consequently the book value of corporate shares is an unreliable standard by which to determine their worth."[49] O'Neal also emphasized that the value of goodwill almost never is shown on corporate books. This further adds to the unreliability of using book value as a guide to worth of shares.

In *Naeger v. Naeger*[50] the court seemed to accept statements of net worth on income tax returns as evidence of the value of the corporation. The figures used for tax purposes are nearly always book value figures.

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47. Lassallette v. Parisian Baking Co., 110 Cal. App. 2d 375, 242 P.2d 671 (1952); Myers, *The Close Corporation in Estate Planning*, 23 J. Mo. B. 480 (1967); cases collected in Annot., 51 A.L.R.2d 606 (1957).

48. B & H Warehouse, Inc. v. Atlas Van Lines, 490 F.2d 818 (5th Cir. 1974); Bendalin v. Delgado, 406 S.W.2d 897 (Tex. 1966); A. CHOKA, BUYING, SELLING AND MERGING BUSINESSES 51 (1969); Blackstone, Robinson, Harvey & Shiach, *How to Put a Price on a Close Corporation*, 22 DIG. OF TAX ART. 43 (1971) [hereinafter cited as Blackstone].

49. F. O'NEAL, *supra* note 45, § 7.24a at 86.

50. 542 S.W.2d 344 (Mo. App., D. St. L. 1976). In Lockett v. Lockett, 558 S.W.2d 387 (Mo. App., D. St. L. 1977), neither the parties nor the court questioned book value as the basis for valuing shares in an employment agency. As goodwill is likely to be the major value in such a business, a serious undervaluing may have resulted.

In fact, the use of depreciation deductions to offset income for tax purposes is one of the main factors in making book value an unrealistic measure. In *In re Marriage of Schulte*[51] the Springfield District of the court of appeals repeatedly referred to two different values for the close corporation shares in question, one of which was book value. Because the court concluded that the award was inadequate even using the higher value figure, it did not have to resolve the issue of relevance of book value. The court could have saved itself trouble and given guidance to attorneys by explaining the weakness of book value. In *Butcher v. Butcher*[52] the court stated that it used the original investment cost (book value) to value a partnership interest because no other evidence was introduced. The other evidence, of course, would have been that the value of the real estate which was the partnership's main asset had greatly appreciated.

Seldom does the net asset value of a business accurately measure its worth. In most operating businesses, earning power may be a more accurate measure of the value of the business. One author has said: "Most authorities now agree that, except in special cases, valuation of industrial companies should be based on earnings. Assets are of importance only because they produce income. The more income produced, the greater their value."[53] The usual method of valuation averages earnings[54] for the preceding five to ten years to determine earning capacity. To produce a current value figure, the historical earning power is capitalized by multiplying that figure by a rate determined by the probability that earnings will continue. The capitalization multiple varies with the risk as to future earnings. This multiple is the reciprocal of the rate of return a willing buyer would want from his investment in purchasing the business. If the risk is high, a prospective buyer would expect a higher rate of return on his money. For example, if a purchaser would demand a twenty percent return on money invested in a certain type of business, he would be willing to invest an amount equal to five times average earnings.

"Without doubt, the most difficult part of valuation is choosing the appropriate capitalization rate."[55] An established business with substantial assets, stable management, and a place in a growing area of the economy would be accorded the highest rate, with a value of perhaps ten times earnings. Risks due to the type of business, management problems, market conditions, and condition of assets and liabilities will

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51. 546 S.W.2d 41 (Mo. App., D. Spr. 1977).
52. 544 S.W.2d 249 (Mo. App., D.K.C. 1976).
53. A. CHOKA, *supra* note 48, at 51.
54. In the case of a sole proprietorship or a partnership, an amount for reasonable salary for the services of the proprietor or partner must be deducted from the "earnings" before capitalization.
55. A. CHOKA, *supra* note 48, at 53.

decrease the rate. O'Neal has stated that for most small businesses in normal times the rate will be about five times earnings.[56] Use of the capitalization of earnings valuation method requires expert witnesses on all factors affecting the condition of the business and its markets.[57] However, this may not be as difficult as it seems. In addition to professional appraisers, other experts may be available, including officers in investment firms or banks financing a certain type of business or persons engaged in buying and selling businesses of a certain type. Such experts are able to make relevant comparison valuations because of their experience with similar businesses. Commonly used evidence is the price-earnings ratio of the publicly traded stock of companies considered comparable to the one in question.[58] There is often an industry-wide norm for the price-earnings ratio.

In *Schulte*[59] capitalization of earnings apparently was utilized as the valuation method by the accountant who audited the company's books and testified concerning the shares' value. The appellate opinion indicated that he arrived at a value estimate of five or six dollars a share by taking into account factors such as continuity of management and then multiplying earnings by a factor of ten or twelve.

Straight capitalization valuation may be highly misleading in a close corporation which has paid large salaries with resultant low corporate earnings. Therefore, it has been suggested that this is not a desirable method of setting the value of shares in a close corporation.[60] Straight capitalization also would be an unrealistic method to value an interest in a corporation in which the tangible assets are exceedingly valuable but the annual earnings are minimal. In *Beckman v. Beckman*[61] asset value rather than capitalization was used to determine the value of shares in a family farm corporation. Unless there had been exceptionally high earnings, this is probably the more accurate method for that corporation.

In the 1920's the I.R.S. approved a split capitalization valuation method (referred to in tax jargon as the A.R.M. 34 formula) which combines features of both asset valuation and earnings capitalization.[62] Later Revenue Rulings have emphasized that all other relevant factors also must be considered,[63] but all factors can be considered using the

56. F. O'NEAL, *supra* note 45, § 7.24d at 94. *Cf.* STAND. FED. TAX REP. (CCH) (1975) ¶ 4460.2995.
57. Schwingle, *Valuation of Closely Held Stocks,* 100 TR. & EST. 555 (1961).
58. Blackstone, *supra* note 48, at 50.
59. 546 S.W.2d 41 (Mo. App., D. Spr. 1977).
60. F. O'NEAL, *supra* note 45, § 7.24d at 94.
61. 545 S.W.2d 300 (Mo. App., D. St. L. 1977).
62. Blackstone, *supra* note 48, at 46; Cohan, *Valuation of Interests in Closely Held Businesses,* 46 TR. BULL. 13, 18 (1966).
63. Rev. Rul. 68-609, 1968-2 C.B. 327; STAND. FED. TAX REP. (CCH) (1975) ¶ 4460.302.

A.R.M. 34 formula as a starting point. The first step is a calculation of past average earnings over several years and average net adjusted value of tangible assets over the same period of time. A reasonable rate of return on the assets (between five and ten percent) is then subtracted from the average earnings figure. The resulting figure is the excess earnings over a fair return on the value of the net tangible assets. This is the portion of earning power often described as goodwill or return on intangible assets. This earning power is capitalized at a determined rate. The capitalization rate ought to be determined according to the probability of earnings continuing in the future as evidenced by a consideration of all relevant factors.

The value of the business is a combination of the net tangible asset value and the intangible earning power value. The virtue of this valuation approach is that it provides separate values for tangible assets, intangible assets, and for the business as a whole.[64] For a close corporation the value of shares is determined by dividing the total number of shares into the final value of the corporation. The final adjustment of share value requires a consideration whether the shares of a close corporation held by a particular individual represent a controlling interest. The actual value of each share will be less if held by someone other than the controlling shareholder.[65] In *Beckman v. Beckman*[66] the trial court valued a one-quarter interest in a family farming corporation as one-quarter of the value of the tangible assets. However, there was no evidence that a one-quarter interest was controlling. Therefore, this valuation probably was high because nothing was deducted to account for the owner's lack of control of the assets.

*Professional Earning Capacity or Goodwill*

A troublesome characterization problem that has arisen with increasing frequency in jurisdictions where marital property is subject to division is whether professional earning capacity or goodwill should be recognized as property. This issue has not been resolved in Missouri. The problem is most acute in those marriages in which the wife was employed to enable the husband to obtain his professional education, usually a medical or law degree. Because the wife of a professional person usually ceases outside employment when her husband's career is successfully launched so that she may fulfill the role of professional wife and mother, her earning capacity will have diminished drastically in comparison to his. Therefore, a court properly may award the wife a substantial share of the marital assets acquired with the husband's earn-

64. F. O'NEAL, *supra* note 45, § 7.24f at 97.
65. Schwingle, *supra* note 57, at 557; Blackstone, *supra* note 48, at 46.
66. 545 S.W.2d 300 (Mo. App., D. St. L. 1976).

ing capacity in order to recognize her direct contribution to his education and to equalize their economic circumstances.[67]

If the professional has practiced for some time prior to the marriage dissolution and the couple has acquired substantial assets from his earnings, the question whether to classify his earning capacity as an asset is likely to be bypassed as it was in *In re Marriage of Vanet*.[68] The court approved a property division which could be analyzed as awarding twenty-six percent of the marital property to the husband and seventy-four percent to the wife; the husband's earning capacity was not characterized as an independent asset. The court spoke of the justification for this lopsided division:

> The record discloses that the wife was the principal "breadwinner" after the marriage while the husband completed his legal education and that she continued working and contributed to the family income until the advent of the first child in 1963. The financial contribution made by the wife towards the husband's legal education was of inestimable value with respect to acquisition of the marital property.... The "economic circumstances" of the wife at the time the marital property was divided were far less desirable than were those of the husband since he possessed the earning power of a lawyer while she possessed only the earning power of a secretary of limited skill.[69]

The situation not yet resolved is the claim that earning capacity itself is an asset acquired during the marriage. Such a claim most likely will be made when there is little or no other marital property. An example is *Magruder v. Magruder*, a Nebraska case which involved a doctor who attended the University of Missouri Medical School while his wife taught in Missouri public schools. The court noted that it was the husband who wanted the divorce just as the couple was reaching the stage in life when they could reap the economic rewards of their investment in his education. Although the court purported to classify the husband's earning ability as an asset, it did not attempt to place a value on that earning capacity. The court recompensed the wife with an order of $100,000 *alimony* payable over ten years conditioned on her not remarrying.[70] A number of appellate opinions have loosely referred to earning ability as an asset[71] and have approved its consideration in dividing property or

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67. §§ 452.330.1(1), .1(3), RSMo (Supp. 1975).
68. 544 S.W.2d 236 (Mo. App., D.K.C. 1976).
69. *Id.* at 241.
70. 190 Neb. 573, 209 N.W.2d 585 (1973).
71. Moss v. Moss, 549 P.2d 404 (Colo. 1976); Brueggemann v. Brueggemann, 551 S.W.2d 853 (Mo. App., D. St. L. 1977); Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975); Daniels v. Daniels, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961); Krauskopf, *Applying the Maintenance Statute*, 33 J. Mo. B. 100 (1977). *See also* Conrad v. Conrad, 471 P.2d 893 (Okla. 1970).

awarding maintenance. However, only in the Oklahoma case of *Diment v. Diment*[72] is it clear that earning capacity developed during the marriage was the basis of a payment *as a division of property*. The wife in *Diment* supported the husband from the eleventh grade through medical school and there was no other marital property to divide. The court held the wife's remarriage did not end the husband's obligation to pay the sum ordered.

In *Stern v. Stern*[73] the New Jersey Supreme Court also dealt with a situation in which there was a dearth of tangible or intangible assets to be divided; the husband, however, partially due to the efforts of the wife and the influence of her father, had become a prominent attorney earning more than $130,000 annually. The lower court had squarely held that the husband's "potential to earn" was property and had awarded the wife $10,000 a year for ten years as her share. The supreme court reversed, stating that potential earning capacity is a factor to consider in making equitable distribution but is not a separate item of property. In *Todd v. Todd*[74] a California court refused to characterize a professional education as an asset because it could not be assigned a monetary value. It is likely that the perceived difficulties of evaluation is also the reason the *Stern* decision did not classify earning capacity as an asset. Other than the cost of acquiring the education, valuing a professional education actually would be valuing the earning capacity acquired through that education. An article criticizing *Todd* asserted that either the cost of the education or a valuation of earning ability similar to that used in wrongful death cases could suffice to arrive at a reasonable monetary figure.[75] A fair interest in this topic suggests that it may have to be resolved in Missouri in the near future.[76] In the meantime, an estimate of future earning capacity certainly would be relevant under the Missouri statute as an economic circumstance relating to just distribution of other property[77] or relating to reasonable needs and ability to pay for maintenance purposes.[78]

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72. 531 P.2d 1071 (Okla. 1974).

73. 66 N.J. 340, 331 A.2d 257 (1975).

74. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (Dist. Ct. App. 1969).

75. Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590 (1974).

76. Part of the movement for women's rights may account for a growing demand that the investment which an employed wife has put into her husband's professional education should not be lost by his decision to end the marriage just when he is about to reap its rewards in earnings. *Id.* It has been argued that investment in human capital during marriage should be recognized and can be valued for purposes of property division. R. Combs, The Development of a Set of Propositional Guidelines and Their Implementation for Use in Decision Making at Dissolution of Marriage in Indiana (May 1977) (unpublished doctoral dissertation at Purdue University).

77. § 452.330.1(3), RSMo (Supp. 1975).

78. §§ 452.335.1(1), .2(6), RSMo (Supp. 1975).

The recognition, valuation, and division of "professional goodwill" as an asset has been more common than recognition of earning capacity. In the community property states of California[79] and Washington,[80] decisions have classified the goodwill of a professional practice as property, pointing out that "the practice of an attorney, physician, or other professional person may include such an element, even though the goodwill in such instances is personal in nature and not a readily marketable commodity."[81]

The goodwill of a normal commercial venture is the earning power in excess of a normal rate of return on assets, the measure of which was discussed above. Because tangible assets ordinarily play a minimal part in the practice of a profession, courts dealing with professional goodwill prefer to define it as the "expectation of continued public patronage."[82]

In the community property states the only property subject to division is that acquired during the marriage; therefore, these jurisdictions have made it clear that only professional goodwill existing at the time of dissolution can be divided.[83] The Texas Supreme Court, however, refused to recognize goodwill in a professional practice. The court said that goodwill could not exist apart from the person and what he does in the future.[84] A Washington court in *Marriage of R.M. Lukens*[85] criticized this result in a case involving a medical doctor who practiced in Tacoma. The trial court valued the tangible assets and accounts receivable of his practice at $55,800 and the goodwill at $60,000. The appellate court affirmed this valuation and stated that the present existence of goodwill could be demonstrated by visualizing the effect on the doctor's practice if he moved to a different locality. The continued expectation of business at his present location was stated to have value despite its unmarketability.

When faced with the issue of valuing goodwill, the California and Washington courts have been adamant that only a presently existing

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79. *In re* Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (Dist. Ct. App. 1974); *In re* Marriage of Lopez, 38 Cal. App. 3d 93; 113 Cal. Rptr. 58 (Dist. Ct. App. 1974); Comment, *Valuation of Professional Goodwill Upon Marital Dissolution,* 7 SW. U.L. REV. 186 (1975).

80. Marriage of R.M. Lukens, 16 Wash. App. 481, 558 P.2d 279 (1976).

81. 558 P.2d at 281.

82. 558 P.2d at 280; *In re* Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (Dist. Ct. App. 1974).

83. *In re* Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (Dist. Ct. App. 1973). *See also In re* Marriage of Foster, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (Dist. Ct. App. 1974); Marriage of Lukens, 16 Wash. App. 481, 558 P.2d 279 (Ct. App. 1976).

84. Nail v. Nail, 486 S.W.2d 761 (Tex. 1972).

85. 16 Wash. App. 481, 558 P.2d 279, 282 (1976).

value is to be measured. The California court in *In re Marriage of Foster* stated:

> [G]oodwill may not be valued by any method that takes into account the post-marital efforts of either spouse but . . . a proper means of arriving at the value of such goodwill contemplates any legitimate method of evaluation that measures its present value by taking into account some past result.[86]

A number of the accepted formulae for valuing commercial goodwill seems to do just that. In *Foster* the court approved three of those formulae as legitimate methods of valuation. The formulae included: past net income of the business for one year less reasonable salary multiplied by a capitalization figure from two to ten; average net earnings over a specified period of time; and three months charges or receipts on accounts receivable. Without inquiry as to how the capitalization multiple was chosen, the court accepted these formulae as "present value" methods.[87]

A certain amount of fictionalization is involved in arriving at a present value of the expectation of future patronage while at the same time forbidding consideration of future efforts. It seems that the only valuation methods that do not utilize evidence of individual future prospects are those applying a capitalization multiple derived either from the I.R.S., from retirement or buy-sell agreements, or from guidelines in the industry or profession. In *In re Marriage of Lopez*[88] and *Marriage of R.M. Lukens*[89] similar formulae appear to have been used, but the courts also pointed out that relevant factors to consider were the practitioner's age, health, past earning power, reputation in the community for skill and knowledge, and his comparative professional success. Undoubtedly, these factors are relevant to the determination of the capitalization multiple because that figure represents a judgment regarding the likelihood of future earnings continuing as in the past. To this extent, even these courts have utilized estimates of future earning potential in arriving at a present value of goodwill. One writer concluded that these courts' failure to provide definitive guidelines leaves them receptive to any reasonable, fair, and equitable approach for valuing professional goodwill upon marital dissolution.[90]

In the common law states, *Stern v. Stern*[91] is likely to become a leading case for its forthright rejection of individual earning capacity but acceptance of professional goodwill as an asset acquired during marriage and subject to division upon dissolution. The court acknowledged that

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86. 42 Cal. App. 3d 577, 584, 117 Cal. Rptr. 49, 54 (Dist. Ct. App. 1974).
87. *Id.* at 585, 117 Cal. Rptr. at 54.
88. 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (Dist. Ct. App. 1974).
89. 558 P.2d at 281.
90. Comment, *supra* note 79, at 186, 205.
91. 66 N.J. 340, 331 A.2d 257 (1975).

determining the worth of goodwill presents difficulties but held, that if goodwill does exist, it should be included among marital assets.[92] Valuation of goodwill was simplified in *Stern* by use of a partnership agreement. The court approved using the formula in the husband's law partnership agreement for calculating a partner's interest payable upon his death as the method for valuing the husband's interest in the partnership for purposes of property division. It was noted that "a fixed sum appearing after the partner's name on a schedule appended to the partnership agreement . . . is obviously intended to reflect those elements of partnership worth other than the member's capital account."[93] The amount appearing after the husband's name was $167,000. The court held that that sum plus the value of his capital account could be used "as the *presumptive* value of defendant's partnership interest in the firm."[94] The court recognized that this figure could be challenged as not reflective of true value, but, in the absence of other evidence, took the amount payable upon death as representing the husband's share of the goodwill of the partnership.

To the extent that a present value exists which was developed by practicing a profession during the marriage, classifying professional goodwill as an asset appears justified because recognized valuation methods can be used to arrive at a monetary figure for division. However, a caution is warranted. In *Stern* not only did the wife succeed in having goodwill included as an asset, but she won affirmance of an alimony order for $36,000 a year. Great care should be taken in such cases to insure that the husband does not pay twice. If his future earning ability is considered by the court in determining division of property or maintenance, then it is essential that the professional goodwill asset be valued only at its present value.

*Rights Under Retirement Plans*

The most valuable asset possessed by an average couple in a long term marriage may be the husband's rights to retirement pay built up over as many as twenty-five years of employment during which the traditional wife remained a homemaker. In the past decade the number of divorces among marriages over fifteen years in duration has increased at an alarming rate.[95] Those divorces have brought a deluge of appellate decisions across the country struggling with the issue of the extent to which pension rights should be categorized as property acquired during

92. *Id.* at 346, 331 A.2d at 261.
93. *Id.* at 346, 331 A.2d at 260.
94. *Id.* at 346, 331 A.2d at 261.
95. One in four divorces in 1974 involved marriages of 15 years or more. Twenty-one percent of the women divorcing in 1974 had passed their 40th birthday. Do It Now, June 1977, 5, at col. 3.

the marriage for purposes of division upon dissolution. To so characterize pension rights in most community property states would give the wife an absolute right to one half of the proceeds. In any jurisdiction such a characterization would allow a payment not subject to divestment by remarriage and perhaps not taxable as income.[96]

It is common to differentiate between "vested" and "nonvested" pension rights because pension plans themselves do so. The usual difference is that prior to vesting, the employee has no rights to any funds if his employment terminates; after vesting, he does have a right to collect some funds at some time. Vested rights could mean that all the employee's rights have matured due to his retirement, *i.e.*, he is already entitled to collect his pension. However, vested rights ordinarily mean that some portion of the ultimate pension benefit is payable to the employee even though he ceases employment prior to retirement: either his own contributions or employer contributions are returnable to him on termination of his employment, or a portion of the benefit will be payable when retirement age is reached.

Most courts have equated vested rights with property rights and have held them subject to division upon dissolution.[97] In *Kruger v. Kruger*[98] a New Jersey court conceptually analyzed the nature of pension payments as recompense for past services and stated: "Logically, . . . the right to such payments should be treated as property 'acquired' during the marriage . . . ." The Missouri appellate courts have approved inclusion of vested retirement rights in property[99] but have not analyzed either the theory for doing so or the practical problems of application such as valuation and distribution. In *Butcher v. Butcher*[100] the court affirmed the trial judge's division of property but mentioned that the

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96. Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976).

97. *In re* the Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied,* 419 U.S. 825 (1974); *In re* Marriage of Pope, 544 P.2d 639 (Colo. App. 1975); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Hutchins v. Hutchins, 71 Mich. App. 361, 248 N.W.2d 272 (Ct. App. 1976); Blitt v. Blitt, 139 N.J. Super. 213, 353 A.2d 144 (1976); Pellegrino v. Pellegrino, 134 N.J. Super. 512, 342 A.2d 226 (1975); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); Pinkowski v. Pinkowski, 67 Wis. 2d 176, 226 N.W.2d 518 (1975); Schafer v. Schafer, 3 Wis. 2d 166, 87 N.W.2d 803 (1958). *Contra,* Fenney v. Fenney, 537 S.W.2d 367 (Ark. 1976); Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976); Baker v. Baker, 546 P.2d 1325 (Okla. 1975). All of the contrary decisions involve rights to military pensions which courts often view as nonvested because dependent upon statute. *See* Cearley v. Cearley, 536 S.W.2d 96 (Tex. Ct. App.), *rev'd,* 544 S.W.2d 661 (Tex. 1976). *See also* Shaw, *Domestic Relations—Husband's "Vested" Interest in Retirement Plan is Divisible as Marital Property,* 42 Mo. L. Rev. 143 (1977).

98. 139 N.J. Super. 413, 354 A.2d 340 (1976).

99. Jaeger v. Jaeger, 547 S.W.2d 207 (Mo. App., D. St. L. 1977); *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., D. St. L. 1975).

100. 544 S.W.2d 249 (Mo. App., D.K.C. 1976).

value of a deferred compensation plan was unknown. In *In re marriage of Schulte*[101] and *Jaeger v. Jaeger*[102] divisions of property were set aside and the cases remanded for determination of the proper disposition of certain assets including interests in the retirement plans.

In some states, that part of the pension to be considered as a marital asset often is determined by figuring the proportion of the working years during which the pension rights accrued that the couple was married and holding that that proportion of the ultimate benefit constitutes marital property subject to division upon dissolution.[103] The share of this asset to which the nonemployee spouse is entitled could be payable in a lump sum at dissolution or could be ordered paid as a percentage of the ultimate benefit if and when that benefit is paid. The latter solution for distribution avoids the difficult problem of placing a present value on the vested rights to receive retirement benefits in addition to the mere right to return of contributions.[104] It also avoids payments to the nonemployee spouse at the time of divorce when the risk exists that the employee spouse's early death may preclude him from ever collecting benefits.[105]

Nonvested interests in retirement plans have fared differently than vested interests. Over thirty-five years ago in *French v. French*[106] the California Supreme Court classed such interests as mere expectancies, holding that they did not constitute property and therefore were not subject to division upon dissolution of marriage. However, with the increase in both the number of workers covered by pension plans and the number of divorces in long term marriages, it is not surprising that California has reevaluated its position and overruled *French*. In *In re Marriage of Brown*[107] the court said that pension rights are not mere expectancies and that a property-interest analysis without regard to contract is fallacious. The *Brown* court stated:

> The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent . . . or of a beneficiary designated by a living insured who has a right to change the beneficiary . . . . As these examples demonstrate, the defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence.

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101. 546 S.W.2d 41 (Mo. App., D. Spr. 1977).
102. 547 S.W.2d 207 (Mo. App., D. St. L. 1977).
103. Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976); Miser v. Miser, 475 S.W.2d 597 (Tex. Ct. App. 1971); DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971).
104. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
105. *Id.*
106. 17 Cal. 2d 775, 112 P.2d 235 (1941).
107. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

> Although some jurisdictions classify retirement pensions as gratuities, it has long been settled that under California law such benefits "do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee." . . . Since pension benefits represent a form of deferred compensation for services rendered . . . the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of property . . . we held in *Dryden v. Board of Pension Commrs., supra*, 6 Cal.2d 575, 579, 59 P.2d 104, that an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract. . . .
>
> Although, as we have pointed out, *supra*, courts have previously refused to allocate this right in a nonvested pension between the spouses as community property on the ground that such pension is contingent upon continued employment, we reject this theory.[108]

The court indicated that unless the mischaracterization of pension rights under *French* were overturned, an inequitable division of community assets would occur:

> Over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community.[109]

In *In Re Marriage of Freiberg*[110] the *Brown* rule was applied. The court approved a division awarding the wife a portion of the benefits earned during the marriage, *when and if paid.* When such a method of distribution is used it makes no difference whether the rights were considered vested or not at the time of divorce, and it points up the essential soundness of holding that "vesting" is irrelevant to characterization as property. The courts of Washington[111] and Texas[112] also have recognized nonvested rights as assets to be divided.

In the common law states there appear to be no decisions in accord with the *Brown* analysis. However, few jurisdictions have ruled on the question of nonvested rights. A Colorado court held that even vested military pension rights were not subject to division because they were not assignable and had no cash surrender value or other fixed lump sum

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108. *Id.* at 844-46, 544 P.2d at 565-66, 126 Cal. Rptr. at 637-38.
109. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.
110. 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976).
111. DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971).
112. Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977).

value.[113] However, a subsequent opinion held that rights to accumulated deductions in an employment plan arising upon termination of employment were marital property.[114] Apparently, normal vesting is the determining factor to the Colorado courts. In spite of language in a New Jersey Supreme Court decision that vesting is not relevant (with respect to accounts receivable),[115] a lower New Jersey court refused to classify nonvested pension rights as property subject to division citing pre-*Brown* cases in California.[116] The influence of the California decision in *Brown* may change the direction of future decisions. It already may have been influential in changing Texas law.[117]

In Missouri interesting litigation is sure to occur because of the existence of *Robbins v. Robbins*,[118] a 1971 Missouri Supreme Court decision. It will be easy to cite *Robbins* as authority for the proposition that nonvested pension rights are not property to be divided at marriage dissolution.[119] However, a careful analysis of the decision reveals that the court did not so hold. Therefore, under the new marriage dissolution law the treatment of nonvested pension rights is an open question. In *Robbins* the divorce court's only power was to award gross alimony, such amount necessarily to be determined by considering the value of the assets of the parties at the time of trial. The wife claimed that the present value of the husband's potential pension benefits should be included in the value of assets at the time of trial. The supreme court affirmed the inclusion of the amount of the husband's contributions to which he would be entitled if he left the employment, but refused to include a greater value based on the varying testimonies of a life insurance underwriter and a life insurance agent. It must be noted that such testimony was not as to the value at time of trial, but rather as to value at the time the husband was thought to be able to retire which was about two years after the divorce trial.

The supreme court did not state in *Robbins* that nonvested pension rights were not property or were not contract rights. Instead, the court said that the husband did have

> a right to his future benefits which the Trustees could not take away from him so long as he complied with the requirements of

113. *In re* Marriage of Ellis, 538 P.2d 1347 (Colo. App. 1975).
114. *In re* Marriage of Pope, 544 P.2d 639 (Colo. App. 1975).
115. Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).
116. White v. White, 136 N.J. Super. 552, 347 A.2d 360 (App. Div. 1975). In Blitt v. Blitt, 139 N.J. Super. 213, 353 A.2d 144 (1976), the court paid lip service to the fact that "vesting" was not determinative but then held that "control" was crucial and reached the same result as if it had held that nonvested rights were not property.
117. Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977).
118. 463 S.W.2d 876 (Mo. 1971).
119. The court did so in Jaeger v. Jaeger, 547 S.W.2d 207 (Mo. App., D. St. L. 1977), and in Brethaur v. Brethaur, No. 37808 (Mo. App., D. St. L. June 21, 1977).

> the plan to the time of retirement. There was never any right in him to a *'present value'* of a future pension. The use of the term 'vested' here is somewhat misleading, and has become a sort of 'red herring.'[120]

The court emphasized that at the time of trial there was no ascertained present value because the husband could do nothing to derive money from the retirement fund except to obtain a return of his contribution and that the trustees could not possibly pay him any sum as the present value of the future pension.

The court then stated: "We consider, and hold, that a *valuation* of defendant's rights as the present value of his possible future pension benefits would be purely speculative and that the court was correct in holding that such a *value* was not a present asset of the defendant."[121] This is a holding only that valuation of whatever rights the husband had at the time of trial was not possible and, thus, no value could be utilized to determine the amount of gross alimony to be ordered. *Robbins* is a sensible decision but does not control the issue of property to be divided under the new marriage dissolution law. The courts' new power to divide property, rather than merely to award an amount of money, means that inability to place a present value on contract rights acquired during the marriage need not limit division of "non-vested" pension rights.

Missouri appellate courts already have held that the powers of the court are as broad as necessary to divide marital property,[122] have affirmed orders for the payment of a percentage of an uncertain sum in the future,[123] and have affirmed recognition of contract rights as property.[124] Unlike the situation in most community property states, the Missouri trial court is not *required* to award to the other spouse any portion of one spouse's retirement benefit, whether vested or not. There is no need to fear arbitrary sharing which might be unfair in some instances. With power to order a distribution when and if payments are made, the present valuation problem of *Robbins* can be avoided. It is submitted that both vested and nonvested interests should be recognized as property so that the trial court in its discretion can fashion an order that is sound and fair to both parties. This may be the only avenue to fairness in those traditional long term marriages where the retirement benefits are the most valuable asset of the parties.

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120. 463 S.W.2d at 879.

121. *Id.* (emphasis added).

122. Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977); Claunch v. Claunch, 525 S.W.2d 788 (Mo. App., D. Spr. 1975).

123. Ortmann v. Ortmann, 547 S.W.2d 226 (Mo. App., D. St. L. 1977); *In re* Marriage of Heddy, 535 S.W.2d 276 (Mo. App., D. St. L. 1976).

124. Claunch v. Claunch, 525 S.W.2d 788 (Mo. App., D. Spr. 1975).

*Personal Injuries Claims*

In *Nixon v. Nixon*[125] the St. Louis District of the Missouri Court of Appeals included as marital property the proceeds of a settlement of the husband's personal injury action acquired during the marriage. The court held that the proceeds constituted marital, not separate, property because they did not fall within any of the statutory exceptions to marital property. The court accepted without question that the proceeds were property. Had the asset been a cause of action for personal injuries not yet reduced to judgment or money, the characterization problem would have been more difficult. In most community property states the cause of action as well as proceeds already received are considered property subject to division.[126] If there is hesitancy to place a present value on the chose in action, the actual sharing of the property can be postponed by an order to divide the proceeds if and when collected. In New Jersey the argument has been made that personal injury causes of action[127] and workman's compensation claims[128] are mere expectancies and therefore do not constitute property subject to division. The courts disposed of those arguments by noting that a contingency does not make an interest a mere expectancy and that the distribution may be effectuated by a division if and when the proceeds of the action do materialize.

However, Missouri courts continue to follow the minority view that a cause of action for personal injuries is not assignable.[129] In jurisdictions following that view, the inability to deal with the chose in action has lead courts to hold that it is not personal property for purposes of division at divorce.[130] These decisions seldom have considered the propriety of applying the rule against assignment of personal injury actions in the husband-wife property division situation. The decisions also fail to explicitly recognize that nonassignability does not necessarily prevent an interest from being "property." Like the interests in a nonassignable pension fund, the personal injury cause of action is an interest in which the marital unit has played a part from its origin. To the extent that it represents compensation for the inability to earn wages during the marriage or for the medical costs incurred, it provides a fund to replace lost marital funds, *i.e.,* funds in which the other spouse would clearly have had an interest at marriage dissolution. The fact that the cause of action could not be assigned to strangers or even to the other spouse for pur-

125. 525 S.W.2d 835 (Mo. App., D. St. L. 1975), *noted in* Brown, *Dissolution of Marriage—Personal Injury Damages as Marital Property*, 41 Mo. L. REV. 603 (1976).

126. Brown, *supra* note 125, at 605.

127. Di Tolvo v. Di Tolvo, 131 N.J. Super. 72, 328 A.2d 625 (1974).

128. Hughes v. Hughes, 132 N.J. Super. 559, 334 A.2d 379 (1975).

129. Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208 (St. L. Mo. App. 1967).

130. Lowrey v. Lowrey, 260 Ark. 128, 538 S.W.2d 36 (1976).

poses of its enforcement does not mean that it has no value or substance worthy of classification as property for purposes of division at divorce.

The more difficult problem in connection with either personal injury causes of action or collected damages is the extent to which the amount should be classed as marital rather than separate property. A student commentator has argued that the *Nixon* court was in error in not recognizing that the portion of the recovery representing damages for Mr. Nixon's personal loss of impaired eyesight should have been held to be his separate property under the "exchange" exception of the statutory definition of marital property.[131] Although this reasoning may appear strained, the same result is reached in half the community property states. Those states include in marital property only the damages for loss of earnings during the marriage and for medical expenses.[132] The fact that the Missouri trial judge has discretion to divide the marital property as he deems just would seem to obviate the necessity for such bifurcated classification of the personal injury recovery.

## THE MARITAL-SEPARATE DISTINCTION

### *The Onerous-Lucrative Source Distinction*

In community property theory all time and effort expended by the marital partners during marriage is considered devoted to the marriage enterprise; therefore, any property acquired by the "onerous" means of one's labor is marital.[133] That property acquired through sources not attributable to the efforts of the parties is said to be "lucrative" and, if transferred to one spouse only, constitutes separate property.[134] These concepts are embodied in the Missouri dissolution statutes[135] which simply define "marital property" as that acquired during the marriage, with certain exceptions.[136] Property acquired prior to the marriage or within

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131. Brown, *supra* note 125.

132. Graham v. Franco, 488 S.W.2d 390 (Tex. 1972); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 82 (2d ed. 1971).

133. W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 127.

134. *Id.*

135. § 452.330.2, RSMo (Supp. 1975). This section is identical to that of the original version of the UNIFORM MARRIAGE AND DIVORCE ACT § 307 (1970). The commissioners stated that the "original proposal was in substance . . . a community property rule." FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (1974). *See* text accompanying note 23 *supra*. *See also* Browning v. Browning, 551 S.W.2d 823 (Ky. App. 1977) (applying an identical statute and differentiating separate from marital property on the basis of whether it was given or earned).

136. § 452.330.2, RSMo (Supp. 1975) defines marital property as:

> all property acquired by either spouse subsequent to the marriage except:

the exceptions is not labeled by the statute, but by elimination must be "separate property."

A major exclusion from marital property is property of one spouse acquired by gift, descent, bequest, or devise.[137] These are all lucrative sources. Because the statute creates a presumption that all property acquired during the marriage is marital, the burden of proof of establishing an exception is on the party asserting it.[138] This is relatively easy with respect to property acquired from lucrative sources. The ambiguity in the statute in regard to a gift to *both* spouses was resolved in *Forsythe v. Forsythe*[139] by holding that such a gift is marital property. That categorization has long been followed in community property states and is justified not by the onerous title theory but by recognition that property may acquire marital status due to the intent of the donor. In *Forsythe* the court interpreted the exception to mean a gift to *either spouse,* not a gift to *both spouses,* saying that the statutory intent is to include in marital property all property which comes to the spouses by virtue of the marital relation.[140] The language in *Elmore v. Elmore*[141] which seems to approve the trial court's treatment of such a gift as exempted from marital property is dicta because the parties had previously deeded the property to their children, and no contention was made that it was not exempted.

The *Forsythe* court readily acknowledged that under this statute one of the spouses could appropriately introduce evidence to show that the gift was, in fact, intended only for that spouse.[142] However, in that case the proof was insufficient to overcome the marital property presumption and to overcome by clear and convincing evidence the presumption that a conveyance to a husband and wife results in joint ownership. Proof of such intent has seldom been achieved in other states with respect to jointly titled gifts.[143]

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(1) Property acquired by gift, bequest, devise or descent;
(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;
(3) Property acquired by a spouse after a decree of legal separation;
(4) Property excluded by valid agreement of the parties; and
(5) The increase in value of property acquired prior to the marriage.

In Forsythe v. Forsythe, 558 S.W.2d 675 (Mo. App., D.K.C. 1977), the court stated that the purpose is to treat as marital property all assets acquired during the marriage by the industry of either spouse.

137. § 452.330.2, RSMo (Supp. 1975).

138. *Id.*; Conrad v. Bowers, 533 S.W.2d 614 (Mo. App., D. St. L. 1975).

139. 558 S.W.2d 675 (Mo. App., D.K.C. 1977).

140. *Id.* at 677.

141. 557 S.W.2d 910, 911 (Mo. App., D.K.C. 1977).

142. 658 S.W.2d at 678.

143. *But see* Singer v. Singer, 252 Ky. 707, 68 S.W.2d 34 (Ct. App. 1934); Raney v. Raney, 128 Mo. App. 167, 106 S.W. 577 (Spr. Ct. App. 1907); Von Hutchins v. Pope, 351 S.W.2d 642 (Tex. Ct. App. 1961).

*Acquisition Prior to Marriage*

Because the statutory definition and the presumption of marital property depend on the property having been "acquired" during marriage, "acquisition" is a key concept. Missouri courts have begun the process of defining acquisition but numerous unresolved issues remain.

Title and Payment Prior to Marriage

The Lombard property in *Conrad v. Bowers*[144] was titled and paid for by the husband prior to the marriage. It is a simple example of property clearly not acquired during the marriage. As one would expect, the court set it aside as the husband's separate property with little discussion.

Title Prior to Marriage—Payment During Marriage

*Cain v. Cain*[145] illustrates the problem of property acquisition in the sense of a purchase having been made prior to the marriage, but with payment having been made during the marriage. The husband received title to land in return for a down payment of $3,500 and his note for $16,500 secured by a mortgage. Two different methods of treating this type situation have been followed in community property states. Texas and New Mexico follow the traditional "inception of title" rule of Spain: the character of the property as marital or separate is determined by the marital status of the parties at the time of "inception" of title.[146] Under the inception of title rule, the marital community is reimbursed for those marital funds expended to pay the acquisition cost of the property, but the remainder of its value, including any increase in value due to general economic conditions, would be the separate property of the spouse who had incepted title prior to marriage. California, Idaho, Nevada, and Washington apply the more recent "source of funds" rule: the character of the property is determined by the source of the funds financing the purchase.[147] Under the source of funds rule the property is considered to be "acquired" as it is paid for; therefore, that portion of the ultimate value (increased or decreased by general economic conditions) which is the same as the portion of the purchase price paid with marital funds is marital property.

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144. 533 S.W.2d 614 (Mo. App., D. St. L. 1975).

145. 536 S.W.2d 866 (Mo. App., D. Spr. 1976), *noted in* Haines, *Dissolution of Marriage—Division of Property Which Has Increased in Value,* 42 Mo. L. Rev. 479 (1977).

146. Hodge v. Ellis, 268 S.W.2d 275 (Tex. Ct. App. 1954); W. de Funiak & M. Vaughn, *supra* note 132, at 133; Haines, *supra* note 145, at 480.

147. *In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1973); W. de Funiak & M. Vaughn, *supra* note 132, at 133; Haines, *supra* note 145, at 481.

The *Cain* decision of the Springfield district of the court of appeals adopted the inception of title rule for determining when property is acquired;[148] it has been followed by the Kansas City district in *Stark v. Stark*[149] and *Davis v. Davis*.[150] In *Cain* the trial court found that the appreciation in value to approximately $565,000 had been "due to the development of adjacent property and not due to any efforts made by" the marital parties.[151] The appellate court recognized that this entire increase in value due to economic conditions was the separate property of the husband. This is, of course, in accord with the statutory exception from marital property of "the increase in value of property acquired prior to marriage."[152]

The appellate court in *Cain* also recognized that jurisdictions following the inception of title rule allow a claim and sometimes a lien against the property for reimbursement of the amount of marital funds devoted to its purchase price.[153] Apparently, no lien had been sought in *Cain*; the appellate court noted that the presence and size of other marital property enabled it to fairly divide the marital property without having to rule on the legality of such a lien.[154] In *Stark v. Stark*[155] some marital funds may have been spent on the husband's debt for his separate property, but the appellate court indicated that the division of other marital property favored the wife and, in effect, reimbursed her for this expenditure of marital funds. Because there was sufficient marital property to allow a division which effectively returned to the wife her share of the marital funds expended on the separate property, the failure to set out these funds as part of the value of the marital assets was not significant in the reimbursement.

In the situation where there are insufficient other marital assets to effect a reimbursement, the value of the marital property should include the amount of marital funds expended to buy the separate property. The amount must be identified clearly and a lien placed against the

148. 536 S.W.2d at 870-72.
149. 539 S.W.2d 779 (Mo. App., D.K.C. 1976).
150. 544 S.W.2d 259 (Mo. App., D.K.C. 1976).
151. 536 S.W.2d at 875.
152. § 452.330.2(5), RSMo (Supp. 1975).
153. 536 S.W.2d at 871, *quoting* 41 C.J.S. *Husband and Wife* § 510(a)(4) (1944); Bartke, *Yours, Mine and Ours—Separate Title and Community Funds,* 44 WASH. L. REV. 379 (1969).
154. 536 S.W.2d at 871.
155. 539 S.W.2d 779 (Mo. App., D.K.C. 1976). Similar reasoning is suggested in Daniels v. Daniels, 557 S.W.2d 702, 705 (Mo. App., D.K.C. 1977), where $5,800 of the wife's money was invested in the husband's real estate prior to marriage. The wife's attorney apparently failed to request a lien for return of these funds. The appellate court approved giving her $3,700 from other marital property due to her pre-marriage investment. The wife should have asked for a constructive trust on the husband's property for return of the full $5,800. *See* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

separate property for the portion of that amount to which the other spouse is considered fairly entitled. Assuming Missouri courts continue to follow the inception of title rule, in a case where marital funds have been paid on a debt owed for separate property of one spouse, the attorney for the other spouse should request a finding of the exact amount of marital funds spent and request that that amount be considered a marital asset similar to a debt owed by the owner of the separate property.

An example of possible inequity is *Davis v. Davis*,[156] which applied the "inception of title" rule to shares in a close corporation. Although the appellate opinion is somewhat unclear, it appears that prior to the marriage the husband and his mother acquired the assets of an oil business and then incorporated, the mother taking 50 shares and the husband 150 shares. The assets were purchased for $84,000, all of which had been paid at time of trial, including $16,000 paid prior to marriage and $22,500 from the proceeds of a loan obtained by the husband and his mother. The trial judge found that the wife had a "marital interest" in the assets of this company to the extent of $40,304.50 which was set apart to her "as her marital interest in said corporation." The appellate court noted that the precise basis for that computation did not appear. The husband obtained a reversal by arguing the inception of title rule. This may be a case of unfair division of property because of a failure to ascertain what marital funds had been spent on the separate property and to request a lien in that amount. Only $38,500 of the purchase price of the assets of the oil business was accounted for by the $16,000 and $22,500 payments. Because the assets were purchased individually by the husband and his mother, most of the remaining $45,400 of the purchase price may have been paid for with marital funds.[157] If that was the situation, a lien for reimbursement should have been placed on the husband's shares in the corporation. Perhaps this is the result the trial judge was trying to reach when he erroneously gave the wife a $40,000 interest in the corporation.

A student writer criticized the inception of title rule as not realistically reflecting the theory of a marital partnership and as discouraging marital partners from investing marital funds in separate property.[158]

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156. 544 S.W.2d 259 (Mo. App., D.K.C. 1976).

157. On the other hand, the case may illustrate a legitimate method for a spouse to pay for previously acquired property during marriage without the funds actually being marital funds. In the absence of facts that would allow for piercing the corporate veil (see text accompanying note 173 *infra*), a normal financing practice would be for the newly formed corporation to assume the debt for the assets. The payments would then be made with corporate funds, not with the husband's earnings. The husband would have exchanged his separately owned property for corporate shares which would remain separate property. (See text accompanying note 181 *infra*).

158. Haines, *supra* note 145 at 484.

The writer pointed out that, because the statute leaves income from separate property as marital property, nearly all expenditures on separate property will be from marital funds. It was suggested that marital discord may result from objection by the nonowner spouse to marital funds being expended on separate property when there is no chance of that spouse benefiting from any increase in value of the property. Attorneys advising the spouses, particularly at the stage of an antenuptial agreement, should be aware of this effect. Clients should be informed that they have no chance of obtaining more than reimbursement if they invest any of their own earnings or income (which are marital property) in payment for the other spouse's separate property. On the other hand, the client who owns property, either independently or through a close corporation, which is not completely paid for prior to marriage should be informed of the effect of keeping the property separate while using marital funds to pay the debt.

Title Prior to Marriage—Improvements During Marriage

In *Stark v. Stark*[159] the court noted that the value of the property acquired prior to the marriage had increased primarily due to improvements added to the property with marital funds. This is a significant difference from the *Cain* context where all the increase in value was due to general economic conditions inflating the value of the land.[160] In *Stark* $12,000 of marital funds was used to construct a home on the land. An additional $15,000 enhancement in the property's value was attributed by the court to the inflated value of that improvement. Of course, the marital estate should be increased by the $12,000 spent to improve the separate property, just as it should for marital funds devoted to the purchase price. However, the wife did not request a lien for the $12,000 or for the increase in the value of the improvement, but unsuccessfully attempted to show that the entire farm had been converted to marital property.

Although neither party so argued, the appellate court in *Stark* held that the inception of title rule caused all of the increase in value of the separate property to belong to the separate property owner. The court then held that the trial court's award of sixty percent of the marital property to the wife sufficiently took into account the marital funds expended on the separate property. The court thus avoided the issue whether both the money spent and the increased value of the improvement should be accounted for. It also did not have to rule on a lien for reimbursement since the other assets were considered sufficient for that purpose. In fact, the amount of the marital property which the wife received exceeded the husband's portion by only $8,000. The husband,

159. 539 S.W.2d 779 (Mo. App., D.K.C. 1976).
160. 536 S.W.2d 866 (Mo. App., D. Spr. 1976).

by retaining the property which had increased in value $27,000, thus benefited $11,000 more than the wife.

De Funiak and Vaughn assert that the traditional Spanish rule and that of the community property states is that if the spouses' *labor* or *industry* has contributed to the increase in value then the community should share in the increase *in proportion to the community's contribution to the increase.*[161] This seems a fair result in terms of allowing the marital estate to gain by its investment of time and industry to improve one of the spouse's separate property. Achievement of this result would not be difficult as expert testimony concerning the value of the land with and without the improvement is probably available.[162] The *Stark* division of the other marital property leaves the wife with little return for that investment.

If the marital property does not include the proportional increase in value of improvements added with marital funds or labor, incentive will be given to diversion of marital funds into improving separate property. Opportunities for overreaching by a sophisticated spouse or by one who has advice of counsel will be enhanced.[163] On balance it may be better policy for the increased value of the added improvement to be included within marital property and therefore subject to division. The legislature could modify the increase in value exception of the statute. However, no legislative modification is actually needed to reach that result. Applicability of the exception for the increase in value of property acquired prior to marriage rests on interpretation of the term "property acquired." Since the improvement itself is added during the marriage, a logical interpretation would be that the *improvement is property acquired during the marriage.* Thus, the exception would not apply. This interpretation would be in accord with the *Cain* court's definition of "acquire" as "[t]o come into possession, control or power of disposal of."[164] This is apparently also the underlying rationale for the traditional Spanish rule that classified as separate property only those increases in value due to

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161. W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 169.

162. *See, e.g.,* Girard v. Girard, 521 S.W.2d 714 (Tex. Ct. App. 1975).

163. The importance of tracing marital funds into separate property and distinguishing such funds from separate property is graphically illustrated in Daniels v. Daniels, 557 S.W.2d 702, 704 (Mo. App., D.K.C. 1977). All the wife's earnings had been deposited in the husband's Postal Employees Credit Union account. The appellate court assumed without deciding that this would make the funds separate within the inception of title rule since the husband owned the account prior to marriage. This result is improper. The inception of title rule merely characterizes the main property; it does not convert marital funds expended on separate property into separate property. One need only read Singleton v. Singleton, 525 S.W.2d 642 (Mo. App., D.K.C. 1975) to be convinced that unscrupulous spouses still are able to fleece their mates of considerable property.

164. 536 S.W.2d at 872.

general economic conditions.[165] Because this issue apparently was not argued or considered in *Stark*, future Missouri courts may have to resolve the problem.

Title Prior to Marriage—Effect of Spouse's Industry

The distinction between increases in value of separate property due to general economic conditions and those due to the industry of one of the spouses could be crucial where no isolated improvement is added, but the management efforts of one of the spouses actually increases the value of the property. A prior owned business in which one spouse works substantially all of the time and which he owns as a sole proprietor or substantial portions of which he owns as a partner or close corporation shareholder are likely examples. Once the inception of title rule is applied, the fact of ownership of a business interest prior to marriage could allow marital labor, which ought to be devoted to the marital partnership, to aggrandize separate property unless the increase in value exception is made inapplicable to increases in value attributable to marital labor. In Texas, which is an inception of title state, *Norris v. Vaughan*[166] illustrates a distinction that can be drawn. Prior to marriage, the husband owned gas wells and an interest in a partnership concerning which he did very little during the marriage. The court held that these interests remained separate property. The husband also owned a one-fourth interest in a partnership for which, during the marriage, he negotiated an agreement obtaining the right to drill a number of wells. The one-fourth interest which he had in those wells by virtue of his partnership interest was held to be community property under what the court described as the "well recognized theory"[167] that property acquired after marriage by toil, talent, or industry is community property.[168] In effect, the Texas court treated the increased assets of the partnership, not as an increase in the value of the husband's property owned prior to marriage, but as *new* property acquired during the marriage. In New Mexico income from separate property remains separate unless the owner's time and industry has been devoted to its production. In *Moore v. Moore*[169] income from a ranch owned by the husband prior

165. De Funiak and Vaughn state that only an increase in capital value of separate assets remains separate, but that all increases due to labor and industry are community property. W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 169. However, in a comprehensive analysis of decisions in the community property states, Bartke reports that five of the eight states reimburse the community for the actual value in labor or funds expended but not for any further enhancement due to inflation. He points out that in more recent years the more rapid rate of inflation calls for including that proportionate increase, as did the traditional Spanish law. Bartke, *supra* note 153, at 419.

166. 152 Tex. 491, 260 S.W.2d 676 (1953).

167. *Id.* at 497-98, 260 S.W.2d at 680.

168. *Id.* at 501, 260 S.W.2d at 682.

169. 71 N.M. 495, 379 P.2d 784 (1963).

to marriage was included in community property during those periods when he managed the ranch himself, but not when the work was done by a hired manager.

These cases suggest that not only earnings of a sole proprietor, but also increased assets of a partnership due to a spouse's efforts should be considered as "property acquired during the marriage" rather than merely as an increase in value of a prior owned interest. The underlying concept controlling these characterizations is that property acquired due to the toil and industry of the spouses during the marriage is marital property. Of course, under the Missouri statute, income from separate property is already marital property;[170] therefore, all receipts of a sole proprietorship or drawings from a previously owned partnership interest would be marital unless traced to a sale of a previously owned capital asset. The uncertain issue is the extent to which increased asset value also should be included as property acquired during marriage. A portion of the partner's interest (his share of profits and surplus if the business were liquidated)[171] may represent an increase due to general economic conditions in the value of the capital invested prior to marriage; another portion of that interest may be directly attributable to his services to the partnership during the marriage. The latter is particularly likely where the partner has devoted long hours to the partnership but has drawn only minimal amounts from it. In community property states, statements are made by the courts that the increase in value is apportioned between separate and marital property in order to reflect the underlying notion that property acquired due to the labor of the spouses should be classed as marital. There is a wide diversity of methods employed, including allocating a fair return on capital investment to the separate property and allocating the amount of a reasonable salary for the efforts expended to marital property.[172]

The close corporation wholly owned or controlled during the marriage by one spouse the value of which has increased during the marriage due to the efforts of that spouse presents even more difficult problems. Because the corporation has its own identity, the only property in question in the dissolution action is usually the stock. If it was owned prior to the marriage, an increase in its value would seem rather clearly excluded from marital property by the statutory exception.

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170. Income is not within any of the exceptions to the definition of marital property in § 452.330.2 RSMo (Supp. 1975). The Commissioner's Note accompanying the prototype UNIFORM MARRIAGE AND DIVORCE ACT § 307 states that income from property owned prior to marriage is marital. Cain v. Cain, 536 S.W.2d 866, 870 (Mo. App., D. Spr. 1976).

171. § 358.260, RSMo 1969.

172. King, *The Challenge of Apportionment*, 37 WASH. L. REV. 483 (1962); cases collected in Annot., 29 A.L.R.2d 530 (1953); W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 165.

Various approaches have been used to characterize a part of the shares' value or a part of the corporate assets as marital property. For example, statements by a Texas court that corporate assets remain the property of the corporation "unless a well recognized basis for disregarding the corporate entity exists"[173] were followed by cases attempting to "pierce the corporate veil" by showing that the corporation was merely the *alter ego* of the owner spouse. In *Dillingham v. Dillingham*[174] the court held that when a businessman conducts virtually all his business affairs through a corporation in which he is the sole shareholder, the assets of the corporation acquired during the marriage are community property. The court agreed with a former attorney general's opinion that it would be an invitation to anyone wanting to defeat the rights of his wife to organize such a corporation and thereby prevent the assets acquired during the marriage from being part of the marital estate. The wife was given some of the "corporate" assets as her share of the marital estate. In *Uranga v. Uranga*[175] the court held that a corporation owned by the husband "must be presumed to be his *alter ego*"[176] on a record showing that he kept only one checking account for both his personal affairs and for the corporation, that part of his salary was used to defray corporate expenses, and that he owed $330,000 to the corporation. On the other hand, many decisions have held that where the corporate affairs are kept separate from those of the individual, the corporate entity will not be disregarded.[177]

Another approach sometimes used to reach the increase in value of corporate assets due to a spouse's labor is to evaluate whether he was paid a reasonable salary for his services to the corporation. If he was not, a portion of the stock's increase in value equal to the amount he should have received for his services might be considered property acquired during the marriage by his industry.[178] The difficulty of showing that the remuneration given was inadequate is such that many

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173. Wells v. Hiskett, 288 S.W.2d 257, 262 (Tex. Ct. App. 1956). The bases for disregarding the corporate entity were stated to be where the corporation is used as a means of protection against fraud, where the corporate organization is illegally conducted, where the corporation is used as a mere sham and device to protect individuals against liability, where the corporation did not exist except practically as a shadow of the individual, where the corporate entity is used to evade existing legal obligations, and where the corporate and individual transactions have not been distinct.

More cases of this type should be expected in the future because the Texas Supreme Court recently held that there is no power to divide separate property. Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977).

174. 434 S.W.2d 459 (Tex. Ct. App. 1968).

175. 527 S.W.2d 761 (Tex. Ct. App. 1975).

176. *Id.* at 765 (emphasis added).

177. *E.g.*, Mifflin v. Mifflin, 556 P.2d 854 (Idaho 1976).

178. *See* King, *supra* note 172, at 487; W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 165.

decisions have affirmed findings that the increase in value remained separate property.[179]

Although the means chosen vary a great deal, there is a large body of precedent in community property states for treating what appear to be increases in the value of prior owned separate property as property acquired during the marriage due to the efforts of one of the spouses. Certainly, such a possibility should be welcomed in flagrant cases of attempts to aggrandize separate property at the expense of the marital unit. Yet, the fairly large numbers of unsuccessful claims attest to the fact that separate property can be developed during a marriage without fear of subjecting it to division in case of dissolution.[180] Among the Missouri cases involving a previously owned corporation, only the record in *Davis v. Davis*[181] (discussed above in regard to payment of the purchase price) indicates that such arguments may have been pertinent. In *Davis* the husband was not only president of the oil company but actively ran the operation. He did everything from driving a truck to working in the service station to keeping the books, yet his salary was only $6,500 annually at the time of trial. There was evidence that the value of assets of the company were between $132,000 and $152,000 at the time of trial. A fair proportion of the increase from the $84,000 purchase price might be attributable to the services of the husband during the marriage. However, there was no evidence of what his services were reasonably worth or that normal market increase of the assets owned at time of the marriage would not account for the increase. Missouri counsel advising persons contemplating marriage should inform them that records of a previously owned corporation should be kept separately, and that a reasonable salary should be paid for services rendered to the corporation. Such action is likely to protect their separate property from claims of the prospective spouse in case of dissolution.

*Exchanges*

Property shown to have been acquired during the marriage and presumed marital can be classed as separate if it is further shown that it was acquired in exchange for separate property. This statutory exception to marital property is the same as the "source" or "tracing" doctrine well

179. Kenney v. Kenney, 128 Cal. App. 2d 128, 274 P.2d 951 (1954); Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 859 (1921); Mifflin v. Mifflin, 97 Idaho 895, 556 P.2d 854 (1976); Michelson v. Michelson, 89 N.M. 282, 551 P.2d 638 (1976); Annot., 29 A.L.R.2d 530 (1953).

180. The Texas court of appeals recently has held that the community is not entitled to reimbursement for the value of one spouse's labor expended on the separate property of the other. Hale v. Hale, 557 S.W.2d 614 (Tex. Ct. App. 1977).

181. 544 S.W.2d 259 (Mo. App., D.K.C. 1976).

known in community property states and going back to ancient Spanish law.[182] One way to state the community property doctrine is: "Property acquired in an exchange partakes of the nature of the property given in exchange."[183] Illustrative of the exception is *In re Marriage of Armbrech*,[184] a Colorado case applying statutory language similar to that of Missouri. The wife's evidence that she had bought the home during the marriage with the proceeds of the sale of a home she owned prior to the marriage led to the holding that the home was not marital property. What is contemplated by the statutory exception is a transaction that merely changes the form of the property but does not change its character as separate property. If property was acquired during marriage and was not a gift, the question should always be asked: "What was given in exchange for this property?"

Reppy and de Funiak have said: "Tracing back to a separate property source is by far the most common means of rebutting the presumption favoring community ownership."[185] However, Brocklebank believes that attorneys do not always appreciate the importance of the source doctrine in classifying property.[186] The appellate decisions indicate that such is the situation in Missouri. No appellate decision was found which involved specific property classified as separate because its acquisition was traced to separate property exchanged for it.[187] It is possible that the 10 acres in *Hulsey v. Hulsey*[188] acquired by the wife by trading inherited property is in this category, but the opinion indicates the trade occurred prior to marriage making the 10 acres separate in any event. In both *Conrad v. Bowers*[189] and *Jaeger v. Jaeger*[190] the court in dicta clearly recognized the effect of an exchange, but the evidence failed to establish one.

In long term marriages in Missouri, it would be difficult to trace the source of much property back to separate property. Perhaps this is why few cases seem to have done so. For the future, attorneys should advise clients who want to protect their separate property from possible division in the event of marriage dissolution to keep records that will facilitate tracing.

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182. W. BROCKELBANK, THE COMMUNITY PROPERTY LAW OF IDAHO 134 (1962).
183. *Id.* at 138.
184. 518 P.2d 300 (Colo. App. 1974).
185. W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 140 (1975).
186. W. BROCKELBANK, *supra* note 182, at 134-38.
187. However, it should be obvious that in a sole proprietorship owned prior to marriage the turnover of inventory will result in most of the stock acquired during the marriage being separate if separate accounts have been kept. The accounts will perform the tracing function.
188. 550 S.W.2d 902 (Mo. App., D. St. L. 1976).
189. 533 S.W.2d 614 (Mo. App., D. St. L. 1975).
190. 547 S.W.2d 207 (Mo. App., D. St. L. 1977).

The tracing concept applies equally well to marital property exchanged for other property. The newly acquired property will retain its character as marital not only because of the statutory marital presumption but also due to the source doctrine. This was obvious in *Nixon v. Nixon*[191] where the proceeds of a personal injury settlement were classified as marital and then traced into a partnership and a corporation. The imposition of a lien on separate property for marital funds spent on it is also an application of the tracing principle. It is interesting that over a hundred years ago, the Missouri Supreme Court applied essentially this reasoning to a case involving community funds from Louisiana which the husband allegedly used to purchase separately titled land in Missouri. The court held that a trust could be imposed on the land to protect the wife's interest.[192]

*Transmutation*

In *Conrad v. Bowers*[193] property which had been owned by the husband prior to the marriage was sold and the proceeds used to purchase the Elmhurst property. Application of the statutory language would result in an immediate presumption that the property was marital because acquired during marriage. A reclassification as separate would occur when it was shown that the source of the funds used to buy it was separate property. However, the Elmhurst property was titled in the joint names of the husband and wife. The court held that the effect of doing so was to make the property marital for purposes of division at marriage dissolution. The dissent criticized the holding for modifying the statutory structure. However, the majority had to deal with the common law presumption, long recognized in Missouri, that when one marital partner titles property in the names of both, he intends a gift to or settlement upon the other. In the absence of express statutory language, the court found no legislative intent to eliminate this pre-existing presumption and held that all property acquired during marriage which was taken in joint names is marital unless it is shown that it was acquired in exchange for separate property *and* that the transfer was not intended as a provision for or gift to the other spouse.[194] The court assumed without discussion that such titling would result in a "contribution to or gift to the marital estate" rather than an individual gift of one-half the prop-

191. 525 S.W.2d 835 (Mo. App., D. St. L. 1975).
192. Depas v. Mayo, 11 Mo. 314 (1848).
193. 533 S.W.2d 614 (Mo. App., D. St. L. 1975).
194. An interesting contrast is provided by Young v. Young, 329 A.2d 386 (Me. 1974), in which the Maine court applied similar statutory language. The common law presumption was not argued. The court held that prior to the effective date of the new statutory concept of marital property there could be no intent to convert separate property to marital property.

erty as separate property to the other spouse.[195] Having classed it as marital, the court could divide all of the property in a just manner. In fact, the entire Elmhurst property had been awarded to the husband and the appellate court affirmed.

The decision leaves open what will be a showing by clear and convincing evidence that such joint titling was not intended as a provision for a settlement upon or a gift to the other spouse. In the Florida case of *Goldstein v. Goldstein*[196] the husband had placed separate securities in a jointly titled stock brokerage account to prevent their distribution in bankruptcy but asserted they were separate for divorce purposes. The divorce court held that he could not divide his interests in that way and that if the title was joint for bankruptcy then it was for divorce also. In contrast, a wealthy woman in New Hampshire who titled her realty jointly with that of her new and younger husband was permitted to retain it as separate property by showing that the transfer was conditioned on his building a home on it and supporting her, which he had failed to do.[197] A Maryland woman succeeded in imposing a resulting trust on jointly titled property for return of her funds upon proof that the parties had agreed that her interest would remain separate.[198]

One wonders whether joint titling for purposes of estate planning or for protection from future creditors, with a written memorandum to the effect that there is no intent that the property be classed as marital or be subjected to division by a court in the event of marriage dissolution, will be effective for both purposes. The Florida decision refusing to recognize the bifurcated intent of the husband may be furthering a public policy designed to discourage fraud on other parties such as those in the bankruptcy proceeding. All three of these illustrative cases would be consistent with a public policy to further the intent of both the parties as evidenced by their mutual agreement. When one party titles his property jointly, it is reasonable to assume that the other party expects it to be an addition to marital property. To protect those expectations, the property should be classed marital unless the donor's contrary intent was clearly brought to the attention of the donee. The evidence in *Goldstein* did not reveal such notice. Because a memorandum of agreement signed by both parties would evidence both the parties' contrary intent, it should be permitted to overcome the presumption.

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195. Applying identical statutory language the Colorado court has reached this same conclusion. *In re* Marriage of Moncrief, 535 P.2d 1137 (Colo. Ct. App. 1975). *See also* Gist v. Gist, 537 P.2d 460 (Okla. Ct. App. 1975); Vadnais v. Vadnais, 558 S.W.2d 249 (Mo. App., D.K.C. 1977).

196. 310 So. 2d 361 (Fla. Dist. Ct. App. 1975).

197. Sweetnam v. Sweetnam, 115 N.H. 80, 333 A.2d 456 (1975).

198. Ensor v. Ensor, 270 Md. 549, 312 A.2d 286 (1973). *See also* Raney v. Raney, 128 Mo. App. 167, 106 S.W. 577 (St. L. Ct. App. 1907) (notes titled jointly were vested in the wife alone).

The *Conrad* decision is of inestimable importance in Missouri because, without specific statutory authorization, it establishes the principle that "transmutation" of the character of the property for purposes of division at dissolution is possible. In community property states the term "transmutation" means a change in the character of the property from either separate to marital or from marital to separate due to the intent of the parties.[199] There is variety among the community property states' laws regarding transmutation. In California the statute specifically allows husband or wife to engage in any transaction with the other in regard to property.[200] It is recognized that a married person may convert his separate property to community property by his voluntary act.[201] The California courts have recognized transmutation based solely on the owner's oral statements, even when the documentary title had not been changed.[202] The result has been a great deal of litigation to determine whether the documentary or oral transactions (sometimes referred to as "pillow talk") in fact established the owner's intent to change the character of the property.[203] Other community property states are more demanding in the degree and quality of proof required.[204] The *Conrad* decision establishes for Missouri the precedent that a *documentary* transaction can transmute otherwise separate property to marital property because it evidences an *intent* to do so.

In *Jaeger v. Jaeger*[205] transmutation by intent also was recognized. The husband had owned considerable stocks and bonds prior to marriage. Some of these were sold during the marriage at or near the time that stocks constituting marital property were sold. The amounts received for the separate and marital stocks were not indicated in the opinion. The proceeds were commingled to purchase additional stocks which were apparently titled only in the husband's name. The court held that the newly acquired stocks were all marital property stating:

> We do not believe the exchange exception . . . is applicable when a person uses both his pre-marriage property and marital

199. W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 213; 41 C.J.S. *Husband and Wife* § 494 (1944). In 1860 the Missouri Supreme Court, applying the Spanish law of the Louisiana territory, held that shares given to the wife which would be her separate property had been converted by her marriage contract to community property. The court held that the parties "could vary the law and place property in the community which otherwise would not have gone into it." Morrison's Administrator v. St. Gemme's Administrator, 31 Mo. 230, 238 (1860).

200. CAL. CIVIL CODE § 5103 (West 1970).

201. Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); *In re* Estate of Rogers, 24 Cal. App. 3d 69, 100 Cal. Rptr. 735 (1972).

202. Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956); Estate of Raphael, 91 Cal. App. 2d 931, 206 P.2d 391 (1949).

203. "In California, transmutation is dangerously easy." W. REPPY & W. DE FUNIAK, *supra* note 185, at 421.

204. *Id.* at 422-26.

205. 547 S.W.2d 207 (Mo. App., D. St. L. 1977).

> property to purchase new property during the marriage. In commingling his own assets with marital assets the spouse has failed to sufficiently segregate his own property. Such a commingling is indicative of an *intent* on the part of the owner of the pre-marriage property to contribute it to the marital estate.[206]

The transmutation here was evidenced not by the documents but by the conduct of the husband in commingling the funds. The decision leaves open the effect of records indicating the exact amounts of money from the sale of the separate property which went into the purchased stocks. The ability to trace and the obvious intent to do so might overcome the intent evidenced by the commingling; there could be an "uncommingling" if amounts could be accurately traced. Many community property courts find themselves involved in intricate problems of "uncommingling" because they hold that commingling alone, so long as it is possible to trace sources, is not enough to convert separate property to marital property.[207]

Broad language in the *Conrad* opinion leaves open the question of what kind of evidence in addition to documents and commingling could suffice to establish an intent to transmute separate property to marital property. In holding that the husband's prior owned property remained his separate property, the court noted that the implication of the prior owned property exception was that such property "maintained and treated as such after the marriage is not marital property."[208] This suggests that "pillow talk" could establish a transmutation through *treating* the property as marital.[209] In California sufficient statements have been, "What is mine is yours . . . this money will go into a home for us; it is just as much yours as mine."[210]

Permitting such transmutation in Missouri would be especially significant if the inception of title doctrine continues to be applied. In any inception of title situation where marital funds have been applied to separate property, attorneys should be alert to statements by the separate owner that indicate that he or she had begun to think of the property as for the benefit of both of them. That type of statement would not be unlikely in the separate owner's attempt to justify spending mar-

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206. *Id.* at 211 (emphasis added).

207. Stahl v. Stahl, 91 Idaho 794, 430 P.2d 685 (1967); W. REPPY & W. DE FUNIAK, *supra* note 185, at 145.

208. 533 S.W.2d at 621.

209. This possibility raises interesting questions concerning the scope of the husband-wife testimonial privilege in Missouri. This privilege has previously been held inapplicable to property and business transactions. Dunn v. Vick, 345 S.W.2d 165 (Mo. 1961). The privilege is not applicable in California. Durrell v. Bacon, 138 Cal. App. 396, 32 P.2d 644 (1931).

210. *Id.* at 398, 32 P.2d at 645.

ital funds on the separate property. However, in both *Stark v. Stark*[211] and *Davis v. Davis*,[212] the efforts to convince the court of transmutation by intent failed. In *Stark* after the marriage both spouses signed a note and mortgage on the separate property. From this the wife argued that the property had become marital by common understanding between them. The court noted that there was no evidence that the note and mortgage were actually issued "on the faith and credit of the separate property"[213] and no other evidence to indicate that the joint mortgage was intended to create a new estate between them. The court stated the general rule to be that the nature of funds expended on separate property does not change its status.[214] In view of the usual practice of Missouri lenders to require both spouses' signatures whenever individually owned real estate is conveyed or encumbered, the decision is not unexpected.

In *Davis* the court recognized that the conduct of the parties may evidence a clear intention that separate property be contributed to the community or to the other spouse. The wife, trying to obtain an interest in a close corporation in which the husband owned three-fourths of the shares, argued that the fact that she had been made a director and a vice-president and had signed notes secured by deeds of trust the proceeds of which were used in the corporation evidenced such intent. The court pointed out that the deeds of trust were on property in which she had no interest and that there was no evidence that she needed an interest in the corporation in order to be a corporate officer. Her evidence that she had become a guarantor of a corporate obligation with no further explanation of the transaction likewise did not suffice to establish the requisite intent to confer upon her an interest in her husband's corporate stock. Probably helpful to the husband was his testimony that she had repeatedly told him she wanted no part of the business. Both *Stark* and *Davis* are devoid of evidence indicating that the owner of the separate property desired to create an interest in it for his wife. They simply show an owner using his spouse's signature and name and marital funds for his own benefit. As discussed earlier, a lien for the return of the marital funds should have been imposed.[215] However, to find a transmutation of the character of the whole property, evidence of an intent to benefit the other spouse would be needed.[216]

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211. 539 S.W.2d 779 (Mo. App., D.K.C. 1976).
212. 544 S.W.2d 259 (Mo. App., D.K.C. 1976).
213. 539 S.W.2d at 782.
214. *Id.* at 783, *citing* 42 C.J.S. *Husband and Wife* § 583 (1944).
215. In Michelson v. Michelson, 89 N.M. 282, 551 P.2d 638 (1976), the refinancing did not change the status of the property, but a lien in the amount of funds spent on the property was imposed. *See* text accompanying note 145 *supra*.
216. A recent Missouri decision, Daniels v. Daniels, 557 S.W.2d 702 (Mo. App., D.K.C. 1977), upheld classification of the husband's credit union account

Transmutation by intent is also an important concept for changing the character of property from marital to separate. Evidence of donative intent by one party and acceptance by the other should suffice to convert marital property to separate by virtue of the statutory gift exception.[217] A simple Christmas gift purchased with marital funds and intended for the sole benefit of the donee could qualify. There is a more serious question of donative intent in regard to an elaborate television and stereo system "given" by the husband to the wife for Christmas or a new sailing boat "given" by the wife to the husband for his birthday. There has been a reluctance in community property states to find the intent to transmute marital property to separate property if the item is very expensive or can be enjoyed by both of the parties after the "gift."[218] An example of insufficient donative intent is *Neeley v. Neeley*[219] in which the Arizona Court of Appeals affirmed the trial court's conclusion that a donative intent was not evidenced by the husband's transfer of ownership of life insurance to the wife. The husband testified that he transferred the insurance so that the proceeds would not be in his estate at death, but that he did not understand that the transfer could make his wife the owner. He further testified that he wanted the insurance to benefit his children. The court also noted that no gift tax return had been filed.

*Valid Agreement*

The Missouri statute excepts from marital property that which is acquired during marriage if "excluded by valid agreement of the parties."[220] The well known separation agreement executed after the parties have separated and in contemplation of marriage dissolution or legal separation certainly is a "valid agreement" if found not unconscionable.[221] However, all community property states except Texas also recognize as valid an antenuptial agreement to exclude all or various types

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as marital property due to transmutation. The wife had deposited all of her earnings in the account, and the account was used for joint purposes. The wife also had signed a signature card. These actions led the wife to believe the account was jointly owned and indicated an intent on the husband's part to benefit the wife. The effect of finding transmutation rather than imposing a lien for the marital funds is to convert the entire separate property to marital. In most cases this would result in a greater dollar amount being classified as marital; however, the fact that this theory has succeeded only once in Missouri indicates the importance of using it in conjunction with a request for a lien.

217. § 452.330.2, RSMo (Supp. 1975); *In re* Walsh's Estate, 66 Cal. App. 2d 704, 152 P.2d 750 (1944).

218. *In re* Walsh's Estate, 66 Cal. App. 2d 704, 152 P.2d 750 (1944).

219. 563 P.2d 302 (Ariz. Ct. App. 1977).

220. § 452.330.3, RSMo (Supp. 1975).

221. *See* Mo. Bar C.L.E., *Missouri Family Law* ch. 9 (1976).

of property from marital property.[222] De Funiak claims that this freedom to agree not to be governed by the provisions regulating earned property during marriage existed in Spain as early as the year 693.[223] The statutes usually require the contract to be written, acknowledged, and witnessed like a deed, and to be recorded in order to affect third parties.[224] Of course, an antenuptial contract in a community property jurisdiction usually governs the property throughout the marriage, at time of divorce, and at time of death. In an old case an antenuptial contract designed to govern division of property *only* at divorce or legal separation was held invalid, apparently because it could encourage divorce.[225] However, in 1973 the Nevada court held that it is reasonable and proper for a couple about to marry to provide for the contingency of divorce.[226] This is the same development that is occurring in common law states. Traditionally, provisions for support or property disposition at divorce were considered void in any agreement executed prior to the breakdown of the marriage;[227] but in recent years a number of courts have held them valid in regard to property disposition.[228] With more persons entering second marriages than previously and the removal of recrimination and collusion as bans to divorce, courts are recognizing the social advantages of allowing persons to plan ahead for the divorce contingency.[229]

In Missouri, because the concept of marital property pertains only to the time of divorce and not at all to transactions during the ongoing marriage, we squarely face the issue whether the parties' contract for classification of the property for purposes of divorce only should be recognized as a "valid agreement." Of course, an antenuptial agreement could provide for waiver of inheritance and election rights at death with added provisions for classification at divorce.[230] Missouri seems to have no cases prior to the new divorce act on the validity of contracts providing for property disposition at divorce, so the courts will be free to consider the wisdom of approving such contracts without the restraints of *stare decisis*.[231] The only language in the new statute which may suggest

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222. W. DE FUNIAK & M. VAUGHN, *supra* note 132, at 334.

223. *Id.*

224. W. REPPY & W. DE FUNIAK, *supra* note 185, at 410.

225. Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).

226. Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973).

227. Reiling v. Reiling, 1 Or. App. 571, 463 P.2d 591 (1970). The decisions were prompted by fears of collusion and easing the path to divorce.

228. Unander v. Unander, 264 Or. 464, 506 P.2d 719 (1973); Klarman, *Marital Agreements in Contemplation of Divorce,* 10 U. MICH. J.L. REF. 397 (1977).

229. Posner v. Posner, 233 So. 2d 381, 384 (Fla. 1970).

230. *See* Mo. Bar C.L.E., *Missouri Family Law* ch. 3 (1976). The author equates a spouse's contractual waiver of the right to claim at dissolution that property is marital to waiver of inheritance and election rights at death.

231. In two cases Missouri courts have held that while the parties are living together contracts *for separation* and settlement of property are against public

a negative legislative intent is in the section dealing with "separation agreements"; "To promote the amicable settlement of disputes between the parties to a marriage *attendant upon their separation* or the dissolution of their marriage, the parties may enter into a written separation agreement . . . ."[232]

Not only is the meaning of "valid agreement" important in regard to antenuptial agreements, but *Conrad* makes it pertinent to transactions during marriage.[233] If joint titling can convert separate property to marital property because it indicates an intent to transmute in the absence of countervailing evidence, then it would seem that any written contract between the parties could evidence the intent to transmute separate property to marital property or vice versa. Those Missouri cases which have already recognized intent as a basis for characterizing property as separate or marital actually have answered the policy argument about "valid agreement." It would seem that if documents or commingling attributable to one party can determine what property is divisible at divorce, then a written contract between *both* of the parties should be able to do so. The validity issue in such case should be similar to that in the waiver of rights at death agreements: fairness and full disclosure.[234] Freedom to contract regarding the nature of the property in advance of marriage or at the time property is acquired during marriage would encourage preplanning and would encourage the use of attorneys in the more productive role of prevention than in the role of scavenger over the broken pieces of marriage.

## Conclusion

The first round of appellate interpretations of the property division section of the Missouri marriage dissolution act is near to ending. The strange beast of marital property is sufficiently tamed to be used with confidence in the average dissolution. All tangible assets, including the proceeds of personal injury claims, and enforceable intangible interests, such as vested contract rights, are all to be included as property. All property acquired during marriage, unless within a statutory exception and not "transmuted" to separate property, is marital. Acquisition occurs at the time title is received, so that property titled in one spouse prior to

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policy. Harrison v. Harrison, 201 Mo. App. 465, 211 S.W. 708 (K.C. Ct. App. 1919); Speiser v. Speiser, 188 Mo. App. 328, 175 S.W. 122 (K.C. Ct. App. 1915). The reason given was that they have a tendency to promote separation and divorce. In the *Harrison* opinion the court stated in dicta: "There, of course, may be a valid settlement of property between husband and wife without a separation," 201 Mo. App. at 468, 211 S.W. at 709.

232. § 452.325.1, RSMo (Supp. 1975) (emphasis added).

233. *See* text accompanying note 191 *supra*.

234. *See* First Nat'l Bank v. Jacques, 470 S.W.2d 557 (Mo. 1971); Youngblood v. Youngblood, 457 S.W.2d 750 (Mo. En Banc 1970).

marriage remains separate with the probability that reimbursement for marital funds and effort spent on it may be enforced. The court must divide marital property; it has wide powers and discretion in the manner of division.

The second round of appellate decisions will reveal the depth and sophistication of the courts' acceptance of the partnership theory of marriage. If the fruits of all efforts of each spouse are, indeed, to benefit the family created by the marriage, then all interests of value, whether contingent (nonvested retirement benefits), nonassignable (personal injury cause of action), unmarketable (goodwill of a professional practice), or cloaked in separate title (increased value of prior owned close corporation or realty), developed by the efforts of either spouse during the marriage should be subject to the discretionary division of the trial court. Likewise, if the property aspects of marriage are to be treated as the interests of a partnership endeavor rather than of a status rigidly defined by law, then all fair agreements between the spouses for classification of their property should be honored. The fullest recognition of marriage as a partnership can be achieved by including all value created by the spouses' efforts as marital property and then by allowing the parties full freedom to determine privately who is entitled to that value.[235]

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235. *See* Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974).