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Transmutation and Source of Funds Rules in Division of Marital Property, The

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THE TRANSMUTATION AND SOURCE OF FUNDS RULES IN DIVISION OF MARITAL PROPERTY

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I. THE PROBLEM

In *Hoffmann v. Hoffmann*[1] the Missouri Supreme Court adopted the source of funds rule as a guide for classifying property as marital or separate. Although the decision joined a clear trend pushed by a triumvirate of significant opinions[2] from common law equitable distribution states, *Hoffmann* may lead all the rest in importance. Missouri was one of the first states[3] to adopt

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1. 676 S.W.2d 817 (Mo. 1984) (en banc).

2. Hall v. Hall, 462 A.2d 1179 (Me. 1983); Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979); Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982).

3. The Missouri statute was passed in 1973. Other early statutes were COL. REV. STAT. 14-10-113(3) (1973); KY. REV. STAT. 403.190(3) (1970); ME. REV. STAT. ANN. tit. 19, § 722-A(3) (1971).

the property division provisions of the 1970 Uniform Marriage and Divorce Act[4] which have been followed to a large extent in approximately half the common law jurisdictions[5] and which exist in most of the community property jurisdictions.[6] Since January, 1974 Missouri courts have fleshed out the statute with innumerable decisions, including early holdings[7] adopting the inception of title rule. The *Hoffmann* court superseded the inception of title rule in the face of a decade of practice and development under it. Thus Missouri followed a pattern first noticeable in community property states.[8] This article will explore both the reasons for and the effects of choosing the source of funds rule rather than the once dominant inception of title rule to characterize property as marital or separate.

II. CLASSIFICATION AND POWER

In "dual property" regimes such as the 1970 UMDA model, the legislature authorizes the courts to divide only "marital property" at marriage dissolution. Therefore, the characterization or classification as marital rather than separate (non-marital) determines the power to divide property. In many of these jurisdictions there is no discretion whether to divide; the statute mandates court division of marital property.[9] The classic Missouri statute defines marital property as any property acquired during the marriage with certain specified exceptions. The statute further provides that all property acquired during the marriage is presumed marital unless proved to be within one of the exceptions. The exceptions include: property acquired by gift, inheritance, or

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4. MO. REV. STAT. § 452.330 (1978).

5. Among those states in which ordinarily only property acquired during the marriage or property jointly acquired may be divided are: Arkansas, ARK. STAT. ANN. § 34-1214(A)(1)-(2) (1985 Supp.); Colorado, COLO. REV. STAT. § 14-10-113(1) (1973); Delaware, DEL. CODE ANN. tit. 13 § 1513(a) (1974); District of Columbia, D.C. CODE ANN. § 16-910(b) (1981); Illinois, ILL. ANN. STAT. ch. 40 § 503(b) (Smith-Hurd 1980); Kentucky, KY. REV. STAT. § 403.190(1) (1970); Maine, ME. REV. STAT. ANN. tit. 19 § 722-A(1) (1971); Maryland, MD CTS. & JUD. PROC. CODE ANN. §§ 3-6A-03 to 3-6A-04 (1973); Minnesota, MINN. STAT. ANN. § 518.58 (1969); Missouri, MO. REV. STAT. § 452.330 (1978); New Jersey, N.J. STAT. ANN. § 2A:34-23 (1952); North Carolina, N.C. GEN. STAT. § 50-20(a) (1984); Oklahoma, OKLA. STAT. ANN. § 1278 (1961); Pennsylvania, 23 PA. CONS. STAT. ANN. § 401(d) (1980); Virginia, VA. CODE § 20-107.3(A)-(D) (1950); West Virginia, W. VA. CODE ANN. 48-2-32 (1985 Supp.).

6. Arizona, ARIZ. REV. STAT. ANN. § 25-318 (1976); Idaho, IDAHO CODE § 32-712 (1981); Nevada, NEV. REV. STAT. § 125.150 (1983); Texas, TEX. FAM. CODE ANN. §§ 3.57, 3.63 (Vernon 1975); Washington, WASH. REV. CODE ANN. § 26.08.110 (1961).

7. Stark v. Stark, 539 S.W.2d 779, 782 (Mo. App., K.C. 1976); Cain v. Cain, 536 S.W.2d 866, 869 (Mo. App., Spr. 1976).

8. *In re* Marriage of Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979). The decision quotes at length from a Nevada opinion which also departed from the inception of title rule. *See* Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973).

9. Corder v. Corder, 546 S.W.2d 798, 801-02 (Mo. App., K.C. 1977).

devise; property acquired in exchange for separate property; property excluded by valid agreement of the parties; and increase in value of property acquired prior to marriage. There is no definition of separate (non-marital) property in many of these statutes. However, anything determined to be acquired prior to marriage or within an exception is automatically classified as separate (non-marital). The controlling consideration in this statutory scheme for classification is not title, but the method and time of "acquiring" the property.When a particular item of property fits entirely within one of these acquisition categories, classification is easy. Problems arise when the acquisition criteria for determining categories are blended. Two major problem situations exist:

1. Marital funds or marital effort have been devoted to property otherwise classifiable as separate.

   Ex. 1. H contracts to buy realty prior to marriage.
   Marital funds provide payments on debt.
   Marital funds provide improvements.

   Ex. 2. W inherits an antique automobile during the marriage.
   W restores it with her personal (marital) effort.
   Marital funds provide restoration supplies.

2. Separate funds or separate efforts have been devoted to property otherwise classifiable as marital.

   Ex. 3. H buys realty during marriage.
   H provides down payment with inherited funds.
   Marital funds provide payments on debt.

   Ex. 4. W wins a roughcut diamond during marriage.
   W provides inheritance funds for cutting and polishing it.

In either case the value of the property is attributable to more than one acquisition process. The statutes' acquisition provisions do not deal directly with these situations. Consequently, the court must fashion an equitable means of accounting for the infusion of one category of property into another.

III. Effect and Methods of Transmutation

"Transmutation" is a principle derived from community property law which recognizes that the character of property as separate or marital can be changed by the intent of the parties.[10] Consequently, if the requisite intent is established it overrides any other means of classifying the property and avoids the problem of how to classify property acquired by a blend of separate and marital elements.

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10. *In re* Marriage of Rogers, 85 Ill. 2d 217, 422 N.E.2d 635 (1981); Carter v. Carter, 419 A.2d 1018 (Me. 1980); Conrad v. Bowers, 533 S.W.2d 614 (Mo. App., St. L. 1975); Bonnell v. Bonell, 117 Wis. 2d 241, 344 N.W.2d 123 (1984); Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 190-91 (1978).

A. *Marital to Separate Transmutation*

Although the issue is seldom litigated, marital property can be transmuted from marital to separate if there is clear and convincing evidence that both parties intend that the property be excluded from their marital property.[11] This is the common situation when husband and wife buy each other personal birthday or Christmas presents. Ordinarily, both of them manifest an intention that the gift be the separate property of the donee. However, a gift ostensibly for one is often meant to be "family" property. The new television set or car "given" to one party at Christmas may be expected to be used by the entire family, and would not be clear evidence of transmutation to separate property for purposes of property division at dissolution. Likewise, an investment program or "collecting" hobby enjoyed by both parties such as art-work, antiques, oriental rugs, or jewels,[12] may include birthday gifts that are actually intended to augment the family estate. Likewise, if the purpose of a transfer for estate planning is to benefit the marital estate, no transmutation would occur. In *In re Marriage of Salisbury*,[13] real property purchased from the parents of the wife's first husband and titled jointly was retitled in the name of the husband for estate planning purposes. The second husband's argument that it had been transmuted for purposes of division at dissolution to his separate property failed because he had signed a memorandum at the time of retitling in which he promised not to borrow against or sell the property without the written consent of his wife, or his daughters if she were not living, and finally to leave the property to the daughters at his death. The court noted that the agreement may not be legally enforceable but held it was relevant to show the intent of the parties. The court found that sole and absolute title had not been vested in the husband and that transmutation did not occur.

B. *Documentary Transactions*

The issue most litigated is transmutation from separate to marital which creates court power to divide property otherwise classifiable as separate. The intent of the owner of the separate property to contribute it to the marital estate is the key factor in its transmutation to marital property. The leading decision in equitable distributions states is *Conrad v. Bowers*,[14] in which separate property of the husband was exchanged for property which was then titled jointly. The Missouri Court of Appeals combined the traditional common law presumption that joint titling constituted a gift or settlement upon the other spouse with the statutory presumption that property acquired during marriage is marital and concluded that joint titling presumptively constitutes a contribution of the entire property to the marital estate for purposes of division at

11. *In re* Marriage of Salisbury, 643 S.W.2d 821, 824 (Mo. App., W.D. 1982).
12. O'Neill v. O'Neill, 600 S.W.2d 493, 495 (Ky. Ct. App. 1980).
13. 643 S.W.2d 821, 824 (Mo. App., W.D. 1982).
14. 533 S.W.2d 614 (Mo. App., St. L. 1975).

dissolution.[15] Joint titling has been accepted as evidence of transmutation by numerous later decisions in Missouri[16] and other jurisdictions.[17] The effect of an antenuptial or contemporaneous agreement in which the parties agree that joint titling is for a limited purpose such as estate planning or shielding the property from creditors of one party is unknown. The Missouri statute lists property excluded by a "valid agreement" as an exception from marital property.[18] In keeping with *In re Marriage of Salisbury*,[19] an agreement contemporaneous with joint titling could be scrutinized to determine the actual intent of the parties to either benefit the marital estate or the individual property owner. However, in other states these agreements have limited value. California, for example, requires the agreement to be in writing.[20] Some decisions have held that if the property is jointly titled for one purpose then it is jointly titled for purposes of distribution as well.[21] These decisions put the property at risk of distribution if the owner tries to mislead or defraud a third party by joint titling.

C. *Shared Use or Marital Resources Devoted to Separate Property*

It is possible, but unlikely to establish the intent to make a gift or contribution of the separate property to the marital estate without change of title by showing how the property was used. In *Boyce v. Boyce*,[22] the husband had

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15. *Id.* at 622.

16. Layton v. Layton, 673 S.W.2d 462, 464 (Mo. App., E.D. 1984); Weast v. Weast, 655 S.W.2d 752, 755 (Mo. App., E.D. 1983) (money received by gift and inheritance transmuted by spending it to improve jointly titled property); Dildy v. Dildy, 650 S.W.2d 324, 329 (Mo. App., S.D. 1983) (premarital shares carried on corporate books in brokerage firm name transmuted when placed in jointly titled brokerage security account); *In re* Marriage of Salisbury, 643 S.W.2d 821, 823 (Mo. App., W.D. 1982); Hebron v. Hebron, 566 S.W.2d 829, 834 (Mo. App., St. L. 1978); Ledbetter v. Ledbetter, 547 S.W.2d 214, 215 (Mo. App., St. L. 1977).

17. Gorchik v. Gorchik, 10 Ark. App. 331, 663 S.W.2d 941 (1984); *In re* Marriage of Moncrief, 36 Colo. App. 140, 535 P.2d 1137 (1975); *In re* Marriage of Altman, 35 Colo. App. 183, 530 P.2d 1012 (1974); T.N.S. v. A.M.S., 407 A.2d 1045 (Del. 1979); *In re* Marriage of Rogers, 85 Ill. 2d 217, 422 N.E.2d 635 (1981); *In re* Marriage of Butler, 346 N.W.2d 45 (Iowa Ct. App. 1984); Carter v. Carter, 419 A.2d 1018 (Me. 1980); Pascarella v. Pascarella, 165 N.J. Super 558, 398 A.2d 921 (1979); McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985); Chastain v. Posey, 665 P.2d 1179 (Okla. 1983); Madden v. Madden, 552 Pa. Super. 401, 486 A.2d 407 (1985); Bonnell v. Bonnell, 117 Wis. 2d 241, 344 N.W.2d 123 (1984); Trattles v. Trattles, 12 FAM. L. REP. (BNA) 1043 (Wis. Ct. App. 1985).

18. MO. REV. STAT. § 452.330.2 (Supp. 1984).

19. Winter v. Winter, No. 48186, slip op. (Mo. App., E.D. March 26, 1985); *In re* Marriage of Salisbury, 643 S.W.2d 821, 824 (Mo. App., W.D. 1982).

20. *In re* Marriage of Martinez, 156 Cal. App. 3d 20, ___, 202 Cal. Rptr. 646, 651 (1984).

21. *See, e.g., In re* Marriage of Moncrief, 36 Colo. App. 140, ___, 535 P.2d 1137, 1138 (1975); Carter v. Carter, 419 A.2d 1018, 1023 (Me. 1980).

22. 694 S.W.2d 288, 290 (Mo. App., W.D. 1985).

allowed his wife to use his prior-acquired car as though it were her own, every day of the ten-year marriage. Because he gave her total and exclusive use of the car the court held that he intended that the car be part of the marital pool of property. An early decision in which the husband told his wife that her name would be on his employee credit union account and she signed an account card was *Daniels v. Daniels*.[23] The husband never turned the card in or put her name on the account, but she contributed significant portions of her earnings to the account during the marriage. The court held that he had treated the account as marital property and, thus, transmuted it. Since she had not actually used the account by withdrawing from it and he did nothing else to indicate an intent to benefit her as distinguished from aggrandizing himself, the decision may be questioned.[24] Either transmutation by commingling or a division of the account based on the source of funds theory would be more logical under current law.[25]

Most decisions refuse to find transmutation where the separate property owner has shared only use of the property with the other spouse, or has increased the property value with the use of marital funds, or services or the name of the other spouse. When the separate owner shares use or obtains marital funds or effort, the owner is benefitting himself, not indicating an intent to benefit the marital estate or the non-owner spouse. The cases include: family living on the separate property and spending marital funds and efforts to pay for and improve it;[26] spouse signing sales contract, mortgage note, and deed of trust on property;[27] wife acting as officer and guaranteeing loans of husband's separately owned corporation;[28] wife working to farm husband's separate farm and believing it was jointly titled.[29] By carefully requiring evidence inferentially supporting an intent of the separate property owner to benefit the marital community, Missouri courts have avoided the unfortunate and extreme position reached in Illinois. The Illinois courts held that any infusion of marital funds to non-marital property transmuted the latter to marital property.[30]

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23. 557 S.W.2d 702, 704-05 (Mo. App., K.C. 1977).

24. Krauskopf, *supra* note 10, at 184 n.163; Note, *Marital Property and Transmutation in a Noncommunity Property State—Conversion from Separate to Marital Property*, 43 Mo. L. Rev. 770 (1978).

25. See *infra* notes 33-47 and accompanying text.

26. Busby v. Busby, 669 S.W.2d 597 (Mo. App., W.D. 1984); Cochenour v. Cochenour, 642 S.W.2d 402 (Mo. App., E.D. 1982); Hauser v. Hauser, 625 S.W.2d 924 (Mo. App., E.D. 1984); Stark v. Stark, 539 S.W.2d 779 (Mo. App., K.C. 1976). Compare these decisions with those in other jurisdictions finding transmutations from joint use and development. *See, e.g.*, Wanberg v. Wanberg, 664 P.2d 568 (Alaska 1983); Stevenson v. Stevenson, 680 P.2d 642 (Okla. Ct. App. 1984); *In re* Marriage of Jenks, 294 Or. 236, 656 P.2d 286 (1982).

27. Rickard v. Rickard, 691 S.W.2d 391 (Mo. App., E.D. 1985); Hauser v. Hauser, 625 S.W.2d 924 (Mo. App., E.D. 1981).

28. Davis v. Davis, 544 S.W.2d 259 (Mo. App., K.C. 1976).

29. Busby v. Busby, 669 S.W.2d 597 (Mo. App., W.D. 1984).

30. *See, e.g., In re* Marriage of Lee, 87 Ill. 2d 64, 430 N.E.2d 1030, 1031 (1981); *In re* Marriage of Smith, 86 Ill. 2d 518, ____, 427 N.E.2d 1239, 1245-46

Since nearly all income including that from separate property is marital income, only the principal of separate property could be spent on separate property without transmuting it. For example, to use rents from a separate apartment to repaint would risk transmutation to marital property. The effect of the Illinois rule was near elimination of the category of non-divisible property.[31] The Illinois legislature sharply curtailed the courts' transmutation theory. Illinois now recognizes transmutation by joint titling and commingling, but specifically excepts from marital property any increase in value of separate property resulting from either contributions of marital funds or effort.[32]

D. *Commingling*

Commingling separate with marital property often evidences intent to transmute it to marital. This is a well recognized basis for transmutation in community property states if the separate property cannot be traced in a specific amount.[33] When the specific amount of separate property can be identified and traced, it is segregated and must be classified by applying other principles, i.e., the exchange, source of funds, or inception of title rules. Many Missouri decisions hold that commingling one's separate property with marital property evidences an intent to transmute to it to marital. In *Jaeger v. Jaeger*,[34] a Missouri court declared for the first time that commingling constitutes transmutation where the commingled proceeds of the sale of separate and marital shares of stock were used to purchase other shares separately titled. A similar holding involved mixed funds in a savings account from which a car was purchased.[35] Transmutation also occurred where both separate and marital property, including inherited funds, wages of both parties, dividends from separate stock, and proceeds from selling both separate and marital stock, were placed in a separately titled bank account without differentiation.[36] Marital labor and substantial sums of marital money expended to restore a 1961 Chevrolet Corvette transmuted the previously separate property.[37]

However, Missouri courts have not clarified whether tracing the precise amount of separate funds contributed to a piece of property or into a combined account will constitute sufficient segregation to negate an intent to trans-

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(1981).

31. *See* Gregory, *Marital Property in Illinois: The Complexities Wrought by the Presumption of Gift, Transmutation, and Commingling*, 1982 So. ILL. L.J. 159; Kalcheim & Shapiro, *Transmutation and Commingling: The Supreme Court's Rebuttable Presumption of Martial Property*, 71 ILL. B.J. 220 (1982).

32. ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd 1985 Supp.).

33. Stahl v. Stahl, 91 Idaho 794, ____, 430 P.2d 685, 688-89 (1967); *see also* Loeb v. Loeb, 11 FAM. LAW. REP. (BNA) 1169, 1170 (N.C. Ct. App. 1985).

34. 547 S.W.2d 207, 211-12 (Mo. App., St. L. 1977).

35. Anderson v. Anderson, 584 S.W.2d 613, 615 (Mo. App., W.D. 1979).

36. Sturgis v. Sturgis, 663 S.W.2d 375, 379-80 (Mo. App., E.D. 1983); *In re* Marriage of Badalamenti, 566 S.W.2d 229, 233-36 (Mo. App., St. L. 1978).

37. Coddington v. Coddington, 652 S.W.2d 243, 244 (Mo. App., S.D. 1983).

mute. The question is whether loss of identity is necessary for transmutation through commingling. The opinion in *Jaeger v. Jaeger*,[38] suggests that the record did not establish exactly the amount of funds from the sale of separate stock which was combined with marital funds to purchase new stock. In *McLerran v. McLerran*,[39] the appellate court affirmed the trial court's conclusion not allowing husband a specific amount of money for assets he claimed he contributed because no argument was made that they had remained intact or were identifiable so that an exchange would apply. In *Dildy v. Dildy*,[40] where transmutation occurred because separate and marital shares were both placed in a jointly titled account, the court also said in dicta that the separate stocks were commingled so that they no longer retained their identity as the husband's own property. Since the once separate shares remained in the account and were identified, it is possible the court would not have found that a commingling sufficient to transmute had occurred even in the absence of joint titling. A decision in which all commingled funds in a bank account were held marital is significant because it, in contrast, also classified a portion of the cash value of prior-owned life insurance policies as marital property. That portion was sufficiently identified because the premiums which paid for that portion of the cash value were shown to have come from marital funds.[41]

Two decisions may have been different if the ability to segregate and identify by tracing exact amounts of separate and marital money had been asserted. In *In Re Marriage of Pate*,[42] the husband, who had retired from the practice of medicine, had a "trading account" which, evidently, also was used for family expenses. The court chose to interpret the testimony that the account included "funds from investments and other income" to imply that the funds were derived in exchange for property acquired prior to marriage and thus were all separate property. The decision flies in the face of the evidence

38. 547 S.W.2d 207, 210 n.7 (Mo. App., St. L. 1977). In *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., St. L. 1975), the husband incorporated his prior-owned sole proprietorship during the marriage and the wife contributed proceeds of the sale of her prior-owned property to separate property. The husband argued that the corporate stock was his separate property. The court held it all marital property, finding that the lack of evidence on the value of his property at either the time of marriage or the time of incorporation failed to establish exchange and, thus, did not overcome the presumption of marital property. *Id.* at 957-58. The term commingling was not utilized in this early decision; the result, however, is the same.

39. 562 S.W.2d 710, 713-14 (Mo. App., K.C. 1978).

40. 650 S.W.2d 324, 329 (Mo. App., S.D. 1983).

41. Sturgis v. Sturgis, 663 S.W.2d 375, 383 (Mo. App., E.D. 1983). *In re* Marriage of Pitluck, 616 S.W.2d 861 (Mo. App., W.D. 1981), should be contrasted with *Sturgis*. Apparently, no argument was made based on commingling as transmutation and the evidence did not establish the amount of marital money spent on premiums. The court held the full cash value remained separate. *Id.* at 863. If argued appropriately, the value should have been either all marital property by transmutation if the source of funds could not be ascertained and traced, or partially separate and marital according to the source of ascertained funds.

42. 591 S.W.2d 384 (Mo. App., W.D. 1979).

that income, all of which would be marital property, was included in the account. The effect was to find no commingling at all in a situation where most of the funds probably were separate. In contrast, the court in *Goldberg v. Goldberg*,[43] went to the other extreme in finding transmutation by commingling. The wife received $1,980,000 from separate stock. Her father, on her behalf, invested both the principal and income over a three-year period which resulted in an increase of $375,876. The court held the entire $2,355,876 marital property because income from separate property is marital and the income was combined with the principal and reinvested. The opinion did not state whether it was possible to separately determine and trace the amount of income and where it was reinvested. If the marital property in the form of income could be traced so that the portion of newly acquired stock attributable to it could be identified apart from that produced by separate property, the court's finding of an intent to confer the entire $2,000,000 of separate property on the marital estate seems questionable. *Pate* and *Goldberg* reach opposite, but perhaps unwise conclusions, because they recognize no middle ground between finding the funds all separate or all transmuted to marital. Recognition of "segregation" through tracing would reach a more fair result consistent with the cases in which marital funds have been used to pay for or improve separate real and corporate property.[44]

The unanswered question is whether the requisite action for transmutation is the combining of one's separate property with marital property, or the inability to trace once combined. When the amount of separate and marital funds that are combined cannot be identified by tracing, treating the undifferentiated mass as marital by transmutation is in accord with the aim of the property division law to treat marriage as an economic partnership.[45]

However, the statute recognizes separate property and provides that it may be exchanged for other property that remains separate. Identification by tracing is the ordinary method of establishing an exchange. Since transmutation depends upon the intent of the separate property owner to augment the marital estate, it ought to be relevant that he or she kept meticulous records and can trace precisely the amount of separate property remaining in an account or exchanged for other property which remains. Such evidence would

43. 691 S.W.2d 312 (Mo. App., E.D. 1985).

44. *See infra* Source of Funds discussion.

45. On the other hand, the intent-to-segregate requirement to avoid transmutation by commingling, which could be found by tracing to an existing identity, probably would not be met if resort were needed to the fictions of first in, first out or last in, first out. Allowing that type of artificial tracing would result in a system of acquests or gains such as that utilized in some continental countries where the total gain from a marriage is divided at dissolution rather than into categories of marital property. One decision in which this tracing occurred is Allen v. Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979). *Allen* relies on Turley v. Turley, 652 S.W.2d 665 (Ky. Ct. App. 1978), for the proposition that the Kentucky statute requires tracing. However, the concurring judge noted that tracing is inimical to the spirit of marriage and that the exchange exception should not require tracing. *Id.* at 669 (Vance, J., concurring).

negate the required intent to benefit the marital estate.[46] Recognition of segregation by tracing specific amounts of separate property would prevent transmutation of the entire mixed account or piece of property. The situation would then be included in those examples described above where traceable funds of one character have combined to acquire or increase the value of property of a different character. Application of the source of funds rule would provide the solution to the problem of ascertainable and still identifiable amounts of combined funds as well as other property.[47]

IV. Source of Funds Rule

A. *Stated*

The source of funds rule is that the character of property as separate or marital is in proportion to the amount of separate and marital funds or effort devoted to its acquisition or improvement.[48] Source of funds determines classification. It applies to situations not wholly controlled by the acquisition rules or by transmutation. The rule applies to property individually titled but *acquired* by a combination of traceable and ascertainable separate and marital funds or property. Acquisition of property over time is recognized as a dynamic, ongoing process. Source of funds also applies to property of one character increased in value by a combination of ascertainable funds or effort of another character. To the extent that the amounts of marital and separate sources are ascertainable, the value of the property will have a dual character—part marital and part separate in proportion to the marital and separate contributions.[49] The significance of the source of funds rule can best be appreciated by contrasting it with the effects of the inception of title rule.

B. *Contrast Inception of Title Rule*

The inception of title approach classifies property as separate or marital at the moment title is taken or "incepted."[50] Even though marital funds are employed to reduce the indebtedness on separate property or to improve the property, the character of the property remains the same permanently.[51] Thus,

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46. Hall v. Hall, 462 A.2d 1179 (Me. 1983). In Winter v. Winter, No. 48186, slip op. (Mo. App., E.D. March 26, 1985), the court utilized voluminous records to establish exchanges of property rather than commingling.

47. *See infra* discussion of Effect of Source of Funds.

48. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc); Hall v. Hall, 462 A.2d 1179 (Me. 1979); Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982); Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979).

49. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc).

50. *Id.* at 824; Busby v. Busby, 669 S.W.2d 597, 599 (Mo. App., W.D. 1984); Stark v. Stark, 539 S.W.2d 779, 782 (Mo. App., K.C. 1976); Cain v. Cain, 536 S.W.2d 866, 869 (Mo. App., Spr. 1976).

51. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc); Busby v. Busby, 669 S.W.2d 597, 599 (Mo. App., W.D. 1984).

when title in one spouse is obtained prior to marriage or during marriage by gift or in exchange for separate property, no infusion of marital funds will change its character.

1. Extent Applied

Missouri appellate courts prior to *Hoffmann* had followed the inception of title theory in most situations.[52] However, it is not accurate to say that Missouri courts recognized only a unitary character for property, i.e., never dual-marital and separate. Dual character had been recognized when title was created partially by gift and partially in consideration for services or marital funds.[53] Property was also held dual when part was a gift to one spouse prior to marriage and part was a gift to both spouses during the marriage.[54] These situations were consistent with the inception of title rule because the dual character of acquisition was present at the time of original inception. Because it was the different sources of the property at time of inception that determined the character, the same result should obtain under the source of funds rule.

In contrast, Missouri courts have held that rights to pension benefits were separate and marital in proportion to the years of employment prior to marriage and during marriage,[55] without considering that their conclusion was inconsistent with the inception of title rule because the right to the pension incepted prior to marriage. Perhaps the logic of the source of funds theory concerning dynamic ongoing acquisition is so patent in the pension situation that no one questioned it. A similar situation existed in *Sturgis v. Sturgis*.[56] Although the *Sturgis* court applied the inception of title rule to marital funds used to reduce the debt on a prior-purchased airplane, it held the cash value of life insurance policies purchased prior to marriage marital to the extent of premiums paid with marital funds. Like the pension benefits, the "property" in form of added cash benefit came into existence over time as consideration was given for it. Perhaps the obviousness of this process is why the parties in *Sturgis* had conceded that the cash value should be partially marital. The fact that a similar phenomenon is occurring as the debt is reduced and the equity increased in property subject to a purchase money mortgage is less obvious. The result was that Missouri courts were applying the inception of title rule to permit only unitary classification of rights in tangible property acquired for consideration, while at the same time they were recognizing dual classification of intangible property rights acquired for a consideration. The dichotomy could not be justified in principle.

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52. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc).
53. Cochenour v. Cochenour, 642 S.W.2d 402, 406 (Mo. App., E.D. 1982); *In re* Marriage of Kinnick, 621 S.W.2d 104, 106-07 (Mo. App., S.D. 1981).
54. Weast v. Weast, 655 S.W.2d 752, 755 (Mo. App., E.D. 1983).
55. Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982) (en banc).
56. 663 S.W.2d 375, 383 (Mo. App., E.D. 1983).

2. Compensation Methods

Under the inception of title rule separate property that had been paid for or improved with marital funds cannot be divided by the court; a method for compensating the marital estate or the non-owning spouse for the contribution of marital funds therefore is needed. Missouri courts dealt with this issue in four ways. The most questionable method was to ignore the marital contribution on the apparent assumption that dividing the other marital property adequately compensated the parties.[57] A more common method was to compensate the parties for marital funds or effort expended on separate property by considering reimbursement as a factor when dividing the marital property.[58] However, the appellate courts did not require findings on the amount of marital funds or value of marital effort devoted to the separate property, or on the specific amount of reimbursement to be made. Consequently, it was not possible to review whether the reimbursement was accomplished, or was equitable in amount. Furthermore this method was wholly ineffective if there was not sufficient other marital property to give the non-owning spouse in consideration for her or his share of the contribution to the separate property. Even if the marital property was insufficient because marital funds had been diverted to the enhancement of separate property, there would be inadequate reimbursement or no reimbursement at all.[59]

A recently used method of compensation was to determine exactly the share of the non-owner spouse in the marital funds spent on the separate property and to order that amount paid to the non-owner by the owner of the separate property. A charge or lien could be placed against the separate property to secure payment.[60] This was a shorthand way of determining that the marital estate was owed the funds or the value of the labor devoted to the separate property, and therefore, total marital property was augmented by that amount. This allowed for a fair division of the augmented marital property. This was the better method because it determined the amount of reim-

57. Stapleton v. Stapleton, 637 S.W.2d 210 (Mo. App., E.D. 1982).

58. Sturgis v. Sturgis, 663 S.W.2d 375, 382 (Mo. App., E.D. 1983); Cochenour v. Cochenour, 642 S.W.2d 402, 406 (Mo. App., E.D. 1982); Null v. Null, 608 S.W.2d 568, 570 (Mo. App., S.D. 1980); Hull v. Hull, 591 S.W.2d 376, 381-83 (Mo. App., W.D. 1979); Stark v. Stark, 539 S.W.2d 779, 783 (Mo. App., K.C. 1976); Cain v. Cain, 536 S.W.2d 866, 875 (Mo. App., Spr. 1976).

59. For criticism of the results in Stark v. Stark, 539 S.W.2d 779 (Mo. App., K.C. 1976), and Davis v. Davis, 544 S.W.2d 259 (Mo. App., K.C. 1976), see Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 182-83 (1978).

60. Winter v. Winter, No. 48186, slip op. (Mo. App., E.D. March 26, 1985); Bishop v. Bishop, 677 S.W.2d 413 (Mo. App., E.D. 1984); Puckett v. Puckett, 632 S.W.2d 83, 85 (Mo. App., E.D. 1982); *see also* Daniel v. Daniel, 639 S.W.2d 650 (Mo. App., S.D. 1982) (maintenance in gross); Rickelman v. Rickelman, 625 S.W.2d 901 (Mo. App., E.D. 1981) (no lien); Ravenscroft v. Ravenscroft, 585 S.W.2d 270, 272 (Mo. App., W.D. 1979) (dicta concerning liens; separate money spent on marital property); Whitenton v. Whitenton, 659 S.W.2d 542, 548 (Mo. App., E.D. 1983) (separate money of one spouse spent on separate property of other spouse).

bursement that should be made, ordered it paid even though other marital property was insufficient, and secured payment. However, the reimbursement was limited to the exact amount of marital funds expended.[61]

The effect of the inception of title rule, which allows reimbursement only for the amount of marital funds or value of marital effort devoted to separate property, is that the marital estate and the other spouse do not share to any extent in the increased value attributable to general economic conditions and market forces. The case of *Cain v. Cain,*[62] involved *payment of the purchase* prior to the marriage for separate property that later increased in value. The husband entered into a $16,500 purchase money mortgage prior to his marriage in 1958 for the purchase of property on the outskirts of Joplin for $20,000. He paid approximately $4,500 toward the purchase price before marriage, and approximately $26,500 of marital funds was devoted to payment on the mortgage debt during the marriage. Evidence in the dissolution action in 1975 showed that the market value of the property was $565,000, with $5,000 still owing on the mortgage thus leaving equity of $560,000. Under the inception of title rule the marital estate obtained no return for its investment in this property. At most, the marital interest would be $26,500. If this were divided equally, the wife's share would be $13,250. The *Cain* court decided that the amount contributed should have been considered along with other factors in dividing the marital property. The court held that this factor along with the wife's economic need entitled her to $61,500 more of the marital property than the trial court had awarded. Presumably, no more than $26,500 of that was reimbursement for the funds expended to pay for the husband's separate property. He retained the full $560,000 equity in the tract as his separate property.

When *improvements* have been added to separate property with marital funds, marital effort, or a combination of marital funds and effort, there is no sharing of the proportion of later economic increase in value attributable to those improvements. In *Stark v. Stark,*[63] $12,000 in marital funds were used to construct a home and other improvements on the husband's land. The court acknowledged that an additional $15,000 enhancement in the property's value was attributable to the inflated value of that improvement. Although the marital estate could establish and be reimbursed for the value of marital services and amount of marital money contributed, it could not share that additional increase in value under the inception of title theory.

A similar result obtains when *marital efforts increase the value of a close corporation* in which the spouse's shares were acquired prior to the marriage. When the inception of title rule is applied the fact of ownership prior to marriage allows marital labor, which ought to be devoted to the marital partnership, to aggrandize separate property. The rule recompenses the marital estate

61. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc).
62. Cain v. Cain, 536 S.W.2d 866 (Mo. App., Spr. 1976).
63. 539 S.W.2d 779 (Mo. App., K.C. 1976).

only for the value of the marital efforts not previously compensated and leaves the share-holder the entire increase in value attributable to that labor. A dramatic difference of opinion concerning this issue between the court of appeals and members of the supreme court in Texas, the leading inception of title state, was resolved in accord with the traditional "reimbursement theory," following withdrawal of an earlier contrary opinion. In *Jensen v. Jensen*,[64] the husband had acquired the shares a couple of months prior to the marriage and by his efforts had increased their value significantly. The court applied the inception of title or "reimbursement theory," holding that the marital community was entitled to reimbursement only for the time and effort devoted over and above that reasonably required to manage and preserve the separate estate, and that reimbursement would be allowed only if compensation for services rendered had not been adequate.[65]

C. *Rationale for Adopting Source of Funds Rule*

In *Hoffmann v. Hoffmann*,[66] the Missouri Supreme Court noted that the inception of title rule has been subject to substantial criticism because it deprives the non-owning spouse of any appreciable return on his or her investment.[67] The court also referred to the Maine court's recognition that depriving the marital unit of a proportional increase in value attributable to improvements made with marital funds or labor creates incentive for a sophisticated spouse to divert marital funds for the improvement of separate property.[68] For these reasons the court found the source of funds theory the preferable method to apply in Missouri and ruled that cases applying the inception of title rule should no longer be followed in that regard.[69]

The Missouri Supreme Court said that the source of funds rule emphasizes a theory of marital partnership and noted, "By adopting the source of funds theory, our statutes and their purpose of promoting the partnership theory of marriage will be consistent in providing for the most equitable distribution of property."[70] The court specifically referred to the Maine Supreme Court's statement in a leading case that the marital community should be en-

64. 665 S.W.2d 107 (Tex. 1984).
65. *Id.* at 110.
66. 676 S.W.2d 817, 824 (Mo. 1984) (en banc).
67. *Id.* (citing Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982); Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157 (1978); Note, *Dissolution of Marriage—Division of Property Which has Increased in Value*, 42 MO. L. REV. 479 (1977); Note, *Marriage Dissolution: An Equitable Approach Toward Property Distribution*, 45 MO. L. REV. 538 (1980)).
68. Hoffmann v. Hoffmann, 676 S.W.2d 817, 825 (Mo. 1985) (en banc) (citing Hall v. Hall, 462 A.2d 1179, 1182 (Me. 1983)); *accord* Heilman v. Heilman, No. 66908, slip op. (Mo. Dec. 17,1985) (en banc).
69. Hoffmann v. Hoffmann, 676 S.W.2d 817, 825 (Mo. 1984) (en banc).
70. *Id.; accord* Heilman v. Heilman, No. 66908, slip op. (Mo. Dec. 17, 1985) (en banc).

titled to share in the proportionate increase in value of property attributable to improvements made by *marital funds and labor*.[71] A common pleas judge in Pennsylvania has clarified the basis for this reasoning by saying that equitable distribution is based on the concept of marriage as a shared enterprise so that when marital assets and efforts contributed to the value of an asset, the asset should not be outside the marital enterprise.[72] In another case the same judge said that the cornerstone of equitable distribution is that the activities of either party during marriage are considered taken on behalf of the marital enterprise; therefore, to the extent that one spouse benefits from his or her labor, the benefits accrue to both partners.[73] This explanation is consistent with early analysis of the theory underlying the Missouri statute.[74]

V. Changes Required in Law and Practice by Source of Funds Rule

A. *Determining Dual Character of a Single Item of Property*

The first change in Missouri law that the *Hoffmann* holding requires is that, when separate and marital resources have been devoted to a single piece of property and those amounts are ascertainable, the trial court must determine what portion of its value is separate property and what portion is marital property. The court must then set apart the separate portion to the separate owner and divide the marital portion. Determining the amount of marital contribution is no longer a matter of discretion because the character of the property itself is different than under the inception of title rule. Property that formerly was wholly separate, now is part marital. The statutory language is mandatory in requiring the court to divide the marital property.[75]

When there is evidence of separate and marital resources combined, and those amounts are ascertainable, the trial court should be required to make findings regarding the amount of marital resources involved. This is necessary to carry out its mandate to determine what is marital and what is separate property. The trial court should have no discretion in carrying out this step, although it does when dividing property already classified as marital. In *Dardick v. Dardick*,[76] the Missouri Supreme Court held that a trial court need not make specific findings as to the value of marital or separate assets when there was only a general request for findings of fact. The court justified its

71. *Id.* at 825 (citing Tibbetts v. Tibbetts, 406 A.2d 70, 76-77 (Me. 1979)).
72. Birkel v. Birkel, 9 Fam. L. Rep. (BNA) 2191 (Pa. Ct. C. 1982).
73. Pascoe v. Pascoe, 11 Fam. L. Rep. (BNA) 1091 (Pa. Ct. C. 1984).
74. *See* Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. Rev. 165 (1976).
75. Mo. Rev. Stat. § 452.330 (1978); Corder v. Corder, 546 S.W.2d 798 (Mo. App., K.C. 1977). In Summers v. Summers, No. 67028, slip op. (Mo. Dec. 17, 1985) (en banc), and Heilman v. Heilman, No. 66908, slip op. (Mo. App., E.D. March 26, 1985), the court remanded for such a determination.
76. 670 S.W.2d 865 (Mo. 1984) (en banc).

decision on two bases: specific findings as to all property in all dissolution cases would place too onerous a burden on trial courts; division of marital property is consigned to the sound discretion of the trial court thus not requiring specific findings for appellate review limited to abuse of discretion.[77] Neither of these reasons appears applicable to the issue of classification of portions of property made up of combined separate and marital resources. However, any attorney litigating the proportion issue should request specific findings of fact.

B. *Full Value Classified in Proportion to Sources*

The significant substantive change that *Hoffmann* and the source of funds rule makes is that the full value of the property, including the increased value due to economic or market forces, must be classified separate and marital *in proportion* to the separate and marital contributions to its acquisition or improvement. The practical effects are that the non-owner shares in the increase in value and the incentive to draw off marital funds and efforts for the sole enhancement of separate property is decreased. Now use of marital funds or effort on separate property will be an investment in which the marital unit as well as the separate owner has opportunity to gain. The facts of *Cain* are instructive. Rather than a maximum of $26,500 added to the marital estate, $436,000 would be marital property. If divided equally, the non-owner spouse would get $128,000 rather than $13,250. Although this extreme disparity may not often occur, as noted by the concurring judge in *Hoffmann*,[78] when it does, furtherance of the partnership marriage concept is achieved only by the source of funds theory. Typically, modest amounts such as the $15,000 increase in value due to improvement in *Stark*[79] will be involved. As a practical matter under the inception of title rule the attorneys should have isolated the amount of contribution in order to determine the amount of reimbursement required. Thus, the change in practice should be primarily in providing evidence of increase in value. It is the substantive right to claim a share in that increase that is significantly different. A few years ago, a decision in a case of first impression in Missouri reached a similar result for a business partnership under the partnership statute. In *Gauldin v. Corn*,[80] the court held that the nonlandowning partner was entitled to his proportionate share of the value of improvements made with partnership funds upon the landowning partner's land. Consistent treatment between business and marital partnerships is warranted by the theory that marriage is a partnership.

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77. *Id.* at 868.

78. Hoffmann v. Hoffmann, 676 S.W.2d 817, 829 (Mo. 1984) (en banc) (Blackmar, J., concurring in part, dissenting in part).

79. 539 S.W.2d 779 (Mo. App., K.C. 1976).

80. 595 S.W.2d 329 (Mo. App., S.D. 1980).

C. *Transmutation Remains and Commingling Clarified*

Source of funds is a theory for classifying property by analyzing the time and nature of acquisition of the property, whereas transmutation is a method for determining whether the parties during or after the acquisition process *intended* the property to have a different classification than that indicated by the acquisition process alone. Therefore, adoption of the source of funds theory is compatible with continued recognition of transmutation. The Supreme Court of Maine is the leading example of a court applying both source of funds and transmutation.[81] For example, absent joint titling in *Cain*, the property is part separate and part marital because acquired with known amounts of combined funds. However, if the property were jointly titled by the husband, the rule of *Conrad v. Bowers*[82] would presumptively characterize it as wholly marital due to his manifested intent.

A clarification should be made involving commingling. As discussed above, it has been unclear in Missouri whether transmutation by commingling occurs only when specific amounts of separate and marital property can no longer be identified through tracing. The principle of consistency would require that portions of a single piece of property or a bank account that can be traced and *remain identified* as marital should be classified marital under the source of funds rule. The proportionate increase in value attributable to that portion would also be marital. Commingling and transmutation of the entire piece of property or account acquired with combined marital and separate funds would occur only when the respective amounts cannot be traced *and identified as still existing.* If resort to accounting conventions such as "first in, first out" were needed to estimate specific amounts, identification would not be sufficient for application of source of funds. Transmutation by commingling would result in the entire fund being marital. For example, in *In re Marriage of Pitluck*,[83] where both separate and marital funds were used to pay for insurance premiums on policies acquired prior to marriage, the court held the entire cash value separate. The non-owner spouse argued for a source of funds result instead of transmutation but could not show the amount of marital funds contributed. Under current law, source of funds would not apply because the amounts cannot be determined. Commingling by transmutation should apply and classify the entire value as marital, not separate. Such trans-

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81. *See, e.g.*, Hall v. Hall, 462 A.2d 1179 (Me. 1983); Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979). Grant v. Zich, 300 Md. 256, ____, 477 A.2d 1163, 1171-73 (1984), apparently is the only decision in equitable distribution states refusing to recognize transmutation from joint titling after adopting the source of funds theory. The opinion overzealously relied on language in Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982), in which the court had adopted source of funds and criticized the unwise extension of transmutation that occurred in Illinois.

82. 533 S.W.2d 614 (Mo. App., St. L. 1975) (discussed *supra* at III. Effect and Methods of Transmutation).

83. 616 S.W.2d 861, 862 (Mo. App., W.D. 1981).

mutation by commingling was the result in *Goldberg v. Goldberg*,[84] where an unstated but apparently small amount of marital funds were combined with nearly $2,000,000 worth of separate property and reinvested. However, under the source of funds rule, if the marital portion could be traced and currently identified, no transmutation by commingling should occur. The investments should be divided in proportion to the traced and identified contributions.

D. *Special Problems: Marital Funds*

1. Improvements

When improvements have been added to separate property with marital funds and the property has increased in value over and above the amount invested, expert opinion should differentiate the portion of the increase attributable to the improvements. In *Layton v. Layton*,[85] the trial court stated that the improvements with marital funds increased the equity by $21,500. Although the opinion does not indicate what evidence established this fact, presumably it included both the amount spent and its proportionate increase in value. The case is a good model for applying source of funds theory. The trial court correctly added the $21,500 increase attributable to the marital funds to the total of marital property and then found that the share of that marital property to which the non-owner wife was entitled was one-half. The trial court then correctly gave the wife a lien against the husband's separate property to insure payment of her share. Unfortunately, the court erred in determining the amount so that the appellate court modified it to give the wife $10,750 and a judgment lien for that amount.

2. To Pay for the Property

The threshold hurdle for a spouse claiming a marital interest in separate property is to establish that marital funds were devoted to acquiring the property. In *Rickard v. Rickard*,[86] the husband received real estate by will from his uncle but heirs of the uncle contested the will. The husband and wife borrowed $6,000, giving a note and deed of trust on the contested property, to pay the contesting heirs. Marital funds paid the note. The court held that marital funds expended had not been used to acquire the property because the loan was not utilized to make payment for the property but rather to buy peace by settling the lawsuit. The property was acquired through the will and order of distribution of the probate court. Therefore, no portion of the property was marital. The court referred to the the *Hoffmann* opinion's definition of "ac-

84. 691 S.W.2d 317 (Mo. App., E.D. 1985); *see also supra* text accompanying note 42.

85. 687 S.W.2d 214, 216 (Mo. App., W.D. 1984).

86. 691 S.W.2d 391 (Mo. App., E.D. 1985). The court found persuasive an analogous Maryland decision: Gravenstine v. Gravenstine, 58 Md. App. 158, 472 A.2d 1001 (1984).

quired" as the "on-going process of making payment for property."[87]

In *Bashore v. Bashore*,[88] title to real property was placed in the husband's name alone and some payments were made prior to the marriage. The debt was fully paid during the marriage, however, the court held the entire property marital. The money paid prior to marriage came from a jointly titled bank account in which both parties had deposited funds at a time when marriage was contemplated, thus, the source of all the funds spent was held "marital."

3. To Pay on Mortgage Debt for the Property

a. Interest

When determining the portions contributed by separate and marital funds in financed property, the first issue is whether to include interest on the debt in the contributions. The Missouri Supreme Court in *Hoffmann* described the source of funds rule as determining the character of property by "the source of funds financing the purchase,"[89] but later said it adopted the definition of "acquired" as being the "on-going process of making payment for acquired property."[90] In keeping with the court's concern for allowing the marital estate and the non-owning spouse a return on investment of marital funds, and with the ordinary meaning of "financing," interest payments would be included. The figures as presented by the wife in the *Cain* case include the amounts paid for interest. The language of *Harper v. Harper*[91] cited by the *Hoffmann* court is sufficiently broad to include interest. The *Harper* court also quotes favorably from *Vieux v. Vieux*,[92] an old California decision which included interest payments as part of the purchase price. However, neither *Vieux* nor *Harper* discuss the question of interest.

In contrast, there are arguments for not including interest in Missouri. The *Hoffmann* court cites and quotes from *Tibbetts v. Tibbetts*,[93] which illustrated how to account for the separate portion of property paid for with both marital and separate by using only the amounts paid on principal and not discussing interest. The *Hoffmann* opinion also cites *Moore v. Moore*,[94] as authority for source of funds adoption in community property states. *Moore* held that interest is not to be included when determining the relative portions of separate and marital funds spent.[95] The court distinguished *Vieux* as not hav-

87. Rickard v. Rickard, 691 S.W.2d 391, 392 (Mo. App., E.D. 1985).
88. 685 S.W.2d 579, 582-83 (Mo. App., W.D. 1985).
89. Hoffmann v. Hoffmann, 676 S.W.2d 817, 824 (Mo. 1984) (en banc).
90. *Id.* at 825.
91. 294 Md. 54, 448 A.2d 916 (1982).
92. 80 Cal. App. 222, 251 P. 640 (1926).
93. *See, e.g.*, Brandenburg v. Brandenburg, 617 S.W.2d 871, 872 (Ky. Ct. App. 1981).
94. 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980).
95. *See* Note, *Source of Funds, The Preferred Alternative*, 50 Mo. L. Rev. 930 (1985) (this issue) for explanation of the figures and computations in *Moore*.

ing discussed the issue. The *Moore* court stated, "The value of real property is generally represented by the owner's equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment."[96] It said that expenditures such as interest, taxes, and insurance do not contribute to the capital investment.

The weakness in the *Moore* court's reasoning denying inclusion of interest as part of the contribution is that the issue to be determined is *who* is the owner of the equity, not what is equity. This question exists in a source of funds jurisdiction because the goal is to adequately protect the marital estate for its investment. The more specific question is what is the investment, not what is the equity. Surely, in common parlance "investment" and "financing" include the cost of borrowing funds to acquire property. In that sense the cost of borrowing contributes to the capital acquisition. If the aim of adopting the source of funds rule is to discourage use of marital funds for the benefit of a separate property owner, both funds spent to reduce the principal and to pay the interest on a mortgage loan should be considered in arriving at the proportionate shares of each.

On the other hand, the theoretical benefits of including interest payments may be outweighed by the burden of complicating the source of funds search. The *Moore* court considered interest a cost of maintaining property similar to taxes, and noted that taxes and insurance also are costs of acquisition. The next step would be an argument that the marital estate used the portion of the property allocated to the separate property owner; therefore credit should be given to that owner for contributing the use value.[97] Such hairsplitting arguments and complex calculations would seriously burden the already onerous task of dividing property. Obviously, the interest issue is open not only in Missouri but in numerous other jurisdictions as well.

b. Determining Proportionate Amounts When a Mortgage Debt Exists

A three-step process will account for the proportionate shares of the separate and marital estates when a mortgage debt is still outstanding. Step 1 determines the value of the equity; step 2 determines the percentages of separate and marital contributions to the acquisition of the property; step 3 multiplies the equity value by the separate and marital percentages to determine what proportion of the property is separate and what is marital. Only step 2 is difficult.

Step 1. Because it is the equity in the property at time of dissolution that is at issue, the first step must determine the equity at the time of dissolution by subtracting the remaining debt from the market value. For example, if $10,000 is owed on property having $30,000 market value, then the equity is $20,000.

96. 28 Cal. 3d at 372, 618 P.2d at 211, 168 Cal. Rptr. at 655.
97. *Id.*

Step 2. The second step requires the determination of the relative percentages of the contributions toward acquisition of the dual-character property by use of separate property and marital funds. There are two major methods of determining contribution which can produce widely varying results when the property has been mortgaged.

a) Accounting for Loan Value

In California the total purchase price (interest not included) is used as the source for the equity at time of dissolution.[98] In other words, the appropriate contribution figure for which percentages are determined is not the amount spent up to the time of dissolution, but rather the total needed to pay for the property. This figure is used because the loan itself is essential to the acquisition of the property.[99] This method deems the economic value of the loan as equal to the dollar amount of the loan.[100] In effect, the funds that will pay off the loan in the future as well as the funds already spent are considered a contribution to the property.

When this method is employed, the amount of money already contributed should be determined first. Because California does not include interest, only down-payment and the amount by which the principal has been reduced by separate and marital funds is determined. In *Moore v. Moore*,[101] the wife had purchased the property prior to marriage for a price of $56,000, paying $16,000 before marriage representing her separate property contribution. During the marriage, community contribution reduced the principal approximately $5,000. In addition, under the loan value method, funds to be paid in the future must be added to those already paid. How to allocate the remaining debt depends upon whether the debt is that of the separate property owner or of the marital partners. The remaining debt should be attributed to the separate property owner if it will be paid off by that person. This is most likely if, as in *Moore*, it was incurred individually prior to marriage. In *Moore*, $35,000 was still owed at dissolution. Since the wife would pay this off, her total contribution to the property was figured at approximately $51,000, or 91% of the purchase price. A similar result should obtain if the separate property owner assumes the responsibility of paying the joint debt as part of the dissolution

98. Moore v. Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980); Graham, *Using Formulas to Separate Marital and Non-Marital Property: A Policy Oriented Approach to the Division of Appreciated Property Upon Divorce*, 73 KY. L.J. 41, 70 (1985).

99. *Id.*

100. Similar reasoning and accounting was used in Missouri to give a non-marital homemaker partner credit for contribution to property acquired during the cohabitation. The property was titled only in the name of the other partner but the homemaker also signed the mortgage note. Brooks v. Kunz, 597 S.W.2d 183 (Mo. App., E.D. 1980).

101. Moore v. Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980). See Note, *supra* note 95, at 933-35, for explanation using terminology of the *Moore* case, labeling the borrowed funds marital or separate depending upon which source will pay for the debt.

settlement. Only if the remaining debt is to be paid off with marital property, should the amount be allocated to the marital estate. In the *Tibbetts* case for example, the debt was joint so the remaining amount owed was added to the previously paid marital funds to reach a total of three-quarters of the purchase price from marital funds. The effect in the example was to give the marital estate credit for the economic value of the loan as a contribution to the property's acquisition, resulting in a three-quarters marital interest.

When the property is sold to pay off the debt, the logic of the loan value method would require substituting for the loan value amount the sale proceeds applied to eliminate the debt. The sale proceeds retiring the debt must be allocated to the separate or marital estate. If it was the separate property owner's debt (prior to the marriage) and, in the absence of sale, he or she would have paid it after dissolution then the economic value of that loan should be credited to the separate owner. By the same token, if the debt was marital because jointly incurred, then the amount of the sale price devoted to paying off the debt should be considered a marital contribution. Such treatment would be consistent with the source of funds and exchange concepts based on tracing.

Whether this method of determining source of funds is wise should be evaluated by considering its effect on division of the equity. When a relatively large amount remains unpaid on the debt, as in *Moore*, the estate credited with the loan value will get most of the increased value whether the increase occurred during the marriage or not. For example, in *Moore* the increase in value was approximately $104,000. The wife would get 91% percent of this already existing value even though it may have developed during the marriage. The amount to be divided as marital property would be only $9,300. The effect is to constrict the marital value available for equitable distribution. The justification for the separate owner receiving most of the value lies in the fact that her credit obtained the loan that enabled her rather than someone else to have title to the land and that she will pay off that percentage of the loan.

b) Considering Only Actual Payments

The Missouri Supreme Court said that the source of funds theory defines "acquired" as being an "on-going process of making payment for acquired property."[102] This definition suggests an emphasis on actual payment rather than loan value. If the equity which exists at the time of dissolution were acquired only by actual payment, the loan value would be ignored as a contribution to acquisition. The percentages then allocated to separate and marital contributions could be drastically different. This actual payments method of determining respective contributions is applied in Kentucky.[103]

In *Newman v. Newman*,[104] the Kentucky Supreme Court held that the

102. Hoffmann v. Hoffmann, 676 S.W.2d 817, 825 (Mo. 1984) (en banc).

103. Missouri and neighboring Kentucky have nearly identical property division statutes. *See* KY. REV. STAT. § 403.190 (1972); MO. REV. STAT. § 452.330 (1978).

104. 597 S.W.2d 137 (Ky. 1980).

equity in property should be divided according to the percentages of the separate and marital contributions to the equity, not to the total purchase price or cost. Non-marital contributions were described as the equity in the property at the time of marriage plus non-marital funds spent in reduction of mortgage principal during the marriage. Marital contributions were defined as the amount expended after marriage from other than non-marital funds in reducing mortgage principal or improving the property. No mention was made of the loan value or of giving credit to the source which would pay off the loan after the marriage.

Although there is some variety among Kentucky courts in the formula used to apply the actual payment method of determining contributions,[105] the reasoning and application of the method by the Kentucky Court of Appeals in *Brandenburg v. Brandenburg*[106] is instructive. The husband had purchased the first property discussed in the opinion prior to the marriage for $15,900, paying $900 cash and giving a mortgage for $15,000. He then paid approximately $325 more on the principal. There apparently was no evidence of value of the property at the time of marriage because the court found the equity value at that time to be $1,252. The marital contribution was the amount of marital funds spent during the marriage to reduce the principal, approximately $1,175. The property was sold at some time during the marriage and approximately $13,800 of the $32,500 proceeds were used to extinguish the debt. The court did not classify the proceeds from the sale which extinguished the debt as either separate or marital, but ignored them as a contribution to the property. No credit was given for the loan value at all. Presumably, if the property were not sold and the debt were to be paid off after the marriage, the same process would be applied. The actual payment approach treats the equity existing either at the time of dissolution or at the time of earlier sale as the only "property" being divided and treats only actual payments as contributions to its acquisition. Consequently, only the actual payments are relevant in dividing the equity. In *Brandenburg*, the equity over and above $13,800 from the sale paid on the debt was $19,000. The court figured the separate ($1,252) and marital ($1,195) contributions as 51.6% and 48.4% respectively and classified the equity as $9,800 separate property and $9,200 marital property. One may question ignoring the $13,800 as property acquired during the marriage which itself should be classified. However, it would be credited in the same proportion as the contributions previously made, so that the percentages of separate and marital contributions would remain the same. To recognize that amount would not change the percentages, which are the key to dividing the remaining "property," the equity.

To decide whether the actual payments method should be preferred over the loan value method, the results should be compared. If there is an outstanding debt for which only one of the spouses will be responsible in the future, the

105. *See generally* Graham, *supra* note 98 (discussion of Kentucky cases).
106. 617 S.W.2d 871 (Ky. Ct. App. 1981).

actual payments method results in a greater portion of the equity being marital and subject to division. In *Brandenburg*, had the loan value and the sale proceeds allocated to extinguishing it been considered a separate contribution, the marital property contribution of $1,175 would have been compared to a total separate contribution of $15,000. The marital property percentage would have been only 7% of the total contributed. Thus, only $1,331 of the $19,000 equity would have been marital rather than $9,200. In *Moore* had the actual payment method been utilized, only the $16,000 actually paid by the wife would have been her contribution. The total contributions would not have been the purchase price, but rather, the sum of the separate $16,000 and the marital $5,000 payments, $21,000. The marital contribution would have been 23% and the separate contribution 76% rather than 91%. Of the $104,000 equity, the marital property would have been $23,900 rather than only $9,300. Thus, when marital funds have been devoted to separately titled and mortgaged property, the two most pronounced effects of the actual payments method of determining relative contribution are relative simplicity in application and an increased amount of marital property to be divided.

4. Value Increases Unevenly Over Time

In most of the cases apportioning a single piece of property between the separate and marital estates, the apportionment formulas operate as though the rate of increase in value of the property is constant with the rate of contribution by the separate and marital elements. For example, in *Moore*[107] the property was worth approximately $56,000 when purchased prior to the marriage and worth approximately $160,000 at the time of dissolution. An argument could be made that if this entire increase occurred prior to the marriage, the funds applied by the marital estate during the marriage did not contribute at all to the increase and the marital estate should not be credited with any of it. In fact, the Kentucky courts have recognized and provided for this phenomena by giving the separate estate credit for contributing both the payments to reduce the mortgage and the increase in value prior to the marriage.[108] In other words, the complete equity at time of marriage is the separate owner's contribution. This is an important aspect of the Kentucky approach.

However, the property could increase in value unevenly during the marriage so that the percentage of marital contribution would not match the rate of increase in which the marital estate is permitted to share even under the Kentucky approach. For example, assume the property was purchased for $10,000; $5,000 was paid prior to marriage, and $5,000 was paid from marital funds during the marriage with the payments extending over five years. Assume during the first year of marriage the value increased fivefold to $50,000 and $1,000 of the marital funds was applied to the principal. It could be ar-

107. 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 622 (1980).
108. Brandenburg v. Brandenburg, 617 S.W.2d 871, 872 (Ky. Ct. App. 1981).

gued that the separate estate had contributed five-sixths of the total contributions at that time and should be entitled to five-sixths of the increase. However, if the marital funds paid on principal after the increase occurred were included in determining total contributions, then each estate would have contributed $5,000 and the increase would be classified one-half separate and one-half marital. The same phenomenon could occur when one contribution was the land and the other was an improvement to the property. For example, one party brought the land to the marriage and marital funds provided the source for building a home on it. If it could be established that most of the increase in value was due to economic conditions affecting the value of land as distinguished from structures on the land, the separate property owner who contributed the land would argue for credit for all the increase.[109] Once again, as a matter of policy the relative benefit to be gained from permitting litigation on this point should be weighed against the complexity and cost of indulging in it. Perhaps the Kentucky system of considering equity value at only two points, time of marriage and time of dissolution, is a justifiable compromise.

E. *Special Problems: Marital Effort*

1. Maintenance or Capital Improvement

In *Rickard v. Rickard,*[110] the wife claimed that her efforts had improved the husband's separate property so as to give her an interest in the property. Unfortunately, the opinion does not state what those efforts produced, but the court held that her contributions merely made the home more comfortable for living during their occupancy and did not enhance the capital value of the property. All the increase in value was attributed to the commercial value of the land, which presumes removal of the residence. This is in accord with decisions in Oklahoma holding that the efforts must be substantial and more than mere maintenance.[111] Apparently, the courts will differentiate between efforts such as painting the walls in contrast to installing new flooring or helping to build a new addition.

2. Metamorphosis Due to Efforts Over Time

A not uncommon situation occurs when most of the normal "working hour" efforts of one or both of the parties is devoted to managing, selling, and reinvesting again and again property brought into the marriage or inherited during the marriage. When this continues for many years, the property in existence at the time of dissolution is a result of separate property and marital effort so commingled that it is no longer possible to attribute a certain portion

109. Such an attempt succeeded in Rickard v. Rickard, 691 S.W.2d 391, 394 (Mo. App., E.D. 1985).

110. *Id.*

111. *See, e.g.,* Templeton v. Templeton, 656 P.2d 250 (Okla. 1983); Bowman v. Bowman, 639 P.2d 1257 (Okla. Ct. App. 1981).

of its value to exchange for the original separate property and another portion to the marital efforts. In effect, marital effort has caused a metamorphosis of the original separate property into a new product attributable to both sources. Missouri courts have not dealt with this problem since *Hoffmann*. In other states, various theories have been applied to classify the result as marital property subject to division. In *Brennan v. Brennan*,[112] the husband owned a small herd of cattle and some farm equipment at the time of marriage. Twenty years later the couple had a dairy business worth $90,000. The New York court held that most of the increase in value was due to the efforts and activities of the two marital partners rather than to the modest original separate property. In accordance with the source of funds theory, the court held the increased value was marital property subject to division. In a similar situation, the Alaska Supreme Court reached the same result using the transmutation theory. In *Wanberg v. Wanberg*,[113] the husband had brought rental real estate to the marriage. During the marriage years, the couple acted as partners in improving and managing these properties. The court held that when both spouses take an active interest in the ongoing management and control of specific assets, they evidence an intent to treat the property as joint. The Alaska decision is in accord with the commingling and "joint use" bases for finding transmutation of the entire value, but the source of funds theory could have been utilized in regard to the increase in value if the evidence established value at time of marriage and at time of dissolution.

The source of funds theory has been applied to recognize marital efforts as the source of increase in shares of stock between the time of marriage and dissolution. In *Beam v. Bank of America*,[114] the husband earned his living trading stocks. The California court held that the increase in value of stock which he brought to the marriage was due to his marital efforts in investing and reinvesting the stock and, therefore, was community property. A New York court has applied the same reasoning.[115] The Kentucky Supreme Court reached the same result by classifying the "profits" of a business buying and selling real estate as income rather than increase in value of the real estate brought to the marriage. The court emphasized that when a spouse earns a livelihood from the profit on buying and selling property, that profit is his "stock in trade" and income as contrasted with increase in value. The court quoted from the comments to the Uniform Marriage and Divorce Act, upon which the Kentucky and Missouri statutes are based, stating that income from non-marital property is marital property.[116] Missouri cases recognizing that income is marital property, and that the product of non-marital property is income, are probably precedent to classify the product of marital effort in investing nonmarital property as income, as opposed to using the source of funds

112. 103 A.D.2d 48, 479 N.Y.S.2d 877 (1984).
113. 664 P.2d 568 (Alaska 1983).
114. 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr 137 (1971).
115. Nolan v. Nolan, 107 A.D.2d 190, 193, 486 N.Y.S.2d 415, 419 (1985).
116. Sousley v. Sousley, 614 S.W.2d 942, 943 (Ky. 1981).

theory.[117]

3. Increased Value of Close Corporation Shares

The most difficult problems in dividing property at marriage dissolution concern classification of the increase in value of shares of a close corporation titled in one spouse's name and acquired by that spouse prior to the marriage or during marriage by gift or inheritance. If either spouse's efforts may have increased the value of those shares during marriage, two major problem areas exist in applying the source of funds theory. These will be discussed in this subsection. We will then discuss two other theories for reaching the value of a close corporation that differ from source of funds. All four of these problems were considered in *Hoffmann v. Hoffmann.*[118]

a. Proving Spouse's Efforts Affected Value

i. Non-Owner Spouse's Efforts

The non-owner spouse, most often the "executive wife," may claim that her efforts contributed to the increased value. Those efforts could be keeping books or doing other tasks in the business itself. More likely the efforts are indirect through entertaining business contacts, traveling to and taking part in social affairs at business meetings, and engaging in civic and country club activities to enhance the business reputation. The wife in *Hoffmann* failed in arguing that her efforts as homemaker, traveling companion, and entertainer contributed to the enhancement of the stock's value. The Missouri Supreme Court held that her personal contributions were not "sufficiently extensive to warrant additional compensation by sharing in the husband's separate property."[119] Although the failure to prove a connection between her efforts and the enhanced value may have been clear, the court's choice of words in affirming the trial court's decision is strange. Since the wife's argument was that her marital efforts were, in fact, a source of the value and therefore, that portion of the value was marital property, the reference to the efforts *not sufficiently warranting additional compensation* by sharing in *his* separate property is inapt for two reasons. First, whether she deserved compensation or not is irrelevant to the issue of classifying property as marital and separate. Under the source of funds theory, if the efforts did produce a portion of the value, then that proportionate part is marital without regard to the equities of how it should be divided. Deserving of compensation could be relevant only to show that the failure to properly classify was not prejudicial because the claimant

117. *See, e.g., In re* Marriage of Williams, 639 S.W.2d 236 (Mo. App., S.D. 1982) (holding that calves born to cows bred prior to marriage were income); Cain v. Cain, 536 S.W.2d 866, 871 (Mo. App., Spr. 1976) (holding that income from separate property is marital).

118. 676 S.2d 817 (Mo. 1984) (en banc).

119. *Id.* at 826.

could have been denied a greater share even if this amount were added to the marital property. Second, the court's use of the expression *the husband's separate property* begs the question. The issue to be decided was whether the property is partially marital because created in part due to the wife's efforts, not whether she should share in his separate property.

Other courts recognize that homemaker contributions of this type could be a source of the enhanced value of the close corporation shares, but as in *Hoffmann*, they sometimes find the proof insufficient.[120] In *Jolis v. Jolis*,[121] a New York court held that the wife of an international diamond merchant did not prove sufficient contribution to the increase in value to effect the classification and division of property. A different approach to proof of contribution is illustrated by a New York court decision which held that increase due to active management efforts of the shareholder spouse, is also due to the homemaker's efforts because they enabled the other spouse to engage in the management activities.[122]

ii. Owner Spouse's Efforts

The more likely claim for including a portion of the enhanced value of close corporation shares in marital property is that marital efforts of the shareholder spouse, rather than mere economic forces, contributed to the value. When the shareholder is a corporate officer and is responsible for the major effort in managing the business this argument can have validity. An increase in value of shares in a close corporation is often the result of the personal services of major stockholders who are also officers or employees.[123] *In re Marriage of Cornell*[124] is a Missouri case that illustrates this situation well. The husband and one other person took over a small business and built it into a multi-million dollar interstate enterprise. Since all the shares were acquired during the marriage, no issue of classification arose.

In the average case, proving the value increase attributable to efforts of the owner-employee is difficult. Not only must value be established, probably by capitalizing earnings,[125] but there must be evidence of the time and form of effort contributed. Testimony of persons knowledgeable about the type of business in question may be needed concerning the probable effect of those efforts on earnings. In the absence of evidence, some community property jurisdictions allocate a reasonable rate of return on the investment in the shares to

120. *See, e.g.*, Sturgis v. Sturgis, 663 S.W.2d 375 (Mo. App., E.D. 1983).
121. 98 A.D.2d 692, 470 N.Y.S.2d 584 (1983).
122. Roffman v. Roffman, 124 Misc. 2d 636, 476 N.Y.S.2d 713 (Sup. Ct. 1983) (citing Connor v. Connor, 97 A.D.2d 88, 468 N.Y.S.2d 482 (Sup. Ct. 1983)).
123. 676 S.W.2d 817, 830 (Mo. 1984) (en banc) (Blackmar, J., concurring in part, dissenting in part).
124. 550 S.W.2d 823 (Mo. App., Spr. 1977).
125. *See* Krauskopf, *Principles of Property Division*, FAMILY LAW AND PRACTICE § 37.04[5] (1985).

economic appreciation and allocate the remaining increase in value to the personal efforts of the shareholder-employee.[126] This approach apparently was not argued in *Hoffmann*, but the wife attempted to prove independently the extent of value increase due to efforts. The holding in *Hoffmann* is somewhat ambiguous in regard to whether the shareholder husband's efforts did contribute to the increase in value. Some of the court's language indicates that the wife's evidence may have been sufficient to prove that his efforts contributed to the increase but failed to show that the husband was not adequately compensated for those efforts.[127] Other portions of the court's opinion indicate that the wife failed to establish that the husband's efforts had contributed at all to the increase in value. Most significantly, the court said, "It is clear from the record that the unusual growth and prosperity of the company was directly attributable to the unforeseen but salutary (for the corporation) consequences of federal and state legislative enactments vis-a-vis sole efforts of the husband."[128] If neither a presumption of contribution above reasonable rate of return nor evidence establishes a relationship between efforts and value, the attempt to utilize source of funds theory to reach the value of separate close corporation shares fails.

b. Relevance of Adequate Compensation for Efforts

Another consideration in *Hoffmann* was that the wife failed to prove the husband had been inadequately compensated for the marital efforts he had devoted to the corporation. After the statement quoted above concerning the source of the increase, the court stated, "None of this evidence would justify a finding that the husband was inadequately compensated for his working efforts during the corporation's growth. Hence, the trial court's judgment that marital property [sic] was not used to increase the corporation's value was properly supported by credible evidence."[129] This language requires some interpretation. The second sentence could refer to both the earlier paragraph concerning failure to prove contribution to value and to the immediately preceding sentence, in which case, it would mean the evidence sustained a finding that no marital efforts ("property") had contributed to the value. On the other hand, it could mean that even though marital efforts ("property") of the husband had caused an increase in value, the trial judge was justified in finding that no portion of that increase was marital property because the husband was ade-

126. *See, e.g., In Re* Marriage of Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979); Beam v. Bank of America, 6 Cal. 3rd 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971); Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973).

127. Judge Blackmar stated that the principal opinion concedes that a substantial portion of the increase was occasioned by the husband's efforts; however, he found that the record was insufficient to reach a definitive conclusion. Hoffmann v. Hoffmann, 676 S.W.2d 817, 830 (Mo. 1984) (en banc) (Blackmar, J., concurring in part, dissenting in part); *see also infra* b. Relevance of Adequate Compensation for Efforts.

128. 676 S.W.2d at 826.

129. *Id.*

quately compensated for his efforts. If the latter interpretation is adopted,[130] the Missouri Supreme Court has created one of the strangest anomalies yet witnessed in the developing law of property division.

To hold that the proportionate increase in value of separate shares attributable to marital effort is not marital property if those efforts have been compensated adequately, is to hold the marital estate has already been reimbursed sufficiently for the marital efforts that enhanced the value of separate property. That means no other portion of the enhanced value should be included in marital property. *If this is the* Hoffmann *holding, it applies the inception of title or "reimbursement" theory which the court had so eloquently overruled in the preceding two pages.* This is exactly the holding of the Supreme Court of Texas, an inception of title state, in *Jensen v. Jensen.*[131] In *Jensen,* the Texas Supreme Court withdrew its earlier decision[132] that had held the entire enhanced value of the stock which results from the time, toil, and effort of the spouses belongs to the community estate. The Texas court's final opinion explained that the "reimbursement" theory (inception of title) states provide that as the stock appreciates it remains the separate property of the owner spouse and the community is entitled only to reasonable reimbursement for the time and effort of either spouse which contributed to the increase in value, but that the "community ownership" theory (source of funds) states hold that the increase in value of stock as result of the time and effort of the owner spouse becomes community property.

The paradox of *Hoffmann* is that the Missouri court had just recognized that allowing only reimbursement for, but no return on, the investment of marital assets in separate property created an incentive to divert marital assets to the separate estate. Therefore, it adopted the source of funds theory to better promote the partnership theory of marriage. The majority in *Hoffmann* also stated that the source of funds theory is a legitimate one to pursue in relation to marital efforts which enhance the value of corporate shares.[133] In view of that acknowledgment, it is difficult to justify the adequate compensation limitation. Arguing that the entire increase in value which was attributable to the marital efforts of the shareholder spouse should be marital property,[134] Judge Blackmar stated that in the absence of the corporate form such value produced by effort would obviously be marital property. He asserted that to do otherwise with the corporate shares would exalt substance over form and greatly magnify the importance of the choice of business association. Judge Blackmar's view has merit.

The partnership marriage theory is that the time and efforts of the mari-

130. After this manuscript went to press, the court applied this interpretation in Heilman v. Heilman, No. 66908, slip. op. (Mo. Dec. 17, 1985) (en banc).

131. 665 S.W.2d 107 (Tex. 1984); *see also supra* III. Source of Funds Rule, B. Contrast Inception of Title Rule.

132. Jensen v. Jensen, 9 FAM. L. REP. (BNA) 2581 (Texas 1983).

133. Hoffmann v. Hoffmann, 676 S.W.2d 817, 825 (Mo. 1984) (en banc).

134. *Id.* at 829 (Blackmar, J., concurring in part, dissenting in part).

tal partners are committed to furtherance of the marriage interests. Therefore, all capital value created by those efforts should be marital without regard to whether any or adequate compensation has been paid or not. To hold otherwise is to imply that marriage does not include a commitment of all effort to the welfare of the marital unit. In this day of widespread non-marital cohabitation and fears for the breakdown of the American family, it is appropriate to ask what marriage does mean. At a minimum, it should include commitment by the partners of their time and labor for the welfare of the family created by the marriage.

In fairness to the *Hoffmann* majority, if its primary holding was that no increase due to efforts was established, its consideration of the compensation issue may have been cursory. Additionally, the case was tried on the inception of title theory and much of the authority cited was from earlier times when that theory was much in the ascendancy.[135] Perhaps the court will reconsider its statement concerning adequacy of compensation in a more fully debated case. For now, Missouri attorneys should consider both the possibilities that the marital property would be only the value of uncompensated efforts and that it could be the entire enhanced value of the shares.

4. Retained Earnings As Marital Property: Distinguished from Source of Funds Theory

In *Hoffmann*, the wife's attempt to reach value insulated by the corporate form included a second theory which depended upon the existence of retained earnings. Judge Blackmar apparently interpreted her contention as relating the efforts of the husband to the increased value of the shares. Retained earnings either identifiable now or plowed back into the business in the past could be due to the efforts of the shareholder spouse and could be reflected in the increased value of his shares. This approach would be the source of funds theory, indistinguishable from the argument described above that efforts contributed to enhanced value. Whether earnings were retained or paid out as dividends would have no direct effect on the valuation of the shares using a capitalization of earnings method. This explains Judge Blackmar's statements in regard to retained earnings. He stated that it should be sufficient to show that the increase in value resulted from personal effort and that it was irrelevant whether earnings were retained or why they were retained.[136] Addition-

135. Footnote 5 cites an inception of title case in Arizona later overruled by *In re* Marriage of Cockrill, 124 Ariz 50, 601 P.2d 1334 (1979). An article by the present author is also cited which was written in 1977 when Missouri courts were applying the inception of title rule and in which she described the adequacy of compensation limit without criticism or statement that it ought to be appropriate only in an inception of title state. *See* Krauskopf, *Marital Property at Marriage Dissolution,* 43 MO. L REV. 157, 187 (1978). Heilman v. Heilman, No. 66908, slip op. (Mo. Dec. 17, 1985) (en banc) was also tried under the inception of title rule.

136. Hoffmann v. Hoffmann, 676 S.W.2d 817, 830 (Mo. 1984) (en banc) (Blackmar, J., concurring in part dissenting in part).

ally, whether the spouse whose efforts caused the increase in value had a controlling interest in the corporation would also be irrelevant. All that would be needed would be to trace the source of the increase in value of his shares to his efforts and classify that portion as marital property.

However, the wife in *Hoffmann* tried to use a different approach than the source of funds theory to reach retained earnings. She was not attempting to trace a portion of the value of any particular asset to marital efforts. She was asserting concealment of personal income which, if received during the marriage, would be marital property. The court summarized her contention as follows:

> If the board of directors had voted to distribute the corporate profits to the stockholders and officers, rather than retain them within the corporation, the income to the husband would have been marital property . . . [T]he husband's position and influence in corporate affairs permitted him to control what should have been marital property by concealing it under the corporate veil as retained earnings.[137]

Her contention is directly analogous to that of the Internal Revenue Service when it claims the corporation has accumulated surplus improperly beyond the reasonable needs of the business to avoid paying dividends to shareholders so that they could avoid taxable income.[138] Whether the corporate earnings are due to improvement in the market in general, or due to legislation favoring this kind of industry is irrelevant to the argument. Furthermore, whether the spouse shareholder's shares increased in value or not is not directly relevant. The crux of this concealment theory is that earnings were improperly retained for the purpose of avoiding payment of dividends to the shareholder spouse so that marital property would be less.

The majority of the Supreme Court of Missouri recognized the concealment of income theory. It held that, in the absence of evidence of collusion with other board members to defraud petitioner, she must show both that the owner spouse had a controlling interest in the corporation and had substantial control over decisions to distribute corporate earnings.[139] Since the husband's 29.5% of the stock was not controlling, and he was only one of four board members, the evidence failed.

Two further statements of the court are confusing and problematical. It said that the court was without jurisdiction to consider the wife's contention that the retained earnings were in excess of reasonable anticipated needs of the business because judgment could be taken only against a party. It also said the wife lacked standing to challenge board decisions. Of course, she had no standing and the court had no jurisdiction to consider wrongdoing of board members and enter a judgment against them as in a shareholders' derivative action. But that is not what she sought. She sought to show that her husband

137. *Id.* at 827 (majority opinion).
138. I.R.C. §§ 531-537 (1985).
139. Hoffmann v. Hoffmann, 676 S.W.2d 817, 826 (Mo. 1984) (en banc).

had concealed marital income by manipulating the corporation. She sought a judgment against him that an amount equal to the concealed income was marital property and that he should pay her whatever was deemed her just share. The court presumably accepted the appropriateness of the retained earnings as concealed marital property theory. It seems to have held that the only proof necessary to establish that is control of the decision-making by the shareowner spouse. Surely, a controlling shareowner spouse in the future will argue that the retention was to meet reasonably anticipated needs of the corporation. It would be strange indeed if there were no jurisdiction in the dissolution court to consider that issue and if the nonowner spouse had no standing to refute it.

In summary, the argument for concealment of marital income through retention of earnings can be used as a second and different avenue from the source of funds argument. Rather than increase in value and contribution, the claimant must establish control of the corporation and retention of earnings rather than paying them out in dividends. The amount constituting marital property is likely to be different than that using the contribution to increased value of shares approach.

5. Piercing the Corporate Veil: Source, Commingling, or Fraud

The *Hoffmann* court footnoted another possible basis for the non-shareholder spouse to reach the value of a close corporation: piercing the corporate veil to attribute a portion or all of the value of the shareholder's stock to the marital unit.[140] This occurs where the corporation merely serves as the *alter ego* of the stockholder and serves primarily as a means to divert marital funds for the benefit of only the owner spouse. The case cited in support was *Dillingham v. Dillingham*,[141] holding 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 are treated as community property. The wife was awarded some of the "corporate" assets. The *Dillingham* court said that to hold otherwise would be an invitation to anyone wanting to defeat the rights of the non-shareholder spouse to organize a corporation to prevent assets from being part of the marital estate. However, generally, cases hold that the corporate and personal affairs of the sole shareholders must be intertwined in order to disregard the corporate entity.[142] Using corporate funds and facilities for personal purposes evidences the sham nature of the corporation. Whether one emphasizes the fraud upon the marital unit, the commingling of corporate and personal affairs, or that the source of the value is actually marital effort is hardly of consequence. Disregarding the corporate structure requires proof of concealing marital property through the device of a corporation that exists for no other purpose than insulation of what would otherwise be marital property.

140. *Id.* at 826 n.7.
141. 434 S.W.2d 459 (Tex. Ct. App. 1968).
142. *See, e.g.*, Mifflin v. Mifflin, 556 P.2d 854 (Idaho 1976); Uranga v. Uranga, 527 S.W.2d 761 (Tex. Ct. App. 1975).

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There appears to have been little success in the past establishing this in marriage dissolution litigation.[143]

VI. CONCLUSION

Classification of property as marital determines power to divide at marriage dissolution in half the jurisdictions in the country. The statutory scheme usually classifies on the basis of the time and method of acquisition of property. When property is acquired or enhanced in value by a combination of the statutory times or methods, courts have made equitable adjustments to the statutory scheme through the principles of transmutation and source of funds. Each of these principles accords fully with the dual property regimes of division. Transmutation legitimates the allocation of property on the basis of the intent demonstrated by the marital partners. Source of funds emphasizes the core principle that marriage means commitment by the partners of their marital funds and efforts to the family.

The Missouri experience reflects the nationwide experience—an unqualified endorsement, but an uneven implementation of the concept of partnership marriage. The general trend of the past 15 years in equitable distribution of property is exemplified by the adoption of the transmutation and source of funds theories. However, in complex situations application occasionally misses the mark and reaches inconsistent results. The *Hoffmann* decision is welcome for its theoretical advancement of the partnership marriage concept and for its potential as a vehicle for appropriate future application of both transmutation and source of funds theories. During the next 15 years to the year 2000 courts have the opportunity to bring their decisions fully into accord with the partnership marriage concept by consistently utilizing the transmutation and source of funds theories so that all marital funds and efforts are committed to the welfare of the family created by a marriage.

143. Cases indexed under corporations or debtor-creditor relations may be fruitful.