WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 95 | Issue 2 Article 7

January 1993

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ALIMONY AND EQUITABLE DISTRIBUTION: ARE THE TWO CONCEPTS COMMINGLED IN WEST VIRGINIA?

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I. INTRODUCTION

Together with issues of equitable distribution, progressive courts are attempting to address hidden inequities in alimony awards. While alimony and equitable distribution of marital assets are now being addressed by the courts as separate issues, recent decisions are enlightening as well as important. They provide progressive and creative mechanisms by which an alimony analysis and an equitable distribution analysis can be used by courts to fashion a financial division of family resources to achieve a fair and meaningful award of alimony, as well as a fair distribution of the marital assets.

Many courts are fashioning alimony awards and dividing marital assets in such a way that both parties are left after the divorce with a standard of living as close as possible to the predivorce standard of living. These courts are focusing on alimony and equitable distribution as they relate to long-term marriages and situations in which one spouse is restricted to a certain earning capacity or has failed to devel-

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op his or her own earning capacity because he or she has been devoted to parental or homemaker duties.

California, as is often the case, addressed this issue early. In the case of *In re Marriage of Rosan*,[1] the California Court of Appeal provided justification for considering the relative earning capacities of the parties and their postdivorce standard of living. The *Rosan* court said:

> In a long marriage during which the wife has not taken outside employment but has devoted herself to wifely and parental duties, the wife has not only failed to develop her own earning capacity, she has presumably contributed to the development of the husband's earning capacity. In many, if not in most, cases the established employment or earning capacity of the husband constitutes the most valuable economic asset of the parties. While this economic attribute is not of such a character as will permit its division as property, it is not to be ignored in considering the problem of continuing support.[2]

Justice Richard Neely of the West Virginia Supreme Court of Appeals has likewise acknowledged that in most divorces, women do not obtain anything of economic value.[3] Only fourteen percent of all divorced women are awarded alimony. "Of the women who are awarded alimony, only 2/3 receive any actual payment, and the median payments for those who receive it is only $2,850.00 per year."[4]

Various statutes have been enacted to ensure the enforcement of alimony awards. Examples of such statutes include the withholding provisions of section 48-2-15b of the West Virginia Code and the requirement in section 48-2-17 that abstracts of alimony orders be recorded. Yet, despite these statutes, once alimony is awarded, the collection process often remains problematic.

As indicated in section 48-2-15 of the West Virginia Code, alimony can take many different forms. The three major types of alimony that currently exist in West Virginia are reimbursement alimony, rehabilitative alimony, and permanent alimony.

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1. 101 Cal. Rptr. 295 (Ct. App. 1972).

2. *Id.* at 304 (citation omitted).

3. RICHARD NEELY, THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE 26 (1984).

4. *Id.* at 26-29.

II. TYPES OF ALIMONY

A. *Reimbursement Alimony*

Reimbursement alimony is the newest form of alimony in many states, including West Virginia.[5] In *Hoak v. Hoak*,[6] the West Virginia Supreme Court of Appeals awarded Rebecca Hoak reimbursement alimony as compensation for her work and financial contribution to the professional education of her husband. Her economic contribution was made with the expectation of achieving a higher standard of living for her family, yet she failed to realize that expectation due to the couple's divorce. In acknowledging that reimbursement alimony is a financial adjustment aimed at repaying the working spouse who enhanced the "career spouse's" income-earning ability, the court demonstrated the necessity, fairness, and equity in requiring spouses to share equally in the benefits and burdens produced by a marriage.[7]

Thus, in an effort to compensate the supporting spouse when a marriage is of insufficient duration for the parties to accumulate substantial marital assets, the court focused on the alimony statutes, deciding that an award of some form of alimony in such situations is required because there is no marital estate of significance to divide between the spouses. The West Virginia court made the following statement concerning reimbursement alimony in *Lambert v. Lambert*:[8] "The decision to make such an award will depend on numerous factors, to be determined by the trial judge, *including the degree to which the equitable distribution of marital property, once fully ascertained, already reflects such a reimbursement.*"[9]

In another case where the West Virginia Supreme Court considered the issue of reimbursement alimony, *Chamberlain v. Chamber-*

5. *See* Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982); DeLarosa v. DeLarosa, 309 N.W.2d 755 (Minn. 1981); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

6. 370 S.E.2d 473 (W. Va. 1988).

7. *Id.* at 478.

8. 376 S.E.2d 331 (W. Va. 1988).

9. *Id.* at 333 (emphasis added); *see also* W. VA. CODE § 48-2-16(b)(5) (1992).

lain,[10] the court affirmed the award to a husband of sixty percent of the marital assets as his share of the marital property instead of awarding him reimbursement alimony for his contribution to his wife's law degree. The trial court had found that the facts of the case did not support an award of reimbursement alimony to Mr. Chamberlain because the court could not determine that Mr. Chamberlain had contributed more to Mrs. Chamberlain's income-earning ability than Mrs. Chamberlain had contributed to Mr. Chamberlain's military career. Thus, the court concluded that each party had sufficiently contributed to the income-earning ability of the other so that reimbursement alimony was not warranted.[11]

The authority for awarding reimbursement alimony in West Virginia is derived from subsections 48-2-16(b)(4) and (b)(16) of the West Virginia Code. This statute requires consideration of the respective income-earning abilities of each of the parties, as well other factors that the court deems just and appropriate.[12]

Courts throughout the country which have awarded reimbursement alimony have issued strikingly similar opinions. These courts are recognizing that it is inequitable for one to sacrifice his or her standard of living in order to enable the other spouse to attain job advancement and a related increase in earning ability and then receive no compensation for such sacrifice. Equity demands that each spouse should leave the marriage in a similar financial position.

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10. 383 S.E.2d 100 (W. Va. 1989).

11. *Id.* at 103.

12. The statute states:

> The court shall consider the following factors in determining the amount of alimony . . . .
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> . . . .
>
> (4) The income earning abilities of each of the parties, based on such factors as educational background, training, employment skills, work experience, length of absence from the job market and custodial responsibilities for children;
>
> . . . .
>
> (16) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of alimony . . . .

W. VA. CODE § 48-2-16(b) (1992).

Thus, reimbursement alimony coupled with equitable distribution is a good solution for short-term marriages in which there has been little accumulation of marital assets. However, reimbursement alimony is improper in marriages of a longer duration involving older parties. An alternative type of alimony is appropriate in such cases.

B. Rehabilitative Alimony

Rehabilitative alimony is generally used to encourage a dependent spouse to become self-supporting by providing alimony for a limited period of time during which the dependent spouse can obtain employment.[13] As the commentators suggest, the primary goal of rehabilitative alimony is to fairly allocate the benefits and the burdens of the marriage.[14]

Based upon the criteria outlined in section 48-2-16(b) of the West Virginia Code, even if a dependent spouse is college educated, alimony may still be appropriate.[15] Courts must consider child care and cus-

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13. Molnar v. Molnar, 314 S.E.2d 73, 76 (W. Va. 1984); *see also* Nancy A. Veith, Note, Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma, 12 U.S.F. L. REV. 493 (1978).

14. Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 260-61 (1989).

15. The statutory factors are:

> In cases where the parties to an action commenced under the provisions of this article have not executed a separation agreement, or have executed an agreement which is incomplete or insufficient to resolve the outstanding issues between the parties, or where the court finds the separation agreement of the parties not to be fair and reasonable or clear and unambiguous, the court shall proceed to resolve the issues outstanding between the parties. The court shall consider the following factors in determining the amount of alimony, child support or separate maintenance, if any, to be ordered under the provisions of sections thirteen and fifteen [§§ 48-2-13 and 48-2-15] of this article, as a supplement to or in lieu of the separation agreement:
>
> (1) The length of time the parties were married;
>
> (2) The period of time during the marriage when the parties actually lived together as husband and wife;
>
> (3) The present employment income and other recurring earnings of each party from any source;
>
> (4) The income-earning abilities of each of the parties, based upon such factors as educational background, training, employment skills, work experience, length

todial responsibilities when determining alimony awards.[16] The West Virginia Supreme Court of Appeals has highlighted the following additional factors that must considered by courts when deciding whether rehabilitative alimony is appropriate in a specific case:

> A court should not relieve a supporting spouse from the duty to maintain the dependent spouse and children by providing only rehabilitative alimony simply because the dependent spouse may have the skills necessary to facilitate a return to the job market. Instead, the court should consider the following factors before opting for rehabilitative alimony over permanent alimony: (1) the dependent spouse's position in the home at the time of the divorce; (2) the age of the children; (3) the parties' income at the time of the divorce and their potential income in the future; and (4) the benefit, where economics permit, of the dependent spouse remaining in the home to care for the children.[17]

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of absence from the job market and custodial responsibilities for children;

(5) The distribution of marital property to be made under the terms of a separation agreement or by the court under the provisions of section thirty-two [§ 48-2-32] of this article, insofar as the distribution affects or will affect the earnings of the parties and their ability to pay or their need to receive alimony, child support or separate maintenance;

(6) The ages and the physical, mental and emotional condition of each party;

(7) The educational qualifications of each party;

(8) The likelihood that the party seeking alimony, child support or separate maintenance can substantially increase his or her income-earning abilities within a reasonable time by acquiring additional education or training;

(9) The anticipated expense of obtaining the education and training described in subdivision (8) above;

(10) The costs of educating minor children;

(11) The costs of providing health care for each of the parties and their minor children;

(12) The tax consequences to each party;

(13) The extent to which it would be inappropriate for a party, because said party will be the custodian of a minor child or children, to seek employment outside the home;

(14) The financial need of each party;

(15) The legal obligations of each party to support himself or herself and to support any other person; and

(16) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable grant of alimony, child support or separate maintenance.

W. VA. CODE § 48-2-16(b) (1992).

16. W. VA. CODE § 48-2-16(b)(4) (1992).

17. Wyant v. Wyant, 400 S.E.2d 869, 875 (W. Va. 1990). The court has also ac-

In light of these factors, rehabilitative alimony is primarily intended for young spouses who are still able to obtain gainful employment.[18] Other factors that the courts should consider are the person's health and actual earning capacity once he or she re-enters the job market.[19]

An example of the type of case which would support an award of rehabilitative alimony is *Cross v. Cross*.[20] The West Virginia Supreme Court of Appeals found rehabilitative alimony appropriate for a middle-aged wife with a college education. However, it is important to note that in *Cross*, the court left open the possibility of permanent alimony *if* Mrs. Cross was unable to become employed.[21]

Using the criteria described above, the West Virginia Supreme Court of Appeals held, in *Queen v. Queen*,[22] that the trial court erred by awarding Mrs. Queen rehabilitative alimony instead of permanent alimony.[23] Mrs. Queen was fifty-one years of age at the termination of the thirty-three year marriage.[24] Mrs. Queen's net annual income was $6,144 while Mr. Queen's annual income was $29,000.[25] During the marriage, Mrs. Queen had been a homemaker and the primary caretaker for the couple's two children.[26] The court considered her age and the disparity in income between the two spouses, as well as the fact that Mrs. Queen might not be able to obtain employment, even though she was willing to try.[27] Thus, rehabilitative alimony was inappropriate in this case. The court has also indicated that it will not accept an award of rehabilitative alimony payable in periodic payments when a lump sum award is accessible and more appropriate.[28]

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knowledged that alimony and child support are within the sound discretion of the trial court and that the appropriate standard of review on appeal is abuse of discretion. Luff v. Luff, 329 S.E.2d 100, 102 (W. Va. 1985).

18. Bettinger v. Bettinger, 396 S.E.2d 709, 723 (W. Va. 1990).

19. Kapfer v. Kapfer, 419 S.E.2d 464, 467 (W. Va. 1992); W. VA. CODE § 48-1-16(b)(6) & (b)(8) (1992).

20. Cross v. Cross, 363 S.E.2d 449 (W. Va. 1987).

21. *Id.* at 452.

22. Queen v. Queen, 375 S.E.2d 592 (W. Va. 1988).

23. *Id.* at 594.

24. *Id.* at 593.

25. *Id.*

26. *Id.*

27. *Id.* at 594.

28. Rogers v. Rogers, 405 S.E.2d 235, 241 (W. Va. 1991).

Another interesting analysis in the area of rehabilitative alimony was utilized by the West Virginia Supreme Court of Appeals in *McGraw v. McGraw*.[29] The court upheld the trial court's ruling that precluded a husband's basic railroad retirement annuity from being considered divisible marital property. The court acknowledged that the Railway Retirement Act expressly precludes from consideration as divisible marital property the basic railroad retirement annuity.[30] Yet, when fashioning the alimony award to Mrs. McGraw, the court structured the alimony award so as to bridge the gap between the time of the divorce and Mrs. McGraw's future eligibility for retirement benefits. Mrs. McGraw argued that the fixed-period alimony award was inadequate. She asserted that her alimony should not stop when she becomes eligible for retirement benefits at age sixty-two. In rejecting her argument, the court reasoned that she was employed and that the respective incomes of Mr. and Mrs. McGraw were relatively similar. The court thus used rehabilitative alimony to equalize the parties' incomes until Mrs. McGraw's retirement benefits actually began. By utilizing the statutory factors contained in section 48-2-16(b) of the West Virginia Code, the court reached an equitable result.

Another factor used by the West Virginia Supreme Court of Appeals in making alimony determinations is overtime pay. In *Stevens v. Stevens*,[31] the court recognized that overtime pay could be used in considering total income for purposes of determining child support. The court followed the practice of other jurisdictions[32] and held that overtime pay, when obtained with some degree of regularity, should be considered when determining total employment earnings. Similarly, in *Rexroad v. Rexroad*,[33] the court stated:

> With regard to the inclusion of overtime pay in calculating earnings, our domestic relations law provides for the payment of alimony and child

29. 411 S.E.2d 256 (W. Va. 1991).

30. 45 U.S.C. § 231m(a) (1988). The Railway Retirement Act provides benefits equivalent to those under the Social Security Act. 45 U.S.C. § 231n-1 (1990).

31. 412 S.E.2d 257 (W. Va. 1991).

32. Jones v. Jones, 472 N.W.2d 782 (S.D. 1991); *In re* Marriage of Vashler, 600 P.2d 208 (Mont. 1979); Reyna v. Reyna, 398 N.E.2d 641 (Ill. App. Ct. 1979); Goetsch v. Goetsch, 159 N.W.2d 748 (Mich. Ct. App. 1968).

33. 414 S.E.2d 457 (W. Va. 1992).

> support "to be ordinarily made from a party's employment income and other recurring earnings." . . . Moreover, . . . the legislature has listed the factors to be considered in making a determination of the appropriate amount of alimony and child support. This list includes "[t]he present employment income and other recurring earnings of each party from any source."[34]

Not only did the court calculate overtime pay for purposes of determining the husband's total income, but the court also remanded the case to the trial court because the alimony award was inadequate.[35] Mrs. Rexroad had an annual net income of $10,000 while Mr. Rexroad had a gross annual income of $42,000.[36] However, the trial court, upon the recommendation of the family law master, had awarded Mrs. Rexroad only $50 per week.[37] The court inferred that the family law master had considered the fault of Mrs. Rexroad in ordering such a small amount of alimony.[38] The court went on to rule that for inequitable conduct to be a bar to alimony, the conduct must be substantial.[39]

In further clarifying the issue of fault and the consideration that needs to be given to fault in determining an alimony award, the court reviewed its decisions in *Peremba v. Peremba*,[40] *Haynes v. Haynes*,[41] and *Charlton v. Charlton*.[42] It concluded that in light of the recent definitional language in section 48-2-15(i) of the West Virginia Code, "[W]e believe that the legislature intended to adopt a uniform standard with regard to the role of fault as it bears on alimony."[43] The court also stated:

> W. VA. CODE § 48-2-15(i) bars a person from alimony in only three instances: (1) where the party has committed adultery; (2) where, subsequent

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34. *Id.* at 459 (footnote and citations omitted) (quoting W. VA. CODE §§ 48-2-15(a) & 48-2-16(b)(3) (1992)) (alteration in original).
35. *Id.* at 458.
36. *Id.* at 459.
37. *Id.* at 458, 459.
38. *Id.* at 459.
39. *Id.* at 460-61.
40. 304 S.E.2d 880 (W. Va. 1983).
41. 264 S.E.2d 474 (W. Va. 1980).
42. 413 S.E.2d 911 (W. Va. 1991).
43. *Rexroad*, 414 S.E.2d at 461.

> to the marriage, the party has been convicted of a felony, which conviction is final; and (3) where the party has actually abandoned or deserted the other spouse for six months. In those other situations where fault is considered in awarding alimony under W. VA. CODE § 48-2-15(i), the "court [or family law master] shall consider and compare the fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship."[44]

Based upon the foregoing, it is abundantly clear that only in egregious situations should the courts consider denying an award of alimony. Fair consideration of the statutory factors listed in section 48-2-16(b) of the West Virginia Code will guide the courts to equitable awards of alimony.

C. *Permanent Alimony*

Permanent alimony takes many forms. The alimony statutes in West Virginia list factors for the courts to consider when they are making determinations of permanent alimony. Courts often use these alimony factors not only in awarding alimony, but also in making an equitable distribution of marital assets. However, in West Virginia, as in most states, separate statutes address the issues of equitable distribution and alimony.[45] This indicates that, as a general matter, alimony and equitable distribution are separate issues that should be independently adjudged.[46] Excess judicial spillover between the two concepts can result in inequitable alimony awards. For example, how is the form and amount of the alimony determined when a husband is also required to pay the wife $2,000 per month for a period of ten years as part of the equitable distribution of the family business? The commentators see these overlapping issues as confusing, but more distressing is that the laundry list of factors contained in both the equitable distribution statutes and the alimony statutes allows judges to emphasize

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44. *Id.* at 461 (citing W. VA. CODE § 48-2-4(a)(1) to (a)(3) (1992) (footnotes omitted) (alteration in original).

45. *See, e.g.*, W. VA. CODE §§ 48-2-16(b) & 48-2-32(c) (1992).

46. However, the West Virginia Legislature has mandated that alimony determinations must take account of the marital property division in certain circumstances. W. VA. CODE §§ 48-1-16(b)(5) (1992).

whichever particular factors that appeal to them or support their decision.[47] Unfortunately, more often than not, the long-term homemakers and caregivers receive their equitable distribution of marital assets in the same proportion as the income-producing spouse. However, those very *same* dollars are then utilized to decrease, or offset, a permanent alimony award, so that the homemaker spouse remains at a severe economic disadvantage with a diminished standard of living when compared to the career spouse.

Although the West Virginia Supreme Court of Appeals is very progressive in awarding permanent alimony based upon the factors listed in the code, the court is deficient in its review of permanent support awards in relation to the standard of living established during marriage. Permanent alimony is based upon the factors contained in section 48-2-16(b) of the West Virginia Code. This statute gives the courts broad discretion in fashioning alimony awards. The alimony statute contemplates a disparity in income, education, and age, as well as many other factors which are intended to provide for a fair award of alimony to the nonsupporting spouse that will allow him or her to maintain, as closely as possible, the same standard of living enjoyed during the marriage. Thus, an award of alimony is appropriate to correct the inequities between the parties' respective financial positions and earning capacities upon divorce.

In reviewing the standard of living analysis, the more progressive courts have acknowledged this critical function of permanent alimony. For example, in the *Klein v. Klein*,[48] the Supreme Court of Vermont stated:

> The function of alimony . . . in most cases, is to accomplish the divorce with the least possible social and financial hardship and disruption. This is made clear by the statements in cases and statutes that alimony should, within the limits of the husband's resources, be such as to maintain the wife's standard of living as nearly as possible at the same level she enjoyed during the marriage. The husband, having entered into one of the strongest and most fundamental relationships known to the law, must con-

47. Keith Hawkins, *On Legal Decision Making*, 43 WASH. & LEE L. REV. 1161, 1186 (1986).

48. 555 A.2d 382 (Vt. 1988).

> tinue to bear its financial burden where he can reasonably do so and where it is necessary in order to prevent a relatively greater hardship to the wife. Divorce inevitably produces painful alterations in the lives of spouses. A major function of alimony is to reduce its financial impact.[49]

In many cases that call for an award of permanent alimony, the dependent spouse lacks a college education or has very limited work experience. The dependent spouse has often dedicated his or her life to raising the children and supporting the other spouse in his or her working endeavors. Additionally, permanent alimony is appropriate when there is no real prospect of a spouse supporting himself or herself at or near the standard of living established during the marriage. Unfairness results, however, when courts use the equitable distribution of marital assets to satisfy alimony requirements. Equitable distribution assets are normally nonincome producing; therefore, they are, by definition, inadequate as spousal support.

In contrast, the spouse in the superior financial position will continue to increase his or her financial security as a result of the enhanced earning powers achieved during the marriage. Simply put, there seems to be a misconception that the equitable distribution of nonincome producing property is to be used against, or to offset, an alimony award. Progressive courts have correctly ruled that such is not the case. In *Larocque v. Larocque*,[50] the Supreme Court of Wisconsin stated: "The property division should provide [both spouses] with a nest egg for retirement or a reserve for emergencies."[51]

Thus, it becomes abundantly clear that the property division—that is, equitable distribution—*should not* be considered in lieu of or as an offset against a permanent alimony award when the factors outlined in section 48-2-16(b) are considered. As the commentators indicate, the length of the marriage is an important factor in determining the appropriate amount of permanent alimony. The longer the marriage, the more the parties have contributed to a joint standard of living. The longer the marriage, the more both parties have set that standard of

49. *Id.* at 387.
50. 406 N.W.2d 736 (Wis. 1987).
51. *Id.* at 740.

living as a measure of their reasonable needs. Finally, the longer the marriage, the more the earning capacity of the homemaker decreases while the earning capacity of the working spouse increases.[52]

III. CURRENT ISSUES

A. *Standard of Living Analysis*

Although the West Virginia Supreme Court of Appeals has been progressive in its permanent alimony awards, it has failed to recognize the connection between permanent alimony and the standard of living that the parties have become accustomed to during their marriage. For example, in *Bettinger v. Bettinger*,[53] the court equitably divided the value of the medical practice, yet awarded Mrs. Bettinger only $2,000 per month as child support and alimony, despite the fact that Dr. Bettinger was making $100,000 per year at the time of the divorce.[54] Even though Mrs. Bettinger had been out of the job market for years and, once divorced, she had no real expectation of ever achieving the same standard of living on her own that she and her husband had enjoyed throughout their marriage, the court awarded only rehabilitative alimony to the physician's wife in *Bettinger*.

Similarly, in *Koppel v. Koppel*,[55] the parties had been married for twenty-nine years. Mrs. Koppel, a nurse, had worked while Dr. Koppel obtained a medical degree. Thereafter, Mrs. Koppel quit work at Dr. Koppel's request so that she could raise their children. She did not work throughout their marriage. At the time of the parties' divorce, Dr. Koppel was earning between $76,000 and $78,000 per year. Mrs. Koppel's earning capacity was estimated to be between $16,000 and $30,000 per year, depending on overtime work. Yet, the West Virginia court adopted the family law master's recommendation to award Mrs. Koppel only $1,000 per month for ten years.

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52. Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration of Alimony*, 21 FAM. L.Q. 573, 586 (1988).

53. 396 S.E.2d 709 (W. Va. 1990).

54. *Id.* at 722.

55. 388 S.E.2d 848 (W. Va. 1989).

The alimony of $1,000 per month for ten years was based upon the length of the marriage, the ages of the parties, the wife's absence from the job market, and the husband's income as a medical doctor. Presumably, the court acknowledged that Mrs. Koppel was entitled to alimony for only ten years because Mrs. Koppel received significant assets through equitable distribution. Thus, the court substituted an award of equitable distribution for an adequate alimony award.

The West Virginia Supreme Court of Appeals, like many courts across the country, fell into this mental trap, even though the purposes of alimony and equitable distribution are different. In this area, and specifically in *Koppel*, the West Virginia Supreme Court's analysis is deficient. Dr. Koppel received, as equitable distribution, the same income-producing property as did Mrs. Koppel. Equitable distribution, however, should be treated primarily as assets set aside for emergencies and retirement.[56]

Under the standard of living analysis, which attempts to enable each party to maintain his or her marital standard of living, the parties should be left in similar financial positions.[57] However, in *Koppel* the disparity of the parties' income-earning capacity is extreme. Dr. Koppel's annual income will more than double Mrs. Koppel's throughout his remaining years of employment. The *Koppel* decision contravenes the intent of the legislature because the court failed to consider all the alimony factors set forth in section 48-2-16(b) of the West Virginia Code. Furthermore, the decision is woefully unfair given the extreme disparity in the income-earning abilities of the respective parties.

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56. *See supra* text accompanying note 51.

57. Although no case specifically addresses the question of when a couple's "standard of living" should be determined for purposes of alimony calculations, be it separation or trial, most courts speak only of the standard of living during the marriage. "Standard of living" is defined as "a minimum of necessities, comforts, or luxuries that is essential to maintaining a person in customary or proper status or circumstances." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223 (1986). Additionally, an alimony award should, to the extent possible, "equalize the parties' respective post-divorce living standards." Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

In another West Virginia case, *Rogers v. Rogers*,[58] the parties divorced after sixteen years of marriage. Although Mrs. Rogers had little or no education and Mr. Rogers was a highly successful attorney, the court awarded Mrs. Rogers only $254,000 as a lump sum alimony award. The court again seemed to be avoiding the standard of living criteria and only provided lip service to the alimony factors outlined in section 48-2-16(b) of the West Virginia Code.

Most progressive courts, however, carefully apply the standard of living analysis when they are determining permanent alimony awards. In *In re Marriage of Smith*,[59] the California Court of Appeal applied a standard of living analysis in making its decision regarding permanent alimony. Based upon the length of the marriage (ten years) and the standard of living that the couple had come to enjoy, the court awarded Mrs. Smith $1,700 per month in permanent alimony. At the time, Mr. Smith was earning approximately $90,000 per year. The *Smith* court acknowledged that in California (as in West Virginia), the ultimate decision regarding spousal support rests within the court's broad discretion. However, the court also stated that trial courts must make alimony decisions within the bounds of reason and must establish the actual marital standard of living in order to determine a reasonable measure of alimony.[60]

Similarly, Utah has established alimony awards based upon the standard of living which existed during the marriage. The Utah Court of Appeals has considered both the relevant facts and equitable principles in making its alimony awards. For example, in *Howell v. Howell*,[61] the court reversed an alimony award to a wife of only $1,800 per month even though the wife received $1,363 per month in child support pursuant to the child support guidelines based upon the husband's gross income of $10,000 per month. In support of its conclusion, the Utah court reasoned:

58. 405 S.E.2d 235 (W. Va. 1991).
59. Smith v. Smith, 274 Cal. Rptr. 911 (Ct. App. 1990).
60. *Id.* at 913.
61. 806 P.2d 1209 (Utah Ct. App.), *cert. denied*, 817 P.2d 327 (Utah 1991).

> [S]he is approximately fifty years old, has minimal marketable job skills, and has spent most of the thirty plus years of the parties' marriage raising and caring for their five children and their home, presumably with the concurrence of plaintiff. Her likelihood of achieving significant salary levels in the future is slim. The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage. We, therefore, hold that the alimony amount set by the court was clearly erroneous.[62]

While acknowledging that an exact mathematical equality of income was not required, the Utah court acknowledged that approximate parity was necessary to allow each party to be in as equal a financial position as possible at the time of the parties' divorce.

While it should not be used as the sole criterion, the standard of living analysis provides an important basis for determining the amount of permanent alimony awards because it furnishes a historic benchmark for determining the reasonableness of an alimony award.[63] By utilizing the factors outlined in section 48-2-16(b) of the West Virginia Code, the West Virginia courts can arrive at reasonable and equitable figures for permanent alimony awards. In addition to the alimony criteria contained in section 48-2-16(b), spousal support guidelines should be formulated similar to existing child support guidelines.[64] Clarifying the factors and supporting them by utilizing the standard of living analysis for a frame of reference is necessary to make alimony awards a rational and equitable process in West Virginia. Perhaps a well-reasoned multiple for determining alimony awards, similar to that used in child support guidelines is necessary to take the arbitrary guesswork out of permanent alimony awards. More importantly, a clearer frame of reference is necessary so that alimony awards are not decreased, offset, or confused with the principles and results of equitable distribution.

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62. *Id.* at 1213 (footnote omitted); *see also* Gardner v. Gardner, 748 P.2d 1076, 1088 (Utah 1988); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

63. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.4(3), at 648 (2d ed. 1988).

64. *See* W. Va. Code § 48A-2-8(a) (1992).

B. *Marital vs. Separate Property*

As indicated above, the equitable division of marital assets and its factors are contained in a separate statute. The provisions which address equitable distribution set forth a different standard and employ different criteria than those used to determine alimony awards and, therefore, the two issues should be decided independently.

West Virginia is a dual property jurisdiction. That is, property may be classified as either marital property or separate property. Marital property includes "[a]ll property and earnings acquired by either spouse during a marriage . . . except that marital property shall not include separate property."[65] Separate property includes property acquired before the marriage; property acquired during marriage in exchange for separate property acquired before marriage; property excluded from marital property by valid agreement of the parties; property acquired during the marriage by gift, bequest, devise, descent or distribution; and property acquired during separation.[66]

In 1987, Professor Krauskopf, although noting that a single piece of property can have a "dual character" in West Virginia (part separate and part marital), concluded that application of the theories contained in the West Virginia statutes present problems of proof in determining contributions to separate property made during the marriage.[67] In essence, when the West Virginia Legislature set forth the definitions of separate and marital property, it adopted the source-of-funds approach in classifying property. Thus, a single piece of property could legitimately have a dual character in West Virginia: part separate and part marital. At least, that was the status of the law in West Virginia until the decision in *Whiting v. Whiting*.[68]

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65. W. VA. CODE § 48-2-1(e)(1) (Supp. 1992).

66. W. VA. CODE § 48-2-1(f)(1)-(5) (Supp. 1992).

67. Joan M. Krauskopf, *Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997 (1987); *see also* Lee vanEgmond, *Toward a More Equitable Distribution of Property Upon Divorce: A Critique of Recent Developments in the Law of Marital Property in West Virginia*, 94 W. VA. L. REV. 531, 546 (1991-92).

68. 396 S.E.2d 413 (W. Va. 1990).

In *Whiting*, the West Virginia Supreme Court stated that, under section 48-2-32 of the West Virginia Code, equitable distribution of marital assets is a three-step process.[69] The first step is to differentiate between the parties' marital property and separate property. The second step is to value the marital property.[70] The final step in the equitable distribution process is to divide the marital property between the parties.[71]

Mr. Whiting had acquired, at the death of his first wife, her one-half interest in certain property. Mr. Whiting subsequently remarried and conveyed title to his property to the new Mrs. Whiting as a joint tenant. The West Virginia Supreme Court of Appeals ruled that transfer of separately-owned property into jointly-owned property changes the character of the ownership interest in the property transferred. The change in title to joint ownership changed the nonmarital property to marital property; the marital property then became subject to equitable distribution.[72] In adopting such a theory, the court noted that many jurisdictions adhere to the general rule that such a result is in accord with the partnership concept of marriage, which is the basis for equitable distribution. The court adopted the view of other jurisdictions which have concluded that the joint titling of what was formerly separate property gives rise to a rebuttable presumption of a gift to the marital estate.[73] Transmutation by title has occurred. For example, if a spouse owning separate property changes the record title to joint ownership, a presumption is created that the owner of the separate property intended to give the other spouse a one-half interest in the property.[74]

However, according to the West Virginia Code, marital assets are classified as marital property or separate property based on how and when the property was *acquired*, as opposed to its title. For example,

69. *Id.* at 416.

70. *Id.* at 417.

71. *Id.*

72. *Id.* at 419; *see also* Lewis v. Lewis, 785 P.2d 550 (Alaska 1990).

73. *See* Burgess v. Burgess, 710 P.2d 417 (Alaska 1985); Boyce v. Boyce, 694 S.W.2d 288 (Mo. Ct. App. 1985).

74. *See* Doody v. Doody, 190 N.E.2d 734 (Ill. 1963); Grant v. Zich, 477 A.2d 1163 (Md. 1984).

marital property includes "[a]ll property and earnings *acquired* by either spouse during a marriage . . . regardless of the form of ownership"[75] and separate property includes:

> (1) Property *acquired* by a person before marriage; or
> (2) Property *acquired* by a person during marriage in exchange for separate property which was acquired before the marriage; or
> (3) property *acquired* by a person during marriage, but excluded from treatment as marital property by a valid agreement of the parties entered into before or during the marriage; or
> (4) Property *acquired* by a party during marriage by gift, bequest, devise, descent or distribution; or
> (5) Property *acquired* by a party during a marriage but after the separation of the parties and before the granting of a divorce, annulment or decree of separate maintenance.[76]

Therefore, according to the statutory definition, property is classified as marital or separate based on *how* and *when* it was *acquired*, not on its form of ownership.

By enacting section 48-3-10 of the West Virginia Code, the legislature intended to classify property according to its means of acquisition rather than by its title. The statute requires that, for equitable distribution purposes, "a gift between spouses must be affirmatively proved."[77] In essence, the legislature indicated that title alone is not sufficient to prove ownership in a contest between spouses and that affirmative proof of a gift is required.[78] This dual property system was adopted because of "essentially common-sense extrapolations of fairness notions and beliefs about spouses' expectations."[79]

The court in *Koontz v. Koontz*[80] considered section 48-3-10 and concluded that one spouse's transfer of the title to his or her separate property to both spouses jointly presumes an intent to make a gift of

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75. W. VA. CODE § 48-2-1(e)(1) (Supp. 1992) (emphasis added).
76. W. VA. CODE § 48-2-1(f) (Supp. 1992) (emphasis added).
77. W. VA. CODE § 48-3-10 (1992).
78. Roig v. Roig, 364 S.E.2d 794, 798 (W. Va. 1987); Shank v. Shank, 387 S.E.2d 325, 328 (W. Va. 1989).
79. Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 152 (1989).
80. 396 S.E.2d 439 (W. Va. 1990).

property to the marital estate.[81] Yet, the court in *Koontz* failed to apply its own rebuttable presumption which it had outlined in *Whiting v. Whiting*.[82] In *Whiting*, the court acknowledged that when the legislature enacted the equitable distribution provisions of divorce law, it abolished the presumption of an interspousal gift in equitable distribution cases. The court in *Whiting* went on to state:

> We stress that the joint titling of the separate property gives rise only to a rebuttable presumption of gift to the marital estate. The presumption may be overcome by a showing that the transferring spouse did not intend to transfer the property to joint ownership or was induced to do so by fraud, coercion, duress, or deception.[83]

If the *Koontz* court had correctly applied *Whiting*'s rebuttable presumption, Mr. Koontz would have been awarded the house because the record showed that the house was jointly titled in order to influence Mrs. Koontz to provide the money needed to finish the house. Put another way, the presumption of a gift was overcome by a showing that the transferring spouse did not intend to make a gift to the marital estate. Mr. Koontz was coerced into the transfer by Mrs. Koontz's refusal to return funds to the household, unless she received joint title to the property.[84]

The West Virginia Supreme Court of Appeals further confused the issue in *Charlton v. Charlton*.[85] Mr. Charlton had been the primary financial planner of the family. He handled the investments and prepared the income tax returns; Mrs. Charlton acknowledged her ignorance in this area.[86] During the marriage, Mrs. Charlton inherited a substantial sum of money. All of the funds were placed into investment accounts in the joint name of the parties and were managed by Mr. Charlton.[87] At the time of the divorce, Mr. Charlton sought an equal division of the inherited funds based upon *Whiting*—Mr.

81. *Id.* at 442.
82. 396 S.E.2d 413 (W. Va. 1990).
83. *Id.* at 421.
84. *Koontz*, 396 S.E.2d at 440.
85. Charlton v. Charlton, 413 S.E.2d 911 (W. Va. 1991).
86. *Id.* at 916-17.
87. *Id.* at 913.

Charlton asserted that Mrs. Charlton had made a gift to him of her separate property.[88]

The court determined that Mrs. Charlton had *not intended* to give her separate property to the marital estate.[89] The court's rationale was based upon notions of fiduciary trust between a husband and wife. The court stated:

> 1. One who receives property from another with whom he has a confidential relationship has the burden of showing that the transfer was fair and made with utmost good faith.
> 2. The relationship between husband and wife is one of confidence and trust.
> 3. Where persons occupy a fiduciary or confidential relationship the lack of independent advice on the part of the person who claims to be disadvantaged by the transaction may be a significant factor in a court's evaluation of the overall bona fides of the transaction.[90]

The court's analysis in *Wood v. Wood*[91] is in stark contrast to the *Charlton* decision. Here, Mrs. Wood had inherited certain stock. She placed portions of the stock (her separate property) into a jointly titled account. Later, those funds were used as a down payment on a home which was jointly titled.[92] The court concluded, "Given that Mrs. Wood's inheritance had been placed in jointly titled investments before being used as the down payment on the jointly titled marital house, we find that the circuit court's classification of the marital house as marital property was justified."[93] Essentially, the *Wood* court held that if a showing could be made that a party was coerced into jointly titling separate property, the presumption of gift to the marital estate would be overcome. If not, the property would be considered a gift to the marital estate.[94]

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88. *Id.* at 915.
89. *Id.* at 917.
90. *Id.* at 916.
91. 403 S.E.2d 761 (W. Va. 1991).
92. *Id.* at 765.
93. *Id.* at 768.
94. *Id.* at 769.

As these cases indicate, in many instances a spouse does not intend joint title designation to constitute a gift of separate property to the marital estate.[95] Spouses often hold title as joint tenants to avoid probate or to simplify tax matters.[96] For example, in *In re Marriage of Benz*,[97] even though Mrs. Benz had placed separate funds into a joint account, the court ruled that Mrs. Benz had rebutted the presumption of a gift to the marital estate because she demonstrated that she lacked business acumen, she desired to placate her husband, and she depended upon his judgment and advice. Therefore, even though her separate property had initially been transmuted[98] into marital property, she rebutted the presumption of a gift of the separate property to the marital estate by proving a lack of donative intent.

Rather than require the parties to litigate their intent or whether one party was induced by fraud, coercion, duress, or deception, the courts can simply uncommingle the separate and marital assets. The West Virginia Supreme Court of Appeals did just that in *Shank v. Shank*[99] and in *Hamstead v. Hamstead*.[100] The court's reasoning and rationale in these cases complied not only with the statutory definitions of marital and separate property,[101] but it also provided for easy accountability of both types of property without providing a windfall or unjust enrichment to the noncontributing spouse.

C. *Overcoming the Presumption of Equal Division*

The West Virginia Legislature has set forth the factors to be used in making a fair distribution of marital assets in section 48-2-32(c) of the West Virginia Code. Although under the statute equal division of marital property is initially presumed to be appropriate, the statute goes on to list several factors which may make proper an adjustment of the property division.[102] If the West Virginia Supreme Court of Appeals

95. *See also* Tallman v. Tallman, 396 S.E.2d 453 (W. Va. 1990).
96. Lynam v. Gallagher, 526 A.2d 878 (Del. 1987).
97. *In re* Marriage of Benz, 518 N.E.2d 1316 (Ill. App. Ct. 1988).
98. *Id.* at 1319.
99. Shank v. Shank, 387 S.E.2d 325 (W. Va. 1989).
100. Hamstead v. Hamstead, 400 S.E.2d 280 (W. Va. 1990).
101. W. VA. CODE §§ 48-2-1(e), 48-2-1(f) (Supp. 1992).
102. The statute states:

is going to continue to honor its *Whiting* analysis, it should consider a solution other than an equal division of marital assets when one party has clearly contributed separate assets to the marital estate in an effort to benefit the entire family unit. Although separate property was transmuted into marital property, a deviation from the presumption of equal division is justified pursuant to the specific statutory factors. The court

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In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties, but may alter this distribution, without regard to any attribution of fault to either party which may be alleged or proved in the course of action, after a consideration of the following:

(1) The extent to which each party has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions, including, but not limited to:

(A) Employment income and other earnings; and

(B) Funds which are separate property.

(2) The extent to which each party has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by nonmonetary contributions, including, but not limited to:

(A) Homemaker services;

(B) Child care services;

(C) Labor performed without compensation, or for less than adequate compensation, in a family business or other business entity in which one or both of the parties has an interest;

(D) Labor performed in the actual maintenance or improvement of tangible marital property; and

(E) Labor performed in the management or investment of assets which are marital property.

(3) The extent to which each party expended his or her efforts during the marriage in a manner which limited or decreased such party's income-earning ability or increased the income-earning ability of the other party, including, but not limited to:

(A) Direct or indirect contributions by either party to the education or training of the other party which has increased the income-earning ability of such other party; and

(B) Foregoing by either party of employment or other income-earning activity through an understanding of the parties or at the instance of the other party.

(4) The extent to which each party, during the marriage, may have conducted himself or herself so as to dissipate or depreciate the value of the marital property of the parties: Provided, That except for a consideration of the economic consequences of conduct as provided for in this subdivision, fault or marital misconduct shall not be considered by the court in determining the proper distribution of marital property.

W. VA. CODE § 48-2-32(c) (1992).

should uncommingle the marital and separate property for purposes of equitable distribution. Support for this proposition is found in many other jurisdictions. Reasonable standards exist for the division of assets.

Yet, many courts continue to expand the scope of divisible marital property by creative uses of the notions of commingling and transmutation.[103] While it may be fair for a court to conclude that separate property has been transmuted into marital property when it is equitably dividing a marital estate after considering, among other factors, the contributions of each spouse toward the marital estate,[104] some commentators, including Professor Levy,[105] note that the presumption that a gift has occurred when property has been jointly titled proposes a *per se* rule of transmutation. While this presumption does permit predictability, it also permits transmutation in a number of situations where an intent to make a gift clearly is absent. The issue for the court is whether the predictability of the *per se* rule that the joint titling of property equals a gift to the marital estate outweighs unfairness or an unjust enrichment to the noncontributing spouse.

Some courts have concluded that the adoption of equitable distribution has abolished the presumption of a gift from joint title.[106] In these states, title is disregarded. The courts merely assess, at the time of divorce, the source of the consideration that was used to purchase the property.[107] Unfortunately, the West Virginia Supreme Court of Appeals' position in *Whiting* invites litigation over the intent to make a gift to the marital estate. Of course, the economic realities permit such litigation only when the amount of the presumed gift is substantial.[108] However, when the presumed gift is substantial, it is also likely that a gift was not intended. While it is reasonable to assert that during the parties' marriage, the spouse permitted the family unit to

103. *See* Westbrook v. Westbrook, 364 S.E.2d 523 (Va. Ct. App. 1988).

104. *See* Lambert v. Lambert, 367 S.E.2d 184 (Va. 1988).

105. Levy, *supra* note 79, at 152.

106. Watson v. Watson, 551 A.2d 505 (Md. Ct. Spec. App. 1989); Griffith v. Griffith, 415 N.W.2d 763 (Minn. Ct. App. 1987).

107. MacIntire v. McKay, 539 A.2d 258 (Md. Ct. Spec. App. 1988); Dorsey v. Dorsey, 487 A.2d 1181 (Md. 1985).

108. Charlton v. Charlton, 413 S.E.2d 911, 917 (W. Va. 1991).

benefit from his or her property, it is also fair to presume that the same spouse, upon divorce, would like to retain the property that he or she contributed. Therefore, at the conclusion of the marriage, the separate assets should be uncommingled.

I am not suggesting that the court adopt the "tracing approach" requested by Mrs. Wood in *Wood v. Wood*.[109] In *Wood*, the court correctly refused to consider what other courts have called draconian tracing requirements. For example, in *Chenault v. Chenault*,[110] the Kentucky Supreme Court recognized that there were simpler and more equitable ways of ascertaining whether property was nonmarital than by using the tracing method.[111]

However, in an effort to avoid a windfall to the noncontributing spouse, the court should not pigeonhole assets, but should use all the factors contained in section 48-2-32(c) to reach a fair division of the marital assets after separate property has been transmuted or commingled into the marital estate. In essence, this permits a court to make additional provisions for a dependent spouse and allows the spouse who contributed separate assets to the marital estate to receive a credit or an offset for those contributions. While this may result in the exercise of a court's discretion, it also prevents a windfall to a noncontributing spouse who received the benefits of the separate assets during the marriage.

Although some commentators have concluded that such a division will promote arbitrary results, the inequities which may result to either the husband or wife under the current approach in West Virginia seem to outweigh the chance of an abuse of judicial discretion under the proposed model.[112] While the proposed model does not totally eliminate the possibility of judicial arbitrariness, the trial courts can be required to consider the statutory factors and to explain with specificity the reasoning used to divide the marital estate.

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109. 403 S.E.2d 761, 767 (W. Va. 1991).

110. *See* Chenault v. Chenault, 799 S.W.2d 575 (Ky. 1990).

111. *See id.* at 578.

112. MARY A. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 64 (1981); Mary A. Glendon, *Fixed Rules and Discretion In Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986).

IV. CONCLUSION

It is reasonable for courts to conclude that spouses, during a marriage, conduct themselves under the assumption that the marriage will continue forever. However, when that does not occur, courts must be prepared to fashion a division of property that is fair and equitable for both parties. In doing so, the courts must properly apply and utilize *all* statutory provisions and criteria. Although this approach may require more thought and analysis and may be more time consuming due to an increased requirement for specific reasoning, such a framework would provide a fair and reasonable division of the marital estate which leaves the parties in relatively equal financial positions.

In light of this analysis, I suggest that the West Virginia Supreme Court of Appeals attempt, when considering divorce actions, to return to each spouse the value of his or her premarriage accumulations and any gifts and inheritance, unless an intent to transmute the property is clear and the assistance of uncommingling is unavailable.[113] Finally, creative utilization of all of the domestic relations statutes is necessary when courts award alimony and apply the equitable distribution statutes. Thus, a little uncommingling, as well as commingling of the two concepts is necessary to achieve the fair and equitable results intended by the legislature.

113. J. Thomas Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263 (1983-84); *see also* J. Thomas Oldham, *Tracing, Commingling and Transmutation*, 23 FAM. L.Q. 219 (1989).