Catholic University Law Review

Volume 37
Issue 3 *Spring 1988*

Article 5

1988

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THE MARITAL/SEPARATE PROPERTY DISTINCTION IN THE DISTRICT OF COLUMBIA—REVISITED

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The District of Columbia's enactment of the Marriage and Divorce Act of 1977[1] (MDA) accepted the principle that marriage is a productive partnership composed of two equal venturers. Hailed as a giant step toward equity, the MDA smashed the idol of legal title and banned worship to the wage earner. The mandate of the new law focused attention on efforts toward the marital union rather than isolated individual enterprises. In order to accomplish those aims, the District of Columbia City Council appended a very long arm to the MDA, allowing the courts to consider distribution of such a wide range of property as to nearly abolish the marital/separate property distinction.[2]

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1. D.C. Law 1-107, 1977 D.C. Stat. 114 (codified as amended at D.C. CODE ANN. §§ 16-901 to -923 (1981)).

2. D.C. CODE ANN. § 16-910 (1981). Section 16-910 provides:

> Upon the entry of a final decree of annulment or divorce in the absence of a valid ante-nuptial or post-nuptial agreement or a decree of legal separation disposing the property of the spouses, the court shall:
>
> (a) assign to each party his or her sole and separate property acquired prior to the marriage, and his or her sole and separate property acquired during the marriage by gift, bequest, devise, or descent, and any increase thereof, or property acquired in exchange therefor; and
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> (b) distribute all other property accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties, in a manner that is equitable, just and reasonable, after considering all relevant factors including, but not limited to: the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in

On its face, the MDA clearly distinguishes between marital and separate property. Sole and separate property includes property brought into the marriage, inherited property, gifted property, and increases in these assets and exchanges for them.[3] The MDA treats all other property as marital, subject to distribution based on a nonexclusive list of factors.[4] Moreover, the MDA creates a strong presumption that property is marital and places the burden of proof on the party claiming otherwise.[5]

Nearly ten years after its enactment and eight years after one of the authors and a colleague first analyzed its provisions,[6] very little case law exists to instruct superior court judges in their application of the MDA. Of the 36,122 divorces filed in the District of Columbia from 1977 through 1986,[7] approximately twenty have produced appellate decisions addressing property distribution pursuant to the MDA.[8] There are numerous possible explanations for this paucity of case law. First, the very lack of precedent impedes likely precedent setters; that is, with so much uncertainty very few litigants are willing to "bet the store" in an area with so few judicially created landmarks.

Second, litigation continues to be prohibitively expensive. Few can afford the financial demands of trial, the cost of appeal, and the possibility of a trial on remand. With a relaxed attitude toward awarding attorneys' fees

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lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income. The court shall also consider each party's contribution to the acquisition, preservation, appreciation, dissipation or depreciation in value of the assets subject to distribution under this subsection, and each party's contribution as a homemaker or to the family unit.

Id.

3. *Id.*

4. *Id.* § 16-910(b); *see also* McCree v. McCree, 464 A.2d 922, 928 (D.C. 1983) (noting that list of § 910(b) factors is nonexclusive); Turpin v. Turpin, 403 A.2d 1144 (D.C. 1979) (same).

5. *See* Hemily v. Hemily, 403 A.2d 1139, 1142-44 (D.C. 1979).

6. *See* Gordon & London, *The Marital/Separate Property Distinction in the District of Columbia,* 29 CATH. U.L. REV. 939 (1980).

7. DISTRICT OF COLUMBIA COURTS, ANNUAL REPORT 78 (1986); DISTRICT OF COLUMBIA COURTS, ANNUAL REPORT 74 (1982).

8. *See* Carter v. Carter, 516 A.2d 917 (D.C. 1986); Bowser v. Bowser, 515 A.2d 1128 (D.C. 1986); Gassaway v. Gassaway, 489 A.2d 1073 (D.C. 1985); Miller v. Miller, 487 A.2d 1156 (D.C. 1985); Gabrielian v. Gabrielian, 473 A.2d 847 (D.C. 1984); Turner v. Taylor, 471 A.2d 1010 (D.C. 1984); Barbour v. Barbour, 464 A.2d 915 (D.C. 1983); *McCree,* 464 A.2d at 922; Powell v. Powell, 457 A.2d 391 (D.C. 1983); Hairston v. Hairston, 454 A.2d 1369 (D.C. 1983); Broadwater v. Broadwater, 449 A.2d 286 (D.C. 1982); Hackes v. Hackes, 446 A.2d 396 (D.C. 1982); Darling v. Darling, 444 A.2d 20 (D.C. 1982); Leftwich v. Leftwich, 442 A.2d 139 (D.C. 1982); Murville v. Murville, 433 A.2d 1106 (D.C. 1981); Burtoff v. Burtoff, 418 A.2d 1085 (D.C. 1980); Brice v. Brice, 411 A.2d 340 (D.C. 1980); *Hemily,* 403 A.2d at 1139; *Turpin,* 403 A.2d at 1144; Benvenuto v. Benvenuto, 389 A.2d 795 (D.C. 1978).

pendente lite,[9] the superior court has stripped away the advantage of one party being able to litigate until he or she has exhausted the other's resources.

Third, few parties have the time or the emotional fortitude to persist through the time-consuming process of litigating a trial, arguing an appeal, waiting for the rendering of an opinion, and relitigating if a remand is ordered. Sooner or later litigants undoubtedly conclude that this phase of their lives should end.

Fourth, an appeal often will be an exercise in futility. Even if a party is successful in convincing the court of appeals that the trial judge erred in making the marital/separate property distinction, on remand the trial judge can award the same amount of property to each party, although the "mix" may differ. For example, suppose that a trial judge split ownership of a marital residence and a small office building, finding that both were martial property. Even though one spouse might successfully convince the court of appeals that the office building was sole and separate property, on remand, the trial judge could award the entire marital residence to the other spouse.

Finally, superior court judges can easily immunize their original decisions against reversal by exercising wide discretion in distribution. Take the example of the husband who claims that most of the parties' investments are his sole and separate property. Rather than tackle the legal classification issue, the trial judge can abide by the presumption that property is marital and classify the assets as marital under the MDA. The court then can apply the list of factors set forth in the MDA and award this property to the husband.[10] Thus, although the husband wanted the court to legally classify the assets as his sole and separate property, he will not appeal the decision because the court ultimately awarded the assets to him. The wife, who won the legal classification battle but has little property to show for it, has no appealable issue except to challenge the trial court's wide latitude in distributing the marital assets.[11]

The consequences of this continued paucity of case law are less speculative than the reasons for its existence. Because so many important issues relating

9. *See, e.g., Darling,* 444 A.2d at 23.

10. *See, e.g., Powell,* 457 A.2d at 391. In *Powell,* the trial court found that shares of stock acquired by the wife after separation but prior to divorce were martial property, but nevertheless awarded them to the wife because "the equities are much stronger after separation." *Id.* at 393. The District of Columbia Court of Appeals upheld the award. *Id.*

11. *See, e.g., Gassaway,* 489 A.2d at 1075 (court has broad discretion in distributing marital property); *Barbour,* 464 A.2d at 922 (same); *Powell,* 457 A.2d at 393 (same); *Hairston,* 454 A.2d at 1371 (same); *Broadwater,* 449 A.2d at 287 (same); *Brice,* 411 A.2d at 344 (same); *Turpin,* 403 A.2d at 1146-47 ("court's discretion under the new statute is at least as broad as it was under the old").

to the marital/separate property distinction under the MDA remain undecided in the District of Columbia, superior court judges have no precedent to guide them in interpreting the MDA and applying it in new situations. For guidance, judges must look to the precedents of other jurisdictions. This is not entirely an unfounded exercise, however, because the District modeled the MDA on the Uniform Marriage and Divorce Act (UMDA),[12] which eight states have adopted and others have used as a model.[13]

This Article identifies those basic marital property issues that remain unresolved in the District of Columbia. By examining the approaches other jurisdictions have taken in resolving similar issues, this Article offers practitioners in the District of Columbia guidance that is consistent with the MDA and its spirit of equating a marriage with a productive partnership.

I. PROPERTY OWNED PRIOR TO THE MARRIAGE AND IMPROVED/MAINTAINED WITH MARITAL FUNDS

The District of Columbia Court of Appeals has not yet decided whether property owned by one spouse prior to the marriage and improved or maintained with marital funds qualifies as (a) the sole and separate property of the spouse who brought the property into the marriage, (b) marital property subject to equitable distribution, or (c) part separate and part marital property. In resolving this open question, the court must determine whether to apply the "source of funds" rule or the "inception of title" rule.

Under the source of funds rule, "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."[14] A single asset can be a hybrid under the source of funds rule, with a portion classified as sole and separate property[15] and the remainder, that proportion consisting of contributions of marital funds, classified as marital property[16] subject to distribution. In contrast to the source of funds rule is the inception of title rule. According to

12. UNIFORM MARRIAGE AND DIVORCE ACT, 94 U.L.A. 147 (1973) [hereinafter UMDA]; *see also Barbour,* 464 A.2d at 919-20 (discussing similar statutory provisions in other jurisdictions).

13. ARIZ. REV. STAT. ANN. §§ 25-311 to -339 (1976); COLO. REV. STAT. §§ 14-2-101 and -113, 14-10-101 to -133 (1973); ILL. ANN. STAT. ch. 40, ¶¶ 101-802 (Smith-Hurd 1980); KY. REV. STAT. ANN. §§ 403.010, 403.110-.350 (Mitchie/Bobbs-Merrill 1984); MINN. STAT. ANN. §§ 518.002-.66 (West 1969 & Supp. 1988); MO. ANN. STAT. §§ 452.300-.415 (Vernon's 1986); MONT. CODE ANN. §§ 40-1-101 to -404, 40-4-101 to -221 (1987); WASH. REV. CODE ANN. §§ 26.09.010-.902 (1980 & Supp. 1988); *see also* 9A U.L.A. 147 (West 1987).

14. Krauskopf, *The Transmutation and Source of Funds Rules in Division of Marital Property,* 50 MO. L. REV. 759, 768 (1985).

15. *See* D.C. CODE ANN. § 16-910(a) (1981).

16. *See id.* § 16-910(b).

this theory, the court classifies property as either separate or marital at the time the owner takes title.[17] The basic difference between these theories stems from their definition of when one "acquires" property. Under the inception of title rule, property is acquired when one has the right to obtain title.[18] In contrast, the source of funds rule recognizes acquisition as an ongoing process, especially where one pays for property in installments.[19]

A. Inception of Title Rule

Under the inception of title rule, property purchased or received before marriage is separate property and retains its classification despite post-marriage enhancements and appreciation.[20] The inception of title rule, an older and more traditional rule than the source of funds rule, has undergone modification over time.[21] States that use the inception of title rule today still insist that the appreciation and enhancement in separate property due to contributions of community property retain the separate classification but recognize a spousal right to recompense for contributions, under either an equitable lien theory or under a right to reimbursement theory.

Potthoff v. Potthoff[22] illustrated the equitable lien theory. The Court of Appeals of Arizona recognized a wife's lien on property acquired by her husband prior to their marriage. In *Potthoff,* the husband had acquired the right to purchase two parcels of land prior to the marriage.[23] The couple used community funds to complete the purchase of one parcel and to build and renovate a shopping center on the second parcel.[24] The husband and the wife signed the loan for the shopping center.[25] The parties listed the second parcel as community property in their federal income tax return.[26] The court held that applications of community funds to separate property did not alter the basic community property principle that the status of separate property may only be altered by agreement or by operation of law.[27] Thus, while both parcels, along with the increases and improvements, re-

17. Krauskopf, *supra* note 14, at 768.
18. *See, e.g.,* Potthoff v. Potthoff, 128 Ariz. 557, 661, 627 P.2d 708, 712 (1981).
19. *See, e.g.,* Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982).
20. Krauskopf, *supra* note 14, at 768-69.
21. *See id.* at 770.
22. 128 Ariz. at 564, 627 P.2d at 715.
23. *Id.* at 559, 627 P.2d at 710.
24. *Id.* at 560, 627 P.2d at 711.
25. *Id.*
26. *Id.* at 561, 627 P.2d at 712.
27. *Id.* at 562, 627 P.2d at 713. However, the court noted that in cases where the community and separate aspects of property became so commingled that the identity of the property was lost, the separate money (but not real property) would be treated as transmuted into community property. *Id.*, 627 P.2d at 713.

mained separate property, the community had a lien on each parcel for the payments, improvements, and renovations made with community funds.[28] The profits or increase in value of the second parcel that were attributable to the husband's community efforts in making the shopping center profitable were, however, community property, unless the husband could show that the increase resulted not from his effort but rather, from the inherent nature of the separate property.[29]

Villarreal v. Villarreal,[30] offers an example of the right of reimbursement theory. The Texas Court of Civil Appeals recognized a right of reimbursement equal to the enhanced value of the separate property improved with community funds.[31] The trial court characterized as entirely marital property a home which the husband acquired several weeks before marriage.[32] The court of civil appeals reversed, invoking the inception of title rule, but noted that the community's contribution to improvements, purchase, or reduction of debt associated with the separate property is reimbursable.[33] In *Jensen v. Jensen*, the Supreme Court of Texas affirmed this approach with respect to appreciation in value of spousal property owned prior to marriage.[34] Under such circumstances, the rule compensates the community for the value of time and effort expended by one party to enhance the value of the separate estate of the other, excluding the amount reasonably necessary to manage and preserve the separate estate.[35] Thus, the court may deduct any amount from the reimbursement award already received by the community as remuneration for such time and effort, including salaries, bonuses, dividends, or fringe benefits.[36]

B. Source of Funds Rule

While the majority of community property states still employ the inception of title rule, it is clearly the minority rule today in other states. The source of funds rule prevails in most jurisdictions, and the trend in common law equitable distribution states is toward its adoption. The rule recognizes

28. *Id.* at 564, 627 P.2d at 715.

29. *Id.* at 565, 627 P.2d at 715.

30. 618 S.W.2d 99 (Tex. Civ. App. 1981).

31. *Id.* at 101.

32. *Id.* at 100.

33. *Id.* at 101; *see also* Fisher v. Fisher, 86 Idaho 131, 383 P.2d 840 (1963).

34. 665 S.W.2d 107 (Tex. 1984).

35. *Id.* at 109.

36. *Id.; cf.* Potthoff v. Potthoff, 128 Ariz. 557, 564, 627 P.2d 708, 715 (1981) (an increase in value attributable to community effort becomes community property under equitable lien theory).

acquisition of property over time as a "dynamic, ongoing process."[37] Therefore, "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."[38]

Three common law equitable distribution states recently have adopted the source of funds rule, beginning with *Harper v. Harper,*[39] where the Maryland Court of Appeals rejected the inception of title rule in favor of the source of funds rule, focusing on an interpretation of the term "acquired" in the applicable Maryland statute. In *Harper,* the husband bought land under an installment contract prior to the marriage. He continued to make payments on the contract during the marriage and later built a home on the property for use as the marital residence.[40] Although the husband at all times retained record title, the wife's name appeared on the mortgage.[41] The husband claimed that he made all payments associated with the home, including payments on the installment contract, as well as construction and maintenance costs.[42] The wife countered that the couple financed the home with proceeds from the sale of the couple's previous home, for which her mother had provided the down payment.[43]

At trial, the court concluded that the parties presented insufficient evidence to show the exact source and extent of funds used for payments for the realty, and construction and maintenance of the marital residence.[44] The trial court held that both the lot and the residence were marital property and ordered a sale, with an equal division of the proceeds.[45] On appeal, the Maryland Court of Appeals addressed two issues: first, whether the real property, when purchased under an installment contract and partially paid for before marriage, was marital property; and second, whether the marital residence constructed on such realty during the marriage was also marital property.[46]

The court rejected the inception of title rule, concluding that the word "acquired" in the Maryland statute meant "the on-going process of making

37. *See* Krauskopf, *supra* note 14, at 768.
38. *Id.*
39. 294 Md. 54, 448 A.2d 916 (1982).
40. *Id.* at 57, 448 A.2d at 918.
41. *Id.* at 58, 448 A.2d at 918.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 58-59, 448 A.2d at 918-19.
46. *Id.* at 55, 448 A.2d at 917.

payment for property."[47] Therefore, the source of funds doctrine, with its emphasis on ascertaining the traceability of expenditures made over time, applied.[48] The court remanded the case with the directive that the trial court determine the source of funds contributed to both the lot and the house.[49] The court would determine the marital nature of the funds based on the ratio that the marital funds bore to the total investment.[50] That proportion would then be subject to equitable distribution.[51] *Harper* provides significant guidance to District of Columbia courts because the Maryland equitable distribution statute is similar to section 16-910 of the MDA.[52] In addition, District of Columbia courts have sometimes looked to Maryland in construing the MDA's equitable distribution provision.[53]

Similarly, in *Hall v. Hall,*[54] the Supreme Judicial Court of Maine considered whether nonmarital property, which the couple renovated and expanded with marital funds, lost its classification as separate property and became marital property.[55] The relevant Maine statute, like the applicable MDA provision, excludes from the definition of marital property "[t]he increase in value of property acquired prior to the marriage."[56]

Based upon this language, the husband in *Hall* argued that the improvements were nonmarital property, and urged the court to follow the inception of title rule.[57] The wife asked the court to adopt the transmutation doctrine and contended that use of marital funds to improve the separate property changed the entire parcel's character to marital property.[58]

The court rejected both positions, instead relying on the source of funds rule.[59] It found that the money spent on the house represented an investment of marital funds.[60] Therefore, the court reasoned, if it denied a return on that investment to the marital estate, it would encourage spouses to divert marital funds toward improvements on separate property.[61] This would cre-

47. *Id.* at 80, 448 A.2d at 929.
48. *Id.*, 448 A.2d at 929.
49. *Id.* at 82, 448 A.2d at 930.
50. *Id.*
51. *Id.*
52. *See* MD. FAM. LAW §§ 8-201 to -213 (1984 & Supp. 1987).
53. Barbour v. Barbour, 446 A.2d 915 (D.C. 1985) (pensions are marital property); Hemily v. Hemily, 403 A.2d 1139, 1143 n.5 (D.C. 1979) (marital property cannot be transformed into separate property by interspousal gift).
54. 462 A.2d 1179 (Me. 1983).
55. *Id.* at 1180-82.
56. 19 ME. REV. STAT. ANN. tit. 19, § 722-A(2)(E) (West 1981).
57. *Hall,* 462 A.2d at 1180.
58. *Id.*
59. *Id.*
60. *Id.* at 1181.
61. *Id.* at 1181-82.

ate an opportunity for the more sophisticated spouse, or the spouse with legal counsel, to take advantage of the other.[62]

Further, in accord with the Maryland court's approach in *Harper,* the *Hall* court interpreted the statutory term "acquired" as an ongoing process of making payment on property, rather than as a final and arbitrary date that a legal obligation to purchase arose.[63] Applying this definition, the court held that the husband had not "acquired" the renovation and improvements before the marriage.[64]

In *Hoffman v. Hoffman,*[65] the Supreme Court of Missouri followed the trend among common-law, equitable-jurisdiction states and adopted the source of funds rule. More significantly, in so doing, it abandoned a long line of Missouri cases upholding the inception of title rule.[66] The dispute in *Hoffman* concerned the status of corporate stock held solely in the husband's name.[67] Prior to marriage, he had acquired 256 shares representing sixteen to seventeen percent of shares outstanding in a close corporation.[68] Subsequent to the marriage, the corporation purchased and retired 858 shares belonging to the husband's father, increasing the husband's interest to 35.3%.[69] Twelve years later, the husband gave away thirty-three shares, reducing his interest to 29.5%.[70]

The wife argued that the increase in ownership interest and value of the corporate stock was marital property. She reasoned that redemption of stock transformed her husband's stock from separate to marital property because her efforts and marital money contributed to the redemption and the stock's increase in value.[71]

The court disagreed with the general proposition that the increase in ownership interest constituted an "acquisition" during coverture, which had the effect of transforming a portion or all of the husband's stock into marital

62. *Id.* at 1182-83 (citing Krauskopf, *Marital Property at Marital Dissolution,* 43 MO. L. REV. 157, 184 (1978)).

63. *Id.* at 1182 (citing Tibbets v. Tibbets, 406 A.2d 70 (Me. 1979)).

64. *Id.*

65. 676 S.W.2d 817 (Mo. 1984) (en banc).

66. *See, e.g.,* Busby v. Busby, 669 S.W.2d 597 (Mo. Ct. App. 1984); Whitenton v. Whitenton, 659 S.W.2d 542 (Mo. Ct. App. 1983); Bishop v. Bishop, 658 S.W.2d 512 (Mo. Ct. App. 1983); Puckett v. Puckett, 632 S.W.2d 83 (Mo. Ct. App. 1982); Ravenscroft v. Ravenscroft, 585 S.W.2d 270 (Mo. Ct. App. 1979); Stark v. Stark, 539 S.W.2d 779 (Mo. Ct. App. 1976); Cain v. Cain, 536 S.W.2d 866 (Mo. Ct. App. 1976); *cf.* Sumners v. Sumners, 701 S.W.2d 720 (Mo. Ct. App. 1985) (en banc) (retroactive application of *Hoffman*).

67. 676 S.W.2d at 820.

68. *Id.* at 821.

69. *Id.*

70. *Id.*

71. *Id.* at 822.

property. Rather, it characterized the new ownership interest as an exchange for an interest owned prior to marriage.[72] Moreover, the court, citing a lack of evidence, rejected the wife's claim that funds used to repurchase the shares came from the husband's salary, which was marital property.[73]

Finally, the court addressed the wife's argument that the stock's increased value resulted in part from her efforts. The court framed the key issue as "whether the stock was wholly 'acquired' prior to the marriage,"[74] noting that the wife did not contest that the original 256 shares belonged to the husband. The court further recognized that resolution of this issue depended upon whether it interpreted the word "acquire" from the perspective of the inception of title rule or the source of funds rule. Upon reviewing the principles of each theory, and taking cognizance that the inception of title rule was losing favor as the less equitable of the two,[75] the court reversed the trial court's application of the inception of title doctrine and followed the source of funds rule.[76]

C. The District of Columbia Rule

Although common law equitable distribution jurisdictions clearly disfavor the inception of title rule, and despite the fact that its fortunes continue to wane even in community property states, the District of Columbia Court of Appeals demurred when it had the opportunity to adopt the source of funds rule. Instead, the court adopted a rule, not followed in other jurisdictions, that has performed inadequately when applied to the wide variety of property distribution cases.

In *Turpin v. Turpin,*[77] decided shortly after the enactment of the MDA,[78] the District of Columbia Court of Appeals addressed whether a jointly funded, jointly owned, and jointly occupied apartment was distributable as marital property. The bulk of the payment for the apartment came from the sale of a home that the husband had owned prior to the marriage.[79] Along with the house proceeds, each spouse contributed cash toward the apartment, which they purchased as joint owners two years after marriage and

72. *Id.*

73. *Id.* at 823.

74. *Id.* (citing Krauskopf, *Marital Property at Martial Dissolution,* 43 MO. L. REV. 157, 180 (1978)).

75. *Id.* at 824 (citing Krauskopf, *Marital Property at Martial Dissolution,* 43 MO. L. REV. 157, 180 (1978)).

76. *Id.* at 825.

77. 403 A.2d 1144 (D.C. 1979).

78. For a discussion of the previous Act, see Green & Long, *The Real and Illusory Changes of the 1977 Marriage and Divorce Act,* 27 CATH. U.L. REV. 469 (1978).

79. *Turpin,* 403 A.2d at 1147.

lived in together for seven years.[80] The superior court judge held that neither the apartment, nor a bond, purchased with the proceeds from the sale of the husband's previous house, were his sole and separate property and distributed both pursuant to section 16-910(b).[81]

On appeal, the husband contended that he could trace 84.73% of the apartment's purchase price to the proceeds of the house.[82] Therefore, he argued, the court should have considered 84.73% of the apartment to be his sole and separate property.[83] The court of appeals rejected this proposal. An important factor in the court's decision was that both the apartment and the bond were jointly titled. The court noted: "[i]f and when the property is put in joint names—for whatever reason—then it is no longer exempted [as sole and separate property] under subsection (a) but rather falls within subsection (b) under which the trial court is to determine how the property is to be distributed."[84] Moreover, the court held that "[t]here is no room under subsection (a) for apportioning property or tracing funds."[85] In light of the pronouncement that it would not apportion or trace property under section 16-910(a), it appeared that the District of Columbia Court of Appeals had declined to follow the source of funds rule.

One year later, however, the court of appeals indicated a willingness to retreat from *Turpin*'s categorical rejection of the source of funds approach. In *Brice v. Brice,*[86] the issue was whether a spouse's property, acquired in a manner enumerated in section 16-910(a), could be treated as property subject to distribution under section 16-910(b). In *Brice,* the wife contended that she had an equitable interest in the marital home because she had made substantial contributions to the household budget.[87] The husband had acquired the house shortly before marriage, held record title, and had made all the mortgage payments.[88] Addressing the wife's argument in dicta, the court noted that "disproportionately high" payments by one spouse for home maintenance and household expenses could create an equitable interest in sole and separate real property.[89]

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1146.
85. *Id.* at 1147. The husband's argument regarding the bond was also rejected. All of the funds for the bond came from the sale of the husband's home. *Id.* The bond was jointly titled, both spouses had dominion and control over it, it was kept in a jointly controlled safety deposit box, and the interest earned from it was deposited into their joint checking account. *Id.*
86. 411 A.2d 340 (D.C. 1980).
87. *Id.* at 343.
88. *Id.*
89. *Id.* The court stated:

Thus, *Brice* leaves open the possibility of conversion of sole and separate property under section 16-910(a) into marital property under section 16-910(b). The decision does not, however, state whether a spouse could convert a portion of an asset.

D. The Solution

A review of the source of funds rule leads to the conclusion that the District of Columbia should adopt a form of the source of funds rule because the rule is consistent with the concept of marriage as a partnership. The inception of title rule encourages inefficiency, motivating a spouse to use marital income to improve only his or her separate property. Under the source of funds rule, each spouse can retain his or her separate property, both spouses benefit from the partnership income, and neither spouse receives a reward for diverting funds toward his or her separate property.

In order to adopt a workable scheme, however, the Court of Appeals for the District of Columbia need not overrule *Turpin* and specifically adopt the source of funds rule. A recent Virginia case, *Smoot v. Smoot,*[90] illustrates that the individual and the partnership can receive proper credit without utilizing the source of funds rule. In *Smoot,* the parties began construction of a new home two years after their marriage.[91] Of the $45,000 down payment, $20,000 came from the husband's settlement for injuries he suffered in an accident that occurred two years before the marriage.[92] The trial court held that the husband could claim a $20,000 credit for the funds that he contributed to the house.[93] The wife appealed, arguing that the court impermissibly applied the source of funds rule and classified the house as part marital and part sole and separate.[94]

Although the state supreme court agreed with the wife that the Virginia statute[95] did not permit the application of the source of funds doctrine, it nevertheless held that awarding a credit was consistent with the statute.[96]

> even in the absence of an antenuptial agreement, we assume for the sake of argument (but do not decide) that disproportionately high payments for home maintenance and household expenses by one spouse may create an equitable interest in real property acquired prior to the marriage and held in the name of the other spouse.

Id.

90. 233 Va. 435, 357 S.E.2d 728 (1987).

91. *Id.* at 437, 357 S.E.2d at 729.

92. *Id.*, 357 S.E.2d at 729.

93. *Id.* at 438, 357 S.E.2d at 729.

94. *Id.* at 439, 357 S.E.2d at 730.

95. VA. CODE ANN. § 20-107.3 (1983). This statute was amended in 1984, 1985 and 1986. *See infra* note 164.

96. *Smoot,* 233 Va. at 442, 357 S.E.2d at 732.

Moreover, the court permitted the use of the source of funds doctrine as an analogy, even though the court had specifically rejected that theory.[97] *Smoot* is useful precedent even though the Virginia statute, unlike the District of Columbia statute, specifically enables the court to make a monetary award.[98] It suggests that the Court of Appeals for the District of Columbia could adopt a method of crediting a spouse for separate contributions to the marriage, and at the same time reward the partnership, without apportioning section 16-910(a) property and, thus, overruling *Turpin.*

II. TRANSMUTATION—JOINTLY TITLED AND COMMINGLED PROPERTY

The transmutation theory recognizes that the intent of the parties can change the characterization of property.[99] As noted above, the District of Columbia courts have shown little flexibility regarding property classifications. Generally, the courts view property as either entirely marital or entirely separate.[100] This rigid, "all or nothing" approach is evident in decisions regarding transmutation and has ultimately resulted in rigid rules that render evidence of intent virtually meaningless. Furthermore, these rules fly in the face of the MDA, which attempted to abolish distinctions based solely on title.[101]

Joint titling, one method of transmutation, was addressed in *Turpin v. Turpin,*[102] where the Court of Appeals for the District of Columbia held that whenever separate property is put in joint names, it automatically becomes marital property.[103] Numerous state courts have adopted a variation of the *Turpin* rule and have held that the act of transferring a nonmarital asset from one spouse to both spouses jointly evidences an intent that the property become part of the marital estate.[104] In those states, however, joint titling

97. *Id.; see also* Brown v. Brown, 5 Va. App. 228, 361 S.E.2d 364 (1987) (asset must be classified either as marital or as separate; not as a hybrid).

98. VA. CODE ANN. § 20-107.3(2)(D) (1983).

99. *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. Ct. App. 1975); Bonnell v. Bonnell, 117 Wis. 2d 241, 344 N.W. 2d 123 (1984); Krauskopf, *supra* note 14, at 190-91.

100. *See supra* notes 77-89 and accompanying text.

101. For a discussion of the difference between the MDA and its predecessor, see Gordon & London, *supra* note 6.

102. 403 A.2d 1144 (D.C. 1979).

103. *Id.* at 1146. The court stated, "If and when the [sole and separate] property is put into joint names—*for whatever reason*—then it is no longer exempted under subsection (a)." *Id.* (emphasis added).

104. *See, e.g.,* Battiste v. Battiste, 135 Ariz. 470, 662 P.2d 145 (1983); Willyard v. Willyard, 719 S.W.2d 91 (Mo. Ct. App. 1986); Quinn v. Quinn, 512 A.2d 848 (R.I. 1986); Bonnell v. Bonnell, 117 Wis. 2d 241, 344 N.W.2d 123 (1984). *But see* Griffin v. Griffin, 415 N.W. 2d 763 (Minn. Ct. App. 1987) (placing proceeds of sale of nonmarital property into jointly titled account did not transform it into marital property).

does not operate as a rigid rule. Instead, it is a presumption that can be overcome by clear and convincing evidence that the transferor did not intend that ownership of the property be transferred to the marital estate.[105]

An early decision addressing the issue of joint titling is *Conrad v. Bowers.*[106] In *Conrad,* the court held that Missouri's newly enacted marital property statute did not overrule the common law presumption that jointly titled property is marital because it evidences an intent to gift property to the other spouse.[107] Other states have adopted the Missouri courts' logic.[108]

A recent Illinois decision, *In re Marriage of Guerra,*[109] illustrates use of evidence of nondonative intent to overcome the presumption that separate property transferred to joint names becomes marital property.[110] In *Guerra,* the court applied a number of factors to determine whether the spouse had rebutted the presumption of marital property. The factors included the size of the gift relative to the entire estate, which spouse paid the purchase price, which spouse exercised control and management over the property, whether improvements and taxes were paid with separate money, when the asset was purchased, and how the parties handled their prior financial dealings with each other.[111] Based on an analysis of these factors, the court held that the husband rebutted the presumption that he intended to give the proceeds of his liquidated company to his wife, even though he deposited the funds in the parties' joint checking account.[112] The court noted that the company stock was the husband's only asset when the parties married and that he alone used the joint account.[113] Moreover, the husband used the funds to purchase a house that he titled solely in his name and had purchased a second house after the parties separated.[114] Finally, when the husband had intended to give property to the wife in the past, his donative intent was

105. *In re* Marriage of Guerra, 153 Ill. App. 3d 550, 505 N.E.2d 748 (husband rebutted presumption where he alone used assets in jointly titled account, first house purchased with proceeds was titled solely in his name, second house was not purchased until after parties separated, and evidence showed that when husband had made previous gifts to wife, his intentions were manifested clearly), *appeal denied,* 116 Ill. 2d 554, 515 N.E.2d 107 (1987).

106. 553 S.W.2d 614 (Mo. Ct. App. 1975).

107. *Id.* at 622. *But see* Grant v. Zich, 300 Md. 256, 477 A.2d 1163 (1983) (statute changed common law presumption of gift arising from joint titling).

108. *See, e.g., Battiste,* 135 Ariz. at 470, 662 P.2d at 145; *Willyard,* 719 S.W.2d at 91; *Quinn,* 512 A.2d at 848; *Bonnell,* 117 Wis. 2d at 241, 344 N.W.2d at 123. *But see Griffith,* 415 N.W.2d at 763 (act of placing proceeds of sale of nonmarital property into jointly titled account did not transform it into marital property).

109. 153 Ill. App. 3d 550, 505 N.E.2d 748 (1987).

110. *Id.* at 558-59, 505 N.E.2d at 754.

111. *Id.* at 556-59, 505 N.E.2d at 752-54.

112. *Id.* at 556, 505 N.E.2d at 752.

113. *Id.*

114. *Id.*

readily apparent.[115]

The Minnesota courts take a slightly different view of joint titling. In *Montgomery v. Montgomery,*[116] the court held that the wife's transfer of title in the parties' home from herself individually to joint tenancy with her husband did not transmute her sole and separate interest in the home into a marital interest.[117] The court examined Minnesota's marital property statute and determined the classification of property by the date of acquisition and not by title.[118] Under these circumstances, the court held that it would be inconsistent with the statute to allow mere transfer of title to transform property.[119] The court reasoned that because "the legislature ha[d] provided definitions of marital and non-marital property, and ha[d] used those definitions as a basis for dividing property in a dissolution . . . allowing the changes in title to transform the classification of property would defeat the legislature's scheme for division."[120]

However, the court did not state that joint titling did not evidence any intent to transmute property. It merely stated that joint ownership is "not dispositive" and specifically noted that "additional factors of long term marriage or transfers by gift might compel a different result."[121]

Both the Missouri rule, as set forth in *Conrad* and the Minnesota rule as outlined in *Montgomery,* are sensible and either could be adopted in the District of Columbia. Several equitable distribution jurisdictions have adopted the Missouri rule, and have applied it after making the marital/separate

115. *Id.* at 553, 505 N.E.2d at 750.

116. 358 N.W.2d 169 (Minn. Ct. App. 1984).

117. *Id.* at 172.

118. *Id.; see also* MINN. STAT. §§ 518.54-.66. Section 518.54(5) states:

> "Marital property" means property, real or personal, including vested public or private pension plan benefits or rights, acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding at any time during . . . which the parties were living together as husband and wife under a purported marriage relationship which is annulled in an annulment proceeding. All property acquired by either spouse subsequent to the marriage and before a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in a form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to section 518.58. The presumption of marital property is overcome by a showing that the property is non-marital property.

Id. § 518.54(5).

119. *Montgomery,* 358 N.W.2d at 172 (citations omitted).

120. *Id.*

121. *Id.*

property distinctions under the source of funds rule.[122] The Minnesota rule is particularly appealing, because both the Minnesota and District of Columbia statutes derived from the UMDA.

The most important aspect of both rules is that they avoid inflexible, automatic transmutation as exhibited in *Turpin* and instead employ a rule of reason. Under either rule, a spouse, like a partner in any joint venture, would not lose his or her separate property simply because he or she becomes a partner in the joint venture of marriage. Conversely, the spouse/partner who contributes to the partnership reaps the benefit of his or her efforts.

Another method of transmutation is commingling, which the District of Columbia Court of Appeals briefly addressed in *Darling v. Darling.*[123] In *Darling,* the husband argued that the court erred in distributing antiques as section 910(b) property because they were corporate rather than personal property.[124] The court stated that "[c]onsidering the commingling of business and personal finances and the fact many of the antiques were purchased with funds earned through the parties' joint efforts, it was proper to distribute the items pursuant to section 16-910(b)."[125] Citing *Turpin,* the court noted that the connection between the antiques and the premarital property was "tenuous" and tracing was impermissible.[126]

The District of Columbia courts' reluctance to adopt the source of funds rule may lead to inequitable results because it forces courts to adopt a per se approach—property either is marital or separate—rather than a rule of reason. For example, a husband may establish a bank account with $10,000 of funds from an unidentifiable source, which, under applicable presumptions, means the money is marital property. In the next three years, the husband deposits $600,000 of inherited funds into the account, clearly sole and separate property. However, under the current statutory framework, all purchases (i.e., exchanges) from the account would be marital property. In other words, any commingling between the two types of property, no matter how slight, converts sole and separate property to marital property without offering special consideration for the disproportionate efforts in the parenting of the property. This is clearly an unfair result.

In resolving this dilemma, judges should be guided by two recent Minnesota decisions. Because the Minnesota marital property statute's definition

122. *See, e.g.,* Hall v. Hall, 462 A.2d 1179 (Me. 1983).

123. 444 A.2d 20 (D.C. 1982).

124. *Id.* at 22-23.

125. *Id.* at 25.

126. *Id.*

of "non-marital property"[127] is very similar to the definition of "sole and separate property" in section 16-910(a) of the MDA, the Minnesota cases present persuasive authority.

In *Nash v. Nash,*[128] the Minnesota Court of Appeals held that the trial court erred in not awarding the wife her nonmarital investment of $5,142 in remodeling the parties' residence.[129] Although the trial court found that the wife had met her tracing requirement by producing receipts demonstrating that she invested the money in the remodeling immediately after inheriting $6,600, it held that the inherited money lost its separate identity because she commingled it in the joint account used to pay family expenses.[130] The court of appeals disagreed, stating, "[t]he parties' earnings of approximately $3,000 per month were used to cover all general family expenses and the inheritance was spent on home remodeling materials about two weeks after it was received. Tracing does not require a party to produce the serial numbers of the dollar bills used."[131] Noting that *"[s]imply routing the funds through the joint account 'does not transform non-marital property into marital property,'* " the court of appeals held that the trial court's denial of a credit for the wife's nonmarital interest was clearly erroneous.[132]

In *Danielson v. Danielson,*[133] the Minnesota Court of Appeals determined that the wife had proved, by a preponderance of the evidence, that she had contributed $23,024 in nonmarital funds to the marital home.[134] The wife introduced an exhibit which showed both the amount of her nonmarital funds (primarily from certificates of deposit) as well as the children's Social Security funds used for improvements.[135] She further demonstrated that she periodically cashed certificates of deposit to pay for the improvements, which could not have been made without her contributions.[136] The court, citing *Nash,* held that the wife had met both her burden of tracing and her burden of showing that a proportion of the marital estate was her separate property.[137] Conversely, the husband was not awarded farm machinery as his sole and separate property because he did not show that the machinery

127. *See* MINN. STAT. § 518.54(5) (1988).
128. 388 N.W.2d 777 (Minn. Ct. App. 1986).
129. *Id.* at 781.
130. *Id.*
131. *Id.*
132. *Id.* (emphasis added) (citing Montgomery v. Montgomery, 358 N.W.2d 169, 179 (Minn. Ct. App. 1984)).
133. 392 N.W.2d 570 (Minn. Ct. App. 1986).
134. *Id.* at 572.
135. *Id.*
136. *Id.*
137. *Id.*

he had brought into the marriage had been exchanged for the couple's present machinery.[138]

The importance of establishing intent was clearly illustrated by the Missouri Court of Appeals in *In re Marriage of Pate.*[139] One of the issues in *Pate* was whether the trial court erred in failing to classify as marital property certificates of deposit purchased with money from a joint checking account.[140] At trial, the husband presented uncontradicted evidence that at the time of the marriage, he had approximately $128,000.[141] The wife entered the marriage with an account of $2,000.[142] After the marriage, the husband deposited money in the joint account and then purchased certificates of deposit, most of which he held in his name.[143] The court of appeals held that it was not error to regard the certificates of deposit as the husband's separate property.[144] The court emphasized that the husband rebutted the presumption that property was marital, where "[t]he whole impact of the [husband's] testimony was that he did not have any intention at any time to transfer ownership of his premarital assets to the [wife] but did intend to afford her the use thereof."[145] The wife testified that she did not know that she was a joint owner of the account.[146] Under these circumstances, the court awarded the certificates of deposit to the husband.[147]

Both the cases addressing joint titling and those considering commingling are consistent with the spirit of the MDA because they deemphasize the importance of title. By giving greater weight to the parties' intent, as evidenced by their actions, recordkeeping practices, and testimony, the courts free themselves to consider each marriage—and its dissolution—on a case-by-case basis. Moreover, because the decisions reward accurate bookkeeping, they are analogous to partnership accounting actions, in which the courts implement every presumption against partners who fail to keep proper records.[148]

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138. *Id.* at 573.
139. 591 S.W.2d 384 (Mo. Ct. App. 1979).
140. *Id.* at 386.
141. *Id.* at 389.
142. *Id.*
143. *Id.* at 390.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *See, e.g.,* Von Seggern v. Von Seggern, 196 Neb. 545, 244 N.W.2d 166 (1976) (burden on plaintiff to establish right to credit); Hurst v. Hurst, 1 Ariz. App. 603, 405 P.2d 913 (1965) (continuing partner's deposits of partnership and personal funds in his personal account are partnership asset where that partner fails to distinguish his personal funds).

III. DATE OF VALUATION

Another issue that the District of Columbia Court of Appeals has not addressed is the date on which property should be valued. Separate but related questions include the cut-off date used for determining inclusion in the marital estate and whether to consider one of the section 16-910(b) factors when determining the "state of the partnership" at the time property was acquired. To determine the proper date of valuation, the District of Columbia Court of Appeals must define the phrase "during the marriage" as used in section 16-910.[149] Consistent with the partnership analogy, the date of permanent separation should be used both for valuation and inclusion purposes.[150]

Some authority for arguing that the phrase "during the marriage" should be defined as "prior to separation" is found in *Powell v. Powell.*[151] The parties in *Powell* married in 1974 and separated in 1979.[152] The wife filed for divorce in February 1980, and the husband filed a counterclaim six months later.[153] The parties owned a total of 182 shares of IBM stock.[154] Prior to separation, the wife held sixteen of those shares in her name and jointly owned a single share with her husband.[155] Between the time of separation and the time of divorce, the wife purchased the additional 165 shares through an employment plan that allowed stock acquisition in lieu of ten percent of her salary.[156] The trial court divided the seventeen shares equally between the parties and awarded the wife the remaining 165 shares.[157] On

149. *See supra* notes 17-19 and accompanying text.

150. Although the District of Columbia Court of Appeals has not yet defined the phrase "during the marriage," *see infra* notes 151-61 and accompanying text, at least one court has used the period from marriage to the divorce decree as the measure. In Barbour v. Barbour, 464 A.2d 915 (D.C. 1983), the issue before the court was whether civil service pension benefits constituted marital property under § 16-910(b). The trial court held that they were marital property and awarded the wife 50% of her husband's pension benefits that were earned during the marriage. *Id.* at 917-18. In determining the amount, the court divided the number of years of the marriage by the number of years of service creditable to the pension. *Id.* at 918. The Barbours were married in 1952, separated in 1964 and divorced in 1981, and the court used 29 as its basis for calculation, thus measuring the length of the marriage from the date of marriage to the date of divorce. *Id.* at 917. The same method of calculation was used by the court in McCree v. McCree, 464 A.2d 922, 925 n.2 (D.C. 1983), decided same day as *Barbour; see also* Murville v. Murville, 433 A.2d 1106 (D.C. 1981) (major assets to be distributed pursuant to D.C. Code § 16-910 was marital home, "the assessed value of which was $35,000 at the time of trial.").

151. 457 A.2d 391 (D.C. 1983).

152. *Id.* at 392.

153. *Id.*

154. *Id.*

155. *Id.* at 393.

156. *Id.*

157. *Id.*

appeal, the husband contended that the trial court erred in finding the 165 shares to be wife's sole and separate property rather than marital property subject to equitable distribution.[158] However, the District of Columbia Court of Appeals affirmed the award, holding that the trial court properly applied the law and considered all factors relevant to equitable distribution.[159] After reviewing the record, the court of appeals stated that the trial judge correctly found that the stock was an asset accumulated during the marriage.[160]

A significant point in *Powell* is the trial court's statement that "the equities [in favor of the wife] are much stronger after separation."[161] Thus, even though the court of appeals was not called upon to define the phrase "during the marriage" and did not fix a date for valuing the property, it did uphold the trial court's decision to award stock acquired after separation but prior to divorce to the wife. Moreover, the court of appeals did not criticize the trial court's statement that the equities favored the wife after separation.

Powell is consistent with the purpose of the MDA. The husband, in *Powell* did nothing to acquire the 165 shares; the partnership/marriage did not even exist at the time of acquisition. The contrary result would encourage parties to quickly file a divorce action and proceed to trial in order to avoid the situation where, although separated, they add to the marital estate. Thus, the current rule unintentionally discourages separations that may result in reconciliation. Treatment of the fruits of labor after separation as marital property penalizes parties who unsuccessfully attempt to reconcile.

The New Jersey Supreme Court probably has given the issue of date of valuation more consideration than any other court. Beginning with *Painter v. Painter,*[162] the court flatly rejected a literal reading of the term "during the marriage" and held that the filing of the complaint, rather than the divorce, should govern valuation. The court has modified the rule in numerous cases since *Painter* and has developed a common-sense policy for both valuation and inclusion that rewards both the partnership while it is a viable entity,

158. *Id.*

159. *Id.* Under § 16-910(b), factors to be considered are:

> duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions of the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income.

D.C. CODE ANN. § 16-910(b).

160. *Powell,* 457 A.2d at 393.

161. *Id.*

162. 65 N.J. 196, 320 A.2d 484 (1974).

and individual industry once the partnership has effectively dissolved.[163]

Furthermore, recent decisions in Virginia,[164] Pennsylvania,[165] Alas-

163. *See* Smith v. Smith, 72 N.J. 350, 371 A.2d 1 (1977) (date of the separation agreement controlling as to both inclusion and valuation if the parties have a separation agreement that could qualify as a property settlement and is fair and equitable); *see also* DiGiacomo v. DiGiacomo, 80 N.J. 155, 402 A.2d 922 (1979) (date of the oral property settlement controls where parties orally agreed upon fair and equitable property settlement and executed it); Carlsen v. Carlsen, 72 N.J. 363, 371 A.2d 8 (1977) (companion case to *Smith*); Borodinsky v. Borodinsky, 162 N.J. Super. 437, 447, 393 A.2d 583, 583 (1978) ("the termination date for determining eligible assets is also the date for valuation of those assets"). In Brandenburg v. Brandenburg, 83 N.J. 198, 416 A.2d 327 (1980), the New Jersey Supreme Court then reviewed its earlier decisions and stated:

> In the absence of a qualifying separation agreement, the date a complaint is filed will fix the termination date of a marriage for purposes of equitable distribution. If the parties have entered into a written separation agreement accompanied by actual physical separation, the date of the agreement will terminate the period of acquisition of distributable assets. If the parties have separated in fact and divided their property pursuant to an oral agreement, assets acquired afterwards are not eligible for equitable distribution.

Id. at 209-10, 416 A.2d at 333 (footnote omitted); *see also* Portner v. Portner, 93 N.J. 215, 460 A.2d 115 (1983) (complaint used to determine the termination date of the marriage must be that complaint which actually results in the final divorce decree); Raspa v. Raspa, 207 N.J. Super. 371, 504 A.2d 683 (1985) (date of filing complaint used where parties separated within marital home by maintaining separate bedrooms and no separation agreement existed).

164. The Virginia legislature amended its statute, addressing the date of inclusion, twice in three years. In 1983, § 20-107.3(A)(2) of the Virginia Code defined marital property as all jointly titled property and "all other property acquired by either spouse during the marriage which is not separate property." VA. CODE ANN. § 20-107-3(A)(2) (1983). The statute further stated the following presumption: "All property acquired by either spouse during the marriage is presumed to be marital property in the absence of satisfactory evidence that it is separate property." *Id.*

The statute was amended in 1984 to make the presumption applicable to that "property acquired by either spouse during the marriage, and before the filing of a bill of complaint stating a ground for divorce." VA. CODE ANN. § 20-107.3(A)(2) (Supp. 1985).

Pursuant to the 1986 amendment, the current version of the Virginia Code states: "All property . . . acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital." VA. CODE ANN. § 20-107.3(A)(2) (Supp. 1987); *see also* Price v. Price, 4 Va. App. 224, 355 S.E.2d 905 (1987) (discussing statutory amendments).

Despite the fact that the statute appears to clarify the inclusion question, it does not address the date of valuation issue. In this regard, the *Price* court recently noted that, although the date of last separation is the most appropriate for inclusion, the evidentiary hearing or trial date may be the most practical for valuation. The court further noted, however, that the trial courts must be flexible and choose the valuation date on a case-by-case basis "since both fortuitous or intentional events can drastically affect values and equities between date of classification and valuation." *Id.* at 232, 355 S.E.2d at 910.

165. The issue before the Pennsylvania Superior Court in Sergi v. Sergi, 351 Pa. Super. 588, 506 A.2d 928 (1986), was the trial court's use of the hearing date rather than the separation date for valuation purposes. The subject of dispute was the marital home, in which the parties' equity was $22,765.00 at the date of separation and $39,500.00 at the time of the hearing. *Id.* at 595, 506 A.2d at 932. The court upheld the trial court's use of the hearing date but specifi-

ka,[166] and Montana[167] either upheld trial court decisions to value marital

cally declined to establish a valuation date to be used in every situation. *Id.* at 592, 506 A.2d at 930. The court recognized that there were logical arguments in favor of using the separation date. The court rejected the argument that it should follow Pennslyvania's divorce code, which excepts from the definition of marital property that property acquired after separation until the divorce date. *Id.* The court stated that the date of inclusion under that section is distinct from the date used for valuation purposes. *Id.; see also* Winters v. Winters, 355 Pa. Super. 64, 512 A.2d 1211 (1986) (hearing date used for valuation); Braderman v. Braderman, 339 Pa. Super. 185, 488 A.2d 613 (1985) (pension valued at hearing date); King v. King, 332 Pa. Super. 526, 481 A.2d 913 (1984) (same). *But see Smith,* 72 N.J. at 350, 371 A.2d at 1; *Borodinsky,* 162 N.J. Super. at 437, 393 A.2d at 583; Barnhart v. Barnhart, 343 Pa. Super. 234, 494 A.2d 443 (1985) (trial court erred in not including value of pension as marital property even though no longer existing at time suit filed; *Sergi* notes that date of separation in this case would be appropriate valuation date).

The concurring judge in *Sergi* would have the court establish a rule stating that "in the absence of extraordinary circumstances, the date for valuing marital property is the date on which the parties separate." *Sergi,* 351 Pa. Super. at 601, 506 A.2d at 935 (Wieland, J., concurring). The concurrence reasoned that using the separation date will be fair, encourage parties to settle their property rights promptly, and allow parties to pursue their separate lives without concern over how their endeavors will be affected in a future property distribution. *Id.* The concurring judge concluded, however, that the circumstances in *Sergi* were "exceptional" so as to warrant valuation at the hearing date. *Id.* at 602, 506 A.2d at 935-36.

166. The Supreme Court of Alaska recently interpreted the meaning of "during the marriage" for inclusion purposes in Schanck v. Schanck, 717 P.2d 1 (Alaska 1986). That court stated:

> As a general rule, we hold that property accumulated with income earned after a final separation that is intended to, and does in fact, lead to a divorce is excluded from the category of marital property, as long as it is obtained without the invasion of any pre-separation marital asset. We decline to specify, as a matter of law, that the effective date when such earnings become severable from marital property is at separation or at filing for divorce. Each case must be judged on its facts to determine when the marriage has terminated as a joint enterprise.

Id. at 3 (footnote omitted). The court accepted the husband's suggestion that the date the wife filed her complaint for divorce was a reasonable cut-off point for inclusion. *Id.* While the court's decision to determine each case on its particular facts was made in the context of inclusion rather than valuation, the court later noted that the property should have been valued on the same date as the date used for inclusion, and remanded to the superior court for calculations. *Id.* at 5; *see also* Burcell v. Burcell, 713 P.2d 802 (Alaska 1986) (no abuse of discretion where trial court relied on date of permanent separation for division of property and award of interest). *But see* Bussell v. Bussell, 623 P.2d 1221 (Alaska 1981) (valuation of property as of date of divorce upheld where not clear that marriage was irretrievable on date of separation).

167. The Supreme Court of Montana considers each situation on a case-by-case basis and is unwilling to create a standard rule for valuation. *See, e.g., In re* Marriage of Hunter, 196 Mont. 235, 639 P.2d 489 (1982). In Lippert v. Lippert, 627 P.2d 1206 (Mont. 1981), the court held that there is no single event in the dissolution process that establishes the date for valuation of marital assets because a court might need to use different valuation dates for different properties. *Id.* at 1208. In *In re* Marriage of Krause, 200 Mont. 368, 654 P.2d 963 (1982), the Montana Supreme Court reiterated the principles of *Lippert,* stating that there is no single event in the dissolution process that is determinative of the valuation date, and it is preferable to value assets at the time of distribution. *Id.* at 379, 654 P.2d at 968.

In *In re* Marriage of Wagner, 679 P.2d 753 (Mont. 1984), however, the Montana Supreme

property as of the date of separation or have specifically recognized it as a benchmark date.[168] It appears that the trend is toward a flexible approach that allows the trial court to determine the valuation date based upon the circumstances presented in each case.

A review of other states' consideration of the matter illustrates the sound reasoning behind valuing property as of the date of a separation culminating in divorce, particularly where, as in the District of Columbia, the statute derived from the UMDA. First, it is consistent with the view of marriage as a partnership.[169] As with any other type of joint undertaking, shared property should include assets acquired by the joint efforts of the parties who

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Court found that the trial court had "abused its discretion by failing to evaluate the marital assets as of the date of separation. *Id.* at 759. After the Wagners separated, the wife left the family ranch and "aggressively" involved herself in a successful new business venture, while the husband terminated the parties' ranch operation, liquidated the livestock and increased the loan encumbering the ranch. *Id.* at 755. The parties' financial status had thus undergone a drastic change between separation and dissolution. The *Wagner* court noted that while it generally used the date of dissolution for valuation of assets, the unusual facts of the case merited deviation from that rule. *Id.* at 758. The court stated "under the circumstances of this case the date of valuation of marital assets should have been the date of separation when, in fact, the marriage was irretrievably broken and individual business practices had not yet altered the financial status quo of the parties." *Id.* at 758-59. The court faulted the trial court because it "essentially rewarded the husband for encumbering the family ranch and penalized the wife for her ambitious effort after the broken marriage to negotiate her own independent financial security." *Id.* at 759.

168. Other states that have left the proper date to the judge's discretion are Iowa, *see In re* Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981) (holding that it is not appropriate for the court to develop general rule and distinguishing earlier cases holding that trial date is proper valuation date) and Ohio, *see* Berish v. Berish, 69 Ohio St. 2d 318, 432 N.E.2d 183 (1982). *But see* Dobbyn v. Dobbyn, 57 Md. App. 662, 471 A.2d 1068 (1984). In *Dobbyn,* one of the issues before the Maryland Court of Special Appeals was whether the chancellor erred in using the date the divorce action was filed for the purpose of valuing marital property consisting of stocks, securities, bonds options, commodities, and reserve funds. Although the parties had agreed that for purposes of inclusion they would use the date the complaint was filed, the appellate court held that the trial court erred in using the date of filing for valuation purposes. *Id.* at 666, 471 A.2d at 1074. The court looked to previous cases where it had held that a marriage is not considered terminated until the date of the decree and noted that it made sense to interpret the phrase "during the marriage" as meaning "the time between the commencement of the marriage and its dissolution by death, annulment or the issuance of a decree of absolute divorce." *Id.* at 667, 471 A.2d at 1075. The court then looked to the preamble to the Marital Property Act and noted that the statute was meant to operate with precision and efficiency. *Id.*, 471 A.2d at 1075. While noting "the exceedingly difficult and tedious technical assessment of financial aspects in this particular matter," the court nevertheless felt that the purposes of the statute were best served by determining value as of the date of the decree of divorce, based upon the evidence produced at trial. *Id.*; *cf.* Rosenberg v. Rosenberg, 64 Md. App. 487, 495, 497 A.2d 485, 495 (no error in valuing property as of date trial ended rather than date of divorce decree where only one month difference), *cert. denied,* 305 Md. 107, 401 A.2d 845 (1985).

169. *See* Smith v. Smith, 72 N.J. 350, 355, 371 A.2d 1, 7 (1977); Rothman v. Rothman, 65 N.J. 219, 223, 320 A.2d 496, 501-02 (1974).

undertook the endeavor. The argument that it is difficult to determine when a marriage irretrievably breaks down (i.e. when the joint venture collapses) is unfounded when one party is seeking a contested divorce pursuant to section 16-904 of the MDA. In that case, the court will have to make findings of fact as to the date of separation and determine whether the period of separation has been continuous.

An adoption of the date of separation would also encourage productivity and independence. Valuing marital property on the separation date rewards industry by encouraging the lower salaried party to seek more lucrative employment. Moreover, it will encourage both parties to advance their investments without fear that their only reward will be a court order to split the proceeds with a former spouse. Using the date of separation also will discourage a particularly acrimonious spouse from dissipating the marital assets prior to trial and will not reward a party's poor investments and faulty judgment.[170]

Furthermore, valuation of property as of the separation date virtually eliminates the chance for a spouse to manipulate the court system. If the court adopts the date of filing the complaint, a party can watch for fluctuations in stock and file at the precise moment when that stock has reached its peak value. If the court adopts either the date of trial or decree, a party could request a continuance of trial until some future date at which the change in property values would benefit his or her interest. This would not only burden the court's already crowded dockets, but might also present ethical problems for an attorney who otherwise is prepared for trial.[171]

Finally, use of the separation date for valuing marital property will promote judicial economy. While the District of Columbia does not routinely schedule pretrial conferences in contested divorce trials, use of the separation date would enhance the value of holding a pretrial conference because the parties would have facts and figures readily available at that time. Even if there were no formal pretrial conference, advance valuations would force parties to focus on property issues earlier in the process and facilitate prompt settlement of claims. Finally, using the separation date would eliminate the court's need to take matters under advisement. If on the day of trial the parties present valuation calculations based on the date of separation, no need exists for the parties or the court to update the information, avoiding delay.

170. *See, e.g., In re* Marriage of Wagner, 679 P.2d 753, 758-59 (Mont. 1984); Sergi v. Sergi, 351 Pa. Super. 588, 591, 506 A.2d 928, 932 (1986).

171. *See* D.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

IV. Loan Proceeds

The District of Columbia has not adequately addressed the issue of whether to classify loan proceeds as sole and separate property or as marital property. In *Bowser v. Bowser,*[172] the District of Columbia Court of Appeals briefly addressed the treatment of loan proceeds in an equitable distribution context. In *Bowser,* the trial court had divided the parties' $25,000 equity in the marital home.[173] Despite the fact that the wife's contributions "far outweighed" the husband's contributions, the trial court awarded him $10,000.[174] The court of appeals found no support for this award, but noted that the fact that the parties had taken out a $10,000 loan for home improvements could support the equity award "only if there [was] evidence that the loan proceeds went into the property and that Mr. Bowser had paid the loan or was solely responsible for paying the loan."[175]

The court of appeals considered sole liability on a loan as a factor under section 16-910(b) in *Benvenuto v. Benvenuto.*[176] In *Benvenuto,* the superior court awarded the jointly titled home entirely to the husband.[177] The court of appeals upheld the award where the evidence showed that the husband alone was obligated to repay his mother for the loan for the house, and neither spouse had made significant monetary contributions either to finance or to improve the house.[178]

However, neither of these cases has considered whether to classify the proceeds from a loan as an asset under the MDA and, if so, how to determine the classification of such an asset. The issue of how to classify credit acquisitions during marriage recently was addressed by the California Court of Appeal in *In re Marriage of Grinius.*[179] California law presumes that all property acquired during the marriage is community property. However, "the character of credit acquisitions during marriage is 'determined according to the intent of the lender to rely upon the separate property of the purchaser or upon a community asset.' "[180] The *Grinius* court reviewed the "intent-of-the-lender" rule and created the following standard: "[l]oan proceeds acquired during marriage are presumptively community property; however, this presumption may be overcome by showing the lender intended

172. 515 A.2d 1128 (D.C. 1986).
173. *Id.* at 1130.
174. *Id.*
175. *Id.*
176. 389 A.2d 795 (D.C. 1978).
177. *Id.* at 797.
178. *Id.* at 798.
179. 166 Cal. App. 3d 1179, 212 Cal. Rptr. 803 (1985).
180. *Id.* at 1185-86, 212 Cal. Rptr. at 808 (citing *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 455, 152 Cal. Rptr. 668 (1979)).

to rely solely upon a spouse's separate property and did in fact do so."[181]

Texas applied a similar rule in *Mortenson v. Trammell,*[182] where the court held that a spouse could rebut the presumption that any loan made to a spouse during the marriage is a community obligation with "clear and satisfactory evidence that the creditor agreed to look solely to the separate estate of the contracting spouse for satisfaction."[183] In *Mortenson,* the wife borrowed money from a bank, using as collateral a certificate of deposit that was her sole and separate property.[184] On the same day, she loaned the money to her daughter and received a secondary vendor's lien and deed of trust as collateral.[185] The loan agreement stated that payment was to be made to both the wife and her husband.[186] The court noted that the creditor intended to satisfy the debt from the wife alone by requiring her certificate of deposit as collateral and would have looked to the wife for repayment of the debt in case of default.[187]

The Supreme Court of Idaho adopted a more expansive view in *Winn v. Winn*[188] when it stated that the intent of the spouses is paramount, and "[i]f there exists between the spouses an actual, articulated intent that the obligation be separate or community in character, that intent shall control."[189] In the absence of such an intent, the court suggested that it will review factors such as the liability of the community for the loan, the basis of credit on which the lender relies in making the loan, the nature of the down payment, the names on the deed, and which spouse signed the documents of indebtedness.[190] According to the court, no single factor is dispositive because "[s]uch an approach is too rigid in light of [the] ultimate purpose of determining the likely intent of the spouses and in consideration of the highly individualistic and often complex fact situations presented."[191]

The District of Columbia should adopt a rule wherein the entity taking the risk receives any benefits from it. Such a standard would be consistent with partnership principles. If a loan is made to an individual, that individual alone is responsible for repayment. If the couple does not offer marital property as collateral, no benefit should accrue to the partnership. Con-

181. *Id.* at 1187, 212 Cal. Rptr. at 809-10.
182. 604 S.W.2d 269 (Tex. Ct. App. 1980).
183. *Id.* at 275.
184. *Id.* at 276.
185. *Id.* at 275-76.
186. *Id.*
187. *Id.* at 276.
188. 105 Idaho 811, 673 P.2d 411 (1983).
189. *Id.* at 814, 673 P.2d at 414.
190. *Id.* at 815, 673 P.2d at 415.
191. *Id.*

versely, if the partnership assumes the risks of liability, it also should reap the benefits.

V. INCREASES IN SOLE AND SEPARATE PROPERTY

By its explicit terms, section 16-910(a) of the MDA provides that "*any* increase" in a sole and separate asset also is sole and separate property.[192] A convincing argument can be made that the term "any increase" should be construed to mean just that—namely, an increase from whatever source and in whatever manner. First, a cardinal principle of statutory construction is that a court should not look behind the plain meaning of a statutory provision.[193] Moreover, the District of Columbia courts have strictly interpreted section 16-910. In *Hemily v. Hemily,*[194] the court noted that in order for property to be exempt from equitable distribution, it must have been acquired in a way enumerated under section 16-910(a). Otherwise, it is section 16-910(b) property. Thus, if an asset qualifies under section 16-910(a) in the first instance, the increase in value also is sole and separate property; to hold otherwise would render the phrase "any increase" meaningless.

Other jurisdictions faced with the issue of classifying increases in sole and separate property have distinguished between whether the increase results from passive factors or from the active involvement of either spouse. The current trend by many state courts is to hold that passive increases—those caused by inflation, appreciation or other market forces not attributable to either party's efforts—in sole and separate property are themselves sole and separate, unless the nondebtor spouse can prove that he or she contributed to the increase.[195]

Although the Maryland marital property statute has no provision regarding the increase of separate property, it has followed the current trend. In

192. D.C. CODE ANN. § 16-910(2) (1981); *see also supra* note 2.

193. *See, e.g.,* Caminetti v. United States, 242 U.S. 470, 472 (1917) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the court is to enforce it according to its terms."); Marshall v. District of Columbia Rental Housing Comm'n, 533 A.2d 1271 (D.C. 1987) (applying principle).

194. 403 A.2d 1139, 1143 n.3 (D.C. 1979).

195. *See, e.g., In re* Marriage of Herr, 705 S.W.2d 619 (Mo. Ct. App. 1986); *see also* Bentley v. Bentley, 84 Ill. 2d 97, 417 N.E.2d 1309 (1981); Rosenberg v. Rosenberg, 64 Md. App. 487, 497 A.2d 485, *cert. denied,* 305 Md. 107, 501 A.2d 845 (1985); Van Newkirk v. Van Newkirk, 212 Neb. 730, 325 N.W.2d 832 (1982); Palmer v. Palmer, 7 Ohio App. 3d 346, 455 N.E.2d 1049 (1982); Mothershed v. Mothershed, 701 P.2d 405 (Okla. 1985); Templeton v. Templeton, 656 P.2d 250, 252 (Okla. 1982); Elam v. Elam, 97 Wash. 2d 811, 650 P.2d 213 (1982); *In re* Marriage of Johnson, 28 Wash. App. 574, 625 P.2d 720 (1981); Plachta v. Plachta, 118 Wis. 2d 329, 348 N.W.2d 193 (Ct. App. 1984).

Rosenberg v. Rosenberg,[196] one of the issues on appeal was whether the trial court erred in holding that a substantial increase, over the course of a thirty year marriage, in the value of the husband's interests in a family business acquired through gifts and bequests were the husband's separate property.[197] The court found that while the husband was a member of the board of directors of one corporation and both corporations were family businesses, the wife did not prove that the husband's personal efforts contributed, either directly or indirectly, to the increase in the husband's interests.[198] Rather, the court noted that the increase in value was attributable to, inter alia, the increase in value and earnings of the companies' subsidiaries, and factors that generally affected the business, such as the oil embargo and shortage of the 1970's.[199] *Rosenberg* conforms with other Maryland decisions holding that an increase in nonmarital stock that is attributable mostly to market factors is separate property.[200] In Maryland, the burden is on the nontitled party to prove that the increase in value of the separate property is not passive.[201] Additionally, the fact that the titled spouse is an owner or employee of a company is not dispositive.[202]

Some jurisdictions have addressed the classification of increases in sole and separate property in their marital property statutes.[203] Of these statutes, Minnesota's statute is most similar to section 16-910 of the MDA because it

196. 64 Md. App. at 487, 497 A.2d 485, *cert. denied,* 305 Md. 107, 501 A.2d 845 (1985).

197. *Id.* at 501, 497 A.2d at 491-92.

198. *Id.* at 530, 497 A.2d at 506.

199. *Id.*, 497 A.2d at 507.

200. *See* Wilen v. Wilen, 61 Md. App. 337, 486 A.2d 775 (1985) (split of nonmarital stock and increase in value of nonmarital stock remains nonmarital); Mount v. Mount, 59 Md. App. 538, 476 A.2d 1175 (1984) (stock dividend received by husband in wholly owned subsidiary of corporation of which husband was 10% owner and employee held separate property); Schweizer v. Schweizer, 55 Md. App. 373, 462 A.2d 562 (1983), *aff'd and remanded,* 301 Md. 626, 484 A.2d 267 (1984) (increase in value of separate stock in corporation, where husband on board of directors, remains separate property); *cf.* Brodak v. Brodak, 294 Md. 10, 447 A.2d 847 (1982) (trailers added by efforts of wife to trailer park gifted to husband held marital property).

201. *See, e.g., Rosenberg,* 64 Md. App. at 530, 497 A.2d at 506.

202. *See, e.g., id.* at 530-31, 497 A.2d at 506.

203. In New York and Kentucky, for example, the increase in value of property acquired prior to the marriage is considered separate property to the extent that such increase did not result from the efforts of the parties during the marriage. KY. REV. STAT. ANN. § 403.190(2)(e) (Mitchie/Bobbs-Merrill 1984); N.Y. DOM. REL. LAW art. 11-A, pt. B(1)(d)(3) (McKinney 1986). Other states specifically include income from the separate property, *see, e.g.,* N.C. GEN. STAT. § 50-20(b)(2) (1984); VA. CODE ANN. § 20-107.3(1)(iii) (1983), or only include the increase in value of that property acquired prior to the marriage. *See, e.g.,* ARK. STAT. ANN. § 34.1214(B) (1947); COLO. REV. STAT. § 14-10-113(2) (1973); DEL. CODE ANN. tit. 13, § 1514(b) (1981); ILL. REV. STAT. ch. 40, para. 503(a) (1977); ME. REV. STAT. ANN. tit. 19 § 722-A(a)(E) (1964); MO. REV. STAT. § 452.330(2)(5) (1945); MONT. CODE ANN. § 40-4-202(1) (1947).

broadly includes as separate property the increases in all types of separate property.[204] Despite the plain language of the Minnesota statute, however, the court, in *Nardini v. Nardini*,[205] held that the increase in the value of separate property attributable to the efforts of one or both spouses during the marriage is marital property, and the increase in value of nonmarital property attributable to inflation or to market forces or conditions remains separate.

The issue before the court in *Nardini* was the classification of the family business.[206] The husband owned fifty percent of the business prior to the marriage and the parties purchased the other half during the marriage.[207] The trial court awarded one half of the present value of the business to the husband as marital property.[208] The court of appeals reversed, noting that although the statute appeared straightforward in stating that the increase in value of nonmarital property also is nonmarital, the statute "seem[ed] out of harmony with the modern definition of property as a bundle of rights."[209] Among the inadequacies in the statute noted by the court of appeals was its failure to offer direction in resolving complex property issues and, specifically, its failure to distinguish between active and passive increases.[210]

In the court's decision in *Nardini*, an important factor used to distinguish between active and passive increases stemmed from earlier Minnesota decisions apportioning marital and nonmarital interests in assets purchased with separate funds, and improved or paid off with marital funds.[211] Because contributions of labor to nonmarital property constitute marital property, the court held in *Nardini* that any increase in value attributable to either spouse's labor should be marital, but any increase in value attributable to inflation or market forces retains separate character.[212]

This reasoning embraces the partnership theory of marriage espoused by the UMDA and recognizes that the active efforts and contributions of either party, whether financial or otherwise, are all important factors in producing a profitable marriage. Because assets, the product of a marriage, are the sum total of all of the contributions made to it, each party has a continuing inter-

204. MINN. STAT. § 518.54(5) (West 1988).
205. 414 N.W.2d 184 (Minn. 1987).
206. *Id.* at 184.
207. *Id.*
208. *Id.* at 187.
209. *Id.* at 191.
210. *Id.*
211. *See* Faus v. Faus, 319 N.W.2d 408 (Minn. 1982); Brown v. Brown, 316 N.W.2d 552 (Minn. 1982); Schmitz v. Schmitz, 309 N.W.2d 748 (Minn. 1981); Quinlavin v. Quinlavin, 359 N.W.2d 276 (Minn. App. 1984).
212. 414 N.W.2d at 191-92.

est in those assets and a right to them at dissolution.[213]

Not surprisingly, the modern trend toward distinguishing between active and passive increases in sole and separate property parallels the emergence of the source of funds rule as the preferred method of classifying a hybrid asset. Both theories are based upon partnership principles and strive to reward each individual's contribution as a partner, while simultaneously preserving individual achievements. This active/passive distinction not only makes sense as a modern trend, but also is consistent with the District of Columbia Court of Appeals holding in *Brice v. Brice.*[214] In *Brice,* the court stated that "disproportionately high payments for home maintenance and household expenses by one spouse may create an equitable interest in real property acquired prior to the marriage and held in the name of the other spouse."[215] Applying the *Brice* test, the court in *Darling v. Darling*[216] held that the wife's extensive contributions to her husband's earnings gave her an equitable interest in the business.[217] Therefore, under *Brice* and *Darling,* an increase in sole and separate property could be reclassified as marital if the nontitled spouse meets his or her burden of showing disproportionate and substantial contributions to the asset. If that burden is met, the court reclassifies as marital property not only the increase, but also the underlying asset itself. The active/passive distinction is similar, but is a more reasonable rule because it allows classification of the increase as marital and allows the titled spouse to retain the underlying asset as his or her sole and separate property.

VI. CONCLUSION

If a marriage in the District of Columbia is to be viewed as a partnership while it endures, it also must be viewed as a partnership during dissolution.

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213. In *Nardini,* the court stated:

> "The concept of equitable distribution is a corollary of the principle that marriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial. . . . [T]he extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance but, rather, by the whole complex of financial and nonfinancial components contributed. The function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was a partnership entity."

Id. at 192 (quoting Wood v. Wood, 119 Misc. 2d 1076, 1079, 465 N.Y.S.2d 975, 977 (Sup. Ct. 1983)).

214. 411 A.2d 340 (D.C. 1980).

215. *Id.* at 343.

216. 444 A.2d 20 (D.C. 1982).

217. *Id.* at 24.

In order to accomplish this, practitioners and trial judges will have to take positions consistent with these principles. Clearly the most important step will be for the court to examine the source of funds rule, or at least some version of it, whereby the parties' resources, both financial and otherwise, are applied in the proper proportion to the marital venture. Credit must be given where credit is due, and the court should not embrace artificial presumptions too tightly; the rule of reason should prevail. In other words, courts should construe the near unfettered discretion already given by the MDA to trial judges more broadly, allowing them to consider the tracing of assets, the intent and extent of commingling, the scope of transmutation, and similar questions. Once they adopt a comprehensive classification scheme, the answers to other questions, such as the role of transmutation and the classification of increases and loan proceeds, will be readily apparent.

As a late bloomer in the marital property area, the District of Columbia has a wealth of precedent from other jurisdictions to follow. If marriage is indeed a partnership then courts should be free to fully determine the contributions of partners based on activities of each individual—as wage earner, homemaker, family maker or breaker—without undue influence from a rigid reading of the Act. The laws in this and other jurisdictions have come a long way in the last ten years. Courts in the District of Columbia have ample precedent to create decisional law in this area that reflects the modern view of marriage as a partnership.