

WANBERG V. WANBERG: CHARACTERIZATION OF PROPERTY FOR THE PURPOSE OF EQUITABLE DISTRIBUTION

I. INTRODUCTION

In *Wanberg v. Wanberg*,¹ the Alaska Supreme Court held that where one spouse actively participates in the ongoing maintenance, management, and control of property acquired by the other spouse prior to marriage, that property must be subject to equitable distribution upon divorce. This note analyzes the impact of *Wanberg* on the determination of what property is subject to equitable distribution in Alaska divorce proceedings. First, equitable distribution in Alaska is discussed. Second, *Wanberg* is analyzed in light of four alternative methods to interpret the Alaska equitable distribution statute. The ramifications of treating separate property as marital property, based on a judicial inference of the parties' intentions, are then discussed. In conclusion, recommendations are offered which would limit the impact of *Wanberg*.

II. BACKGROUND ON EQUITABLE DISTRIBUTION IN ALASKA

"Equitable distribution" refers to the division of property upon divorce based on the court's determination of what is equitable.² Alaska statutory law formerly provided for equitable distribution without regard to when or how the property was acquired.³ Alaska Statute section 56-5-13 originally provided:

Whenever a marriage shall be declared void or dissolved the court shall have power to further decree as follows . . .

. . . .

Sixth. For the division between the parties of their joint

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1. 664 P.2d 568 (Alaska 1983).

2. L. KORNFELD & M. KRANZ, EQUITABLE DISTRIBUTION: AN UPDATE 3 (1982).

3. ALASKA STAT. § 56-5-13 (1949) (amended 1968) (subsequently renumbered § 9.55.210(6); current version at § 25.24.160(6) (effective 1983)).

property or the separate property of each, in such manner as may be just, and without regard as to which of the parties is the owner of such property⁴

In *Merrill v. Merrill*,⁵ the Alaska Supreme Court set out the principal factors for trial courts to consider in reaching a "just" division:

the respective ages of the parties; their earning ability; the duration [of the marriage] and conduct of each during the marriage; [the parties'] station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances, including the time and manner of acquisition of the property in question, its value at the time and its income producing capacity if any.

Thus, property acquired prior to marriage, or during the marriage but by gift, inheritance, or in exchange for previously owned property was available for distribution. The time and manner of acquisition, however, influenced whether such property would be distributed and, if so, how it would be divided.

Trial courts were given much discretion in dividing property: the division would stand unless it was "clearly unjust."⁶ As a result, no clear pattern emerged concerning the division of property acquired by one party prior to marriage.⁷ In *McSmith v. McSmith*,⁸ the Alaska Supreme Court upheld a property division in which the trial court divided equally the parties' marital property after allowing set-offs for their nonmarital property. That same year, however, the court emphasized in *Crume v. Crume*⁹ that Alaska law did not distinguish between assets acquired prior to marriage and those subsequently acquired.

In 1968, the equitable distribution provision was amended to read:

In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide . . .

. . . .

(6) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the

4. *Id.*

5. 368 P.2d 546, 547-48 n.4 (Alaska 1962).

6. *Id.* at 547; *see* *Crume v. Crume*, 378 P.2d 183, 186 (Alaska 1963); *Rhodes v. Rhodes*, 370 P.2d 902, 905 (Alaska 1962).

7. For purposes of this note, "marital property" will refer to property acquired during the marriage and "nonmarital property" will refer to all other property owned by the parties.

8. 387 P.2d 454, 455 (Alaska 1963).

9. 378 P.2d 183, 186 (Alaska 1963).

balancing of the equities between the parties requires it¹⁰

By distinguishing between property acquired during marriage and that previously acquired, Alaska joined a number of states which based equitable distribution on this distinction.¹¹ Many non-community property states follow the community property rule that allows division only of property acquired during the marriage, whether joint or separate, except (1) property acquired by gift, bequest, or inheritance, (2) property acquired in exchange therefor, (3) property acquired before marriage and its increase, and (4) property excluded by a valid separation agreement of the parties.¹² In these states and in Alaska, the *time* of acquisition is the principal factor in determining what property is subject to equitable division.

Although the Alaska statute initially provides only for the division of property acquired after marriage, it also provides for the invasion of property previously acquired "when the balancing of the equities between the parties requires it." This "invasion clause" was first interpreted by the Alaska Supreme Court in *Vanover v. Vanover*.¹³ In *Vanover*, the court held that the 1968 amendment to Alaska Statute section 25.24.160(6) did not circumscribe the broad discretion regarding property division previously afforded trial courts.¹⁴ The validity of the *Merrill* factors¹⁵ as guidelines for equitably dividing marital property was also reaffirmed.¹⁶ The *Vanover* court then set out the following factors for determining whether to invade nonmarital assets: the duration of the marriage, the parties' conduct during the marriage, the manner in which the property was acquired, the value of the property when acquired and at present, and any other equitable factors indicating that the spouses should share in that property.¹⁷

The court held that invasion of the husband's nonmarital property was appropriate in *Vanover* because the wife's monetary contributions toward family expenses and taxes had enabled the husband to retain his nonmarital property.¹⁸ The fact that the husband's nonmarital property had greatly appreciated during the marriage

10. ALASKA STAT. § 25.24.160 (1983).

11. *See, e.g.*, COLO. REV. STAT. § 14-10-113 (1973); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980 & Supp. 1981); ME. REV. STAT. ANN. tit. 19, § 722-A (1964 & Supp. 1977); MO. REV. STAT. § 452.330 (1977 & Supp. 1981).

12. *See generally* Freed, *Equitable Distribution as of December 1982*, 9 FAM. L. REP. (BNA) No. 1, 4001, 4002 (Jan. 11, 1983) (categorizing states according to methods of property characterization and distribution).

13. 496 P.2d 644 (Alaska 1972).

14. *Id.* at 648.

15. *See supra* note 5 and accompanying text.

16. *Vanover*, 496 P.2d at 648.

17. *Id.*

18. *Id.* at 647.

while the wife's had not appreciated also influenced the court.¹⁹ The court held:

Where one spouse has made contributions to the marital community, whether of a pecuniary or of a more intangible nature, and where these contributions have benefited in any manner the separate property of the other spouse acquired before marriage, we believe that the trial court may determine that all or a portion of that property should be included with the property acquired after marriage in effecting a just and equitable division of property.²⁰

In subsequent cases, the Alaska Supreme Court followed *Vanover* by analyzing one spouse's contributions to both marital and specific nonmarital property and then requiring invasion of the nonmarital property.²¹ However, no clear analytical pattern developed in cases involving nonmarital property. In some cases, general equitable considerations such as age, health, and employment history were cited to support invasion of specific nonmarital property.²² In *Courtney v. Courtney*,²³ however, invasion was discussed in terms of the value of both marital and nonmarital property, rather than by focusing on equitable concerns. The court initially set out the value of the parties' total property.²⁴ It then subtracted the value of the husband's nonmarital property at the time of the marriage. The difference was divided equally between the parties. An existing debt incurred during marriage was imposed upon the husband; this gave him a lower net amount than that awarded the wife. The court held that such an imposition did not constitute invasion because the husband had been awarded a sum greater than the value of the property he brought into the marriage.²⁵ The approach in *Courtney* contrasts with the *Vanover* analysis which based invasion on the other spouse's contributions to the nonmarital property or upon more general equitable considerations, regardless of the initial division of marital property.

The statutory distinction between marital and nonmarital property was practically ignored by the Alaska Supreme Court in

19. *Id.*

20. *Id.* at 648.

21. See *Moore v. Moore*, 499 P.2d 300, 304 (Alaska 1972) (wife's contributions of earnings, labor, and housekeeping services); *Ross v. Ross*, 496 P.2d 662, 665 (Alaska 1972) (husband's contributions of money and labor).

22. See *Hager v. Hager*, 553 P.2d 919, 924 (Alaska 1976); *Courtney v. Courtney*, 542 P.2d 164, 169 (Alaska 1975) (alternative holding); *Burrell v. Burrell*, 537 P.2d 1, 6 (Alaska 1975).

23. 542 P.2d 164, 168 (Alaska 1975).

24. In *Courtney*, the trial court had previously awarded to the husband his specific nonmarital property. However, the supreme court focused on property values rather than ownership of specific property. *Id.*

25. *Id.*

*Hinchey v. Hinchey*²⁶ and *Rosson v. Rosson*.²⁷ In both cases, the court deferred to the trial court's discretion in dividing specific property. Characterization of the property as either marital or nonmarital was brushed aside. Instead, the supreme court reasoned that the trial court had the discretion to divide the property despite its characterization. Only a cursory mention of equitable considerations supporting invasion was made in each case.²⁸

In sum, although the Alaska equitable distribution statute clearly distinguishes between types of property according to the time of acquisition, the Alaska courts have not handled this distinction in a predictable manner. Decisions to invade nonmarital property have been based on general equitable considerations, equitable factors specific to that property, or a value approach based on the inability of marital property alone to satisfy the equities. At times, the Alaska court has even rejected the legislative pronouncement by implying that the distinction between marital and nonmarital property is unimportant.

III. *WANBERG V. WANBERG*

A. Facts and Holding

The Alaska Supreme Court's recent decision in *Wanberg v. Wanberg*²⁹ illustrates the court's tendency to blur the line between marital and nonmarital property. In *Wanberg*, the court required invasion of specific nonmarital property as a matter of law. This holding was based on the judicially inferred intent of the parties.³⁰

The parties in *Wanberg* had obtained a divorce after five and one-half years of marriage. The husband's net worth at the time of the marriage was calculated as \$366,000 and the wife's was \$38,000. The estate was valued at \$704,450 at the time of the divorce; \$57,500 of which was awarded to the wife. On appeal, she challenged the trial court's failure to classify specific property as marital. She also argued that certain nonmarital assets should have been invaded because the parties had treated those assets as joint holdings.³¹

The court decided whether specific properties were available for equitable distribution. The court first examined real estate holdings owned by the husband prior to marriage upon which the parties had, after their marriage, constructed a five unit apartment building. The couple had lived in one of these units for two years. They had ob-

26. 625 P.2d 297 (Alaska 1981).

27. 635 P.2d 469 (Alaska 1981).

28. See *Rosson*, 635 P.2d at 471; *Hinchey*, 625 P.2d at 304.

29. 664 P.2d 568 (Alaska 1983).

30. *Id.* at 571.

31. *Id.* at 570.

tained a \$120,000 loan on the building in their joint names. The wife had participated in making design and alteration decisions concerning the building. She had also cleaned, advertised and shown the units, entertained prospective tenants, and collected rent money. The trial court had treated only the appreciation resulting from property improvements as an asset subject to equitable distribution. The Alaska Supreme Court held that the entire equitable value of the property and apartment building was divisible.³² The supreme court also held that another commercial building owned by the husband prior to marriage was divisible, because the wife had significantly participated in the ongoing business affairs involving that property.³³ Another nonmarital commercial property was not invaded because the wife had not significantly contributed to its management.³⁴ Two other assets were classified as marital by the court because they were acquired during the marriage.³⁵

In *Wanberg*, the court articulated a three-step approach for equitable division: (1) determine what property is available for distribution, (2) find the value of that property, and (3) decide how to equitably apportion the property. The question whether to invade specific property was addressed in the first step. The court held:

In limited circumstances invasion of one spouse's property acquired before coverture may be required as a matter of law. One such circumstance is where the parties, by their actions during the marriage, demonstrate their intention to treat specific items of property as joint holdings Such intention is manifest when both spouses can be shown to have taken an interest in the ongoing maintenance, management, and control of specific assets. Where such circumstances exist, basic fairness requires that property treated by the spouses as jointly held be available for equitable division³⁶

Nonmarital property was effectively characterized as marital for purposes of property division. The actual allocation was left to the trial court's discretion, using the *Merrill* factors as a guide.³⁷ By treating nonmarital property as marital and by failing to provide a strict equitable standard for dividing that property, the *Wanberg* court fur-

32. *Id.* at 572.

33. *Id.* at 573.

34. *Id.*

35. *Id.* at 573-74. The husband argued that one of these assets, an airplane, should have been classified as nonmarital because it was purchased with proceeds from the sale of another airplane he owned prior to marriage. The court rejected this argument, basing its holding on a literal interpretation of the "acquired . . . during coverture" language of ALASKA STAT. § 25.24.160(6) (1983) and on the fact that the new airplane had been purchased nine months before the sale of the old one. 664 P.2d at 574.

36. 664 P.2d at 571 (footnotes omitted).

37. *Id.* at 574.

ther eroded the statutory distinction between marital and nonmarital property.

B. Alternative Approaches

Wanberg concerned the distribution of one spouse's nonmarital property to which the other spouse had contributed significant time and labor. A court might take one of four analytical approaches for characterizing such property for the purpose of equitable distribution under the Alaska statute.

First, the court might wholly ignore the statutory distinction between marital and nonmarital property. The Alaska Supreme Court verged upon this approach in *Hinchey*³⁸ when it reasoned that characterizing certain property as marital or nonmarital was unnecessary because the trial court had discretion to reach both kinds of property. The suggestion in *Wanberg* that identical standards might apply to the division of marital and the invasion of nonmarital property could also be interpreted as taking this approach.³⁹ This analysis conflicts with the statutory provision for equitable distribution which clearly contemplates different treatment of the two property categories.⁴⁰ The 1968 amendment created this distinction so that only marital property would be distributed, except under special circumstances.⁴¹

A second possible approach to the *Wanberg* facts would transmute the entire property from nonmarital into marital property. The Supreme Court of Illinois took this approach in *In re Marriage of Smith*.⁴² In *Smith*, the Illinois court held that the commingling of one spouse's nonmarital property with either marital property or nonmarital property of the other spouse created a presumption of transmutation.⁴³ The court inferred an intent to treat the property as marital because marital funds were used to improve nonmarital property.⁴⁴ Illinois law provided for the distribution of marital property after excepting each spouse's nonmarital property.⁴⁵ One spouse's contribution to the acquisition, preservation, depreciation,

38. 625 P.2d at 304; see also *Rosson*, 635 P.2d at 471.

39. 664 P.2d at 574.

40. See ALASKA STAT. § 25.24.160(6) (1983) (distinguishing between property "acquired only during coverture" and that "acquired before marriage").

41. *Judiciary Comm. Report on Comm. Substitute for House Bill No. 247*, 5th Legisl., 1st Sess. (Mar. 22, 1967).

42. 86 Ill. 2d 518, 427 N.E.2d 1239 (1981).

43. *Id.* at 529, 427 N.E.2d at 1244.

44. *Id.* at 531, 427 N.E.2d at 1245. *But cf. In re Marriage of Cook*, 9 FAM. L. REP. (BNA) 2672, 2673 (Ill. 1983) (wife's use of marital telephone for her nonmarital business transactions did not create presumption of transmutation).

45. ILL. ANN. STAT. ch. 40, § 503(d) (Smith-Hurd 1980 & Supp. 1981).

or appreciation of the other's nonmarital property is considered in allocating the marital property.⁴⁶

The *Wanberg* decision is analogous to a transmutation approach because the court focused on the parties' treatment of the property as a joint holding. By inferring that the intent of the couple was to treat the property as joint property, the court required invasion — treating the nonmarital property as though it were marital.⁴⁷ The time of acquisition was to influence the actual division of the property, not its characterization.⁴⁸

Many states transmute nonmarital property into marital property when title to it is transferred from single to joint ownership.⁴⁹ The transfer creates the presumption of a gift to the marital estate.⁵⁰ This presumption can be overcome, however, by a written agreement or by clear evidence of a contrary intent.⁵¹

The transmutation approach circumvents Alaska's statutory characterization of property according to the time of acquisition. The statutory language could be reconciled with the transmutation approach by adopting the presumption of a gift from one spouse to the marital estate; thus, the property would have been "acquired" by the marital estate. However, this approach endangers a married person's ability to retain separate property. When property has been transferred from single to joint ownership, a clear affirmative act has been taken and the intent is clear. But when property characterization turns on factual questions of a spouse's contributions and subjective inferences of intent, as it did in *Wanberg*, uncertainty results.

Treating the property as part marital and part nonmarital is a third possible approach to *Wanberg*. This hybrid approach is comparable to the "source of funds" theory adopted by some states.⁵² Under the "source of funds" theory, when property is acquired with both marital and nonmarital funds, it retains this dual character. Upon divorce, the marital estate is reimbursed for a proportionate

46. *Id.* § 503(d)(1).

47. *Wanberg*, 664 P.2d at 571.

48. *Id.* at 574.

49. *See, e.g., In re Marriage of Lucas*, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); *Smith*, 86 Ill. 2d at 522, 427 N.E.2d at 1244; *Carter v. Carter*, 419 A.2d 1018, 1022 (Me. 1980). *But cf. Hemily v. Hemily*, 403 A.2d 1139, 1143 (D.C. 1979) (no transmutation from marital to nonmarital when husband conveyed his interest to wife who then became sole title holder).

50. *Carter v. Carter*, 419 A.2d 1018, 1021 (Me. 1980).

51. *See In re Marriage of Lucas*, 27 Cal. 3d 808, 816, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); *Coates v. Coates*, 64 Ill. App. 3d 914, 916-17, 381 N.E.2d 1200, 1203 (1978).

52. *See, e.g., Hall v. Hall*, 462 A.2d 1179, 1181 (Me. 1983); *Harper v. Harper*, 294 Md. 54, 80, 448 A.2d 916, 929 (1982).

share of its investment from the enhanced value of the property.⁵³ This theory has also been applied when marital funds were used to improve nonmarital property⁵⁴ and when marital contributions consisted of the other spouse's services.⁵⁵ The statutory definition of marital property as that acquired during marriage has been reconciled with the theory by interpreting "acquisition" as an ongoing process which is not dependent on the passage of title.⁵⁶

Alternatively, the property could be characterized as nonmarital but subject to a lien held by the marital estate proportionate to the enhanced value resulting from marital contributions.⁵⁷ This alternative focuses on the increase in value due to marital contributions. Often, the contributions consist of expenditures for mortgage payments or improvements.⁵⁸ Some states also reimburse the marital estate for appreciation in marital property based on the indirect contributions by the homemaker spouse.⁵⁹

In *Wanberg*, the Alaska Supreme Court overturned the trial court's award of one-half of the appreciation in nonmarital property to the wife. The court held that the value of the entire property was subject to equitable distribution because of the parties' joint management efforts.⁶⁰ The hybrid "source of funds" approach contrasts with the Alaska court's characterization of the entire property in *Wanberg* as marital. The court left open the possibility, however, that the trial court could base the actual division of property on the extent of the wife's contributions to the husband's nonmarital property.⁶¹

A fourth approach to *Wanberg* focuses on equitable concerns. Under this approach the property would retain a nonmarital character if it were not purchased during marriage. However, the fact that one spouse's contributions enhanced the value of the other's nonmarital property would be considered in fairly dividing the marital property.⁶² Nonmarital property would be invaded only if the court were unable to satisfy the equities through an allocation of marital property.

53. *Hall v. Hall*, 462 A.2d 1179, 1182 (Me. 1983).

54. *Id.*

55. *Harper v. Harper*, 294 Md. 54, 82, 448 A.2d 916, 930 (1982).

56. *See Tibbetts v. Tibbetts*, 406 A.2d 70, 77 (Me. 1979).

57. *See Baker v. Baker*, 80 Wash. 2d 736, 745, 498 P.2d 315, 321 (1972).

58. *See In re Marriage of Johnson*, 28 Wash. App. 574, 576, 625 P.2d 720, 720 (1981).

59. *See Griffith v. Griffith*, 185 N.J. Super. 382, 385, 448 A.2d 1035, 1036 (Ch. Div. 1982); *Parrott v. Parrott*, 278 S.C. 60, 63, 292 S.E.2d 182, 184 (1982).

60. *Wanberg*, 664 P.2d at 572.

61. *Id.*

62. *See Bentley v. Bentley*, 84 Ill. 2d 97, 101, 417 N.E.2d 1309, 1311 (1981); *Stark v. Stark*, 539 S.W.2d 779, 782 (Mo. Ct. App. 1976).

The language of the Alaska statute suggests this type of approach.⁶³ Further, *Ross v. Ross*⁶⁴ supports this interpretation of the statute. In *Ross*, the husband was awarded all of the marital property and a portion of the wife's nonmarital property. The award was based on his contributions of money and labor which enhanced the value of his wife's property.⁶⁵ *Courtney v. Courtney*,⁶⁶ in which the court held that no invasion occurred when the husband was awarded an amount greater than his net worth prior to marriage, also supports this approach.

In *Wanberg*, however, the court analyzed the equities involving the treatment of specific property in characterizing that property as distributable. Alternatively, the court could have reserved its decision concerning the appropriateness of invasion until it determined whether all the equities could have been satisfied through a distribution of the marital property. By adjusting for the equities more broadly rather than within each item of property, the court could have equitably accounted for the wife's contributions without forcing a sale or division of the husband's separate property.

IV. CHARACTERIZATION OF PROPERTY FOR EQUITABLE DISTRIBUTION AFTER *Wanberg*

The Alaska Supreme Court's tendency to blur the line between marital and nonmarital property creates problems for a married person wishing to maintain separate property. Because implied intentions may effectively transform nonmarital property into marital property, any improvements to, use of, or maintenance of, nonmarital property may transform it into marital property. Uncertainty about what conduct constitutes an intent to treat property as a joint holding could inhibit dealings with nonmarital property.

A number of questions involving property characterization remain unanswered under Alaska law. After *Wanberg*, the act of transferring title from single to joint ownership will certainly subject property to equitable distribution as a joint holding. Taking out a joint mortgage on property titled in one spouse's name should have the same effect.⁶⁷ The impact of exchanging nonmarital property for other property during the marriage remains uncertain. In *Wanberg*, the husband argued that an airplane purchased during the marriage

63. See ALASKA STAT. § 25.24.160(6) (1983) (providing for invasion of property acquired before marriage "when the balancing of the equities between the parties requires it").

64. 496 P.2d 662 (Alaska 1972).

65. *Id.* at 665.

66. 542 P.2d 164, 168 (Alaska 1975).

67. See *Wanberg*, 664 P.2d at 572.

was nonmarital property because it had been purchased with proceeds from the sale of an airplane he owned prior to marriage. The court rejected this argument, basing its holding on two factors: first, the fact that the old airplane was not sold until nine months after the new one was purchased; and second, the literal statutory language defining marital property as "acquired . . . during coverture."⁶⁸ Given the court's unwillingness to apply the statute literally in treating the commercial properties owned by the husband prior to marriage as marital property, the timing factor may have been determinative on the exchange issue. If so, a nearly simultaneous exchange of nonmarital property for similar property during the marriage may not result in characterization of that property as marital.

The Alaska Supreme Court has not addressed the question of characterizing property obtained during marriage by gift, bequest, or inheritance. In *Burrell v. Burrell*,⁶⁹ the court held that inherited property was distributable. However, the court explicitly avoided deciding whether inherited property was marital or nonmarital.⁷⁰ The statutory language suggests that such property should be characterized as marital. Under *Merrill v. Merrill*,⁷¹ the manner of acquisition would then influence how the marital property would be distributed.

Characterization of the appreciation of nonmarital property also remains uncertain under Alaska law. In *Hinchey v. Hinchey*,⁷² the court held that business property was distributable when the majority of its appreciation occurred after marriage. The court declined to characterize the property as either marital or nonmarital.⁷³ Appreciation of nonmarital property resulting purely from inflation or market conditions may remain nonmarital.⁷⁴ If such appreciation results from spousal contributions, however, an Alaska court may subject the entire property to equitable distribution depending on the nature and extent of the contributions.⁷⁵

In *Wanberg*, the court required invasion of nonmarital property "where the parties, by their actions during marriage, demonstrate their intention to treat specific items of property as joint holdings."⁷⁶ This language could be extended beyond the *Wanberg* facts to cases

68. *Id.* at 574.

69. 537 P.2d 1 (1975).

70. *Id.* at 6 n.15.

71. 368 P.2d 546, 547 n.4 (Alaska 1962).

72. 625 P.2d 297, 304 (Alaska 1981).

73. *Id.*

74. *See* *Mol v. Mol*, 147 N.J. Super. 5, 7, 370 A.2d 509, 510 (App. Div. 1977).

75. *See* *Wanberg*, 664 P.2d at 572.

76. *Id.* at 571.

where the couple uses marital funds or funds of the nonowner spouse to improve or maintain nonmarital property.⁷⁷ Also, joint use of property may trigger invasion. Even the other spouse's indirect contributions could support an extension of *Wanberg*. In both *Moore v. Moore*⁷⁸ and *Vanover v. Vanover*,⁷⁹ the wife's monetary contributions toward family expenses, which enabled the husband to maintain his separate property, supported the decision to invade the husband's property. The court also recognized the wife's indirect contributions as a homemaker in *Moore*.⁸⁰ Such expansions of *Wanberg* could vitiate the statutory distinction between marital and nonmarital property.

V. CONCLUSION

Married persons wishing to preserve their nonmarital property must be careful in their dealings with such property. For example, segregated funds should be used for maintenance on and improvements to nonmarital property to rebut any inference that the property is considered by the parties to be a joint holding. Any joint expenditures for the property should be reimbursed from separate funds. If one spouse contributes labor to benefit the other spouse's nonmarital property, a salary might be paid for such work. Execution of a written agreement may also effectively maintain the status of nonmarital property. Such an agreement must be executed voluntarily, with knowledge of the extent of property affected, under conditions evidencing no fraud or duress, and with conscionable terms.⁸¹

The *Wanberg* holding should be limited in order to effectuate the statutory distinction between marital and nonmarital property. Certainly the court may compensate a spouse for his or her contributions to the nonmarital property of the other spouse. Compensation, however, could be achieved in most cases by accounting for those contributions in an equitable distribution of marital property. The court should initially determine the value of the property acquired during marriage and allocate this property by considering all rele-

77. See *In re Marriage of Smith*, 86 Ill. 2d 518, 531, 427 N.E.2d 1239, 1245 (1981).

78. 499 P.2d 300 (Alaska 1972).

79. 496 P.2d 644 (Alaska 1972).

80. 499 P.2d at 304; see also *Bussell v. Bussell*, 623 P.2d 1221, 1223 (Alaska 1981).

81. See, e.g., *Sanders v. Colwell*, 248 Ga. 376, 377, 283 S.E.2d 461, 462 (1981); *In re Marriage of Hadley*, 88 Wash. 2d 649, 654, 565 P.2d 790, 793 (1977); cf. *Scherer v. Scherer*, 249 Ga. 635, 641, 292 S.E.2d 662, 666 (1982) (antenuptial contract); *Hook v. Hook*, 69 Ohio St. 2d 234, 236, 431 N.E.2d 667, 669 (1982) (antenuptial contract).

vant equitable factors. Nonmarital property should be invaded only when marital property is insufficient for full compensation. By invading nonmarital property only as a last resort, the court can satisfy the equities while maintaining the integrity of nonmarital property and satisfying the statutory language.

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