1985

Using Formulas to Separate Marital and Nonmarital Property: A Policy Oriented Approach to the Division of Appreciated Property upon Divorce

Louise Everett Graham
University of Kentucky College of Law, lgraham@uky.edu

Click here to let us know how access to this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub
Part of the Family Law Commons

Recommended Citation
Using Formulas to Separate Marital and Nonmarital Property: A Policy Oriented Approach to the Division of Appreciated Property Upon Divorce

BY LOUISE EVERETT GRAHAM*

INTRODUCTION

Over the past ten years every writer venturing to discuss domestic relations must have been tempted to emphasize the importance of his or her work by opening with mention of the growing number of divorce cases confronting the court system.1 Beyond its numerical impact upon the judicial process, however, divorce litigation provides an important opportunity for the study of property rights and the institutions from which those rights are derived. Divorce cases increasingly involve difficult and complex questions concerning the marital property rights of the marriage partners.2 The importance of marital property cases is broader than the individual rules that they teach. By studying the answers to the marital property puzzle, we learn about the status of the institution of marriage itself. Whatever the social value attached to that institution in theory, the actual treatment of the parties and their property rights upon marriage dissolution gives concrete answers to questions concerning the risks and benefits that derive from marriage and how those risks and benefits are divided between the parties.

* Associate Professor of Law, University of Kentucky. B.A. 1965, J.D. 1977, University of Texas. The author wishes to thank Susan Alley, J.D. 1985, University of Kentucky, for her research and editorial assistance in the preparation of this Article.

1 Between 1970 and 1980 the divorce rate rose from 3.5 per 1,000 population to 4.2 per 1,000 population. Although there was a slight drop in the rate between 1979 and 1980, from 5.3 per 1,000 to 5.2 per 1,000, there were almost two million divorces in 1980. U.S. DEPT. OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 85-86 (104 ed. 1984).

2 Because irretrievable breakdown is the sole ground for divorce in Kentucky, there is almost no litigation concerning entitlement to a divorce. KY. REV. STAT. ANN.
By allocating to married persons particular property rights upon divorce, the legal system has sought to protect spousal expectations with regard to participation in marriage. Thus, modern marital property law generally treats married persons as partners and the marriage as an economic partnership. As commentators have often pointed out, treatment of marriage as an

§ 403.140(1)(c) (Baldwin 1984) [hereinafter cited as KRS]. The few questions that remain generally relate to the trial court's ability to refuse or to order conciliation conferences, see, e.g., Putnam v. Fanning, 495 S.W.2d 175 (Ky. 1973), or to grant legal separation rather than an absolute divorce, see, e.g., La Fosse v. La Fosse, 564 S.W.2d 220 (Ky. Ct. App. 1978). In contrast, an increasing number of assets has been subject to scrutiny as potential marital property. See Heller v. Heller, 672 S.W.2d 945, 947-48 (Ky. Ct. App. 1984) (goodwill of a professional practice treated as divisible marital property); Quiggens v. Quiggens, 637 S.W.2d 666, 668-69 (Ky. Ct. App. 1982) (worker's compensation award treated as divisible marital property); Leveck v. Leveck, 614 S.W.2d 710, 712-13 (Ky. Ct. App. 1981) (cash value of life insurance policy treated as divisible marital property); Munday v. Munday, 584 S.W.2d 596, 598 (Ky. Ct. App. 1979) (interest in "Clifford trust" treated as divisible marital property); Foster v. Foster, 589 S.W.2d 223, 224-25 (Ky. Ct. App. 1979) (vested pension benefits treated as divisible marital property). In other states, divorcing couples have litigated the right to a wide array of assets. See, e.g., In re Marriage of Donnelly, 190 Cal. Rptr. 756, 757 (Ct. App. 1983) (income protection benefits derived from life insurance policy); Cathleen C.Q. v. Norman J.Q., 452 A.2d 951, 954-55 (Del. 1982) (country club membership); Cluck v. Cluck, 647 S.W.2d 338 (Texas Ct. App. 1982) (country club membership); In re Marriage of Roark, 659 P.2d 1133, 1134-35 (Wash. App. 1983) (right to severance pay). As these cases demonstrate, the range of assets subject to litigation is as diverse as the attorney's imagination. A more difficult problem arises concerning the division of so-called "career assets" and "human capital." One commentator has argued that family efforts to promote the career of one spouse result in "career assets," which should belong to the marital unit. See Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1210-12 (1980-81). Another argument is based upon the notion that effort expended to achieve a professional degree or license is "human capital" which properly belongs to the marital community. See Bruch, The Definition of Marital Property in California: Toward Parity and Simplicity, 62-63 (background study for California Law Revision Commission), quoted in In re Marriage of Sullivan, 184 Cal. Rptr. 796, 812 (Ct. App. 1982). Although the Kentucky Supreme Court has indicated that an educational degree or professional license may not be treated as marital property, see Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982), the court of appeals recently ruled that spousal contribution to the acquisition of such an asset may be taken into consideration in dividing marital property, see McGowan v. McGowan, 663 S.W.2d 219, 223 (Ky. Ct. App. 1983).


economic partnership emphasizes sharing principles that underlie the general social conception of marriage. Those sharing principles are most evident in statutes providing that all property of the parties, however and whenever acquired, is available for equitable distribution upon marriage dissolution.

Emphasis upon the unity or shared aspect of marriage is not without difficulty in a society that emphasizes individual rights. A number of states, including Kentucky, have adopted marital property rules which require differentiation between nonmarital and marital property. Nonmarital property generally falls into


5 See, e.g., Prager, supra note 3, at 1; Weitzman, supra note 4, at 1256.


7 At common law married persons were treated as a unit with most significant rights lodged in the husband. See 2 F. Pollock & F. Maitland, The History of English Law 399-436 (2d ed. 1911). Perhaps the earliest harbingers of individuality were the Married Women's Property Acts, which generally permitted women to contract and hold property separately from their spouses. See, e.g., KRS §§ 404.010-060. More recent trends have permitted women to hold a domicile separately from their spouses. See, e.g., Blair v. Blair, 85 A.2d 442, 445 (Md. 1952); Restatement (Second) Conflict of Laws § 21 (1971). It has also been held that marriage raises no presumption of agency between the spouses. See Bennett v. Mack's Supermarkets, 602 S.W.2d 143, 146-47 (Ky. 1979).

In a number of areas connected to domestic relations, the legal trend has been away from the treatment of marriage partners as persons with unified interests and toward recognition of their individual rights. In the areas of contraception and abortion, for example, it is clear that spouses have individual rights which must be respected. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976) (husband cannot have "veto power" over wife's decision to have an abortion).

two categories: property acquired before marriage and property acquired after marriage in a particular manner such as gift or inheritance. Because nonmarital property is assigned to one of the parties and is not generally available for equitable distribution upon divorce, states adopting a rule featuring nondivisible, nonmarital property implicitly emphasize ongoing individual rights of spouses in addition to the rights of the marriage partnership.

When the marital partnership is dissolved, states recognizing rights both in individual spouses and in the marital partnership face dual tensions in the equitable distribution of assets. Not only is there the inevitable conflict arising from each adversary spouse's claim to a larger portion of the assets, but there is also the additional tension inherent between the rules designed to maximize marital partnership property and the rules requiring recognition of the rights of individual spouses. This tension is most readily apparent when the marital partnership and an individual spouse make a valid claim to the same asset. A clear example of such a claim arises when, prior to marriage, one spouse owned property which has increased in value during the marriage, either through reduction of an outstanding mortgage on the property or because of appreciation through inflation.

In Kentucky, appreciated property is subject to a proportionate approach which looks to the source of the funds to determine the extent to which property is marital or nonmarital. The Kentucky courts developed this approach in a series of cases beginning with Robinson v. Robinson and ending, most recently, with Brandenburg v. Brandenburg. Through this series

---

9 See, e.g., KRS § 403.190. See also ILL. ANN. STAT. ch. 40, § 503; IOWA CODE ANN. 598.21; W. VA. CODE § 48-2-1. Presumptions can operate to benefit the marital estate. In some states, for example, property acquired during the marriage is presumed to be marital property absent clear and convincing evidence shown by the nonmarital claimant. See, e.g., KRS § 403.190. See also ILL. STAT. ANN. ch. 40, § 503(b).
10 See, e.g., KRS § 403.190. But see IOWA CODE ANN. § 598.21(2) (permitting division of nonmarital property under limited circumstances).
11 Throughout this Article the Kentucky rule will be referred to as either the "proportionate approach" or the "source of funds rule."
13 617 S.W.2d 871.
of cases the Kentucky courts have also proposed formulas for the determination of marital and nonmarital shares in appreciated property. These formulas have received serious criticism. Detractors of the Robinson-Brandenburg formulas have argued that such formulas deprive trial courts of needed discretion and that the formulas work unfairness in many cases.\textsuperscript{14}

The purpose of this Article is to examine the Kentucky approach in light of the Uniform Marriage and Divorce Act, to compare the Kentucky approach with that used in other states with similar marital property laws, to determine whether the Kentucky approach comports with other policies underlying the Uniform Marriage and Divorce Act as adopted in this state, and to evaluate both the usefulness and the fairness of the formulas. Section I of the Article sets out the background of the Kentucky approach. Section II analyzes the impact of the Uniform Marriage and Divorce Act and examines the approaches of other states to the problem of appreciated property. Section III addresses the problem of choosing between divergent approaches. Section IV discusses particular issues raised by the use of formulas for allocating the shares of the separate and marital estates.

I. Kentucky Treatment of Appreciated Property

A. An Overview of Kentucky Rules for Property Division

In Kentucky, property division upon marriage dissolution is controlled by statute. The property division statute mandates segregation of the separate assets of each spouse from the marital property of both prior to a just division of marital property.\textsuperscript{15} Specific categories of separate property are statutorily enumerated as exceptions to the general rule that marital property is all

\textsuperscript{14}Id. at 875 (Gudgel, J., concurring). See also Potter & Ewing, \textit{Apportioning Marital and Nonmarital Interests In A Single Asset}, 9 Ky. BENCH & B. 14 (April 1983).

\textsuperscript{15}See KRS § 403.190, construed in Angel v. Angel, 562 S.W.2d 661, 663 (Ky. Ct. App. 1978). See also Farmer v. Farmer, 506 S.W.2d 109 (Ky. 1974). When marital and nonmarital assets have been commingled, the nonmarital claimant must overcome a significant presumption with regard to assets acquired during the marriage. See KRS § 403.190(3). Kentucky requires the nonmarital claimant to trace proceeds from non-
property acquired by either spouse subsequent to the marriage. These statutory exceptions are of two basic kinds. One type of exception arises because of the time at which property is acquired. Such a temporal exception is a corollary to the basic marital property rule that all property acquired during the marriage is marital. Property acquired by a spouse either before the marriage or after a decree of divorce or legal separation is the separate property of that spouse. The other type of exception arises because of the manner in which a spouse acquires property. For example, property acquired by gift or inheritance remains the separate property of the donee or beneficiary spouse. The only statutory exception speaking directly to appreciated marital exchanges into currently held property. See, e.g., Turley v. Turley, 562 S.W.2d 665 (Ky. Ct. App. 1978); 562 S.W.2d 661. Moreover, nonmarital claimants must trace the specific asset. See Brunson v. Brunson, 569 S.W.2d 173 (Ky. Ct. App. 1978). The formulas discussed in this Article assume that nonmarital claimants have successfully traced their nonmarital contribution under Kentucky rules.

KRS § 403.190(2)(a)-(e), modeled after Alternative B of § 307 of the Unif. Marriage and Divorce Act, provides that:

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise or descent;
(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
(c) Property acquired by a spouse after a decree of legal separation;
(d) Property excluded by valid agreement of the parties; and
(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

KRS § 403.190(2) states that property acquired subsequent to the marriage and not otherwise excluded by subsections (a) through (e) is marital property. The negative implication of this section is that property acquired prior to the marriage is nonmarital. Subsection 2(c), which also makes the time of acquisition dispositive of the property’s character, has been strictly interpreted. See Stallings v. Stallings, 606 S.W.2d 163, 164 (Ky. Ct. App. 1980).

KRS § 403.190(2)(c).

KRS § 403.190(2)(a) and (2)(b) are wholly dependent upon the manner in which property is acquired.
property states that property is nonmarital if it derives from "[t]he increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage." \(^{21}\)

### B. Case Law Treatment of Appreciated Property

The Kentucky courts' treatment of appreciated property has been based upon two principles. First, the courts have judicially defined property to include only the equity interest in an asset. \(^{22}\) Second, Kentucky courts have used a "source of funds" rule to permit property to have dual characteristics—a particular asset can be both marital and nonmarital. \(^{23}\) Although the courts have been consistent in their use of a source of funds or proportionate approach, they have differed in the exact formulae used to allocate appreciated value to the nonmarital and marital estates. \(^{24}\) During the past decade, inflated values for real property have accentuated this problem. \(^{25}\)

In *Robinson v. Robinson*, \(^{26}\) the Kentucky Court of Appeals adopted the first in a series of formulae designed to allocate property appreciation between the nonmarital and marital estates. The *Robinson* court declared that "the equity in . . . property shall be considered nonmarital at the time of separation in that proportion which this [nonmarital] equity bore to the value of the property at the time of the marriage." \(^{27}\) The court's

---

\(^{21}\) KRS § 403.190(2)(e).


\(^{23}\) See, e.g., *Brandenburg v. Brandenburg*, 617 S.W.2d at 872; *Newman v. Newman*, 597 S.W.2d 137, 138-39 (Ky. 1980). The source of funds approach gives rise to an interest in the property on the part of both estates. Its use is particularly important if it is defined as an ownership interest rather than a right to reimbursement. See text accompanying notes 139-46 infra. Other states that permit property to have dual characteristics include Delaware, see, e.g., *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 725 (Del. 1983); Maine, see, e.g., *Hall v. Hall*, 462 A.2d 1179, 1182 (Me. 1983); Maryland, see, e.g., *Harper v. Harper*, 448 A.2d 916, 928 (Md. Ct. App. 1982); and Missouri, see, e.g., *Hoffman v. Hoffman*, 10 FAM. L. REP. (BNA) 1637, 1637-38 (Sept. 11, 1984).

\(^{24}\) See text accompanying notes 26-50 infra.

\(^{25}\) See generally *Potter & Ewing*, supra note 14, at 14 ("when applied to mortgaged property that has appreciated in value during the marriage, the [Brandenburg] formula unjustly favors the non-marital interest").

\(^{26}\) 569 S.W.2d 178.

\(^{27}\) Id. at 181.
example for the use of its formula involved a nonmarital estate which had contributed $20,000 prior to the marriage toward the purchase of property valued at $40,000 at the time of the marriage. After marriage the mortgage was retired through marital contributions, and at divorce the property value was $60,000. Using this example, the formula adopted by the *Robinson* court may be expressed as follows:

\[ \frac{\text{nmc}}{\text{fmv}_m} \left( \frac{\$20,000}{\$40,000} \right) \times \text{fmv}_d \left( \frac{\$60,000}{\$30,000} \right) = \$30,000 \text{nmp} \]

One year after *Robinson*, the Kentucky Court of Appeals reaffirmed portions of the *Robinson* formula in *Woosnam v. Woosnam*. Patricia Woosnam owned a home with a value of $13,300 when the parties married. The property was subject to a $9,446.23 mortgage. Several years after the marriage the Woosnams sold the property for $37,500 and purchased a second home. Although the trial court had allowed Patricia a nonmarital share of the first home based on the relationship of her

---

28 *Id.* On the actual facts of *Robinson* the court dealt with two pieces of property. Mrs. Robinson owned a one-half interest in property called the Apple House Market. *Id.* at 179. She failed, however, to demonstrate that she had any equity in that property at the time of the marriage. *Id.* at 181. The court ruled that the value of that property after mortgage satisfaction was marital. *Id.* Mr. Robinson had purchased the Dairy Maid Drive-In prior to his marriage and had paid some $19,000 as a down payment and premarital mortgage payments. *Id.* at 180. The $11,000 balance was wholly satisfied after the marriage. *Id.* at 180-81. The court ruled that when the value of the Dairy Maid Drive-In was established, 19/30 of that sum was to be assigned as nonmarital property. *Id.* at 181.

29 *Id.* at 181.

30 For purposes of succinctly expressing the formulas used by the courts, the following symbols are used: 1) nmc = nonmarital contribution; 2) fmv\_m = fair market value at the date of marriage; 3) fmv\_d = fair market value at the date of dissolution. In all of the Kentucky formulas, nonmarital contributions have been monetary contributions despite *Robinson* dicta that homemaker contributions might be considered. For a discussion of problems raised by this aspect of the rule, see text accompanying notes 176-79 infra.

31 587 S.W.2d 262 (Ky. Ct. App. 1979).

32 *Id.* at 263.

33 *Id.*

34 *Id.*
equity in that home to its total value as of the date of her marriage, it ruled that all of the increased value in the second home was due to marital effort. The court of appeals reversed and required the application of the proportionate approach to both homes. The Woosnam formula, however, required the court to subtract the value of permanent improvements attributable to marital contribution before applying the Robinson formula. The Woosnam adaptation of Robinson may be stated as follows:

Formula 2

\[
\frac{\text{nmc}}{\text{fmv}_m} \times \text{fmv}_d - (\text{value of permanent improvements})
\]

The Robinson-Woosnam approach came before the Kentucky Supreme Court in Newman v. Newman. William Newman had inherited $52,000 and a lot valued at $3,000. Together with his wife Polly, William borrowed $13,000 and the couple used the lot, the inherited money and the mortgage proceeds to construct

---

35 Id.
36 Id.
37 Nothing in the marital property statute supports this aspect of the Woosnam formula. See KRS § 403.190.
38 Since the trial court made no finding as to the value of permanent improvements, the Woosnam formula is difficult to apply demonstrably to the facts of the case. However, some calculations may be attempted. Patricia's nonmarital contribution to the first home was $3,833.77, based upon its value of $13,300 at the time of marriage and the outstanding mortgage of $9,466.23. 587 S.W.2d at 263. That nonmarital contribution in the first home would be approximately

Formula 6

\[
\frac{3,834}{13,300} \times 19,175 = 5,587.
\]

As to the second home, Patricia's nonmarital share would be

Formula 7

\[
\frac{5,587}{23,000} \times 37,500 - (x),
\]

where x is the unknown value of permanent improvements.
39 597 S.W.2d 137.
40 Id. at 138.
a family residence. The fair market value of that residence at the time of marriage dissolution was $125,000. The Supreme Court approved the trial court's use of the Robinson proportionate approach even though the separate property in Newman had not been acquired prior to the marriage. In squarely rejecting Polly's claim that William's nonmarital contribution should be returned to him and the remaining amounts be divided as marital property, the Court approved the proportionate approach.

In Brandenburg v. Brandenburg, the court of appeals retained a proportionate approach, but adopted a new formulation for that approach. The new formula compares the nonmarital contribution to equity with the sum of the marital and nonmarital contributions. Graphically, the formula for the nonmarital contribution may be stated as follows:

\[ \frac{\text{nmc}}{\text{tc}} \times \text{equity} = \text{npm} \]

The Brandenburg formula differs from the earlier formulas in

\[ 41 \text{Id.} \]
\[ 42 \text{Id. at 139. The formula in Newman produced the following results. William's nonmarital interest was 55/68 or 80.88%. That interest was applied to the fair market value at dissolution (fmv), which was$125,000, for a nonmarital share of$101,100. Id.} \]
\[ 43 \text{Id. Since the property was acquired after the marriage, William as the nonmarital claimant should have had the burden of proof, requiring him to trace his contribution into a specific asset. See Brunson v. Brunson, 569 S.W.2d 173, 176 (Ky. Ct. App. 1978); Turley v. Turley, 562 S.W.2d 665, 668 (Ky. Ct. App. 1978).} \]
\[ 44 \text{See 597 S.W.2d at 139. Any claim that the Newman Court did not approve the proportionate approach can be laid to rest by a careful reading of the opinion. Although the section in which the Court discusses the formula is labelled "maintenance," the Court stated: "[W]e need, therefore, not only to determine whether the formula used by the trial court in distinguishing marital property from nonmarital property is proper, but to determine whether the formula was properly applied." Id. at 138. This approach is consistent with the property statute which requires any court to first assign to each party his or her separate property and then to divide the marital property between the parties, see KRS § 403.190, and with the maintenance statute which makes entitlement to maintenance dependent in part upon the extent of awards of marital property, see KRS § 403.200 (1984).} \]
\[ 45 617 S.W.2d 871 (Ky. Ct. App. 1981). \]
\[ 46 \text{Id. at 873.} \]
its use of total contributions to the property rather than fair market value at the date of the marriage and in its use of "present equity" rather than fair market value at the date of dissolution.

Each of the various formulas from Robinson to Brandenburg has been adopted without significant explanation by the appellate courts. In spite of the differences in the formulas, neither the policies behind the formulas nor the relationship of the formulas to the property division statute has been widely examined. The Brandenburg formula has been criticized for unfairly leveraging the separate estate and for depriving trial courts of necessary discretion. Because the court of appeals' decision states that its formula is not mandatory, trial courts may feel free to ignore the rules developed in Brandenburg. Both attorneys and trial courts, however, have been nourished on precedent and hunger for a rule. Since it is therefore unlikely that Brandenburg will fade away, some assessment of the formula and the proportionate approach upon which it is predicated is needed. The first question is whether the Kentucky proportionate approach is the most appropriate rule for distributing property upon divorce. A second issue concerns the formulas used to implement that approach.

II. Evaluation of the Basic Approaches to Division of Appreciated Property

A. Does the Marital Property Statute Require a Proportionate Approach?

An obvious place to begin an evaluation of Kentucky's proportionate approach is with the property division statute itself. The statute does not deal explicitly with increased value resulting

---

47 See Brandenburg v. Brandenburg, 617 S.W.2d at 872-74; Woosnam v. Woosnam, 587 S.W.2d at 263-64; Robinson v. Robinson, 569 S.W.2d at 181.
48 Potter & Ewing, supra note 14, at 15.
49 617 S.W.2d at 875 (Gudgel, J., concurring).
50 Id. at 873.
51 Before undertaking that examination, however, it is important to note that Kentucky cases deal with several distinct kinds of increased value. In some cases, property
from mortgage reduction. It simply states that property acquired before marriage is separate property and that property acquired during the marriage belongs to the marital partnership.\(^\text{52}\) Ascertaining the definition of "property" is a critical task. In some states, known as "inception of title" states,\(^\text{53}\) property means any legally cognizable interest in an asset, including the interest of a buyer which is encumbered by a mortgage.\(^\text{54}\) In these states, the character of property is fixed at the moment of acquisition of title and is not thereafter changed by marriage.\(^\text{55}\) Under an inception of title rule, a spouse who purchased Blackacre and made only a ten percent down payment prior to marriage would not acquire all possible interests in Blackacre prior to marriage, but that spouse would have the dispositive interest of title. Thus, for purposes of characterization and property division upon divorce, the purchasing spouse would have acquired Blackacre as separate property.\(^\text{56}\) In other states, however, the focus is not on time of acquisition but the source of the funds used to acquire

---

value increases have resulted from the reduction of an outstanding loan obligation secured by the property. See, e.g., Brandenburg v. Brandenburg, 617 S.W.2d 871, 872-74 (Ky. Ct. App. 1981). A second type of increased value is attributable to the increase in fair market value of the property through inflation. See, e.g., Robinson v. Robinson, 569 S.W.2d 178, 180-81 (Ky. Ct. App. 1978). Finally, property may increase in value because of postmarital permanent improvements. See, e.g., Woosnam v. Woosnam, 587 S.W.2d 262, 264 (Ky. Ct. App. 1979).

\(^\text{52}\) See KRS § 403.190.


\(^\text{54}\) Although inception of title states require that the spouse claiming the property have some legally cognizable interest in the property prior to marriage, such states do recognize interests other than the interest of a purchaser. See Strong v. Garrett, 224 S.W.2d 471, 474-75 (Tex. 1949) (husband began adverse possession under color of title prior to marriage; property was husband's separate property under inception of title rule).

\(^\text{55}\) See Honnas v. Honnas, 648 P.2d 1045, 1046 (Ariz. 1982) (residence owned prior to marriage retains premarital character); In re Estate of Freeburn, 355 P.2d 385, 389 (Idaho 1976) (motel acquired during marriage presumed community property); Lucas v. Lucas, 621 P.2d 500, 501 (N.M. 1980) (proceeds from sale of covenant not to compete were not community-property); Colden v. Alexander, 171 S.W.2d 328, 334 (Tex. 1943) (use of community funds to pay interest and taxes does not change status of title); Cummings v. Anderson, 614 P.2d 1283, 1286-87 (Wash. 1980) (rule applied to copurchasers under real estate sales contract).

\(^\text{56}\) The ownership rights of the separate property claimant may, however, be subject to the community's right to reimbursement for community funds used to enhance the value of the separate property. See notes 84-86 infra and accompanying text.
property interests.\textsuperscript{57} In these states a source of funds rule defines property as "equity" and permits property to be marital, non-marital or some combination of both depending upon whether marital or nonmarital funds were used to purchase the property.\textsuperscript{58} Because the Kentucky property division statute does not define property, it does not itself demand either an inception of title rule or a source of funds rule.\textsuperscript{59}

The root of the Kentucky proportionate approach, therefore, is the judicial definition of property as equity.\textsuperscript{60} It is only with this definition that the statute dictates that an asset purchased prior to marriage, but encumbered by a mortgage reduced after marriage with marital funds, is not wholly separate property.\textsuperscript{61} Because property means equity, a spouse may acquire property prior to the marriage only to the extent that he or she has made nonmarital contributions to the equity.\textsuperscript{62} If the spouse with title to the property continues to build equity during the marriage, the property or equity will be acquired in part after the marriage. The source of funds will be marital even though only one spouse's salary satisfied the mortgage obligation since that salary is marital property.\textsuperscript{63} Thus, the Kentucky rule rejects the idea that the

\textsuperscript{57} Tibbets v. Tibbets, 406 A.2d 70, 76 (Me. 1979) (court described source of funds rule as "more flexible and more equitable" than inception of title rule); Harper v. Harper, 448 A.2d 916, 923-26 (Md. Ct. App. 1972) (good comparison of inception of title and source of funds rules).

\textsuperscript{58} For a discussion of the policies underlying the source of the funds rule, see text accompanying notes 97-106 infra.

\textsuperscript{59} See KRS § 403.190.

\textsuperscript{60} See Robinson v. Robinson, 569 S.W.2d at 181.

\textsuperscript{61} See id. The statute is the source of the rule that premarital contributions are nonmarital. See KRS § 403.190.

\textsuperscript{62} Of course, the source of funds rule would not change the ownership interest of a party who owns unencumbered property prior to marriage and who makes no improvements to the property during marriage. Nor would the rule change ownership during marriage. During the marriage neither spouse has an ownership interest in the other's property. Two Kentucky cases have characterized dower as a property right that "vests" during marriage. See Truitt v. Truitt's Adm'r, 162 S.W.2d 31, 35 (Ky. 1942); Maryland Casualty Co. v. Lewis, 124 S.W.2d 48, 50 (Ky. 1939). However, the better view is that dower and curtesy rights are inchoate rights. See Comment, Tax Implications of the Uniform Marriage and Divorce Act: Does the Davis Rule Still Apply in Kentucky?, 66 Ky. L.J. 889, 895-96 (1977-78). Given the inchoate nature of both dower and curtesy rights, it is fair to say that during marriage, neither spouse has an interest in the other's property arising solely by virtue of the marriage. See KRS § 404.010(1). However, neither spouse may convey real property without the other's release of either dower or curtesy rights. See Schanengold v. Behen, 208 S.W.2d 726, 729 (Ky. 1948).

\textsuperscript{63} See Stallings v. Stallings, 606 S.W.2d 163, 164 (Ky. 1980). Because the marital
character of property is determined as of the date that the titleholder takes title and looks instead to the source of the funds used to enhance the property's equity. As a result of this rule, property may possess dual characteristics upon divorce; that is, it may be both marital and separate.

The judicial definition of property as equity has further implications. The value of an asset may increase not only through the reduction of outstanding loan principal but also through appreciation caused by inflation. The Robinson rule requires the nonmarital estate to share this latter type of appreciation with the marital estate. The definition of property as equity means that, of the total bundle of rights we call property, only some of those rights will be acquired prior to marriage. Therefore, only the inflationary value attributable to those premarital rights remains nonmarital. Once Robinson requires a split in the property based upon the source of the funds used for ownership acquisition, the statute requires splitting the inflationary increase also.

partnership is entitled to the efforts of each individual spouse during the marriage, the Stallings Court was correct in holding that property need not have been acquired by joint efforts in order for it to be marital. See generally W. Defuniak & M. Vaughn, Principles of Community Property § 62 (2d ed. 1971).

64 This rule is consistent with the property division statute's proscription that the manner of holding title does not defeat the presumption that the property is marital property. See KRS § 403.190(3).

65 See Robinson v. Robinson, 569 S.W.2d at 181, where the court gives an example using property valued at $40,000 at the time of the marriage and worth $60,000 at divorce.

66 See id. See also note 30 supra and accompanying text.

67 The Robinson formula assumes that the inflationary growth of the property depends upon both premarital and marital equity. In an earlier Article commenting on the Robinson-Brandenburg formulas, a coauthor and I noted that one problem with these formulas was their assumption of a constant rate of inflation. See Graham & Jakubowicz, Domestic Relations Survey, 70 Ky. L.J. 425, 447 n.116 (1981-82). Cf. Gillespie v. Gillespie, 506 P.2d 775, 779 (N.M. 1973) (rate of return on nonmarital investment tied to an escalating prime rate because of the length of the marriage). This observation may be important to a separate property claimant whose premarital contributions occurred during times of double digit inflation and who forsees marital contributions during less rapid growth. To a large extent, however, this problem is avoided by the use of the fair market value at marriage (fmv\textsubscript{m}) in the Robinson formula, which should allocate all premarital growth to the separate property claimant. See Woosnam v. Woosnam, 587 S.W.2d at 263-64.

68 See KRS § 403.190(2)(e). The Robinson rule does not deal with the issue of whether increase in value due to the efforts of only one spouse may be marital property.
In summary, the Robinson proportionate approach is dictated not by the marital property statute, but by a judicial definition of property requiring allocation of property according to the source of funds used to acquire the asset. Because the statute is subject to more than one interpretation, it is profitable to examine the experience of other courts with similar statutes.

B. Community Property States' Treatment of Appreciated Property

Although Kentucky is not a community property state, Kentucky's property division statute has its source in the marital property law of such states. The Kentucky statute derives from the 1970 version of the Uniform Marriage and Divorce Act. This act has been interpreted as adopting community property rules for property division upon divorce. Thus, Kentucky may be said to have adopted a division scheme that is generally similar to community property law: Kentucky law recognizes two

under subsection (2)(e). Kentucky courts have indicated that "joint or team" efforts may convert the increase in value of nonmarital property to marital property. See Stallings v. Stallings, 606 S.W.2d at 164. The language regarding team effort stems from cases that preceed the adoption of the UNIF. MARRIAGE AND DIVORCE ACT [hereinafter cited as the UMDA] in Kentucky. See, e.g., Colley v. Colley, 460 S.W.2d 821, 826-27 (Ky. 1970). The notion of team effort in Colley should be taken as a prestatutory formulation of the concept of marital partnership. It should not be extended to require that each party in a marital partnership must make a monetary contribution in order for an increase in value to be excluded from subsection (2)(e) and have as its source marital funds. If the marital partnership and the notion of deferred community has any meaning, it is that the partnership should benefit from those gains acquired through the efforts of either spouse during the marriage. See generally W. defuniak & M. vauchin, supra note 63, at § 62. Thus an individual spouse's salary is clearly marital property. See 606 S.W.2d at 163. Increased value due to mortgage reduction or improvements from that salary are also marital property. See Brandenburg v. Brandenburg, 617 S.W.2d at 872.

69 See notes 51-52 supra and accompanying text.

70 See notes 60-62 supra and accompanying text.


72 See Podell, supra note 71, at 175.
estates, marital and separate, and it allocates property to them upon divorce based upon the time or manner of acquisition of the property.\footnote{For a general discussion of community property laws, see W. McClanahan, supra note 53. See also W. Defuniak & M. Vaughn, supra note 63.} For this reason, an assessment of community property rules related to division of increased value becomes important.

All community property states regulate by statute both the existence of community property\footnote{See W. McClanahan, supra note 53, at §§ 4.13-4.14.} and its availability for division upon divorce.\footnote{See id. at § 4.30.} Differences in the statutes\footnote{All states treat increased value due to capital appreciation differently from rent or profits. See id. at §§ 6:9-6:10. As to income from separate property, Louisiana, Texas and Idaho treat that income as community property. See id. at § 6:12. The other community property states follow a rule that such property remains separate. See id. at § 6:13. The latter rule is the result of the imposition of common law solutions upon a community system. See Prager, The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975, 24 UCLA L. Rev. 1 (1976-77).} do not override certain common themes affecting the apportionment of increased value. While various states differ in their characterization of the community’s interest,\footnote{See id. at § 4.30.} the rules under which they approach the problem are sufficiently similar for meaningful comparison. The primary historical distinction made by all community property states is the differentiation between increase in value due to labor of one or both of the spouses and increase in value due to other causes.\footnote{See W. Defuniak & M. Vaughn, supra note 63, at § 62.} These “other” causes are widely varied and may include such causes as general inflation and increased market demand for a particular product.\footnote{See Spector v. Spector, 531 P.2d 176, 186 (Ariz. Ct. App. 1975) (increase in value due to real estate boom).} The common denominator is that these causes are not related to spousal effort. For
purposes of historical description and discussion this Article will refer to these causes by their historical name, "inherent causes."

Because the Kentucky approach is based upon a judicially created source of funds rule, it is useful to examine rules for division in Texas, a community property state that has consistently implemented the alternative inception of title rule. Under that rule a spouse who purchased an asset before the marriage would retain that asset as separate property upon divorce, even though the purchase was encumbered by a mortgage and the mortgage obligation was satisfied with community funds. Similarly, a spouse who began a business prior to marriage in an inception of title state would be able to claim that business as his or her separate asset. In order to prevent unjust enrichment of the spouse claiming the separate property, Texas has permitted the community to claim an equitable right of reimbursement for money used to reduce mortgage obligations or to otherwise enhance property. As to real property, Texas courts have permitted an award of the lesser of the enhanced value or the amount expended. However, in cases not involving real property, Texas has permitted satisfaction of the community's interest in property which has appreciated during the marriage. Thus,

---

80 See notes 60-64 supra and accompanying text.
82 See text accompanying notes 54-56 supra.
83 See Jensen v. Jensen, 665 S.W.2d at 109; Vallone v. Vallone, 644 S.W.2d at 458 (spouse allowed to keep initial percentage traceable to separate estate).
84 See Dakan v. Dakan, 83 S.W.2d 620, 627 (Tex. 1935). The reimbursement rule applied in Dakan, along with similar rules, developed at a time when the husband was the manager of the community assets. Additionally, these early cases involved improvements to real property that could not, consistently with other property rules, be separated from the real property to which they had become affixed. A compromise between the fixture rules and the necessity of protecting a wife from a breach of fiduciary trust by the husband, produced the reimbursement rule. See In re Marriage of Warren, 104 Cal. Rptr. 860, 862-63 (Ct. App. 1972). The Texas reimbursement rule does not permit the court to award the property itself to the community claimant. See Cameron v. Cameron, 641 S.W.2d at 215; Eggemeyer v. Eggemeyer, 554 S.W.2d at 142.
85 See, e.g., Trevino v. Trevino, 555 S.W.2d 792, 799 (Tex. Civ. App. 1977); Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943); Dakan v. Dakan, 83 S.W.2d at 627. Other community property states permit more varied types of reimbursement. See, e.g., Cockrill v. Cockrill, 601 P.2d 1334, 1336 (Ariz. 1979).
the Texas courts have denied reimbursement where one spouse has received remuneration from a separate business during the marriage.\footnote{See Vallone v. Vallone, 644 S.W.2d at 458-60. Accord Weinberg v. Weinberg, 432 P.2d 709 (Cal. 1967); Speer v. Quinlin, 525 P.2d 314 (Idaho 1974). Arizona has in some cases refused to treat the salary as the measure of the community interest. See, e.g., Evans v. Evans, 288 P.2d 775, 777 (Ariz. 1955); Lawson v. Ridgeway, 233 P.2d 459, 464 (Ariz. 1951). However, it has permitted ongoing apportionment, even in the context of real property. See Tester v. Tester, 597 P.2d 194, 196 (Ariz. Ct. App. 1979).}

This rule of ongoing apportionment has received recent attention from Texas courts in cases in which the disputed asset was a business begun by one spouse prior to the marriage. In \textit{Jensen v. Jensen}, the Texas Supreme Court dealt with the increased value of stock in a closely held corporation. Prior to his marriage to Burlene Jensen, Robert Jensen was the owner of RLJ Enterprises.\footnote{Id. at 107 (Tex. 1984).} Some four months prior to the marriage, RLJ Enterprises acquired Newspaper Enterprises, Inc., in a "unique" business opportunity.\footnote{Id. at 108.} Robert Jensen was described by the court as the key man of RLJ Enterprises; during the marriage he drew salary, bonuses and dividends from the corporation.\footnote{Id.} His salary drawn from the corporation rose from approximately $64,000 in 1976 to $100,000 in 1979.\footnote{See id. at 109.} The Texas Supreme Court held that the Jensens' community estate did have an interest in the increased value of the RLJ stock.\footnote{See id.} Reaffirming the inception of title rule, however, the court held that the stock was owned by Robert Jensen and that the community's interest was an interest in reimbursement for Jensen's work effort during the marriage.\footnote{Id. at 110.}

The Texas reimbursement rule possesses two significant qualifications. First, under \textit{Jensen} the separate property owner is entitled to expend sufficient effort to manage and preserve a separate estate.\footnote{Id.} Second, community reimbursement at divorce must be determined only after subtracting all forms of reimbursement received by the separate owner spouse during the
The effect of this ongoing apportionment rule can be seen by noting the Jensen court’s statement that if Robert Jensen had been adequately compensated during the marriage, Burlene Jensen would have had no claim for reimbursement. The strict inception of title rules applied in Texas may be contrasted with rules developed by the California courts. In Pereira v. Pereira, the California Supreme Court held that although the community was entitled to the increased value attributable to the efforts of either spouse, the separate property owner was entitled to retain some portion of a business attributable to inherent increase in the value of his or her original interest. The court noted that Frank Pereira's original capital investment remained in the business while he carried on its operations during the marriage. That investment was an essential part of the business even though Pereira’s own skill accounted for the principal portion of the increase in value. On these facts, the court adopted the rule that the separate property owner was entitled to a portion of the increase in value that was “at least [equal] to the usual interest on a long investment well secured.”

Pereira has not remained the sole apportionment rule in California. In Van Camp v. Van Camp, the California Court of Appeals upheld an apportionment formula which determined the reasonable value of the separate property claimant’s services as the value of the community interest and which allocated the excess increase to the separate estate. Though Van Camp also involved a premarital business, the court departed from the Pereira rule on the ground that Van Camp’s participation in the business was not necessarily more important to its success than was his original investment. The court pointed out that under the Pereira rule had Van Camp hired a manager for his business, the entire business would have remained his separate property.

91 Id.  
92 Id. at 109-10.  
93 103 P. 488 (Cal. 1909).  
94 See id. at 491.  
99 Id.  
100 Id.  
101 See id.  
103 See id. at 889.  
104 See id.
because none of it would have resulted from his labor. The court noted it would be unfair to deprive Van Camp of the increase in value so long as the community was adequately compensated for his work effort.

Strictly segregating "work effort" increases from increases due to "inherent causes," the earliest rules in California apportioned property between the marital and separate estates according to causation. Although recognizing that this total increase in value might proceed from both types of causes, the early rules did not permit the community to share in increases attributable to inherent causes. In a recent series of cases dealing with real property, California courts have taken a new approach to the valuation of separate and community interests when a separate property claimant traces the use of his or her funds to the purchase of real property which has subsequently appreciated in value. This approach permits both estates to share in capital.

---

105 See id.
106 See id. at 889-90. The Van Camp rule thus permitted a type of ongoing apportionment in California. The California Supreme Court has approved both the Pereira and Van Camp rules for valuation of a business. See Beam v. Bank of America, 490 P.2d 257, 261 (Cal. 1971). California courts apply the apportionment rule not only to investments in a business, but also to real estate and securities investments. Id. See also Kershman v. Kershman, 13 Cal. Rptr. 288, 289 (Dist. Ct. 1961) (securities investments).
107 See VanCamp v. VanCamp, 199 P. at 885.
108 See Pereira v. Pereira, 103 P. at 448.
109 One aspect of the California cases is beyond the scope of this Article. A number of the California cases have dealt with the effects of placing property in joint tenancy. At one time California statutes created a presumption that a single family residence held in joint tenancy was community property. See In re Marriage of Lucas, 614 P.2d 285, 288 (Cal. 1980). The Lucas court allowed a separate property claimant to trace separate property contributions into such a residence if the claimant could demonstrate an express or implied agreement, which could be written or oral. Id. at 288-89. Once that tracing was permitted under Lucas, a proportionate approach, first developed in In re Marriage of Aufmuth, 152 Cal. Rptr. 668, 674 (Ct. App. 1979), was applied to the property. Recent legislative amendments have overruled the tracing requirements of Lucas and have imposed more stringent rules for tracing property. See In re Marriage of Martinez, 202 Cal. Rptr. 646, 650-54 (Ct. App. 1984); In re Marriage of Neal, 200 Cal. Rptr. 341, 345-46 (App. 1984). The legislative change affects the number of instances in which tracing will be permitted and affects allocations of increase in value when the property is placed in joint tenancy. See CAL. CIV. CODE § 4800 (West 1983). It does not, however, vitiate the formulas that derive from Aufmuth in all instances. See In re Marriage of Neal, 200 Cal. Rptr at 346 n.11.

The Kentucky courts have never denied a separate property claimant the ability to trace his or her funds into property held in joint tenancy. See Farmer v. Farmer, 506 S.W.2d 109, 111-12 (Ky. 1974). Indeed, in Kentucky the only limit on tracing is the ability to trace into a specific asset. See Brunson v. Brunson, 569 S.W.2d 173, 176 (Ky. 1980).
appreciation or increased value due to inherent causes. Additionally, both estates share in appreciation that results from the reduction of outstanding mortgage obligations.

The California rule divides increased value due to mortgage reduction between the community and separate estates according to actual contribution. In re Marriage of Moore illustrates the approach. Prior to her marriage to David Moore, Lydie Moore purchased a home for $56,560.57. She made a down payment of $16,640.57 and executed a mortgage for the balance of the purchase price. Before the marriage she paid $245.18 on the outstanding loan principal. After the marriage the parties made payments on the loan principal totalling $5,986.20. At the time of marriage dissolution the fair market value of the house was $160,000. The division of increased value due to mortgage reduction in Moore may be represented as follows:

*Formula 4*

<table>
<thead>
<tr>
<th>Formula 1</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a) down payment</td>
<td>$16,640.57</td>
</tr>
<tr>
<td>b) premarital reduction of loan principal</td>
<td>245.18</td>
</tr>
<tr>
<td>c) post separation payment on mortgage principal</td>
<td>581.07</td>
</tr>
</tbody>
</table>

amount of mortgage reduction credited to separate estate $17,466.82


See In re Marriage of Moore, 618 P.2d 208, 210-12 (Cal. 1980); In re Marriage of Marsden, 181 Cal. Rptr. 910, 915-17 (Ct. App. 1982).

See 181 Cal. Rptr. at 915-17.

618 P.2d 208 (Cal. 1980).

Id. at 209.

Id.

Id.

Id.

Id.

Id.

18 Under the California rule, postseparation payments are separate property. Under
The California rule also requires the trial court to allocate each estate's share of capital appreciation to that estate.\textsuperscript{119} This allocation is accomplished through a three-step procedure which requires the court to (1) determine the amount of capital appreciation, (2) determine the nonmarital estate's share or percentage of capital appreciation, and (3) determine the dollar amount of capital appreciation which belongs to each estate.\textsuperscript{120} Using the facts of Moore, that exercise may be represented as follows:

\textit{Formula 5}

\textbf{Formula 2}

\begin{itemize}
\item \textbf{Amount of capital appreciation credited to separate estate}
\item a) determination of capital appreciation:\textsuperscript{121}
\begin{equation*}
FMV_d - PP = CA \\
\$160,000 - \$56,640.57 = \$103,359.43
\end{equation*}
\item b) determination of separate estate share:
\begin{equation*}
\frac{\text{down payment} + (\text{loan value} - \text{community payments})}{\text{purchase price}} \\
\frac{\$16,640.57 + (\$40,000 - \$5,986.20)}{\$56,560.57} = 89.43\% \text{ share}
\end{equation*}
\item c) dollar amount of capital for separate estate:
\begin{equation*}
\text{separate estate share} \times CA = \text{separate estate's dollar amount of capital} \\
89.43\% \times \$103,359.43 = \$92,434.34
\end{equation*}
\end{itemize}

Finally, the sums of formula one (\$17,466.82) and formula two (\$92,434.34) are added together for the total separate or nonmarital share of the asset.

This examination of the rules in community property states demonstrates a number of points. First, the diversity of rules

\textsuperscript{119} See In re Marriage of Moore, 618 P.2d at 210-11.

\textsuperscript{120} See id. at 211.

\textsuperscript{121} FMV\textsubscript{d} means fair market value at dissolution and PP means purchase price. CA means capital appreciation.
among these states means that there is no single community property law that provides a lodestar for decisions. Second, community property states have, in some cases, applied differing rules to real property and business assets, permitting ongoing apportionment only with the latter type of asset. Third, although older decisions tended to strictly segregate inherent cause appreciation from work effort appreciation, some courts have begun to permit both estates to share as joint investors in capital appreciation.

III. DEVELOPING OTHER CRITERIA FOR CHOOSING BETWEEN RULES FOR DIVISION OF APPRECIATED PROPERTY

Two normative bases for evaluating Kentucky's treatment of division of appreciated property have already been explored: the extent to which the marital property statute demands a proportionate approach and the extent to which the Kentucky rule derives from community property law. Neither of these criteria is dispositive since the property statute does not necessarily compel a source of funds approach and since the approaches of the community property states are diverse. Other criteria, therefore, must provide the answer. Many persons regard rules dividing marital property upon divorce as being protective of the parties' justifiable expectations with regard to marriage. Those expectations might also form normative criteria against which a rule could be tested. Professors Weinstein and Bruch have effectively used arguments based in part upon spousal expectations to defend significant allocation of marital property

122 See text accompanying notes 85-86 supra.
123 See text accompanying notes 107-08 supra.
124 See text accompanying notes 109-11 supra.
125 See text accompanying notes 51-68 supra.
126 See text accompanying notes 71-124 supra.
127 The pitfalls of attempting to develop normative criteria for domestic relations cases are obvious. Divorce courts necessarily possess wide discretion. KRS § 403.190(1) requires the court to divide the property in "just proportions." KRS § 403.200 requires the court to determine whether the party claiming a right to maintenance can meet his or her reasonable needs. The existence of discretion, however, does not make it impossible to develop normative criteria for assessment of the general guidelines.
128 See, e.g., Prager, supra note 3, at 2-14.
to homemaker spouses and to argue that earning capacity acquired during the marriage should belong to the marital partnership.\textsuperscript{129} One problem with using party expectations as criteria is that these expectations have themselves become increasingly diverse. While thirty years ago most prospective marital couples may have contemplated husbands who worked outside the home and wives who worked within the home, today it is not possible to identify a typical marriage structure.\textsuperscript{130}

In many other areas of the law, rules are perceived as allocating risks to the parties entering a legal relationship. All of us are familiar with rules which allocate the risk of loss between buyer and seller\textsuperscript{131} or which allocate other risks of nonperformance between parties to commercial transactions.\textsuperscript{132} That such rules have not been applied in domestic relations cases is a reflection of our reluctance to admit that there are some similarities between those transactions and the economic aspect of marriage. Both the marital partnership and the commercial transaction are relational\textsuperscript{133} and each involves real economic risks associated with the breakdown of the relationship.\textsuperscript{134} This admission need not deny the emotional content of intimate relationships nor require us to treat every aspect of marriage as if it were a commercial venture.

Although various rules for apportionment currently place the economic risks of marriage and divorce upon either the individual’s separate estate or the marital estate, the rules have been developed without any assessment of the policies reflected by the risk assignments. By identifying the risks involved, it is possible to make a more forthright evaluation of property division rules and, thus, to judge the uses to which the marriage institution has been molded.\textsuperscript{135}

\textsuperscript{129} See Bruch, \textit{supra} note 2, at 62-63; Weitzman, \textit{supra} note 2, at 1210-12.

\textsuperscript{130} For a discussion of the changing roles of men and women see Bratt, \textit{Joint Custody}, 67 Ky. L.J. 277-80 (1978-79).

\textsuperscript{131} See U.C.C. § 2-509 (1977).

\textsuperscript{132} Examples of such rules include those which permit one party to claim excuse for breach of contract, or rules that permit contract formation upon the mailing of an acceptance. See U.C.C. §§ 2-615, -206 (1983).

\textsuperscript{133} Both depend upon an underlying contract, although the terms of the marriage contract are typically dictated by the state.

\textsuperscript{134} See Weitzman, \textit{supra} note 2, at 1265-66.

\textsuperscript{135} Some writers have attempted to assess the risk allocation of legal rules in order
After marriage there are two important types of rights at stake: those of each individual and those of the marital partnership. These rights are reflected both in community property statutes and in Kentucky’s property division statute. If a marital property rule makes it difficult for the separate estate to retain separate property, the rule carries with it a “marriage risk for the individual who is the nonmarital owner.” Conversely, if a marital property rule makes it difficult for the marital estate to accumulate property, the rule places the entire “risk of marriage breakdown” on the marital estate. In either case, broader policies may be implicated.

The rule announced by the Texas court in Jensen does not directly address the risk allocated to each estate upon commencing the marriage partnership. However, if “marriage risk” is defined as the danger of losing the ownership of an asset, the Texas rule poses no such risk to the separate estate. The inception of title rule mandates that the separate property owner retain title to the property. The separate owner’s sole problem is the risk of a particular use of a given capital investment. Assuming that Robert Jensen had only $50,000 to invest prior to marriage, he might have taken that money and invested it in common stock. Additionally, he might have chosen to do so through the services of a broker. It is also theoretically possible that, since Robert spent no time or effort other than the minimal permissible amount under the Texas rule, any appreciation in

to make the argument that certain risk allocations are more efficient than others. See generally A. Polinsky, An Introduction to Law and Economics (1983). Others have argued that cost-benefit analysis and the attendant allocation of risk ignores social values that are difficult to quantify. See id. at 132. It is not the purpose of this Article to argue that particular marital property rules are more efficient than others. Rather the notion of risk has been borrowed from other fields of law in order to demonstrate that more is at stake for the marital estate than some ephemeral expectation. The notion of risk and consideration of the economic loss to each estate should help to illuminate the policy choices that must be made within this area.

See KRS § 403.190; note 103 supra.

Such a risk might not necessarily discourage a party from marrying because other values associated with marriage could outweigh that risk.

Placing the entire risk of marriage breakdown on the marriage would seem to violate the general policies of the Kentucky version of the UMDA. See KRS § 403.110 (1972).

See 665 S.W.2d 107, 109 (Tex. 1984).

Id.
value during the marriage would remain separate.\textsuperscript{141} Upon divorce Robert would retain his separate property portfolio with its appreciated value. He thus would retain not only his original investment but also the earning power of that investment. In the actual Jensen case, Robert Jensen invested his money in a closely held corporation, a holding company in which he was the "key man."\textsuperscript{142} Having created the corporation and withdrawn a salary from it, under the Jensen rule he faces a community claim to the corporation only if the salary withdrawn was not adequate.\textsuperscript{143} It is apparent that upon divorce there is no "marriage risk" associated with this form of investment. Robert retains both his original capital investment and its passive earning power.

The loss to the community on the other hand is quite different. The community has a claim on an intangible asset: the "efforts of a spouse."\textsuperscript{144} In the above example which depicts Robert as a passive investor, this intangible asset is free to be used elsewhere. Since he spends minimal time on his stock, Robert's skills can be applied in other areas to create wholly community assets.\textsuperscript{145} In the case actually litigated, however, the community was deprived of the opportunity to be an investor by the rule of ongoing apportionment and was deprived of the chance to use Robert's work efforts to create other assets not related to his separate property. The community was a consumer, constantly devouring its share of the investment process.\textsuperscript{146}

In summary, the Jensen rule is free of marriage risk for the separate property investor. Marriage risk arises if and only if the fact of marriage threatens the separate property owner with

\textsuperscript{141} See id.
\textsuperscript{142} See id. at 108.
\textsuperscript{143} Id. at 109.
\textsuperscript{144} See W. DEFUNIAK & M. VAUGHN, supra note 63, at § 62.
\textsuperscript{145} Of course, he or she might also decide to play golf every day. See Lakenan v. Lakenan, 64 Cal. Rptr. 166, 167 (Ct. App. 1968) ("He appears to be a great devotee of golf and to have spent a large portion of his time in the pursuit of that sport."). However, neither the community property system nor any other marital property system can guarantee that a spouse will be diligent or successful. What ought not to be barred is the economic opportunity.
\textsuperscript{146} Some marital partnerships might, of course, have savings from salary or use that salary to purchase other valuable assets. Nevertheless, one can assume that in most instances salary withdrawals will not dissipate capital assets and that the marital partnership will not share in their appreciation.
the loss of his or her capital investment and its earning power. Under the *Jensen* rule, the marital community loses an opportunity to be an investor; it cannot invest its asset—the efforts of either spouse—in an enterprise that might increase in value through inherent causes. That effect can be seen by comparing the *Jensen* rule to the proportionate rules developed in other states.

The approach used in Kentucky and by the *Moore* court in California might best be labeled a "shared investment" approach. Although the two states have developed different formulas for implementing the approach, there are a number of similarities in methodology. California's treatment of appreciated marital property recognizes that the growth value of an asset may consist of two separate kinds of growth: reduction in mortgage principal and capital appreciation. The California courts permit both the marital and the separate estates to share in increases in capital appreciation. This treatment of the marital estate as a joint investor in the inflationary growth of an asset is a departure from prior California rules that strictly segregated increased value due to work efforts of one of the spouses from increased value attributable to inherent causes. The California rule thus produces a marriage related risk for the separate property claimant. By marrying, the claimant will be required to share the capital appreciation of an asset with the marital estate. On the other hand, if the risk to the marital estate of marriage breakdown is defined as the economic risk associated with the lack of marital property available for division upon dissolution, this risk is significantly reduced under the

---

147 See text accompanying notes 22-50, 162-66 *supra*. A comparison between the Texas rule in *Jensen* and the California rule in *Moore* is not barred by the fact that the cases deal with different types of property. Although the *Moore* formula itself could not be applied to shares of stock in a corporation, both that formula and the *Jensen* rule implicate similar issues regarding the community's use of a separate asset and the community's contributions to that asset. See text accompanying notes 162-66 *infra*.

148 See *In re Marriage of Moore*, 618 P.2d 208, 211 (Cal. 1980).

149 See id.

150 See *Van Camp v. Van Camp*, 199 P. 885, 888 (Cal. 1921); *Pereira v. Pereira*, 103 P. 488, 491 (Cal. 1909).

151 Under California's equal division rule the separate property claimant would lose one-half of the marital property share. See 618 P.2d at 211.
California approach. To the extent that increased value is due to inflation, the increase is unearned by either spouse. Allocation of this increase between the estates reflects a respect for the importance of each estate.

In choosing between the possible approaches consistent with Kentucky's marital property statute, the "shared investment" approach is not only preferable but may be required by certain social policies reflected in the Uniform Marriage and Divorce Act as adopted in Kentucky. To return to the theme of party expectations, the diversity of those expectations does not over-ride the more general social conception that marriage is a partnership. Few marital partners would have any expectation that the risk of marriage breakdown would be assessed entirely against the marital estate. In addition, few individuals would expect to

---

152 Obviously many marriages break down without the parties accumulating a significant amount of marital property. Studies generally show that most divorcing couples have little or no property. See Weitzman, supra note 2, at 1189, nn.32-34. In marriages in which entitlement to appreciated value is at issue, however, a significant amount of property is involved. The economic risk, therefore, is not one associated only with lack of financial success. Instead, it relates to changed economic circumstances after a divorce. As Professor Weitzman has aptly demonstrated in her seminal article, the result of changed economic circumstances after divorce is most likely to mean that wives suffer serious postdivorce economic erosion. Id. at 1240-53. Moreover, the difference between the incomes of husbands and wives after divorce increases with income level. Id. at 1243. The disparity is also significant in long term marriages. Id. at 1248.

153 Inflationary increases represent the fact that it takes $80,000 today to buy what was a $40,000 home some years ago. It is certainly possible to hypothesize a situation in which the requirement that the nonmarital claimant share an asset with the marital partnership will force that claimant to divest himself or herself of the asset without the ability to acquire a similar asset in an inflated market. Another possibility is that the nonmarital claimant will have to buy out the marital claimant and that the nonmarital purchaser will have to pay a significant rate of interest to do so. This problem, however, is one that is always present upon divorce—it is not possible to divide one pie into two pieces and leave each person with a whole pie. The Brandenburg formula will apportion the value of the home between the nonmarital and marital estates according to contribution. If both parties to the marriage now have to seek a home in a new and more difficult market, there is at least no disparity between them that proceeds from the loss of contributions made. Moreover, the spouses must act in the same economic market so that that factor is not a source of disparity. Thus, the risk assigned to the nonmarital claimant under a source of funds rule does not have the same aura of gender disparity as the risk to a marital partnership that it will acquire no assets. See note 152 supra.

154 Because the UMDA replaced a statutory scheme that awarded property to the spouse in whose name that property was held with the marital partnership theory, any balance to be struck between protecting the individual separate owner and the marital partnership should weigh the interests of that partnership heavily. The intent of the
completely lose a separate asset by virtue of marriage. The current Kentucky approach wisely adopts the source of funds rule, which balances the risks of marriage and divorce between the nonmarital estate and the marital estate. The source of funds rule is thus preferable to the Jensen, or inception of title, approach in that it affords recognition to the importance of the marriage institution while retaining some status for individuals within that relationship.

IV. PARTICULAR PROBLEMS WITH FORMULAS: IMPLEMENTING THE SOURCE OF FUNDS RULE

The use of formulas to allocate the interests of the marital and nonmarital estates has been attacked as an unfair depriva-

UMDA's drafters clearly was to create a larger group of assets available for division and to minimize the necessity for postmarital support. See UMDA § 308, 9A U.L.A. 160 comment (1973). See also Graham, State Marital Property Laws and Federally Created Benefits: A Conflict of Laws Analysis, 29 WAYNE L. REV. 1, 49-50 (1982). In Kentucky, this preference precedes the adoption of the UMDA. See Colley v. Colley, 460 S.W.2d 821, 825 (Ky. 1970). However, it cannot be said to be controlling because the statute creates a wide variety of exceptions for the characterization of property as separate. See KRS § 403.190(2). The legislature, therefore, must have intended to balance the interests of the two estates with some preference for the marital estate.

Under Alternative B of UMDA § 307, that possibility exists. See UMDA § 307 Alternative B, 9A U.L.A. 143 comment (1973). That section makes available for division all property however and whenever acquired. See UMDA § 307 Alternative B, 9A U.L.A. 143. In one state which originally adopted such a rule, recent legislative amendments have now exempted from division gifts to individual spouses from third parties. See N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1984). That amendment is based upon the legislature's determination that failure to exempt such property from division frustrated party expectations. See id.

In other states, that balance is being struck very differently. See CAL. CIV. CODE § 4800 (West Cum. Supp. 1984). Under California rules relating to property held as joint tenants, the separate property claimant may receive as reimbursement only the separate equity in the property which existed at the time it was converted into a joint tenancy. See In re Marriage of Neal, 200 Cal. Rptr. 341, 346 (Ct. App. 1984). The California rule for joint tenancy property has been criticized as being inequitable to the separate estate. See In re Marriage of Huxley, 10 FAM. L. REP. (BNA) 1693 (Oct. 30, 1984); Buol v. Buol, 10 FAM. L. REP. (BNA) 1599, 1600 (Aug. 16, 1984). Illinois has adopted an approach at the other end of the spectrum. Under that state's approach, a marital partnership can claim a share of appreciation based on the nonmonetary contribution of a spouse only if the nonowner spouse made a "significant" contribution and the asset appreciated substantially. See ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd Cum. Supp. 1984).
tion of the trial court's historical discretion when acting in equity.\textsuperscript{157} In Kentucky, formulas have been said to prevent "fair" division in many cases.\textsuperscript{158} In order to analyze this criticism, it is necessary to consider what is meant by unfairness. Some of the perceived unfairness arises from recurrent disparity between the economic positions of the spouses after divorce.\textsuperscript{159} Another aspect of the unfairness charge, however, relates to the \textit{Brandenburg} formula's requirement that the marital estate pay the taxes and interest on real property without receiving credit for that payment.\textsuperscript{160} The former charge against the use of formulas is but an aspect of public perceptions of unfairness in the divorce process while the latter is a specific complaint against the formula itself.\textsuperscript{161}

Neither the Kentucky \textit{Brandenburg} formula\textsuperscript{162} nor the formula adopted by the California courts credits the community estate with the payment of taxes and interest.\textsuperscript{163} In \textit{Moore}, the California Supreme Court rejected the claim that its formula unfairly required the marital estate to service the mortgage obligation by payment of interest and taxes.\textsuperscript{164} The court reasoned that such contributions were irrelevant to a formula designed to divide appreciated value because they were not part of capital investment.\textsuperscript{165} More importantly, the court implied that if the community were credited with such payments, the separate property claimant might be permitted to charge an offsetting amount for the community's use of the property.\textsuperscript{166}

\textsuperscript{157} See 617 S.W.2d 871, 875 (Ky. Ct. App. 1981) (Gudgel, J., concurring).
\textsuperscript{158} See Potter & Ewing, \textit{supra} note 14, at 34.
\textsuperscript{159} See Weitzman, \textit{supra} note 2, at 1249-53.
\textsuperscript{160} See \textit{Brandenburg} v. \textit{Brandenburg}, 617 S.W.2d at 873.
\textsuperscript{161} Both critics and trial courts have ignored the fact that judicial discretion can function even within the context of the \textit{Brandenburg} formula. Once the amount of marital property is determined, a trial court retains wide discretion to allocate that property. See \textit{Johnson} v. \textit{Johnson}, 564 S.W.2d 221 (Ky. Ct. App. 1978). The nonmarital property claimant does not lose all of the marital estate's share under the \textit{Brandenburg} rule. Rather, the marital share is available for just division. See KRS § 403.190 (West 1984).
\textsuperscript{162} See 617 S.W.2d at 873.
\textsuperscript{163} See \textit{In re} Marriage of \textit{Moore}, 618 P.2d 208 (Cal. 1980).
\textsuperscript{164} See \textit{id.} at 210.
\textsuperscript{165} See \textit{id.} at 211.
\textsuperscript{166} See \textit{id.}.
The implication that the separate property owner might be entitled to offsetting compensation raises a number of problems. Although the Moore court indicated that the value of the community’s use of the property would merely offset the interest and taxes paid,\(^6\) this may not be so. Suppose that the wife owned a home prior to marriage and that the mortgage payment on the home was $400, $350 of which represented amounts payable for interest and taxes. Suppose further that the marital partnership decided to live in the house and that mortgage payments were made from the salaries of either or both spouses. Moore implies that paying $350 for interest and taxes is the same as renting the property.\(^6\) The $350 payment is not the rental value of the property, which might be more or less than $400. Instead, it is the rental cost of the money borrowed by the wife to purchase the property prior to marriage. Indeed, it is highly unlikely that the two figures, interest payment and fair rental value, bear any relationship to each other since they would be influenced by entirely different economic factors.

Some commentators have suggested that a more equitable approach would credit the community with the entire loan balance and require the community to discharge the loan obligation.\(^6\) This solution has been rejected by the California courts\(^7\) and accounts for some of the major differences between the formula used in Moore and that adopted by the Kentucky Court of Appeals in Brandenburg. In Moore, the separate property claimant was the loan obligor.\(^7\) The Moore formula established the separate property share by comparing the down payment and the total loan value less community payments on loan principal to the purchase price of the asset.\(^7\) The Brandenburg

\[\text{\footnotesize\textsuperscript{6}}\] See id.

\[\text{\footnotesize\textsuperscript{7}}\] See id.

\[\text{\footnotesize\textsuperscript{16}}\] See, e.g., Potter & Ewing, supra note 14, at 15.

\[\text{\footnotesize\textsuperscript{17}}\] See, e.g., 618 P.2d at 211.

\[\text{\footnotesize\textsuperscript{18}}\] Id. California presumes that loans acquired during the marriage are community property unless the creditor intends to look to the separate assets of the acquiring spouse. See In re Marriage of Stoner, 195 Cal. Rptr. 351, 354-55 (Ct. App. 1983). Cf. O’Neill v. O’Neill, 600 S.W.2d 493 (Ky. Ct. App. 1980); Bodie v. Bodie, 590 S.W.2d 895 (Ky. Ct. App. 1979) (both holding that debts acquired during marriage are not presumed marital debts).

\[\text{\footnotesize\textsuperscript{19}}\] See 618 P.2d at 211.
formula does not credit either estate with the loan value; it compares actual contributions only.\textsuperscript{173}

Because the California formula allocates the credit for the loan value to the estate liable on the loan, it treats the loan as a valuable community asset. In certain situations the investment opportunity provided by a loan with a low interest rate may indeed have functional value that would permit its characterization as "property."\textsuperscript{174} Even where the loan is the "property" of a separate owner, it has been maintained through partnership expenditures.\textsuperscript{175} One possible solution could recognize both the value of the loan as property and the contribution of the partnership by payment of taxes and interest. This solution would require the loan obligor to reimburse the marital partnership for the interest and taxes it had paid and to pay a reasonable rate of interest as if he or she had borrowed that amount from the community.

Another problem raised by the Robinson-Brandenburg formulas relates to the failure of the Kentucky courts to take into account the possibility of nonmonetary contributions that enhance the value of separate property. In other jurisdictions, courts have treated nonmonetary contributions to separate property as creating a compensable right to reimbursement.\textsuperscript{176} In most cases, however, these nonmonetary contributions have been work effort actually expended upon repair of the property or improvements to the property.\textsuperscript{177} The Kentucky courts have rejected the notion that a nonmonetary contribution by a homemaker spouse could convert separate property into marital property.\textsuperscript{178} It is not clear whether the courts would also discount more direct contributions to the enhancement of property value.\textsuperscript{179} If such contributions have a fair market value it would be possible to include

\textsuperscript{173} See 617 S.W.2d at 873.
\textsuperscript{174} Such assets may be marital property. \textit{But see} McGlone v. McGlone, 613 S.W.2d 419 (Ky. 1981) (Veteran's Administration grant held to be nonmarital property).
\textsuperscript{175} See text accompanying notes 162-74 \textit{supra}.
\textsuperscript{177} See 636 P.2d at 883.
\textsuperscript{178} See 617 S.W.2d at 873.
\textsuperscript{179} Suppose, for example, that one spouse provided work and labor which directly enhanced the other's real property. \textit{See In re Marriage of Olsen}, 451 N.E.2d 825 (Ill. 1983) (requiring the contribution to be significant).
them in any future formulation of rules for apportioning separate and marital property.

**CONCLUSION**

An examination of various state rules for the division of appreciated property upon divorce demonstrates that few states have encountered facile solutions to the problem. The Kentucky courts have developed an approach which attempts to balance the rights for both the marital and nonmarital estates when each estate has contributed to property acquisition. Since an examination of past cases reveals that other considerations may also be involved in making a fair division, the courts will need to adopt an even more flexible attitude toward formulation of the marital and nonmarital interests. Courts will need to consider, for example, how to treat the marital partnership’s payment of interest and taxes on real property and how the concepts underlying the Brandenburg formula should apply to business assets.

For the legislature the problem is a larger one. It must consider whether the property division statute as currently implemented by the courts strikes a fair balance between the marital and nonmarital estates. Any rule that decreases the potential for marital property will have a significant impact upon homemaker spouses, especially in long-term marriages.\(^{180}\) Rules that limit the marital estate usually cause homemakers to leave the marriage with little or nothing. A fall in the number of purely homemaker spouses may not, however, lead to a conclusion that rules augmenting the marital estate can be abandoned.\(^{181}\) Men’s earning capacity continues to significantly exceed that of women.\(^{182}\) For that reason rules that limit the marital estate will widen the gap between the spouses’ financial circumstances after divorce.


\(^{181}\) See note 106 supra.

\(^{182}\) A thirty-five year old male with four years of college has an expected lifetime earning capacity of $956,000. A female of the same age and education has a projected earning capacity of $335,000. *Statistical Abstract of the United States* 470 (104 ed. 1984). A forty-five year old woman with four years of college can expect to earn $207,000 during her working lifetime; a similarly situated male can expect to earn $639,000 during the same period. *Id.*
The real barriers to fairness and equality in this area are connected to two problems. The first problem lies in our failure to recognize an underlying social problem which is broader than divorce. Disparate pay and work opportunities for men and women have substantial economic effect whether or not individuals are married or unmarried. Resolving this disparity in the context of divorce makes marriage an avenue for the reallocation of wealth between men and women. Although this may not be unfair in some contexts, we may ask ourselves whether healthy marital relationships are promoted by such uses of the institution of marriage in lieu of a frontal attack on the problem. A second barrier to fairness is the tendency to form one rule to cover a variety of marital relationships. In Kentucky, this inclination is joined with a rule disfavoring private agreements that would produce a different allocation of property on divorce from that permitted by statute. Thus, long-term marriages in which one spouse works only within the home are subject to the same rules as shorter marriages in which the spouses’ contributions arise in substantially similar ways.

Kentucky’s property division statute will be strengthened by a rule which gives consideration to both flexibility and fairness. A formula such as that used in *Brandenburg* illuminates what is at stake in the development of such a rule and challenges the limits of fairness and flexibility.

---