

A "JUST AND PROPER DIVISION": PROPERTY DISTRIBUTION AT DIVORCE IN OREGON

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In one of its greatest understatements in recent years, the Oregon Supreme Court in *In re Marriage of Masee* [FN1] observed that the Oregon property division statute is "long, complicated, and somewhat cumbersome." [FN2] In 1953, the statute simply provided that at divorce the court may divide "the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances." [FN3] Since then, the statute has been amended repeatedly so that it now takes up more than a page of the Oregon statute books. The first third of the statute, which is the most significant part, now provides:

107.105(1) Whenever the court grants a decree of marital annulment, dissolution or separation, it . . . [may] decree as follows: . . .

f): For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. A retirement plan or pension or an interest therein shall be considered as property. The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held. Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species *736 of co- ownership, and a transfer of marital assets pursuant to a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property. [FN4]

This language, which was added to the statute in 1977 and 1981, [FN5] structures the trial judge's discretion and expresses a basic *737 principle underlying family property law: spouses are economic partners in the sense that they share the property that either or both earn during the marriage.

The [1977 amendments to Oregon Revised Statutes (ORS) 107.105] resulted, at least in part, from a resolution of the Oregon Women's Political Caucus Convention recommending that the role of the homemaker be recognized as an economically valuable contribution to the acquisition of assets during marriage. One intent underlying the 1977 amendments is the recognition that although money for the acquisition of property during the marriage often results from the labors of the employed spouse, the efforts of the nonwage- earning homemaker are also an important contribution toward the acquisition of property during the marriage. [FN6]

At hearings on the 1977 amendments, legislators debated whether one spouse's contributions, including homemaking, to the other spouse's career or education should be taken into consideration by the court in awarding spousal support, making a property division, or both. [FN7] A proposal to include such considerations as a factor in making an award of spousal support was defeated, [FN8] but a majority of legislators apparently believed that counting homemaking as a contribution in the division of property "ma[d]e sense" as part of "a dissolution of a partnership." [FN9]

Three major 1982 Oregon Supreme Court decisions interpreted *738 the new language to mean that when parties divorce, their marriage is, at least presumptively, to be treated as an economic *739 partnership in which marketplace work and homemaking are both valued, and in which title does not control ownership. In *In re Marriage of Engle* [FN10] the court of appeals had held that the wife had "little interest" in corporate stock, which was acquired after the parties' marriage in the husband's name because "she had no power to transfer the property by will or otherwise." [FN11] The supreme court rejected this conclusion, saying:

[W]hen property is acquired with monies earned by a working spouse, whether title is taken in the husband's

name, the wife's name, or in both names, the acquisition of the property would *740 be treated, at least presumptively, as having resulted from the equal efforts of the spouses. . . .

For tax or other reasons, marital partners may choose to acquire property and take title in the name of either or both, as joint tenants, tenants in common, tenants by the entirety, with or without rights of survivorship, or otherwise. The 'homemaker contribution' sentence of ORS 107.105(1)(e) was intended to recognize the participation of the nonworking homemaker spouse, whose efforts contribute to the acquisition of property in numerous tangible and intangible ways, and to minimize the effect of the state of title of an asset acquired after marriage, so far as the division of property is concerned. [FN12]

The two other major 1982 opinions, *In re Marriage of Pierson* [FN13] and *In re Marriage of Jenks*, [FN14] reiterated and applied this analysis, and the supreme court has consistently adhered to it since then. Nevertheless, one of the most persistent themes in Oregon property division law is the reluctance of some lower courts, including the court of appeals at times, to recognize the homemaker's contributions as valuable to the family economy. As recently as 1999, the supreme court in *In re Marriage of Masee* [FN15] was once again confronted with an opinion from the court of appeals which disregarded the value of homemaking. Reversing, the supreme court said:

The third sentence [of ORS 107.105(1)(f)] . . . requires the court to determine that a homemaker spouse made 'a contribution' to the acquisition of marital assets. That sentence prohibits the court from determining that the homemaker spouse made no contribution to the acquisition of marital assets simply because that spouse attended to the home and family and, consequently, played no direct role in the business or other *741 activity that created marital assets. [FN16]

These difficulties of interpretation and application derive in part from the very complexity and obscurity of the property division statute and, I suspect, in part from continued resistance to the principles that underlie the statute. This Article addresses these problems by proposing a coherent interpretation of the statute in light of the major supreme court cases interpreting it. The Article includes a suggested rewrite of the statute to reflect this interpretation.

The first part of this Article places the Oregon statute into national context, showing that the norms which it embraces are and have been dominant throughout the country for a number of years. The second part analyzes the Oregon statute in detail. The third part is the proposed rewrite of the statute.

I The National Scene--Acceptance of the Marital Partnership Theory at Divorce [FN17]

Modern divorce property division law is intrinsically tied to the grounds for divorce itself. Before 1970, most state statutes allowed divorce only for the marital fault of one of the parties. In that year, California adopted a pure no-fault system. [FN18] Oregon followed in 1971. [FN19] In the fault era, a minority of states required that at divorce, property be awarded to the spouse who had owned it during the marriage, and the others allowed courts discretion to divide at least some property equitably. In equitable distribution states, fault was often an important factor in property division. [FN20] By the mid-1980s all common law states had *742 moved to some form of equitable distribution. [FN21]

*743 However, the adoption of no-fault divorce changed understandings about what should be considered in determining an equitable distribution. Divorce policy now sought to relieve spouses of a relationship that was "socially dead" so that they might seek new and more satisfying relationships. Several principles seemed to flow from this goal. One was that judicial decrees should end, as far as possible, all personal and economic ties between the spouses. Second, the abandonment of fault grounds, coupled with the emerging emphasis on gender equality, implied that both spouses should become equal and independent social and economic actors after divorce and that neither spouse should be especially burdened by the divorce decree.

These developments had a number of theoretical and practical implications for economic orders at divorce. Most generally, these orders sought to end the relationship between formerly married parties. The approach to property division which emerged drew upon social perceptions about the importance of women's work in the unpaid domestic economy and the legal theory of community property. Legislatures and courts in most states came to regard both spouses as contributors to assets acquired during marriage.

The Uniform Marriage and Divorce Act (UMDA), which was drafted during this era, typifies this approach. [FN22] Section 307 of the Act deals with property division, and in its original form it provided that when parties divorce, each spouse is to receive his or her separate property and the court is to divide the marital property in such proportions as the court deems just. [FN23]

Initially, the Family Law Section of the American Bar Association opposed the UMDA property division provisions because the proposal moved common law property states so far toward community property concepts, at least for purposes of divorce. [FN24] However, the original UMDA approach has prevailed. By the *744 mid-1990s, most American jurisdictions provided that, at divorce, each spouse should receive his or her separate property, and marital property should be divided equitably. [FN25] Empirical studies of how judges divide property show that they strongly favor an equal division of marital assets, but different divisions can be justified based on the judge's determination of who contributed to the acquisition of property during the marriage and the needs of the parties following divorce. [FN26]

These principles are expressed in the most recent model statement of divorce property division law, the American Law Institute's Principles of the Law of Family Dissolution. These principles provide that marital property is to be divided equally unless the court finds 1) that an unequal division is necessary to provide for the spouse according to principles that justify spousal support or 2) one spouse improperly disposed of marital assets before the divorce. [FN27] Marital property is anything acquired during the marriage that is not separate property, and separate property includes inheritances and gifts to one spouse during the marriage. [FN28] Separate property is to be awarded to the owner unless there is too little marital property to permit the court to order reimbursement of one spouse for the other spouse's improper disposition of marital property. [FN29]

The 1977 and 1981 amendments to Oregon's property division statute were inspired by the UMDA provisions discussed above, [FN30] but the wording of the Oregon statute is less clear than the equivalent sections of the UMDA. While property division must begin with an interpretation of the statute, [FN31] substantial judicial interpretation has always been required.

*745 II The Supreme Court's Interpretation of ORS 107.105(1)(f)

The first step in dividing property in Oregon is to determine which property is marital and which is separate, since different division rules govern each category. The first part of this section discusses the basic categorization issue, and the second discusses the rules for dividing each class of property. The third part of this section discusses two more complex issues that concern categorization: how to determine when property has been changed from separate to marital or vice versa, and how to treat the increase in value and income from separate property.

A. Dividing Property into Marital and Separate Shares

The Oregon property division statute includes the terms property of the parties and "marital assets" but does not explicitly define either. [FN32] The statute empowers the court to divide all the property of the parties as may be "just and proper." [FN33] Other terms in the statute apply only to "marital assets": the language concerning the homemaker's contribution, the rebuttable presumption of equal contribution, and the clause providing that "[s]ubsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership. . . ." [FN34] Though the statute does not define "marital assets" explicitly, the supreme court has used these provisions to craft a definition of "marital assets" and a structure for dividing marital assets at divorce. These definitions and rules are very similar to analogous ones used in other states with marital property systems. [FN35]

As the court has interpreted the statute, the term "marital assets" is defined by comparison to separate property. Categories of separate property have been identified, and "marital assets" are everything else acquired during the marriage by either party. The effect is that all the parties' property is assumed to be marital unless a party can establish that it is separate.

*746 The first case concerning characterization decided by the Oregon Supreme Court was *In re Marriage of Lemke* in 1980. [FN36] The parties had been separated for twenty years before they divorced, and the husband had acquired property during the separation. [FN37] The court held that the presumption of equal contribution had been rebutted, stating "it is 'just and proper' . . . that a spouse who acquires property during an extended period of mutual financial independence preceding a dissolution is to be allowed to retain that property." [FN38]

Nine years later in *In re Marriage of Richardson* [FN39] the court applied this principle to division of a spouse's interest in a retirement plan. The court held that the portion of the interest earned during the marriage was marital, but that the part earned during the parties' six-year pre-divorce separation was not. [FN40] *Richardson* is also notable for its holding that the pension, which did not vest until after the parties had separated, was earned throughout the time that the employee husband worked, rather than all being earned at the moment it vested. [FN41]

***747** Three 1982 decisions, *In re Marriage of Pierson*, [FN42] *In re Marriage of Jenks* [FN43] and *In re Marriage of Seefeld*, [FN44] largely completed the basic picture. *Pierson* concerned the treatment of property which the wife alone inherited during the marriage. [FN45] The court held that the property was the wife's sole property, saying: "The presumption of the husband's equal contribution by non-financial means is rebutted because wife's acquisition was by sole inheritance after the parties separated, unaffected by efforts of the husband." [FN46]

In *Jenks* the court held that property given to the husband by his father and grandmother after the marriage was his separate property. [FN47] The court observed:

The statutory presumption of equality of contribution to the acquisition of marital assets . . . would apply . . . to a distribution of marital assets purchased with the earnings of one spouse. In the absence of evidence to the contrary, the presumption would require a holding that a non-earning spouse's efforts contributed to the accumulation of family property. The presumption may be overcome, however, by a finding that property was acquired by one spouse by gift or inheritance, uninfluenced by the other spouse. In such a case, there has been no economic or other contribution by the other spouse to the acquisition of the asset.

Here, we must apply the presumption to all the marital assets including the [[property given to the husband]. Had husband's title been the only evidence regarding that property, the presumption of equal contribution to acquisition would require that the property be subject to equal division, absent other factors. The fact that it was acquired by gift, free from any finding that the gift was related to wife's efforts or that wife was an object of the donative intent, overcomes the statutory ***748** presumption. Therefore, wife is not entitled by virtue of the statutory presumption to share in the distribution of the value of that real property as of the date of its acquisition. [FN48]

In *Seefeld* the court said that property which the parties owned before marriage--the husband's house, retirement account, and stamp collection, and the wife's retirement account--were not marital assets. [FN49] The next year, in *In re Marriage of Miller*, [FN50] the court relied on the same principle, treating property which the husband had acquired before the marriage as his separate property.

As interpreted by these cases, ORS 107.105(1)(f) is a typical deferred marital property statute. All property acquired during the marriage is presumed to be marital, but if evidence establishes that property was given to or inherited by one spouse alone during the marriage, it is separate. Premarital property is also separate. These principles establish a foundation for the division of assets at divorce, which the next section discusses.

B. Distributing Marital and Separate Property

ORS 107.105(1)(f) provides no explicit rules for allocating the parties' property at divorce, but the Oregon Supreme Court has interpreted the statute as creating some presumptive rules and criteria for deviating from these rules. The court has concluded that the statutory provisions regarding "contribution" imply two presumptions: that marital property is to be divided equally and that separate property is to be awarded to the owner. [FN51] The court has also established that these presumptions can be overcome and a different division made to accomplish other purposes, particularly providing for the support of a needy ex-spouse or for children of the marriage. The most important issue that remains unclear is under what circumstances the parties' unequal "contributions" to marital property warrant an unequal division.

Pierson clearly established the presumptive rules for dividing marital and separate property, as well as judicial authority to deviate from these divisions to provide for the needs of one of the spouses. The supreme court in that case said:

***749** Absent overriding considerations, marital assets should be divided as equally as practical. Where, as here, one spouse is equitably entitled to receive a marital asset because he or she acquired it free from any contribution of

the other spouse, the asset can initially be removed from the equation. . . .

The equation of property division and the entitlement of a party to individually acquired property may be disturbed in order to accomplish broader purposes of a dissolution. There are social objectives as well as financial ones to be achieved and that may result in an uneven financial division. . . .

Where a decree cannot achieve all the objectives of a dissolution and at the same time divide property exactly evenly, the court should order a division of assets which is out of balance to the extent required for the accomplishment of the other purposes of the decree, whether that be to preserve assets, to enable a party to pay support, or, as here, to enable both parties to begin post-marital life with a degree of economic self-sufficiency, or to satisfy other subsections of ORS 107.105. [FN52]

Applying these principles, the court in Pierson ordered an unequal division of marital assets based on the greater needs of the husband, who earned significantly less than his wife and who did not share in his wife's substantial inheritance. Similarly, in Richardson the court awarded the wife more than half the marital assets because of her smaller income and earning power, as well as her sometimes debilitating emotional problems and substantial medical expenses. [FN53] In Seefeld [FN54] the court extended this rationale to provide for the needs of the parties' child. The court awarded more than half of the marital home to the wife but limited the circumstances in which property may be awarded for the sake of providing for children.

This does not mean that property should be divided differently simply because there are children to care for. Where the assets and foreseeable earnings available to the parties are reasonably sufficient to provide funds for the needs of the children, the proper division of property and the award of child support and spousal support should each be considered separately,*750 dividing the property as may be "just and proper" between the parties.

Where earnings and assets are not sufficient to support the needs of the children as well as both parties, however, courts often cannot escape the necessity to determine which combination of support payments, property, and other sources of income will most effectively provide for the children. Frequently this results in an award of the family home to the custodial parent. It may also involve an award of property that helps to meet current needs (for instance, an automobile for family transportation) rather than imposing higher child support payments that cannot realistically be counted on. [FN55]

Besides approving an unequal division of marital assets to provide for need, a number of cases have also approved unequal divisions of marital assets to avoid the continued financial entanglement of the parties or to preserve the value of assets against a forced sale. However, these circumstances can only justify minor deviations from an equal division. [FN56]

Together these cases clearly articulate the following principles: (1) marital property is presumptively to be divided equally, (2) separate property is presumptively to be awarded to the owner, and (3) these presumptions can be rebutted by evidence establishing that a different division is necessary to provide for the post-divorce needs of a former spouse or child or, to a limited extent, to preserve assets or avoid financial entanglement of the parties.

The supreme court case law is less clear concerning the extent to which a party may argue for a different division based on unequal*751 contributions to marital assets. Two major cases address this issue: In re Marriage of Stice, [FN57] decided in 1989, and In re Marriage of Masee, [FN58] decided a decade later.

In Stice the parties disagreed about the division of shares of corporate stock which the wife had purchased through a payroll deduction plan during the marriage. Throughout the twenty-five-year marriage both parties had worked, earning similar salaries. They had essentially maintained and managed separate checking and savings accounts, although they bought real property and cars together. The trial court found that the wife saved much of the money she earned, while the husband generally spent his on personal entertainment, though it did not characterize his expenditures as a misappropriation or waste of marital assets. [FN59] The trial court awarded the wife the bulk of the stocks.

When the case reached the supreme court, the wife argued that she had "contributed" more than her husband had to the acquisition of the stocks because she had saved for them while her husband had spent most of his discretionary income. She also claimed she was entitled to more than half of the marital assets because she had done most of the homemaking and was entitled to the benefit of the homemaker presumption. The supreme court rejected both

arguments and ordered an equal division of the marital assets, including the stocks which had been acquired during the marriage from the wife's salary.

Stice strongly indicates that courts should not inquire into the details of the parties' lives during the course of the marriage in an effort to assign relative economic values to their roles. The Stice court interpreted the property division statute as treating married people as economic partners who share marital assets at the end of the marriage without an inquiry, except in extreme cases, into who had done what during the marriage. The opinion provides:

In a long-term marriage in which the parties' properties were acquired during the marriage, the parties should separate on as equal a basis as possible. . . .

The trial court correctly found that the disputed stock was marital property. We proceed to consider whether wife rebutted the presumption of equal contribution by husband. We conclude that she did not. Throughout their marriage the parties *752 commingled their financial affairs. Both incomes were used to purchase marital assets, to pay marital debts, and to support the parties' standard of living. . . .

Furthermore, we find no agreement or common understanding between the parties that the disputed stock was to be wife's separate property. Although the trial court stated that she was saving and investing for the future, it did not suggest, much less find, that she was saving only for her own future, and not for the parties' common future.

Wife's argument that husband's pursuit of his enjoyment and hobbies was, in effect, a "waste" of marital assets is not supported by a preponderance of the evidence in the record. . . . [FN60]

Stice also rejected the wife's argument for more than half of the marital assets because she had worked a "double shift," [FN61] having both a marketplace job and doing most of the housework. The effect of the court's decision is to reinforce two principles: that marriage is an economic partnership and that courts should not inquire into the ways that the parties conducted themselves during the marriage for the purpose of rewarding or punishing a party. The court said:

We do not find the . . . "homemaker" provision relevant to the facts of this case. The legislative history of the statute indicates that the provision primarily was intended to recognize that "non-earning spouses who maintain the home, do the cooking and cleaning and raise the children, also contribute to the acquisition of property in a tangible way." In the context of ORS 107.105(1)(f), the legislative mandate to consider a homemaker-spouse's contribution serves to reinforce the statutory presumption that both parties to a marriage contribute equally to the acquisition of property during the marriage. The provision effectively places the homemaker-spouse's non-economic contributions on a par with the breadwinner-spouse's direct economic contribution to the acquisition of property.

We find no legislative intent, however, that when a spouse works outside the home and, additionally, performs "homemaker" duties, she or he should be able to rely upon the homemaker provision to establish that she or he contributed more than 50 percent to the acquisition of property during the *753 marriage. We conclude that the homemaker provision may be applied only to support the presumption of equal contribution; it may not be used by a "breadwinner-homemaker-spouse" to rebut the presumption of equal contribution by the other spouse. [FN62]

Thus, Stice strongly suggests that an equal division of marital assets is usually correct in the absence of the need of a spouse or a child. This approach is supported by several policies: (1) marriage is to be treated as an economic partnership; (2) family privacy is promoted, both in the sense that courts should be reluctant to alter arrangements that parties have themselves made [FN63] and in the sense that the details of the parties' marital lives are not made public; and (3) judicial and other dispute-resolving resources are conserved by rules that minimize the need for detailed, case-by-case decisionmaking.

In re Marriage of Masee, [FN64] which the Oregon Supreme Court decided in 1999, can be interpreted as retreating from the Stice position that ordinary marital assets should be divided equally. However, it should not be read this way. The major issue in Masee was the treatment of the increase in value of the husband's separate property, a business, during the parties' marriage. The trial court awarded all of the business, including its increase in value, to the husband. [FN65] The court of appeals affirmed, holding that the increase in value was a marital asset subject to the presumption that the spouses had contributed equally. The court of appeals also held that the husband had rebutted the presumption by showing that the wife had not contributed directly or indirectly to the increase because, except for "isolated instances," she did not help operate the business. [FN66]

The supreme court reversed, holding that the court of appeals had erred by failing to consider the wife's contribution as a homemaker, as required by the statute. [FN67] The supreme court *754 stated, "[i]f proper consideration were given to the record before the court at this time, including wife's homemaker contribution, the question whether husband has carried his burden of proof and rebutted the statutory presumption of equal contribution is indeed a close one." [FN68] The court remanded the case for further factfinding on the contribution issue. Earlier in the opinion the court suggested the nature of the inquiry that the trial court might take. The court said:

In assessing the magnitude of the homemaker spouse's contribution and in comparing the homemaker spouse's contribution, to that of the breadwinner spouse in order to determine whether the presumption of equal contribution is rebutted, the court must refrain from either overvaluing or undervaluing the contribution of the homemaker spouse merely because the homemaker spouse made that contribution in the context of the household or the family, rather than in a commercial or other nondomestic context. The court also must keep in mind that, in the categorical sense, a homemaker spouse's contribution in a domestic setting is indistinguishable analytically from a breadwinner spouse's contribution to the acquisition of marital assets in a business or other nondomestic setting.

In deciding whether the presumption of equal contribution is rebutted, the court first must determine the magnitude of each spouse's overall contribution to the acquisition of marital assets from evidence in the record. If one spouse is a homemaker, that determination necessarily will include an assessment of the homemaker spouse's contribution to the enterprise of homemaking. A homemaker spouse's overall contribution may consist of a combination of domestic contributions and economic or other nondomestic contributions.

Once the court has determined each spouse's overall contribution to the acquisition of marital assets, the court compares the respective contributions of the spouses. The ultimate question is whether the spouse seeking to rebut the presumption of equal contribution has proved, by a preponderance of the evidence, that the other spouse did not contribute equally to the acquisition of marital assets. If the court determines that the presumption of equal contribution is rebutted, the presumption drops from the case and the court divides the property according to the magnitude of each spouse's contribution to the acquisition of marital assets. In other words, the court distributes the marital assets without regard to any presumption, but in a manner that is just and proper in all the circumstances, including the proven contributions of the parties to the acquisition of marital assets. [FN69]

*755 This language can be read to mean that the trial court should admit evidence about the details of each party's activities throughout the marriage, should attempt to assign values to those activities, including the homemaker's work, and then should attempt to correlate these values to the parties' marital assets, the sort of inquiry clearly rejected in *Stice*. However, *Massee* did not disapprove of *Stice* and likely intended to preserve its approach to valuing spouses' contributions to marital assets. This interpretation seems particularly likely, considering that a major aim of the supreme court's *Massee* opinion was to emphasize that the courts' fundamental role is to interpret and apply the governing legislation. [FN70] This legislation, as we have seen, expresses, albeit imperfectly, the policy that at divorce, property division should reflect the economic community of the spouses. [FN71] Further, the peculiar nature of the marital asset at stake, the increase in value of a spouse's separate property, could easily result in it being treated differently at divorce than other marital assets. The next section discusses this issue.

C. Changes in the Character of Property and Increases in Value of and Income from Separate Property

All jurisdictions which divide property at divorce using a marital/separate property system must deal with two additional significant issues: how property is changed from separate to marital and vice versa, and how to treat increases in value of and income from separate property. (Increases in value of and income from marital property are marital property in all deferred marital property jurisdictions.) Until recently the Oregon courts have dealt with some of these issues by using the so-called "rescission" doctrine. "Rescission" connotes returning the parties to their premarital financial positions, [FN72] and, as a practical matter, its potential *756 use arises only where one or both of the parties brought significant assets into the marriage. However, the "rescission" terminology tends to obscure rather than clarify the issues, and the supreme court in 1999 in *Massee* indicated that courts should address issues directly rather than through the lens of "rescission." [FN73]

1. Changing Separate Property into Marital Property [FN74]

When courts discuss whether "rescission" is appropriate, they are generally considering whether a party's separate

property has been converted into marital property by conduct of the owner. Some courts discuss the potential of "rescission" in "short-term" marriages, which suggests an examination of how long the marriage lasted. [FN75] However, since its 1982 opinion in Jenks, [FN76] the Oregon Supreme Court has rejected a temporal analysis for identifying "short term" marriages and adopted an inquiry into whether the parties' "financial affairs [have] become commingled or committed to the needs of children to the point that the parties cannot readily be restored to their pre-marital situations." [FN77]

In Jenks itself the court concluded that rescission was not appropriate. The main issue in the case was the treatment of real property which had been given to the husband alone and which was, therefore, initially his separate property. [FN78] The parties had remodeled the property into their family home, and the court *757 concluded that "this donated property has been integrated into the common financial affairs of the parties and their children. We conclude that it is properly a part of the property division equation." [FN79] In other words, the court found as a matter of fact that, notwithstanding how the property was titled, the husband had treated the property as "family" property, rather than managing it separately, and that this was sufficient to change the property into a marital asset.

Similarly, in Seefeld [FN80] the husband sold the house that he brought into the marriage and put the proceeds into a house titled in both names. When the parties divorced, he argued that the case was suitable for rescission, meaning that the house *758 would be sold and he would be reimbursed for the money he put in, as well as receiving other items of premarital property. Rejecting this argument, the court treated the house as marital property because the parties had treated it as "family" property and the wife had contributed to mortgage payments. [FN81]

In Miller, [FN82] the only supreme court decision applying "rescission," the court held that at the end of a four-year marriage, each spouse should be awarded real property that he or she had brought into the marriage without an equalizing judgment in favor of either. The court characterized this outcome as being in the nature of a rescission, although the justifications for that result are not entirely clear from the opinion.

The facts of the case suggest why the court decided that it was appropriate to return the parties to their premarital positions. This was the second marriage between the parties, who had first married in 1960 and divorced in 1975. They remarried in 1976 and divorced again in 1981. At the first divorce the wife was awarded the family home; it was this asset which she brought into the second marriage. The husband purchased property between the first divorce and second marriage. If all the parties' assets had been treated as "marital," the husband would have been awarded a judgment against the wife for \$15,000. Even though the wife had committed her property, the home, to a family purpose, the court may have regarded the argument to treat the property as marital as partially undoing the decision made at the first divorce. Moreover, the wife's earning capacity was substantially less than the husband's, suggesting that she would likely have received more of the property under the "need" principle discussed above, [FN83] if the property had been regarded as marital.

While these cases do not fully address the question of when separate property will be regarded as converted into marital property, the basic contours of a solution can be discerned. Conversion is fundamentally a question of the owner's intent, and if the owner titles the property in the names of both spouses or treats the property in a way that indicates that the property has been committed to common uses, a change in character is inferred. [FN84] However, the cases do not suggest that merely because *759 separate property is commingled with marital property, it becomes marital property. [FN85]

2. Increases in Value, Rents, and Other Profits from Property

In Miller an implicit issue was the appropriate treatment of the increase in value of separate property which occurred during the marriage. [FN86] However, the court did not address this issue. No case in Oregon has directly addressed a similar issue: the characterization of income derived from separate property. In the 1999 case of Masee, [FN87] the supreme court for the first time squarely addressed the increase in value of separate property. As discussed above, [FN88] the court reversed the court of appeals for failing to consider the value of the homemaker's contributions to the increase in the separate property's value. [FN89] Ordinarily, the terms "marital asset" and "marital property" mean the same thing, and, therefore, to characterize the increase in value of separate property as a "marital asset" would mean that the increases were marital property. However, in Oregon, "marital asset" and "marital property" have different meanings. The "marital asset" language in ORS 107.105(1)(f) only means, as we have seen, that the property is presumptively marital property. [FN90] As discussed above, this is how the Masee court used the term "marital assets," for it remanded the case for further consideration of whether the presumption had been rebutted. [FN91] Thus, Masee does not clearly resolve whether the increase in value of separate property

is marital or separate property.

Other states which have dealt with this issue have come to one of two resolutions: some states treat all increases in value of separate property as marital, and others characterize the increase as *760 separate or marital depending on the reason for the increase. [FN92] Treating the increase in value of separate property as marital property has several virtues. It is simple to apply, at least initially, and it maximizes the amount of marital property, which can be seen as promoting the policy of regarding the spouses as an economic unit. [FN93] However, treating the increase in value of separate property as marital property can be criticized on principled and practical grounds. Consider, for example, what happens to an investment asset, such as stocks, which were originally separate property, if the increase in value is automatically marital property. The stocks become partly separate and partly marital, even if all the increase is attributable to inflation and market forces and the spouse-owner does nothing with the stocks except hold them. From some perspectives, this outcome provides an unjustified windfall to the other spouse. In addition, many assets will consist of commingled separate and marital shares, raising issues about whether the entire asset has been converted into marital property and, if not, how to sort out the separate from the marital share.

For these reasons, most states reject treating all increases in value of separate property as marital, although they do not go to the other extreme of treating all increases as separate property. Instead, they inquire into the reason for the increase in value and characterize increases which are attributable to market and inflationary forces as separate and increases which are traceable to the efforts of either or both spouses as marital. [FN94] The leading cases are from California, *In re Marriage of Pereira* [FN95] and *In re Marriage of Van Camp*. [FN96] Under *Pereira*, a reasonable return on the separate investment is calculated and treated as separate property; the remainder of the increase in value is community property. [FN97] Under *Van Camp*, a fair salary for the labor of the spouse who was running the business is calculated. If the business paid this spouse less than this amount, the community receives *761 enough of the increase in value of the business to make up the difference, and the rest of the increase in value is separate property. [FN98] No hard and fast rules determine when each rule should be used; California case law provides that *Pereira* should be used when the appreciation in value is primarily attributable to community efforts, and *Van Camp* should be used when the primary cause is market factors and the like. [FN99]

A final issue is the treatment of income from separate property. No Oregon Supreme Court case deals with this issue, but it is a corollary to the increase in value issue. In many situations, whether separate property produces income or increases in value is simply a matter of the owner's investment choices, e.g., between a government bond or a growth stock. Therefore, if increases in value are separate, income should be characterized as such, and if increases are characterized as separate or marital property, depending on the reason for the increase, income should be characterized as such. [FN100]

III The Oregon Property Division Statute Redrafted

The Oregon property division statute, as interpreted by the *762 supreme court, creates a deferred marital property regime which is very similar to the law in most other American jurisdictions and to most of the principles expressed in the ALI Family Dissolution Principles. On its face, however, this is far from apparent. The statute's obscurity impedes application by lawyers and judges not steeped in its legislative history and the details of cases interpreting it. The statute, should, therefore, be redrafted so that it more clearly expresses the rules and principles described in this Article.

The rest of this section is my proposed redrafting of ORS 107.105(1)(f), which, though not shorter than the current version, is clearer and more complete. This proposed version incorporates the fundamental principles expressed in the current version of the statute as well as those articulated by the supreme court in the cases that this Article has discussed. In addition, it deals with issues, identified in the discussion above, that have not yet come before the supreme court in ways that are consistent with current case law. The subsections of the proposed statute are cross-referenced by footnotes to earlier sections of this Article that discuss the relevant cases.

107.105(1). Whenever the court grants a decree of marital annulment, dissolution or separation, it may decree as follows:

* * *

(f) For the division between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper.

(A) The court shall require full disclosure of all assets by the parties.

(B) For purposes of this section, property shall be classified as "separate" or "marital" according to the following principles:

i) "Marital property" is all property acquired after the marriage by either or both parties, regardless of how it is titled, which is not separate property. Subject to the rules in (iii), (iv), and (v), below, all property of either party or both is rebuttably presumed to be marital property. [FN101]

ii) A party's "separate property" includes property owned by the party before marriage; [FN102] property inherited during the marriage by a party; [FN103] property given to a party during the marriage; [FN104] property acquired by a spouse during an extended period of mutual financial independence *763 preceding a dissolution of the marriage, [FN105] and property received in exchange for separate property. A party claiming that property is separate property has the burden of persuasion to establish that it fits into one of the categories listed in this subsection. [FN106]

iii) The increase in value of and rents, profits and income from marital property is marital property.

iv) The increase in value of and rents, profits and income from separate property is

a) Marital property if substantially attributable to the efforts of either spouse after marriage; [FN107]

b) Separate if substantially attributable to inflation, interest received, or other passive forces not involving productive effort by either spouse.

v) Separate property is converted into marital property if the acts of the owner of the separate property demonstrate an intent to do so. A party claiming that separate property has been converted into marital property has the burden of persuasion, except that it shall be rebuttably presumed that the owner of the separate property intended to convert it into marital property if

a) The owner titled the property in the joint names of the spouses or in the name of the other spouse alone, or

b) The owner commingled the separate property with marital property, or

c) the owner integrated the separate property into the family's common financial affairs. [FN108]

B) It shall be rebuttably presumed that an equal division of marital property is just and proper. [FN109]

C) It shall be rebuttably presumed that an award of the separate property of each party to that party is just and proper. [FN110]

D) The presumptions in (B) and (C) may be rebutted by evidence establishing that an unequal division of the marital property or the award of one party's separate property to the other is necessary

i) to assure that both parties to a long-term marriage have the resources for self-sufficient, post-dissolution life apart, [FN111]

ii) to provide for the children of the marriage, [FN112]

iii) to compensate a spouse for the other spouse's misappropriation*764 or waste of marital assets, [FN113] or

iv) to preserve assets, [FN114] or to avoid the continued financial entanglement of the parties, [FN115] though only minor deviations from an equal division are allowed under this provision.

(E) The court shall consider reasonable costs of sale of assets, taxes and other costs reasonably anticipated by the parties in determining what division is just and proper.

(F) For purposes of this section, "property" includes a retirement plan or pension or an interest therein but does not include a party's earning capacity. [FN116]

Conclusion

In the two decades since the Oregon legislature amended the *765 divorce property division statute to provide for the equitable division of marital property, the supreme court has adhered faithfully to the fundamental concepts expressed in that and later amendments. Unfortunately, the later legislative process of amending the statute to reflect these judicial interpretations has been imperfect.

As it reads today, ORS 107.105(1)(f) is obscure, dense, and very confusing. Familiarity with case law is necessary for a complete understanding of the application of any statute in any state, but only those who are very familiar with the Oregon Supreme Court's cases can even begin to understand the state's law of property division at divorce. This situation is undesirable under any circumstances, for it means that knowledge about what the law really says is reserved to those experts who have the time and background to delve into and assimilate the case law. It is particularly unfortunate that the statute governing one of the most fundamental aspects of family law is so impenetrable, since in almost half of all family law cases neither party is represented by an attorney. [FN117] The legislature should amend the statute so that it can be understood by a well-educated layperson, or, at the very least, a general-practice lawyer. I hope that the statutory revision proposed in this Article meets that standard and can serve as a catalyst for change. Until that time, I hope my analysis and synthesis of the statute and cases will assist the practicing bar and bench.

[FN1]. Dorothy Kliks Fones Professor, University of Oregon School of Law. Thanks very much for research assistance to Suzan Powell and Lee Ann Whitmore. Special thanks to Jim Beard, UO '97, who got me started on this project and talked over issues of Oregon law with me.

[FN1]. 328 Or. 195, 970 P.2d 1203 (1999).

[FN2]. *Id.* at 200, 970 P.2d at 1208.

[FN3]. Act of May 9, 1953, ch. 635, §§ 1, 2, 1953 Or. Laws 1170 (formerly Or. Rev. Stat. 107.100(4) (1953)).

[FN4]. The legislature, recognizing that courts sometimes award spousal support in lieu of dividing marital property, added the following provisions regarding spousal support in lieu of property division in 1983 and 1987. Act of Aug. 4, 1983, ch. 728, § 2, 1983 Or. Laws 1347; Act of July 20, 1987, ch. 885, § 2, 1987 Or. Laws 1856. For purposes of this paper, these provisions are not particularly significant, however.

The court shall require full disclosure of all assets by the parties in arriving at a just property division. In arriving at a just and proper division of property, the court shall consider reasonable costs of sale of assets, taxes and any other costs reasonably anticipated by the parties. If a spouse has been awarded spousal support in lieu of a share of property, the court shall so state on the record, and shall order the obligor to provide for and maintain life insurance in an amount commensurate with the obligation and designating the obligee as beneficiary for the duration of the obligation. If the obligor dies prior to the termination of such support and such insurance is not in force, the court may modify the method of payment of spousal support under the decree or order of support from instalments [sic] to a lump sum payment to the obligee from the estate of the obligor in an amount commensurate with the present value of the spousal support at the time of death. The obligee or attorney of the obligee shall cause a certified copy of the decree to be delivered to the life insurance company or companies. If the obligee or the attorney of the obligee delivers a true copy of the decree to the life insurance company or companies, identifying the policies involved and requesting such notification under this section, the company or companies shall notify the obligee, as beneficiary of the insurance policy, whenever the policyholder takes any action that will change the beneficiary or reduce the benefits of the policy. Either party may request notification by the insurer when premium payments have not been made. If the obligor is ordered to provide for and maintain life insurance, the obligor shall provide to the obligee a true copy of the policy. The obligor shall also provide to the obligee written notice of any action that will reduce the benefits or change the designation of the beneficiaries under the policy.

Act of July 20, 1987, ch. 885, § 2, 1987 Or. Laws 1856.

[FN5]. The 1977 amendments added the following two sentences to the statute:

The court shall view the contribution of a spouse as a homemaker in the contribution of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the

marriage.

Act of July 27, 1977, ch. 847, § 2, 1977 Or. Laws 904. In 1981, the wording of the provisions regarding homemakers and the presumption of equal contribution were both reworded slightly, and language designed to obtain tax advantages for divorcing Oregon couples was added to the property division statute. This new wording reinforced the principles inherent in the 1977 amendment. It provided:

The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held. Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets pursuant to a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.

1981 Or. Laws, ch. 775, § 1.

[FN6]. *In re Marriage of Engle*, 293 Or. 207, 213-14, 646 P.2d 20, 23 (1982) (en banc).

[FN7]. Work Session on H.B. 2471 Before the Senate Judiciary Comm., 59th Or. Senate (May 12, 1977).

[FN8]. Work Session on H.B. 2471 Before the Senate Judiciary Comm., 59th Or. Senate (May 12, 1977) (comments of Sen. Carson); Report on H.B. 2471 Before the House Judiciary Comm., 59th Or. House (May 9, 1977) (original version of H.B. 2471 on May 9, 1977, prior to the House Amendments by the Committee on Judiciary of May 12, 1977); Public Hearing and Work Session on H.B. 2471 Before the House Judiciary Comm., 59th Or. House (May 12, 1977).

[FN9]. See Work Session on H.B. 2471 Before the Senate Judiciary Comm., 59th Or. Senate (June 17, 1977) (remarks of Sen. Carson). In making the 1977 amendments to the property division statute, the legislators also discussed how to value the contribution of a homemaker, how the statutory presumption of equal contribution could be rebutted, and how the court should treat inherited property in the property division process. See Work Session on H.B. 2471 Before the House Judiciary Comm., 59th Or. House (May 9 & 12, 1977) (remarks of Representatives Gardner, Bugas, Myers, Rutherford, and Richards).

The legislature and courts have repeatedly revisited the question of how to compensate spouses for their contributions to each others' careers and earning capacities, continuing through the 1999 legislative session. In the first major spousal support case following the 1977 amendments to ORS 107.105(1)(f), the supreme court suggested that earning capacity should not be handled through property division, saying, "[w]e do not, however, approve the allocation of future earnings on principles applicable to property rights." In *In re Marriage of Grove*, 280 Or. 341, 358, 571 P.2d 477, 488, modified 280 Or. 769, 572 P.2d 1320 (1977). In 1983, the legislature amended ORS 107.105(1) to include "[t]he contribution by one spouse to the education, training and earning power of the other spouse" as a factor that courts are to consider in setting an award of spousal support. Act of Aug. 4, 1983, ch. 728, § 2, 1983 Or. Laws 1348.

In 1993 the legislature amended the property division provision to treat enhanced earning capacity as property in some cases. The new language provided:

The present value of, and income resulting from, the future enhanced earning capacity of either party shall be considered as property. The presumption of equal contribution to the acquisition of marital property, however, shall not apply to enhanced earning capacity. A spouse asserting an interest in the income resulting from an enhancement of earning capacity of the other spouse must demonstrate that the spouse made a material contribution to the enhancement. Material contribution can be shown by, among other things, having contributed, financially or otherwise, to the education and training that resulted in the enhanced earning capacity. The contribution shall have been substantial and of prolonged duration.

Act of July 12, 1993, ch. 315, § 1, 1993 Or. Laws 779. In the next legislative session the word "shall" in the first sentence was changed to "may." Act of July 17, 1995, ch. 608, § 3, 1995 Or. Laws 1649. In 1999 the legislature repealed all this language and rewrote the spousal support statute. The effect of these changes is that contributions by one spouse to the other's earning capacity will be considered in awarding spousal support. The new provisions create three kinds of spousal support:

(A) Transitional spousal support as needed for a party to attain education and training necessary to allow the party to prepare for reentry into the job market or for advancement therein. The factors to be considered by the court in awarding transitional spousal support include but are not limited to:

- (i) The duration of the marriage;
- (ii) A party's training and employment skills;

- (iii) A party's work experience;
- (iv) The financial needs and resources of each party;
- (v) The tax consequences to each party;
- (vi) A party's custodial and child support responsibilities; and
- (vii) Any other factors the court deems just and equitable.

(B) Compensatory spousal support when there has been a significant financial or other contribution by one party to the education, training, vocational skills, career or earning capacity of the other party and when an order for compensatory spousal support is otherwise just and equitable in all of the circumstances. The factors to be considered by the court in awarding compensatory spousal support include but are not limited to:

- (i) The amount, duration and nature of the contribution;
- (ii) The duration of the marriage;
- (iii) The relative earning capacity of the parties;
- (iv) The extent to which the marital estate has already benefited [sic] from the contribution;
- (v) The tax consequences to each party; and
- (vi) Any other factors the court deems just and equitable.

(C) Spousal maintenance as a contribution by one spouse to the support of the other for either a specified or an indefinite period. The factors to be considered by the court in awarding spousal maintenance include but are not limited to:

- (i) The duration of the marriage;
- (ii) The age of the parties;
- (iii) The health of the parties, including their physical, mental and emotional condition;
- (iv) The standard of living established during the marriage;
- (v) The relative income and earning capacity of the parties, recognizing that the wage earner's continuing income may be a basis for support distinct from the income that the supported spouse may receive from the distribution of marital property;
- (vi) A party's training and employment skills;
- (vii) A party's work experience;
- (viii) The financial needs and resources of each party;
- (ix) The tax consequences to each party;
- (x) A party's custodial and child support responsibilities; and
- (xi) Any other factors the court deems just and equitable.

Act of July 12, 1999, ch. 587, § 1, 1999 Or. Laws Adv. Sh. pt. 6, at 165 (to be codified at Or. Rev. Stat. § 107.105).

The underlying difficulty with which the legislature was dealing in the 1993- 1999 legislation is that a spouse who provided substantial assistance, especially financial assistance to his or her spouse during school and the early years of a career, was often ineligible for spousal support because he or she was demonstrably capable of self-support. The 1993 legislation solved this by providing that the assisted spouse's enhanced earning capacity was property, which the helping spouse could share without proving "need." *Id.* However, treating a person's earning capacity as property presents ideological problems and may be too inflexible. The repeal of the earning-capacity-as-property provision and its replacement with the provision for "compensatory spousal support" avoid these problems.

[FN10]. 293 Or. 207, 646 P.2d 20 (1982) (en banc).

[FN11]. *Id.* at 210, 646 P.2d at 21.

[FN12]. *Id.* at 214-15, 646 P.2d at 24.

[FN13]. 294 Or. 117, 653 P.2d 1258 (1982) (en banc).

[T]he statutory presumption of equal contribution is based upon a legislative recognition that a nonemployed, non-earning spouse contributes in other ways to the financial situation of the family and should be given the benefit of that contribution if a property division becomes necessary.... Second, the ownership provisions were intended to obviate burdensome tax consequences which attach upon the transfer of an asset or part of an asset from the legal owner to the other spouse pursuant to a property division. We conclude that the legislature intended to give the benefits of the presumption of contribution and tax avoidance to all property acquired during the marriage, regardless of the source of the acquisition.

Id. at 122, 653 P.2d at 1261-62.

[FN14]. 294 Or. 236, 656 P.2d 286 (1982) (en banc).

[FN15]. 328 Or. 195, 970 P.2d 1203 (1999).

[FN16]. *Id.* at 203, 970 P.2d at 1210.

[FN17]. This section is partly based on Leslie J. Harris et al, *Family Law*, ch. 5, Parts A and B (1996).

[FN18]. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 513 (2d ed. 1988).

[FN19]. Act of June 4, 1971, ch. 280, § 9, 1971 Or. Laws 389 ("The dissolution of a marriage may be decreed when irreconcilable differences between the parties have caused the irremediable breakdown of the marriage.") (codified at Or. Rev. Stat. § 107.025 (1971)).

[FN20]. In 1969 seventeen common law property states and the District of Columbia made no provision for equitable distribution of property at divorce. Robert J. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* App. B., B-1 to B-18 (1969). Today no common law property state relies on title-based distribution. In three community property states equal division of community property and separate property to the owner is required. Cal. Fam. Code § 2550 (West 1994); La. Civ. Code Ann. art. 1290, 1308, 2336, 2341 (West 1987); La. Code Civ. Proc. Ann. art. 82 (West 1999); N.M. Stat. Ann. § 40-4-7 (Michie 1999). See generally William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 *Fam. L.Q.* 163 (1989).

Oregon's first statute governing the division of marital property, enacted in 1853, provided that all property was to be awarded to the party found at fault in the divorce, except to the extent that the court made a different disposition of the property of that party. In making this judgment, the judge was to give "regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of children." Act of Jan. 17, 1854, ch. 2, § 8, 1853 Or. Gen. Laws 496. In 1865, the Oregon statute was amended to remove most of the judge's discretion, providing that it was the "duty of the court" to award to the successful plaintiff one-third of the losing party's property. This statute did not authorize the court to award any of the plaintiff's property to the defendant. Act of Dec. 20, 1865, ch. 5, § 11, § 495, 1843-1872 Or. Gen. Laws 210 (Deady ed. 1866). However, after a decree was given, upon the motion of either party, the court did "have power to set aside, alter or modify so much of the decree as may provide for the appointment of trustees, for the care and custody of minor children, or the nurture and education thereof, or the maintenance of either party." *Id.* § 498; cf. Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 *J. Fam. L.* 807, 827 (1988) (during the 19th century, property settlement was awarded to provide for the wife's future needs, rather than as a division of assets accumulated during the marriage) (citing *In re Marriage of Schichtl*, 55 N.W. 309, 309-10 (Iowa 1893); *In re Marriage of Boggs*, 49 Iowa 190, 191 (1878); *In re Marriage of Campbell*, 37 Wis. 206 (1875)).

[FN21]. Oregon adopted equitable distribution much sooner. In 1947, the property division statute was amended to restore the judge's discretion regarding the share of the loser's property to be awarded to the winning plaintiff. Act of Apr. 21, 1947, ch. 557, § 1, 1947 Or. Laws 1029 (formerly codified at Or. Rev. Stat. § 107.100) (repealed 1971) (codified as amended at Or. Rev. Stat. § 107.105(1)(f) (1990)). In 1953 the statute was further amended to give the judge discretion to divide "the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances." Act of May 11, 1953, ch. 635, §§ 1, 2, 1953 Or. Laws 1171 (formerly codified at Or. Rev. Stat. § 107.100) (repealed 1971) (codified as amended at Or. Rev. Stat. § 107.105(1)(f) (1990)). This language survives today as the first sentence of the current property division statute, ORS 107.105(1)(f). Thus, the version of the property division statute in place in 1953 gave a great deal of discretion to the trial judge; the statute did not give specific guidance, and thus put few limits on the trial judge's discretion.

The Oregon property division statute remained essentially unchanged for almost twenty-five years. Even when Oregon abolished fault-based divorce and changed to no-fault divorce based on irreconcilable differences in 1971, the property division statute itself was not changed, though a section was added to the code to provide that fault could not be considered in awarding property. See Act of Jun. 4, 1971, ch. 280, § 10, 1971 Or. Laws 389 (codified as amended at Or. Rev. Stat. § 107.036(3) (1997)). ("In dividing, awarding and distributing the real and personal property ... between the parties, ... the court shall not consider the fault, if any, of either of the parties in causing grounds for the annulment or dissolution of the marriage."). This statutory wording survives today. See Or. Rev. Stat. § 107.036(3) (1997).

[FN22]. Unif. Marriage and Divorce Act, 9A U.L.A. 159 (1998).

[FN23]. Under former § 307, marital property was "all property acquired by either spouse subsequent to the marriage except: (1) property acquired by gift, bequest, devise, or descent; ... (3) property acquired by a spouse after a decree of legal separation; (4) property excluded by valid agreement of the parties; and (5) the increase in value of property acquired before the marriage." Unif. Marriage and Divorce Act § 307, 9A U.L.A. 289 (1998) (amended language found in the notes following the current language).

[FN24]. See Herma H. Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cin. L. Rev. 1, 8-11, 46-51 (1987); Robert J. Levy, An Introduction to Divorce-Property Issues, 23 Fam. L.Q. 147, 148 n.3 (1989).

[FN25]. American Law Institute, Principles of the Law of Family Dissolution § 4.02, cmt. a (Proposed Final Draft, Part I, 1997) [hereinafter ALI Principles]. Linda D. Elrod & Timothy B. Walker, Family Law in the Fifty States: An Overview, 27 Fam. L.Q. 515, 695 (1994). For a general discussion, see Levy, *supra* note 24.

[FN26]. Marsha Garrison, How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making, 74 N.C. L. Rev. 401, 452-58 (1996); Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 Fordham L. Rev. 827 (1988).

[FN27]. ALI Principles, *supra* note 25, §§ 4.15(1), (2)(a) & (b), 4.16.

[FN28]. *Id.* at §§ 4.03(1) & (2).

[FN29]. *Id.* at § 4.17.

[FN30]. *In re Marriage of Engle*, 293 Or. 207, 215 n.7, 646 P.2d 20, 24 n. 7 (1982) (language is drawn from Unif. Marriage and Divorce Act § 307).

[FN31]. *In re Marriage of Masee*, 328 Or. 195, 200-01, 970 P.2d 1203, 1208-09 (1999) (citing *Portland Gen. Elec. Co. (PGE) v. Bureau of Labor and Indus.*, 317 Or. 606, 610, 859 P.2d 1143, 1146 (1993)).

[FN32]. Or. Rev. Stat. § 107.105(1)(f) (1997).

[FN33]. *Id.*

[FN34]. *Id.*

[FN35]. See ALI Principles, *supra* note 25, § 4.03 & cmts. thereto.

[FN36]. 289 Or. 145, 611 P.2d 295 (1980).

[FN37]. *Id.* at 147, 611 P.2d at 296.

[FN38]. *Id.* at 148, 611 P.2d at 297. The ALI Family Law Principles make a similar provision, except that a formal marker of separation is required before property is treated as separate. See ALI Principles, *supra* note 25, § 4.03(4) ("Property acquired during marriage but after the parties have commenced living apart pursuant to either a written separation agreement or a judicial decree, is the separate property of the acquiring spouse unless the agreement or decree specifies otherwise."). California and Washington provide that property acquired while the parties live separately is separate property. Cal. Fam. Code § 771 (West 1994); *In re Estate of Osicka*, 461 P.2d 585 (Wash. Ct. App. 1969); see also N.C. Gen. Stat. § 50-20 (1999); Pa. Cons. Stat. § 3501(1) (1996); *In re Marriage of Dietz*, 436 S.E.2d 463 (Va. Ct. App. 1993). For a review of the cases and rationale for the more formal ALI rules, see ALI Principles, *supra* note 25, § 4.03, Reporter's Note d, pp. 99-103.

The Oregon Court of Appeals has treated property acquired during premarital cohabitation as marital property when the parties later divorced. *In re Marriage of Burton*, 92 Or. App. 287, 758 P.2d 394 (1988); *In re Marriage of Caverly*, 65 Or. App. 98, 670 P.2d 199 (1983). No Oregon Supreme Court decision decides this question. Section 4.03(6) of the ALI Principles treats premarital property similarly.

[FN39]. 307 Or. 370, 769 P.2d 179 (1989).

[FN40]. *Id.* at 377, 769 P.2d at 184.

[FN41]. *Id.* ORS 107.105(1)(f) was amended in 1983 to provide that a retirement plan, pension, or an interest therein is property. Or. Rev. Stat. § 107.105(1)(f) (1983) (as amended by Act of Aug. 4, 1983, ch. 728, § 2, 1983 Or. Laws 1347-49 (codified as amended at Or. Rev. Stat. § 107.105 (1997))). This amendment overruled *In re Marriage of Giovanini*, 50 Or. App. 279, 622 P.2d 722 (1981), which held that nonvested pensions were not divisible property. In *Richardson* the court reasoned that even though the husband's interest in the pension was not vested when the parties separated, he had a property interest in it, and to the extent that it was attributable to the husband's pre-separation employment, its present value was an individually acquired marital asset to which the presumption of equal contribution applied. *Richardson*, 307 Or. at 377, 769 P.2d at 184. That portion of the pension acquired after the separation was an individually acquired asset as to which the presumption was "rebutted because this portion of his pension was earned solely by the husband's efforts at a time when the parties were no longer living as a marital unit." *Id.* The *Richardson* court also approved numerous lower court decisions regarding valuation of pensions. *Id.* at 378, 769 P.2d at 184. Cf. *In re Marriage of Swan*, 301 Or. 167, 720 P.2d 747 (1986) (holding that Social Security benefits are not divisible property, in large part because of federal preemption).

[FN42]. 294 Or. 117, 653 P.2d 1258 (1982).

[FN43]. 294 Or. 236, 656P.2d 286 (1982).

[FN44]. 294 Or. 345, 657 P.2d 201 (1982).

[FN45]. 294 Or. 117, 653 P.2d 1258 (1982).

[FN46]. *Id.*

[FN47]. 294 Or. at 237, 656 P.2d at 289.

[FN48]. *Id.* at 241, 656 P.2d at 289-90.

[FN49]. 294 Or. at 351, 657 P.2d at 205.

[FN50]. 294 Or. 660, 661 P.2d 1361 (1983).

[FN51]. See cases discussed *infra* in this section. These rules are endorsed by the ALI Principles. ALI Principles, *supra* note 25, §§ 4.15(1), 4.17.

[FN52]. 294 Or. at 123-24, 653 P.2d at 1261-62 (citations omitted).

[FN53]. 307 Or. at 381-82, 769 P.2d at 186. To implement this principle, one must decide how much a former spouse "needs" in the form of support or extra property, an issue governed by the law of spousal support, which is beyond the scope of this article.

The Uniform Marriage and Divorce Act and the ALI Principles both endorse using property division to accomplish purposes ordinarily accounted for through the use of spousal support. Unif. Marriage and Divorce Act § 307, 9A U.L.A. 289 (1998); ALI Principles, *supra* note 25, § 4.15(2)(a).

[FN54]. 294 Or. 345, 657 P.2d 201 (1982).

[FN55]. *Id.* at 351, 657 P.2d at 205. At the time *In re Marriage of Seefeld* was decided, the amount of child support was determined by the formula developed in *In re Marriage of Smith*, 290 Or. 675, 626 P.2d 342 (1981). Legislation enacted after *Smith* requires courts to use a formula promulgated by the Support Enforcement Division of the Oregon Department of Justice. Or. Rev. Stat. § 25.270 (1994). The current rules can be found at Oregon Administrative Rules 137-050-0320 through 137-050-0490. These rules call for child support to be paid in the form of a monthly payment to a child's custodial parent, and the extent to which a court could order a one-time transfer of property in lieu of a higher monthly payment is unclear under these rules. For a discussion of the basics of child support in Oregon see Leslie J. Harris, *The Proposed ALI Child Support Principles*, 35 *Willamette L. Rev.*

717 (1999); see also Leslie J. Harris et al, *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 Or. L. Rev. 689 (1990).

[FN56]. See, e.g., *In re Marriage of Pierson*, 294 Or. 117, 653 P.2d 1258 (order avoids forced sale of residence or awarding one spouse a judgment lien on property awarded to the other); *In re Marriage of Haguewood*, 292 Or. 197, 638 P.2d 1135 (1981) (awarding all of the family-owned business to the husband with offsetting judgment payable over time to wife to avoid having both spouses continue to own the business or having to sell off major assets of the business).

[FN57]. 308 Or. 316, 779 P.2d 1020 (1989).

[FN58]. 328 Or. 195, 970 P.2d 1203 (1999).

[FN59]. 308 Or. at 322, 779 P.2d at 1024.

[FN60]. *Id.* at 327-29, 779 P.2d at 1026-28 (citations omitted).

[FN61]. *Id.* Compare Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989); Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 *Fam. L.Q.* 279, 297-99 (1989) ("because contributions are conceived of as equal in the partnership model, the fact that [women employed in the marketplace] make dual contributions (money and household) likely will not be recognized") (emphasis in original).

[FN62]. 308 Or. at 329, 779 P.2d at 1027-28 (citations omitted).

[FN63]. Compare *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953). Commentaries on this principle include Mary Ann Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 *Am. J. Comp. L.* 1, 5-10 (1975); Lee E. Teitelbaum, *Family History and Family Law*, 1985 *Wis. L. Rev.* 1135, 1144-45, 1174-78 (1985); Bruce C. Hafen, *The Family as an Entity*, 22 *U.C. Davis L. Rev.* 865, 909, 912 (1989).

[FN64]. 38 Or. 195, 970 P.2d 1203 (1999).

[FN65]. *Id.* at 199, 970 P.2d at 1208.

[FN66]. *Id.* at 207-8, 970 P.2d at 1212-13.

[FN67]. *Id.* at 208, 970 P.2d at 1213.

[FN68]. *Id.* at 208-09, 970 P.2d at 1213.

[FN69]. *Id.* at 204-05, 970 P.2d at 1211-12 (citation omitted).

[FN70]. *In re Marriage of Masee*, 328 Or. 195, 201, 970 P.2d 1203, 1208- 09 (1999).

[FN71]. The experience of West Virginia with this issue provides a cautionary example. In *In re Marriage of LaRue*, 304 S.E.2d 312 (W. Va. 1983), the West Virginia Supreme Court of Appeals said that awards based on homemaker services should be based, at least in part, on the quality of the homemaker's work. "[A] homemaker who, over the course of the marriage, has been frugal in the handling of homemaker expenditures and has thereby enhanced the family assets is entitled to a more equitable return than one who has been extravagant." *Id.* at 323. The next year the West Virginia legislature amended the property division statute to create a rebuttable presumption for equal division of marital property, and excluding consideration of fault.

[FN72]. The court of appeals first applied "rescission" theory in an opinion by Judge, later Justice, Jacob Tanzer, in *In re Marriage of York*, 30 Or. App. 937, 569 P.2d 32 (1977). As the supreme court noted in *Masee*, the court of appeals' opinion in *York* predates the adoption in 1977 of the modern version of the property division statute. *Masee*, 328 Or. at 209 n.6, 970 P.2d at 1213 n.6.

[FN73]. Masee, 328 Or. at 210, 970 P.2d at 1214.

[FN74]. Often the topics covered in this section are discussed in terms of whether the character of property has been "transmuted" from one class to another. I have avoided the term "transmutation" because it is sometimes understood as carrying with it a number of highly technical rules for determining when such a change has occurred. Cf. *In re Marriage of O'Brien*, 508 S.E.2d 300, 306 (N.C. Ct. App. 1998) (rejecting the theory of transmutation, which the court interpreted as requiring the conclusion that commingling marital and separate funds automatically transmutes separate property into marital property).

[FN75]. See, e.g., *In re Marriage of Glatt*, 41 Or. App. 615, 598 P.2d 1237 (1979); *In re Marriage of Olinger*, 75 Or. App. 351, 707 P.2d 64 (1985).

[FN76]. *In re Marriage of Jenks*, 294 Or. 236, 656 P.2d 286 (1982).

[FN77]. *Id.* at 242, 656 P.2d at 290. The court of appeals, despite the direction from the supreme court in *Jenks* to look at the degree to which the parties had commingled their assets, continued to define "long-term" and "short-term" chronologically. See cases cited in note 75 *supra*.

[FN78]. See *supra* text accompanying notes 47-48.

[FN79]. *Jenks*, 294 Or. at 243, 656 P.2d at 290. Justice Peterson concurred, arguing that the wife should be regarded as having an equal interest in the property not because it was integrated into the family finances, but rather to recognize the economic value of her contribution as a homemaker. *Id.* at 246, 656 P.2d at 292. This line of analysis has not, however, prevailed. Compare Section 4.18 of the ALI Principles, which provides in part:

(1) In marriages that exceed a minimum duration specified in a uniform rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

ALI Principles, *supra* note 25, § 4.18. Explaining this proposal, the reporter says:

After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses....

States that distinguish between marital and separate property generally do not have provisions under which the character of separate property changes with the passage of time. However, some permit divorce courts to redistribute separate property to the nonowning spouse. Courts in these states are more likely to use their authority to reallocate separate property at the dissolution of long-term marriages. This section provides that remedy without introducing the problems of discretionary adjudication inherent in such hotchpot systems.

Id. at 240, cmt. a.

[FN80]. *In re Marriage of Seefeld*, 294 Or. 345, 657 P.2d 201 (1982).

[FN81]. *Id.* at 351, 657 P.2d at 204.

[FN82]. 294 Or. 660, 665-66, 661 P.2d 1361, 1363-64 (1983).

[FN83]. See *supra* text accompanying notes 52-55.

[FN84]. There are no Oregon Supreme Court cases concerning the more uncommon issue of converting marital property into separate property. This issue should be decided according to the principle discussed in the text, that is, whether or not the owner's intent to convert has been proven.

[FN85]. In some common-law property states commingled separate and marital property becomes entirely marital

property. E.g., *In re Marriage of Smith*, 427 N.E.2d 1239 (Ill. 1981). Other common-law property states and community property states say that the asset has a mixed character. See generally J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* § 11.03 (1994).

[FN86]. 294 Or. 660, 661 P.2d 1361 (1983).

[FN87]. 328 Or. 195, 970 P.2d 1203 (1999).

[FN88]. See *supra* text accompanying notes 64-69.

[FN89]. *Massee*, 328 Or. at 207-09, 970 P.2d at 1212-13.

[FN90]. See *supra* text accompanying note 48.

[FN91]. See *supra* text accompanying notes 67-70.

[FN92]. See ALI Principles, *supra* note 25, §§ 4.04, 4.05 and commentaries thereto.

[FN93]. Compare *Bea Ann Smith*, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689, 698-706 (1990) (arguing that Texas community property laws tend to maximize the amount of separate property for the sake of protecting wives' separate property but have the effect of minimizing the amount of property subject to distribution at divorce).

[FN94]. ALI Principles, *supra* note 25, cmt. § 4.04.

[FN95]. 103 P. 488 (Cal. 1909).

[FN96]. 199 P. 885 (Cal. App. 1921).

[FN97]. 103 P. at 491.

[FN98]. 199 P. at 888-90.

[FN99]. *In re Lopez*, 113 Cal. Rptr. 58 (Cal. App. 1974). Commentators tend to prefer the rule that will, on the facts of the particular case, give the greater return to the primary source of the increase in value. E.g., William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 Fam. L.Q. 163, 175 n.59 (1989). See also J. Thomas Oldham, *Separate Property Businesses that Increase in Value During Marriage*, 1990 Wis. L. Rev. 585 (1990).

[FN100]. The Uniform Marriage and Divorce Act treated increases in value of separate property as separate and income as marital. *Unif. Marriage and Divorce Act* § 307, 9A U.L.A. 289 (1998). A reporter for the UMDA later commented, however, with regard to the increase in value that the drafters were thinking of assets that increased without effort on the owner's part. Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 Fam. L.Q. 147, 154 (1989).

Of the community property states, four say that the income from separate property is marital, and the other five say that it is separate. Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 Law & Contemp. Probs. 171 (1993). The common law property states are also divided. *Id.*; Emily Osborn, *Comment, The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 Wis. L. Rev. 903, 918-930.

The ALI Family Dissolution Principles treat increases in value of and income from separate property the same, based on the rationale discussed in the text, and thus, characterization depends on the reason for the increase or income. ALI Principles, *supra* note 25, §§ 4.04, 4.05.

[FN101]. See *supra* Part II.A.

[FN102]. See *supra* text accompanying notes 49-50.

[FN103]. See *supra* text accompanying notes 45-46.

[FN104]. See supra text accompanying notes 47-48.

[FN105]. See supra text accompanying notes 36-41.

[FN106]. See generally supra Part II.A.

[FN107]. See supra text accompanying notes 87-101.

[FN108]. See supra text accompanying notes 78-81.

[FN109]. See supra text accompanying note 52.

[FN110]. See supra text accompanying notes 36-50.

[FN111]. See supra text accompanying notes 52-53.

[FN112]. See supra text accompanying notes 54-55.

[FN113]. See supra text accompanying notes 59-60. See also ALI Principles, supra note 25, at § 4.15(2)(b) (stating that an unequal division of marital property may be awarded when one spouse made an improper disposition of it) & § 4.16 (stating that financial misconduct is grounds for unequal division of marital property).

[FN114]. See supra text accompanying note 56.

[FN115]. See supra text accompanying note 56.

[FN116]. The remainder of ORS 107.105(1)(f), which is reproduced above at note 4 and which deals with an award of spousal support in lieu of property division should be placed in a different section to make the statute more readable. The new section might read:

(g) (A) If a spouse has been awarded spousal support in lieu of a share of property, the court shall so state on the record, and shall order the obligor to provide for and maintain life insurance in an amount commensurate with the obligation and designating the obligee as beneficiary for the duration of the obligation.

(B) If the obligor dies prior to the termination of such support and such insurance is not in force, the court may modify the method of payment of spousal support under the decree or order of support from installments to a lump sum payment to the obligee from the estate of the obligor in an amount commensurate with the present value of the spousal support at the time of death.

(C) The obligee or attorney of the obligee shall cause a certified copy of the decree to be delivered to the life insurance company or companies. If the obligee or the attorney of the obligee delivers a true copy of the decree to the life insurance company or companies, identifying the policies involved and requesting such notification under this section, the company or companies shall notify the obligee, as beneficiary of the insurance policy, whenever the policyholder takes any action that will change the beneficiary or reduce the benefits of the policy. Either party may request notification by the insurer when premium payments have not been made.

(D) If the obligor is ordered to provide for and maintain life insurance, the obligor shall provide to the obligee a true copy of the policy. The obligor shall also provide to the obligee written notice of any action that will reduce the benefits or change the designation of the beneficiaries under the policy.

Former sections (g)-(i) of ORS 107.105(1) would then be relettered as (h)- (j).

[FN117]. The number of pro se filings (where one or both parties have no attorney) is accelerating. In as many as 80 percent of family law cases in Oregon, at least one side is unrepresented. Between 1994 and 1996, the number of cases in which neither side was represented rose from 38 to 40 percent of filings in Oregon.

....

EBON Parties who manage their own divorces typically do not have all the information needed to construct a fair and equitable settlement. They usually do not know what to include or consider in determining the sharing of assets. Oregon Task Force on Family Law, Final Report 5 (Dec. 31, 1977).