INCREASES IN SEPARATE PROPERTY AND THE EVOLVING MARITAL PARTNERSHIP

Suzanne Reynolds

Wake Forest University Research Paper Series in Legal Studies

This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract=1354256
Increases in Separate Property and the Evolving Marital Partnership

Suzanne Reynolds
INCREASES IN SEPARATE PROPERTY AND THE EVOLVING MARITAL PARTNERSHIP

Suzanne Reynolds*

TABLE OF CONTENTS

INTRODUCTION ........................................................................ 240
I. ORIGINS OF THE TREATMENT OF INCREASES IN VALUE OF SEPARATE PROPERTY ............................................ 244
   A. Natural Causes Versus Funds or Labor of the Marriage 245
   B. The Spanish Civil Law .............................................. 249
   C. The Nineteenth Century Common Law ....................... 252
   D. The Treatment of Increase in Value in the Community Property States: The Common Law Hinders the Recognition of Increasing Expectations in the Marital Partnership ................................................. 258

1. Classifying the increase .................................................... 259
   a. Increase due to funds ............................................ 259
   b. Increase due to labor ............................................ 262
       1) The early law: no recognition .......................... 263
       2) Limited recognition ........................................ 264
           a) Theories of title: the preference for acquisitions .......... 265
           b) The kind of effort .......................................... 267
           c) The form of asset and rights to increases ............ 269
           d) Indirect contributions in acquisitions and increases ..... 270

2. Apportioning the increase ............................................... 273
   a. Community funds .............................................. 274
   b. Community labor ............................................. 277
       1) The rate of return method ................................. 277
       2) The compensation method ................................ 280

* Associate Professor of Law, Wake Forest University School of Law. B.A., Meredith College, 1971; M.A., University of North Carolina, 1976; J.D., Wake Forest University School of Law, 1977. The author wishes to thank Joseph VonKallist, Wake Forest University School of Law, class of 1987; and Susannah M. Bennett and Vicki F. Goldstein, Wake Forest University School of Law, class of 1990, for their research assistance in the preparation of this article.
II. THE DEVELOPMENT IN THE COMMON LAW STATES: CONFINING AND EXPANDING THE EXPECTATIONS OF SHARING

A. Confining the Philosophy of Sharing in the Common Law States

1. Classifying the increase: limiting the recognition of marital funds and efforts
   a. The preference for acquisitions: marital funds
   b. The preference for acquisitions: marital labor

2. Classifying the increase: retreat to title theory
   a. Requiring funds or efforts of the non-titled spouse
   b. Ignoring indirect contributions

B. Recognizing Expanded Notions of Sharing

1. Treating increases in value like acquisitions: expectations to share
   a. Recognizing equitable concerns in analyzing increases in value
   b. The equitable concern to protect marital choices
     1) Protecting the marriage from the manipulative spouses
     2) Recognizing the marriage's right to a return on its investment
     3) Expanding the definition of marital efforts
     4) Discouraging purchases of equivalent marital property
     5) Recognizing the importance of indirect contributions

2. Expanding the expectations of the marital partnership
   a. Decisions as marital efforts: determining when legitimate expectations attach
      1) Express or implied agreements
      2) Special circumstances
   b. Indirect contributions as marital efforts

C. The Evolving Partnership: A Partnership with No Analogy

1. Inappropriateness of the business analogy
2. Explanations for the expansion
3. Impact of the recognition of increased expectations

CONCLUSION

INTRODUCTION

This article treats a common problem presented by divorce. Assume that wife purchased Blackacre before her marriage to husband and during the course of the marriage, Blackacre increased in value. In addition, hus-
band started a small business before the marriage, which likewise increased in value. The spouses live in a state that, like about half the states, authorizes the court to distribute at divorce only that property acquired after the marriage and not the parties’ separate property.\(^1\) Despite this limitation, at the hearing on property division, each spouse claims a share of the appreciated separate property, maintaining that since the property appreciated during the marriage, the marriage should share in the increased value through a property award.

One might expect that a statute would answer the spouses’ claims. Divorce, after all, is largely a statutory creature.\(^2\) In fact, many states deal with the issue of appreciated separate property in their general property or family law statutes.\(^3\) The statutory treatment, however, proves almost irrelevant in predicting whether the increase in value becomes marital property.\(^4\) The answer depends not on the state’s statute dealing with appreciated separate property, but on the state’s view of the marital partnership.

In reaching this conclusion, the article focuses on common law states that have enacted statutes authorizing their courts to divide property at divorce.\(^5\) As the first portion of the article demonstrates, the origins of

---

1. The distinction between property acquired before and after the marriage in part distinguishes all property and dual property states. For a discussion of this distinction, see infra notes 14, 34-50 and accompanying text.

2. E.g., 2 H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.1 at 2 (2d ed. 1987). (“Although divorce procedure and the divorce defenses developed in large part through the adoption of rules from equity and from the English ecclesiastical law, the grounds for divorce are exclusively statutory.”)


4. For a discussion of states’ views of the marital partnership, see infra notes 256-405 and accompanying text. Professor Joan Krauskopf points out that the statutes are poor predictors because such strong policy concerns dominate this area. Krauskopf, Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property, 89 W. Va. L. Rev. 997, 1019 (1987).

5. The article groups states into common law states and community property states depending on the states’ treatment of property during the ongoing marriage. The one exception is Wisconsin, which the article treats as a common law state with a statute authorizing the division of property at dissolution. Wisconsin has enacted the Uniform Marital Property Act, which, like the community property states, recognizes common ownership during the marriage. Wis. Stat. Ann. § 766.001 (West Supp. 1987). Because of its history as a common
the controlling principles on this issue lie in the community property states, not in the common law states. For the most part, however, the courts in the community property states simply rely on precedent to decide issues of appreciated separate property. The article concentrates instead on the treatment in the common law states. At least some of the courts in these states have re-analyzed how to classify appreciated separate property in light of the evolving marital partnership. As a result, opinions in these states reflect the assumption that most couples have higher expectations of each other than the couples in the marital partnership of the 19th century. A certain irony exists in the conclusion that the common law states—not the community property states—have recognized that higher expectations characterize the modern marital partnership. The classic distinction between the community property and common law states has been the difference in the partnership and separate property views of marriage. The general view is that the policies of the community property states have always reflected and continue to reflect the philosophy of marital sharing, as in a partnership. The property law of these states have always recognized that during the marriage, the spouses enjoy common ownership of at least that property acquired during the marriage. The policies of the common law states, on the other hand, have traditionally reflected the individualism of the common law, law state, however, the article treats Wisconsin as a common law state.

For simplicity, the article refers to those states with common law histories as common law states. Because almost all these states authorize the distribution of property at divorce regardless of title, in this sense, they are not common law states. See, e.g., Younger, Marital Regimes: A Story of Compromise and Demoralization, Together With Criticism and Suggestions for Reform, 67 CORNELL L. REV. 45, 71-74 (1981). The article nevertheless uses the phrase "common law states," to refer not to their current treatment of property at divorce, but to their history and treatment of property during the ongoing marriage. These states no longer follow common law principles in their treatment of property at divorce.

6. For example, the Commissioners on Uniform State Laws promoted the Uniform Marital Property Act by describing how the Act drew from the partnership ideals of community property law and contrasted the Act with separate property notions:

Some of the root concepts can be traced to the sharing ideal which is at the center of the historical community property approach. The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system. It is also the heart of the Uniform Marital Property Act. Common law states have been moving closer and closer to the sharing concept in both divorce and probate legislation, and the Uniform Marital Property Act builds on the direction of that movement. Sharing is seen as a system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage. The Act creates and protects that share without forcing a spouse to await the completion of a gift from the other spouse or the garnering of proof of dollar-for-dollar contributions to the purchase price of assets acquired over the years of marriage.


7. For a discussion of community property, see infra notes 34-49 and accompanying text.
attaching great significance in matters of property to the fact of title and almost none to the fact of marriage. In fact, the common law states continue to rely on title to regulate rights to property during the ongoing marriage. Only at divorce, common law states that have revised their laws to recognize marital property concede that the marriage was, after all, a partnership. For this reason, the general consensus has been that the better claim to the view of marriage as a partnership rightly belongs to the community property states.

This article maintains that, at least in their treatment of appreciated separate property, some common law states have done a better job than the community property states of identifying the contemporary partnership underlying most marriages. Among community property states, the

8. See, e.g., the provision in the North Carolina statute recognizing that the rights of equitable distribution attach only after motion of a party, N.C. Gen. Stat. § 50-21(a) (1987), and vest only at separation, Id. § 50-20(k).


10. Although these generalizations are true, commentators have recognized for some time that each system has influenced the other. See, e.g., Prager, The Persistence of Separate Property Concepts in California’s Community Property System, 1849-1975, 24 UCLA L. Rev. 1 (1976); Comment, supra note 8.

11. For the view that broader notions of the marital partnership may be reflected in ways other than the treatment of increases in value, see the conclusion infra notes 406-08 and accompanying text.
courts view the marital partnership as if it had not changed in the years since the adoption of the civil law doctrine of community property. Among some of the common law states, a broader view of the marital partnership emerges and leads to more far-reaching analyses.\textsuperscript{12}

In Part I, the article traces the development of the principles on increases in value to the community property states and the Spanish civil law. The article then illustrates the development of these principles in the community property states, concentrating on the view of marriage that the treatment reflects. In Part II, the article first considers the impact of this view on the early treatment of appreciated separate property in some of the common law states. Next, the article contrasts the community property and early common law treatment of appreciated separate property with the later development in common law states. The article concludes that as common law states analyzed the issue of appreciated separate property, they recognized the increased expectations of the marital partnership. Finally, the article suggests what this more realistic view of the marital partnership should mean in the further development of the treatment of increases in value.

I. ORIGINS OF THE TREATMENT OF INCREASES IN VALUE OF SEPARATE PROPERTY

Although a number of issues reflect changes in thinking about the marital partnership,\textsuperscript{18} this article discusses that evolution only in the setting of the treatment of increases in value of separate property. This sec-

\textsuperscript{12} This article promotes a philosophy of sharing over a more individualistic philosophy as appropriate to the marriage relationship. The article justifies the premise of a sharing model by the concept of marital property. Since marital property assumes common ownership, a basic tenet of a partnership and sharing, the article likewise assumes the propriety of a model based on sharing.


\textsuperscript{13} For a discussion of some other settings in which changes in thinking about the marital partnership have had an impact, see infra notes 405-08 and accompanying text.
tion describes the problem and traces some of the extant analytical distinctions to Spanish civil law and its view of the marital partnership. The civil law, however, was not the only influence on the development of the increase in value of separate property. This section describes the other significant influence: the common law's protection of separate property. In the final portion of this section, the article illustrates the effect of both these influences—Spanish civil law and the 19th-century common law—in the case law of community property states in classifying and apportioning appreciated separate property.

A. Natural Causes Versus Funds or Labor of the Marriage

About half the states in this country divide all the property that the couple or either spouse owns at divorce. These states are called all-property states. The other half, known as dual-property states,14 recognize two kinds of property at divorce: property that the court may divide and property that it may not. The property that the court may not divide is called separate property, non-marital property, or the like. The divisible property is usually called community property or marital property.16

When separate property increases in value during the marriage in a dual-property state, divorce may force a court to decide how to treat the appreciation. The statutory treatment varies. Some statutes provide that the increase in value of separate property remains separate;16 others pro-

14. Some of the statutes reflect a middle ground between all-property and dual-property classification. For example, some states recognize that only certain property is generally available for distribution at divorce. Upon proof of special circumstances, however, the court has the authority to distribute all the property of the marriage. Wisconsin has one of these hybrid statutes. The Wisconsin statute provides in part:

Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner.


15. For example, the Illinois statute provides that "[f]or purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage," with exceptions "known as 'non-marital property.'" Ill. Ann. Stat. ch. 40, para. 503(a) (Smith-Hurd Supp. 1988).

16. For example, the North Carolina statute provides in pertinent part: "The increase in value of separate property and the income derived from separate property shall be considered separate property." N.C. Gen. Stat. § 50-20(b)(2) (1987).
vide that the increase becomes community\textsuperscript{17} or marital\textsuperscript{18} property. Still other statutes provide that the increase in value is separate property except under certain enumerated circumstances.\textsuperscript{19} Some property division statutes make no mention of the topic.\textsuperscript{20}

Even if a statute exists, it is a poor indicator of how a state will classify the increase. Regardless of the statutory language, almost all states classify the increase as separate on the one hand or community or marital on the other by evaluating the manner in which the property increased.\textsuperscript{21} If the property increased by what the court determines to be natural causes, then the court classifies the increase as separate property. If, on the other hand, the court finds that either the funds or labor of the marriage caused the increase, then the court classifies the increase as community or marital property.

Courts have distinguished between increases resulting from natural causes and increases resulting from funds or labor of the marriage by as-

\textsuperscript{17} The Texas statute indirectly labels the increase in value of separate property as community property in its statute on management of community property: "During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to: (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition." Tex. Fam. Code Ann. § 5.22 (Vernon 1975). The cases on increases in value and income of separate property, however, narrowly construe the statute. See, e.g., Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984).

\textsuperscript{18} For example, the Colorado statute provides in pertinent part:

An asset of a spouse acquired prior to the marriage or in accordance with subsection (2)(a) or (2)(b) of this section shall be considered as marital property, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.


\textsuperscript{19} For example, the Rhode Island statute provides in pertinent part: "[T]he court may assign the appreciation of value from the date of the marriage of property or an interest therein which was held in the name of one party prior to the marriage which increased in value as a result of the efforts of either spouse during the marriage." R.I. Gen. Laws § 15-5-16.1 (Supp. 1987).

\textsuperscript{20} For example, the Wyoming statute on property division makes no mention of appreciated separate property:

In granting a divorce, the court shall make such disposition of the property of the parties as appears just and equitable, having regard for the respective merits of the parties and the condition in which they will be left by the divorce, the party through whom the property was acquired and the burdens imposed upon the property for the benefit of either party and children. The court may decree to either party reasonable alimony out of the estate of the other having regard for the other's ability and may order so much of the other's real estate or the rents and profits thereof as is necessary be assigned and set out to either party for life, or may decree a specific sum be paid by either party.


\textsuperscript{21} For a discussion of the treatment by community property states, see infra notes 89-198 and accompanying text. For a discussion of the treatment by common law states, see infra notes 200-390 and accompanying text. Some of these states draw similar distinctions in classifying the income from separate property. For a discussion of the relationship between the two, see infra note 49.
sensing the spouses' influence on or control over the increase. Courts have described as natural causes inflation, market conditions, interest, rising land values, efforts of third parties, and other circumstances that the parties themselves have not caused.\(^{22}\) Since the spouses have little control over these circumstances, courts generally have concluded that any resulting increase should remain separate property.

On the other hand, courts generally conclude that using marital funds or labor on the separate property warrants classifying the increase as marital. Courts have found that the use of marital funds on separate property justifies classifying the increase as marital\(^ {23}\) and have labelled various kinds of efforts as marital labor. For example, courts have found working in a separately owned business,\(^ {24}\) handling management and administrative work for the property,\(^ {25}\) and making major repairs, alterations, and additions\(^ {26}\) to be marital labor. Courts have classified the increases resulting from these efforts and other similar efforts as marital property.

In the examples in the introduction, each spouse owned property at divorce that they had acquired before the marriage. The wife owned Blackacre, which had appreciated during the marriage. The distinction between appreciation from natural causes and appreciation due to funds or labor of the marriage would determine whether the husband would be entitled to share in the increase in value of Blackacre at divorce. If Black-

---

22. See, e.g., Lawing v. Lawing, 81 N.C. App. 159, 175, 344 S.E.2d 100, 111-12 (1986) (no difference between "passive" increases, such as interest and inflation, in separate property and "active" increases by third parties over whom neither spouse has responsibility); Templeton v. Templeton, 656 P.2d 250, 252 (Okla. 1982) (value increase of separate property caused by circumstances beyond spouse's control is not jointly acquired property unless non-owning spouse's contributions were also causal factor). In Moyers v. Moyers, 372 P.2d 844, 846 (Okla. 1962), the court distinguished between "normal appreciation or ordinary course of events occurring during the coverture" and "appreciation of joint efforts and skill."


acre appreciated because of marital efforts\textsuperscript{27} in improving the property or the use of marital funds to improve the property,\textsuperscript{28} then the court might classify the increase as marital, and the husband would be entitled to share. If, on the other hand, Blackacre appreciated only because of inflation, then a court might classify the entire increase as separate property. Similarly, the wife would not be entitled to share in the increased value of the husband’s pre-marital business if economic conditions caused the business to appreciate. If marital labor\textsuperscript{29} in the business produced the increase, however, then the court might label at least some portion\textsuperscript{30} of the

\textsuperscript{27} Some courts distinguish between increases in value depending on whether the titled or non-titled spouse expended the efforts. Compare Wadlow v. Wadlow, 200 N.J. Super. 372, 491 A.2d 757 (1985) (affirming that non-titled husband was not entitled to share in increase in value of securities account because he had not produced satisfactory evidence that he had contributed to increase in value) with Conner v. Conner, 97 A.D.2d 88, n.4, 468 N.Y.S.2d 482, 490 n.4 (App. Div. 1983). In Conner, the court first referred to the active-passive distinction to distinguish between increases due to natural causes and increases caused by the labor or funds of the marriage. In this footnote, the court, in dicta, dispensed with the need for efforts of the non-titled spouse and urged that the appreciation of a business operated only by the titled spouse should also qualify as marital property. Id. For criticism of drawing distinctions based on which spouse expends the efforts, see infra notes 235-39 and accompanying text.

\textsuperscript{28} See, e.g., de Funiak, Improving Separate Property or Retiring Liens or Paying Taxes on Separate Property with Community Funds, 9 Hastings L.J. 36 (1957).

\textsuperscript{29} For a discussion of the concern over which spouse contributed the labor, see supra note 27. Most courts, especially in community property states, analyze the quality of the efforts that the spouses contribute. Part of the thesis of this article is that community property states, to a greater extent than common law states, restrict the kinds of efforts that will cause the court to recognize the marital interest in the increase in value. Compare In re Estate of Neilson, 57 Cal. 2d 739, 371 P.2d 745, 22 Cal. Rptr. 1 (1962) (parties must at least expend minimal efforts to render increase community property; non-titled spouse failed to prove that labors of titled spouse involved any special skills) with Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434 (1975) (indirect efforts of non-titled wife as homemaker might entitle her to share in increased value). For further discussion of this distinction, see infra notes 235-39 and accompanying text.

\textsuperscript{30} In some states, it is critical to determine which source of increase was more important—natural increases or increases due to marital funds or labor. For example, the court in Speer v. Quinlan, 96 Idaho 119, ..., 525 P.2d 314, 321 (1973), observed that the rate-of-return approach implied that the court had determined that community efforts contributed to the increase in value more than the separate property. On the other hand, the reasonable-compensation approach implied that the court had determined that community efforts were less significant. Id. For a discussion of this principle, see also Krauskopf, supra note 4. For a discussion of the rate of return and reasonable compensation as methods of apportioning, see infra notes 170-98 and accompanying text. See also infra note 197 for the point that the choice of method may depend also on the form of asset.

Before recent changes, Arizona courts classified the increase as either all community or all separate, depending on whether the labor or funds or the separate property was more significant in producing the increase. See, e.g., Nelson v. Nelson, 114 Ariz. 369, 560 P.2d 1276 (Ct. App. 1977) (holding that increased value of stock was separate property despite labor of husband in corporation); Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979) (abolishing all-or-nothing rule). See also Adler, Arizona’s All-or-Nothing Approach to the Classification of Gain from Separate Property: High Time for a Change, 20 Ariz. L. Rev. 597 (1978); Note, Uniform Marriage and Divorce Act: Suggested Revisions for Equality Between Spouses, 1987 U. Ill. L. Rev. 471, 480-83 (discussion of Spanish and American rules on increases in value; Spanish rule allocates increase while American rule represents
increase as marital property.

The distinction between natural causes on the one hand and marital efforts or funds on the other has largely shaped the treatment of increases in value. In fact, case law has developed this distinction regardless of what the state's statute provides. States whose statutes label the increase as separate draw the distinction,\(^{31}\) as do those states whose statutes are silent on the topic.\(^{32}\) The strength of the distinction derives from its firm roots in the marital partnership of Spanish civil law, which later helped to develop the principles on increases in value in community property states. The community property states in turn influenced the development in common law states with property division statutes.\(^ {33}\)

B. The Spanish Civil Law

The Spanish law distinguished between the causes of increases in value of separate property because of its view of the marital partnership. The idea of marriage as a partnership was fundamental to Spanish civil law. Commentators have proudly described how this partnership respected the individuality of the spouses.\(^ {34}\) Unlike the common law, at least before reform, the spouses maintained their pre-marital legal identities.\(^ {35}\) The civil law not only recognized each spouse's legal identity but also recognized the importance to the marital partnership of the efforts of each of these separate persons. By its doctrine of the common ownership of property, the civil law recognized that the efforts of these partners were equally valuable to the partnership and earned the spouses the right to share in the assets of the marriage.\(^ {36}\)

In this partnership, however, the partners had the right to expect to


\(^{32}\) The New Jersey statute draws no distinctions on increases. N.J. Stat. Ann. § 2A: 34-23 (West 1987). For a New Jersey case drawing the distinction, see, e.g., Mol v. Mol, 147 N.J. Super. 5, 370 A.2d 509, 510 (1977) ("We hold that plaintiff is not entitled to share in that portion of enhancement in value of the house which was due solely to inflation or other economic factors and to which she did not contribute in any way.")


\(^{34}\) W. de Funiak & M. Vaughn, Principles of Community Property § 11, at 28 (2d ed. 1971).

\(^{35}\) Compare the common law treatment set forth infra note 57 and accompanying text.

\(^{36}\) See, e.g., Younger, supra note 5, at 63.
share only in certain property. That property in which the spouses had a
geright to expect to share was called community property; the property in
which the spouses had lesser or no expectations was called separate prop-
erty. The civil law thus created a dual system of property, either commu-
nity or separate.

The civil law classified as community property all the “acquests and
gains” of the marriage.37 This phrase included everything that the hus-
band or wife earned during the marriage or bought with those earnings.38
The law classified property that either of the spouses acquired by gift or
inheritance or the like as separate property.39

Another way to explain the difference between community and sepa-
rate property is through the concept of onerous and lucrative titles.40
Property is community property, or an acquest of the marriage, if ac-
quired by onerous title. Onerous title is title acquired by labor, efforts, or
other consideration for value.41 Property is separate, or a non-acquest of
the marriage, if acquired by lucrative title. Lucrative title is title that the
party acquires because of the donative intent of the benefactor.42 The
wording of many contemporary statutes reflects the Spanish law’s defini-
tion of community property as that property acquired by onerous title.
Community or marital property is often statutorily defined as that prop-
erty acquired during the marriage except by gift, bequest, devise, or de-
scent—in other words, acquired by onerous title. Separate property is
often described as that property acquired before the marriage or during
the marriage but only by gift, bequest, devise, or descent—in other words,

37. W. de Funiak & M. Vaughn, supra note 34, § 58, at 114.
38. Id. at 115. Some commentators explain the Spanish law’s recognition of commu-
nunity ownership by referring to societal conditions. Because primitive living condi-
tions required all the efforts of both spouses for survival, the law recognized that everything the
spouses managed to eke out should, in justice, belong to both of them. For this reason, the
sources of community property law are the customs of those people in poor social and eco-
nomic straits. Kirkwood, Historical Background and Objectives of the Law of Community
Property in the Pacific Coast States, 11 Wash. L. Rev. & St. B.J. 1, 2 (1936). The common
law system, on the other hand, has been said to force the law of the aristocracy on the
laboring masses. Id. See also Younger, supra note 12, at 211, 214. Professor Younger points
out that the sources of community property “are the Code of Hammurabi, the Twelve Ta-
bles of Gortyn and the Fuero Juzgo, or Visigothic Code. Stemming from a way of life said to
be classless and democratic and spread, incidentally, by people said to be barbaric, the com-


39. W. de Funiak & M. Vaughn, supra note 34, § 62, at 128. Different rules apply if
the benefactor is one of the spouses. Id. at §§ 140-43. See, e.g., the North Carolina statute,
which provides in part:

“Separate property” means all real and personal property acquired by a spouse
before marriage or acquired by a spouse by bequest, devise, descent, or gift dur-
ing the course of the marriage. However, property acquired by gift from the
other spouse during the course of the marriage shall be considered separate
property only if such an intention is stated in the conveyance.

40. W. de Funiak & M. Vaughn, supra note 34, § 62, at 126-29.
41. Id. at 127.
42. Id. at 128. See also supra note 39.
by lucrative title.\textsuperscript{43}

In the civil law system, the acquests of the marriage belonged not to one of the spouses but to the partnership.\textsuperscript{44} The partnership had the right to expect to share in the acquests because of another principle: the earning power of the marriage belonged to the partnership.\textsuperscript{46} Because the talents and skills of the partners belonged to the partnership, everything that those talents and skills produced, either in themselves or as remuneration for those efforts, likewise belonged to the partnership. The partners rightfully expected to share in the acquests of the marriage because during the marriage the law presumed that the partners expended all funds or efforts for the good of the marriage.\textsuperscript{46} Since the marital partnership produced its acquests for the marriage, the marriage and its partners legitimately expected to share them.

Because of Spanish civil law's view of the marital partnership, separate property remained the property of the spouse with title. By definition, the marriage did not produce that property; property was separate property if acquired by lucrative title, title that did not involve the earning power of the marriage. The partners could legitimately expect to share only in that property acquired by onerous title—by the earning power of the marriage.

These concepts of the marital partnership and the legitimate expectations of its partners underlie the special principles that developed to deal with the increase in value of separate property. These principles attempted to honor the partnership's rights to the earning power of the marriage. Just as marital partners had no right to expect to share in separate property, they had no right to share in its increase if the increase were the product merely of nature or time or other influences over which the parties had no control.\textsuperscript{47}

On the other hand, if the earning power of the marriage caused sepa-

\begin{itemize}
\item \textsuperscript{43} See, e.g., the Kentucky statute, which provides, in relevant part, that “marital property” means all property acquired by either spouse subsequent to the marriage except:
\begin{itemize}
\item \textsuperscript{a} Property acquired by gift, bequest, devise, or descent;
\item \textsuperscript{b} Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
\item \textsuperscript{c} Property acquired by a spouse after a decree of legal separation;
\item \textsuperscript{d} Property excluded by valid agreement of the parties; and
\item \textsuperscript{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.
\end{itemize}
\end{itemize}

\begin{itemize}
\item \textsuperscript{44} See W. de Funiak & M. Vaughn, supra note 34, § 58, at 114-15.
\item \textsuperscript{45} See id. § 11.1, at 23-28. See also Evans, Primary Sources of Acquisition of Community Property, 10 Calif. L. Rev. 271, 271 (1922). See this recognition in the preamble to recent Maryland legislation, supra note 9.
\item \textsuperscript{46} W. de Funiak & M. Vaughn, supra note 34, § 62, at 127.
\item \textsuperscript{47} Id. § 73, at 168 & n.84. See also L. Golden, Equitable Distribution of Property § 5.39 (1983) (distinguishing between increases due to economic factors and increases due to efforts of parties).
\end{itemize}
rate property to increase in value, the increase lost its immunity and became community property.\textsuperscript{48} For example, if one of the spouses during the marriage built an addition on separate property, the value of the addition was marital property. Like other property produced by the earning power of the marriage, the partnership had some interest in this property.\textsuperscript{49}

To honor the principle that the earning power of the marriage belonged to the marriage, Spanish civil law recognized in this limited way that spouses had some rights in separate property. They had an interest in the increase of that property if the funds or labor of the marriage were responsible for it. In the section that follows, this article traces the grafting of common law concepts onto the civil law principles controlling increases in value. This common law influence kept the marital partnership from evolving. In the setting of increases in value of separate property, community property law continued to evaluate the expectation of the 19th-century marital partnership.

\textbf{C. The Nineteenth-Century Common Law}

The treatment of increases in value of separate property has its roots in Spanish civil law, which can be traced to the Visigoths who entered Spain in 415 A.D.\textsuperscript{50} As this section demonstrates, however, the common law also influenced the analysis of how to classify increases in value of separate property. One can appreciate the current handling of these increases only by considering the impact of the common law on the early development of community property law. The tracing of common law concepts into community property law focuses on the process in the community property law of California.\textsuperscript{51} This concentration is appropriate: California has been influential in the development of community property law in general\textsuperscript{52} but particularly in the development of the treatment of

\begin{footnotesize}
\begin{enumerate}
  \item W. De Funiak & M. Vaughn, supra note 34, § 73, at 169-70.
  \item Id. The significance that Spanish civil law attached to the earning power of the marriage explains the distinction it drew between increases in value of separate property and income of separate property. The Spanish law classified the income of separate property as community on the theory that the income of separate property necessarily entailed the expenditure of labor by one of the parties. See Comment, Apportionment of Income from a Spouse’s Separately Owned Property, 51 Calif. L. Rev. 161, 164 (1963). The law classified the increase in value of separate property as separate because the increase could be the product of natural causes. Cf. W. De Funiak & M. Vaughn, supra note 34, §§ 71, at 160-63 and § 73, at 168 n.34.
  \item One of the most significant departures from the Spanish law in the early development of community property law in this country involved the treatment of the income of separate property. While the Spanish law classified the income as community, California, Arizona, Nevada, New Mexico, and Washington classified the income as separate. See infra notes 70-88 and accompanying text. This departure is the source of the Spanish and American rules, referred to supra note 30.
  \item W. De Funiak & M. Vaughn, supra note 34, at § 22, at 43.
  \item For a thoughtful and scholarly treatment of this process, see generally Prager, supra note 10.
  \item The commentators credit the statutory community property law to California
\end{enumerate}
\end{footnotesize}
increases in value of separate property. The following description demonstrates the influence of Spanish civil law and the decision to retain the civil law system. The struggle that accompanied that decision, however, reveals the impact of the common law on the treatment of increases in value of separate property.

The delegates to the California Constitutional Convention adopted the community property law that existed when the territory was under Mexican rule. Any description of the debates preceding that decision, however, understates how intensely the delegates held their different views. Those delegates who supported the law of community property offered a number of reasons why not to follow the common law states, one of which was the common law's treatment of the married woman. Surely some of the delegates were familiar with Blackstone's description of how the common law annihilated the legal rights of the married woman. Just as surely, some of the delegates thought the common law was wrong.

models. See, e.g., 2 AMERICAN LAW OF PROPERTY § 7.3 (A.J. Casner ed. 1952); McKay, COMMUNITY PROPERTY § 6 (2d ed. 1925); 3 C. VERNIER, AMERICAN FAMILY LAWS 207-08 (1935); Kirkwood, supra note 38, at 8.


55. See J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA 267 (1850) (remarks of Mr. Botts) ("I tell you, Mr. Chairman, that if you introduce this clause, you must take care to carry along with it a speedy and easy and effectual way of procuring divorces, for they will come as sure as you live, as a necessary consequence."). See generally Prager, supra note 10, at 18-21.

56. Dean Prager posits that one reason some of the delegates opposed the community property law was that they did not understand the Spanish system. The majority of delegates were not natives, but persons born in other parts of the United States and familiar with only the Anglo-American common law system. Prager, supra note 10, at 10-11. At least one delegate supported the system because he foresaw that community property law would attract rich women to California. He exhorted fellow bachelors to vote for the provision in their self interests. J. BROWNE, supra note 55, at 258 (remarks of Mr. Halleck).

57. See 1 W. BLACKSTONE, COMMENTARIES * 442. ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.") For an important work on the common law's treatment of marital property, see Johnston, Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. REV. 1033 (1972).

58. J. BROWNE, supra note 55, at 18 (remarks of Mr. Semple); at 263 (remarks of Mr. Dimmick); and 264-65 (remarks of Mr. Jones).
They argued for a more enlightened treatment of the married woman.\textsuperscript{59} The delegates to the convention do not deserve all the credit for these views. A movement beyond the bounds of the 1849 convention hall was sweeping through the United States as the delegates debated the wisdom of the community versus the common law property systems. In fact, the common law that the delegates contrasted with the community property system should actually be called the “reformed common law”\textsuperscript{60} because of the impact of married women’s property acts. The married women’s property acts of the common law states sought in general to restore legal status to the married woman.\textsuperscript{61} Specifically, many of these acts sought to restore to the married woman what marriage in the common law states took away: the right to own property in her own name, to transfer it, to contract, to bring suit in her own name, and to keep earnings from any employment that she might pursue.\textsuperscript{62} Concerning the wife’s property rights, the married women’s acts preserved for the wife her separate property.

By the time of the California convention, four of the common law states had already enacted legislation to redress some of the common law’s inequities.\textsuperscript{63} This reform movement from the common law states, in turn, helped shape the developing community property law. Perhaps nothing illustrates the impact of the married women’s property acts on the California convention more than the constitutional provision by which California became a community property state. Reading more like a piece of a married women’s property act than a constitutional provision establishing a community property system, the constitution provided:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife’s separate property.\textsuperscript{64}

Most of this constitutional provision focuses not on community property but on preserving separate property. Only by the phrase “held in common,” did the delegates acknowledge that California had become a com-

\textsuperscript{59} Id. at 263 (remarks of Mr. Dimnick).

\textsuperscript{60} See Prager, supra note 10, at 3.


\textsuperscript{62} 2 H. Clark, supra note 2, at 504.

\textsuperscript{63} Mississippi, 1839; Michigan, 1844; Maine, 1844; and New York, 1848. See, e.g., Comment, Mississippi Woman’s Law, supra note 61, at 1112-13.

\textsuperscript{64} Cal. Const. of 1849, art. XI, § 14.
munity property state.

In this way, the reformed common law influenced the provision that established California as a community property state: the provision showed the concern of the reformed common law for protecting the wife’s separate property. Some of the legislation implementing this constitutional provision likewise showed the common law’s influence. Most significantly, the legislation awarded full management and control of both the community and separate property to the husband.65 By another statute implementing community property law, California classified the income of separate property as community property.66 While the income was community property, the husband could decide what to do with it.67 The statute giving the husband management and control of community and separate property reflected the influence not of the Spanish law68 or even of the reformed common law, but of the common law before the changes made by the married women’s property acts.

In these and other ways,69 the common law influenced the legislation that followed the adoption of the civil law and restricted its view of community property. Especially in the analysis of increases in value of separate property, the common law influenced not only the statutes in the community property states, but also the early case law in those states.

The common law, for example, influenced the case law in the community property states in the treatment of the income of separate property. True to its Spanish heritage, California provided by statute that the in-

66. 1850 Cal. Stat. ch. 103, § 9. For an explanation of the Spanish origins for classifying income of separate property as community, see Comment, supra note 47, at 163-64.
67. The civil code of 1872 restored the power to manage her separate property to the wife. 1 Codes and Statutes of California § 5162, at 595 (T. Hittel ed. 1876).
68. For a chronological description of all the legislation that followed the adoption of the constitutional provision establishing community property, see id. at 34-47. The purpose here is to focus on the statutes and decisional law that had the greatest influence on increases in value. Certainly, subsequent legislatures amended some of the legislation that this article cites as illustrative of a separate property rather than a partnership philosophy. Id. at 47-63 (describing reform enactments of 1891-1927) and 68-81 (detailing recent changes in California law). In fact, Dean Prager concludes that the 1973 amendments removed most of the vestiges of separate property concepts, with the important exception of Cal. Civ. Code § 5125(d) (Deering Supp. 1988), which directed the court to grant exclusive management rights to a spouse who operates a business. Prager, supra note 10, at 77. For criticism of the effect of this statute as depriving the wife of one of the most important assets of the marriage, see L. Weitzman, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 97-101 (1985). By the time of these later amendments, however, courts in most states had wrestled with increases in value. The struggles in the most influential case law represent the influence of the early legislation. See infra notes 92-198 and accompanying text.
69. For another example of the influence of the common law in the early community property states, see the treatment of rights of succession. Early legislation recognized rights of survivorship only if the wife died first. Act of May 8, 1861, ch. 323 § 1, 1861 Cal. Stat. 310-11. The civil law recognized rights of survivorship in community property regardless of which spouse died first. In combination with the provisions on management, it is small wonder that the wife’s interest in the community property was characterized as a “mere expectancy.” Van Maren v. Johnson, 15 Cal. 308, 311 (1860).
come of separate property belongs to the community.\textsuperscript{70} For example, if wheat were grown on separate property, the profits from the sale of that wheat would be income from separate property and classified as community property.

Classifying the income of separate property as community property honors the principle that the efforts of the marriage belong to the partnership.\textsuperscript{71} The Spanish law reasoned that since separate property probably produced income only through the efforts of the spouses,\textsuperscript{72} the income was rightly community property. Even though this concept is basic to Spanish civil law, common law notions tortured it.

The common law influence is evident in an early opinion in which the California Supreme Court reviewed a case that had applied the statute on income of separate property. The court declared the statute unconstitutional,\textsuperscript{73} reasoning that the provision recognizing community property\textsuperscript{74} also recognized the importance of the wife’s separate estate.\textsuperscript{75} In fact, the court read into the constitutional provision the intent to incorporate the common law’s view of separate property.\textsuperscript{76} Since another statute gave the husband control of the community property,\textsuperscript{77} this statute would, in effect, give the husband control of the income of separate property. The court concluded that the statute that classified the income of separate property as community undermined the significance that the constitution attached to the integrity of the wife’s separate property and found the statute unconstitutional.\textsuperscript{78}

By its analysis in this case, the court went even further than the common law states in protecting the separate property of the wife. The court maintained that the common law refused to divide the rights of ownership and control in separate property.\textsuperscript{79} In fact, the court was mis-

\textsuperscript{70} 1850 Cal. Stat. ch. 103, § 9.
\textsuperscript{71} For a discussion of the origins of this principle in Spanish civil law, see supra notes 44-49 and accompanying text.
\textsuperscript{72} G. McKay, Community Property § 176 (1st ed. 1910).
\textsuperscript{73} George v. Ransom, 15 Cal. 322 (1860).
\textsuperscript{74} Cal. Const. of 1849, art. XI, § 14. For the text of the provision, see supra text accompanying note 64.
\textsuperscript{75} George, 15 Cal. at 324.
\textsuperscript{76} As the court stated,

This term “separate property” had a fixed meaning in the common law and in the minds of those who framed the Constitution, the large majority of whom were familiar with or had lived under that system. By the common law, the idea attached to the wife’s separate property and the idea which forms a portion of its definition, is, that it is an estate, held in its use and its title, for the exclusive benefit and advantage of the wife.

\textit{Id. at 324}.
\textsuperscript{77} Act of April 17, 1860, ch. 103, § 9, 1849-50 Cal. Stat. 254.
\textsuperscript{78} George, 15 Cal. at 324.
\textsuperscript{79} As the court stated,

The common law recognized no such solecism as a right in the wife to the estate, and a right in someone else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property in full and separate ownership in one, with a right in another to control it, and enjoy all of its benefits.
taken. At least as far as real property was concerned, the common law recognized a married woman’s right to own property in her own name but gave the husband the right of control, including the power to alienate the property during the existence of the marriage. Because of this mistaken analysis, the California Supreme Court attached more significance to the separateness of separate property than did the common law states themselves.

In response to this decision, the California Legislature amended the statute on the income of separate property to provide that the income of separate property was not community property but remained separate property—a significant departure from the Spanish law. Other states followed suit, and several states currently make similar provisions.

In this way, common law influenced community property states to reject the civil law principle that the income from separate property is community property. The decisions by some of the community property states to treat the income of separate property as separate set the course for the treatment of the increase in value of separate property as well.

---

Id.

80. The property at issue in *George* was stock and its dividend income. *Id.* at 322.
82. Some commentators complain that the inability of lawyers and judges steeped in common law analysis to appreciate common ownership has undermined the partnership goals of community property law. W. de Funk & M. Vaughn, *supra* note 34, §§ 3-5. This principle is illustrated by the Spanish law’s simultaneous recognition of ownership in both spouses and management in one. *Id.* at § 97.
84. W. de Funk & M. Vaughn, *supra* note 34, § 71, at 160.
87. The opinions of the era likewise reveal the influence of common law on interpretations of community property provisions. See, e.g., *Spear v. Ward*, 20 Cal. 659 (1862) (using analogies to married women’s property acts to decide whether debts incurred during marriage were separate or community).
88. The statutory provisions of some states similarly treat increases and income. See, e.g., *Ariz. Rev. Stat. Ann.* § 25-213 (1976) ("All property, real and personal, of each spouse, owned by such spouse before marriage and acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse.") The case law, however, treats the issues similarly even when the statutory treatment differs. See, e.g., the Arkansas statute, which classifies increase in value of separate property as separate but makes no provision for the income of separate property. The Arkansas statute provides in part: "For the purpose of this statute ‘marital property’ means all property acquired by either spouse subsequent to the marriage except . . . the increase in value of property acquired prior to the marriage.” *Ark. Stat. Ann.* § 34-1214 (Supp. 1985).
89. As pointed out above, despite the statutory treatment of increases in value, the case law incorporated the natural enhancement analysis of Spanish civil law. In the setting of the income from separate property, natural enhancement analysis distinguishes between income arising naturally from the separate property and income produced by the funds or efforts of
The case law in this country has similarly analyzed the income from and increases in value of separate property.\textsuperscript{88} For this reason, the influence of the common law in causing community property states to treat the income of separate property as separate was especially significant.

\textit{D. The Treatment of Increases in Value in the Community Property States: The Common Law Keeps the Marital Partnership from Developing}

As described in the preceding section, the common law helped shape the treatment of increases in value of separate property in the community property states. The mix of civil law and common law brought principles fundamental to each system into conflict. To the Spanish system, recognizing that the funds and labor of the marriage belong to the marriage lay at the heart of community property and the marital partnership.\textsuperscript{89} To the common law system, the separate identity of property and the rugged individualism that had come to characterize the common law was central.\textsuperscript{90} When separate property increased in value by funds or labor of the marriage, the law could not honor both systems. The conflict forced the law to try to accommodate the two, but instead of accommodation, the separate property philosophy of the common law prevailed.

This section demonstrates how the common law prevailed by looking the marriage. This distinction characterizes analysis of issues involving both increases in value and the income of separate property. See, e.g., Nelson v. Nelson, 114 Ariz. 369, 560 P.2d 1276 (Ct. App. 1977) (subjecting increase in value to same test as test used when profits in question); In re Nelson's Estate, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962) (applying natural enhancement analysis to decide that income of separate property should be apportioned).

\textsuperscript{88} For other opinions acknowledging that increases and income warrant similar treatment, see, e.g., Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708 (1946); In re Estate of Graniss, 142 Cal. 1, 75 P. 324 (1904); In re Estate of Higgins, 65 Cal. 407, 4 P. 389 (1884); Lewis v. Johns, 24 Cal. 98 (1864); In re Marriage of House, 106 Cal. App. 3d 434, 165 Cal. Rptr. 145 (1980); Speer v. Quinlan, 96 Idaho 119, —, 525 P.2d 314, 319-20 (1973).

Sometimes, it is difficult to determine whether appreciated property is income or an increase in value. See, for example, the debate on the accumulation of retained earnings in Jolis v. Jolis, 111 Misc. 2d 965, —, 446 N.Y.S.2d 138, 146 (1981), aff'd, 98 A.D.2d 692, 470 N.Y.S.2d 584 (App. Div. 1983). See also infra notes 318-27 and accompanying text.

According to the Spanish view of the marriage partnership, increases in value and income of separate property present distinct issues. The Spanish law assumed that income required efforts, which in return required a finding that the income was community. See supra note 49. On the other hand, the Spanish view of the marriage partnership concluded that if the parties chose to leave the separate property intact and expend no energies or funds on it, then the partnership deserved no portion of any increase. See W. de FUNIAK & M. VAUGHN, supra note 34, \S\ 73, at 168-69. Under those circumstances, the doctrine of lucrative title would classify the increase as separate.

\textsuperscript{89} For a discussion of the views of Spanish civil law, see supra notes 34-49 and accompanying text.

\textsuperscript{90} See Powell, supra note 12, at 38. The author contrasts the systems of several common law and community property states and finds the two common law systems to be "the closest approach to the individualistic standard yet existent in any of these United States." Id.
first at analyses from community property states classifying the increases in value of separate property as either separate or community property. Next, the section reviews opinions in which the courts struggled not with classifying the increase but with apportioning the increase between the separate and community interests. In the treatment of both of these aspects of increases in value of separate property, the community property states subordinate the marital partnership and its philosophy of sharing in favor of protecting the separate estate. The section concentrates on appellate cases from California and Idaho with references to other community property states. The focus on California recognizes the influence of that state in the development of the treatment of increases in value. The focus on Idaho demonstrates that even in a state with a different statutory treatment of increases of separate property, community property law has similarly developed the law in this area.

1. Classifying the increase

In the struggle between recognizing that labor or funds belong to the marriage and preserving the separate estate, the separate estate prevailed. The tenet of Spanish civil law that funds or labor of the spouses belonged to the partnership was central, yet, because of the strength of the commitment to preserving separate property, the early community property law carved out a major exception for funds or labor applied to separate property.

a. Increase due to funds. To some extent, community property law on the use of community funds in connection with separate property reflects special rules that confined the expectations of the marital partnership. The Spanish civil law recognized that the partnership had legitimate expectations to increases in value even of separate property if

91. Idaho is one of those states that, unlike California, statutorily requires courts to classify the income of separate property as community. Idaho Code § 32-906 (1963). California originally classified the income of separate property as community property. The decision in George and a subsequent amendment, however, changed this classification to separate property. See supra notes 66-88 and accompanying text. Since Idaho statutorily treats income differently from California, one would expect the two states to treat differently not only the income of separate property, but also increases in value of separate property. Instead, states tend to analyze increases in value the same way they analyze issues involving the income of separate property. See supra notes 87-88 and accompanying text. Moreover, the statutes of neither California nor Idaho treat the increase in value of separate property. See supra note 3. For this reason as well, one might expect that a comparison of opinions from these states would reflect the difference in their statutes on the income of separate property. The opinions, to the contrary, reflect similar handling of the issues.

92. W. De Funik & M. Vaughn, supra note 34, § 11.1, at 24. See also Evans, Primary Sources of Acquisition of Community Property, 10 Calif. L. Rev. 271.

93. See, e.g., Krauskopf, supra note 4, at 1014 (courts defeat idea of partnership marriage by failing to recognize efforts and skills as entitling community to resulting increase).

94. Some states distinguish between the use of community funds to improve separate property, to reduce the indebtedness of separate property, and to acquire separate property. For the basis of these distinctions, see infra notes 120-26 and accompanying text.
marital earnings caused the increase. Nevertheless, in the early analysis of the use of marital funds on separate property, community property law practically ignored the community's interest.

The earliest cases involving the use of community funds on separate property dealt with the use of community funds to improve the separate property of the wife. In these cases, the courts held that the improved separate property was entirely separate. The courts ignored the fact that community funds had improved the wife's separate property. By ignoring the marital character of the funds, these holdings departed from the civil law's treatment of increases in value and reflected the preeminence of common law concepts in applying community property statutes.

The early cases involving improvements to separate property relied on legislative intent to conclude that the improved property remained entirely separate, thus protecting the wife's separate estate. In addition, the analysis relied on the management rights of the husband to conclude that since the husband controlled the use of the community funds, his decision to expend them on the wife's separate property evidenced a gift to her separate estate. Later, when the facts involved the husband's separate property, the decisions followed the precedent set in the cases involving the wife's separate property: the use of community funds to improve the husband's estate likewise gave no claim to the community. In this way, community property law extended the concern of the reformed common law to protect the separate estate of the wife from the disabilities of coverture. Community property law extended this concern, however, to an estate that suffered no disabilities by coverture: the estate of the husband.

More quickly than it did for marital labor, community property law eventually paid some heed to its Spanish origins. The law came to recognize that, at least in some circumstances, the community had an interest

---

95. For a discussion of increases attributable to each spouse, see supra notes 47-49 and accompanying text.

96. E.g., Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931) (improvements made with community funds belong to spouse owning separate property); Shaw v. Bernal, 163 Cal. 262, 124 P. 1012 (1912) (improvements made on wife's separate property with community funds became wife's separate property); Bank of Orofino v. Wellman, 26 Idaho 425, 143 P. 1169 (1914) (improvements made by husband on wife's separate property out of reach of husband's subsequent creditors); Lombardi v. Lombardi, 44 Nev. 314, 195 P. 93 (1921) (improvements by husband on wife's separate property do not result in change in title). For a review of the cases dealing with improvements to property, see Comment, The Husband's Use of Community Funds to Improve His Separate Property, 50 CALIF. L. REV. 844 (1962).

97. W. De Funiak & M. Vaughn, supra note 34, § 73, at 168-74. Spanish civil law recognized that the community deserved to be reimbursed for expenditures made on behalf of the separate property. The measure of the reimbursement was the amount of the increased value, not just the amount of the expenditure. Id. at 171.

98. For examples of cases dealing with improvements to property, see supra note 96.

99. Id.

100. In re Barreiro's Estate, 86 Cal. App. 764, 261 P. 509 (1927); In re Estate of Higgins, 65 Cal. 407, 4 P. 389 (1884).
in an increase in value of separate property caused by marital funds.\textsuperscript{101} If the spouses spent marital income to improve a separately owned building, for example, the community had some interest in the increase in value of the building. No particular change in view heralded the change in result. To the extent that the opinions explained this change at all, they relied on the exclusive management that the early community property laws vested in the husband.\textsuperscript{102}

Community property law vested even more management rights in the husband than did the Spanish civil codes.\textsuperscript{103} Because the husband controlled the use of marital funds, community property law began to recognize that he ought to exercise this control for the welfare of the partnership. Therefore, when the husband decided to use community funds to reduce a lien on separate property, the community had some interest.\textsuperscript{104} In this sense, community property law began to recognize the interest of the marital partnership in the use of marital funds not to nurture the partnership, but to compensate for the ways in which it was not like a real partnership at all.

Apart from the conclusion that the husband’s right of control deserved some check, the opinions simply began to attach increasing significance to the use of marital funds in finding that the community had some interest in the increases of separate property produced by those funds.\textsuperscript{105}

\textsuperscript{101} In Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (1929), the court found that the use of community funds to improve the husband’s separate estate warranted different treatment. The court held that the community should be reimbursed for the use of these funds measured by the value of the improvement, not just the amount of the expenditure. \textit{Id.} at \textit{at}, 283 P. at 845. Eventually the rule came to be that as long as the non-titled spouse failed to consent, the community should be reimbursed whether the funds were used on the separate estate of the husband or wife. \textit{In re Marriage of Frick}, 181 Cal. App. 3d 997, 1019-20, 226 Cal. Rptr. 766, 779 (1986).

\textsuperscript{102} For this rationale in connection with the control of funds, see Provost v. Provost, 102 Cal. App. 775, \textit{at}, 283 P. 842, 844 (1929):

To hold otherwise would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. \textit{Id. See also} Weinberg v. Weinberg, 67 Cal. 2d 557, \textit{at}, 432 P.2d 709, 712, 63 Cal. Rptr. 13, 16 (1967) (finding on related issue that husband must apportion alimony and child support payments between community and separate estates); \textit{In re Chandler’s Estate} 112 Cal App. 601, \textit{at}, 297 P. 636, 637 (1931) (definite amount of community funds used by husband to improve his separate property only becomes husband’s separate property if wife consents);


\textsuperscript{103} For further discussion comparing Spanish civil law to community property law, see \textit{supra} notes 66-88 and accompanying text.

\textsuperscript{104} \textit{E.g.}, \textit{Gapsch v. Gapsch}, 76 Idaho 44, 277 P.2d 278 (1954).

b. Increase due to labor. To an even greater extent, community property law on expending marital efforts as opposed to marital funds reflects special rules that subordinated the interest of the marital partnership to the interest of the separate estate. Although the labor of the spouses was the hallmark of community property, the early cases involving increases in value denigrated the importance of this labor and refused to classify any of the resulting increase as community. To support these opinions, the courts found that "[t]here is no magic in the touch or manipulation of the husband," who labors on the wife’s separate property. 106 To the contrary, the civil law had long recognized the magic of that touch by finding that any resulting increase in value belonged to the marital partnership. Yet, in the setting of increases in value, the law focused on the significance of separate property, and, in particular, on the constitutional provision that recognized how the reformed common law protected the wife’s separate property. 109 In this setting, the law struck the balance

Ann. 968, 24 So. 637 (1898).

The measure of recovery for the use of community funds reveals a great deal about the state’s concept of the partnership. If a state merely reimburses the community for the use of its funds, the state recognizes no interest in the community in the increase itself. See, e.g., Malone v. Malone, 64 Idaho 252, 130 P.2d 674 (1942) (community estate credited and husband’s estate charged for improvements of his separate property with community funds but not with improvements made voluntarily); Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984) (community property entitled to reimbursement for reasonable value of time and effort of either spouse that contributes to increase in value). For a discussion of the measure of recovery for the use of community funds in connection with separate property, see infra notes 159-66 and accompanying text.

106. This finding did not necessarily mean, however, that the court would award title to the separate property to the non-titled spouse. Rather, the finding authorized the court to recognize the value of the increase in computing the size of the community estate.

107. For a discussion of the development of the law in the area of increases in the value of separate property, see infra notes 127-38 and accompanying text.

108. Lewis v. John, 24 Cal. 98, 104 (1864). See also Hester v. Stine, 46 Wash. 469, 90 P. 694 (1907) (involving income of wife’s separate property and also relying on provision on separate estates of married persons to justify holding that separate estate was not liable for debts of other spouse). One of the few early exceptions to the classifying of increases as separate was Smith v. Smith, 12 Cal. 216 (1859). In that case, however, the court relied on the presumption of community property rather than the significance of the use of community funds to find that the increased value of the husband’s lots was community property. Id. at 224.

109. In discussing this constitutional provision, one court noted:

The manifest object of the framers of the Constitution was to protect the wife, as well during the lifetime of the husband as after his death, should she survive him, against the consequences of his improvidence or misfortune, by securing to her, separate and apart from him, such property as she may hold in her own
on the side of the separate property by classifying property as entirely separate even when marital labor caused it to increase in value.

(1) The early law: no recognition.

The early law developed a number of doctrines that enabled it to avoid recognizing the interest of the partnership in increases of separate property produced by marital labor. For example, community property law developed the doctrine of “ordinary use.”\textsuperscript{110} If the labor of one spouse during the marriage involved only the “ordinary use” of separate property, then any resulting increase or income retained its separate status.\textsuperscript{111} Therefore, if the separate property were a farm and the labor in question were merely farming, any resulting increase in value involved the ordi-

right at the time of marriage, and such as she may afterwards acquire by gift, devise, or descent. The Constitution, therefore, to that end, departs widely from the rules of the common law, and, in effect, provides that the relation of the wife to her property, so far as title, use, and enjoyment are concerned, shall not be prejudiced by the fact of coverture, and that no legal or beneficial interest therein shall thereby pass and vest in the husband.

\textit{Lewis}, 24 Cal. at 102-03. In \textit{Lewis}, the issue was the liability of the wife’s separate estate for the debts of the husband. Although this case involved the income from the wife’s separate property, the court in dicta acknowledged that the increase in value of her property should be treated similarly. \textit{Id.} at 102.

110. The doctrine also applied to the income of separate property: if the income resulted from the ordinary use of the property, the fact that the spouses expended energy or funds on it was irrelevant. \textit{In re Cudworth’s Estate}, 133 Cal. 462, 65 P. 1041 (1901). This untoward result prompted Justice McFarland to concur reluctantly:

[The wife’s] only chance to acquire by marriage any interest in property is to marry a man who has nothing, with the hope that he may afterwards earn something in which she will have a community right. The case at bar is one of peculiar hardship; for here the wife, having a slender income from a little separate property which she owned, allowed the husband to take that income and gets nothing back from it.

\textit{Id.} at ..., 65 P. at 1044.

111. \textit{E.g.}, \textit{In re Estate of Higgins}, 65 Cal. 407, ..., 4 P. 389, 390 (1884). Even though the facts involved a great deal of effort by the husband on his separate property, including the expenditure of community funds, the court found that the property remained separate under either Illinois or California law: “[I]t would seem from the findings that all the accumulations after the marriage were the result of the ordinary use by him of the property which he owned at the time of his marriage with the petitioner.” \textit{Id. See also In re Pepper’s Estate}, 158 Cal. 619, 112 P. 62 (1910) (ordinary use of farm includes labor, warranting classifying all the fruits separate if business is a farm or agricultural enterprise rather than some other kind of business), overruled by \textit{In re Neilson’s Estate}, 57 Cal. 2d 733, 731 P.2d 745, 22 Cal. Rptr. 1 (1962); \textit{In re Graiss’ Estate}, 142 Cal. 1, 75 P. 324 (1904) (management of business involved only its ordinary use). \textit{In re Neilson’s Estate}, 57 Cal. 2d 733, ..., 371 P.2d 745, 749, 22 Cal. Rptr. 1, 4 (1962), overruled \textit{Pepper} insofar as it held that the court need not apportion when it finds the apportionment impossible. The \textit{Neilson} court called into question the \textit{Pepper} court’s distinction between kinds of businesses. \textit{But see In re Marriage of Lopez}, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (nature of law practice will usually require finding that its increase in value belongs to community). \textit{Neilson} did not directly question the ordinary use distinction. \textit{See also Lake v. Lake}, 18 Nev. 361, ..., 4 P. 711, 729 (1884) (income of toll road and bridge, hotel, and ranch derived from its ordinary use).
nary use of the farm and was therefore separate property.\textsuperscript{112}

The operations of this rule could be harsh. If the income-producing spouse worked entirely on separate property, then the marriage accumulated nothing if the labor involved only the ordinary use of the separate property.\textsuperscript{113} Because this result ignored the fact of marital labor, it conflicted with the civil law, which taught that marital labor belonged to the marriage.\textsuperscript{114} In this setting, however, the law subordinated the concern for the partnership to share the fruits of marital labor in favor of the separate property.\textsuperscript{115}

\textbf{(2) Limited recognition.}

Eventually, community property law came to recognize that at least in some circumstances, the community had an interest in the increase of separate property if marital labor produced that increase. Commentators credit an early Nevada case,\textsuperscript{116} which dealt with rights to income of separate property, with the first recognition that the community estate might be entitled to some interest in the yield of separate property if the labor or skill of the marriage produced it.\textsuperscript{117} After that case, the law paid more attention to the civil law notion that funds or labor of the community belong to the community.

As in the analysis of marital funds on separate property, no particu-

\begin{footnotes}
\item[112] \textit{In re Estate of Higgins}, 65 Cal. 407, 4 P. 389 (1884).
\item[113] See, e.g., \textit{In re Cudworth's Estate}, 133 Cal. 462, 65 P. 1041, 1043 (1901) (husband spent virtually all his time in management of his separate estate).
\item[114] See, e.g., W. De Puniak & M. Vaughn, supra note 34, § 67, at 146 (greater earnings by one spouse immaterial to rights of marital partnership). The fact that the spouse expended the labor during the marriage entitled the partnership to share. \textit{Id.}
\item[115] The law drew similar distinctions about the income of separate property. In general, community property law provided that income acquired during the marriage belonged to the community. When the income came from separate property, however, the law found ways to avoid classifying it as community, even in a state in which the statute classified the income of community property as community property. See, e.g., \textit{Malone v. Malone}, 64 Idaho 252, 130 P.2d 674 (1942) (only net income of separate property deserves classification as community; community therefore not entitled to reimbursement for taxes paid on separate property). Likewise, in \textit{Martsch v. Martsch}, 103 Idaho 142, 645 P.2d 882, 887 (1982), the court distinguished between salaries, which it found to be all community, and the income of separate property, only the net of which it found to be community property.
\item[116] \textit{Lake v. Lake}, 18 Nev. 361, 4 P. 711 (1884).
\item[117] The court in \textit{Lake} classified all the income as separate property of the husband. The court, in a passage significant for recognizing the possibility of apportioning, acknowledged:

And in this or any other case, if profits come mainly from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. \textit{On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community.}

\textit{Id.} at 363, 4 P. at 728 (emphasis added).

For a discussion of this case, see Comment, supra note 49, at 169-71. As the author points out, the analysis in \textit{Lake} relied on analogies to common law principles rather than partnership principles of community property law. \textit{Lake}, 18 Nev. at 361, 4 P. at 728-29.
\end{footnotes}
lar change in view explained the change in result. The opinions simply began to rely on the fact of marital labor on separate property to justify a finding that in some cases, the community had an interest in the increase.\textsuperscript{118} Despite early cases to the contrary, the later cases began to find that when income or increase in value was the product of marital labor, part of the income or increase “was, of course, community property.”\textsuperscript{119}

Like the early cases involving marital funds, these early cases ignoring the significance of marital labor took their toll. In the following section, the article demonstrates the effect of these early cases in the differing treatment of acquisitions of property with marital and separate funds and increases in value of separate property.

\begin{itemize}
\item [(a)] Theories of title: the marital partnership may expect to share only in acquisitions.
\end{itemize}

A state’s theory of title\textsuperscript{120} logically controls whether the court concludes that use of marital funds or labor has acquired property or, in the alternative, has caused it to increase in value. For example, in the hypothetical in the introduction, the wife owned Blackacre as pre-marital property. Assume that by making a down payment, she received title to Blackacre before the marriage. She financed the rest of the purchase price and began making periodic payments on the principal and interest. Although she made several periodic payments before the marriage, she made most of them after the marriage with marital funds.

Depending on the state’s theory of title, a court could reason at divorce that she acquired Blackacre with separate and marital funds or that Blackacre increased in value through the use of marital funds. The wife acquired Blackacre with separate and marital funds if the state follows the source-of-funds theory.\textsuperscript{121} By this theory, the significance of acquiring

\begin{itemize}
\item \textsuperscript{118} In re Neilson’s Estate, 57 Cal. 2d 733, 871 P.2d 745, 22 Cal. Rptr. 1 (1962) (involving income of separate property); Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (involving income of business acquired during marriage and of separate property); Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1974) (involving marital labor in business that was separate property).
\item \textsuperscript{119} Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 491 (1909) (dealing with income of separate property).
\item \textsuperscript{120} For a discussion of theories of title, see, e.g., Krauskopf, The Transmutation and Source of Funds Rules in Division of Marital Property, 50 Mo. L. Rev. 759, 768-72 (1985); Sharp, Equitable Distribution of Property in North Carolina: A Preliminary Analysis, 61 N.C.L. Rev. 247, 254-59 (1983). See also Krauskopf, Marital Property At Marriage Dissolution, 48 Mo. L. Rev. 157 (1978); Note, Dissolution of Marriage—Division of Property Which Has Increased In Value, 42 Mo. L. Rev. 479 (1977); Comment, What’s Yours is Mine and What’s Mine Is Mine: The Classification of the Home Upon Dissolution, 28 UCLA L. Rev. 1365 (1981).
\item \textsuperscript{121} For the treatment of source of funds, see, e.g., Krauskopf, supra note 4; Krauskopf, supra note 120; Sharp, supra note 120; Note, Source of Funds, The Preferred Alternative, 50 Mo. L. Rev. 930 (1985). For cases discussing the source of funds, see, e.g., Painter
property for the purposes of determining separate and community interests is not the passing of title. Rather, what is significant is the source of the funds used to pay for the property. This view, which now dominates, shows a concern for respecting the expectations of the parties. To the extent that the partnership used funds from each estate to pay for the property, each estate has the right to expect to share in that property.

The inception-of-title theory, on the other hand, focuses on the legal act of passing title. In the hypothetical, when title passed to the wife, Blackacre was separate property. A court following this theory would reason that Blackacre was “acquired” with separate funds. Even though marital funds may have reduced the indebtedness on the property, the property retained its separate character regardless of the source of funds used to pay the loan balance. Therefore, reducing the lien on the property by paying the loan balance increases the equity of the separate property and presents the court with the question of how to treat its increase in value.

The source-of-funds and inception-of-title theories, therefore, lead to different analyses of how to treat the net value of Blackacre at divorce. If a state follows the source-of-funds theory, then the facts of the hypothetical should lead a court to conclude that the separate and community estates jointly “acquired” the equity. That determination would cause the


122. As common law states analyze the issue, most choose the source-of-funds approach. See cases cited supra note 121. The inception-of-title approach prevailed among the community property states. Even these states, however, are adopting the analysis of the source of funds. E.g., In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980). See also Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina, 65 N.C.L. Rev. 195, 210-12 & n.92 (1987).

123. For a discussion of the development of the concern for protecting the marital estate’s return on its investment, see infra notes 284-86 and accompanying text.

124. The inception-of-title theory reflects the Spanish law origins of the concept of marital property. Under the Spanish civil system, property retained its status as separate even if community funds paid part of the purchase price. W. DE FUNIAK & M. VAUGHN, supra note 34, § 64, at 130-33. While Spanish law fixed the status of the property as separate, it did recognize that the community should be reimbursed for its contributions. Id. § 64, at 133.

125. Even in states that do not follow the inception-of-title theory, however, some opinions nevertheless treat these facts as raising an issue of increase in value rather than acquisition. See, e.g., Wade v. Wade, 72 N.C. App. 372, 373-80, 325 S.E.2d 260, 267-68 (1985). See also Sharp, supra note 122, at 211-16. More recently, however, the North Carolina Court of Appeals has held that the use of marital and separate funds to acquire property presents an issue of joint acquisition, not increase in value of separate property. Cf. Wade, 72 N.C. App. 372, 325 S.E.2d 260 with Mishler v. Mishler, 90 N.C. App. 72, 367 S.E.2d 385 (1988) (properties acquired before and during marriage classified according to marital and separate interests) and Willis v. Willis, 86 N.C. App. 546, 358 S.E.2d 571 (1987) (property acquired before and during marriage properly categorized as part marital and part separate, not as increased value separate property).
court to classify the equity in this example as partially separate and partially community. The court would also have to decide the proportions of each interest in the property. If a state follows the inception-of-title theory, it should reason that Blackacre is wholly separate. In that case, the use of marital funds or labor has caused an increase in value of separate property. Under the inception-of-title doctrine, the growth in equity represents the increase in value of the separate property. The court again would need to classify that increase as either separate or community, or, as in the case of its acquisition, partially separate and partially community.

Even though the title theory leads to a different approach, it should not necessarily lead to a different result. Whether the court is analyzing the growth in equity of Blackacre as its acquisition or as its increase in value, in either case, the court is deciding how to classify that equity. In either case, the equity grew because of the use of marital funds. Because of notions basic to the civil law, the partners have some interest in the growth in value anytime marital resources cause that growth.

Community property law, however, acknowledges the community's interest in Blackacre because of the expenditure of marital funds or labor much more readily if it concludes that the funds or labor have acquired Blackacre. In the community property states, if the courts reason that marital funds or labor have caused Blackacre, as separate property, to increase in value, then the courts are more reluctant to recognize a partnership interest. The following sections illustrate that distinction.

(b) The kind of effort.

A number of principles relating to marital labor have led community property law to analyze acquisitions with separate and marital resources differently from increases in value of separate property. In analyzing acquisitions, community property law presumes that any property interest arising during the marriage is community property. The law does not analyze the effort that caused the property interest to arise. For example, if during the marriage the employment of one spouse earns unvested pensions and unexercised stock options, the community has an interest in those rights. The issue is the acquisition of these property rights, and community property law readily acknowledges the right of the community. The law does not analyze the effort that caused the property to come into being in deciding whether the community has an interest in it.

Moreover, when the issue is the acquisition of property, community property law recognizes that indirect contributions, such as homemaker contributions, earn rights to property. Using the illustrations above, if the

126. See, e.g., the discussion of unitary- or dual-classification states in Sharp, supra note 122, at 214.
127. See also sources cited infra notes 159-61.
spouse whose company granted the unvested pensions or unexercised stock options were the only spouse generating income, community property would nevertheless recognize the right of the other spouse to share in that property.\(^{130}\) The civil law insisted that the spouse who contributed indirectly to the marriage, as a homemaker or otherwise, was entitled to the acquisitions of the marriage as readily as the income-earner.\(^{131}\)

Community property law treats increase in value of separate property differently from its acquisition with separate and marital resources. When the issue is the increase in value of separate property, community property law recognizes only certain efforts as giving the community an interest in the product. As a result, the law less frequently acknowledges the interest of the community. In the above example, when the employee spouse acquired pension rights, the law recognized the interest of the community without evaluating the effort that produced the rights. Community property law would recognize the interest of the non-employee spouse even if that spouse were not generating any income. When the issue is whether the community is entitled to the increase in value of separate property, however, the opinions closely evaluate the effort that produced the increase in value and grant the community an interest only for certain kinds of efforts.\(^{132}\)

For example, if the property in issue were a separately owned business and the labor were the management of that business, community property law would recognize that only certain kinds of efforts entitle the community to an interest. Case law shows that if the marital efforts consist of overseeing the separate property, the courts in community property states are likely to classify the increase as entirely separate property, even if the management efforts were the cause of the increase in value.\(^{133}\) This result follows even if the management involved extensive efforts by the titled spouse.\(^{134}\) For example, if the husband spent all his time in his

\(^{130}\) E.g., W. De Funiak & M. Vaughn, supra note 34, § 67, at 146. For example, In re marriage of Brown, 15 Cal. 3d 838, 851-52, 544 P. 2d 561, 569-70, 126 Cal. Rptr. 633, 641-42 (1976), the husband’s employer was the source of the pension rights at issue. The court’s review, however, assumed that the wife earned the rights to the property by her contributions to the community, not to the employment.

\(^{131}\) W. De Funiak & M. Vaughn, supra note 34, § 62, at 127.

\(^{132}\) For discussion of the types of efforts required, see infra notes 133-41 and accompanying text.

\(^{133}\) E.g., In re Estate of Ney, 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (1963) (involving questions of income and increase of stock portfolio); In re Cudworth’s Estate, 133 Cal. 462, 65 P. 1041, 1103 (1901) (finding that income from managing separate estate retained separate character); Mifflin v. Mifflin, 97 Idaho 395, 556 P.2d 854, 855 (1976) (implicitly finding that efforts in connection with a rental transaction did not entitle community to share in increased book value resulting from favorable arrangement); Cord v. Cord, 98 Nev. 210, 644 P.2d 1026 (1982) (involving time spent managing separate wealth).

\(^{134}\) Hamlin v. Merlino, 44 Wash. 2d 851, 272 P.2d 125, 130 (1954) (husband spent all of time and effort in grocery business; because a corporation, all increase classified as separate).

One commentator on the early law of Texas in this area suggested that the law should draw distinctions between isolated sales of separate property, the income from which should remain separate, and the business of selling separate property, the income from which
separately owned grocery, the state might nevertheless recognize no interest in the community.

(c) The form of asset and rights to increases.

If the effort in question is working in a business, the community property courts are more willing to recognize that the community has an interest only in certain business forms. For example, if the business is a small corporation or a partnership, then the courts are more likely to classify the increase in value as community property. If, on the other hand, the separate asset is a substantial corporation, then the courts are more likely to classify the increase in value as separate property.

Only occasionally do the opinions acknowledge that the results depend on the kind of effort or the form of business association in which the spouse expends the marital effort. The results of the cases, however, lead inescapably to the conclusion that the kind of effort and the type of business make a difference. The courts simply have been more willing to classify increases in value as community property if the separate property

should inure to the community. Emery, Mutations, 4 Sw. U.L. Rev. 123, 126-27 (1950).

135. E.g., Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (saloon and cigar business).


138. As pointed out infra notes 287-336 and accompanying text, only some common law states have been willing to find that decisionmaking is an effort that might warrant classifying property as marital. The distinction that the community property states draw between small corporations and partnerships on the one hand and large corporations on the other is probably related to the reluctance to acknowledge decisionmaking as a marital effort. The efforts of the spouse in the small corporation or partnership are, in a sense, more physically active. For example, in theory, partnerships have no existence apart from the partners: the business depends on the actions of the partners for every operation. On the other hand, corporations exist independently of the persons who operate them. The efforts of the spouse who works in this corporation, especially in the large corporation, are less “active” than the efforts of the spouse who works in the partnership. The spouse working in the corporation only makes decisions for the corporation, which exists apart from the labor of the spouse. In contrast, the spouse working in the partnership is performing its every function.

139. E.g., Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973) (concluding that California courts have largely confined rate-of-return approach to unincorporated associations).

Commentators have more frequently observed that the form of business makes a difference:

[I]t is clear that, where the separate property in question is real estate or an unincorporated business with which personal services ostensibly belonging to the community have been combined, the rule is that all the income or increase will be considered as community property in the absence of a contemporaneous segregation of the income between the community and the separate estates. On the other hand, where, as in the instant case, the husband at the time of marriage owned all or substantially all of the stock of a corporation, somewhat different principles are applicable.

Emery, supra note 134, at 129 (citations omitted) (emphasis in original).
is a partnership or small corporation. If the separate asset is a substantial corporation or a stock portfolio for which the spouse simply makes managerial decisions, the courts are less likely to classify the increase of the property as community.

On occasion, courts and commentators have criticized the analysis of increases in value because of these artificial distinctions. The efforts of a spouse in a partnership surely entitle the community to the fruits of those efforts just as much as the efforts of a spouse in a corporation. The opinions suggest, however, that courts in community property states are so solicitous of the separate property that they are willing to make any distinctions, even artificial ones, to support holding that the community has no interest in the increase in value of the separate property.

(d) Indirect contributions in acquisitions and increases.

The treatment of indirect contributions also illustrates how differently the courts in community property states analyze acquisitions with separate and marital resources from increases in value. When the courts face the issue of the community’s interest in joint acquisitions, the effect of indirect contributions, such as homemaker contributions, is clear: both spouses are entitled to share in the acquests of the marriage. The analysis of cases involving increases in value of separate property, however, largely ignores homemaker contributions. Instead, the courts require a close “causal” relationship between the efforts of the spouse and the increase in value.

140. For cases in which the courts classify some interest in the partnerships or small corporation as community, see, e.g., In re Marriage of López, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); Swope v. Swope, 112 Idaho 974, 739 P.2d 273 (1987); Salisbury v. Meeker, 152 Wash. 146, 277 P. 376 (1929).


142. See, e.g., In re Neilson’s Estate, 57 Cal. 2d 733, 371 P.2d 745, 748, 22 Cal. Rptr. 1, 4 (1962) (overruling In re Estate of Pepper, 158 Cal. 619, 112 P. 62 (1910)). Justice Traynor, in Neilson, criticized the Pepper decision for drawing what he described as an arbitrary distinction in the setting of classifying the income of separate property. Id.

143. E.g., King, The Challenge of Apportionment, 37 Wash. L. Rev. 483, 485 (1962) (concluding that drawing classification distinctions based on type of separate asset involved is illogical).

144. See, e.g., In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

145. See, e.g., In re Estate of Pepper, 158 Cal. 619; —, 112 P. 62, 63 (1910), overruled by In re Neilson’s Estate, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962). The court in Pepper acknowledged the homemaking functions of the wife, a rare occurrence in the early cases. The court, however, classified the increases and income of the husband’s separate estate as separate. For a discussion of the current recognition of indirect contributions as warranting a classification of increases in marital property, see infra notes 383-89 and accompanying text. For criticism of the lack of attention to homemaker contributions to separate property, see also Cohen, What’s a Wife Worth?, 11 Fam. Advoc. No. 1, 20 (1988).

146. For examples of cases requiring close causal relationships, see, e.g., Weinberg v.
Unless the jurisdiction has expanded its definition of “caused,” the requirement of a close causal relationship means that the courts will not classify increases in value of separate property as community property because of indirect contributions. If the courts require the spouse making the indirect contributions to demonstrate, for example, that homemaker efforts actually caused the rise in value of a separately owned business, the court will not classify the increase in value of the business as community property. The homemaker spouse cannot demonstrate a causal link, at least in the traditional sense, between work in the home and the increase in value.

Weinberg, 67 Cal. 2d 557, —, 432 P.2d 709, 715, 63 Cal. Rptr. 13, 19 (1967), in which Justice Traynor carefully reviewed the efforts of the husband in the marriage, apparently trying to determine if any of those efforts actually caused the increase in value of the separately owned business. See also In re Estate of Ney, 212 Cal. App. 2d 891, —, 28 Cal. Rptr. 442, 446 (1963) (pointing out in denying community any increase in value of husband’s stock portfolio that “it is not the increase during marriage in the value of a husband’s separate property . . . that may become community property, but only that portion of such increase and proceeds as is directly attributable to the husband’s skill and ability” (citing Cozzi v. Cozzi, 81 Cal. App. 2d 229, 183 P.2d 739 (1947))); Simplot v. Simplot, 96 Idaho 239, —, 526 P.2d 844, 849 (1974) (agreeing with findings of trial court that wife failed to demonstrate that efforts of husband had actually caused increase in value of company).

147. Some states, however, require the petitioning spouse to demonstrate the causal relationship while also recognizing indirect contributions as establishing property as marital or community. See infra notes 238-53, 352-57 and accompanying text. The labelling of contributions as “indirect” implicitly acknowledges that no causal link exists, at least in the traditional sense.

148. Certainly, recognizing the value of homemaker services is central to the concept of marital property. Spanish civil law recognized homemaker and other indirect contributions in its concept of the community of acquests and gains. W. de Fonvielle & M. Vaughn, supra note 34, § 67, at 146. The need to recognize homemaker contributions in this country was at the heart of the divorce reform movement of the 60’s and 70’s. In 1963, a Presidential Commission urged that “[d]uring marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment, or death.” REPORT OF THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMAN 47 (1963). See also R. Levy, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 155-66 (1967); Report of the Task Force on Family Law and Policy to the Citizens’ Advisory Council on the Status of Women 1-6 (1968) [hereinafter Report of the Task Force]. Professor Mary Ann Glendon reports early movements for legislative reform in Glendon, MATRIMONIAL PROPERTY: A COMPARATIVE STUDY OF LAW AND SOCIAL CHANGE, 49 Tul. L. Rev. 21, 22 (1974). For a more recent review of the divorce reform movement, see Fineman, IMPLEMENTING EQUALITY: IDEOLOGY, CONTRADICTION AND SOCIAL CHANGE: A STUDY OF RHETORIC AND RESULTS IN THE REGULATION OF THE CONSEQUENCES OF DIVORCE, 1983 Wis. L. Rev. 789.

The reformers insisted that property laws recognize the role of the homemaker in creating the property of the marriage, regardless of how the property was titled. The reformers insisted that homemakers earn property rights in part because they “cause” the property to come into being: they enable the other spouse to earn property in the traditional sense of furnishing the consideration. See, e.g., Price v. Price, 113 A.D.2d 299, —, 496 N.Y.S.2d 455, 460 (App. Div. 1985), aff’d, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986). By the same token, indirect contributions “cause” an increase in separate property. A jurisdiction may not recognize this link, however, if it defines “cause” narrowly.
In short, when the community property states focus on classifying the increase as community or separate, the separate property interests of the common law prevail. The common law’s goal of preserving the integrity of the separate property completely dominates the partnership goals of the civil law. Few cases refer to the concept of partnership in dealing with these issues.\textsuperscript{149} The results and analyses, however, illustrate a certain assumption about the marital partnership: spouses have a right to expect to share in the acquisitions of the marriage made with separate and marital resources. If marital resources produce increases in value of separate property, however, spouses have an interest in this increase only in certain instances. If marital labor produced the increase, only certain kinds of efforts give rise to the community’s interest.

The opinions occasionally acknowledge that failing to recognize the partnership’s interest in increases in value of separate property might encourage a titled spouse to divert marital resources into separate property.\textsuperscript{150} By failing to recognize the partnership’s interest, labor that might otherwise result in community property instead increases the spouse’s separate estate. This rule flaunts the civil law’s presumption that the par-

---

\textsuperscript{149} For example, in Price v. Price, 217 Cal. App. 2d 1, 31 Cal. Rptr. 350 (1963), the apportioning by the court resulted in no award of the increase of the separate business to the community. The court found that even if the community were entitled to the increase, the family expenses consumed the increase. Id. at _, 31 Cal. Rptr. at 354-55. When the wife complained that the husband had not sufficiently proved the family expenses, the court referred to the partnership analogy to justify its holding. The court distinguished the marriage partnership from the business partnership by noting the difference in accounting detail necessary to satisfy the evidentiary requirements in community property issues. Id. at _, 31 Cal. Rptr. at 354.

\textsuperscript{150} E.g., In re Grammis’ Estate, 142 Cal. 1, _, 75 P. 324, 325-26 (1904) (titled husband “is at liberty to devote all that is necessary to the support of the family out of the community funds, and to preserve the separate property, if he so chooses” (citing In re Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901)); Lake v. Bender, 18 Nev. 361, _, 4 P. 711, 725 (1884) (“If the husband . . . spends his time in increasing his separate estate, instead of enriching the community, [the wife’s] remedy is an appeal to his better nature. The law furnishes no aid.”)

The lack of concern for diversion has surfaced in the community property states in cases in which the non-titled spouse seeks an interest in the value of a corporation. For the discussion of apportioning, see infra notes 153-98 and accompanying text.

One apportioning rule measures the interests of the community by considering what a reasonable salary would have been for the labor of the spouse who worked in the separately owned business. E.g., Van Camp v. Van Camp, 53 Cal. App. 17, _, 199 P. 885, 889 (1921) (applying “reasonable salary” means of apportioning value increase). Community property states have used the rule extensively when the separate property was an incorporated business. E.g., Speer v. Quinlan, 96 Idaho 119, _, 525 P.2d 314, 321 (1973) (most used alternative rule, the rate-of-return rule, may be applied to separate businesses that are partnerships rather than corporations). The Van Camp court authorized the use of the salary formula even if the corporate form were a sham for the use of the business as an instrumentality of the titled spouse. 53 Cal. App. at _, 199 P. at 890. Any holding that condones the manipulation of business forms to preserve separate property reflects little concern for the marital partnership. See also Simplot v. Simplot, 96 Idaho 239, _, 526 P.2d 844, 848 (1974) (refusing to disregard corporate form in wife’s efforts to classify retained earnings as community property without evidence that husband was intentionally depriving community of assets).
ties contribute all their efforts for the common good of the partnership.\textsuperscript{151} Nevertheless, the community property law subordinated this concern in deference to the separate property. Not until some of the common law states rethought these issues did the law show a concern for what marital partners have a right to expect from the increases in value of separate property.\textsuperscript{152}

2. Apportioning the increase

The analysis of how to classify increases in value among the community property states appears for the most part in cases before 1970.\textsuperscript{153} Since that time, the analysis in most of the opinions of the community property states has concentrated not on whether the increase in value is community property, but on how to apportion the increase between the community and separate estates.\textsuperscript{154} This section analyzes the apportioning schemes and what they reflect about the states' view of the marital partnership. Like the treatment of how to classify the increase, the apportioning schemes suggest that the partners have no right to expect to share in the increase in value of separate property even if marital funds or labor produce it. In fact, the apportioning schemes, while recognizing that the community is entitled to share, protect the separate estate at the expense of the interests of the marital partnership. This section briefly reviews what factors determine the results in the apportioning cases and concludes that these factors have little relevance to partnership premises.

In deference to the management rights of the husband and to the significance of the use of community funds and labor, the law eventually credited the community with some interest in the increase in value of separate property. From the analysis in the opinions, classifying this increase as at least partially community property had nothing to do with sharing expectations on the part of the partners.\textsuperscript{155} In fact, if the case involved the use of marital labor, community property law credited the community with an interest in the increase in value only for certain kinds of efforts and only for certain property.\textsuperscript{156} Community property law did not always acknowledge the interest of the community in the increase of separate property produced by marital labor. As demonstrated in the fol-

\begin{itemize}
\item 151. W. De Funiak & M. Vaughn, supra note 34, § 71, at 161.
\item 152. For further discussion of the courts’ expanded recognition of notions of sharing, see infra notes 256-390 and accompanying text.
\item 153. For discussion of these cases, see supra notes 94-119 and accompanying text.
\item 154. Texas continues to follow a rule that, in effect, does not recognize the interest of the community in the increase in value. See infra note 178 and accompanying text. Arizona abandoned its “all or none” approach, which recognized the community’s interest only if that interest dominated. Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979). See also Adler, supra note 30.
\item 155. For a discussion of the basis of community property law’s recognition that the community had an interest in an increase in value, see supra notes 101-07, 118-29 and accompanying text.
\item 156. For a discussion of the type of property and labor required for such a finding, see supra notes 133-51 and accompanying text.
\end{itemize}
lowing section, even when the law recognized that the community had some interest, its apportioning methods avoided calling that interest the right to share in the increase in value of separate property.

The topic of apportioning appreciated separate property between the community and separate estates has received a great deal of attention.\textsuperscript{157} When a spouse works in a separately owned business that increases in value during the course of the marriage, the community property states have devised a number of elaborate schemes to calculate how much of that increase belongs to the separate property owner and how much belongs to the community.\textsuperscript{158} The purpose here is to describe only those methods most commonly used and to draw some conclusions on what these methods reveal about the view of the marital partnership among the community property states. The article looks first at methods of apportioning increases in value produced by the use of community funds and then at methods of apportioning increases produced by the labor of the spouses. In both of these contexts, the community property states avoid calling the right of the partners the right to share in the increase.

\textit{a. Community funds.} The courts' treatment of the use of community funds in connection with separate property clearly illustrates an intent to preserve the separate identity of the estates and to avoid recognizing the right to share the increase in value. When the issue is the acquisition of property with community funds, community property law recognizes sharing. When the issue is the increase in value of separate property by community funds, the apportioning methods of the community property states recognize not the right of the partners to share in that increase, but only the right of the community to be reimbursed for the use of its funds.

For example, community property law has freely assumed that spouses in the marital partnership expect to share in property acquired


\textsuperscript{158} For example, as early as 1962, one commentator had already counted ten systems and advocated the creation of another. King, supra note 143, at 485-92, 497-98.
by funds of the marriage. If the husband in a traditional marriage earns income that he uses to purchase certificates of deposit, the wife who has cared for the home and children may expect to share in the property as fully as the husband.\(^{159}\) Similarly, if funds from both the community and separate estates were used to acquire this property, then community property law recognizes the right of each estate to share in the investment.\(^{160}\) In fact, community property states have devised apportioning formulas to allow each estate, separate and community, to realize some return on its investment of marital funds in separate property.\(^{161}\) Because the partners rightfully expect to share, the law does not evaluate the efforts that produced that property. Instead, courts merely classify the property as at least partly community property. Then the courts apportion in ways that recognize the spouses’ legitimate expectations to share in whatever property the partnership produces.

When the issue is the use of funds to increase the value of separate property, however, the apportioning method differs. The community property states then analyze that the community has no right to share in the increase in value—only the right to be reimbursed for the use of its funds. The choice of words is significant. At first, the community property states literally reimbursed the community for the use of community funds to enhance separate property. For example, one court found that a husband’s separate estate should reimburse the community in the amount of $584 when the husband used $584 of community funds to improve his separate real property.\(^{162}\) Later, the measure of the reimbursement

\(^{159}\) E.g., W. de Funia & M. Vaughn, supra note 34, § 67, at 146 (“The right of the spouses to share equally in the acquisitions, earnings and gains of each other was in no way dependent upon any necessity that the acquisitions, earnings and gains of each should be equal.”) See, e.g., In re Marriage of Brown, 15 Cal. 3d 838, 850-52, 544 P.2d 561, 569-70, 126 Cal. Rptr. 633, 641-42 (1976), in which Justice Tobriner justified the classification of nonvested pensions as community property in part on the contributions of the wife. The wife made these contributions not to the employer who granted the pension, but to the community. Id.

\(^{160}\) When the first outlay of funds for property comes from the separate estate and the remainder comes from some mixture of separate and marital funds, the community property states more consistently than the common law states analyze the property as having been acquired by both estates rather than as property owned exclusively by the community. Compare In re Marriage of Marsden, 130 Cal. App. 3d 426, 437-40, 181 Cal. Rptr. 910, 915-17 (1982) (prenuptial appreciation of separate property is credited to separate estate) with Hall v. Hall, 462 A.2d 1179 (Me. 1983) (proportion of increase in value of improvements made during marriage on separate property must be credited to marital estate). The common law states, even while recognizing the doctrine of the source of funds, analyze the issue as an increase in value of separate property. Hall, 462 A.2d at 1181-82. See supra notes 120-26 and accompanying text.


ment changed. Now, by the commonly accepted formula, the court computes the measure of the reimbursement based on the increased value or the expenditure, whichever is greater. Therefore, if the husband used community funds to remodel his hotel and restaurant business, then the community might be entitled to the amount by which the remodeling increased the market value of the property rather than the smaller amount, the outlay for the construction.

Even though the courts have expanded the measure, they continue to analyze the community’s interest in terms of the right of “reimbursement.” Rather than concluding that the partnership should share in the increase, the opinions have simply used the measure of the increase.

163. *E.g., In re Marriage of Frick,* 181 Cal. App. 3d 997, 1019-20, 226 Cal. Rptr. 766, 779 (1986) (reiterating rule but finding no evidence that funds were community); *Hiatt v. Hiatt,* 94 Idaho 367, 1121, 1123 (1971) (finding that husband failed to show that amount of expenditures on garage business was not reflective of increased value). For cases measuring the reimbursement by the increased value, see also, *Provost v. Provost,* 102 Cal. App. 775, 283 P. 842, 845 (1929) (measuring community’s interest by improvements that such community property has affected in separate property); *Suter v. Suter,* 97 Idaho 461, 546 P.2d 1169 (1976) (measuring community’s interest by amount by which use of community funds for irrigation rights increased value of land); *Tilton v. Tilton,* 85 Idaho 245, 376 P.2d 191 (1963) (measuring community interest by value of property increased or amount expended by community funds); *Gapsch v. Gapsch,* 76 Idaho 44, 277 P.2d 278 (1954) (measuring community’s interest by amount single spouse’s property is enhanced by community funds); *Gardner v. Gardner,* 107 Idaho 660, 691 P.2d 1275 (Ct. App. 1984) (distinguishing between full reimbursement measured by greater of two amounts depending on use of community funds); *Sims v. Billington,* 50 La. Ann. 968, 24 So. 637 (1898) (distinguishing between property improvements due to joint labor and expense and ordinary property improvement and appreciation).

164. *E.g., Frick,* 181 Cal. App. 3d at 1020, 226 Cal. Rptr. at 779.


166. Only if the court finds that community funds helped to acquire the property rather than to increase the value of the separate property do the community property states regularly use an analysis that recognizes the right to share in the property. For example, in *Martsch v. Martsch,* 103 Idaho 454, 645 P.2d 882 (1982), the court recognized that the community might be entitled to a certain percentage of the increased value based on the community’s proportionate contribution to the payment of the purchase price of the property. Although the trial court, with the appellate court’s blessing, actually only reimbursed the community for the amount of the contribution, the appellate court recognized, at least in theory, the propriety of the community’s sharing in the increase in the proportion of its contribution. *Id.* at 887: The appellate court, however, still only spoke in terms of reimbursing the community, not in terms of sharing. The occasion was a special kind of increase in value: an increase of the equity of the property by contributions to its acquisition. *See also Gapsch v. Gapsch,* 76 Idaho 44, 277 P.2d 278, 285 (1954) (recognizing proportionate interests when both community and separate funds acquire property and deciding to reimburse separate estate).

When the use of community funds can be analyzed as an issue of acquisition, community property states, like common law states, apply different rules from those applied in issues of increase in value. In addition to the Idaho cases, see, e.g., *In re Marriage of Marsden,* 130 Cal. App. 3d 426, 218 Cal. Rptr. 910, 915-16 (1982) (applying formula to compute proportionate shares of interests of community and separate estates when each estate was involved in paying off purchase price on property). It is significant to note that for the most part, community property states analyze the community’s interest in increases of value.
to compute the amount of the reimbursement. By analyzing the issue in this way, the community property states have, in effect, avoided labelling the increase in value as community property and have avoided acknowledging the right of the partners to share in the increase in value.

b. Community labor. The community property states similarly analyze increases in separate property due to marital labor as opposed to marital funds. When the issue is acquiring the property by marital labor, community property law recognizes that the partners may expect to share in the property. On the other hand, when the issue is the increase in value of separate property by marital labor, the opinions in the community property states do not reflect the right of the community to share in the increase—only the right of the community to be reimbursed for its labor.\textsuperscript{167} In cases involving marital labor, like the cases involving marital funds, the community property states avoid acknowledging the right of the community to share. Instead, both of the common apportioning methods reflect not sharing, but preserving the separate identities of the community and separate estates.

The two most common approaches to apportioning increases in value of separate property due to the labor of the marriage can be traced to two early California cases on the income of separately owned businesses.\textsuperscript{168} Both approaches acknowledge that if one of the spouses expends labor on separate property, the court should review the interests of the community.\textsuperscript{169} If the court finds that the labor entitles the community to an interest in the increase of the separate property, then the court should allocate the respective community and separate interests.

\textbf{(1) The rate-of-return method.}

One approach, labelled the rate-of-return approach,\textsuperscript{170} allocates the interests by awarding to the separate estate a reasonable rate of return on the use of the separate property. The court awards the balance of the increase to the separate property. For example, assume that a husband had started a law practice before marriage.\textsuperscript{171} At the time of marriage, the

---

\textsuperscript{167} For discussion of the alternative methods of allocation, see infra notes 170-98 and accompanying text.

\textsuperscript{168} Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909); Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921).

\textsuperscript{169} Pereira, 156 at \textsuperscript{--}, 103 P. at 491 (increasing separate property and decreasing community property to extent of earnings derived from husband’s energy, character, and business skill); Van Camp, 53 Cal. App. at \textsuperscript{--}, 199 P. at 889 (acknowledging husband’s contributions to seafood company as president and manager).

\textsuperscript{170} E.g., Krauskopf, supra note 4, at 1015.

\textsuperscript{171} For a case with similar facts, see In re Marriage of Lopez, 38 Cal. App. 3d 98, 113 Cal. Rptrt. 58 (1974).
law practice had a value of $100,000. At the time of divorce, the law practice had a value of $300,000. The parties were married for 10 years. At a rate of seven per cent, the rate-of-return approach, recognizing that the capital played some part in the increased value, would allocate $196,740 to the separate estate. The court would allocate the balance to the community estate. A number of cases involving increase in value use this method of allocation.

The other approach, called the compensation method, also depends on a finding that one of the spouses has expended labor in connection with separate property. If the separate property has increased in value and the court determines that the community has an interest in that increase, then the court determines a reasonable compensation for the marital labor. That amount is community property. If the spouse received at least that much remuneration for his or her work in connection with the separate property, then the community has received all it deserves and there is no award to the community. For example, if the husband manages his separately owned automobile dealerships, by this method, any increase in value remains entirely separate if the husband received what the court considers to be an adequate salary from the businesses. If the court finds that the community was inadequately compensated for the spouse's services from the separate business, it compensates the community in that amount. The court classifies as separate property the balance of the amount of the increase over the compensation awarded the community. This method has proved to be popular as well.

172. A common date for figuring the accumulation of marital or community property and its valuation is the date of separation. See, e.g., the North Carolina statute, which provides in part: "For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties." N.C. Gen. Stat. § 50-21 (1987).

Some states choose instead the date of trial for valuation purposes. The California statute provides in part: "For purposes of making this division, the court shall value the assets and liabilities as near as practicable to the time of trial . . . ." Cal. Civ. Code § 4800 (Deering Supp. 1988).

173. See, e.g., Mayhood v. LaRosa, 58 Cal.2d 498, 374 P.2d 805, 24 Cal. Rptr. 837 (1962) (declaring that profits and funds derived after marriage from community assets are community property, and half of community property passed under will of wife); In re Neilson's Estate, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962) (apportioning proceeds between separate and community funds when proceeds directly traceable to separate estate or its enhanced value); In re Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (involving income and amount of interest of separate property as well as community interest in intangibles); Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971) (involving income of separate property as well as its increase); Price v. Price, 217 Cal. App. 2d 1, 31 Cal. Rptr. 350 (1963) (involving income of separate property as well as its increase); Todd v. McCollgan, 89 Cal. App. 2d 599, 201 P.2d 414 (1949) (tax case approving rate-of-return approach).

174. E.g., Krauskopf, supra note 4, at 1016.


Both methods implicitly acknowledge that efforts during the marriage belong to the marriage and, therefore, that some part of the increase attributable to those efforts belongs to the community.\textsuperscript{179} In applying these methods, however, courts in the community property states have avoided an analysis that acknowledges that the partners might expect to share in the increase.\textsuperscript{178} Rather, the application of these methods reveals a concern to protect the separate identity of the estates.\textsuperscript{180} This section applies this thesis first in the setting of the rate-of-return method and then in the setting of the compensation method.

The rate-of-return method is potentially more favorable to the community than the compensation method. If there is a sizeable increase in separate property, the rate-of-return method will usually prove to award more money to the community estate than the compensation method. Under the rate-of-return method, after computing a reasonable return on the separate property, all of the balance belongs to the community.\textsuperscript{181} Because the community receives the balance after subtracting a specific sum, this method could grant a sizeable sum to the community.\textsuperscript{182}

Courts use this method, however, not because it recognizes the spouses' right to share, but because it preserves the separate estate. With few exceptions,\textsuperscript{183} the opinions in the community property states have an-

\textsuperscript{174} (analyzed as income case but actually dealing with increase in value represented by retained earnings); Speer v. Quinlan, 96 Idaho 119, 515 P.2d 314 (1973).

\textsuperscript{178} E.g., Speer, 96 Idaho at \textsuperscript{-}, 525 P.2d at 323 (community efforts should be rewarded).

Of course, not all community property states follow either of these two methods. Texas, for example, continues merely to reimburse the marital estate for the value of its labor and does not recognize the community's right to share in the increase. Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984).

\textsuperscript{179} For community property analyses that do reveal some concern for sharing, see infra note 183.

\textsuperscript{180} In one sense, it is not surprising that the focus of the analysis of increase in value has protected the separate estate. Like the analysis of increases in value, see supra notes 93-157 and accompanying text, the analysis of the early apportioning cases relied heavily on common law rather than the property law of the Spanish civil system. In Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909), for example, the court drew heavily on common law treatment of the liability of the wife's estate for the separate debts of her husband. Id. at \textsuperscript{-}, 103 P. at 491 (citing Boggs v. Richards, Adm'r, 39 W. Va. 567, 20 S.E.2d 599 (1943) and Glidden v. Taylor, 16 Ohio St. 509 (1886)). See a discussion of this line of reasoning in Comment, supra note 49, at 172-76.

\textsuperscript{181} E.g., In re Neilson's Estate, 57 Cal. 2d 733, \textsuperscript{-}, 371 P.2d 745, 748, 22 Cal. Rptr. 1, 4 (1962) (citations omitted) (increase of real property warrants computing fair return on separate property and allocating balance to community property).

\textsuperscript{182} Of course, if the increase is less than or equals the rate of return, then the court will not award any sum to the community. See criticism of computing the rate of return first and awarding the balance to the community in Krauskopf, supra note 4, at 1015-16.

\textsuperscript{183} Pereira acknowledged at one point in the opinion that the community should share in the increase: "This share of the earnings [the part attributable to spousal efforts] was, of course, community property." Pereira, 156 Cal. at \textsuperscript{-}, 103 P. at 491. The analysis that the community should share, however, did not resurface among the California cases until Beam v. Bank of America, 6 Cal. 3d 12, 17-18, 490 P.2d 257, 260, 98 Cal. Rptr. 137, 141 (1971) ("community should receive a fair share of the profits" in analyzing increase and
alyzed the interest of the community as the right to be compensated, not as the right to share in the increase in value.\textsuperscript{184} Again, the wording is significant. The opinions suggest that the court must allocate\textsuperscript{185} or apportion\textsuperscript{186} some of the increase to the community, not that the spouses deserve to share through a return on their investment of marital labor.\textsuperscript{187}

The reluctance to acknowledge that the partners may expect to share in the increase has quite an impact. For example, if the increase in value is small, awarding a certain rate of return to the community may completely consume the amount of the increase in value. In that case, the community receives nothing even though community labor produced an increase in value. If the analysis in the community property states assumed that the partnership has a right to expect to share in the increase in value, then the law would require the apportioning method to award some interest to the community.

In some cases, the rate-of-return method does apportion some part of the increase in value to the community. Nevertheless, analysis that avoids recognizing that the partnership has the right to share in the increase, as opposed to the right to be compensated, is still significant. The judicial reluctance to acknowledge the right to share in the increase in value of separate property has thwarted the development of the marital partnership and its philosophy of sharing in the community property states.\textsuperscript{188}

\textbf{(2) The compensation method.}

The use of analysis that perpetuates separateness rather than sharing is even more apparent in the second method, the compensation method. Under this method, the court merely compensates the community for its efforts. The court does not recognize that the community should share in the increase or receive any return for investing in the separate property by expending marital labor.\textsuperscript{189} Rather, if the court decides that the com-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{184} For example, the opinions commonly recognize that the separate estate should receive its share of its investment. The community does not "receive its share of its investment" but merely receives the balance. \textit{E.g., In re Neilson's Estate, 57 Cal. 2d 733, \_\_\_\_\_\_\_\_\_\_\_\_ (1962). In this way, the analysis distinguishes between sharing and merely receiving the balance due as appropriate compensation.}
  \item \textsuperscript{185} \textit{E.g., Neilson, 57 Cal. 2d at \_\_\_\_\_\_\_\_\_\_\_\_ (1963).}
  \item \textsuperscript{186} \textit{E.g., Mayhoo v. Laras, 58 Cal. 2d 498, \_\_\_\_\_\_\_\_\_\_\_\_ (1962); In re Neilson's Estate, 57 Cal. 2d 733, 733, 371 P.2d 745, 745, 22 Cal. Rptr. 1, 1 (1962).}
  \item \textsuperscript{187} For the recognition in common law states that the marriage deserves a return on its investment, see \textit{infra} notes 284-86 and accompanying text.
  \item \textsuperscript{188} For a discussion of the sharing philosophy recognized in the common law states and the impact of that analysis on issues of classification, see \textit{infra} notes 256-390 and accompanying text.
  \item \textsuperscript{189} For an analysis of the return on investment in the setting of marital funds, see
\end{itemize}
\end{footnotesize}
community should receive any portion of the increase, it is only because the court has concluded that the community has been inadequately compensated for its labor.\textsuperscript{190}

By this analysis, even if the husband spends all his efforts working in a corporation that increases in value by several million dollars during the marriage, the wife might not share in that increase. If the court concludes that the husband’s salary adequately compensated him, the community receives no part of the increase.\textsuperscript{191} The courts treat the laboring spouse as any other non-spouse employee to compute a reasonable income, as if the fact of marriage gives the parties no expectations to share in the increase.\textsuperscript{192} When the courts “compensate” the community instead of allowing it to share in the increase in value, the courts ignore the community’s right to share the fruits of marital labor.\textsuperscript{193}

In all of these ways, the apportioning cases focus more on preserving the separate estate than on recognizing a philosophy of sharing.\textsuperscript{194} In the

\textit{infra} notes 284-86 and accompanying text.

\textsuperscript{190} E.g., Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973) (remanded to determine whether husband had received adequate compensation in his work for separate company).

\textsuperscript{191} Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974). One doctrine developed in the community property states underscores that the community’s entitlement is to a reimbursement and not to sharing. Under the compensation method, the courts commonly use the family-expense doctrine, which often has the effect of leaving nothing for the community even if the court concludes that it was inadequately compensated for its labor. See \textit{In re} Nelson’s Estate, 57 Cal. 2d 738, 371 P.2d 745, 22 Cal. Rptr. 1 (1962). The family-expense doctrine originated as a method to deal with a commingled fund of both community and separate assets. \textit{In re} Estate of Cudworth, 133 Cal. 462, 65 P. 1041 (1901). The doctrine provides that upon proof of community expenses, the law should presume that the community portion of the commingled funds paid for the community expenses. Therefore, if any funds remain after paying the expenses, the doctrine helps preserve the balance as separate property.

In the setting of the increase in value of separate property, the courts have also used the family-expense doctrine to protect the separate property. If the court concludes that the community was inadequately compensated for its labor, then it awards the community an amount equal to the difference between adequate compensation and the compensation received. The court, however, allows the separate property owner to reconstruct the family expenses over the life of that compensation period. The court presumes that the expenses would have been paid from income generated by labor on the separate property and other income of the marriage. If the family expenses would have consumed the income that the court determines to be adequate compensation, which is often the case, then the court does not award anything to the community. See, e.g., Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971); \textit{In re} Nelson’s Estate, 57 Cal. 2d 738, 371 P.2d 745, 22 Cal. Rptr. 1 (1962); \textit{In re} Estate of Ney, 212 Cal. App. 891, 28 Cal. Rptr. 442 (1963). This doctrine is but another example of the efforts of community-property states to preserve the separateness of the separate property despite the expenditure of marital labor and energies.


\textsuperscript{193} \textit{Id.} at 323, 526 P.2d at 329-30 (McFadden, J., dissenting).

\textsuperscript{194} Moreover, certain evidentiary rules also serve on occasion to protect the integrity of the separate property when the court must deal with the facts as an issue of increased value. The doctrine of transmutation provides that the parties may change separate property into community property and recognizes the use of the property and oral and written agreements as evidence of the intent to transmute. See, e.g., Krauskopf, supra note 4, at 1002-09. \textit{See also}, e.g., Feldman & Maher, \textit{Classification of Property upon Dissolution of
community property states, if the courts analyze the issue as one involving appreciated separate property, then the partners of the marital partnership may expect the law to protect the integrity of the separate property at the expense of the partnership interest. Instead of allowing the marital partnership to share in the increase in value, the law simply pays the community for its funds or labor.

The results in the community property cases demonstrate that the apportioning formulas find no right in the parties to share in increases in value of separate property produced by marital funds and efforts. In many—if not most—of the cases involving increases in value of separate property, the court does not award any of the increased value to the community. Regardless of which method of apportionment the court

Marriage: Suggestions for Maintaining Our “Dual System” in the Aftermath of Smith, 71 Ill. B.J. 100 (1982); Krauskopf, supra note 120. Some of the cases suggest that it is more difficult to establish the intent to transmute separate property into community property when the facts involve the increase in value of that property rather than its acquisition. E.g., In re Marriage of Denny, 115 Cal. App. 3d 543, 550, 171 Cal. Rptr. 440, 443 (1981) (court refused claim of transmutation even though wife worked in and at times solely managed husband’s separately owned donut shop). For support of the thesis that evidentiary burdens are more stringently applied in the setting of increases in value, see Sherry v. Sherry, 108 Idaho 645, 701 P.2d 265, 270 (Ct. App. 1985) (husband did not carry burden of establishing causal relationship between community efforts and funds and increased value). Cf. the analysis used in the common law states set forth infra notes 255-390 and accompanying text.

195. By analyzing an issue as something other than the increase in value of separate property, courts in community property states may reach a result that protects the community’s interest. For example, a separately owned business may become entirely community property by the doctrine of commingling. E.g., Millington v. Millington, 259 Cal. App. 2d 896, 67 Cal. Rptr. 128 (1968) (sporting goods business entirely community because of commingling of separate and community assets). Likewise, the determination that one spouse made a gift to the community plays a part in the treatment of property that originated as separate property. E.g., Gardner v. Gardner, 107 Idaho 660, 691 P.2d 1275, 1279-80 (Ct. App. 1984) (recognizing that community would receive entire value of improved separate property rather than reimbursement for the use of marital funds if wife could establish husband’s intent to make gift to community). Since this article focuses on the views of partnership that emerge from the treatment of appreciated separate property, it does not consider the many other ways in which a court may find that the community has an interest in property that originated as separate property.

196. E.g., In re Marriage of Denny, 115 Cal. App. 3d 543, 171 Cal. Rptr. 440 (1981) (increase in value of donut shop from some point after marriage to separation insignificant in light of value from marriage to separation); In re Marriage of Camire, 105 Cal. App. 3d 859, 164 Cal. Rptr. 667 (1980) (increase in value of house all separate estate since wife rebutted presumption of community property arising from joint tenancy statute); Beam v. Bank of Am., 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971) (none of income nor increase of cash and securities community property because, under Pereira, rate of return consumes increase; under Van Camp, family expenses consume compensation); Price v. Price, 217 Cal. App. 2d 1, 31 Cal. Rptr. 350 (1963) (increase not community property because seven percent rate of return consumed increase); In re Estate of Ney, 212 Cal. App. 891, 28 Cal. Rptr. 442 (1963) (income and increase of separate estate not causally related to spouse’s time in managing stock acquisitions and sales); Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955) (increase in value of auto dealership not-community property because marriage adequately compensated for husband’s management of auto dealership); Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921) (income of seafood company did not
uses, courts in community property states analyze increases in value of separate property in ways that prevent the marital partnership from sharing in those increases.

II. THE DEVELOPMENT IN THE COMMON LAW STATES: CONFINING AND EXPANDING THE EXPECTATIONS OF SHARING

As the above discussion demonstrates, the analysis of increases in value of separate property trace to community property concepts of Spanish civil law as restricted by separate property notions of the 19th-century common law. This strange hybrid insists on protecting the integrity of separate property at the expense of recognizing the community’s interest in the funds or labor of the marriage. Community property law was so solicitous of separate property that when such property increased in value through the labor or funds of the marriage, the law found ways to avoid recognizing the community’s entitlement to this increase. To avoid recognizing the community’s interest, the law treated acquisitions of property with separate and marital resources differently from increases in value of separate property. While the law recognized a philosophy of sharing in classifying acquisitions of property with separate and marital resources, that philosophy did not characterize the way in which community property law classified or apportioned increases in value of separate

call for unusual skills from manager-husband); Miffin v. Miffin, 97 Idaho 895, 556 P.2d 854 (1976) (increase in value of trailer company not community property because labor adequately compensated); Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974) (retained earnings not income of separate property); Sherry v. Sherry, 108 Idaho 645, 701 P.2d 265 (Ct. App. 1985) (community should be reimbursed for labor if value of community efforts proved); Cord v. Cord, 98 Nev. 210, 644 P.2d 1026 (1982) (increase in separate estate not community property because time and effort on behalf of separate estate was minimal).

197. Because of this article’s focus, it does not discuss how courts decide which method of apportioning to use. The decision is significant. Because the two methods are so different, they can lead to dramatically different results. See, e.g., Krauskopf, supra note 4, at 1013-24. For a comment on choosing a method of apportionment, see supra notes 133-43 and accompanying text. Just as the form of the asset is significant in decisions on how to classify, the form of the asset is probably the most significant factor in a court’s choice of an apportionment method. The rate-of-return method is found most often in conjunction with small corporations, partnerships, and, particularly, service-oriented businesses. E.g., Mayhood v. LaRosa, 58 Cal. 2d 498, 374 P.2d 805, 24 Cal. Rptr. 837 (1962) (separate property consisted of vineyards and orchards); In re Neilson’s Estate, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962) (separate property was grain operation); Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909) (separate property was saloon and cigar business). See also Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314, 321 (1973) (concluding that California courts have largely confined rate-of-return approach to unincorporated associations).

The compensation method, on the other hand, is found most often in conjunction with more substantial corporations. See, e.g., Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955) (increase in value of automobile dealership); Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921) (seafood corporation); Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973) (large corporation). Certainly, there are exceptions to these distinctions. See, e.g., Price v. Price, 217 Cal. App. 2d 1, 31 Cal. Rptr. 350, 353-54 (1963) (computing community interest in husband’s closely held corporation based on seven percent rate of return for separate property).
property.  

For the most part, the common law states reached the issue of how to treat the increase in value of separate property later than the community property states. Moreover, the influence of the community property states is clear in the development of this issue among the common law states. The analyses among the common law states, however, fall into two categories. In the first category are the common law states whose decisions reflect community property law by failing to recognize a philosophy of sharing when evaluating increases in value of separate property. The opinions from these states, however, restrict the community property view still further by incorporating some holdovers of title theory.

In the second category are common law states that have discarded notions of title theory in analyzing increases in value of separate property. In fact, these common law states recognize expanded expectations in the modern marital partnership. In this category are states whose opinions reflect a marital partnership more contemporary than the one that dominates the analysis in the community property states.

The first part of this section demonstrates the community property influence in the common law states as they draw distinctions between the sharing that characterizes issues of acquisition as opposed to issues of the increase in value of separate property. The second part reviews opinions among several common law states that, in effect, recognize that parties may have expectations of sharing in the increases in value of separate property. The second part also demonstrates that the opinions in these common law states differ dramatically from opinions in the community property states: in these opinions, the common law states find that the same philosophy of sharing that characterizes issues of acquisition also characterizes issues of the increases in value of separate property.

A. Confining the Philosophy of Sharing in the Common Law States

1. Classifying the increase: limiting the recognition of marital funds and efforts

The following background shows that the common law states have the same general approach to increases in value of separate property. Like the community property states, many common law states provide that only certain property owned at divorce is divisible. In other words, these common law states have dual-property systems. The common law

---

198. As illustrated in Part I, some of the cases from community property states do classify the increase in value of separate property as community and then apportion the increase between the community and separate estates. As discussed supra notes 155-98 and accompanying text, however, community property states have developed apportioning methods that attempt to avoid acknowledging that the community shares in the increase in value.

199. Compare cases cited supra notes 89-198 with cases cited infra notes 200-408.

200. The article calls states with a common law history "common law states" even though their property division statutes reflect marital property theory—a civil law notion. See supra note 5.
states with dual-property systems have generally recognized the distinction that Spanish civil law drew between increases in value due to natural causes and increases due to the labor or funds of the marriage.\footnote{201} Also, like the community property states, the common law states draw these distinctions regardless of the state's statutory definitions of marital and separate property. Opinions from states that statutorily classify the increase in value of separate property as separate draw the distinction between the manner in which the separate property increases,\footnote{202} as do opinions from states whose statutes are silent on the topic.\footnote{203}

The common law states follow the civil law distinction between natural causes versus marital funds or labor by a variety of theories.\footnote{204} Some

\footnote{201. For discussion of the distinction between natural causes and marital funds, see infra notes 204-10 and accompanying text. Some states, however, now classify all of the increase as marital. For example, in Colorado, the relevant statute defines the increase in value of premarital separate property as “marital property.” Colo. Rev. Stat. § 14-10-113(4) (2007). The Pennsylvania statute defines the increase in separate property acquired during the marriage as “marital property.” 2 Pa. Stat. Ann. tit. 23, § 401 (Purdon Supp. 1988). At least one Pennsylvania court has construed the statute to include the increase in value of premarital property within the definition of marital property. Anthony v. Anthony, 355 Pa. Super. 589, 514 A.2d 91 (1986). Courts in these states will thus no longer need to consider whether the increased value was the result of natural causes or of activities or funds of the marriage. In Colorado, however, a spouse’s contribution to the increase is a factor in how the court divides the marital property. See In re Marriage of Wildin, 39 Colo. App. 189, 563 P.2d 384 (1977).}


\footnote{204. In Brennan, 103 A.D.2d at 479 N.Y.S.2d at 880, the court observed: “Exempting from equitable distribution ‘separate property’ which one of the spouses owned before the marriage or which was later acquired by gift or inheritance is consistent with the statutory rationale; such property cannot be considered to have been the product of the marital enterprise.” Id. The court further observed that excluding general increases in value likewise reflected the new divorce provisions since the marital partnership could not have caused such increases. Id. See also Wegman v. Wegman, 123 A.D.2d 220, 509 N.Y.S.2d 342 (App. Div. 1986) (property acquired by gift or inheritance excluded from marital property), amended on other grounds, 123 A.D.2d 220, 512 N.Y.S.2d 410 (App. Div. 1987). One of the first cases construing New Jersey’s equitable distribution statute foreshadowed this distinction between increases in value in which the parties could have played a part and those in which they could not have played a part. In Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974), the Supreme Court of New Jersey defended its dual-property system and explained that property owned before marriage was not subject to distribution at divorce. Since that case, the Legislature amended the statute to provide that property acquired by gift, devise, or intestate succession during the marriage has a similar immunity, Act of December 31, 1980 ch. 181, 1980 N.J. Laws 819-19, thus limiting Painter’s broad interpretation of “property.” See Landwehr v. Landwehr, 111 N.J. 491, 545 A.2d 738, 741-42 (1988). In a footnote, however, the court explained that if appreciation in value of separate property included “elements of value contributed [either] by the [non-owning] spouse” or by the husband and wife jointly, then that increase might be subject to distribution as marital property. Painter, 65 N.J. at n.4, 320 A.2d at 493 n.4.}
find that the increase of separate property may be marital only if the increase is produced by the joint industry of the spouses.\textsuperscript{206} Others willingly classify as marital property increases of separate property due to “active” appreciation while classifying as separate property increases due to “passive” appreciation.\textsuperscript{208}

Regardless of the theory, the opinions generally draw similar distinctions between the kinds of activities that warrant classifying the increase as marital property and those activities that do not. The use of marital funds gives rise to a finding that the court should classify at least some of the increase as marital.\textsuperscript{207} In addition, increase in value is partly marital when the marriage has expended efforts, such as handling clerical work for the property, cleaning, and making minor repairs;\textsuperscript{208} managing the

\textsuperscript{205} E.g., Williams v. Williams, 428 P.2d 218, 222 (Okla. 1967) (distinguishing between increase in value of property “by reason of changing economic conditions and through these parties’ joint industry,” finding that only increases due to joint industry could be distributed).

\textsuperscript{206} For example, in North Carolina, the court of appeals has found that active increases become marital property and subject to distribution. Passive increases remain separate property. See Beightol v. Beightol, 90 N.C. App. 58, 60-61, 367 S.E.2d 347, 349 (increase in value of rental condominium units titled to husband deemed marital property when wife handled communications with complex manager, wrote checks for mortgage and utilities, and conducted “spring cleaning” of units), review denied, 323 N.C. 171, 373 S.E.2d 104 (1988); McLeod v. McLeod, 74 N.C. App. 144, 148-50, 327 S.E.2d 910, 913-15 (increase in value of stock in closely held corporation that results from active participation of marital community is marital property), review denied, 314 N.C. 331, 333 S.E.2d 488 (1985); Phillips v. Phillips, 73 N.C. App. 65, 73-74, 326 S.E.2d 57, 60-61 (1985) (increase in value of stock of closely held corporation due to active participation deemed marital property); Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 266 (increase in value of husband’s land upon which was situated newly constructed marital home comes from active participation and is marital property), disc. review denied, 313 N.C. 612, 330 S.E.2d 610 (1985). The court in Wade analyzed the facts as if they presented the court with a question of increase in value but concluded that the parties had “acquired” new property. Id. at 380, 325 S.E.2d at 268-69. For this distinction, see also supra notes 125, 160 and accompanying text.

The active-passive distinction apparently traces to a New York opinion. The distinction appeared first as dicta in Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (App. Div. 1983). In extolling all contributions of the marriage, remunerative and non-remunerative, Justice O’Connor, delivering the judgment of the court, insisted that all efforts of the marital partnership that yield fruits belong to the marriage and that partnership theory does not distinguish between efforts using separate or marital property. Id. at __, 468 N.Y.S.2d at 490 (O’Connor, J., with other four justices concurring in result only). In a footnote, Justice O’Connor illustrated the difference in results between property that increases passively, such as bank accounts or securities, and property that increases actively, such as the ownership-interest in a closely held business. Id. at __, n.4, 468 N.Y.S.2d at 490 n.4.

While the North Carolina courts apply “active participation” analysis, the court of appeals has refused to draw a bright line to determine whether increases from passive investments are marital property. McLeod, 74 N.C. App. at 149 n.1, 327 S.E.2d at 914 n.1.


\textsuperscript{208} Beightol, 90 N.C. App. at 60, 367 S.E.2d at 349.
separate business; and making major repairs, alterations, and additions.  

Although the common law states share this general background, they fall into two categories based on how they apply these principles. In the first category are common law states that, like community property states, limit the recognition of marital funds and efforts. In the second are states that expand expectations of sharing in the marital partnership. This section discusses the first category. Like the community property states, some of the common law states recognize that the marital partnership has an interest only in certain kinds of marital labor. As explained above, the community property states are reluctant to recognize labor that consists of decisions about the management of separate property, even though managing property is an effort of the marriage. Moreover, the results of decisions in the community property states show that the courts are more willing to award some interest in the increase in value if the partnership expends that labor on certain kinds of businesses. These results demonstrate that the courts in the community property states are more willing to award the community an interest in partnerships or small corporations rather than in large corporations, even though marital labor on separate property was involved in all cases.

Two examples illustrate the reluctance to recognize certain efforts and certain kinds of property. For example, the expert management of a spouse may increase the value of the stock that the spouse owns as separate property. Likewise, the decision of a spouse to hold a painting in an art collection until the best time to sell involves a marital effort. Like the community property states, however, some of the common law states refuse to recognize these decision-making efforts as labor of the marriage. The reasoning of a New Jersey appellate court explained how the court concluded that these kinds of decision-making efforts do not entitle the partnership to share in the increase in value. According to the court, marketable securities derive their value from factors other than the personal participation of the stock owner. Likewise, a painting in an art collection increases in value by the market for the artist or subject, not because of the efforts of the owner.

211. For a discussion of states that have expanded expectations of sharing in the marital partnership, see infra text accompanying notes 257-74.
212. For discussion of the courts' concern over classifying property derived from management of separate property as community property, see supra note 138 and accompanying text.
213. For discussion of the courts' willingness to view property from a partnership or small corporation as community property, see supra notes 135-38 and accompanying text.
This explanation defines “efforts” in a way that excludes decision-making as marital labor. Marketable securities and art collections may increase in value for reasons other than the usual definition of the “efforts” of the parties. Securities may increase in value, for example, because of the release of a committee report on protectionist trade legislation while an art collection may increase in value because of the equally unpredictable, if perhaps less volatile, change in public sentiment about a particular artist or subject. Nevertheless, the value of the separate property may also involve the expenditure of marital labor in deciding what to do with the property. A restrictive definition of marital labor precludes recognizing that marital labor might have had something to do with the increase.

Consequently, the results in some common law states, like the results in community property states, show that the kind of separate property in issue is the most decisive factor in predicting whether the court will classify the increase in value as separate or marital property. The court is more likely to classify the increase in value as marital property if the separate property happens to be real property216 or stock in a closely held217 or professional corporation218 rather than stock in a publicly held corporation.219 The results depend not on the expectations of the partnership, but the fortuity of the kind of separate property a spouse happens to own.220

These and other points illustrate that, like the courts in the community property states, the courts of some common law states recognize a

---


216. Mol v. Mol, 147 N.J. Super. 5, 370 A.2d 509 (1977) (wife entitled to share increased value of real property to which she or marital unit contributed). Most of the cases in which the Oklahoma appellate courts recognized that the marriage was entitled to share in the increase in value of separate property involved the appreciated value of the marital home. See, e.g., May v. May, 596 P.2d 556 (Okla. 1979); Williams v. Williams, 428 P.2d 218 (Okla. 1967); DuBoise v. DuBoise, 418 P.2d 924 (Okla. 1966); Raines v. Gifford, 370 P.2d 1 (Okla. 1962).


218. Grayer v. Grayer, 147 N.J. Super. 513, 371 A.2d 753, 757 (1977) (recognizing that increased value of professional corporation of lawyers was subject to division and demanding for valuing that asset).


220. For example, the New York appellate courts have recognized the significance of the form of asset in cases involving increases in value of separate property. See Price v. Price, 113 A.D.2d 299, 496 N.Y.S.2d 455, 461 (App. Div. 1985) (“finding of a causal connection between appreciation in a separate property asset and the nontitled spouse’s indirect contributions as a homemaker and parent will depend on . . . . the nature of the separate property”); Price v. Price, 69 N.Y.2d at 503, 503 N.E.2d at 689, 511 N.Y.S.2d at 224 (“Whether assistance of a nontitled spouse, when indirect, can be said to have contributed ‘in part’ to the appreciation of an asset depends primarily upon the nature of the asset . . . .”) It is interesting to note that the appellate division lists the asset last among several considerations while the New York Court of Appeals lists the asset first in a reference to only two considerations. Id.
philosophy of sharing only for the initial acquisition of property, not for the increase in value of separate property. As long as the opinions distinguish between acquisition and increases in value, they reflect a narrow view of the marital partnership. If the partners expect to share in the use of marital funds or labor to acquire property, then logically they expect to share in the use of marital funds or labor to increase the value of separate property. Like the community property states, however, some common law states conclude that parties to the partnership reasonably expect to share depending on whether the funds or efforts have helped acquire property or have helped separate property increase in value.

a. The preference for acquisitions: marital funds. The distinction between cases of acquisition and increases is most apparent in the common law states when the increase in value of separate property is due to the use of marital funds. The same funds may have helped acquire property that has both separate and marital interests or helped the separate property increase in value. When the court determines that the marital funds helped “acquire” property, the court is more likely to conclude that the entire property is marital property or, at least, that the property is mostly marital property. For example, when the titled spouse pays the down payment for Blackacre with separate funds and marital funds help reduce the indebtedness, the court is likely to conclude that Blackacre is mostly, if not entirely, marital. On the other hand, when the titled spouse pays for Blackacre entirely with separate funds and marital funds merely improve Blackacre, the court is more likely to find that none of the increase is marital.

If the spouse took title to Blackacre when it was entirely separate property and marital funds reduced the indebtedness on Blackacre, then the state faces a choice of how to analyze the use of the funds. The state’s theory of title should determine whether the use of the marital funds has helped acquire the property or helped separate property increase in value. If the state follows the source-of-funds analysis, then the use of marital funds to reduce the indebtedness on Blackacre logically repre-

221. For an explanation of how acquisition versus increase in value relates to theories of title, see supra notes 120-26 and accompanying text.

222. See, e.g., Nix v. Nix, 80 N.C. App. 110, 341 S.E.2d 116 (1986) (court treating all property as marital; use of marital funds to pay indebtedness as true-in-value case); Haynes v. Haynes, 197 Okla. 221, 169 P.2d 563 (1946) (husband’s funds used to pay off some indebtedness on wife’s separate property; court decreeing that property was not separate and that husband should have one-fourth interest).


224. See cases cited supra note 222.


226. For a discussion of acquisition versus increase in value analyses in the community property states, see supra notes 120-26 and accompanying text.
sents its acquisition by the separate and marital estates. If the state follows the inception-of-title theory, and if title passed when Blackacre was entirely separate property, then the use of marital funds to reduce indebtedness represents Blackacre’s increase in value.

The courts sometimes ignore the significance of the state’s theory of title when characterizing the issue.\textsuperscript{227} Nevertheless, the results bear out the conclusion that courts are more likely to find that the marital estate has an interest when they conclude that marital funds did not increase the value of separate property, but rather have helped acquire property.

\textit{b. The preference for acquisitions: marital labor.} The treatment of increases in value of separate property resulting from marital labor also illustrates that some common law states, like the community property states, analyze acquisitions differently from increases in value. Marital labor, however, illustrates this distinction in a different way. When the partnership has used marital funds in connection with separate property, the same funds represent either the acquisition of the property or the increase in value of separate property. The answer depends on the state’s theory of title. If the wife received title to Blackacre before the marriage, the use of marital funds to reduce the indebtedness on Blackacre either helps to acquire Blackacre or increases the value of Blackacre as separate property, depending on whether her state follows the source-of-funds or inception-of-title theory.\textsuperscript{228}

When the marital estate contributes labor to separate property, the courts usually do not face a choice of analyses. The labor ordinarily raises the issue only of the increase in value of separate property.\textsuperscript{229} For example, when the wife brings Blackacre to the marriage, one or both of the spouses may work on an addition to the property. This contribution of marital labor usually involves only increasing the value of Blackacre, not acquiring it. The labor would raise the issue of acquiring Blackacre only in the rare instance when the creditor of Blackacre accepted labor as payment of the purchase price or as some other way to reduce the indebtedness on Blackacre.

Nevertheless, like the use of marital funds, the use of marital labor in connection with separate property also provides a contrast between the analyses of acquisitions and of increases in labor. To draw the contrast, the article compares cases involving labor on property that has no separate property interest with cases involving labor on separate property that increases in value as a result.

This contrast reveals two ways in which some common law states confine the expectations of the marital partnership to an even greater de-

\textsuperscript{227} For example, none of the cases cited supra notes 222, 223 recognize the drawing of this distinction. For commentary on the confusion among the opinions, see Sharp, supra note 122, at 216-17 and accompanying text. See also supra note 129.

\textsuperscript{228} For a discussion of acquisition versus increase in value analyses, see supra notes 120-26 and accompanying text.

\textsuperscript{229} Sharp, supra note 122, at 216 n.120.
gree than do the community property states. First, some common law states require that the non-titled spouse furnish the labor that increases the value of the separate property. Second, among the states that make this requirement, some refuse to recognize indirect contributions to satisfy it.

2. Classifying the increase: retreat to title theory

   a. Requiring funds or efforts of the non-titled spouse. The civil law recognized that the partnership expects to share in the acquisitions of the marriage regardless of which spouse’s labor furnished the consideration for those acquisitions. Everything produced by marital labor belonged to the partnership.\textsuperscript{230} Therefore, there was no need to determine which spouse had contributed the funds or labor. Since the law presumed that both spouses labored with the good of the community in mind,\textsuperscript{231} the yield of labor by either of them simply belonged to the marriage.

   Some common law states have honored this principle, however, only when marital funds or labor acquire property and not when marital funds or labor increase the value of separate property. For example, when the issue is the initial acquisition of property, the common law states that have enacted statutes distributing marital property at divorce classify the property as marital even though only one of the spouses contributed the labor that earned the property.\textsuperscript{232} In the setting of acquiring property, the courts have followed the community property states and rightly concluded, for the most part,\textsuperscript{233} that they should classify property as marital property.

\textsuperscript{230} For a discussion of acquisitions and the marital partnership, see supra notes 44-46 and accompanying text.

\textsuperscript{231} For discussion of the presumption that all efforts are expended for the good of the community, see supra note 46 and accompanying text.


\textsuperscript{233} See Day, 281 Ark. at \textemdash, 663 S.W.2d at 721 (court candidly admitting that it had struggled with concept of marital property and had improperly classified certain kinds of property).

Although common law states have adopted the concept of marital property, it is not fully implemented. For example, many equitable distribution statutes list “contribution” as a factor in deciding how to divide the property that the court has classified as marital. For example, an Arkansas statute provides that if an equal division of property is not equitable, the court should consider the “contribution of each party in acquisition, preservation or appreciation of marital property, including services as a homemaker.” Ark. Stat. Ann. § 9-12-315 (Supp. 1987). In this way, the Arkansas statute authorizes the court to consider which spouse labored in conjunction with the property in deciding how to divide the property. Despite the presence of other factors, the cases suggest that the determination of which spouse labored is often the deciding factor in courts’ decisions on how to divide the property. For example, one case in Arkansas, Ford v. Ford, 272 Ark. 506, 616 S.W.2d 3 (1981), involved the dissolution of a marriage in which the wife had spent most of her married life contributing as a homemaker until she began to suffer severe depression. By statute, the trial court divided the entireties’ property equally. Ark. Stat. Ann. § 34-1215 (Cum. Supp. 1985), replaced by Ark. Stat. Ann. § 9-12-317 (1987) (automatically converting estate
without regard to which spouse contributed the labor that provided the consideration. In these decisions, the common law states have applied the civil law notion that the labor of either spouse belongs to the marriage, not to that spouse alone.

In analyzing increases in value, however, some common law states have assumed that there is no expectation of sharing. These states ask which spouse furnished the labor resulting in the increase. Only if the non-titled spouse furnished the labor will the court classify the increase in value as marital and recognize that the marriage may expect to share in it.

For example, in deciding issues of acquisition, the New Jersey appellate courts have recognized that the labor of either party during the marriage belongs to the marriage; therefore, the yield of that labor belongs to the marriage regardless of who performed it. If only one spouse receives a salary or earns wages, the courts should recognize that both spouses expect to share those earnings and what they purchase. In deciding increase-in-value issues, however, the New Jersey appellate courts have required that the non-titled spouse furnish the labor that causes the increase in value. By requiring the non-titled spouse to prove that his or her labor caused the increase in value, the law has subordinated the importance of marital efforts to a concern for the origin of the property. When the property in question originated as separate property, courts have shielded the appreciated separate property from claims of the marital estate. Instead, the New Jersey appellate courts have conditioned

by entirety into one in common). Even in light of Arkansas’ presumption of an equal division, however, the trial court divided the rest of the property in a ratio of 90% to 10% in favor of the husband. Ford, 272 Ark. at . 616 S.W.2d at 8. In lamenting the unequal disposition against the economically weaker party, the dissent noted that equitable distribution may disadvantage the economically weaker spouse, often the wife. Dissenting Judge Purtle commented, “Divorced women cannot stand any more progress if this is progress.” Id. at . 616 S.W.2d at 9 (Purtle, J., dissenting).

Using the contributions of the parties as a factor in distributing the property, however, involves a different question from the question of how to classify the property in the first instance. In deciding how to classify the property, the statutes do not direct the courts to consider who furnished the labor for the property. In fact, such a consideration would conflict with the goal of divorce reform to recognize indirect contributions to the acquisition of property. For a discussion of indirect contributions, see supra note 148 and accompanying text.

234. For example, in Painter v. Painter, 65 N.J. 196, . 320 A.2d 484, 493-94 (1974), the court observed that “property . . . attributable to the expenditure of effort by either spouse . . . clearly qualifies for distribution. Here we have principally in mind the earnings of husband or wife; such assets are certainly comprehended by the statute.” Id.

235. In a footnote in Painter, the court suggested that contributions by the non-titled spouse or by the wife and husband jointly might entitle the marital estate to share in the increased value. 65 N.J. at . n.4, 320 A.2d at 493 n.4. By distinguishing efforts by the non-titled spouse and joint efforts from efforts by the titled spouse alone, the court presaged a finding that efforts of the titled spouse alone that increased the value of the property belong only to the titled spouse.

236. E.g., Wadhlow v. Wadhlow, 200 N.J. Super. 372, 491 A.2d 757 (1985) (affirming that husband, non-titled spouse, was not entitled to share in increase in value of securities account because husband had not produced satisfactory evidence that he had contributed to
the right to the increase in value on proof of efforts by the non-titled spouse. Other jurisdictions have fallen into the same analysis, recognizing the labor of either spouse when the issue is the acquisition of property but not when it is the increase in value of separate property.

This result vividly demonstrates the influence of the common law on the development of this issue. By requiring the non-titled spouse to prove the furnishing of labor, the courts have injected the common law doctrines of title into the community of acquests and gains. By shielding the labor of the titled spouse from claims that the labor belongs to the marriage, the courts have rejected the very basis of the marital partnership. This result reflects not the marital partnership, but title theory.

By recognizing only certain kinds of efforts on certain types of property and by requiring proof of the non-titled spouse's labor, some common law states undercut the marital partnership. The treatment of increases in value of separate property reveals another departure from increase in value); Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1085 (1982) (ordering wife, non-titled spouse, to share in value of mortgage pay-down after finding that she contributed to increase in value). See also Mol v. Mol, 147 N.J. Super. 5, 370 A.2d 509 (1977) (remanded to distinguish growth in value from inflation due to contributions of wife, non-titled spouse); Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434 (1975) (remanded to determine “the extent that [the increase] may be attributable to the expenditures of the effort of plaintiff wife, [the non-titled spouse]”) (citation omitted), certif. denied, 69 N.J. 391, 354 A.2d 319 (1976).

237. For example, the appellate courts of Oklahoma also reflect this holdover of title-theory analysis. In order for the non-titled spouse to share in the increase, that spouse must prove that he or she contributed to the growth in value. Templeton v. Templeton, 656 P.2d 250 (Okla. 1982) (husband did not establish requisite causal link between increase in value of wife's separate property and his efforts); Kirkland v. Kirkland, 488 P.2d 1222 (Okla. 1971) (non-titled wife unable to trace growth in stock to any activity on her part); Longmire v. Longmire, 376 P.2d 273 (Okla. 1962) (if there were any increase in value of leases and other separate property in issue, non-titled husband failed to establish that his efforts caused increase); Wright v. Wright, 577 P.2d 922 (Okla. Ct. App. 1978) (if closely held corporations increased in value during marriage, wife's contribution was insignificant; increase in value of lots and mobile home also belonged only to husband since they increased in value either because of inflation or improvements from other separate property).

These cases establish that the Oklahoma courts require direct contributions to establish the right to marital property if the claim relates to an increase in value of separate property. The Oklahoma courts use a different test for general acquisitions. Cf. Durfee v. Durfee, 465 P.2d 161 (Okla. 1969) (wife's domestic activities could equate to contributions so direct participation in "business world" is not required); Moyers v. Moyers, 372 P.2d 844 (Okla. 1962) (joint efforts and skill provided). See this observation also in Note, Joint Industry, supra note 157, at 214-15.

New York's statute defining separate property requires that the non-titled spouse contribute the effort before the court may classify any increase in value in separate property as marital. The statute provides: "The term separate property shall mean . . . property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse . . . ." N.Y. Dom. Rel. Law § 236 Pt. B(1)(d)(4) (McKinney 1986) (emphasis added). Nevertheless, courts have concluded that classification as marital does not depend on a finding of efforts by the non-titled spouse. See infra notes 345-57 and accompanying text. As pointed out above, the statutes are poor indicators of how the states resolve any of the issues dealing with increases in value.
the civil law and its marital partnership: the minimizing of the significance of homemaker contributions.

b. Ignoring indirect contributions. Spanish civil law and, later, the community property states, recognized homemaker contributions through the common ownership of property. A basic tenet of the partnership of the community property system was that the parties contributed in various ways to the marriage, and property law should equally value those contributions. The divorce-reform movement of the 1960's and 1970's brought this tenet to the common law states through the concept of marital property.

As explained above, some common law states require that the non-titled spouse prove that his or her efforts caused the increase in value as a prerequisite to classifying some of the increase as marital. Among those common law states that require efforts by the non-titled spouse, some states restrict the right still further by refusing to recognize that the non-titled spouse can make these efforts through indirect contributions.

For example, although the New York appellate courts eventually changed their views on this subject, some of the first cases dealing with

238. For an example of the treatment of homemaker contributions, see supra note 159.

239. Id.

240. For example, the New York Legislature clearly intended that homemaker contributions figure into the decision to classify property as marital. The memorandum accompanying the bill that became New York's equitable distribution statute provided:

The basic premise for the marital property and alimony (now maintenance) reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and the ability to pay. From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal, and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case.

MEMORANDUM IN SUPPORT OF LEGISLATION, supra note 9.

In the related question of how to distribute the property classified as marital, the New York statute clearly refers to homemaker contributions:

In determining an equitable disposition of property . . . , the court shall consider:

any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party


241. For discussion of the New York appellate court's views on increases in value and indirect contributions, see infra notes 345-51 and accompanying text.
increases in value of separate property demonstrate the distinction. These courts were willing to recognize the importance of indirect contributions only for initial acquisitions of property, not for increases in value of separate property. Like the courts of other states, the New York appellate courts acknowledged, for the most part, that divorce reform demanded that property laws recognize indirect contributions. Therefore, in general acquisition issues, the trial and appellate court opinions acknowledge that the contributions of the homemaker engaged in non-remunerative work entitle that spouse to the property acquired during the marriage to the same extent as the efforts of the income-producing spouse. Like other states, however, the early reported opinions on this issue distinguished between homemaker contributions for general acquisitions and contributions for increases in value of separate property: the opinions recognized that homemaker contributions warranted recognition only for the acquisition of property, not for the increase in value of separate property.

This distinction yielded anomalous results. If a homemaker freed an income-producing spouse to spend time in a business that was started the day after marriage, the business and its increase in value belonged to the marriage as marital property. Yet, if a homemaker freed an income-producing spouse to spend time in a business that the owner spouse acquired one day before the marriage, any increase in value belonged only to the owner spouse. The contributions valued in one setting received no

242. For an example of one state that has not recognized that indirect contributions entitle the non-titled spouse to an equal share of the estate, see supra note 233.

243. For discussion of indirect contributions, see supra note 148 and accompanying text.

244. For example, see the discussion of the New York Legislature’s views on homemaker contributions, supra note 240.

245. The Oklahoma appellate opinions, for example, ignore homemaker contributions in deciding issues of increases in value of separate property. In several cases, the appellate court acknowledged that the wife contributed as a homemaker but did not analyze her homemaking contributions in determining rights to any increase in value. E.g., May v. May, 596 P.2d 536, 538 (Okla. 1979); Wright v. Wright, 577 P.2d 922, 923 (Okla. Ct. App. 1978). See also Brandenburg v. Brandenburg, 617 S.W.2d 871, 873 (Ky. 1981) (contribution of one spouse as homemaker shall be considered only in fixing marital property to be assigned to that spouse); In re Marriage of Herr, 705 S.W.2d 619, 623 (Mo. 1986) (wife must prove that property’s net worth increased as result of her substantial contributions as homemaker in order to prove enhanced value is result of joint endeavors); Hoffman v. Hoffman, 676 S.W.2d 817, 826 (Mo. 1984) (refusing to recognize homemaker contributions in setting of increases in value).

recognition in another.\textsuperscript{247}

In both of these ways—requiring the non-titled spouse to establish labor in connection with the separate property and refusing to recognize indirect contributions—the common law states acknowledged expectations to share only for the initial acquisition of marital property. The sharing that the law recognized in one setting had made no impact on the law of increases in value of separate property. Both of these failings relate to another distinction between analyses of issues of acquisition and of increases in value: the requirement that labor “cause” the property to come into being.

In the setting of acquiring property, Spanish civil law expanded the definition of how one “causes” property to exist. Since the labor of both spouses belong to the marriage, the civil law decreed that both spouses owned property that the labor of only one of the spouses “caused” in the traditional sense.\textsuperscript{248} In this way, the labor of an unemployed spouse nevertheless helped “cause” the property to come into being. Community property law adopted this approach and reasoned that indirect contributions “cause” property to come into being in a way different from, but just as important as, the way more direct forms of labor cause property to exist.

The common law states followed these ideas in dealing with issues of acquiring property.\textsuperscript{249} These states do not require that a spouse prove that he or she “caused” property to exist as a condition of classifying that property as marital property. In the setting of increases in value of separate property, however, some common law states have applied traditional causation requirements. For example, in some of the states that require proof of efforts by the non-titled spouse, courts have refused to recognize homemaker contributions as entitling the marriage to share in the appreciation of separate property.\textsuperscript{250} These courts have found the correlation


\textsuperscript{248} W. de Funak & M. Vaughn, supra note 34, \S 67, at 146.

\textsuperscript{249} For discussion of how common law states deal with the issue of acquiring property, see supra notes 222-34 and accompanying text.

\textsuperscript{250} At one stage, the trial and appellate courts of New York ignored homemaker contributions in increases in value. See supra note 246 and accompanying text. Part of the explanation for this holding was the concern for establishing a causal relationship between
between caring for the home and children and the increase in the value of the separate property to be too tenuous. Under a traditional definition of “caused,” perhaps caring for the children does not “cause” a separately owned business to increase in value. A premise of marital property law,

the efforts and the increase in value. The trial court in Jolis v. Jolis, 111 Misc. 2d 965, 446 N.Y.S.2d 138, 147 (1981), refused to classify any increase as marital because of its concern for the speculative relationship between indirect contributions and increases in value. The appellate division disagreed in theory and concluded that indirect contributions could warrant classifying the increase as marital. It agreed that in that case, however, the wife, the non-titled spouse, “could not corollate how and in what manner her indirect spousal efforts or services led to the appreciation.” Id. at 147, 470 N.Y.S.2d at 586. See also Sementilli v. Sementilli, 102 A.D.2d 78, 477 N.Y.S.2d 626 (App. Div. 1984) (finding link between efforts and increase so difficult to establish that court classified two items of property as separate property of either spouse in order to avoid issue).

For examples of cases restrictively defining “caused” outside the setting of homemak contributions, see Wadlow v. Wadlow, 200 N.J. Super. 372, 491 A.2d 757 (1985) (husband not entitled to participate in increased value because efforts he made in form of paying some taxes were negligible); Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1035 (1982) (wife should share in increased value because her efforts found to have actually contributed to mortgage reduction). See also Mol v. Mol, 147 N.J. Super. 5, 370 A.2d 509, 511 (1977) (restricting wife’s share to that portion to which she actually contributed); Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434, 436 (1975) (restricting wife’s share to actual contributions). For other examples, see Longmire v. Longmire, 376 P.2d 273 (Cal. 1962) (although non-titled husband actively managed wife’s separate property, husband could not establish success of his efforts); Wright v. Wright, 577 P.2d 922, 924 (Okla. Ct. App. 1978) (denying non-titled wife interest in increase in value of corporation because of her inability to prove efficacy of her work for corporation; court finding instead that she made an effort to play up the amount of work she did for [the business]).

251. It is difficult to reconcile the recognition that homemaker contributions entitle the marriage to share in the increase in value of separate property with the traditional definition of the causation requirement. In tandem, those principles require the trial court to recognize homemaker contributions and to find that those contributions actually helped the asset appreciate. Nevertheless, New Jersey opinions purport to honor both of these principles. See Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434 (1975). For this reason, some New Jersey cases discuss the quality of the non-titled spouse’s homemaking. For example, in Scherzer; 136 N.J. Super. at 397, 346 A.2d at 436, the court said in the course of remanding:

True, the judge found that the marriage was one of turmoil from its inception, but it does not necessarily follow that plaintiff’s supportive role was nonexistent or that she contributed nothing to the enterprise. Even if it should be determined that she was responsible in considerable part for the antagonistic marriage relationship, that factor alone should not bar her from sharing in the marital assets. Even a sparring partner can be said to contribute in some measure to the success of an adversary.

See also Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1035, 1036 (1982) (“[The non-titled spouse] cleaned, cooked, took care of the house and evidently helped make it a pleasant home.”) The Griffith court’s analysis puts the New Jersey courts in the position of trying to assess the petitioning spouse’s homemaking abilities as a prerequisite to classify some of the increased value in the estate as marital. The recognition that homemaker contributions entitle one to an increased value in certain assets accurately reflects some of the goals of marital property law. Combining that recognition with the requirement that those contributions cause a specific asset to appreciate, however, requires the factfinder to draw some probably meaningless distinctions. The factfinder must review facts offered by the parties to a dead marriage and try to distinguish between good and bad contributions to the once-vital relationship.
however, is that traditional definitions had worked inequities. Divorce reform stressed that the homemaker "causes" property to exist when the homemaker frees the income-earning spouse to spend marital energies elsewhere.

Certainly, the courts in common law states in construing property division statutes expand the definitions of some of the terms for some purposes. Nevertheless, the opinions in some common law states reveal the refusal to define "caused" as expansively in the setting of increases in value of separate property as in other settings.

The opinions from these common law states reveal that some courts have recognized that parties expect to share only the acquisitions of the marriage. Like the community property states, these states do not recognize that partners have any expectations to increases in value of separate property. Like the community property states, these common law states refuse to attach significance to all the labor of the marriage, choosing instead to recognize that only certain kinds of effort on certain kinds of property deserve recognition in classifying increases in value as marital property. Also, like the community property states, these states use an analysis that avoids recognizing that the parties may expect to share in increases in value of separate property.

These common law states confine the expectations of the marital partnership even further than the community property states. These states restrict the interests of the marriage in increases in value to increases that the non-titled spouse can trace to his or her labor. In addition, these states refuse to recognize that indirect contributions can satisfy that requirement.

In combination, these features create a dramatic difference between the way these common law states treat acquisitions on the one hand and increases in value of separate property on the other. For example, in classifying a business that one of the parties had begun after the marriage, the court could easily conclude that the business is marital. The fact that only one party spent time in the business would be immaterial to its clas-

252. An infamous case illustrating the inequities of the former system is Wirth v. Wirth, 38 A.D.2d 611, 326 N.Y.S.2d 308 (App. Div. 1971). See also White v. White, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985) (citing Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979) (wife who had worked closely in husband’s business received only her half of entireties property)), in which the North Carolina Supreme Court acknowledged the harshness that title theory had worked on the homemaker. Professor Fineman, however, posits that reform's focus on the traditional housewife and the inequities that she suffered at the hands of title theory resulted in reform legislation that failed to address the circumstances of other victims of divorce. Fineman, supra note 148, at 853-67.

253. For discussion of the importance of a jurisdiction's definition of "causes," see supra note 148 and accompanying text.

254. For example, in the celebrated case of O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), the New York Court of Appeals held that a professional license could be considered marital property. The court cautioned against defining the equitable distribution statute in traditional terms, insisting that the context in which the terms were being interpreted—the divorce reform legislation—required interpretations unfettered by traditional concepts. Id. at 577, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.
sification as marital or separate. If the other spouse had maintained the household, those efforts would underscore the propriety of classifying the business as marital. Moreover, the marital classification would not require the homemaker spouse to prove that he or she "caused" the property to come into existence.

On the other hand, some common law states have placed heavy burdens on the non-titled spouse to establish the marriage's right to increases in value of separate property. The non-titled spouse must establish that the separate property increased by his or her labor. This labor must furnish the consideration for the property in the traditional, restrictive sense of "causing" the property to exist.

B. **Recognizing Expanded Notions of Sharing**

In the previous section, the article explained how some common law states, like the community property states, distinguish between issues of acquiring property and of increasing the value of separate property to find that partners in the marital partnership rightfully expect to share only in the acquisition of property. These states restrict the expectations still further by bringing to the analyses of increases in value of separate property some holdovers of title theory.

Not all common law states, however, show the influence of the restrictive community property view of the marital partnership or of title theory. In this second category are common law states that have more recently analyzed the issue of the increase in value of separate property. Courts in these states recognize that parties to the modern marital partnership have more expectations of each other than the parties to the partnership of the 19th-century civil law. As a result, the courts in these common law states draw fewer distinctions between initial property acquisitions and increases in value of separate property than do the community property states or restrictive common law states. By drawing fewer distinctions between acquisitions and increases in value, they recognize an expanded philosophy of sharing and broaden the concept of the marital partnership.

1. **Treating increases in value like acquisitions: expectations to share**

A synthesis of opinions reveals a central difference between this second category of common law states on the one hand, and the community property states and restrictive common law states on the other. The later common law opinions have recognized that the partners to the marital partnership may have legitimate expectations to share in appreciated separate property. In this way, these common law states have acknowledged that parties to modern marital partnerships have higher expectations of

---

255. For discussion of increases resulting from the labor of either spouse during the marriage, see supra note 234 and accompanying text.
each other than the parties to the earlier partnership of Spanish civil law. This section explores how these states have recognized these higher expectations, suggests what those expectations are, and offers some explanations of why common law states have re-analyzed the marital partnership to conclude that couples’ sharing expectations of each other have increased.

The results of the cases prove that some common law states more readily classify the increase of separate property as marital—especially when the increase is produced by the efforts of the marriage—than do the community property states. Part of the thesis of this article is that in their willingness to recognize the marriage’s right to the appreciation, these states recognize expanded expectations in the marital partnership. Two differences in analyses lead to these conclusions. First, these later common law courts have recognized that general equitable concerns are important in analyzing not only acquisitions, but also increases in value of separate property. Second, these courts have found new equitable concerns in protecting the choice of how to invest marital resources.

a. Recognizing equitable concerns in analyzing increases in value.
The idea that equitable concerns should guide courts in classifying property at divorce is not novel. In both community property and common law states, courts recognize equitable concerns in deciding how to classify property.256 For example, in deciding whether to classify a stock option as separate or community property, a California appellate court referred freely to the “equitable considerations, especially in the family law field,” that enable the judge “to fashion a remedy which achieves a just result.”257 Relying on the community’s right to contractual interests earned while the marriage existed, the court concluded that the community had an interest in a percentage of the stock options that accrued to the em-

---

256. Some states explicitly authorize the courts to use discretionary factors to decide whether to alter the equal division: “The court shall presume that all . . . property [other than acquests] is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering [its list of discretionary factors].” Wis. Stat. Ann. § 767.255 (West 1981). Even without explicit statutory authorization, some courts in equal-division states use the discretionary factors to decide whether to honor the presumption of equal division. E.g., Smith v. Smith, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985). See also Sharp, supra note 122, at 245.

ployee-husband during the marriage. 

Similarly, courts in both community property and common law systems have relied on equitable concerns in deciding to classify unmatured pensions as marital property. One New Jersey appellate court judge, for example, eloquently recanted an earlier position in which the court had refused to classify any part of a pension as marital property. In explaining his change of view, he acknowledged that fairness to the homemaker spouse demanded that the court classify as marital property beneficial interests that arose during the marriage. Likewise, the New York Court of Appeals drew freely from equitable principles in classifying a professional license as marital property. To justify its holding, the court concluded that the legislature intended to classify an interest as marital property whenever the fact of marriage gave one spouse an equitable claim to it. In these settings and others, appellate courts across the country have recognized that in applying the property statutes, courts must focus on the circumstances of the parties not only to distribute property, but also to classify it in the first place. Although some courts purport to confine equitable concerns to distributing rather than classifying property, most conclude that they should classify property in light of the equity that the property legislation sought to achieve.

Although courts from both community property and common law systems have referred to equitable concerns in classifying property, a comparison of cases reveals an important distinction. Courts from both marital systems refer to equitable considerations to guide them in classi-

258. Id. at 794, 201 Cal. Rptr. at 687.
260. Id. at 4, 438 A.2d at 319-20.
262. Id. at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746.
264. See also Memorandum in Support of Legislation, supra note 9, at 94 (“An important aspect of this legislation is the flexibility which is incorporated due to the tremendous variation in marital situations and the equities involved. Flexibility rather than rigidity is essential for the fair disposition of a given case.”)
265. See, e.g., Williams v. Williams, 428 P.2d 218, 222 (Okla. 1967); Moyers v. Moyers, 372 P.2d 844, 846 (Okla. 1962) (both circumscribing role of equity in property division, confining it to determination of how to divide property clearly defined as jointly acquired). See also Bold v. Bold, 374 Pa. Super. 317, 542 A.2d 1374, 1379 (1988) (because spouses have reciprocal duties, courts should limit role of equitable principles in deciding economic issues at divorce to facts clearly involving unjust enrichment of one spouse beyond these mutual duties). See also supra note 257.
fying property when the issue is the acquisition of property.\textsuperscript{266} When the issue is the appreciation of separate property, however, only some of the common law states regularly refer to equitable principles in deciding whether to classify at least a portion of the increase as marital.

While the community property states have referred to equitable concerns in classifying acquisitions, they have not referred to these concerns with any regularity in treating appreciated separate property. Instead, these courts have devised methods of apportioning that view the right of the community as the right to be reimbursed if its funds or labor increase the value of separate property.\textsuperscript{267} Instead of considering whether equitable partnership interests have attached to the separate property or its increase in value, the courts focus on apportioning methods that preserve the separate identities of the separate and community estates.

Some of the common law states, on the other hand, rely on equitable concerns to analyze not only acquisitions, but also appreciated separate property. In their analyses of appreciated separate property, these courts refer generally to the goal of property division to achieve equitable results, a reference unusual only because it appears in analyses of the rights to increases in value of separate property. For example, in one Maryland case, the parties had used marital funds to improve separately owned real property. A Maryland appellate court justified remanding to the trial court to determine the marital and non-marital interests by referring to the “broad remedial purpose” of the state’s property division statute.\textsuperscript{268}

Other common law courts have also relied on general equitable concerns in analyzing the increase in value of separate property. For example, some of these courts look at the circumstances of the parties to determine whether the increase is marital. In one Minnesota case, the wife asked the court to classify as marital the increase in value of a separately owned company that sold fire protection equipment.\textsuperscript{269} The court agreed and treated the retained earnings of the corporation as income.\textsuperscript{270} Because of interpretations of the Minnesota statute, treating the earnings as income enabled the court to classify them as marital property.\textsuperscript{271} To support its conclusion that the marriage deserved to share in the earnings, the court referred to the traditional division of labor in the long, 31-year marriage.\textsuperscript{272} It noted that the 31 years of joint effort by the couple changed the nature of the original non-marital interest.\textsuperscript{273} Similarly, an Ohio appellate court concluded that it should classify the appreciation of

\textsuperscript{266} For discussion of courts’ concerns with equity in classifying property, see supra notes 257-64 and accompanying text.

\textsuperscript{267} For discussion of the reimbursement of community funds used in increasing the value of separate property, see supra notes 160-98 and accompanying text.


\textsuperscript{269} Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987).

\textsuperscript{270} Id. at 195.

\textsuperscript{271} Id. at 193.

\textsuperscript{272} Id. at 195.

\textsuperscript{273} Id.
farm property as marital after reviewing, along with other factors, the significant contribution to the appreciation of the non-marital property made by both spouses.274

As these cases show, some common law states have brought general equitable concerns to bear in analyzing increases in value of separate property. The opinions, however, go further. In addition to these general concerns, some common law courts have identified a central, equitable concern as persuasive in classifying the increase of separate property as marital: the equitable concern to treat the marriage fairly in its choices of how the marriage invests its marital resources.

b. The equitable concern to protect marital choices. In one sense, the concern for protecting the partnership interest in the use of marital resources is commonplace. In fact, the civil law reasoned that marital funds and labor belong to the marriage in part because the marriage should enjoy the results of its decisions about how to spend marital resources. Common law courts, however, have attached new significance to this choice and have brought fresh equitable concerns to the analysis of increases in value of separate property. In the following section, the article illustrates first how common law courts have expanded the specific equitable concern of protecting marital choices on how to use marital funds and marital labor. The article then relates this expanded concern to the increased expectations of the evolving marital partnership.

In a number of ways, courts in some common law states have attached new significance to the concern for the choice implicit in deciding how to use marital funds and efforts. In connection with marital funds, the cases almost uniformly hold that the marital estate deserves some recognition for the use of marital funds on separate property.275 When the parties choose to devote marital funds to improving real property, for example, the marital estate should enjoy some portion of the increased value of the separately owned lot and house.276 Only rarely do the common law courts facing this issue deny the marriage the right to share in the increase in separate property resulting from the use of marital funds.277 The finding that the marriage deserves recognition for the use of

276. Hall, 462 A.2d at 1179.
marital funds, in itself, is not particularly noteworthy. Community property states for some time, under a number of theories, have recognized the community's interest. What is noteworthy, however, is the analysis that the courts in some of these states have used to reach this conclusion. The analysis has, on occasion, offered fresh rationales for the conclusions on the use of marital funds. For example, the courts in some of these common law states have analyzed the choice involved in deciding whether to spend marital resources on marital or separate property. In this analysis, the courts have focused on the opportunity this choice presents for the manipulative spouse to divert resources from the marriage to separate property.

(1) Protecting the marriage from the manipulative spouse.

Some of these common law courts have tried to discourage the manipulative spouse by finding that any increase of separate property attributable to marital funds belongs to the marriage. Early in the analysis of increases in separate property, community property states offered a similar reason for finding that the use of marital funds on separate property gave the community the right to be reimbursed. At one point, community property statutes gave the husband the right to control community property. Some opinions held that these management rights justified a finding that the community receive some interest for the use of community funds. The husband should not be able to use this power to take an "unfair advantage" over the wife. Community property states, however, have since amended their statutes on control of the community property. Without the husband's extraordinary power over the community, these states have found no other cause to be concerned over the opportunity to manipulate funds. Some common law states, in contrast, recognize that even without the right of extraordinary control over property, the marriage still faces the possibility of the manipulative

need only be reimbursed to marital estate). In a case from Ohio, Palmer v. Palmer, 7 Ohio App. 3d 346, 465 N.E.2d 1049 (1982), the court classified the increase in the property as separate, concluding that marital funds were insubstantial in the property appreciation, which was primarily due to inflation.

278. See, e.g., Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984) (discussing theories of reimbursement and community ownership as two approaches to analyzing marital efforts).


280. For discussion of early law granting the husband exclusive management of community property, see supra notes 102-04 and accompanying text.


282. Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967) (husband should have to apportion alimony and child support obligations between separate and community estates).

(2) Recognizing the marriage's right to a return on its investment.

Another rationale for rewarding the marital estate for the use of marital funds on separate property emerges from the opinions in some common law states. According to these opinions, the marital estate deserves a return on its investment. Therefore, if the parties use marital funds to improve a separately owned lot, the marital estate deserves to share in the increase in part because the increase represents a return on the marital estate's investment.

This reasoning distinguishes these common law states from the community property states even though the community property states reach similar results. For example, as a general rule, when the community uses community funds on separate property, the measure of reimbursement is the increase in value of the separate property. In this way, the community estate actually receives a return on its investment. Although the community property states may have reached results that grant the marriage a return on its investment, they have avoided an analysis that forces them to admit it.


This concern for the diversion of assets appears in settings other than the increase in value of separate property. For example, in Gibbons v. Gibbons, 174 N.J. Super. 107, 415 A.2d 1174, 1178-79 (1980), the New Jersey appellate court classified as marital a gift from a third party during the marriage. The court justified the result in part by the possibility that the receipt of the gift might divert funds from the marital estate. That result could follow, as the court assumed it did in this case, if the receipt of the gift freed the receiving spouse from the need to pursue remunerative activities. Since the decision to pursue less remunerative activities might decrease the marital estate, the non-titled spouse had at least an equitable claim to the property received by gift. Nevertheless, the New Jersey Legislature amended the property division statute to make clear that a gift was not marital property. Act of Dec. 31, 1980, ch. 1801, 1980 N.J. Laws 818.

285. E.g., Lawrence v. Lawrence, 75 N.C. App. 592, 595, 331 S.E.2d 186, 188 (marital funds and efforts used to improve separately owned lot), review denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

286. For example, it is common among community property states to find that the proper measure of reimbursement for the use of marital funds on separate property is the increased value of the separate property rather than the amount of the expense. See supra notes 165-66 and accompanying text. The courts typically analyze the right of the marital estate as the right of reimbursement, not the right to participate in the investment. E.g., Suter v. Suter, 97 Idaho 461, 546 P.2d 1169, 1173 (1976).

The opinions from the community property states have developed formulas that recognize the rights of both separate and marital estates to share in the acquisition of property. E.g., In re Marriage of Marsden, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910, 918 (1982). When community property states recognize the right of the marital estate to enjoy a return on its investment, however, they label the issue as one involving the acquisition of property by the marital and separate estates, rather than one involving the increase in value of separate property. Id. In this way these states have avoided finding that the marital estate deserves to participate in the decision to invest in separate funds.
This expanded concern for the choices of the marriage in investing its resources appears in analyses of marital labor as well as marital funds. Like their treatment of marital funds, some common law courts regularly find that if the use of marital labor on separate property increases its value, the marriage deserves an interest in the increase.\(^{237}\) Like the recognition that marital funds belong to the marriage, the recognition that marital labor belongs to the marriage is not particularly noteworthy. What is noteworthy, however, is the way in which common law states have defined marital labor and efforts. Common law states have expanded the notion that marital labor inures to the benefit of the marriage by expanding the concept of "labor" of the marriage. These states have broadened the concept of "labor" of the marriage to include, in certain circumstances, the act of making decisions.

(3) Expanding the definition of marital efforts.

Community property states and the common law states that followed their example narrowly defined "efforts" that would entitle the marriage to the increase in value of separate property. As a result, only certain kinds of efforts on certain kinds of property would cause courts in those states to recognize the marital interest in the increase.\(^{238}\) In the common law states later treating the issue of appreciated separate property, the


\(^{238}\) For discussion of the kinds of efforts and property courts will recognize as part of the community, see supra notes 133-52, 212-20 and accompanying text.
first cases likewise defined marital efforts in what had become the traditional way. The opinions in these states traditionally defined labor to include various physical efforts on behalf of the separate property. The labor most frequently the subject of litigation was activity by a spouse in managing the affairs of a business or professional organization. The analyses among these common law courts that reached this issue later, however, expanded the definition of labor to include decisions or choices themselves. Expanding the concept of marital labor to include decision-making has increased the instances of classifying the increases of separate property as marital.

For example, the decision-making power of one spouse over the use of separate funds has led courts in some common law states to classify part of the resulting increase as marital. In one New York case, the husband left a salaried position with a corporation to manage his securities portfolio. The court found that the marriage deserved to share in the appreciation of his securities because of his power over this separate property.

Other common law courts have also analyzed appreciated separate property in ways that expand the traditional definition of marital efforts to include decisionmaking. The North Carolina Court of Appeals, for example, also defined “efforts” to include decisionmaking and found that the marital estate may share in any increase in separate property that results from those decisions. In one case, the court reviewed a wife’s claim to share in the increase of a closely held corporation that the husband had controlled during the marriage. The husband inherited some shares and increased his proportionate interest when the corporation redeemed all other outstanding shares. When the court remanded to value various marital and separate interests, it offered an example of marital efforts that earned the rights to a portion of the appreciation: the business decision to redeem the stock. Because the husband derived a benefit from this decision, the law should classify the increase as marital. Like the analysis on the use of marital funds, this analysis shows a

---

289. For discussion of marital labor, see supra notes 212-20 and accompanying text.
293. Id. at 190, 486 N.Y.S.2d at 418.
295. Id. at 146, 327 S.E.2d at 912.
296. Id. at 151, 327 S.E.2d at 915. The court actually defined the decision to redeem as an example of “active appreciation.” The North Carolina courts draw the active-passive distinction between natural increases and increases due to the efforts of the parties. Wade v. Wade, 72 N.C. App. 372, 375, 325 S.E.2d 260, 268, disc. review denied, 313 N.C. 612, 330 S.E.2d 616 (1985).
297. McLeod, 74 N.C. App. at 151, 327 S.E.2d at 915. The court explained that the marriage had acquired property by the decision to redeem. By the use of the term “ac-
concern for preventing the manipulative spouse from diverting resources from marital property. 298

Community property states, however, have not been willing to label decisions as efforts of the marriage. To the contrary, community property states developed the ordinary-use doctrine, 299 which finds the increase in value of separate property to be separate if the labor expended on the separate property was no more than what was necessary for the reasonable use of the property. Excluding labor that could be characterized as the reasonable use of the property excludes decisions about the property as a marital effort since decisions surely involve reasonable use of the property. Although the analysis in some opinions in the community property states suggests a retreat from the ordinary-use doctrine, 300 other opinions from the community property states continue to rely upon a version of it. 301

The reception of a 1942 case also illustrates a reluctance among community property states to develop the idea of decisionmaking as a marital effort. In this case a California court suggested that decisionmaking might be labor entitling the community to share in the increase in value. 302 The husband had spent most of his efforts in a 25-year marriage managing his separately owned stocks and bonds. 303 In affirming the decision of the trial court to classify $10,000 as community property, the court noted that the length of the marriage and other circumstances prevented the classification from being unfair to the husband. 304 This opinion, now over 45 years old, has not been influential in expanding the concept of marital efforts. Moreover, that case involved a long marriage and many decisions as the bases for the claim that the community deserved to share in the increase in value of the separate property.

Among common law states, the facts do not have to be as compelling for the courts to find that decisionmaking is a marital effort that may warrant classifying some of the resulting increase as marital property. Some of the cases from common law states have found a single decision 305 required,” the court mixed its analysis of the issue as the increase in value of separate property with analysis as the acquisition of marital property.

298. Id. at 149-50, 327 S.E.2d at 914; Phillips v. Phillips, 73 N.C. App. 68, 74, 326 S.E.2d 57, 61 (1985).
299. For discussion of the development of the ordinary-use doctrine, see supra note 110 and accompanying text.
300. For cases that illustrate a retreat from the ordinary-use doctrine, see supra note 111.
301. E.g., Simplot v. Simplot, 96 Idaho 239, —, 526 P.2d 844, 849 (1974) (no portion of increase in stock in business community in part because labor of husband did not involve special skills); Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984) (community entitled to reimbursement for expenditure of community labor only to extent efforts were extraordinary).
303. Id. at —, 132 P.2d at 603.
304. Id.
or decisions made over a much shorter time period\textsuperscript{306} worthy to be called marital labor.

These examples illustrate that some common law courts in general find that decisionmaking may be an effort of the marriage. Common law courts have applied this general conclusion in the specific setting of decisions about corporate assets and retained earnings may.\textsuperscript{307} In analyzing manipulation of corporate funds and classification of retained earnings, some common law courts find decisionmaking to be a marital effort that entitles the marriage to share in the increase in value of separate property. At times, however, these courts use analysis that couches the issue as something other than the increase in value of separate property. Nevertheless, in reaching a result that classifies some portion of the corporate assets as marital, the courts have concluded that, at times, the exercise of power over separate property should inure to the marriage.\textsuperscript{308}

For example, in one North Carolina appellate case,\textsuperscript{309} the husband and his brother operated a closely held business. The husband inherited some of his shares, and the value of the stock increased during the marriage.\textsuperscript{310} The court remanded the case to compute the extent to which various factors contributed to the appreciation\textsuperscript{311} but found on a related issue that because the husband dominated the corporation, the acquisitions of the corporation became marital property.\textsuperscript{312} In an earlier case, the court had cautioned that when the husband freely shifted corporate funds, the resulting acquisitions were at least partially marital.\textsuperscript{313} In the later case, the court reasoned even more confidently that the power over the separate corporation warranted a finding that the acquisitions with corporate funds were marital.\textsuperscript{314}

Opinions in some community property states also analyze the use of the business by the titled spouse in order to decide how to classify the property in issue. The later opinions from some common law states and the earlier opinion from community property states, however, contrast sharply in their rationale for awarding the marriage an interest in a portion of the business. In the opinions from the common law states, the courts base the decision to classify a portion of the increase in the business as marital on the decision-making power of the titled spouse, usually the husband.\textsuperscript{315} The courts find that the power to make these decisions

\textsuperscript{307} See a discussion of these issues in Krauskep, supra note 4, at 1027-28.
\textsuperscript{308} Not all exercises of power over separate property should inure to the marriage. See the discussion infra notes 402-09 and accompanying text.
\textsuperscript{309} Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).
\textsuperscript{310} Id. at 174, 344 S.E.2d at 110.
\textsuperscript{311} Id. at 176, 344 S.E.2d at 112.
\textsuperscript{312} Id. at 168, 344 S.E.2d at 107.
\textsuperscript{314} Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).
\textsuperscript{315} McLeod v. McLeod, 74 N.C. App. 144, 151, 327 S.E.2d 910, 915 (1985). The Mc-
warrants a holding that will protect the marital estate. The husband need not have treated the business as his alter ego in order for the court to reach its conclusion.\textsuperscript{316} Therefore, the wife need not carry the difficult burden of proving that the court should pierce the corporate veil before the marital estate can participate in the increase in value.

In community property states, on the other hand, the courts have recognized that the community deserves a portion of the value of the business only when the titled spouse, again the husband in these cases, uses the business as his alter ego.\textsuperscript{317} In these cases, the husband has completely disregarded the corporate form so that the court cannot distinguish between business and personal matters. The commingling of business and personal assets leads the courts in these cases to classify the entire business, not just the increase, as community property.\textsuperscript{318}

In the opinions from the common law states, in contrast, the courts have not depended on a finding that the corporate form was a sham. Rather, the husband's power over the business convinced the court that the increase in value was marital property.\textsuperscript{319} In these and other cases, some common law courts have found that the exercise of the power over the funds of the separately owned corporation belongs to the marriage.

Courts have handled a related issue when parties dispute how the court should classify the retained earnings of a separately owned corpora-

---

\textsuperscript{316} For example, there is no discussion in \textit{McLeod} of disregard for the business form. In \textit{Phillips}, there is mention of the corporate "veil." 73 N.C. App. at 74, 326 S.E.2d at 61. In \textit{Lawing}, there is mention of treating business and personal accounts interchangeably. 81 N.C. App. at 166-67, 344 S.E.2d at 106. The opinions, however, did not find that the corporations became the alter egos of the husband.

317. \textit{E.g.}, Millington v. Millington, 259 Cal. App. 2d 896, 67 Cal. Rptr. 128 (Dist. Ct. App. 1968) (conduct of business warranted finding that husband had transmuted separate property into community property); Uranga v. Uranga, 527 S.W.2d 761 (Tex. Civ. App. 1975) (business was husband's alter ego, and entire business was community property); Dillingham v. Dillingham, 434 S.W.2d 459 (Tex. Civ. App. 1968) (increase of corporation should be community property because husband disregarded corporate form, and entire property should be community because husband commingled assets).

For analysis of a case involving a partnership rather than a corporation, see Downs v. Downs, 410 So. 2d 793 (La. Ct. App. 1982) (partner's profits in partnership should be classified as income and therefore community property if partner may withdraw shares freely, for any reason), \textit{review denied}, 414 So. 2d 375 (La. 1982).


Again, only the common law states show a concern for the power of the titled spouse. A Minnesota case illustrates the common law approach. In *Nardini v. Nardini*, the Minnesota Supreme Court treated the retained earnings of a separately owned company as income. Because the court classified income of the marriage as marital, the retained earnings became marital property. The court reasoned that since marital labor produced the earnings, the classification as marital was proper. Although common law courts have not consistently found that retained earnings are marital property, they have used a variety of approaches that makes this finding possible. Either by treating the earnings as increases in value, income, or acquisitions of the marriage, the analyses in some common law courts focus on the significance of marital labor or on control as a reason to recognize the marital interest.

At least one court in a community property state has likewise concluded that the retained earnings of the business, a partnership in that case, were community property. The difference in approaches between this court and the courts in common law states again illustrates less concern by the community property courts to protect the community from the power to make decisions. In the community property case, the Idaho court based its decision to classify the earnings as community property on the form of the business. The appellate courts of Idaho had three times rejected an appeal to classify retained earnings as community property. On this occasion, the supreme court found that the retained earnings of the partnership should be classified as community property. The court justified a conclusion different from the two earlier cases by pointing to the difference in the corporate and partnership forms, suggesting that the

---

320. For a discussion of this topic, see Krauskopf, *supra* note 4, at 1027-28.
321. 414 N.W.2d 184 (Minn. 1987).
322. See *id.* at 195.
323. See *id.* at 193 (referring to commentary in original version of the Uniform Marriage and Divorce Act).
324. *Id.* at 184.
326. E.g., *id.* (under facts of case, no portion of increase was separate property).
327. *Nardini*, 414 N.W.2d 184 (retained earnings were income and therefore marital property).
330. *Id.* at __, 739 P.2d at 280.
corporate form of business at least partially insulated corporate retained earnings from recognizing the marital interest.

An opinion from a common law court, the Supreme Court of Minnesota, in contrast, expressly rejected basing its holding that retained earnings were marital property on the form of the business association.\(^{333}\) Instead, the court reasoned that the use of marital efforts to increase the earnings demanded that the marriage share in these funds.\(^{334}\) As expressed by an appellate court from another common law state,\(^{335}\) the power to control requires that the law recognize that there will be times when the court should classify the retained earnings as marital. Courts in common law states have cited these and other equitable considerations to decide that retained earnings of a separate business will sometimes be marital property.

By expanding the definition of marital “efforts” to include decision-making, the courts in some common law states have expanded the specific equitable concern to protect the marital interest in choices that involve property. Dicta and legislative commentary foreshadowed this expanded concern. In dicta in one North Carolina case, the court of appeals suggested that decisions could be efforts when the parties decided to preserve “passive” investments by spending marital funds.\(^{336}\) When that happened, the marital estate would deserve to share in the appreciation of the separate property even though neither spouse “caused” the increase, at least in the traditional sense. The decision to consume marital property and protect the separate property, however, justified recognizing a marital interest in the increase in value. Commentary to the New York family law legislation similarly recognized that the decision not to consume separate property might, under some circumstances, create marital property if that separate property increased in value.\(^{337}\)

---

333. See Nardini, 414 N.W.2d at 195.
334. Id.
336. Id. at 149 n.1, 327 S.E.2d at 914 n.1. See also In re Marriage of Wildin, 30 Col. App. 189, 191, 563 P.2d 384, 386 (1977), in which the court observed that “conservation of the principal of an estate is, in itself, a valuable contribution which should be considered” in the distribution of assets. Id.
337. N.Y. DOM. REL. LAWS § 236 practice commentary at 221 (McKinney 1986). The commentary provides in pertinent part:

The active/passive management distinction is certainly useful in avoiding the harsh results that would flow from viewing a business that was the economic cornerstone of a long-term marriage as separate property . . . . On the other hand, strict reliance upon an active/passive management distinction has its short-comings as well. For example, assume that one spouse has a valuable interest in government securities at the time of marriage. Assume further that the other spouse is employed and generates such income so as to not require the invasion of the capital and therefore, the securities are periodically “rolled over” with interest being added to the original principal. Under the strict reading . . . those “rollovers” would be property in exchange for separate property. To hold that because the investment was “passive,” indirect spousal contributions of the other spouse as wage earner [are to be unreimbursed upon dissolution of the marriage] would seem unfair.
reporting of decisions like the ones discussed above, some common law courts have made this expansive definition of "efforts" a part of their decisional law on property division statutes.

(4) Discouraging purchases of equivalent marital property.

Some opinions among the common law states reflect the specific equitable concern for protecting choices in another way. The nature of certain separate property has raised the issue of whether its use discourages the marriage from acquiring equivalent marital property. For example, if pre-marital property serves as the marital residence, the choice to reside in this separate property discourages the marriage from acquiring equivalent property. Common law courts have shown an equitable concern for protecting the partners from bearing alone the burden of choices made during the marriage. The concern has convinced several courts in common law states that the appreciation of the separate property that has discouraged the purchase of marital property alternatives should be classified as marital. By this analysis, merely deciding to live in separate property gives the marital estate the right to share in the increase in value of that property. No such concern surfaces among the opinions in community property states.

(5) Recognizing the importance of indirect contributions.

Finally, the specific equitable concern for protecting the marital estate from the consequences of decisions involving separate property appears in the analysis of indirect contributions. Some courts in common

---

Id. 338. In re Marriage of Jenks, 294 Or. 226, 656 P.2d 286 (1982); Anthony v. Anthony, 355 Pa. Super. 589, 514 A.2d 91, 94 (1986). In Jenks, the court did not analyze the case as presenting the issue of the increase in value of separate property. The court found that the entire property became marital because of the joint labor and funds, a special kind of transmutation theory.

In fact, as courts review the use to which the marriage devotes separate property, they frequently find that the use has caused the property to lose its separate character and become entirely marital. The courts then analyze the issue not as appreciated separate property, but as the transmuting of separate property into marital. Anthony v. Anthony, 355 Pa. Super. 589, 514 A.2d 91, 94 (1986). See, e.g., Wanberg v. Wanberg, 664 P.2d 568 (Alaska 1983) (family's use of five-unit building as marital residence, in addition to family's ongoing management of units, warranted classifying entire property as marital); Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986) (husband's use of corporate finances for personal matters justified finding that purchases with funds of separately owned corporation were marital); Roffman v. Roffman, 124 Misc. 2d 636, 476 N.Y.S.2d 713 (N.Y. Sup. 1983) (because separately owned furniture company was primary source of income for family, growth of business became entirely marital); Stevenson v. Stevenson, 680 P.2d 642 (Okla. Ct. App. 1984) (husband's separately owned lot and marital improvements became entirely marital partly because of use as marital residence); In re Marriage of Jenks, 294 Or. 226, 656 P.2d 286 (1982) (separate property became marital because of joint labor and funds); Kendall v. Kendall, 367 S.E.2d 437 (1988) (couple lived together before marriage, during which time husband built home for couple; after marriage, home was transmuted into marital property).
law states consider the choices that are implicit in making indirect efforts and the part these choices play in appreciated separate property. In this way as well, common law states have attached new significance to protecting the property choices of the marriage in analyzing increases of separate property.

Divorce reform recognized that the law should protect the choice implicit in the decision to contribute indirectly rather than directly to the financial health of the marriage.\textsuperscript{339} In fact, recognizing that property statutes should reward the indirect contributions of the homemakers was a major tenet of reform.\textsuperscript{340} While both community property and common law states value indirect contributions in analyzing rights to general property acquisitions, only some of the common law states value indirect contributions in considering interests in appreciated separate property.\textsuperscript{341}

In one sense, the recognition by common law states of indirect contributions only compensates for their inadequacies in the treatment of this issue. Common law states more often than community property states condition the interest of the marriage in increases in value of separate property on proof that the non-titled spouse caused the increase. This prerequisite misapprehends a basic premise of the concept of marital property: that the labor of either spouse during the marriage belongs to the marriage. Which spouse furnished the labor causing the increase

\begin{flushright}
339. For discussion of the courts' reluctance to recognize indirect spousal contributions, see supra note 159 and accompanying text. Some states attempted reform before major statutory change. \textit{E.g.,} Parrott v. Parrott, 278 S.C. 60, 292 S.E.2d 182 (1982) (deciding before enactment of property division statute that wife's foregone career opportunities earned her interest in marital residence titled solely in name of husband).


One reason for this omission is statutory. Some of the common law states statutorily require that the efforts that increase the separate property come from the non-titled spouse as a condition of classifying the increase as marital. \textit{E.g.,} N.Y. DOM. REL. LAW § 236, Pt. B(d)(3) (McKinney 1986). Therefore, states with this requirement consider indirect contributions to determine if these efforts satisfy the statute. Statutes in community property states do not insist that the non-titled spouse provide the efforts causing the increase. Therefore, there is less need to analyze indirect contributions. This statutory difference, however, does not provide the whole picture. If a state valued indirect contributions, then those contributions might entitle the marriage to a portion of the appreciation when the property increased by inflation or other market forces. \textit{See infra} notes 374-80 and accompanying text.
should be immaterial.\textsuperscript{342}

Not all common law states, however, required contributions by the non-titled spouse as a prerequisite to rights in the increase in value of separate property. In some of the states later deciding this issue, the courts concluded that efforts by either spouse entitled the marriage to share in the increase. For example, with no apparent struggle on this issue,\textsuperscript{343} the North Carolina Court of Appeals\textsuperscript{344} observed that the efforts of either spouse entitle the marital estate to share in the increase in value of separate property.\textsuperscript{345}

\begin{itemize}
\item 342. For discussion of the equal treatment of each spouse’s labor, see supra notes 35-46 and accompanying text.
\item 343. The North Carolina statute is as restrictive as any in recognizing the interest of the marriage in increases in value of separate property. The statute provides that the income and the increase in value is separate property, statutorily recognizing no exceptions. N.C. GEN. STAT. § 50-20 (1987). The appellate opinions of North Carolina, however, classify this increase as marital as freely as the opinions in any of the states. This observation underscores how poorly the statutes predict a state’s treatment of this topic.
\item 344. The development of the principles on increase in value in North Carolina has, to date, resided with various panels of the court of appeals. Moreover, in several instances, the Supreme Court of North Carolina has disapproved of the interpretation of the equitable distribution statute by the lower appellate court. E.g., Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 490 (1986) (disapproving presumption of marital property recognized in Loeb v. Loeb, 72 N.C. App. 205, 324 S.E.2d 33 (1985), and other cases). See also Armstrong v. Armstrong, 322 N.C. App. 396, 368 S.E.2d 595 (1988) (disapproving requirement that trial courts make findings of fact to support unequal divisions of property but not equal divisions, a distinction drawn in Loeb and other cases). When the North Carolina Supreme Court treats these issues of increases in value of separate property, different rationales may emerge.
\item 345. In Wade v. Wade, 72 N.C. App. 372, 378, 325 S.E.2d 260, 267 (1985), both spouses contributed to the increase in value. In its analysis, however, the court noted that the marital estate earns a right to the increase whenever “one or both of the spouses” make contributions. Id. at 379, 325 S.E.2d at 268. Likewise, in Phillips v. Phillips, 73 N.C. App. 68, 74, 326 S.E.2d 57, 61 (1985), the court of appeals directed that on retrial, the trial court should determine whether “either or both of the spouses” caused the increase in value of the separate property. The strength of the commitment of the North Carolina case law, however, is in some doubt. In several of the cases in which both spouses made contributions to the separate property, the appellate court focused its analysis on the contributions of the non-titled spouse. Beightol v. Beightol, 90 N.C. App. 58, 60, 367 S.E.2d 347, 349 (1988); Lawrence v. Lawrence, 75 N.C. App. 592, 594, 331 S.E.2d 186, 188, disc. review denied, 314 N.C. 541, 335 S.E.2d 18 (1985). Nevertheless, in no case has the court required a finding of contributions by the non-titled spouse, and the Wade dicta on the sufficiency of efforts of either spouse appears in almost all the subsequent cases.
\end{itemize}

The rationale behind marital property supports dispensing with the need for the non-titled spouse to establish that he or she contributed efforts that increased the value of the separate property. Because all efforts expended during the marriage belong to the marriage, the concept of marital property justifies the conclusion that one spouse has contributed anytime either spouse expends marital efforts. If spouse A’s labor during the marriage earned property, that property would be marital property regardless of how spouse B spent his or her energies. If spouse B in fact was only a financial and emotional drain on the marriage, that fact might be relevant to property distribution but not to classification. Tying the right to property to the spouse who furnished the consideration is a holdover of title theory and is incompatible with the concept of marital property. Therefore, the North Carolina appellate courts appropriately dispensed with the need for efforts by the non-titled spouse as a prerequisite to classifying as marital the increase in value of separate property.
Because some common law states require contributions by the non-titled spouse, however, these states have had a greater need to develop the law of indirect contributions and its relationship to the increase of separate property. To the extent the law required proof of contributions by the non-titled spouse, it was important for these states to recognize that indirect contributions could satisfy this requirement.

For example, in New York, the marital property division statute required that the non-titled spouse cause the increase in value of the separate property as a prerequisite to classifying the increase as marital.\textsuperscript{346} Therefore, it was significant to the marital right to increases in value of separate property for the court to recognize that the non-titled spouse could contribute these efforts indirectly through homemaker and other kinds of contributions.

Dictum in the New York appellate case that created the active-passive distinction foreshadowed recognition that homemaker contributions entitled the marriage to share in increases in value.\textsuperscript{347} This court maintained that all efforts of the marriage deserve recognition and reasoned that if labor did not directly produce property, it produced property indirectly by freeing the other spouse.\textsuperscript{348} Later courts made the same observation in concluding that indirect contributions earned rights to increases in value. These courts reasoned that it was illogical to value homemaking differently depending on whether the income-producing spouse was expending efforts on marital or separate property.\textsuperscript{349} More-

\textsuperscript{346} For the relevant provision in the New York statute, see supra note 251. Even though New York's statute classifies increases in value as marital only for "contributions or efforts of the other spouse," N.Y. Dom. Rel. Law § 236 Pt. B(1)(d)(4) (McKinney 1986) (emphasis added), the New York cases have all but dispensed with the need for a finding of efforts by the non-titled spouse. In Price v. Price, 69 N.Y.S.2d 8, ___ 503 N.E.2d 684, 690, 511 N.Y.S.2d 219, 224 (1986), the New York Court of Appeals held that the increase in value would be separate property only when the efforts of third parties or market forces produced the increase. The positive corollary to this finding is that when the efforts of either spouse produce the increase, the court should appropriately classify the increase as marital. Cases before Price foreshadowed this conclusion. See, e.g., Cappello v. Cappello, 110 A.D.2d 399, 400, 488 N.Y.S.2d 399, 400 (App. Div.) (wife entitled to increase in profit-sharing plan with no discussion of her efforts), aff'd, 66 N.Y.S.2d 107, 485 N.E.2d 983, 495 N.Y.S.2d 318 (1985); Nolan v. Nolan, 107 A.D.2d 190, ___ 486 N.Y.S.2d 415, 419 (App. Div. 1985) (wife entitled to share in increase in husband's securities since he had actively managed them).

\textsuperscript{347} As one New York court noted:

Without this active-passive management distinction, it would not be possible to characterize as marital property the appreciation of a business, owned and operated solely by the one spouse before and during marriage, which happened to be the sole object of the owner-manager's remunerative labors during marriage and the sole pecuniary support of their household.


\textsuperscript{348} \textit{Id.} at ___, 468 N.Y.S.2d at 490. See also the reference to the enabling function of homemaker contributions in Estep v. Estep, 353 Pa. Super. 227, ___, 509 A.2d 419, 422 (1986). See also Krauskopf, supra note 4, at 998.

\textsuperscript{349} In Nolan v. Nolan, 107 A.D.2d 190, 486 N.Y.S.2d 415 (App. Div. 1985); the facts demonstrated the logical fallacy. The titled spouse, the husband, had worked for a corporation during part of the marriage. As the court observed, his income and its acquisitions were
over, the significance of homemaking contributions and the goal of divorce reform to honor these efforts urged these courts to find that indirect contributions satisfied the requirement that the non-titled spouse contribute marital efforts.\textsuperscript{350} For at least these reasons,\textsuperscript{351} the New York Court of Appeals made it clear that the "other" spouse offered "contributions or efforts" through homemaking and other non-remunerative activities.\textsuperscript{352}

Clearly marital property. \textit{Id.} at \textemdash, 486 N.Y.S.2d at 418-19. The wife's homemaking and other contributions during this time warranted that classification. \textit{Id.} at \textemdash, 486 N.Y.S.2d at 419. For another part of the marriage, the husband spent his efforts managing his securities portfolio, which was separate property. \textit{Id.} at \textemdash, 486 N.Y.S.2d at 418. Unless the increases in value of that portfolio were found likewise to be marital property, then the wife's homemaking contributions became valueless to the marriage when the husband directed his efforts towards a different asset. The court's holding, which found that the increased value of the securities was marital property, avoided that position. \textit{See also} Brennan v. Brennan, 103 A.D.2d 48, \textemdash, 479 N.Y.S.2d 877, 880-81 (App. Div.) (if homemaking efforts were significant in connection with some property, they were surely significant for other property), \textit{aff'd}, 124 A.D.2d 410, 507 N.Y.S.2d 507 (App. Div. 1986).

The North Carolina Court of Appeals has likewise reached this conclusion with less judicial wringing of hands than characterized the struggle by the New York reviewing courts and some of the community property states. \textit{See, e.g.,} Beightol v. Beightol, 90 N.C. App. 58, 60, 367 S.E.2d 347, 349 (1988); Lawing v. Lawing, 81 N.C. App. 159, 174-75, 344 S.E.2d 100, 111 (1986) (both referring to indirect contributions).

\textsuperscript{350} \textit{E.g.,} Wood v. Wood, 119 Misc. 1076, \textemdash, 465 N.Y.S.2d 475, 477 (N.Y. Sup. 1983). The \textit{Wood} court noted:

The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition. Thus, the extent to which each of the parties contributes to the marriage is not measurable by only the amount of money contributed to it during the period of its endurance but, rather, by the whole complex of financial and nonfinancial components contributed.

\textit{Id.}


\textsuperscript{351} The court of appeals found another rationale persuasive in holding that contributions and efforts in its statutory exceptions to separate property should include homemaker contributions. The court observed that the legislature intended "marital property" to be broadly construed and "separate property" to be narrowly construed. \textit{Price v. Price}, 69 N.Y.2d 8, 16-17, 503 N.E.2d 684, 687-88, 511 N.Y.S.2d 219, 223-24 (1986). Therefore, the exception from separate property—"appreciation . . . due in part to the contributions or efforts of the other spouse"—deserved to be construed broadly. \textit{Id.} N.Y. Dom. Rel. Law § 236 (McKinney 1986 & Supp. 1988). Construing "contributions or efforts" broadly led naturally to recognizing homemaker efforts.

\textsuperscript{352} \textit{Price}, 69 N.Y.2d at 17-18, 503 N.E.2d at 689, 511 N.Y.S.2d at 224-25. The \textit{Price} court revealed the extent to which it valued non-remunerative contributions in another interesting, if less significant, way. Courts had commonly listed as examples of indirect contributions not only homemaking and child-care efforts, but the non-titled spouse's efforts in entertaining and socializing with business associates of the titled spouse. \textit{E.g.,} Wood v. Wood, 119 Misc. 2d 1076, \textemdash, 465 N.Y.S.2d 475, 476 (N.Y. Sup. 1983). An early and influential commentary on the New York statute had labelled these social efforts examples of indirect contributions. Foster, \textit{Commentary on Equitable Distribution}, 26 N.Y.L. Sch. L. Rev. 1,
By recognizing that the trial courts should honor homemaker contributions in classifying the increase of separate property as marital, these courts have also implicitly accepted an expansive interpretation of how one spouse “causes” the increase in value of separate property. The New York statute defining separate property recognizes an exception only when the increase in value is due to the efforts of the non-titled spouse. In a way that injects a philosophy of sharing into issues of increases in value, the New York Court of Appeals has reasoned that the non-titled spouse has “caused” the increase in value whenever the titled spouse expends time and efforts on the separate asset. Like some of the other appellate courts that bring a sharing philosophy to this issue, the court concluded that only when the efforts of neither spouse result in an increase in value has the non-titled spouse failed to cause an increase.

In sum, these common law states have decided that spouses legitimately expect to share not only in general acquisitions, but also in increases in value of separate property. Through their treatment of these issues, these states have found that since the labor of both spouses belongs to the marriage, it does not matter which spouse has labored in conjunction with the separate property. Since indirect contributions, like those of the homemaker, deserve credit in the setting of acquisitions, they deserve credit in the setting of increases in value of separate property. Since marital property law in general does not strictly require proof of the causal link between efforts and property, the proof is unnecessary as

9 (1981). By the time Price reached the Appellate Division, the court had concluded that these efforts should not be labeled indirect but recognized as examples of direct contributions to the increase in value of separate property. 113 A.D.2d 299, —, 496 N.Y.S.2d 455, 462 (App. Div. 1985) (wife deserved credit for her direct contributions, which court found to be “conferring with customers, entertaining clients and attending conventions and trade shows”), aff’d, 69 N.Y.2d 8, 503 N.E.2d 684; 511 N.Y.S.2d 219 (1986).

353. Not all the common law states protect indirect contributions; however. See, e.g., McNaughton v. McNaughton, 74 Md. App. 490, 538 A.2d 1193 (Ct. Spec. App. 1988) (ignoring wife’s homemaker contributions to increase in value of stock in closely held corporation that increased because of inflation and other economic factors); Hoffman v. Hoffman, 676 S.W.2d 817 (Mo. 1984) (ignoring wife’s homemaker contributions because did not make substantial financial impact).

354. For discussion of causation in increases in value, see supra notes 147-49, 249-54 and accompanying text.

355. For discussion of New York’s marital property statute, see supra note 345.


357. E.g., Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1035 (1982) (wife, through her homemaking contributions, could be entitled to interest in separate property because of mortgage pay-down).

358. The court stated:

As a general rule, however, where the appreciation is not due, in any part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the nontitled spouse has no claim to a share of the appreciation.

Price, 69 N.Y.2d at 18, 503 N.E.2d at 690, 511 N.Y.S.2d at 225.
well in the setting of increases in value.

To date, the recognition of indirect contributions in analyzing increases in value of separate property has not changed how community property states and restrictive common law states treat increases in value of separate property. Since some common law states require proof of contributions by the non-titled spouse as a prerequisite to classifying the property as marital, the recognition of indirect contributions merely compensates for a requirement at odds with the concept of marital property.\(^{359}\)

Moreover, in the cases from common law courts in which the courts have extolled the value of indirect contributions, a more traditional analysis would have achieved the same result. In these cases, the facts have presented both physical and managerial contributions by the titled spouse as well as indirect contributions by the non-titled spouse. Therefore, if the state had not required efforts by the non-titled spouse as a prerequisite, the court could have reached the same result by focusing on the contributions of the titled spouse. For example, in the case in which the New York Court of Appeals confirmed the value of indirect contributions, the husband controlled a separately owned corporation that sold kitchen parts and appliances.\(^{360}\) The husband spent marital efforts in connection with the business, and the wife contributed directly to the business by attending conventions and serving as hostess in various social events. In addition, the wife contributed indirectly as homemaker and mother.\(^{361}\) The court found that the wife had satisfied the statutory requirement for entitlement to increases in value by her direct and indirect contributions and affirmed, classifying a portion of the increase as marital.\(^{362}\) Because the husband had contributed marital efforts, causing an increase in value of the separate property, the court did not need to rely on the indirect contributions except to satisfy New York’s statutory requirement that the non-titled spouse contribute to the increase in value.

For these reasons, the cases from common law states recognizing the value of indirect contributions in analyzing increases in value of separate property are not revolutionary. The cases recognize indirect contributions out of the need to correct misapplications of marital property law. Moreover, these courts recognize the right to increases in value only when, except for the inappropriate requirement of efforts by the non-titled spouse,

\(^{359}\) For discussion of indirect contributions, see supra notes 238-55 and accompanying text.

\(^{360}\) Price, 69 N.Y.2d at 12, 503 N.E.2d at 685, 511 N.Y.S.2d at 220.

\(^{361}\) Id.

\(^{362}\) Id. at 17-18, 503 N.E.2d at 689-90, 511 N.Y.S.2d at 224. The court of appeals did not limit the marital interest to the portion by which the wife had increased the value of the property. Instead, the court labelled all the appreciation that could be traced to the husband’s efforts as marital property. Id. at 18-19, 503 N.E.2d at 690, 511 N.Y.S.2d at 225. The amount of her contribution, the court found, was relevant only to how the trial court distributed the property. Id. See also Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434, 436 (1975) (value of indirect contributions of wife should be measured by value of direct contributions of husband), certif. denied, 69 N.J. 391, 354 A.2d 319 (1976).
traditional analysis would have led to the same result.

Recognizing indirect contributions as the basis of a right to the increase in value of separate property, however, is potentially revolutionary for this issue. For example, assume that the titled spouse owns a securities portfolio that increases without the direct efforts—managerial or otherwise—of either party. The non-titled spouse contributes to the marriage in a number of non-remunerative ways, in particular, caring for the home and children. If indirect contributions earn rights to the increase in separate property, then the wife has basis for claiming an increase in the value of the portfolio. The cases among common law states recognizing the value of indirect contributions in analyzing increases in value of separate property stop short of such a holding.\(^{364}\) Even so, the emphasis on indirect contributions among the courts in some common law states is significant. This emphasis demonstrates the equitable concern among those common law states to protect the choices of the marriage. The emphasis may also foreshadow further expansions of the definition of marital efforts.\(^{366}\)

2. Expanding the expectations of the marital partnership

The above discussion illustrates that the opinions from some common law courts have focused equitable concerns not only on general acquisitions of property, but also on the increases in value of separate property. In analyzing these increases in value, some of the common law courts have tried, in particular, to protect the choices involved in deciding how to expend marital resources. They have expanded the definition of marital efforts and guarded the marital estate from the manipulation of marital resources. In addition, these courts have raised a new concern: the danger that the use of separate property will cause the marriage to forego the acquisition of equivalent marital property. These courts have reintroduced a concern familiar in other settings: protecting a spouse from suffering from the choice to make non-remunerative contributions.

By raising and expanding these concerns, the courts in these common law states have re-analyzed the marital partnership. The partnership that has emerged from the analyses in these cases is one in which the spouses

\(^{363}\) Assume also for the purpose of this discussion that the facts do not present the issue of decisions as efforts that would entitle the marital estate to share in the increase. See infra notes 377-83 and accompanying text.

\(^{364}\) A case coming close to this holding is Beightol v. Beightol, 90 N.C. App. 58, 63, 367 S.E.2d 347, 349 (1988), in which the court of appeals extolled indirect contributions in affirming the trial court’s classification of a portion of the increase in value of a condominium as marital property. The court focused on the efforts of the non-titled spouse and found that even if those efforts were characterized as no more than “those which a caring and loving spouse would have performed in any event,” they nevertheless deserved recognition in the increase in value. Id. Since the efforts of the titled husband and the use of marital funds had also helped improve the property, however, id. at 60, 367 S.E.2d at 349-50, the narrow holding of the case does not rest on the indirect contributions.

\(^{365}\) For discussion of indirect contributions as marital efforts, see infra notes 384-50 and accompanying text.
expect more of each other than the spouses in the partnership of the civil law: the partners expect that each will make choices about property—including choices about separate property—with each other’s welfare in mind.\textsuperscript{366} Therefore, the partners assume that unless some circumstance warrants a different conclusion, they will benefit from the choices that have an impact on property. On the other hand, if the choices are burdensome, the partners assume, unless some circumstance warrants a different conclusion, that neither will bear this burden alone. In the following section, this article illustrates the difference between what community property law recognizes as expectations in the marital partnership and what some common law states see as legitimate expectations. In its comparison, the article explores the potential of the partnership of the common law states to expand the classification of increases in value of separate property as marital.

By adopting the Spanish civil code, community property states accepted at least some limited recognition that marriage is a partnership. They adopted the partnership analogy implicitly by recognizing that the parties to the marriage expect to share in its acquisitions, regardless of which spouse furnished the consideration. The spouses had a right to expect to share in those acquisitions without having to trace remunerative labor to certain items of property. For acquisitions, this partnership recognized that the partners benefit from the choices made during the marriage: however the marriage acquires property, the marriage should benefit from that choice by sharing in the ownership.

When the property originated as separate property, however, the results indicated that community property states thought that the parties did not expect to share in any portion of that property.\textsuperscript{367} The fact of separate title kept these states from considering whether the parties might have legitimate expectations about some part of that property as well. The analysis avoided labelling the community right as the right to share in the increase and, instead, analyzed the community’s interest in a way that preserved the separate identities of the two estates. Therefore, even in a case in which the community property court decided that the husband’s labor had caused an increase in value of his separate property, it might decide to classify all of the increase in value as separate property if it determined that the community had been paid for its services.\textsuperscript{368} The community property court simply did not consider whether the partners

\textsuperscript{366} These observations have sometimes implicitly relied on the marital partnership and, at other times, have explicitly relied on the analogy. For an explicit reference, see Hall v. Hall, 462 A.2d 1, 1179, 1181-82 (Me. 1983) (there should be no diversion of funds in partnership).

\textsuperscript{367} For discussion of various aspects of different community property laws, see supra text accompanying notes 90-197.

\textsuperscript{368} E.g., Beam v. Bank of Am., 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971) (community living expenses paid by husband’s income from separate property should be charged against community income); Speer v. Quinlan, 96 Idaho 119, 525 P.2d 314 (1973) (recognizing significance of husband’s labor and remanding to determine whether husband had been adequately compensated for his labor).
could have any legitimate expectations in the increase. Some common law states, on the other hand, recognize that the partners in a marital partnership expect to share not only in the property acquired during the marriage, but also in the appreciation of separate property. Unlike community property states, these common law states have not avoided analyzing the right of the marriage as the right to share in the increase in value. When the partners use marital funds on separate property, for example, some of these common law states analyze the marital interest not as the right of reimbursement, but as the right to receive a return on the investment of marital resources—in other words, the right to share in the increase. If a husband used marital funds to increase holdings in certificates of deposit, the increase would be marital not because each partner can expect that the law will protect the identity of each estate, but because each partner can expect that, unless circumstances warrant a different conclusion, the law will recognize that spouses expect the choice of how to invest marital resources to inure to the benefit of each partner.

a. Decisions as marital efforts: determining when legitimate expectations attach. As explained above, one way some of the common law states have recognized higher expectations in the marital partnership is by expanding the concept of marital labor. Not only physically active efforts, but the act of decisionmaking as well may justify classifying any resulting increase in value as marital property. The exercise of that power gives the other spouse the right to expect that the decision was made with the best interest of the partnership in mind. Therefore, if the husband decides to use corporate funds to redeem other outstanding stock of a separately owned business and increase his proportionate share, his deci-
sion is a marital effort that has caused separate property to increase in value, which in turn may give the wife the legitimate expectation to share in that increase. Because of the nature of this unique partnership, legitimate expectations may arise when the partnership makes choices.

Determining that choices are marital efforts has caused courts in these common law states to recognize the marital interest in separate property when community property courts might not. The common law courts have found marital efforts in relatively short-term management of a securities portfolio and in the decision to redeem stock. These courts have found that the use of corporate decision-making power may warrant classifying property as an acquisition of the property and, therefore, entirely marital.

Analyzing decisionmaking as a marital effort, however, could expand the marital classification of increases in value of separate property far beyond these situations. Assume, for example, that the husband brings IBM stock to the marriage as separate property. Neither spouse works for IBM. The husband does not actively manage the shares but does decide to retain them. Since the husband has power over the fate of those shares, he has made a decision: to keep them. Would some of the common law courts classify any increase in that stock as marital just because the husband has this power?

By determining that decisions can be marital efforts, some common law courts have recognized in theory that a decision to keep the separate property may justify classifying the increase as marital. Moreover, dicta and legislative commentary support such a holding. As of yet, no case goes as far as the IBM hypothetical. The analysis in these states, however, logically leads to the conclusion that the decision to retain the shares could justify classifying the increase in value as marital. The pertinent question is whether the decision to retain the shares raises legitimate expectations on the part of the non-titled spouse to share in the increase in value. While some common law courts have acknowledged that spouses may have legitimate expectations to share, they have not determined the circumstances that make those expectations legitimate.

---

373. E.g., McLéod v. McLéod, 74 N.C. App. 144, 151, 327 S.E.2d 910, 915 (recognizing that portion of increased value of shares in closely held corporation will be categorized as marital property even though inherited), cert. denied, 314 N.C. 381, 333 S.E.2d 488 (1985).


377. For a North Carolina case and the New York legislative commentary supporting this conclusion, see supra notes 335-36.

378. For discussion of a case that has come close to such a conclusion, see supra note 364.
(1) Express or implied agreements.

Legitimate expectations may attach to increases in separate property through an agreement or through special circumstances. Either an agreement or special circumstances may raise legitimate expectations to share when spouses make choices about property. For example, when the husband brings IBM shares to the marriage as separate property, an express or implied agreement by the spouses may give the wife the right to expect to share in any increase of those shares. A modest family budget might force the choice between (1) consuming marital income for living expenses in order to allow the shares to appreciate; or (2) invading the shares, consuming them instead, and using some portion of the marital income for investments. If the family budget forced a choice about which property to consume—the separate shares or marital property—then that choice gives the wife the right to expect to share in the increase in value of the separate stock.

The task for the trial court in deciding whether legitimate expectations attach would be to determine whether the parties had reached such an agreement. If the spouse seeking to classify the increase as marital, the wife in the IBM example, had the burden of proof, then she would need to persuade the court that the parties had either expressly or implicitly agreed that the marriage would protect the shares. For instance, she could offer conversations about the shares and about other investments to establish an express agreement. To establish an implied agreement, she could offer evidence establishing the sources of marital income and family expenses and demonstrate that the separate shares remained intact only by consuming all the marital income. That evidence might establish an implied agreement to consume marital income in order to preserve the separate property. If, on the other hand, the wife did not know of the existence of the separate shares during the marriage, that fact would indicate that there was no express or implied agreement that gave her the right to expect to share in any of their increase in value. 380

(2) Special circumstances.

The right to expect to share in the increase in value of separate property, however, should not depend solely on finding an express or implied agreement. The courts should be receptive, as some common law courts have been, to circumstances that raise expectations of sharing in the increase in value of separate property. An example that common law courts have begun to develop involves the use of separate property. The use of separate property may, on occasion, give the non-titled spouse the legitimate expectation to share at least in the increase in value of that prop-

379. For a discussion of the significance of the burden of proof in classifying increases, see Krauskopf, supra note 4, at 1021-22.

380. The non-titled spouse might be entitled, based on other theories, to an interest in the separate property even though the spouse did not know of its existence. For the discussion of special circumstances, see infra notes 381-83.
roperty. For example, if the parties use a separately owned house as their marital residence, the court may find that the use gives the non-titled spouse the right to expect to share at least in the increase in value of that property.\textsuperscript{381} Because that use discouraged the non-titled spouse from purchasing equivalent marital property, that spouse’s expectations to share are reasonable.

The courts have also found circumstances giving rise to legitimate expectations of sharing in the use of a separately owned business.\textsuperscript{382} If, for example, a separately owned business were the primary source of income for a long marriage, the non-titled spouse has a right to expect to share in the increase of the business. The non-titled spouse can also legitimately expect to share in the growth of a separately owned business if the controlling spouse exercises freewheeling control over the use of the separate asset.\textsuperscript{383} In all these instances, the use of the separate property is a circumstance that the courts may consider in deciding whether the non-titled spouse may legitimately expect to share in its appreciation.

Analyzing decisions as marital labor gives the non-titled spouse a basis to argue that the court should classify the increase in value of separate property as marital anytime one of the spouses makes a decision about the separate property. The non-titled spouse could resort to traditional analysis if the marriage used other marital labor or marital funds to increase the value of the separate property. If the only marital labor in connection with the separate property were the decision to keep it, analyzing that decision as a marital effort provides an alternative basis for recognizing the interest of the marriage. The non-titled spouse would have to establish either an express or implied agreement or special circumstances justifying legitimate expectations to share in that increase in value.

\textit{b. Indirect contributions as marital efforts.} The above section demonstrates that common law states have recognized higher expectations in the marital partnership by determining that its partners may rightfully expect to benefit from the choices made about property and that those expectations may attach to the increase in value of separate property. The analysis in the common law courts makes another assumption: part-

\textsuperscript{381} Anthony v. Anthony, 355 Pa. Super. 589, 514 A.2d 91 (1986). In several cases, the courts have found that the use of separate property as the family residence warrants treating the whole property—not just the increase in value—as marital. E.g., Wanberg v. Wanberg, 664 P.2d 568 (Alaska 1983) (residence that is separate property will be treated as joint property); Stevenson v. Stevenson, 680 P.2d 642 (Okla. Ct. App. 1984) (residence purchased by husband 46 days before marriage but improved by both spouses constituted joint property); In re Marriage of Jenks, 294 Or. 236, 656 P.2d 286 (1982) (separate property treated as joint property when both spouses demonstrated through actions during marriage their intention to treat property as joint). These cases depend not on analysis of increases in value, but on theories of transmutation.

\textsuperscript{382} In Roffman v. Roffman, 124 Misc. 2d 636, 476 N.Y.S.2d 713, 716 (N.Y. Sup. 1983), the court concluded under these facts that the business had been acquired during the marriage. Apparently, the use of the separate property led the court to find an intent to transmute to marital property.

\textsuperscript{383} Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).
ners assume that they will share the burdens of choices about property. The treatment of indirect contributions in the setting of increases in value of separate property supports this conclusion and has the potential for greatly expanding the circumstances in which the law classifies increases in value as marital.

Only the common law states have analyzed the significance of indirect contributions in entitling the marriage to share in the increases in value of separate property. To date, this analysis has not led to results that the courts could not have reached by using traditional analysis focusing on direct contributions. As explained above, in the cases that have noted the significance of indirect contributions, the facts have made clear that at least one of the spouses also contributed directly to the increase in value of the separate property.

Like the analysis of choices as a marital effort, however, the analysis of indirect contributions could lead to a greatly expanded classification of increases in value as marital property. To return to the IBM example, assume that the husband owns IBM stock as his separate property. Assume the additional fact that the wife contributes to the marriage as a homemaker and mother. Power of the husband aside, do her indirect contributions to the marriage require that the law classify any increase in that stock as marital? None of the cases go this far, but the recognition of indirect contributions in this setting logically raises the question.

Again, the pertinent question is whether the wife's indirect contributions raise legitimate expectations on her part to share in the increase in value. Common law courts have not developed guidelines to determine when those expectations would be legitimate, but an express or implied agreement or other special circumstances provide the rationale. For example, the wife might offer her indirect contributions as evidence of an implied agreement to protect the IBM stock and consume marital property in its place. If the wife's indirect contributions to the marital income enabled the family to preserve the shares of separately owned stock, then she has established her right to expect to share in their increase in value.

If indirect efforts warrant classifying the increase in value of separate property as marital, the increase may be marital anytime a spouse makes indirect contributions. Again, the non-titled spouse could resort to traditional analysis if the marriage had used marital funds or direct efforts to increase the value of the separate property. If the only marital labor were the spouse's indirect contributions, then the non-titled spouse would have an alternative basis to establish the marital interest. The non-titled spouse relying on indirect contributions would have to establish, however,
that either an express or implied agreement or other special circumstances raised legitimate expectations to share in the increase.

Recognizing choices and indirect contributions as marital labor makes a marital interest possible in any kind of separate property. In fact, if courts continue to develop this analysis, it will greatly expand the kind of separate property that gives the marriage an interest in its increase. By traditional analysis, the most important fact in predicting whether a non-titled spouse would receive any interest in the increase of separate property was the character of the property. If the property were real property, a service-oriented business, or a closely held business, the non-titled spouse was more likely to receive a portion of the appreciation. On the other hand, if the property were a securities portfolio, bank account, art collection, or other personal property particularly susceptible to market fluctuations, then current analysis most often characterizes its increase as separate. Commentators have long criticized

387. E.g., In re Marriage of Lopez, 88 Cal. App. 3d 93, __, 113 Cal. Rptr. 58, 66 (Dist. Ct. App. 1974) (remanded to determine community interest in value of spouse’s law practice); Tibbetts v. Tibbetts, 406 A.2d 70, 75 (Me. 1979) (increase in value of real property proportionately marital). See also supra notes 135-43, 216-20 and accompanying text.

analysis that draws a distinction in classifying property based on the kind of property at issue.\textsuperscript{389}

If courts continue to acknowledge the importance of choice and indirect contributions, then a non-titled spouse could share in the increase of an investment that to date courts have considered to appreciate only “passively.” If the non-titled spouse could establish an express or implied agreement to consume marital property in order to allow the separate investment to grow, then the non-titled spouse could share in the increase. If the non-titled spouse could establish other special circumstances—such as the use of the work of art—then the court might find that the non-titled spouse should share at least in its increase in value.\textsuperscript{390}

Because of the difficulty of establishing express or implied agreements or special circumstances, traditional analysis would remain relevant. In those instances when the non-titled spouse could establish the use of marital funds or physical efforts in connection with the separate property, precedent would support classifying the increase as marital. The focus on the equitable concern for the choices made during the marriage, however, would provide an alternative basis for recognizing the interest of the marriage. In those instances in which the only labor was either decisions or indirect contributions and in those instances in which the property increased because of market factors, this alternative analysis offers other bases to recognize a marital interest.

C. The Evolving Partnership: A Partnership with No Analogy

The partnership that emerges in the cases from the courts of some common law states little resembles the economic partnership on which community property states based their model. That partnership recognized that its partners expected to share only if marital efforts or labor acquired property. Common law states, on the other hand, have reasoned that partners in a marital partnership expect to share the benefits and burdens of choices that have an impact on property. In drawing these conclusions, common law states have recognized that the parties to modern marital partnerships have higher expectations of each other than the parties to the partnership analyzed by the community property states. Even more clearly, the parties to the modern marital partnership have far more expectations of each other than the parties to the business partnership.

1. Inappropriateness of the business analogy

The civil law analogized the marital partnership to the business partnership to explain the ownership of property without tying that ownership to specific remunerative efforts.\textsuperscript{391} Just as business partners own the

\textsuperscript{389} E.g., King, supra note 143, at 485.

\textsuperscript{390} A number of courts have found that the use of the separate property may make the entire property, and not just the increase in value, marital. See supra note 337.

\textsuperscript{391} For a comparison of common law and Spanish civil law, see supra notes 34-50
assets of their partnership without regard to which partner furnishes the consideration for any given asset, spouses own property in common, regardless of which partner furnishes the consideration.

The utility of the business partnership as an analogy to the marital partnership, however, is limited to the explanation of common ownership. Commentators have criticized the use of the business partnership analogy to analyze various issues at divorce.\textsuperscript{382} The development of the analogy by common law states to analyze increases in value of separate property, however, suggests that the analogy remains useful as long as the courts applying it confine the analogy to the explanation of common ownership of acquisitions.\textsuperscript{383}

As some common law courts have reasoned in the setting of increases in value of separate property, spouses legitimately have expectations of each other far beyond the expectations that characterize the business partnership. These partners, unlike their business counterparts, may le-

\textsuperscript{392} For example, see Sharp, supra note 133, at 198-201. Much of the criticism of the partnership analogy focuses on the analogy's promoting equal as opposed to equitable distribution of marital property. See, e.g., Fineman, supra note 148, at 838; Prager, supra note 12, at 2-6.


\textsuperscript{393} The opinions in a number of states refer to the partnership analogy when analyzing the division of property at divorce. See supra note 9. Less frequently, but on occasion, a court uses the analogy in a way that illustrates that it recognizes that the business partnership is not the exact counterpart of the marital partnership. For example, the New Jersey appellate courts have compared marriage to a partnership but have cautioned that it is much more. See, e.g., Rothman v. Rothman, 65 N.J. 219, ..., 320 A.2d 496, 501-02 (1974) ("Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute.") See also Price v. Price, 113 A.D.2d 299; ..., 496 N.Y.S.2d 455, 460 (App. Div. 1985), aff'd, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986); Wood v. Wood, 119 Misc. 2d 1076, 465 N.Y.S.2d 475 (N.Y. Sup. 1983). For this position in a Pennsylvania case, see Flynn v. Flynn, 341 Pa. Super. 76, ..., 491 A.2d 156, 162 (1985) (Beck, J., concurring in part and dissenting in part), in which Judge Beck argued for an immediate offset rather than a deferred distribution of a pension. In the course of that argument, Judge Beck cited legislative recognition "that marriage is, inter alia, an economic partnership whose assets, upon dissolution of the marriage, may be equitably divided and distributed." Id. The significant part of the comment is the reference to the "other things" that marriage is.

In some states, on the other hand, the opinions treat the marital partnership as if it were no different from the business partnership. In one Oklahoma case in which the court refused to classify any of the increase in the corporation as marital property, the court maintained that the non-titled husband's participation in the wife's separately owned business "was like any other officer of a corporation who does not own company stock." Mothershed v. Mothershed, 701 P.2d 405, 410 (Okla. 1985). The court discounted the fact that he was a spouse spending marital energy.
gittimately expect that each partner will make decisions in the partnership’s best interests. If a decision would have an adverse impact on one of the marital partners at dissolution, that partner can legitimately expect that in this unique partnership, the partners will share the burden.\textsuperscript{394} For example, in the marriage partnership, some courts have recognized that it is reasonable for the partners to expect that all choices are made with the good of the partners in mind.\textsuperscript{395} Because marriage is more than a business partnership, some common law states have reasoned that the law of divorce appropriately considers whether the use of separate property discouraged the purchase of equivalent marital property. Some courts have reasoned that the increase in value of separate property should belong to the marriage if the existence and use of that separate asset, like the use of separately owned real property as the family residence, discouraged the marriage from acquiring “equivalent marital property.”\textsuperscript{396}

This conclusion underscores the fact that the marital partnership gives rise to expectations different from its business counterpart. The parties to a business partnership have no right to think that either will insulate the other from the harsh effect of partnership choices.\textsuperscript{397} For ex-

\textsuperscript{394.} These expectations, of course, have ramifications far beyond the setting of increases in value of separate property. For example, these expectations would justify the continued recognition of alimony. Business partner A may have no claim on partner B at dissolution if A has spent all his or her partnership time developing skills that are not as marketable as the skills that B developed during the existence of the partnership. When one spouse, however, spends all his or her time applying less marketable skills—that spouse may legitimately expect not to suffer for those choices at divorce.

The decline in alimony awards, however, suggests that courts do not find these expectations reasonable. For studies on the fate of alimony, see, e.g., L. Weitzman, supra note 68, at 167; McGraw, Sterin & Davis, A Case Study in Divorce Law Reform and Its Aftermath, 20 J. Fam. L. 443 (1981-82); McLindon, Separate But Unequal: The Economic Disaster of Divorce for Women and Children, 21 Fam. L.Q. 351 (1987); Seal, A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California, 1 Fam. Advoc. No. 4, 10 (1979); Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79 (1986). See also infra note 408 and accompanying text.

\textsuperscript{395.} E.g., Conner v. Conner, 97 A.D.2d 88, --, 468 N.Y.S.2d 482, 496 (App. Div. 1983) (Bracken and Brown, JJ., concurring in result only).

\textsuperscript{396.} Anthony v. Anthony, 355 Pa. Super. 583, --, 514 A.2d 91, 95 (1986). Of course, courts refer to the expectations involved in the marital partnership in contexts other than the increase in value of separate property. For example, in one North Carolina case, the court justified classifying a jointly titled residence as marital property by referring to the expectations that titling jointly raises. McLeod v. McLeod, 74 N.C. App. 144, 157, 327 S.E.2d 910, 919, cert. denied, 314 N.C. 331, 333 S.E.2d 486 (1985) (stating that Supreme Court had overruled McLeod to extent that it held that Equitable Distribution Act created “a presumption that all property acquired by the practice during the course of the marriage is marital property.” (citing Johnson v. Johnson, 317 N.C. 437, 454 n.4, 346 S.E.2d 430, 440 n.4 (1986), overruling recognized, Dunlap v. Dunlap, 85 N.C. App. 324, 328, 354 S.E.2d 734, 736 (1987)).

\textsuperscript{397.} For a thoughtful study of altruism, see Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983). Professor Olsen concludes, in part, that the altruism in the family as currently conceived fosters a sexual hierarchy and the domination of women. She does not conclude, however, that there should be no altruism in the family; rather, she concludes that various dichotomies have hindered human
ample, assume that business partner A has property that she allows the partnership to use but that she does not deed to the partnership. She uses some of her partnership income to improve her separate property. At the dissolution of the partnership, business partner B has no legitimate claim on the increase in value of the separate property. In the marriage partnership, however, some courts have recognized that it is reasonable for the partners to expect that all choices are made with the good of the partners in mind.\textsuperscript{398} Partners in the marital partnership legitimately have higher expectations of each other than the partners in a business partnership.\textsuperscript{398}

2. \textit{Explanations for the expansion}

Two points related to history and timing may explain why common law states have been willing to recognize higher expectations in the marital partnership while community property states, at least in this setting, have not. The reference in some of the opinions to the separate property system at least partially explains why some common law states have been more willing to apply equitable considerations to increases in value of separate property. Among common law states, the desire to remedy the inequities of the separate property system convinces some of the courts to apply equitable considerations to these issues.\textsuperscript{400} Community property states, although influenced by separate property notions in this setting, have not acknowledged this influence and do not demonstrate any concern for excising the inequities of the separate property system. To remedy the injustices of the old system, some common law states willingly acknowledge that in the marital partnership, spouses have legitimate expectations to share even separate property. In this way, they have expanded the partnership view of marriage beyond the community property counterpart.

The other point relates to timing. Some of the common law states that have recognized that the marital partnership may expect to share in appreciations of separate property reached these issues later than the community property states and later than the common law states with development and that altruism should characterize the market as well as the family.

\textsuperscript{398} \textit{E.g.}, Conner v. Conner, 97 A.D.2d 88, --- N.Y.S.2d 482, 496 (App. Div. 1983) (Bracken and Brown, JJ., concurring in result only).

\textsuperscript{399} The statutory treatment of increases in value imposes some limit on these equitable considerations and expands the notion of what marital partners may legitimately expect of each other. The statutes in many of these states limit the courts' ability to classify increases of separate property as marital to increases caused by marital efforts. But even those states with the most far-reaching analyses have stayed within this limit. They have simply suggested that decisionmaking—the choice to consume marital property and preserve separate property—and indirect contributions may be efforts that cause an increase in value of separate property.

\textsuperscript{400} For example, in Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 267-68 (1985), the court of appeals observed that it should interpret the equitable distribution statute in light of the inequities that the legislation sought to address—the unfair distribution of property under title concepts.
more restrictive approaches. In the meantime, experience with the statutes produced by divorce reform has raised new concerns. Studies report that the economics of divorce have created the "feminization of poverty."\textsuperscript{401} Women and the children for whom they have custody have become the victims of divorce reform. Nationwide, states have empaneled task forces and other groups to gauge the extent of the problem and propose solutions.\textsuperscript{402}

To the extent that divorce reform has created a class of victims, it has failed to achieve the results the reformers sought.\textsuperscript{403} One explanation for the failure is a miscalculation about the part property division would play in the typical divorce. While divorce reform touted property division as the primary means of accommodating need at divorce, the average divorcing family has insufficient property to address the post-divorce need that exists.\textsuperscript{404} Common law states have less property division precedent than do community property states. The judiciary in common law states, therefore, may feel freer to try to respond to the need to divide more property at divorce than their community property counterparts. Classifying more and more increases in value of separate property as marital may represent an attempt to increase the available pool of marital property and to use it to address post-divorce needs.\textsuperscript{405}

3. Impact of the recognition of increased expectations

Recognizing that parties to the marital partnership expect to share in benefits and burdens of choices that have an impact on marital property may apply to more settings than merely the increase in value of marital property. To the extent that courts recognize these expectations in the marital partnership, the recognition could affect the approach to every classification issue. For example, in the setting of increased earning capacity as an item of marital property,\textsuperscript{406} recognizing that spouses expect


\textsuperscript{402} See the examples of the studies cited supra note 401.

\textsuperscript{403} See, e.g., Report of the Task Force, supra note 148, at 5-6 (listing goals of achieving equity in reform of family laws).

\textsuperscript{404} Weitzman, supra note 68, at 61-65.

\textsuperscript{405} How a state defines marital property controls how fairly the state can divide the property at divorce. See, e.g., Sharp, supra note 120, at 273.

\textsuperscript{406} For commentary on the problem of handling increased earning capacity at divorce, see, e.g., Albert, \textit{Dissolution of Marriage When One Spouse Holds a Professional Degree—A Call to Fairness}, 36 \textit{Drake L. Rev.} 1 (1987); Bruch, \textit{The Definition and Division of Marital Property in California: Towards Parity and Simplicity}, 33 \textit{Hastings L.J.} 769, 813-21 (1982); Erickson, \textit{Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity}, 1978 \textit{Wis. L. Rev.} 947; Herring, \textit{Divisibility of Ad-
to share in the benefits and burdens of choices that have an impact on property suggests that the law must compensate the spouse who makes sacrifices in order to enhance the earning capacity of the other spouse.\textsuperscript{407} In fact, if courts fully recognize these expectations as typical of the modern marital partnership, the analysis could affect issues outside the classification of property. If parties expect to share in the benefits and burdens of marital choices, then those expectations offer another rationale for the awarding of alimony.\textsuperscript{408} Courts have struggled with the analysis of alimony since the advent of no-fault divorce.\textsuperscript{409} With a focus on the impact of marital choices, a new rationale supports the continued use of alimony. For example, the choices the parties made during the marriage may have depressed the income of one of the spouses. To illustrate, if the parties decided that the wife should subordinate her career for the welfare of the family, then that marital choice gives rise to an expectation to share the burden of that choice. This expectation would justify an award of alimony that reflected that the parties expected that neither would suffer at divorce for the consequences of that choice.

CONCLUSION

Community property states viewed marriage as a partnership but recognized that its partners expected to share only in acquisitions of the marriage. Because of the way in which the law on increases in value developed, community property states found that the parties to the marital partnership had no expectations to share in the increase in value of separate property.

Some common law states also recognized sharing expectations only in acquisitions of the marriage. In fact, some of these common law states restricted expectations in increases in value of separate property even further than did the community property states. These states added the requirement that the non-titled spouse be the source of the increase in

\textsuperscript{407} Some of the commentators and cases already recognize that the problem of increased earning capacity raises the legitimate expectations of the parties to the marital partnership. See, e.g., Haugan v. Haugan, 117 Wis. 2d 200, \textemdash, 343 N.W.2d 796, 800 (1984) (remedy appropriate when partnership fails to realize anticipated benefits and one spouse suffers costs and lost opportunities); Krauskopf, supra note 406. The treatment of increases in value of separate property by some common law states suggests that this analysis should be central to the question.

\textsuperscript{408} An exploration of contemporary analysis of alimony is beyond the scope of this article. For just such an exploration, see Brinig & Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855 (1988).

\textsuperscript{409} Commentators have linked the decline of awards of alimony to the implementation of no-fault divorce. For some of these conclusions, see, for e.g., the studies mentioned supra note 394.
value. Some of these states also refused to recognize that indirect contributions would satisfy this requirement.

Other common law states, however, re-analyzed the marital partnership and found that its partners have higher expectations of each other than the partners to the marital partnership of the 19th-century civil law. These states conclude that couples in the modern marital partnership expect to share also in the increase in value of separate property. By focusing on the equitable concern for choices made during the marriage, some common law states have found that the expectations of the parties to the marital partnership have changed: parties now expect to share the benefits and burdens of choices that have an impact on property.

The recognition that couples have these expectations could be significant. The concern for marital choices could cause courts to recognize that spouses may have legitimate expectations in separate property that increases passively as well as actively. Such a holding would greatly expand the instances in which courts classify increases in value as community or marital property. By increasing the pool of marital property, courts would show renewed respect for one of the goals of divorce reform: to attempt to end the economic relationship between divorced spouses by addressing post-divorce need through property division. By recognizing that parties to the marital partnership have expectations in increases in separate property, the courts also acknowledge that the expectations that spouses have of each other have increased over time. This recognition underscores the fact that the marital partnership, while analogous in limited respects to the business partnership, really has no analogy.

The recognition that parties to the marital partnership expect to share in the benefits and burdens of marital choices could apply outside the setting of increases in value of separate property. To the extent courts recognize these higher expectations of parties to the modern marital partnership, the recognition could affect the analysis of any issue involving how to classify marital property, whether an issue of the increase in value of separate property or the general acquisition of marital property. Moreover, recognizing that the parties to the marital partnership expect to share the benefits and burdens of marital choices offers a rationale for alimony that survives the advent of no-fault divorce.

Some common law states have analyzed the issue of appreciated property in a way that recognizes that parties to the modern marital partnership have higher expectations of each other than the parties to the marital partnership of the civil law. If these states are correct, the recognition should animate the analysis of all the ways that marital choices have an impact at divorce.