SELECTED ISSUES IN PROPERTY DIVISION: JOINT TENANCY AND INCREASE IN VALUE OF SEPARATE PROPERTY

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A. JOINT TENANCY PROPERTY

One major issue in Oklahoma is whether joint titling changes a piece of property from separate to marital. The cases have long held that titling a property in the names of the husband and wife clearly indicates that the property is no longer the separate property of the grantor.

> The rule is, where a husband purchases lands with his own money and takes title thereto in the name of his wife or in the joint name of himself and wife, no trust arises in favor of the husband by reason thereof in the lands standing in the name of the wife, but the presumption of law is that a gift was intended.[1]

The presumption of a gift applies even when the parties take title to the property prior to marriage.[2] The effect of the gift language means that the spouse who provided the purchase price from his or her separate property is not entitled to a constructive trust on the property for his or her benefit. Prior to 1999 the case law was clear that the presumption could only be rebutted by showing that there was fraud or a separate agreement between the parties that the property was to remain separate.[3] In 1999 the supreme court changed the analysis in Larman v. Larman.[4] The parties were married in 1983. In 1989 they moved into a rental home [Churchill] owned by the wife's mother and took over a $450.00 monthly mortgage payment. They used marital funds to make improvements on the property. They lived at the Churchill residence until the death of the wife's mother in 1993. The wife inherited the Churchill residence along with her mother's residence [Luglena] and $100,000. Using inherited funds, the wife bought a lot next door to Luglena. Unbeknownst to the wife, the sellers conveyed the lot to the wife and husband as joint tenants. Six months later the parties moved from Churchill to Luglena where they used spousal funds to make the mortgage payments. At this point the wife began making the Churchill mortgage payments out of inherited funds. Not long after the family moved

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[1] Mendenhall v. Walters, 1916 OK 524, Â¶ 10, 157 P. 732. See also Yates v. Yates, 1923 OK 863, 219 P. 705; Swanson v. Swanson, 1951 OK 374, 250 P.2d 40; Fletcher v. Fletcher, 1952 OK 28, 244 P.2d 827; Shackelton v. Sherrard, 1963 OK 193, 385 P.2d 898; Chastain v. Posey, 1983 OK 46, 665 P.2d 1179. At least one court has held that the same result is required when the conveyance is to the parties as tenants in common. Walker v. Walker, #115,407(Tulsa 2018)(unpublished)(cert den all concur)

The presumption does not extend to the contents of a safe-deposit box that is in joint tenancy. Estate of Stinchcomb, 1983 OK 120, 674 P.2d 26.

[2] Hill v. Hill, 1983 OK 81, 672 P.2d 1149; Marriage of Gress and Kuhn, 2016 OK CIV APP 13, 367 P.3d 518.

[3] See Shackelton v. Sherrard, 1963 OK 193, 385 P.2d 898.

[4] 1999 OK 83, 991 P.2d 536.

to Luglena, the wife refinanced the existing mortgages on Churchill and Luglena to secure a lower interest rate and monthly payment. In order to obtain refinancing, she had to place title to the properties in the names of both spouses as joint tenants.

The trial court found that Luglena and its adjoining lot were the wife's separate property and that Churchill was marital. The court of civil appeals reversed the finding on Luglena and held that it also was marital property. The supreme court found that both the Churchill and Luglena properties were separate.

The husband argued that because the property was jointly titled, the law presumed a gift from the wife to the husband. The court found, however, that there was no intent to make a gift. While it is true that a presumption of a gift arises from the joint titling, it can be rebutted by clear and convincing evidence that no gift was intended. In this case, the court said, the record clearly showed that title was placed in joint tenancy without any intention to make a gift. The sole reason why the properties were placed in joint tenancy was to effectuate the refinancing.[5]

Several questions remained after the Larman decision. The first issue is whether Larman applies to personal property, as well as real property. At the time Larman was decided all published cases involved real estate.[6] In footnote 16 of the Larman opinion, the author of the opinion cites Weberg v. Weberg[7] for the proposition that placing the husbands separate funds did not become marital property when placed in a joint tenancy bank account in the absence of evidence showing a donative intent on the part of the husband. However, when the issue came before the court of civil appeals, the panel did not cite or discuss that footnote.

In Beale v. Beale,[8] the husband, during the marriage, transferred several bank and stock accounts from his name to the names of himself and his wife. He claimed he did so because "in case something happened to me" his spouse would be covered. After the parties became estranged, he transferred to accounts back into his name. In the divorce the wife claimed all of the accounts as marital assets, while the husband argued they were separate property. The trial court determined that all of the accounts were separate and the appellate panel affirmed in part and reversed in part.

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[5] See also Smith v. Villareal, 2012 OK 114, 298 P.3d 533.

[6] The supreme court, at one point, did hold that money placed in a joint tenancy bank account lost its separate character, as well as any property purchased with money from a joint bank account. See Gilbreath v. Gilbreath, 56 O.B.J. 929 (Okla. 1985). However, that opinion was ultimately withdrawn, although for other reasons.

[7] 463 N.W.2d 382 (Wis. Ct. App. 1990).

[8] 2003 OK CIV APP 90, 78 P.3d 973.

The panel first determined that Larman did apply to bank accounts since the ways in which title to certain bank accounts and in which title to real property can be held are similar. With regard to the individual accounts, the court found that two of the accounts were subject to the presumption and had become marital property. The court looked at the documents that opened the account. The fact that both spouses were listed as "co-owners" was not sufficient to invoke the presumption. However, the testimony of the husband that at the time he opened the account, he intended it to be a joint account was sufficient to invoke the presumption. In a second account the court found that the signature card, which noted that the account was a "joint account" unless designated otherwise, was controlling and, therefore, required the applicability of the presumption. Other accounts were found to not be "joint accounts" and, therefore, did not require the court to apply the presumption. Some of the accounts merely listed the spouse as "co-owners." This, without more, according to panel, was insufficient to indicate that the accounts were "joint accounts."[9]

The second major issue concerning joint titling is whether anything other than fraud, a special agreement, or refinancing would justify a court in disregarding the joint title and holding that the property is the separate property of the one supplying the purchase price. The most common explanation offered is that the parties took title as joint tenants for estate planning purposes. The court of civil appeals skirted this issue in Bartlett v. Bartlett.[10] Six parcels of land were transferred from the husband's name into joint tenancy and ultimately into revocable trusts. The husband presented information that he created the revocable trust on the advice of an attorney engaged in estate planning to the effect that he place assets of equal value in each trust. This would substantially reduce his estate taxes. The court noted that this is a different issue than placing property into joint

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[9] Marriage of Johnson, 2011 OK CIV APP 105, 264 P.3d 143, applied the joint tenancy presumption to automobiles. The husband jointly titled two motor vehicles that he purchased prior to marriage. Absent any other evidence the court found the trial court's characterization of the vehicles as marital was appropriate. See also Black v. Black, #106,205 (OKC 2010)(unpublished)(husband's separate property jet-ski jointly titled during marriage becomes marital property because "Husband failed to present any evidence whatsoever to explain what non-donative intent, if any, may have prompted the re-titling of the property."

[10] 2006 OK CIV APP 112, 144 P.3d 173. The presumption was found to be rebutted in Dang v. Nguyen, #107,797 (Tulsa 2011)(unpublished), where the husband testified that he added his wife's name to his bank account because "he sponsored her to come to the United States and he had to prove he had enough money to take care of her before she could become a permanent resident." . At least one court has held that the fact that all the property in joint tenancy account can be traced to the husband's separate property does not rebut the presumption. Marriage of Lemon, #113,719 (Tulsa 2016)(unpublished).

tenancy for the purpose of avoiding probate. The panel acknowledged that the supreme court in Larman cited In re Marriage of Wojcicki,[11] in a footnote, for the proposition that a husband's transfer of real property to joint tenancy with his wife to avoid probate was not a gift of the property to the marital estate. However, it noted that the evidence in Wojcicki showed that the husband was an immigrant who experienced difficulty succeeding to title to his properties after his first wife died. He, therefore, asked his attorney to place his properties in joint tenancy with his second wife in order to prevent such difficulty upon the death of either party. This circumstance, coupled with other factors, led the court to affirm the finding that the Husband had overcome the presumption of a gift. The panel found that Wojcicki is therefore not a case involving the stated reason of avoiding probate taxes, but rather avoiding the perceived difficulty of passing title through probate and were not persuaded that the Larman court's recognition of Wojcicki indicates that transferring property to joint tenancy for the purpose of avoiding estate taxes (as opposed to avoiding probate) may overcome the gift presumption in Oklahoma. The panel expressed no opinion on whether the citation to Wojcicki in Larman foreclosed the issue of whether the presumption is rebutted by evidence that placing property in joint tenancy for the purpose of avoiding probate.

The parties in Bartlett also conveyed their house from the husband's name into joint tenancy. The husband testified that he never intended a make a gift to the wife. The appellate panel noted that the only evidence in existence to rebut the presumption was the husband's testimony that he never intended a gift. This was not sufficient to rebut the presumption by clear and convincing evidence.[12]

In Beale v. Beale,[13] which concerned bank accounts in joint tenancy, the appellate panel found the presumption had been rebutted in two situations. First, in one account the husband added the wife's name to his checking account. However, only the husband had access to the checkbook and only the husband used the checkbook. The wife contributed nothing to the funds in that account. This, the court concluded, sufficiently rebutted the presumption that a gift was intended. Second, with regard to another account, the court found that although the husband intended the account to be joint, there was no evidence that the wife knew of the existence of the account. Since ability to accept the gift was lacking due to the wife's ignorance of the account existence, the husband had sufficiently

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[11] 440 N.E.2d 1028 (Ill. Ct. App. 1982).

[12] See also Crocker v. Crocker, 2003 OK CIV APP 58, 72 P.3d 65 (donor's testimony standing alone is insufficient to rebut the presumption). But see Beene v. Beene, 2014 OK CIV APP 32, 324 P.3d 1264, where the trial court's determination that the rationale for the husband placing the property in joint tenancy was to stop the wife's nagging was for a collateral purpose and the appellate panel affirmed.

[13] 2003 OK CIV APP 90, 78 P.3d 973.

rebutted the presumption that a gift was intended.[14]

The third issue that remains under Oklahoma law is whether placing separate property in joint tenancy creates marital property or two equal pieces of separate property. Normally a gift creates a separate property interest in the recipient. This approach accords with the common law approach to joint tenancy which required that the parties each own equal shares. If this approach is followed then a court has no discretion in dividing joint tenancy property. It must award each joint tenant one-half of the property as that joint tenant's separate property.[15] This would require the trial court to partition the joint tenancy property. However, if the gift is made to the marital estate instead of the donee spouse, the trial court can divide the property in an equitable manner and need not award each spouse one-half of the property.

In Gist v. Gist,[16] and Garvey v. Garvey,[17] the court of civil appeals held that joint tenancy property was marital and the trial court would be prohibited from considering any part of the property as the separate property of either spouse. In Hill v. Hill,[18] the court held that, because the property was in joint tenancy, the trial court did not error in treating the property as jointly acquired during marriage. However, in Winter v. Winter,[19] the supreme court decided that the trial court was in error when it automatically determined that joint tenancy property was to be considered marital. The court also indicated that Gist and Garvey were overruled. The opinion is unpublished; therefore, not authoritative and may

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[14] See also Marriage of Rivers, #113,045 (Tulsa 2016)(unpublished) Other cases with regard to excuses are Marriage of Davis-Sturtz, #106,999 (OKC 2010)(unpublished), the couple had a two month marriage during which husband jointly titled his house to avoid probate. The appellate court said a short marriage is not a legitimate excuse which would rebut the presumption of a gift.

[15]This was certainly the approach in the early cases. See Guyer v. London, 1940 OK 272, 102 P.2d 875. ("Syllabus by the Court. * * * 4. When real property is deeded to both husband and wife the presumption is that each takes an undivided one-half interest therein, in the absence of anything in the deed indicating a contrary intent. 5. Where real estate standing in the name of husband and wife was traded for other real estate and title to the latter was taken in the name of the husband only, a finding that a trust resulted in favor of the wife as to an undivided one-half interest in same held not against the clear weight of the evidence.").

[16]1975 OK CIV APP 34, 537 P.2d 460

[17] 1980 OK CIV APP 3, 606 P.2d 618.

[18]1983 OK 81, 672 P.2d 1149.

[19]#58,254 (Okla. 1984) (unpublished).

not be cited or relied in brief or argument.[20] In the absence of publication the court of civil appeals continues to assume that joint tenancy property is marital.[21]

B. Joint Tenancy Trusts

The court of civil appeals extended the joint tenancy rules developed with regard to tangible property to joint family trusts in Marriage of Murphy,[22] which involved the marital home located on a six acre tract (Tract 1) and an adjoining nine acre tract (Tract 2), both denominated in the opinion as Richland Road. The home was the wifeâ€™s separate property as a result of a divorce from her first husband. Soon after the marriage, the parties as "Trustors," executed a trust, prepared by an attorney, entitled the â€œMichael O. Murphy and Kyong S. Murphy Family Trust which they reserved the power to revoke or amend. They appointed themselves to be the "Trustees." If either died, the remaining original trustee would become the successor trustee, and upon his or her death, the wife's daughter would become the trustee and the ultimate beneficiary. The husband and wife were the trust's income beneficiaries, for whose primary purpose the trust was expressly created. They executed a quit claim deed which conveyed Tract 1 and Tract 2 to Husband and Wife as Co-Trustees of the Family Trust. The husband also transferred to the Family Trust his separate property, including a residential property in Bethany, Oklahoma, a subdivision lot in Oklahoma City, and a brokerage account.

Three years later, the husband and wife decided to refinance Tract 1. As required by the lenders, the Co-Trustees of the Family Trust executed a warranty deed conveying only Tract 1 to themselves, as joint tenants with rights of survivorship. That same day, after they executed the loan documents and obtained the funds, they reconveyed Tract 1 back to the Family Trust.

The trial court, relying on the second conveyance back to Family Trust determined that Tract 1 was marital property, as well as Tract 2. The wife appealed on this issue and the appellate panel affirmed, albeit on a different theory.

The appellate panel concluded that the entire marital home (both tracts) were marital property because, following the conveyance to the trust, the parties jointly used and managed the property, in particular they reserved to themselves the right revoke the trust

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[20] See 12 O.S. App. 1, Rule 1.200(b), (e).

[21] See Bartlett v. Bartlett, 2006 OK CIV APP 112, 144 P.3d 173("It has long been the rule in Oklahoma that when spouses own property in joint tenancy, regardless of the source of the funds used for purchasing the property, a gift of the property to the marital estate is presumed."); Beale v. Beale, 2003 OK CIV APP 90, 78 P.3d 973.

[22] 2010 OK CIV APP 1, 225 P.3d 820.

and receive the income from the trust.

The appellate panel characterized the trust as a "joint trust" or joint revocable trust." Such trusts, the court noted, are an alternative estate planning technique which have become popular in common-law property states because they avoid probate and the need to sever jointly owned assets into separate trusts for each spouse.

The panel found that the Bartlett case[23] particularly instructive in that the panel in that case had noted that it was necessary that the husband in Bartlett give part of his separate property to make each trust nearly equal "in order to receive the benefit of his tax planning measures." In this case, the wife's intent to transfer a beneficial interest in the marital home "before death" was established by her conveyance of that property into a joint trust with a single trust estate comprised of the parties' separate and jointly acquired property for which she and her husband were the income beneficiaries during their lifetimes. Based on the parties' transfer of both Tract 1 and Tract 2 into the joint trust and all the benefits they received from its creation, the panel concluded that the conveyances into the Family Trust was the functional equivalent of a transfer into joint tenancy. Therefore, the trial court's classification of the entire Richland Road property as marital was not clearly against the weight of the evidence.

The case is important for its conclusion concerning the use of family trusts. It also raises clear ethical questions for estate planners. It appears that attorneys engaging in estate planning should clearly explain to the married couple what is likely to happen to the property should the parties divorce. If married couples were aware of the consequences of divorce, as well as death, they might well not choose this particular estate planning device.

VI. Income From and Appreciation in Value of Separate Property

A. Income From Separate Property

Currently, Oklahoma cases disagree on whether income from separate property is or is not marital. In In re Pierce's Estate,[24] the court held that income from separately owned oil and gas leases was not "jointly acquired" within the context of the forced heirship statute.[25] However, in cases under the Oklahoma Community Property Act the supreme court, without discussing previous cases, held that income from separate property was

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[23]2006 OK CIV APP 112, 144 P.3d 173

[24]1932 OK 757, 17 P.2d 411.

[25]84 O.S. § 213

community property.[26] There is a suggestion in some opinions that income from separate property that is generated by marital labor is marital, but that income which is the result of economic forces remains separate.[27] Classifying income as marital or separate depending on the source of the income is the approach that should be followed since it corresponds to the distinction used in classifying an increase in value of separate property. Attorneys and judges should not be required to distinguish between income and an increase in the value of the capital asset.

B. Increase in Value of Separate Property

1. The Source of the Increase

First, Oklahoma has developed the rule that if the separate property of one spouse has not increased in value, even though the other spouse has spent a considerable amount of marital labor on the first spouse's separate property, the property remains separate. In Longmire v. Longmire,[28] the wife inherited $345,000 from her mother. The husband spent most of the marriage managing the money and the property purchased with the inheritance. As a result of his efforts, the value the marital estate was reduced to under $100,000. Since there was no enhancement in value, what remained was the separate property of the wife. In other words, the husband's labor during the marriage did not produce a profit. Therefore, the husband is not entitled to a share of the property. The efforts during marriage did not change the essential nature of the property as separate.[29]

This aspect of the problem was also addressed in Mothershed v. Mothershed.[30] During the marriage the wife's father formed an oil and gas business and gave her a substantial share in it. Through a series of acquisitions and exchanges, she eventually held the total equity ownership of the company. She never participated in the business or its affairs; instead, she relied on her father and husband to manage it. When the father

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[26]See Turner v. First Natl. Bank of Muskogee, 1955 OK 369, 292 P.2d 1012; Swanda v. Swanda, 1952 OK 268, 248 P.2d 575.

[27]Compare Peters v. Peters, 1935 OK 673, 46 P.2d 487 with Moyers v. Moyers, 1962 OK 146, 372 P.2d 844.

[28]1962 OK 219, 376 P.2d 273.

[29]See also Armstrong v. Armstrong, 1969 OK 193, 462 P.2d 656 (no evidence that house inherited by husband worth more at time of dissolution that at time of inheritance); Owen v. Owen, 1938 OK 419, 80 P.2d 628; Hutto v. Hutto, 1979 OK CIV APP 58, 602 P.2d 1055 (among other problems, wife did not prove that net worth of husbandâ€™s business increased during marriage).

[30] 1985 OK 23, 701 P.2d 405.

withdrew from its management in 1975, the husband assumed full control until 1981, when he was removed by the board of directors. The husband contended on appeal, among other arguments, that his managerial efforts and financial commitments entitled him to share in the enhanced value of the wifes stock. The supreme court held that both the stock and its increase in value were separate. Part of the reason for the court's decision was that, in actuality, the company operated at a loss during the years that the husband ran the company. Because there was no increase in the value of the company during the husband's stewardship, the total property was separate.

Second, if the value of separate property increases during marriage primarily as a result of the efforts of the non-owning spouse, then it has always been clear that the increase is marital property. The classic case is Moyers v. Moyers.[31] When the marriage began, the wife owned and operated an electronics company. After the marriage the husband and wife operated the business jointly for five years. Then, later, he managed the business for another period of years after the parties reacquired the company. During the last four years, the wife did not participate in the business. It was undisputed that at no time did the husband own any part of the business. The supreme court held that it was clear that the enhancement in the value of the business occurred because of the joint efforts and skills of both parties. It was not due to the normal appreciation or operation of market forces. Therefore, the husband was entitled to share in the increase in value of the business during the marriage as well as its profits.[32]

The third rule developed by Oklahoma courts is that if the increase in value of the separate property results solely from inflation or other economic factors not attributable to

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[31] 1962 OK 146, 372 P.2d 844.

[32] There are a number of Oklahoma cases which make the same point. See Honeywell v. Honeywell, 1959 OK 163, 344 P.2d 589 (husband owned farm before marriage; in determining value of marital estate court deducts value of farm when purchased from present valuation of the property); Williams v. Williams, 1967 OK 97, 428 P.2d 218 (farm homestead is husband's separate property; however, on remand court must determine whether there was enhancement in value due to joint efforts of the parties); Stuart v. Stuart, 1967 OK 136, 433 P.2d 951 (money that wife earned during marriage plus proceeds of wife's retirement account which was accumulated during marriage used to pay off mortgage on husband's separate property house now increased in value by $35,000; house is treated as â€œin reality acquired by joint industry of the parties'); Read v. Read, 1969 OK 95, 456 P.2d 529 (use of marital funds to reduce debt on separate property creates marital property); Hauser v. Hauser, 1969 OK 131, 460 P.2d 436 (identical to Williams; case remanded to determine value of increase to farm homestead). Cf. Collins v. Tax Comm., 1968 OK 148, 446 P.2d 290 (Although one spouse brings separate property to the marriage, enhanced value resulting from joint efforts, skill or funds of both working together constitutes jointly acquired property subject to division.).

the efforts of either party, the increase in value will be separate property. In May v. May,[33] the husband owned a house before the marriage. During the marriage he deeded the wife one-third of the house. The couple made improvements on the house; the costs were split in accordance with ownership. The wife, who took care of the house, claimed that all of the increase was marital property. The court determined that the wife was entitled to one-third of the acquisition cost, plus one-third of the cost of improvement, plus one-third of the increased value of the house by reason of market forces. All this was her separate property deriving from the deed to her of one-third of the house. If any increase in value could be attributed to her efforts, then that would be marital property. Thus, the principle is that an increase in value resulting from forces other than joint efforts of the parties will adhere to the separate estate of each party.[34]

This view was confirmed in Templeton v. Templeton[35] and Mothershed v. Mothershed.[36] In Templeton, the issue was whether the increase in the value of an apartment building due solely to inflation was to be considered marital property. In holding that the increase in value was not marital property the court said:

> If one spouse brings separate property to the marriage, increased or enhanced value of the property will not constitute jointly acquired property during coverture unless the enhancement value was the result of joint efforts, skill or funds of both spouses. In order for a spouse to successfully prove that enhanced value is the result of joint endeavors, it must be shown that the net worth of the property increased during the marriage as the direct result of substantial contribution by the spouse of effort, skill or funds. Enhancement in the value of a spouse's separate property which is caused by appreciation, inflation, or circumstances beyond the parties' control is not jointly acquired property unless the non-owning spouse can prove that his/her contributions were also a causal factor.[37]

The husband in Templeton could not show that the increase in the value of the property resulted from anything other than inflation. Thus, the increase was separate property. This approach was reconfirmed in the Mothershed opinion. The only increase in the value of the corporation managed by the husband was an increase in stock in a second

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[33]1979 OK 82, 596 P.2d 536

[34]See also Midyett v. Midyett, 1952 OK 159, 243 P.2d 650. ("Syllabus by the Court. 1. A natural enhancement in value of the separate property of one spouse, acquired before marriage, is not community property, although such increase in value accrued during coverture.").

[35]1982 OK 127, 656 P.2d 250

[36]1985 OK 23, 701 P.2d 405.

[37]1982 OK 127, ¶ 5, 656 P.2d 250, 252.

corporation held by the first corporation. The stock increase was attributed solely to the market increase in the price of oil and gas. Once again, when the increase in value is due to forces apart from the joint industry of the parties, the increase is separate property.

The Templeton quotation gave rise to considerable confusion with regard to the fourth scenario: The separate property increases in value solely to the efforts of the owning spouse. Is the non-owning spouse entitled to share in the increase in value? The fact pattern was first addressed in Ford v. Ford.[38] The husband, a lawyer, had practiced as a partnership prior to the marriage. During the marriage he dissolved the partnership and established a professional corporation. The value of his practice became a crucial issue at trial. The trial court gave the husband a $40,000 credit as the value of the partnership interest at the time of the marriage. The court, then, valued the professional corporation, declared that the increase in value of over $96,000 to be marital property and awarded each party half of the increase in value.

Although the court of civil appeals reversed, the supreme court affirmed the trial court. With regard to the issue of the increase in value of the law practice during marriage, the court first quoted the general rule regarding an increase in value from Templeton v. Templeton that "where one spouse brings separate property to the marriage and an increased value of the property occurs as a result of joint efforts of the husband and wife, the other spouse is entitled to an interest in the appreciation of the property." The issue in Ford, thus, was reduced to the question of what constitutes joint efforts during marriage. Must the non-titled spouse actually contribute economically, either by money or by labor, to the increased value of the business, or is it sufficient if that spouse fulfilled his or her marital role?

The court resolved that issue by holding that: "The share of "joint industry" attributable to the wife need not be in the form of a monetary contribution or actually working in the law office as suggested by the husband." The court took full note of the fact that the wife had been the primary caretaker for the party's child. Thus, the trial court's decision that the increase in the value of the law practice was marital was affirmed and the court of appeals' decision was vacated.[39]

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[38]1988 OK 103, 766 P.2d 950

[39]The Ford decision is also notable for several other issues. First, the supreme court held that the court of civil appeals erred when it directed the wifeâ€™s attorneys to pay into the court clerk one half of the fee he had received, pending the outcome of the case. It is axiomatic from the court of civil appeals' own decisions that the attorney is not a party to the case. Consequently, he cannot be directed to pay money into court; nor can the judgment for attorney fees run in favor of the attorney. See Gardner v. Gardner, 1981 OK CIV APP 9, 629 P.2d 1283. Second, the court of civil appeals clearly erred in netting out of the marital estate the amount of attorney fees that the husband was ordered to pay the wife. To do so clearly runs contrary to the policy of 43

The Ford decision is consistent with prior Oklahoma law. The Oklahoma position has always been that the stay-at-home spouse's entitlement to share in marital property does not derive from participation in the business world as distinguished from domestic activities.[40] The only confusion that has occurred is whether the stay-at-home spouse's role entitled that spouse to share in an increase in the value of separate property during marriage.

Ford did not totally resolve the problem. The issue still remained as to whether the non-owning spouse had to contribute some "joint industry" whether by staying home and taking care of the children, or, if not, whether the non-owning spouse had to contribute economically to the increase in value. This question was finally set to rest in Thielenhaus v. Thielenhaus.[41] The issue concerned the increased value of the husband's defined contribution pension plan during the marriage. The retirement account was independently managed. The fund was valued at $76,733 at the time of the marriage and $317,550 at the time the parties separated. The issue was how much of the increase should be considered marital property. The court of civil appeals held that the trial court erred in not including the entire increase in the value of the plan in the marital estate. The supreme court reversed the court of civil appeals.

It first noted that the burden of proof was on the non-owning spouse to show that the enhancement is the result of either spouse's endeavors. It, then, held that where a spouse brings separate property to the marriage, its increased or enhanced value, produced by investment managed by *neither* spouse or by appreciation, inflation, changing economic conditions, or circumstances beyond the parties' control, cannot be treated as a divisible marital asset unless, of course, there be proof that the increase resulted from efforts, skills or funds of *either* spouse.

The language in italics[42] clearly indicates that term "joint efforts" does not that both

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O.S. § 110 (2001), which authorizes the trial court to order the payment of attorney fees and costs by either of the parties. Additionally, it would seem clear that the debt incurred for an attorney in a divorce proceeding has been acquired after separation and, therefore, is a separate debt that cannot be made part of the marital estate.

[40]See Durfee v. Durfee, 1969 OK 195, 465 P.2d 161. See also Turner v. First National Bank & Trust Co., 1955 OK 369, 292 P.2d 1012 cited with approval in Stuart v. Stuart, 1967 OK 136, 433 P.2d 951 ("[A]ll property, not falling within the definition of separate property, acquired after the marriage by the labor either of the husband or the wife is nevertheless deemed to be acquired by the labor of both spouses.").

[41]1995 OK 5, 890 P.2d 925.

[42]The opinion was corrected twice in order to insert this language. See 66 O.B.J. 482 (1995); 66 O.B.J. 574 (1995).

spouses must contribute to the increase in value in order for that increase to be classified as marital. Rather, any increase in separate property that is the result of the labor of either spouse during marriage is marital property. It reinforces the rule that the results of the labor of the parties during marriage belong to the marital estate.[43]

In order to classify any increase in the value of separate property as marital, the non-owning spouse must show: 1. The value of the property at the time of marriage; 2. The value at time of separation; 3. The marital cause of the increase, either labor or funds. If there is no evidence on any of these three points, the attempt to show that the increase in the value of separate property as marital will fail.[44]

2. The Problem of Apportionment: Pension Plans

In the increase in the value of separate property cases, it will be rare that the entire

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[43]The only decision which appears inconsistent with Theilenhaus is Kirkland v. Kirkland, 1971 OK 98, 488 P.2d 1222. The evidence in that case showed that the husband had inherited stocks from his father having a value of about $86,000. The evidence also indicated that the husband managed these stocks as his separate property during the marriage. None of his salary went into the portfolio. He did use some of the proceeds for family expenses. At the time of trial the stocks had a market value of about $150,000. The wife contended that she was entitled to one-half of the increase in value of the stocks. The trial court did award her $8,000 of the increase. The supreme court said this was done in cognizance of the wifeâ€™s claim to a portion of the increase. The court rejected the wife's claim to one-half of the increase because the defendant contributed nothing to the increase by joint effort, skill or funds. However, the opinion does not stand for the proposition that the non-owning spouse must contribute economically to the increase in value. There is nothing in the decision that indicates why he stock portfolio increased in value. It may have been due to the husband's efforts or the increase may have been attributed to market forces. If the latter, then Kirkland is simply the forerunner of the May and Templeton cases. Additionally, the wife did receive $8,000 of the increase in value which indicates that she did have some entitlement to the increase. There is nothing in Oklahoma case law which suggests that the non-owning spouse is entitled to one-half of the increase. Thus, Kirkland can be rationalized as consistent with the remainder of the cases. There are other decisions which explicitly require that the non-title spouse prove that his or her economic contributions caused the increase in value to the owning spouse's separate property. However, there are cases from the court of civil appeals, which are not precedential, and primarily result from a misreading of some of the earlier supreme court cases. See e.g., Wright v. Wright, 1978 OK CIV APP 10, 577 P.2d 922; Hutto v. Hutto, 1979 OK CIV APP 58, 602 P.2d 1055. These cases are inconsistent with Ford and Theilenhaus and should be considered overruled.

[44]Marriage of Murphy, 2010 OK CIV APP 1, 225 P.3d 820.

increase will be due solely to outside economic forces or solely to marital efforts. Normally an increase will be due to both marital efforts of the spouse and general market conditions. Oklahoma follows the source of funds theory in determining what property is marital and what property is separate. To be consistent with the source of funds rule, there must be some method of apportioning the increase in value between the separate and the marital estates.

The supreme court came to this exact conclusion in Thielenhaus v. Thielenhaus.[45] This case concerned the increased value of the husband's defined contribution pension plan during the marriage. The retirement account was independently managed. The fund was valued at $76,733 at the time of the marriage and $317,550 at the time the parties separated. The issue was how much of the increase should be considered marital property. The court of civil appeals held that the trial court erred in not including the entire increase in the value of the plan in the marital estate. The supreme court reversed the court of civil appeals.

That increase, which is attributable to the husband's employment during marriage, is clearly marital property. However, that part of the value of the pension entitlement, which is attributable to the investment by the pension plan manager of the husband's portion of the plan acquired prior to marriage, is separate property since no marital efforts are involved. Also, separate is that increase in the pre-marital amount of the pension due to interest income. Also to be classified as marital property is the amount the pension increased due to investment by the pension plan manager of the marital contributions and interest accumulated on the marital contributions. The increase in value, therefore, had to be apportioned between the marital and separate estates. The court found that the husband's method of apportioning the value was not unreasonable. However, since the record did not reflect evidence of value, the court remanded the case to the trial court to ascertain the marital component of pension.

3. Other Problem Areas of Apportionment

In one common situation, a spouse brings a mortgaged piece of realty to the marriage as separate property. During the marriage, marital funds are used to reduce the outstanding indebtedness and build equity in the property. Although there are no Oklahoma cases dealing with this situation, the rationale of Thielenhaus clearly requires that there be an apportionment. For example, In re Marriage of Herr,[46] the husband's father gave him a farm subject to an outstanding mortgage. The husband assumed the mortgage. The farm appreciated substantially by the time the parties' marriage ended and the wife claimed that the farm, or at least its appreciation in value, should be classified as marital property. She stressed that mortgage payments during the marriage had been

[45]1995 OK 5, 890 P.2d 925.

[46]705 S.W.2d 619 (Mo. Ct. App. 1986)

made with marital funds.

The Missouri Court of Appeals first determined what portion of the farm had been acquired by the marital partnership under the source of funds rule. The mere assumption of the mortgage did not make the property marital, the court decided. Furthermore, the farm's increased value was not marital simply because the appreciation occurred during the marriage. Moreover, the payment of interest on the debt for the farm did not give rise to a marital interest in the property. Instead, the court concluded, the parties acquired a marital interest in the farm only by expending funds to reduce the indebtedness secured by the farm.

To determine the exact amount of the marital and non-marital interests in the farm's appreciated value, the court decided to use the formula adopted by the Kentucky Court of Appeals in Brandenburg v. Brandenburg.[47] Under that formula, the marital interest is calculated as the marital contribution to the property divided by the total contribution to the property, multiplied by the equity in the property at the time of dissolution. The marital contribution is the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal, plus the value of all improvements made to the property after marriage from other than nonmarital funds. Equity is the equity in the property at the time of valuation.[48]

Attorneys should be careful not to utilize a reimbursement theory. In the inception of title state of Texas,[49] the increase in value of separate property belongs either solely to

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[47]617 S.W.2d 871 (Ky. Ct. App. 1981)

[48]Other courts that have considered the problem have varied the formula slightly. One court has suggested the formula should divide the nonmarital investment by the purchase price, and then multiply that fraction by the value of the property at the time of the partiesâ€™ separation. The use of purchase price and market value instead of equity will vary the percentages and, thus, produce different results with regard to which part is marital and which part separate. See Stroh v. Stroh, 383 N.W.2d 402 (Minn. Ct. App. 1986); Marriage of Moore, 618 P.2d 208 (Cal. 1980). While the exact formula is the subject of some debate, all courts and commentators agree that some formula must be found to distribute the marital and separate part of the property. W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 131-165 (1982).

[49]See Comment, The Effect of Community Time, Talent and Industry upon Separate Property, 22 BAYLOR L. REV. 527 (1970). Texas is the only state that seems not to realize that there is a problem of apportionment when separate property increases in value. It is the only community property state that continues to adhere to an all or nothing approach to the classification of the increase. All other jurisdictions have abandoned that approach. See e.g., Cockrill v. Cockrill, 601 P.2d 1334 (Ariz. 1979).

the separate estate or solely to the marital estate. Where the marital estate reduces the mortgage on separate property, the marital estate is only entitled to reimbursement of the funds spent. This approach is inconsistent with the source of funds theory and Thielenhaus v. Thielenhaus. Its use denies the marital estate its share of the increase in value and should not be utilized in Oklahoma.

When one spouse devotes most of his working efforts toward developing a separate property business, the increase in the value of that business usually has two sources. Part of the increase must be attributed to the labor of the owning spouse. Since this labor belongs to the marital estate, part of the increase in value clearly belongs to the marital unit. However, part of the increase is surely to be attributed to the value of the separate property that was brought into the marriage. Thus, some method needs to be found to apportion the increase in value between the marital and separate estates.

Historically, two methods have developed in the community property states to apportion the increase between the community and separate estates:[50] the reasonable rate of return method and the reasonable compensation method. Both methods are being applied in the marital property jurisdictions to apportion the increase in value between the marital and separate estate.

The reasonable rate of return method classifies the separate property as capital and allows its owner a reasonable return on that capital. California pioneered this method when the increase in value was primarily because of spousal efforts.[51] The method assures that the separate estate will receive its due even though the property is developed primarily by marital efforts. Most of the increase in property, however, is classified as marital because the marital estate is the major contributor to the increase. The rationale for this approach is that "the increment being attributable to the personal efforts of the husband belonged to the community . . . but without capital he could not have carried on the business."[52] Utilization of this method requires a preliminary decision that community or marital efforts were primarily responsible for the increase in value.[53]

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[50]King, The Challenge of Apportionment, 37 WASH. L. REV. 483 (1962).

[51]See Pereira v. Pereira, 103 P. 488 (Cal. 1909); Randolph v. Randolph, 258 P.2d 547 (Cal. Ct. App. 1953).

[52]Pereira, 103 P. at 491.

[53]For example, in the Randolph case the husband had spent all of his efforts working in his separate floral business. The court approved awarding all the increase to the community except for a return at the legal rate of interest of seven percent on the value of the separate property at the date of marriage. The court said that they would use the legal rate of interest unless the separate owner proved that another method would be clearly preferable

An example of the use of this method in a marital property state is MacDonald v. MacDonald.[54] The husband's father gave him an interest in a family automobile dealership during the marriage. He worked in the business during the marriage and the wife was primarily a homemaker, but occasionally helped out in the business. The court held that under the source of funds theory the marital estate includes that portion of the increase in value of separate property that is attributable to the labor of either of the spouses during marriage. The court concluded that most of the increase in value of the automobile dealership, and the property bought with dealership income, was due to marital efforts. The case was remanded to allow the trial court to award the husband a reasonable return on the value of the dealership at the time he received it as a gift from his father.[55]

Other cases in community property states have developed a second method of apportioning the increase: reasonable compensation. This is used for situations where the invested separate property contributed more than the marital skills and effort to the increase in value.[56] In Van Camp v. Van Camp,[57] the husband was wealthy man and was the general manager of a very successful seafood corporation which was in existence for many years before the marriage. Although the court recognized the contribution of his efforts, it found that he had been paid an extremely high salary during the marriage. The court held that the increase in value was derived principally from the property. The reasonable compensation method gives most of the increase to the separate estate. The community is only entitled to reasonable compensation for marital labor. What is reasonable may or may not be larger than the amount that was paid, depending upon what a reasonable salary for such an individual should be. Perhaps this is what Justice Hodges was referring to in Templeton v. Templeton,[58] when he dismissed the husband's "menial" labor on the apartment complex by saying that "he was more than adequately

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[54]532 A.2d 1046 (Me. 1987).

[55]Another example is Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987). The husband purchased a half interest in the business four years before marriage for $2,500. At the end of the thirty year marriage the business was worth more than a half-million dollars. During the marriage, the husband was the primary manager of the business. The Minnesota Supreme Court held most of the increased value of the business was due to appreciation attributable to the effort of one or both parties. The court indicated that the husband should be compensated for his non-marital contribution. On remand the trial court was instructed to award the husband a fair rate of return on the $2,500.

[56]See e.g., Speer v. Quinlan, 525 P.2d 314 (Idaho 1974).

[57]199 P. 885 (Cal. Ct. App. 1921)

[58]1982 OK 127, 656 P.2d 250.

compensated for any contribution he made because he was paid a salary."[59]

4. An Increase in the Value of Marital Property During Separation

The approach used with regard to an increase in value of separate property should also be utilized with regard to the increase in value of marital property during separation. This issue is often hidden under the question of the date of valuation of property. The two issues coincide when marital property has increased in This issue is often hidden under the question of the date of valuation of property. The two issues coincide when marital property has increased in value during separation due to economic or other factors not associated with either of the two spouses. When this occurs it does not matter whether one addresses the issue as the date of valuation or an increase in the value of marital property. If property has increased in value due to economic forces (so-called passive assets), it is usually valued as close to trial as possible, thereby attributing all the increase to the marital estate. If analyzed as an increase in value issue, the result is that any increase, not attributable to the efforts of the parties, adhere to the estate that owns the property. For example, in Sien v. Sien,[60] the increase in value of the husband's 401(k) plan during separation was due to interest on the marital portion and, therefore, was marital property. The same is true, the appellate panel held, with regard to interest on a marital debt. The interest continues to be a marital debt even if it accrues during separation.

However, if property increases during separation due to the efforts of the owning spouse, analyzing the issue as a valuation date problem produces an unfair result. If so analyzed, the valuation date would be the time the parties separated not intending to ever reconcile. This has the effect of awarding all of the increase in value to the separate estate. Instead, the increase in value should be apportioned between the marital estate and separate estate using the same methods as apportioning the increase in value of separate property during marriage. For example, if the marital property is a business that has increased in value due to the efforts of one of the spouses during separation, the marital estate should be entitled to a fair return on the capital that it contributed.

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[59]An Oklahoma case which is close to this fact pattern is Hutto v. Hutto, 1979 OK CIV APP 58, 602 P.2d 1055.

[60]1994 OK CIV APP 159, 889 P.2d 1268. See also Dorn v. Heritage Trust Co., 2001 OK CIV APP 64, 24 P.3d 886.

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