

Chapter 5

CHARACTERIZATION AND DIVISION OF PROPERTY IN DIVORCE

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I. (§5.1) Introduction and Statutory Authority

In 1974 the present dissolution of marriage statute became effective in Missouri. The 1974 law dramatically changed Missouri's prior divorce law in many ways. One of the most significant changes in the statute was that it granted jurisdiction to the divorce court to divide the property of the parties. Before the 1974 law, the courts had no authority to divide property within the scope of a divorce proceeding. Instead, there was a "race to the courthouse" to file a partition lawsuit upon entry of a divorce decree. The 1974 law changed all of that in

Missouri, and since that time the divorce court has been vested with broad powers to determine the existence, character, value, and ultimate ownership of property owned by a divorcing couple. Section 452.330, RSMo Supp. 1996.

Under the present statute, the court is charged with the responsibility of determining the character of property owned by the parties. Property is either “marital” or “nonmarital” under the statute. Section 452.330.1-4. After the court has determined its character, the court must then set apart to each spouse his or her nonmarital property. The marital property is divided “in such proportions as the court deems just after considering all relevant factors. . . .” Section 452.330.1. The court’s order as it affects distribution of marital property is a final order that may not be modified at a later date. Section 452.330.5.

The application of the dissolution of marriage statute to the infinite variety of circumstances present in the many marriages dissolved in Missouri each year is far more complicated than its straightforward language reveals. This chapter summarizes the existing law on division of property at divorce. It also attempts to identify some particularly complicated but common circumstances and guide the practitioner through them.

This chapter provides some practical suggestions on how to present evidence on property issues to the court in a manner intended to capture the court’s attention and reduce the message to its most concise, effective form.

II. (§5.2) Classification of Property at Divorce

For the purposes of the Missouri dissolution of marriage law, “marital property” is all property acquired by either spouse after the marriage, except for property acquired in a specific manner excepted by the statute. The exceptions to the marital property rule are property acquired in the following manner:

- (1) Property acquired by gift, bequest, devise, or descent;
- (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) Property acquired by a spouse after a decree of legal separation;
- (4) Property excluded by valid written agreement of the parties; and
- (5) The increase in value of property acquired prior to the marriage or pursuant to subdivisions (1) to (4) of this subsection, unless marital assets including labor, have contributed to such increases and then only to the extent of such contributions.

Section 452.330.2, RSMo Supp. 1996.

A decree that fails to set apart separate property and marital property is not final for appeal. *Wagner v. Wagner*, 823 S.W.2d 523 (Mo. App. W.D. 1992); *Zimmer v. Zimmer*, 826 S.W.2d 904 (Mo. App. S.D. 1992). Therefore, the first task for the court—and for the practitioner presenting the case to the court—is to identify nonmarital property and isolate it from the marital estate.

A. Separate Property

1. (§5.3) PROPERTY ACQUIRED BY GIFT, DEVISE, BEQUEST, OR DESCENT

All property acquired separately by gift is nonmarital. This includes property gifted by one of the parties to the other during the marriage, and it applies even if the gift was acquired with marital funds. For example, anniversary gifts given to a wife by a husband during their marriage are considered the wife's nonmarital property. *Townsend v. Townsend*, 705 S.W.2d 595 (Mo. App. E.D. 1986); *see also Heineman v. Heineman*, 768 S.W.2d 130 (Mo. App. W.D. 1989). Obviously, then, an engagement ring given in contemplation of marriage becomes the nonmarital property of the recipient—even if the marriage lasted only sixteen weeks. *Smith v. Smith*, 797 S.W.2d 879 (Mo. App. S.D. 1990).

The elements of a “gift” in divorce cases are the same as for any other purpose, and, in the event of a dispute, they must be proven:

1. A present intention to make a gift on the part of the donor;
2. Delivery of the property by the donor to the donee; and
3. Acceptance by the donee, whose ownership takes effect immediately and

absolutely.

Id.

Property gifted to one of the parties by someone outside the marriage is the separate property of the recipient, as is property acquired by inheritance. A party claiming a gift must prove the gift with clear and convincing evidence. *Scism v. Scism*, 844 S.W.2d 506 (Mo. App. E.D. 1992); *Heineman v. Heineman*, 768 S.W.2d at 137. Counsel should note that with *titled* property, the gift is presumed to be made to the titleholder. Once the title interest is proven, there is no need to prove the elements of gift described above. It is not for the trial court to look to the donor's motive in making the gift. *In re Marriage of Johnson*, 856 S.W.2d 921 (Mo. App. S.D. 1993).

2. (§5.4) PROPERTY ACQUIRED IN EXCHANGE FOR PROPERTY ACQUIRED BEFORE THE MARRIAGE OR IN EXCHANGE FOR PROPERTY ACQUIRED BY GIFT, BEQUEST, DEVISE, OR DESCENT;
PROPERTY ACQUIRED AFTER DECREE OF LEGAL SEPARATION

As with other claimed separate property, the burden is on the party claiming the separate nature of the property to prove with clear, cogent, and convincing evidence that the property was acquired in the manner described. Mere conclusory testimony

of one party, without corroboration, will not satisfy the required threshold of proof. *Reed v. Reed*, 762 S.W.2d 78 (Mo. App. S.D. 1988). Therefore, bare testimony should be considered the proof of last resort.

PRACTICE TIP: Documents are always the best evidence, and especially so for this purpose. It is suggested that in any case in which the practitioner recognizes an issue relating to the character of property, he or she should obtain the documents necessary to prove the following facts for each asset:

- a. The acquisition date;
- b. The person originally acquiring the property;
- c. The status of title at acquisition and at time of trial;
- d. The method and source of payment;
- e. The parties' intentions as to character;
- f. The use of the property; and
- g. The contributions of each party to acquisition.

21 JACK COCHRAN, MISSOURI PRACTICE *Family Law* § 5.10 (1990).

Typically, not all of the documents necessary to prove these facts will be available from the client or the opposing party. Documents that do exist are frequently within the control of the opposing party and not accessible to the client. It is also possible that neither party possesses the needed information. But the inquiry should not stop with the parties. To satisfy the standard of proof, the attorney must expend all efforts necessary to locate and present the paper trail showing the manner in which the asset was ultimately acquired. This may involve searching title records, reviewing old tax returns, business records, or corporate minutes and resolutions. The attorney may have to review probate records to obtain copies of a relevant will or pertinent orders of distribution. It may be necessary to depose the trustee of a trust that is known to exist, obtaining a copy if the client has none.

Only in this manner can the record be clear enough to withstand the scrutiny of a trial judge who understands the marital property presumption and to hold up on appeal given the standard of proof cited in the cases.

3. (§5.5) PROPERTY EXCLUDED BY VALID WRITTEN AGREEMENT

Written antenuptial and postnuptial agreements, if valid, provide an additional exception to the marital property presumption. The parties to a marriage may contract, either before or during the marriage, to treat property in any number of ways in the event of a divorce. As long as the agreement is valid, its terms are binding on the court, which is obliged to act in accordance with them. As to the validity of these agreements in Missouri, see *Estate of Youngblood v. Youngblood*, 457 S.W.2d 750 (Mo. banc 1970); *Degerinis v. Degerinis*, 724 S.W.2d 717 (Mo. App. E.D. 1987); *Ferry v. Ferry*, 586 S.W.2d 782 (Mo. App. W.D. 1979).

PRACTICE TIP: These agreements are frequently challenged in divorce cases

on any number of grounds. Typically, questions about the validity of the agreement are not answered until the court enters its decree. But in *Gould v. Rafaeli*, 822 S.W.2d 494, 496 (Mo. App. E.D. 1991), a Rule 74.04 motion for partial summary judgment was used to successfully establish the validity of the agreement early in the case, long before the ultimate trial on the remaining issues. The authors can imagine the successful use of this motion by either the challenger or defender of this agreement in any given case. The purpose of the motion would be to establish the parameters of the case early in the process and avoid unnecessary expenditures to litigate an issue that could have already been judicially determined. Unfortunately, this result cannot be guaranteed because a partial summary judgment is an interlocutory order and therefore not subject to appeal. In *Gould*, the appeal challenged a partial summary judgment granted by the trial court, which determined the agreement to be valid and enforceable. The court of appeals affirmed. Even if the validity of the agreement remains in issue after the partial summary judgment, the advantage on appeal—as a practical matter in a bench-tried case—rests with the party who prevailed in the trial court.

4. (§5.6) INCREASE IN VALUE OF PROPERTY ACQUIRED BEFORE THE MARRIAGE OR PURSUANT TO SUBDIVISIONS 1 TO 4 OF § 452.330.2, RSMO, UNLESS MARITAL ASSETS INCLUDING LABOR HAVE CONTRIBUTED TO THE INCREASES AND THEN ONLY TO THE EXTENT OF THE CONTRIBUTIONS

The important exception to the rule—that increases in the value of separate property remain separate—occurs when the contribution of marital efforts has caused, at least in part, the increase in value. This issue is the source of a great deal of litigation.

In *Meservey v. Meservey*, 841 S.W.2d 240 (Mo. App. W.D. 1992), the Western District Court of Appeals considered the marital contributions of a farm wife to the increase in value of her husband's separate farming corporation during their twenty-three year marriage. The wife's proof at trial was that she took meals to field workers, fed the livestock, moved farm machinery, and located parts for repairs. The court said marital labor, effort, or services will entitle a spouse to a proportionate share of the increase in value of the other spouse's separate property "only after comprehensive substantiation." In addition, there must be proof of: (1) a contribution of substantial services; (2) a direct correlation between those services and the increase in value; (3) the amount of the increase in value; (4) performance

of the services during the marriage; and (5) proof of the value of the services, the lack of compensation, or inadequate compensation received. *Id.* Proof of performing services during the marriage, alone, is not sufficient to prove the contribution to the value of the separate asset and the accompanying entitlement to a share of the increase. There must be proof of the value of the services provided and of a connection between the performance of those services and the increase in the value of the asset. In *Meservey*, the wife failed to show any connection between the performance of her services, the value of them, and the resulting increase in the value of the farm's corporate stock. *See also Deffenbaugh v. Deffenbaugh*, 877 S.W.2d 186 (Mo. App. E.D. 1994).

In *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. banc 1984), the wife contended the increase in the value of her husband's stock in a separate, closely held corporation was marital due to her husband's efforts expended during the marriage. The Supreme Court required proof of the value of the husband's services to the corporation or that he had sacrificed payment of marital funds, by way of salary or dividends, in order to increase the value of the corporation's stock. In absence of this proof, the Court said "[i]t would require substantial speculation to conclude that the stock's value had appreciated in any amount due to the husband's forsaking marital property compensation for his services." *Id.* at 826.

In *Heineman v. Heineman*, 768 S.W.2d 130 (Mo. App. W.D. 1989), the wife owned a photographic studio before her marriage. During the marriage she took no salary from the studio corporation as an income tax-saving strategy. The value of the separate corporation increased dramatically during this period, and the increase was directly traceable to the salary forbearance by the wife. The court found that the increase in the retained earnings of the corporation was derived from money that otherwise would have been paid to the wife as her salary, which would have been marital. The retained earnings were determined to be the repository of the marital contribution to the increase in value of the business and were determined to be marital. *Id.* at 137.

PRACTICE TIP: The use of expert testimony should be considered for use in proving a reasonable level of compensation to be expected for the individual in question. There are statistical studies available to accountants and other professionals that compile national average compensation paid to officers of similarly situated businesses based upon size of the business and other relevant characteristics. The practitioner should also consider the use of expert testimony to prove the value of a claimed contribution to the acquisition of an asset. For example, where the contribution of carpentry services provided by one of the spouses is claimed to have increased the value of the other's separate residence, counsel should consider the testimony of a carpenter or contractor to prove the value of the work performed or the testimony of a realtor to prove its relationship to

the increase in value of the structure. But the proponent of this contribution evidence may claim a marital interest that is limited to the value of the contributions made; there is no marital interest that attaches to an increase in the value of separate property that results from general market considerations or inflation. Section 452.330.2(5), RSMo Supp. 1996. The limitation applies only to claimed interests in the increase in value of separate property. *Id.* There is no corresponding limitation on the value of a claimed contribution to the acquisition of marital property, whether that contribution is from the separate funds of the proponent or from marital funds generated by marital efforts.

B. Marital Property

1. (§5.7) TITLE AND EVOLUTION OF THE SOURCE OF FUNDS RULE

The manner of classifying “marital” and “separate” property has evolved dramatically since 1984. The most significant change from the prior law came with the adoption of the pure “source of funds” rule by the Supreme Court of Missouri. This occurred in 1984 in *Hoffmann v. Hoffmann*, 676 S.W.2d 817 (Mo. banc 1984). Under the *Hoffmann* source of funds rule, the character of property was determined solely by the source of funds financing its purchase. *Id.* at 824. The property was considered to be acquired as it was paid for, so that a portion of the property’s ultimate value could be both marital and separate property. The source of funds approach embodied a theory of marital partnership. *Id.*

The source of funds rule allowed compensation for marital efforts and property contributed to the acquisition or enhancement of the value of the asset. These contributions would not otherwise be reflected in the title ownership of the property. The equitable theory of the rule also gave the marital estate a proportionate share of the total *appreciated* value of the property, even if due only to general economic conditions and not attributable to any further marital effort or contribution. “Thus, the spouse who contributed nonmarital funds, and the marital unit that contributed marital funds each [received] a proportionate and fair return on their investment.” *Neal v. Neal*, 776 S.W.2d 861 (Mo. App. S.D. 1989).

The acquisition of an interest in the appreciated value of separate property, by operation of the source of funds rule, is dramatically demonstrated in *In re Marriage of Herr*, 705 S.W.2d 619 (Mo. App. S.D. 1986). In *Herr*, the wife contended she was entitled to a “share of the appreciation in the value of the [Husband’s separate] farm attributable to the period of time when the marital unit assumed the debt on the farm.” *Id.* at 622. The court developed the following formula for determining the marital interest in the farm attributable to the

contribution of marital funds used to pay down the debt:

$$\begin{aligned} \text{nonmarital property} &= \text{nmc}/\text{tc} \times e \\ \text{marital property} &= \text{mc}/\text{tc} \times e \end{aligned}$$

“nmc” is the nonmarital contribution, which was defined as the equity in the property at the time of marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from the nonmarital funds.

“mc” is the marital contribution, which was defined as 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.

Total contribution (tc) was defined as the sum of nonmarital and marital contributions.

Equity (e) was defined as the equity in the property at the time of distribution. “This may be either at the date of the decree . . . or, if the property has been sold prior thereto and the proceeds may be properly traced, then the date of the sale shall be the time at which the equity is computed.” *Id.* at 625.

Using this formula, the court could determine the marital property interest in an otherwise separate asset, and more importantly, the marital interest in its appreciated value. It is this “equity” component of the formula that allows the acquisition of an interest in the appreciated value of separate property.

The *Herr*, 705 S.W.2d 619, formula was adopted in the eastern district in *Winter v. Winter*, 712 S.W.2d 423 (Mo. App. E.D. 1986).

Counsel should note, however, that since the passage of § 452.330.4, RSMo Supp. 1996, commingling alone does not create a marital interest in the appreciated value of previously separate property. Nor does commingling, alone, transmute the character of the property from separate to marital. The statute, enacted four years after the *Hoffmann*, 676 S.W.2d 817, opinion was written, provides: “Property which would otherwise be nonmarital property shall not become marital property solely because it may have become commingled with marital property.”

Thus, since the appreciation in the value of separate property remains separate—per § 452.330.2(5)—it seems there can be no acquisition of a marital interest in the increase by virtue of the commingling of marital property with the separate property. This would seem especially so given the language set forth in § 452.330.2(5), which limits the acquisition of a marital interest in the increase in the value of separate property to the extent of the marital contributions made. *Id.* The marital interest in separate property would equal the value of marital contributions proven, and no more.

Even though it might appear the *Herr*, 705 S.W.2d 619, formula should no longer be followed, some cases have continued to apply it and have thereby awarded to a spouse an interest in the appreciated value of the other’s separate property. See *Moritz v. Moritz*, 844 S.W.2d 109, 112 (Mo. App. W.D. 1992), in which the court stated: “In order to determine the marital interest in debt-free property that has been acquired by the investment of both marital and nonmarital

funds, the proper formula to use is: marital contribution/total contribution x value.” See also *Brooks v. Brooks*, 911 S.W.2d 631 (Mo. App. E.D. 1995). This formula grants an interest in the appreciated value of separate property because it is based upon the value at the time of the division. This is inconsistent with the language of § 452.330.2(5) referred to above.

Before *Hoffmann*, 676 S.W.2d 817, the character of property was determined by the “inception of title” rule. The “inception of title” rule classified property as separate or marital at the moment title was taken without regard to the origin of the funds with which the asset was acquired. The inception of title rule was patently unfair to the party who held no title interest in the asset, but contributed in some manner to its acquisition. The source of funds rule provided a means for recognition of the contribution.

Some of the impact of the source of funds rule described in *Hoffmann*, 676 S.W.2d 817, was diluted by the Missouri legislature when it adopted § 452.330.4 set forth above.

The revised provision protects separate property from automatic transmutation to marital property by commingling alone. Additionally, the revised provision protects the appreciated value of separate property from being recharacterized as marital property due to commingling. But the essence of *Hoffmann*, 676 S.W.2d 817, appears to remain in force to this extent: The source of funds with which an asset is acquired is now nearly as important a consideration for the court in classifying property as the status of its title.

2. (§5.8) TRANSMUTATION

Property that at one time during the marriage was clearly separate may become transmuted to marital property by either (1) gifting or joint titling, or (2) commingling. *Doll v. Doll*, 819 S.W.2d 739 (Mo. App. E.D. 1991). It is important to remember that these concepts are not the same and that each is treated differently under the case law and the dissolution of marriage statute. *Id.* at 741.

a. (§5.9) *Transmutation by Joint Title or Gift to Marital Estate*

The execution of a deed in joint names represents evidence of a donative intent to create a gift to the marital estate. This is a rebuttable presumption. *In re Marriage of Smith*, 785 S.W.2d 764 (Mo. App. E.D. 1990), citing *Kramer v. Kramer*, 709 S.W.2d 157 (Mo. App. E.D. 1986), and *Allen v. Allen*, 770 S.W.2d 529 (Mo. App. E.D. 1989). This is so even where one spouse furnished all of the consideration. *Doll v. Doll*, 819 S.W.2d 739 (Mo. App. E.D. 1991), citing *Kramer* and *Dunsford v. Dunsford*, 671 S.W.2d 282, 283 (Mo. App. E.D. 1983). The cases make it quite clear that only the clearest possible evidence that no gift to the estate was intended may rebut the presumption. The “clear and convincing” standard

refers to evidence that “instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder’s mind is left with an abiding conviction that the evidence is true.” *In re Marriage of Jennings*, 910 S.W.2d 760, 763 (Mo. App. S.D. 1995). Mere self-serving testimony that there was no intent to make a marital gift is entitled to little weight. *Absher v. Absher*, 841 S.W.2d 293 (Mo. App. E.D. 1992); *Stephens v. Stephens*, 842 S.W.2d 909 (Mo. App. S.D. 1992).

Even where substantial evidence exists that a primary purpose apart from the creation of a gift to the estate motivated the change in title, Missouri courts have determined that donative intent to create a marital gift was presumed to exist concurrently with it. *McDonough v. McDonough*, 762 S.W.2d 827 (Mo. App. E.D. 1988).

b. (§5.10) *Transmutation by Commingling*

At one time, any commingling of marital property with separate property transmuted the entire corpus to marital property. For example, in *Cartwright v. Cartwright*, 707 S.W.2d 469 (Mo. App. E.D. 1986), the court held that, when interest earned on a separate certificate of deposit during the marriage is commingled with the separate principal, the entire fund became transmuted to marital property. In 1988 the Missouri General Assembly amended § 452.330, now RSMo Supp. 1996, by adding a new subsection 4: “Property which would otherwise be nonmarital property shall not become marital property solely because it may have become commingled with marital property.” Section 452.330.4.

The effect of the amendment was to protect separate property from inadvertent transmutation such as in *Cartwright*, 707 S.W.2d 469. If *Cartwright* were decided under the 1988 amendment, the separate certificate of deposit would remain separate, despite the commingling of the interest earned on it during the marriage.

But the 1988 amendment did not alter the effect of joint titling of property, which property continues to be presumptively marital. *Doll v. Doll*, 819 S.W.2d 739, 741 (Mo. App. E.D. 1991).

PRACTICE TIP: The attorney representing a party who claims he or she did not intend to contribute separate property—which became jointly titled—to the marital estate should concentrate on proving his or her *contribution* to the acquisition of the asset rather than attempting to rebut the marital presumption as to the marital nature of the jointly titled property. By arguing *contribution*, the attorney may still be able to recoup a substantial percentage of the client’s separate funds in the division of property despite its marital nature. This valuable argument is addressed more fully in §5.13, *infra*.

III. (§5.11) Considerations for Disposition of Property

Section 452.330, RSMo Supp. 1996, describes the factors for the court to consider in dividing the marital estate. Under the statute, the court is to divide the marital property in proportions as the court deems just after considering all relevant factors, including:

- (1) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children;
- (2) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (3) The value of the nonmarital property set apart to each spouse;
- (4) The conduct of the parties during the marriage; and
- (5) Custodial arrangements for minor children.

Section 452.330.1(1)-(5).

It should be noted that the statute does not provide for an *equal* division of the marital estate; the division need only be *equitable* given the considerations enumerated above. *Dove v. Dove*, 773 S.W.2d 871 (Mo. App. W.D. 1989). It is this distinction that prevents the Missouri dissolution of marriage statute from being a true “no-fault” statute. Rather, Missouri has a “modified” no-fault statute: The conduct of the parties may bear upon the division of their marital property at divorce. See JESSE A. GOLDNER, MISSOURI DISSOLUTION OF MARRIAGE, SUPPORT, AND CHILD CUSTODY § 6-1 (Harrison Company 1987).

As will be seen, the cases impact heavily upon the statute, alternately expanding and restricting its terms and further defining its language.

A. (§5.12) Economic Circumstances of the Parties

In *Mika v. Mika*, 728 S.W.2d 280 (Mo. App. E.D. 1987), the Eastern District Court of Appeals examined economic circumstances and upheld a property division of roughly eighty-four percent to the wife and sixteen percent to the husband. In *Mika*, the husband earned \$121,000 per year, and the wife stopped working shortly after the marriage at his request. She was also unemployed at the time of the divorce. An additional economic factor considered by the court in upholding the trial court’s decree was the balance between income-producing and nonincome-producing property. The court approved the award of a cash payment to the wife to compensate her for the fact that the sixteen percent of the property awarded to the husband was income-producing. This cash payment “need not be linked to any particular asset” in that circumstance. *Id.* at 284.

In *Rudden v. Rudden*, 765 S.W.2d 719 (Mo. App. E.D. 1989), the Eastern District Court of Appeals stated Social Security benefits or potential benefits are economic factors to be considered, along with other factors, in the disposition of the marital property. *Id.* at 720. This was held to be so even though the benefits are not assignable as marital or separate property within the context of a divorce. *But cf.* § 169.572.1, RSMo 1994. This does not mean the benefits are considered property for purposes of divorce, because, in fact, they are not.

Based upon this statute and its mandate to consider the parties’ respective

economic circumstances, other cases have awarded the marital residence to the custodial parent. See *Mueller v. Mueller*, 782 S.W.2d 445 (Mo. App. E.D. 1990); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. E.D. 1987). Once the court has awarded to the custodial parent the right to remain in the marital residence, that right may not be conditioned upon whether the spouse remarries or cohabits with another person. *Bixler v. Bixler*, 810 S.W.2d 95 (Mo. App. E.D. 1991).

B. (§5.13) Contribution to the Acquisition of the Marital Property

The court may award a greater percentage of the marital property to the party who contributed more to its acquisition. Although this factor refers generally to the parties' respective conduct and contributions of services and funds during the marriage, it is especially important where the client committed substantial separate funds or assets to the marital estate that ultimately became jointly titled. As indicated in §5.2, *supra*, the heavy presumption of donative intent for jointly titled property will be nearly impossible to rebut. But the contribution argument presents an alternative theory to obtain reimbursement to the client.

For example, in *Ryall v. Byrd*, 903 S.W.2d 683 (Mo. App. E.D. 1995), the court approved a ninety percent to ten percent division of property in a fifteen-month marriage where one party contributed all the assets and earnings of the parties in that fifteen-month period.

In *Abrams v. Abrams*, 787 S.W.2d 902 (Mo. App. E.D. 1990), the court awarded \$12,000 of the marital equity interest in the marital home to the wife and \$2,000 of that interest to the husband. There was evidence the wife used a \$10,000 inheritance to purchase the property for the couple.

In *Whaley v. Whaley*, 805 S.W.2d 681 (Mo. App. E.D. 1990), the trial court awarded sixty-five percent of the estate to the husband and thirty-five percent to the wife. The appeals court affirmed the division because the marriage was relatively short—seven years—and most of the marital property was acquired with funds the husband brought into the marriage. The wife brought no assets into the marriage.

PRACTICE TIP: This contribution argument should also be made where one of the parties contributed substantial premarital funds to the use of the marital entity. Even though the funds were exhausted by the time of the divorce, the parties may have enjoyed a higher standard of living during their marriage than they might otherwise have experienced. The contributing party may be entitled to a disproportionate share of the remaining estate.

It should be noted, however, that the significance of a greater financial contribution by one spouse as a factor for division of the estate diminishes over time. *In re Marriage of Hash*, 838 S.W.2d 455 (Mo. App. S.D. 1992). Therefore, it

would seem that the longer the marriage, the less significant the greater financial contribution as a factor in the division and the more likely the contribution will be considered a gift to the estate.

C. (§5.14) Value of the Nonmarital Property Awarded Each Party

There are few cases in which this factor was held to be dispositive on the issue of property division. But it has been held that the court should not deduct, dollar-for-dollar, from the share of marital property to be awarded based upon the separate property awarded to that party; the court is merely to consider it, and there is no elaboration in the cases as to the extent and manner of the consideration. *Smith v. Smith*, 702 S.W.2d 505 (Mo. App. S.D. 1985).

Special consideration should be given to this factor when counsel is representing a party whose spouse has substantial separate assets at his or her disposal. In that circumstance, the value of the adverse party's separate estate may militate in favor of a disproportionate division of the marital estate that favors counsel's client.

D. (§5.15) Conduct of the Parties During the Marriage

Conduct of the parties is frequently cited as the reason for a particular disposition of the marital property in the cases. The types of conduct to be considered are many and have included physical abuse and telephone harassment, *Divine v. Divine*, 752 S.W.2d 76 (Mo. App. S.D. 1988); alcohol abuse and concealment of assets, *In re Marriage of Clark*, 801 S.W.2d 496 (Mo. App. E.D. 1990); and the dissipation of marital funds, *In re Marriage of Gourley*, 811 S.W.2d 13 (Mo. App. S.D. 1991); *Hogrebe v. Hogrebe*, 727 S.W.2d 193 (Mo. App. E.D. 1987). Of course, there are many cases in which sexual misconduct and adultery were dispositive factors.

Frequently, there is a claim of misconduct as relates to infidelity. The statute makes no distinction between misconduct that occurs before and after the separation, and presumably all misconduct is technically relevant. In many cases the claimed infidelity occurs at or near the time of separation from the spouse, making the distinction between pre- and postseparation misconduct even more relevant when representing the party who desires to raise the claim of misconduct. The cases say, however, that postseparation misconduct may be relevant only when it places additional burdens upon the marriage, financially or otherwise. *Mika v. Mika*, 728 S.W.2d 280 (Mo. App. E.D. 1987); *see also Dardick v. Dardick*, 670 S.W.2d 865, 870 (Mo. banc 1984).

Since postseparation misconduct is often considered irrelevant by the court, it may be difficult to draw the court's attention to this conduct unless it is especially egregious or injurious. Therefore, when representing the spouse who wishes to raise the issue, consideration should be given to discovery of moneys and assets

expended by the bad actor that inured to the benefit of his or her paramour. The financial expenditures clearly demonstrate a financial burden upon the marital estate. They may also make postseparation misconduct—which might otherwise be deemed irrelevant—entirely relevant for trial.

When representing the “bad actor” spouse, this approach by opposing counsel may only be prevented by an agreement to provide an accounting of the expenditures without the need for formal discovery by him or her. While this agreement does not eliminate the issue, the issue can frequently be defused and its volatility controlled. It also makes the issue less intimidating to the client, who should make settlement decisions based upon rational factors rather than upon fear of some unknown sanction for his or her judgment.

E. (§5.16) Custodial Arrangements for Minor Children

This factor first appeared in the statute in 1988 as new subparagraph (5) of § 452.330.1, RSMo. The first case in which the amendment appears to have been relied upon to support a disproportionate division of property in favor of a custodial parent was *Howerton v. Howerton*, 796 S.W.2d 665 (Mo. App. S.D. 1990). In *Howerton*, the court of appeals adjusted the division of property on appeal by awarding the custodial parent an additional \$10,000 in marital property, payable in 100 equal monthly installments of \$100 each until paid. The stated rationale for adjusting the property award in this manner was the need to protect the financial maintenance of the minor children, as well as to apply § 452.330.1(5), now RSMo Supp. 1996, which had just been added to the statute. The court notes that until the revision that added § 452.330.1(5) to the existing statute, the financial protection of children primarily depended upon the allowance of child support under § 452.340, now RSMo Supp. 1996. The *Howerton* court felt the amendment to § 452.330.1 reflected a legislative intention that the courts use the division of property to assist in this function. *Howerton*, 796 S.W.2d at 668.

IV. Treatment of Particular Property or Circumstances

A. (§5.17) Dividends and Stock Splits

Cash dividends earned during the marriage on separate property are considered income during the marriage and are therefore marital. *Drikow v. Drikow*, 803 S.W.2d 122 (Mo. App. E.D. 1990). But additional stock acquired because of a split

of or dividend on separate stock remains separate property. The rationale is the split does not represent an increase of property owned before the marriage; rather, it is merely a greater number of shares that represent exactly the same ownership and value as existed before the stock split or stock dividend. *In re Marriage of Bruske*, 656 S.W.2d 288 (Mo. App. W.D. 1983).

B. (§5.18) Marital Debts

The determination of who will be responsible for debts incurred during the marriage is a factor the trial court is to consider in seeking a fair division of marital property. *Whitworth v. Whitworth*, 806 S.W.2d 145 (Mo. App. W.D. 1991); *Levis v. Levis*, 713 S.W.2d 561 (Mo. App. E.D. 1986). But debts incurred during the marriage are not marital property, and the trial court is under no obligation to distribute them. *Harper v. Harper*, 764 S.W.2d 480 (Mo. App. E.D. 1989). The failure to distribute responsibility for payment of marital debts within the decree does not prevent its finality. *Fiorani v. Fiorani*, 720 S.W.2d 438 (Mo. App. W.D. 1986). But in *Oldfield v. Oldfield*, 688 S.W.2d 778 (Mo. App. E.D. 1985), it was held the trial court abused its discretion by failing to consider liens against the husband's corporations and other marital debts in valuing the marital estate, resulting in an unfair division of property. The decree was modified on appeal to rectify the inequitable division. *Id.* at 782.

C. (§5.19) Military Pensions

Military pensions are divisible, even when not fully vested. In *Fairchild v. Fairchild*, 747 S.W.2d 641 (Mo. App. W.D. 1988), the parties were married for thirteen years. The husband had been in the service for fifteen years and would become entitled to receive payments from his pension after twenty years' service. The court held that his wife was entitled to 1/2 of 13/20ths of any retirement pay that may become payable to the husband. "The fact that entitlement to retirement benefits depend [sic] upon contingencies and by their nature are speculative—both as to future entitlement thereto, and as to amounts—does not deprive them of their character as marital property." *Id.* For a further discussion of military pensions see §15.27 of this deskbook.

D. (§5.20) Missouri State Teachers' Retirement Pensions

A court of competent jurisdiction may divide the pension, annuity, benefits, rights, and retirement allowance provided pursuant to the Missouri teacher and school employee retirement system between the parties to any action for dissolution of marriage to the same extent and in the same manner the court may divide any federal old-age, survivors, or disability insurance benefit of the parties provided pursuant to the federal Social Security Act, 42 U.S.C. §§ 201, *et seq.* Section 169.572, RSMo 1994. But § 169.572.1 states that “[n]o court shall divide or set aside any federal old-age, survivors or disability insurance benefit provided . . . pursuant to the federal Social Security Act . . . in any proceeding for dissolution of marriage.” The effect of this statute is that these state teachers’ pensions are the separate property of the teacher and that to divide them is reversible error. *Gismegian v. Gismegian*, 849 S.W.2d 201 (Mo. App. E.D. 1993). For a further discussion see §15.31 of this deskbook.

E. (§5.21) Disability Benefits and Workers' Compensation Awards

Disability insurance benefits are considered substitutes for lost earnings occasioned by an inability to work and therefore the same as postdissolution earnings. As a result, they are nonmarital property under § 452.330.2(3), RSMo Supp. 1996. *Sherman v. Sherman*, 740 S.W.2d 203 (Mo. App. W.D. 1987). A lump-sum award of workers’ compensation benefits, including an award before dissolution, is nonmarital to the extent the award compensated the recipient for future loss of earnings that had accrued since the dissolution of the marriage. *Pauley v. Pauley*, 771 S.W.2d 105 (Mo. App. E.D. 1989).

F. (§5.22) Professional Degrees

Professional degrees, per se, are not considered property subject to the dissolution of marriage law. *Roark v. Roark*, 694 S.W.2d 912 (Mo. App. E.D. 1985). Nor do the cases consider there is an increase in “human capital” attributable to the acquisition of a professional degree or of board certification in a medical specialty that can be ascribed to have a value and be considered as an asset in the division of property. *Riaz v. Riaz*, 789 S.W.2d 224 (Mo. App. E.D. 1990). But the contribution of one spouse to the acquisition of the degree by the other spouse may indeed be considered in dividing property as well as in awarding maintenance. *In re Marriage of Studyvin*, 779 S.W.2d 338 (Mo. App. S.D. 1989); *In re Marriage of*

Dusing, 654 S.W.2d 938 (Mo. App. S.D. 1983); *Lowrey v. Lowrey*, 633 S.W.2d 157 (Mo. App. W.D. 1982).

PRACTICE TIP: Counsel should always present evidence on the nonprofessional spouse's contribution, if any, to the acquisition of a professional degree by the other spouse. This evidence is frequently persuasive to the court, especially when the parties are young and have accumulated little in the way of property to divide.

G. (§5.23) Personal Injury Claims and Proceeds

An unliquidated claim for damages arising from personal injury during the marriage is marital property for purposes of the dissolution of marriage proceeding. *Jobe v. Jobe*, 708 S.W.2d 322 (Mo. App. S.D. 1986). The proceeds of a personal injury settlement received by one of the parties during the marriage are marital, *Zimmer v. Zimmer*, 770 S.W.2d 514 (Mo. App. W.D. 1989) (annuity settlement); *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. App. E.D. 1975) (lump-sum settlement proceeds); including proceeds from actions under the Federal Employers' Liability Act (FELA) (45 U.S.C. §§ 51, *et seq.*), *Gonzalez v. Gonzalez*, 689 S.W.2d 383 (Mo. App. E.D. 1985).

H. (§5.24) Insurance Premium Renewals

In a western district case, a State Farm agent was allowed to keep his renewals earned during the marriage as part of his share of the marital estate. The renewals, though speculative in amount, were denominated as marital property by the court. *Whitworth v. Whitworth*, 806 S.W.2d 145 (Mo. App. W.D. 1991).

I. (§5.25) Capital Loss Carryovers

In *Mills v. Mills*, 663 S.W.2d 369 (Mo. App. E.D. 1983), the court determined a capital loss carryover under I.R.C. § 1212 was marital property and allocated it as between the parties. *See* §5.34, *infra*.

J. (§5.26) Inchoate Interests

The term "property" in § 452.330, RSMo Supp. 1996, includes inchoate interests. *Claunch v. Claunch*, 525 S.W.2d 788 (Mo. App. S.D. 1975). Inchoate interests acquired before marriage are separate even though the acquisition of the asset is not perfected until after the marriage takes place. *In re Marriage of Null*,

608 S.W.2d 568 (Mo. App. S.D. 1980). The ultimate acquisition of legal title after the marriage relates back to the time the inchoate right was initially acquired. *Id.* at 570.

K. (§5.27) Dissipation or Wasting of Assets

If there is evidence that one spouse squandered marital properties, the trial court may order reimbursement in the dissolution proceeding. *Layton v. Layton*, 687 S.W.2d 214 (Mo. App. W.D. 1984), citing *Calia v. Calia*, 624 S.W.2d 870 (Mo. App. W.D. 1981). See also *Schneider v. Schneider*, 824 S.W.2d 942 (Mo. App. E.D. 1992). For example, where the marital residence is foreclosed upon and one of the spouses has the means to prevent the foreclosure and ultimate loss of equity in the asset, the court may charge the offending party with the loss in the property division. *Heins v. Heins*, 783 S.W.2d 481 (Mo. App. W.D. 1990). In this vein, a Pennsylvania court has held that the husband dissipated marital assets to the extent there was increased income tax liability caused by his refusal to file a joint federal tax return with his wife for no good reason. *Gruver v. Gruver*, 539 A.2d 395 (Pa. Super. Ct. 1988).

L. (§5.28) Concealment of Assets

Punitive damages were awarded a plaintiff who discovered after the divorce that her spouse had intentionally concealed property during the proceedings. *Burris v. Burris*, 904 S.W.2d 564 (Mo. App. S.D. 1995).

A Michigan case allowed for the divesting of all property a spouse attempted to conceal at the time of the divorce, and it awarded it to the innocent spouse before dividing the remaining property. *Sands v. Sands*, 482 N.W.2d 203 (Mich. App. 1992). “Once a spouse intentionally has misled the court or the opposing spouse regarding the existence of the asset, that spouse should be estopped from receiving any part of that property.” *Id.*

PRACTICE TIP: When representing the non-moneyed spouse, it behooves the attorney to test the parties’ cash flow for several years before the proceeding, up to and including the time of the trial. By examining the cash flow experienced by the parties, the attorney can determine whether all income and assets have been accounted for. The cash flow examination is conducted by preparing a spread sheet that lists each and every infusion of cash to the parties during the period in question. Cash infusions relevant to this purpose include income from employment, proceeds realized from the sale of assets, loans taken out from banks or from the parties’ closely held or professional corporation, income tax refunds paid to the parties, and similar infusions. After accounting for all cash coming into the marriage during the relevant period, all known expenditures are deducted. Most of these are obtained

from the parties' tax returns or the adverse party's statement of income and expenses. These expenditures might include, but not be limited to: federal, state, and city income taxes paid; Social Security tax and other deductions from payroll; the monthly expenses sworn to on the affidavit of income and expenses; IRA or profit-sharing contributions made; investments known to have been purchased during the relevant period; and any existing *pendente lite* order or other known support payments being made.

The excess of cash received over known expenditures may indicate the existence of an undisclosed asset such as a bank account or other investment. By studying the parties' cash flow, the attorney puts the burden on the moneyed spouse to account for the missing funds at trial. If the funds cannot be accounted for, the court may consider crediting them to the marital estate in the division of property and awarding them to the party unable to account for their whereabouts. Cash flow studies are a powerful tool for both trial and settlement negotiations.

M. (§5.29) Ownership Interest of Third Parties/Joinder

Where third parties claim an interest in marital assets, they may and should be joined in the divorce case so that the interests of all the owners are protected. *Ravenscroft v. Ravenscroft*, 585 S.W.2d 270 (Mo. App. W.D. 1979). Where there is no title interest but there remains an issue as to whether a third party has an interest in property, an attempt should still be made to join the third party. But this order is largely discretionary with the trial court. *See In re Marriage of Stamatiou*, 798 S.W.2d 737 (Mo. App. W.D. 1990). Where there is evidence that an asset titled in the name of another is in fact owned by one of the parties, one court included the asset in the estate even though the third party was not joined. *Cochran v. Cochran*, 716 S.W.2d 275 (Mo. App. E.D. 1986). There is another case in which the divorcing parties, while not holding title to real property held in the names of the husband's parents, were found to have the equitable ownership of the parcel on a resulting trust theory. *Ham v. Ham*, 691 S.W.2d 944 (Mo. App. W.D. 1985).

N. (§5.30) Corporate Alter Ego

The general rule is the trial court may not divide the assets of a corporation not a party to the litigation even if the stock is owned entirely by a party. *Mehra v. Mehra*, 819 S.W.2d 351 (Mo. banc 1991). In these circumstances, the trial court is generally limited to disposing of the corporate stock. But the trial court may direct a party, as sole shareholder of the corporation, to cause the corporation to transfer

certain corporate property to create an equitable division of property. *Id.* There is other authority, however, that the court may allocate property of a corporation even if that entity has not been joined in the proceeding if the corporation is merely the alter ego of the party before the court. *Secor v. Secor*, 790 S.W.2d 500 (Mo. App. E.D. 1990). See also *Schlingman v. Reed*, 750 S.W.2d 501 (Mo. App. W.D. 1988), in which the court ignored the corporation's separate existence by allowing a creditor to garnish corporate assets to satisfy a judgment against the debtor who owned the entire corporation:

Under the alter ego or instrumentality rule, when a corporation is really indistinct from the person controlling it, then the corporate form may be disregarded if to retain it would result in injustice. Moreover, a court may, in its equitable powers, "disregard the separate legal entity of the corporation and the individual where the separateness is used as a subterfuge to defraud a creditor." [Citation omitted.]

Id. at 504; see also *Krajcovic v. Krajcovic*, 693 S.W.2d 884 (Mo. App. E.D. 1985).

V. (§5.31) Tax Consequences Incident to Property Transfers in Divorce

The tax consequences attendant to property to be divided should always be considered by the practitioner in settling the case or in preparing evidence for trial. The tax consequences of a dissolution of marriage should be taken into consideration in ordering a division of marital property. *In re Marriage of Lewis*, 808 S.W.2d 919, 924 (Mo. App. S.D. 1991); *Clark v. Clark*, 801 S.W.2d 95, 99 (Mo. App. E.D. 1990). The burden is upon the party desiring the court to consider tax consequences to present evidence about them to the court. *In re Marriage of Harrison*, 657 S.W.2d 366 (Mo. App. S.D. 1983). The court is not obligated to reach its own conclusions about tax consequences absent this evidence. *Id.*

While it is not necessary to become a taxation expert, it is certainly necessary to develop a general sensitivity to tax implications of divorce. Sensitivity will alert the lawyer to subjects needing further study with accountants or other tax experts and to items of evidence needed for trial.

Typically, taxation issues arise in the division of property in the following two areas:

1. Capital gain on the asset: To what extent has taxable gain accrued on the property to be divided and how should the attendant tax liability be allocated? If the residence is to be sold, have any previous gains been rolled into it that will be realized upon sale? Is the tax burden on the gain to be shared by the parties or borne by only one of them? If it is to be borne by only one of them, is this by design or by default? May the gain be rolled over without recognition? The concept of fair

market value contemplates a sale. Therefore, the trial court may presume a sale and its attendant tax consequences in valuing property for division. *Hogan v. Hogan*, 796 S.W.2d 400 (Mo. App. E.D. 1990).

2. Recapture of Depreciation or Investment Tax Credits: This is particularly important given the present bankrupt status of many real estate investment partnerships and resultant recapture of depreciation taken. Additionally, assets used primarily in business during the marriage may have been depreciated. A change in the primary use of the property after division may result in a recapture of the depreciation taken. The recipient of the asset with the recapture potential is the recipient of the tax liability.

A. (§5.32) Taxation of Property Transfers Between Spouses

Internal Revenue Code § 1041 governs the taxability of property transfers and divisions between spouses incident to a divorce proceeding. No gain or loss is recognized on a transfer of property from a spouse to a spouse, or a former spouse, but only if the transfer is incident to a divorce. I.R.C. § 1041(a). Section 1041 applies to all transfers between spouses, and a divorce need not be contemplated between the spouses at the time of the transfer for it to apply. Treas. Reg. § 1.1041-1T(a) (1997). Additionally, annulments and other determinations that the marriage is *void ab initio* still constitute divorces for purposes of § 1041 treatment. Treas. Reg. § 1.1041-1T(b) (1997). A transfer is presumed to be “incident to the divorce” if the transfer occurs within one year after the marriage ends or occurs within six years after the end of the marriage and is pursuant to a divorce instrument—as defined in I.R.C. § 71(b)(2). Treas. Reg. § 1.1041-1T(b) (1997). Section 1041 is not applicable to transfers to nonresident alien spouses. I.R.C. § 1041(d).

Unlike the pre-1984 law promulgated by the U.S. Supreme Court, *United States v. Davis*, 370 U.S. 65 (1962), neither the transferor nor the transferee under I.R.C. § 1041 recognizes gain or loss on the transfer.

The recipient of the property receives a carryover basis in the property transferred. This means the transferee receives the same basis the transferor had in the property at the time of transfer. The carryover basis applies even if it is a bona fide purchase for value and without regard to whether the basis is greater than, less than, or equal to the fair market value at the time of transfer. This can be dangerous to the recipient spouse if there is a low basis in the transferred property. A low basis could cause substantial liability for tax on “phantom” gain at the time the property is ultimately disposed of.

Gain or loss is only recognized upon sale of the property by the transferee spouse. Counsel should note that, if the transferor client needs to use the loss realized on an asset in the same year as the transfer of the asset to the spouse is contemplated, the transferor should consider whether the asset should be transferred to his or her spouse. The transferee receives the right to claim the loss, which transfers with the property.

The regulations require the transferor to provide the transferee with all records sufficient to determine the adjusted basis at the time of transfer, as well as notice of the potential of investment tax credit recapture.

PRACTICE TIP: The attorney should consider including language in the separation agreement or proposed decree that imposes a contractual or decretal obligation upon the transferor to seasonably provide these records to the transferee.

B. (§5.33) Investment Tax Credit and Depreciation Recapture

The transferee will be subject to investment tax credit recapture upon disposition of the asset. Although these credits were repealed in 1986, there are still assets in existence upon which these credits were taken. This typically occurs where the asset is used by the transferee for personal use and before transfer the asset was used in business and depreciated or investment tax credits were taken on it. An example is: H transfers an automobile to W. H had taken an investment tax credit on the automobile for the two years he used the vehicle for business purposes prior to its transfer to W. W's use of the vehicle is solely personal. W is subject to recapture of the investment tax credit previously taken by H. Treas. Reg. § 1.1041-1T(d) (1997).

Depreciation taken on depreciable assets will also be recaptured upon disposition by the transferee. Therefore, it is important to determine whether these assets have been depreciated before agreeing to accept them at a value which does not account for this liability. Treas. Reg. § 1.1245-1 (1997); Treas. Reg. § 1.1250-3 (1997).

In certain circumstances, transfers to a third party on behalf of a spouse may qualify under I.R.C. § 1041 for nonrecognition treatment by the recipient spouse. But the recipient third party does not receive the benefit of the nonrecognition rules.

C. (§5.34) Nonrecognition of Gain on Sale of Principal Residence

Gain on sale of the parties' principal residence may not be recognized under certain circumstances:

1. The seller must purchase a new principal residence within a period of two years before the date of the sale and ending two years after the sale; and
2. The purchase price of the new residence must equal or exceed the sale price of the prior residence. If not, gain will be recognized to the extent of the difference. I.R.C. § 1034(a).
3. An age fifty-five one-time exclusion gain of up to \$125,000 is not recognized if the taxpayer so elects, even if no new home is purchased. I.R.C. § 121. Counsel should be cognizant of the following limitations:
 - a. The election may only occur one time; if the parties are still married at the time of the election, *both* must make the election.
 - b. The house that was sold must have been the party's principal

residence for three of the last five years before the sale.

Counsel should be especially sensitive to the existence of previous gains on assets that were rolled over into the acquisition of the asset in existence at the time of the divorce. For example, the basis may not be related to purchase price of the parties' residence if gains from the sale of previous residences were rolled into the present home. IRS form 2119 from the tax returns filed in years of prior sales should provide the necessary information to document these rollovers.

It is also important to remember that the principal residence is the residence in which the person claiming the exemption resides *at the time of sale*. Therefore, if the client has removed himself or herself from the residence before the sale, he or she may be deemed as having abandoned the residence. Care should be taken in advising the client in these circumstances and to preserve the claim to the principal residence if possible. The client should be advised to maintain his or her principal residence in the marital home, and any other residence should be considered temporary. The client should arrange his or her affairs accordingly to preserve the right to claim principal residence.

D. (§5.35) Capital Loss Carryovers

In many circumstances the parties may have experienced a capital loss that exceeds the \$3,000 annual amount by which the loss may exceed capital gains. To the extent allowed, the unused capital losses exceeding this limit are carried over to later years until fully utilized. I.R.C. § 1211(b).

The loss carryover is, for all practical purposes, an asset that should be bargained for at the time the case is negotiated. *Mills v. Mills*, 663 S.W.2d 369 (Mo. App. E.D. 1983). Its importance should also be presented to the court when the case is tried. It has definite economic value to the holder of the privilege and should not be overlooked. Counsel should review Schedule D of the individual tax returns from prior years to ascertain whether a carryover exists. If the figure \$3,000 appears on the schedule, there is probably a loss carryover remaining to be used in future years.

E. (§5.36) Retirement Plans

The recipient of the retirement plan is the party taxed on the distributions taken from it. Therefore, counsel should note that a \$50,000 certificate of deposit and a profit-sharing plan containing \$50,000 are not of equal value. The moneys in the plan will be taxed upon distribution, and, if the distribution occurs early, there is

likely to be a penalty. A trial court is entitled to take cognizance of tax liability in determining the present value of a pension or profit-sharing plan. *Stein v. Stein*, 789 S.W.2d 87 (Mo. App. E.D. 1990). Additionally, care must be taken to see that distributions from qualified plans are rolled into a qualified tax deferred vehicle such as an IRA account within the time prescribed by law. This is because rules that, in effect, eliminated previously existing sixty-day “safe harbor” provisions regarding distributions from qualified plans became effective January 1, 1993. The change affected distributions pursuant to qualified domestic relations orders (QDROs). Pursuant to I.R.C. § 3405(c) and (d), both effective January 1, 1993, the plan administrator must withhold twenty percent of moneys distributed from a qualified plan *unless* the transfer is made directly to the recipient’s IRA or another qualified plan. The withholding amount is mandatory, and it will result in a loss of accessibility of the funds to the client if care is not taken to avoid its occurrence. If the distribution is made to the recipient, the mandatory twenty percent withholding applies. Therefore, care should be taken in drafting QDROs to make payment directly to the recipient’s IRA or qualified plan. For a further discussion of retirement plans, see Chapter 15 of this deskbook.

VI. Valuation of Property

A. (§5.37) Use of Experts

Expert testimony is the safest and most reliable way to prove value of an asset in divorce. Typically, there is an issue as to value of real estate. Although the owner of property may testify as to his or her opinion of its value, *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. App. S.D. 1977), the court may give less weight to his or her testimony because the property owner is an interested party. The use of a real estate appraiser is advisable when settling or trying the case.

Experts may also be used to value business interests, professional practices, pensions, antique motor vehicles, antiques, jewelry, furniture and household goods, farm equipment, and similar assets.

B. (§5.38) Professional Practices

Professional goodwill acquired during the marriage may be subject to division if it can be proven to exist. The leading case on this issue in Missouri is *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. banc 1987). *Hanson* expanded to professional practices the long-held view that the goodwill of a business is property. *Hanson* defined goodwill in a professional setting as the value of the practice that exceeds

its tangible assets and that is the result of the tendency of clients/patients to return to and recommend the practice irrespective of the reputation of the individual practitioner. *Id.* at 434. Goodwill is property that attaches to and is dependent upon an existing business entity, rather than the reputation and skill of an individual. *Id.* Proof of the existence of professional goodwill must be made before a value can be ascribed to it. *In re Marriage of Parker*, 762 S.W.2d 506, 509 (Mo. App. S.D. 1988). Proof of existence is made only where there is evidence of a recent actual sale of a similarly situated professional practice, an offer to purchase the practice, or expert testimony and testimony of members of the subject profession as to the existence of goodwill in a similar practice in the relevant geographic and professional market. *Hanson*, 738 S.W.2d at 435. “Absent such evidence, one can only speculate as to the existence of goodwill. Divisions of marital property may not be based on speculation as to the very existence of the property being divided.” *Id.*

After the existence of goodwill has been proven, evidence must be adduced as to its *value*. The Court in *Hanson*, 738 S.W.2d 429, expressed a strong preference for the “fair market value” approach, that being the price the practice would bring if it were sold on the open, relevant market to a qualified professional. *Id.* at 436. The court should not consider the value of a covenant not to compete in assigning a value to the professional practice unless there is evidence the practitioner intends to cease practice. *Gerard v. Gerard*, 825 S.W.2d 21 (Mo. App. W.D. 1992). But it is important to note the court did not reject other formulae for determining value, and a careful reading of *Hanson* is certainly warranted should the practitioner desire to utilize another method of valuation in a given case. As to the value of goodwill for skilled artisans such as tailors and artists, see *Hogan v. Hogan*, 796 S.W.2d 400 (Mo. App. E.D. 1990), and *Ikonomou v. Ikonomou*, 776 S.W.2d 868 (Mo. App. E.D. 1989).

C. (§5.39) Valuation Date

The relevant valuation date for property in divorce is the date of trial. *In re Marriage of Gourley*, 811 S.W.2d 13 (Mo. App. S.D. 1991); *see also In re Marriage of Gustin*, 861 S.W.2d 639 (Mo. App. W.D. 1993). The relevant valuation date for property in divorce, on remand for retrial from the court of appeals, is the date of the retrial. *In re Marriage of Rickard*, 818 S.W.2d 711 (Mo. App. S.D. 1991). Where a marital asset is divided in an equitable proceeding brought after the dissolution decree is entered, the value of the asset is properly made as of the date

the asset is finally divided, rather than the date of the decree. *Sauer v. Newman*, 666 S.W.2d 811 (Mo. App. E.D. 1984).

D. (§5.40) Manner of Division

The trial court has a duty to fully dispose of the property of the parties in its decree; in the absence of unusual economic circumstances, it is error to allow title to marital property to remain vested in both parties as tenants in common. *Whaley v. Whaley*, 805 S.W.2d 681 (Mo. App. E.D. 1990). Similarly, a division that leaves the parties tenants in common of personal property susceptible to division in kind should be avoided. *Davis v. Davis*, 544 S.W.2d 259 (Mo. App. W.D. 1976). The rationale behind the rule is to prevent “the unnecessary extension of disputes and ill feeling.” *Id.* at 264. Unusual economic circumstances may involve a decree where one spouse is allowed to occupy the marital residence until the emancipation of a minor. *Whaley*, 805 S.W.2d at 682. They may also be present where there is but one substantial asset incapable of division in kind and where neither party has the means necessary to purchase the other’s interest in the asset. *Glosier v. Glosier*, 817 S.W.2d 580 (Mo. App. E.D. 1991).

VII.(§5.41) Finality of Decree as to Property

Division/Undivided Property

Section 452.330.5, RSMo Supp. 1996, states:

The court’s order as it affects distribution of marital property shall be a final order not subject to modification; provided, however, that orders intended to be qualified domestic relations orders affecting pension, profit sharing and stock bonus plans pursuant to the U. S. Internal Revenue Code shall be modifiable only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of order.

From time to time a party will discover certain property that was not included in the marital estate at divorce. Sometimes this failure to include the property in the estate occurs through sheer inadvertence; other times it occurs by misrepresentation or intentional nondisclosure by a party. In any event, when a judgment of the trial court distributing marital property becomes final, it may not be modified in the same case. Rather, the Supreme Court of Missouri has held the sole remedy for this situation is an independent suit in equity to divide the previously undivided property. *Chrun v. Chrun*, 751 S.W.2d 752 (Mo. banc 1988).

The legal statutes of limitation apply to this equitable action, although it has not

yet been determined whether the five-year or the ten-year statute applies. *Doss v. Doss*, 822 S.W.2d 427 (Mo. banc 1992). Prudent counsel should assume the five-year statute applies and act accordingly in filing an action to fully protect the interests of the client.

VIII. (§5.42) Conclusion

The body of law on property division changes in some manner on an almost weekly basis due to the constant issuance of opinions by the courts of appeals and the increasing frequency with which federal law affects the rights of individuals in divorces. These new cases continue the evolutionary process of the law from its statutory underpinnings to its application in a variety of factual patterns and circumstances. Counsel should tread cautiously and diligently to make sure the rule being applied remains in favor.