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Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Distribution Law

Besides having a practical impact on the lives of millions of people,[1] marital property law, particularly divorce property law, also expresses some of the most fundamental assumptions about a culture's understanding of marriage. For example, early common-law property ownership rules, which denied married women personal property ownership and most incidents of real property ownership, clearly expressed the patriarchal nature of

* Dorothy Kliks Fones Professor, University of Oregon School of Law. Thanks to Judge David Brewer of the Oregon Court of Appeals and William J. Howe of Gevurtz, Menashe, Larson & Howe, P.C. for talking with me about the issues discussed in this Article. Their insights were invaluable. I also greatly appreciate my colleagues Merle Weiner and Caroline Forell for reading and commenting on drafts of this Article, and my research assistants, University of Oregon law students Jessica Hendricks and Melissa Hurley. This Article is dedicated to the memory of the late Jim Beard, a 1997 graduate of the University of Oregon School of Law, a wonderful man and wonderful attorney who worked with me on the first Article that I wrote about Oregon property division law, *A "Just And Proper Division": Property Distribution at Divorce in Oregon*, 78 OR. L. REV. 735 (1999).

[1] The National Center for Health Statistics reported that in 1989 there were 1,157,000 divorces and 1,182,000 in 1990. Sally C. Clark, Centers For Disease Control and Prevention, Advance Report of Final Divorce Statistics, 1989 and 1990, 43 *Monthly Vital Statistics Report* No. 9, at 9 (Supp. 1995), *available at* http://www.cdc.gov/nchs/data/mvsr/supp/mv43_09s.pdf (last visited Mar. 15, 2005). Of course, property division does not have a substantial economic significance for many divorcing couples because they have not been married long enough to have amassed much property to divide. The Census Bureau found that the average length of first marriages that end in divorce is 7.8 years for men and 7.9 years for women. For second marriages that end in divorce, the average duration is 7.3 years for men and 6.8 years for women. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 12 (2002). In the mid-1990s, Professor Marsha Garrison reported that in most states the median net value of marital assets was $25,000 or less. Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 11 (1994).

marriage at the time the rules were developed and for centuries thereafter.[2] In contrast, marital property law in all states today expresses formal equality between the spouses.[3]

Rules of marital property ownership also express assumptions about the extent to which spouses are regarded as economic partners or as separate economic actors. On this issue, state law is not so consistent. The distinction is most obvious between community property and common-law property states. Community property emphasizes the economic union of spouses, since it provides that the parties own equally all property that either party earns during the marriage. In contrast, in common-law property states, the basic assumption is that each spouse owns the property he or she earns in the marketplace or is given. While spouses can and often do own property jointly, creating joint property requires an affirmative act—the conveying of title to them in some form of joint ownership.[4]

However, the distinction between community property and common-law property is no longer as important as it once was because the rules for dividing property *at divorce* have evolved so that they are similar in all states. And divorce is the main time at which spouses care about their legal rights in family property. People very rarely go to lawyers for advice about their property rights while they are happily married,[5] and ordinarily they do not even care what the law says about those rights. Typically, the difference between common-law and community property also does not matter for couples when the marriage ends at the death of one of the spouses because most people who die leave all of their property to the surviving spouse unless they are quite wealthy or have children from a former marriage.[6] But property

[2] For a brief discussion of the common-law property scheme, see LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 8-11 (2d ed. 2000). The chapter of which this selection is a part explores the rules of traditional marriage in a variety of contexts.

[3] *See id.* at 11-13, 24-28. The U.S. Supreme Court, in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), held that a law that automatically designated the husband as manager of all family property violated the Equal Protection Clause.

[4] See HARRIS & TEITELBAUM, *supra* note 2, at 6-28 for elaboration of these ideas. R

[5] If they did, they would probably be shocked. Whenever I teach family law, at the beginning of the course I ask my students what principles of property ownership and management they believe apply in their state. Though I have never taught in a community property state, inevitably the students describe a community property system of ownership and egalitarian management. They are incredulous when I explain modern common-law property rules to them.

[6] *See, e.g.*, MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 86-95

law matters at divorce.

Community property states have always provided that community property is shared at divorce and that, usually, separate property is awarded to the owner.[7] Today the law applicable to property division at divorce in almost all common-law property states, including Oregon, has evolved so that it is remarkably similar to community property.[8]

This property division system, used throughout the U.S., balances the tension between individuality and unity in marriage by requiring that at divorce, spouses share in the economic fruits of the work of both during the marriage, but not that they share any property that they bring into the marriage or that is given to one of them alone during the marriage.

That Oregon uses this property system at divorce is, however, not at all clear upon a first reading of its property division statute, section 107.105(1)(f) of Oregon Revised Statutes. The statute provides in relevant part:

> Whenever the court grants a decree of marital annulment, dis-

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(1970); *see also* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 74-75 (6th ed. 2000) (citing research showing that most decedents want their surviving spouses to receive all of their property unless they have large estates or children from a former marriage).

If the spouse who died wants to disinherit or leave as little as possible to the surviving spouse, it does matter where the parties lived, for community property and elective-share rights are quite different. *See* HARRIS & TEITELBAUM, *supra* note 2, at 106-115. **R**

[7] *See* HARRIS & TEITELBAUM, *supra* note 2, at 430-31. In 1947 Oregon's property-division statute was amended to give the judge discretion to award a share of property of the spouse found at fault for the divorce to the innocent spouse. Act of Apr. 21, 1947, ch. 557, §1, 1947 Or. Laws 1029 (formerly codified at OR. REV. STAT. § 107.100) (repealed 1971). In 1953 the statute was amended by substituting language that survives as the first sentence of OR. REV. STAT. § 107.105(1)(f) today. This language gave the judge discretion to divide "the real or personal property, or both, of either or both of the parties, as may be just and proper in all the circumstances . . . ." Act of May 11, 1953, ch. 635, §§ 1-2, 1953 Or. Laws 1171 (formerly codified at OR. REV. STAT. § 107.100(4) (repealed 1971). **R**

[8] HARRIS & TEITELBAUM, *supra* note 2, at 445; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 4.03 cmt. a (2002) [hereinafter ALI PRINCIPLES]. The system is variously called a deferred marital property system, *see, e.g.*, Leslie Joan Harris, *A "Just and Proper Division": Property Distribution at Divorce in Oregon*, 78 OR. L. REV. 735, 741-44 (1999), or a dual classification system, *see, e.g.*, Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115 (1997). **R**

In 1977 and 1981, Oregon adopted the language which has been interpreted as creating such a system. Act of July 27, 1977, ch. 847, § 2, 1977 Or. Laws 904; 1981 Or. Laws, ch. 775, § 1.

> solution or separation, it has the further power to decree as follows: . . . For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances . . . . The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held.

The Oregon Supreme Court has interpreted the statute[9] as expressly creating two categories of property: "marital property," that is, all property of either spouse, regardless of how titled or when acquired, which the trial court has discretion to divide at divorce; and "marital assets," all property acquired during the marriage. The parties are presumed to have contributed equally to the acquisition of marital assets but not to that portion of marital property that either party brought into the marriage.[10] The court has also found that the statute clearly implies a third category of property—separate property, including premarital property and gifts to or inheritance by one spouse alone, to which the rebuttable presumption of equal contribution does not apply.[11] From these implicit categories and the statutory admonition about homemaker contributions, the court has developed rules for division:

> 1) A party may prove that property acquired during marriage is not subject to the rebuttable presumption because the parties did not contribute to it equally, most notably because it was given to, willed to, or passed by intestate succession to only one of the spouses;[12]
> 2) Property to which the rebuttable presumption does not apply or as to which the presumption has been rebutted, that is, premarital property and one party's gifts or inheritances, ordinarily should be awarded to the owner;[13]
> 3) Property acquired during the marriage and as to which the presumption is not rebutted should be divided equally between the parties, absent a substantial reason for deviating.[14]

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[9] For a more complete discussion of the development of the Oregon case law, see Harris, *supra* note 8, at 737-41, 745-55. **R**

[10] *See In re* Marriage of Kunze, 337 Or. 122, 133, 92 P.3d 100, 107-08 (2004). *Kunze* is the latest in a line of opinions that develop and reiterate the analysis in the text.

[11] *Id*.

[12] *See Kunze*, 337 Or. at 142, 92 P.3d at 112.

[13] *See Kunze*, 337 Or. at 131, 92 P.3d at 107.

[14] *Id*.

Thus, despite the handicap of a cryptic statute,[15] the Oregon Supreme Court has developed a system for implementing the principle that spouses should share in the economic fruits of their marriage. However, the courts have had difficulty with complex issues about categorizing property as either separate or jointly held and subject to equitable division, and with the extent to which they should inquire into the parties' conduct during the marriage to determine the ultimate division of property. The recent Oregon Supreme Court decision in *In re Marriage of Kunze*[16] resolves some of the most difficult issues of characterization and sheds light on what courts should consider in making the ultimate division. This article discusses these issues and the *Kunze* court's resolution of them in light of the solutions used in other states. The issues with which *Kunze* is concerned are difficult not only because of their technical complexity, but also because the tension between individuality and community in the economics of marriage and, indeed, of marriage itself, is inherent in their resolution.

Section I of this Article sets the stage by outlining the characterization issues that *Kunze* addresses; the treatment of increases in value of separate property and of conduct that may result in separate property being converted into property that is divisible between the parties. Section II analyzes the resolution of these issues in *Kunze*. Section III considers the implications of *Kunze* for characterization issues that are still unresolved in Oregon and for how courts should inquire into the parties' conduct during the marriage to effect the final property division. Section IV explores future directions that law reform in this area might take.

I

Two Problems of Characterization: Increases in Value and Commingling

Sophisticated issues of characterizing property as jointly or separately held have been central to the Oregon Supreme Court's two most recent cases on property division at divorce, *In re Marriage of Massee*,[17] decided in 1999, and *Kunze*,[18] decided in 2004. In the five years between these opinions, a majority of

[15] For a proposed revision of the statute see Harris, *supra* note 8, at 761-65. **R**

[16] *Kunze*, 337 Or. at 122, 92 P.3d at 100.

[17] 328 Or. 195, 970 P.2d 1203 (1999).

[18] 337 Or. at 122, 92 P.3d at 100.

the property division cases that came before the Oregon Court of Appeals also concerned characterization problems. The most significant of these cases concerned the character of the increase in value of separate property[19] and the effect of "commingling" separate property with jointly held property.[20] These are among the most difficult issues of characterization, ones that perplex courts in other states as well.

A. The Character of Increases in the Value of Separate Property

Massee was centrally concerned with the division of the increase in the value of separate property. The specific question was whether a homemaker wife was entitled, at the end of a two-year marriage, to share in the increase in value of a business and other assets that her husband had brought into the marriage.[21] The lower courts had held that because she had not contributed directly to the increase in value, i.e., she had not invested money or worked on the property, she should receive none of its value.[22] The supreme court reversed, holding that the character of the increase in value of separately held property is analytically separate from the character of the principal value of the property at the time it came into the marriage.[23] While property brought into the marriage is separate, increases in its value are acquired during marriage and are, therefore, subject to the rebuttable presumption of equal contribution,[24] as are other marital assets. The

[19] *In re* Marriage of Gibbons, 194 Or. App. 257, 94 P.3d 879 (2003); *In re* Marriage of Gilbert-Walters, 177 Or. App. 133, 33 P.3d 709 (2001); *In re* Marriage of Terhaar, 171 Or. App. 112, 14 P.3d 657 (2000); *In re* Marriage of Bidwell, 170 Or. App. 239, 12 P.3d 76 (2000); *In re* Marriage of Long, 159 Or. App. 471, 978 P.2d 410 (1999); *In re* Marriage of Hall, 159 Or. App. 196, 977 P.2d 387 (1999).

[20] *In re* Marriage of Van Horn, 185 Or. App. 88, 57 P.3d 921 (2002); *In re* Marriage of Kunze, 181 Or. App. 606, 47 P.3d 489 (2002); *In re* Marriage of Gilbert-Walters, 177 Or. App. 133, 33 P.3d 709 (2001); *In re* Marriage of Albers, 174 Or. App. 243, 23 P.3d 430 (2001); *In re* Marriage of Padgett-Bellegante, 169 Or. App. 272, 7 P.3d 773 (2000); *In re* Marriage of Ward, 165 Or. App. 426, 998 P.2d 691 (2000); *In re* Marriage of Butler, 160 Or. App. 314, 981 P.2d 389 (1999). Three other cases concern application of the well-settled rule that property acquired while the parties are married but permanently separated is not divisible. *In re* Marriage of Wanless, 168 Or. App. 238, 3 P.3d 179 (2000); *In re* Marriage of Good, 165 Or. App. 327, 997 P.2d 244 (2000); *In re* Marriage of Taraghi, 159 Or. App. 480, 977 P.2d 453 (1999).

[21] *Massee*, 328 Or. at 196-200, 970 P.2d at 1206-08.

[22] *Massee*, 328 Or. at 199-200, 970 P.2d at 1208.

[23] *Massee*, 328 Or. at 206-07, 970 P.2d at 1211-12,.

[24] *Massee*, 328 Or. at 207, 970 P.2d at 1212.

court also emphatically affirmed that a homemaker is entitled to share in the value of property acquired during the marriage through the productive efforts of the other spouse, regardless of whether the homemaker works outside the home in addition to doing the bulk of the household work.[25] This holding is a corollary of the core principle that parties share the results of their labor during the marriage.

In analyzing how to distribute the increase in value of separate property that accrues during marriage, most courts first determine the cause of the increase in value of the separate property.[26] In most states, appreciation attributable to the contribution of marital funds or the productive efforts of one or both spouses is divisible, while increases caused by market forces or inflation are separate property and should ordinarily be returned to the owner.[27] The *Massee* court did not explicitly employ this analysis, though its language suggests that a trial court should consider the extent to which the efforts of either or both spouses contributed to the increase.[28] Because the record was

[25] *Massee*, 328 Or. at 202-06, 970 P.2d at 1209-11.

[26] ALI PRINCIPLES, *supra* note 8, § 4.04 & cmt. a. **R**

[27] *Id*. While a few states provide that the non-owning spouse's efforts must cause the appreciation and a few others say that both spouses' work must contribute to the appreciation to justify marital classification, most states classify appreciation as marital if the efforts of either spouse produced the appreciation. Bell, *supra* note 8, at 149. **R**

The ALI Family Dissolution Principles treat increases in value of and income from separate property the same, characterizing them as separate or marital depending on the reason for the increase or income. ALI PRINCIPLES, *supra* note 8, §§ 4.04-.05. The Uniform Marriage and Divorce Act treated increases in value of separate property as separate and income as marital. UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 289 (1998). A reporter for the UMDA later commented, however, with regard to the increase in value, that the drafters were thinking of assets that increased without effort on the owner's part. Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 154 (1989). **R**

[28] The court said:

> In deciding whether the presumption of equal contribution is rebutted, the court first must determine the magnitude of each spouse's overall contribution to the acquisition of marital assets from evidence in the record. If one spouse is a homemaker, that determination necessarily will include an assessment of the homemaker spouse's contribution to the enterprise of homemaking. . . . Once the court has determined each spouse's overall contribution to the acquisition of marital assets, the court compares the respective contributions of the spouses. The ultimate question is whether the spouse seeking to rebut the presumption of equal contribution has proved, by a preponderance of the evidence, that the other spouse did not contribute equally to the acquisition of marital assets. If the court determines that the presumption of equal contribution is rebutted, the presump-

insufficient to determine the value of the husband's property at the time of marriage and at the time of divorce, as well as other facts, the court remanded the case for further presentation of evidence and fact finding.[29]

The property at issue was in substantial part a small business that the husband had owned before the marriage and that he continued to work in after the marriage.[30] Therefore, it is likely that his labor, rather than market forces, produced a significant part of the increase in value, if not all of it.[31] Under the principles discussed above, the wife should, therefore, have shared in the increase.

After *Massee*, two panels of the Oregon Court of Appeals decided cases concerning the increase in value of separate property,

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> tion drops from the case and the court divides the property according to the magnitude of each spouse's contribution to the acquisition of marital assets. In other words, the court distributes the marital assets without regard to any presumption, but in a manner that is just and proper in all the circumstances, including the proven contributions of the parties to the acquisition of marital assets.

Massee, 328 Or. at 205, 970 P.2d at 1211. For further discussion of this language, *see infra* text accompanying notes 158-72.

[29] *Massee*, 328 Or. at 209, 970 P.2d at 1213.

[30] *Massee*, 328 Or. at 197-98, 970 P.2d at 1207, 1212-13.

[31] Sorting out how much of the value of the business was caused by labor and how much by the original capital investment is complex and necessarily speculative. The leading authorities in community property states come from California. Pereira v. Pereira, 103 P. 488 (Cal. 1909); Van Camp v. Van Camp, 199 P. 885 (Cal. App. 1921). Under *Pereira*, a reasonable return on the separate investment is calculated and treated as separate property; the remainder of the increase in value is community property. Under *Van Camp* a fair salary for the labor of the spouse is calculated. If the spouse was paid less than this amount, the community receives enough of the increase to make up the difference, and the rest of the increase in value is separate property. No hard and fast rules determine when each rule should be used; California case law provides that *Pereira* should be used when the appreciation in value is primarily attributable to community efforts, and *Van Camp* should be used when the primary cause is market factors and the like. *In re* Marriage of Lopez, 113 Cal. Rptr. 58 (Ct. App. 1974). Commentators tend to prefer the rule that will, on the facts of the particular case, give the greater return to the primary source of the increase in value. *E.g.*, William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 175-76 & n.59 (1989); *see also* J. Thomas Oldham, *Separate Property Businesses that Increase in Value During Marriage*, 1990 WIS. L. REV. 585 (1990). The ALI Principles adopt this analysis. ALI PRINCIPLES, *supra* note 8, §§ 4.04-.05. **R**

After the author published her 1999 article about *Massee*, *see* Harris, *supra* note 8, a knowledgeable source told her that the *Massee* court was put off by the complexity of the *Pereira-Van Camp* analysis and wanted to avoid it. **R**

but the decisions employed inconsistent analyses.[32] In *In re Marriage of Hall*,[33] the court treated the increase in value of and income from premarital property as having been acquired during the marriage without examining whether they were attributable to infusions of capital or labor or to passive forces. Instead, the court divided all the property acquired during the marriage, based on each spouse's contributions.[34] *In re Marriage of Terhaar*[35] concerned the division of the increase in value of the husband's premarital securities. While the court said that the increase was subject to the presumption of equal contribution because it was acquired during the marriage, it found that the husband had rebutted the presumption because the wife was not a homemaker and so did not "directly or indirectly affect[ ] the entirely passive appreciation" of the assets.[36]

Thus, while *Massee* holds that post-wedding increases in the value of separate property are marital assets subject to the presumption of equal contribution, neither *Massee* nor later court of

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[32] While the treatment of the increase in value of separate property was at stake in at least four other cases that the court of appeals decided after *Massee*, none of them analyzes the issue extensively. *In re Marriage of Long*, 159 Or. App. 471, 978 P.2d 410 (1999), held that in the absence of evidence about how much premarital property increased in value during the marriage, none of the value of the property was a "marital asset" subject to the rebuttable presumption. In *In re Marriage of Bidwell*, 170 Or. App. 239, 12 P.3d 76 (2000), the court seems to have been assumed that the $57 million increase in value of the brokerage house owned by husband during the marriage was all divisible, likely because the company had no value at the time the husband acquired it. *In re Marriage of Gilbert-Walters*, 177 Or. App. 133, 33 P.3d 709 (2001), simply upheld the trial court's refusal to treat separately the increase in value of the parties' separate property on the basis that all the parties' properties had become too commingled to do so. For a discussion of the commingling issue, *see infra* notes 66-74 and accompanying text. *In re Marriage of Gibbons*, 194 Or. App. 257, 94 P.3d 879 (2003), concerned property given to the husband during the marriage. The court's analysis is not clear; as to some of the property, the court found that the presumption of equal contribution was not rebutted, based on the wife's contributions to the marriage, and as to other property the court found that the presumption was rebutted, based on the breakdown of the parties' marriage. The court treated the increase in value of the property in the same way that it treated the principal, without acknowledging that a separate analysis might be appropriate.

[33] 159 Or. App. 196, 977 P.2d 387 (1999).

[34] 159 Or. at 204-05, 977 P.2d at 391. For a discussion of the contributions analysis, *see infra* notes 158-71 and accompanying text.

[35] 171 Or. App. 112, 14 P.3d 657 (2000).

[36] *Terhaar*, 171 Or. App. at 115-16, 14 P.3d at 659. The court said that the wife was not a "homemaker" because both parties worked outside the home and did housework. *Terhaar*, 171 Or. App. at 117-18, 14 P.3d at 660.

appeals cases make clear when or upon what basis such increases are ultimately subject to equitable division between the spouses.

B. Converting Separate Property to Jointly-Held, Divisible Property

The second set of issues that remained unclear after *Massee* concerns how separate property can be changed to property that is subject to equitable division. The Oregon courts tend to address these issues under the umbrella label of "commingling," while other states often use the term "transmutation."[37]

In many states the term "commingling" refers only to the situation in which one party's separate property is mixed with marital property in the same asset,[38] as when a bank account includes some separate and some joint funds, or when a party brings separate property into the marriage and then joint funds are used to pay expenses or make improvements on it.

Oregon courts have used commingling to include not only this situation[39] but also cases in which a spouse adds the name of the other spouse to property that was originally separate property[40] and to cases in which a spouse who owned separate property commits it to family uses, as when a house brought into the marriage becomes the family home.[41] Most of the Oregon cases involve more than one of the senses of commingling.[42] For ease of discussion, this Article will use the term "true commingling" to refer to the situation in which separate and marital assets are mixed together, "joint titling" for cases in which a person adds his or her spouse's name to the title of separate property, and "implied-in-fact gift" for the situation in which a spouse commits separate property to family uses.

1. The Range of Methods for Analyzing Commingling

For each of the three situations described above, courts in dif-

[37] *See* Harris, *supra* note 8, at 756-59, especially 756 n.74; *see also Kunze*, 337 Or. at 140-41, 92 P.3d at 111 n.11. The supreme court's opinion in *Kunze* stated, "Some jurisdictions refer to the change in the character of separately acquired property to joint property from commingling as 'transmutation.'" *Id*. R

[38] *See* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 5.24 (2d ed. 1996 & Supp. 2002) [hereinafter EQUITABLE DISTRIBUTION].

[39] *See Kunze*, 337 Or. at 137, 92 P.3d at 110.

[40] *See Kunze*, 337 Or. at 141, 92 P.3d at 112.

[41] *See Kunze*, 337 Or. at 140-41, 92 P.3d at 111-112.

[42] *Id*.

ferent states use a variety of rules and methods for determining when property is separate and when it is subject to division. Familiarity with these alternatives helps in understanding the significance of the Oregon courts' treatment of these situations. The remainder of this part discusses in detail commonly-used analyses for each situation.

a. True Commingling

In almost all common-law property states and all community property states it is legally possible for an asset to consist partly of separate property and partly of marital or community property.[43] A party who claims that property is partly separate has the burden to prove the claim.[44] If a party fails to carry the burden of proof, the entire asset is marital.[45]

A party carries the burden of proof to show, by tracing, that an asset includes separate property. At the root of tracing is the principle, formally accepted in all states, that property acquired in exchange for separate property remains separate property.[46] The states vary, though, in how they apply the tracing requirement when parties do not agree whether an asset was acquired in exchange for separate property.

The most complex tracing rules have developed in community property states. These rules also appear in the case law of common-law property states, though cases from the same state may use different tests under different circumstances.[47] The rules can be illustrated by describing how bank accounts into which separate and marital funds have been deposited would be treated.

The most rigorous test requires the party who claims that some of the account consists of separate funds to establish a paper trail for each transaction; if even one step cannot be documented, the

[43] EQUITABLE DISTRIBUTION, *supra* note 38, at § 5.24. In some common-law property states, commingled separate and marital property becomes entirely marital property by operation of law; in these states, an asset cannot be partly separate and partly joint. *E.g.*, *In re* Marriage of Smith, 427 N.E.2d 1239 (Ill. 1989). *See also* ALI PRINCIPLES, *supra* note 8, § 4.03, cmt. c; § 4.06 & cmts. R

[44] ALI PRINCIPLES, *supra* note 8, §§ 5.01, 5.03; *see also* Bell, *supra* note 8, at 155. In some states, the spouse must establish the claim of separate property by a preponderance of the evidence, while other states require clear and convincing evidence. EQUITABLE DISTRIBUTION, *supra* note 38, at § 5.03. R

[45] In some states, "the separate property is said to have transmuted into marital property by commingling." Bell, *supra* note 8, at 161. R

[46] *Id.* at 154-55.

[47] EQUITABLE DISTRIBUTION, *supra* note 38, at § 5.24. R

party has not traced out the separate property, and the entire account is marital.[48] The second approach, called the total recapitulation method, requires that all the marital funds deposited during the marriage and all the marital expenses paid from the account be totaled separately. Then the marital expenses are subtracted from the marital deposits. If the difference is positive, that amount in the account is marital.[49] The third test, the "marital assets out first" method, requires that withdrawals from a commingled account are considered marital funds until all the marital funds are exhausted, regardless of the purpose for which the money was spent.[50] The fourth test, the pro rata method, requires calculation of what percentage of the money deposited in the account over time is separate. Then, any money remaining in the account, as well as any assets purchased with the money, are characterized as separate in the same proportion. For example, if twenty-five percent of the deposits into the account were separate funds, any asset purchased from the account is twenty-five percent separate and seventy-five percent marital, and any money that remains in the account is twenty-five percent separate and seventy-five percent marital.[51]

b. Joint Titling

When a spouse who owns separate property adds the other spouse's name to the title, the question is whether the owner has given a present interest in the property to the other spouse. In a few states, so long as the original owner deliberately changed the legal title to the property to include the spouse's name, the conveyance is a gift.[52] In the remaining states, adding a spouse's name to the title of property is at least evidence of intent to make a gift.[53] In most states legal title is not conclusive; the issue is whether the original owner intended to convey a beneficial interest to the other spouse.[54] Adding the spouse's name creates a presumption in favor of finding a gift, but the owner spouse can

[48] Joan F. Kessler et al., *Tracing to Avoid Transmutation*, 17 J. AM. ACAD. MATRIMONIAL L. 371, 372-73 (2001).

[49] *Id.* at 377. A variant of this is the family expense method. *Id.*

[50] *Id.* at 376.

[51] *Id.* at 377-78.

[52] These states include Colorado, Idaho, Maine, Missouri, Pennsylvania, and West Virginia. EQUITABLE DISTRIBUTION, *supra* note 38, § 5.18. R

[53] *Id*.

[54] These states include Florida, Illinois, Kentucky, Minnesota, Oklahoma, and Rhode Island. *Id*.

rebut the presumption by proving that he or she did not intend to make a gift of the beneficial interest, but rather changed the title for some other purpose.[55]

c. Implied-in-Fact Gift

The third category of transactions includes a wide variety of circumstances in which a person claims that his or her spouse indicated an intention to give separate property to the marital estate.[56] Whether the original owner had the necessary intent is a question of fact. Relevant evidence can include the owner's written or oral statements and whether the owner dedicated the property to family uses.[57]

As this discussion shows, the fact patterns that Oregon courts have labeled as instances of commingling can be quite distinct. They may involve situations in which the owner of separate property has allowed it to become mixed with marital property (true commingling), where the owner has added the name of his or her spouse to the title (joint title), or where the owner has treated the property in a way that suggests he or she may have intended to give the separate property to the marital estate (implied-in-fact gift). The common thread that unites these three kinds of fact patterns is that they raise questions about whether the owner intended to and succeeded in maintaining the property as separate property not subject to equitable division. The resolution of these problems often requires the court to interpret complex and ambiguous facts in light of uncertainty about how much the law should promote the ideal of marriage as an economic community rather than treating the spouses as individuals. The next section describes the varying ways that Oregon courts dealt with these problems before *Kunze*.

2. The Oregon Courts' Treatment of "Commingling" Before Kunze

Three of the earliest modern property division decisions from the Oregon Supreme Court involve claims that separate property had been converted into property subject to division at divorce

[55] *Id*.; Bell, *supra* note 8, at 159-160. **R**

[56] EQUITABLE DISTRIBUTION, *supra* note 38, at § 5.24; Bell, *supra* note 8, at 163-64. **R**

[57] EQUITABLE DISTRIBUTION, *supra* note 38, at § 5.24. **R**

by commingling. In two of the cases, *In re Marriage of Jenks*[58] and *In re Marriage of Seefeld*,[59] the court concluded that property brought into the marriage by one spouse or given to one spouse alone should nevertheless be divided between the parties. In each case an important reason was that the property had been "integrated into the common financial affairs of the parties and their children."[60] In other words, the court found, notwithstanding how the property was titled, that by treating the property as "family" property, the husband had implicitly given the property to the marital estate. In addition, in *Seefeld* the husband had titled the property in the names of both spouses, and the wife had contributed to mortgage payments.[61] The opinion does not indicate whether these facts were crucial to the decision. In the third case, *In re Marriage of Miller*,[62] the court awarded the wife as her separate property a home that she had brought into the marriage in which the parties had lived. The opinion did not explain the reason for the different analysis.[63]

Jenks, *Seefeld* and *Miller* are all more than twenty years old, and the supreme court did not explicitly address "commingling" again until it decided *Kunze*. However, because the fact patterns that go under the label of commingling arise often, the Oregon Court of Appeals has dealt with this set of issues frequently. For example, just in the five years between the supreme court's opinions in *Massee* and *Kunze*, the court of appeals decided six major cases that raise these issues.[64] A different panel of the court decided each case, a different judge wrote each opinion, and the opinions do not all use the same analysis. The last point is not

[58] 294 Or. 236, 656 P.2d 286 (1982).

[59] 294 Or. 345, 657 P.2d 201 (1982).

[60] *Jenks*, 294 Or. at 243, 656 P.2d at 290.

[61] *Seefeld*, 294 Or. at 350, 657 P.2d at 204.

[62] 294 Or. 660, 665-66, 661 P.2d 1361, 1363-64 (1983).

[63] The facts suggest a sensible rationale for the different outcome in *Miller*, but the opinion does not make this rationale at all clear. This was the second marriage between the parties, who had first married in 1960 and divorced in 1975. They remarried in 1976 and divorced again in 1981. At the first divorce, the wife was awarded the family home; it was this asset that she brought into the second marriage. If all the assets had been treated as "marital," the husband would have been awarded a judgment against the wife for $15,000. The court may have regarded treating the property as marital as partially undoing the decision at the first divorce.

[64] *In re* Marriage of Van Horn, 185 Or. App. 88, 57 P.3d 921 (2002); *In re* Marriage of Gilbert-Walters, 177 Or. App. 133, 33 P.3d 709 (2001); *In re* Marriage of Albers, 174 Or. App. 243, 23 P.3d 430 (2001); *In re* Marriage of Padgett-Bellegante, 169 Or. App. 272, 7 P.3d 773 (2000); *In re* Marriage of Ward, 165 Or. App. 426, 998 P.2d 691 (2000); *In re* Marriage of Butler, 160 Or. App. 314, 981 P.2d 389 (1999).

surprising, considering the limited and ambiguous supreme court case law[65] and the differing points of views that can reasonably be taken with regard to these issues. None of the six cases involved only true commingling, joint titling, or an implied-in-fact gift, and most involved all three elements. Nevertheless, it is helpful to sort out how the courts treated each of the elements to show the various ways in which these facts can be analyzed. This, in turn, will clarify the significance of the supreme court's opinion in *Kunze.*

a. True Commingling

The two cases in which true commingling is the most dominant feature are *In re Marriage of Butler*[66] and *In re Marriage of Gilbert-Walters*.[67] In *Butler*, the court of appeals said that a business that the couple had started that used the husband's premarital funds as start-up capital was a marital asset acquired during the marriage.[68] The court concluded that the husband had not rebutted the presumption of equal contribution as to the premarital funds, commenting that once separate funds are commingled they will rarely be traced out.[69]

In contrast, in *Gilbert-Walters* the court upheld a trial court order that appears to have used something like the pro rata method[70] to divide all the parties' property, both that brought into the marriage and that acquired after the marriage.[71] The parties' complex financial affairs had quickly become very entangled, leading the trial court to find that tracing out separate contributions was not appropriate.[72] However, the trial court also found that the wife had overcome the presumption that her husband had contributed equally to the total assets—apparently in large part because she brought much more into the marriage—

[65] Indeed, the supreme court in *Kunze* discusses *Jenks* as the only precedent discussing commingling and observes, "Since that decision, this court has not clarified further when the integration of a separately acquired asset through commingling requires that asset to be included in the property division." *Kunze*, 337 Or. 122, 137, 92 P.3d 100, 109 (2004).

[66] 160 Or. App. 314, 981 P.2d 389 (1999).

[67] 177 Or. App. 133, 33 P.3d 709 (2001).

[68] *Butler*, 160 Or. App. at 322, 981 P.2d at 394.

[69] *Id*.

[70] *See supra* note 51 and accompanying text.

[71] *Gilbert-Walters*, 177 Or. App. at 140, 33 P.3d at 713.

[72] *Gilbert-Walters*, 177 Or. App. at 137, 33 P.3d at 711.

and the husband did not appeal that finding.[73] To effectuate the division, the court determined the value of the assets each party brought into the marriage and the ratio they bore to each other and then divided all the property between the spouses in the same proportion.[74]

b. Implied-in-Fact Gift

The court of appeals was very likely to conclude that separate assets had been converted into divisible joint property when the owner had committed the funds to build a family home or pay other family expenses. As discussed above, this kind of fact pattern presents the factual issue of whether the owner intended to make a gift of some of the separate assets to the other spouse,[75] but none of the Oregon cases expressly used a gift analysis. Instead, the cases spoke in terms of whether property was "acquired" before the marriage, of whether the presumption of equal contribution had been rebutted, and of commingling and tracing.

In two cases, *In re Marriage of Padgett-Bellegante* and *Butler,* the court said that the spouse who claimed property as separate could not rebut the presumption of equal contribution because of the "commingling" and commitment to family purposes.[76] In *In re Marriage of Albers* the court achieved the same result but said that the wife, who deposited her inheritance into a joint account and used the money for family purposes, had commingled the separate money with marital funds and that separate assets may not be traced out of commingled assets.[77]

The importance of donating separate property to a family use is highlighted by *In re Marriage of Van Horn*, in which the wife received substantial gifts and inheritances during the marriage and kept them in her own name.[78] However, she used some of the money to pay family expenses and to buy land and build a house, titled in her name alone.[79] The court of appeals rejected

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[73] *Gilbert-Walters*, 177 Or. App. at 141, 33 P.3d at 714.

[74] *Gilbert-Walters*, 177 Or. App. at 141-42, 33 P.3d at 713-14.

[75] *See supra* notes 56-57 and accompanying text.

[76] *In re* Marriage of Padgett-Bellegante, 169 Or. App. 272, 276-777, 7 P.3d 773, 775 (2000); *In re* Marriage of Butler, 160 Or. App. 314, 319-21, 981 P.2d 389, 393-94 (1999).

[77] 174 Or. App. 243, 248-49, 23 P.3d 430, 433 (2001).

[78] 185 Or. App. 88, 90, 57 P.3d 921, 922 (2002).

[79] *Van Horn*, 185 Or. App. at 90-91, 57 P.3d at 922.

her claim that the house was her separate property, saying that the wife contributed her trust fund money to the joint uses of the parties to such an extent that she had either not rebutted the statutory presumption of equal contribution, or, if she had rebutted the presumption, that equity demanded that husband still share in the value of the property. While the money may have been segregated in name, it was not meant to be segregated in practice.[80]

c. Joint Titling

The recent opinions from the court of appeals treat a spouse's addition of the other spouse's name to the title of property as very strong evidence of intent to donate the property to the marital estate. In *Padgett-Bellegante*, the court said that when a wife added her husband's name to real property that she brought into the marriage, the property was acquired during the marriage because of the retitling, and that the evidence of her premarital ownership was not sufficient to rebut the presumption even as to the value at the time of marriage.[81] The *Albers* court said that once separate property is commingled by being deposited into a joint account, tracing out separate property is not permitted.[82] In *Butler* the wife received an inheritance during the marriage, depositing some of the money into a joint account and some into an account in her name alone.[83] The court of appeals held that the wife could present evidence to establish that the account in her name only was hers alone, but not as to the account in both names.[84]

Keeping property titled in the name of only one spouse does not, however, ensure that it will be treated as separate property. In both *In re Marriage of Ward* and *Van Horn* the court held that property brought into the marriage by one spouse and titled in that spouse's name alone was, nevertheless, subject to equitable division because of the extent to which it had been donated to marital uses, mixed with marital funds and labor, or both.[85]

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[80] *Van Horn*, 185 Or. App. at 95, 57 P.3d at 925.

[81] *Padgett-Bellegante*, 169 Or. App. at 277-78, 7 P.3d at 775-76.

[82] *Albers*, 185 Or. App. at 247-48, 57 P.3d at 433.

[83] *In re* Marriage of Butler, 160 Or. App. 314, 316-17, 981 P.2d 389, 390-91 (1999).

[84] *Butler*, 160 Or. App. at 321-22, 981 P.2d at 393-94.

[85] *In re* Marriage of Ward, 165 Or. App. 426, 998 P.2d 691 (2000). The court held that all of the parties' bank accounts, one of which was titled in the husband's name alone and the other two titled jointly, were subject to division because of the exten-

As these six cases illustrate, the Oregon Court of Appeals in recent years often found that because a party's separate property had been commingled with marital property, it had become subject to equitable division. However, the court used the term "commingled" to mean different things in different opinions, sometimes connoting that separate property had been mixed with marital property, that separate property had been "reacquired" after the marriage and so had become subject to the rebuttable presumption of equal contribution, or that it had been committed to familial purposes. Because of the varied ways in which the court used the term commingling and the differences in details of the analyses, the law in this area was uncertain and unpredictable. The time was ripe for the supreme court to address commingling again.

II

In re Marriage of Kunze

Kunze raises three issues: 1) the legal significance of mixing separate and marital assets; 2) the legal consequences when a spouse who owns separate, premarital, or inherited assets commits them to family uses or titles them in the names of both spouses; and 3) the characterization of the increase in value of separate property.[86] A national commentator calls the supreme court's opinion in *Kunze* a "superlative example of statutory construction" that resolves complex issues consistently with the approaches taken in a majority of states.[87] In addition, the opinion synthesizes prior decisions and provides a useful template for analyzing property division issues.

A. The Trial Court and Court of Appeals Opinions

Throughout the Kunzes' twenty-year marriage, the wife worked and always earned more than the husband.[88] From 1985 to 1991 he was a full-time student, and the parties lived on the

sive commingling of their financial affairs. *Ward*, 165 Or. App. at 429, 988 P.2d at 692; *Van Horn*, 185 Or. App. 88, 95, 57 P.3d 921, 925.

[86] *In re* Marriage of Kunze, 337 Or. 122, 92 P.3d 100 (2004).

[87] Brett R. Turner, *Separate Property and Joint Title: A Tale of Two Cases*, 21 Equitable Distribution J. (No. 7) 73 (July 2004). This review compares the *Kunze* opinion favorably to that of the Maine Supreme Court in *Spooner v. Spooner*, 850 A.2d 354 (Me. 2004), which dealt with similar issues but reached a more unusual conclusion.

[88] *Kunze*, 337 Or. at 125, 92 P.3d at 103.

wife's earnings and income from her property, though he worked on the family residence.[89] The husband was employed from 1991 to 1993, when he was seriously injured at work.[90] For the next eighteen months the wife cared for him and their infant daughter while managing the various properties.[91] After he recovered, in 1995 he entered into a business venture that was a financial failure.[92]

At their divorce in 1999, the parties disputed the distribution of three assets: 1) the Chaps Court property—a parcel traceable to property that the wife inherited during the marriage; 2) the Germantown Road property—a parcel of property that the wife brought into the marriage; and 3) the National City property—a piece of real property that she inherited from her aunt during the marriage.[93]

The parties purchased the Chaps Court property, a fourplex that they rented with the proceeds from the sale of a duplex that the wife had inherited during the marriage.[94] Chaps Court was titled in the names of both spouses as tenants by the entirety.[95] The inherited National City property was titled in wife's name alone at all times, and she deposited rent from it in the parties' joint account.[96]

The parties lived in a house on the Germantown property for the first three years of the marriage and thereafter rented it.[97] The wife deposited the rental income into the parties' joint bank account, from which expenses related to the property were paid.[98] The house was titled in the wife's name alone until 1995, four years before the divorce, when she added the husband's name to the title at the insistence of a lender from whom they

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[89] *Kunze*, 337 Or. at 126, 92 P.3d at 104.

[90] *Kunze*, 337 Or. at 127, 92 P.3d at 104.

[91] *Id*.

[92] *Kunze*, 337 Or. at 128, 92 P.3d at 105.

[93] *Kunze*, 337 Or. at 129, 92 P.3d at 105. The wife brought a third parcel, a farm in North Dakota, into the marriage. *Kunze*, 337 Or. at 125, 92 P.3d at 103. The husband conceded that this property was her separate property. *Kunze*, 337 Or. at 128 n.5, 92 P.3d at 105. In turn, the wife agreed that the family home, purchased with the proceeds of property that she inherited, and a bank account traceable to another parcel she had brought into the marriage, should be divided equally. *Kunze*, 337 Or. at 129-30, 92 P.3d at 105.

[94] *Kunze*, 337 Or. at 127, 92 P.3d at 104.

[95] *Id*.

[96] *Kunze*, 337 Or. at 126, 92 P.3d at 104.

[97] *See Kunze*, 337 Or. at 125-26, 92 P.3d at 103.

[98] *Id*.

borrowed money to finance the husband's business venture.[99]

When the parties filed for divorce, the husband claimed that all the assets were "marital assets" subject to the presumption of equal contribution and that they should be divided equally.[100] The wife argued that she should receive as her separate property the value of her inheritance invested in the Chaps Court property, her premarital equity in the Germantown Road property, and all of the National City property.[101]

The wife prevailed on these claims in the trial court.[102] Not surprisingly in light of its recent opinions,[103] the court of appeals rejected the trial court's conclusions regarding the Chaps Court and Germantown Road properties. However, it agreed with the trial court's disposition of the National City property.

The court of appeals said that the Chaps Court property, which was purchased with the proceeds of wife's inheritance, was "acquired during the marriage" and was, therefore, a marital asset subject to the rebuttable presumption of equal contribution.[104] As in several other recent court of appeals opinions, the court adopted an approach that makes it practically impossible to trace out separate property once it has been mixed with marital property or jointly titled.[105] The court said,

> [F]unds from the sale of property that belong to one spouse will remain an asset of that spouse only if they remain segregated; if they are deposited into a joint account or used to acquire a joint asset, courts will not trace the funds back to their original source.[106]

Therefore, because the property was jointly titled, the court found that it was a joint asset.

The court also concluded that the Germantown Road property was entirely divisible. The court's critical analytical move was

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[99] *Kunze*, 337 Or. at 127-28, 92 P.3d at 104-05.

[100] *Kunze*, 337 Or. at 128, 137, 92 P.3d at 105, 109-10.

[101] *Kunze*, 337 Or. at 129, 92 P.3d at 105. She agreed to an equal division of the appreciation in value of the Germantown Road and Chaps Court properties and to other pieces of property acquired during the marriage with her premarital or inherited assets. *Kunze*, 337 Or. at 128-29, 92 P.3d at 105.

[102] *Kunze*, 337 Or. at 128, 92 P.3d at 105.

[103] *See supra* notes 66-85 and accompanying text.

[104] *See supra* notes 9-10 and accompanying text. The court cited *In re* Marriage of Butler, 160 Or. App. 314, 918 P.2d 389 (1999).

[105] *Id*. For a discussion of the earlier cases, *see supra* notes 66-73, 81-83, and accompanying text.

[106] *Kunze*, 181 Or. App. at 618, 47 P.3d at 495-96.

finding that when the wife added the husband's name to the title during the marriage, the property was "acquired during the marriage," thus becoming a marital asset subject to the rebuttable presumption.[107] Then, the court used an analysis similar to that regarding the Chaps Court property. It said, "[O]nce she transferred the Germantown Road property into joint ownership, the original source of the asset, although pertinent in some circumstances, is not dispositive."[108] Citing the husband's work after the marriage that helped maintain and improve the property, the court concluded that the wife had not rebutted the presumption as to any of the value of the property.[109]

In contrast, the court of appeals concluded that the National City property should go entirely to the wife. Although the property was a marital asset because "acquired during the marriage," the court said that the wife rebutted the presumption as to the principal amount because she received it as an inheritance to which the husband did not "contribute."[110] The court found that husband also did not "contribute" to the increase in value of the property, which was also "acquired" during the marriage, because it was "virtually a passive investment throughout the marriage" and so should go to the wife.[111] This conclusion is notable for its apparent acceptance of the distinction between active and passive increases in the value of separately owned assets, with different conclusions about the character of the increase following from the distinction.[112]

B. The Supreme Court Opinion

The Oregon Supreme Court rejected the court of appeals' position that when separate property is commingled, the original owner cannot trace out the separate property, and the court's position that the wife's argument that "commingling" is relevant only "when the source of that asset has become obscured or when the social and financial objectives of the dissolution otherwise cannot be achieved."[113] Instead, the court said that commingling can affect property distribution in two ways: by

[107] *Kunze*, 181 Or. App. at 618, 47 P.3d at 495.
[108] *Kunze*, 181 Or. App. at 618, 47 P.3d at 496.
[109] *Kunze*, 181 Or. App. at 618-19, 47 P.3d at 496.
[110] *Kunze*, 181 Or. App. at 617-18, 47 P.3d at 495.
[111] *Id*.
[112] *See supra* notes 26-27 and accompanying text.
[113] *In re* Marriage of Kunze, 337 Or. 122, 136-37, 92 P.3d 109-10 (2004).

preventing a party from rebutting the statutory presumption of equal contribution because the evidence is insufficient to allow the separate assets to be traced;[114] or by evincing the intent of the owner of separate property to convert it to an asset that is divisible at divorce.[115]

The first kind of commingling that the court discussed is mixing separate and marital assets together in one piece of property, which this Article calls "true commingling."[116] The court held that true commingling does not automatically result in conversion of separate to joint property and that it is possible for an asset to have a mixed character.[117] However, a party who claims that an asset is mixed has the burden to trace out the separate property. If that party cannot carry the burden, the entire asset is subject to equitable division.[118]

The court then discussed the second circumstance to which the

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[114] *Kunze*, 337 Or. at 137-38, 92 P.3d at 110.

[115] *Kunze*, 337 Or. at 140-41, 92 P.3d at 111-12.

[116] *See supra* notes 44-51 and accompanying text.

[117] The court said:

> Although ORS 107.105(1)(f) does not require the court to undertake the task of tracing the parties' respective contributions when commingling has made the identification of those contributions unreliable, the fact that a party has commingled a separately acquired asset with the shared finances of the marital partnership does not create that difficulty in all circumstances.

Kunze, 337 Or. at 139, 92 P.3d at 111.

[118] The court said:

> [W]e observe that the parties are in agreement as to one way that commingling may affect the court's analysis under ORS § 107.105(1)(f) — that is, the court's identification of the parties' respective contributions to a disputed property in deciding whether the statutory presumption of equal contribution is rebutted. The parties recognize that, as a threshold evidentiary matter in challenging the statutory presumption under ORS 107.105(1)(f), a spouse must be able to identify that spouse's separate contribution to claim entitlement to a disputed asset as an asset that was acquired separately. The parties further agree, as do we, that, when a spouse has commingled a separately acquired asset with the joint assets of the marital partnership, that act of commingling may make the identification of the separately acquired asset so unreliable as to defeat any claim on that spouse's part of an unequal contribution by the other spouse. Stated differently, when a spouse has mixed a separately acquired asset with the joint assets of the marital partnership—for example, by depositing separately acquired funds into an active account that also contains joint funds—then that act of commingling may preclude the court from identifying that spouse's separate contribution with sufficient reliability to rebut the statutory presumption that both spouses have contributed equally to the disputed asset.

Kunze, 337 Or. at 137-38, 92 P.3d at 110.

term "commingling" may apply: facts that suggest that the owner of separate property gave that property to the marital estate.[119] The effect of joint titling is subsumed under this category as possible evidence of intent to make a gift.[120]

The court said that this issue arises only after a party has successfully asserted that an asset is separate, either by showing that it is premarital or by rebutting the presumption of equal contribution applicable to an asset acquired during marriage. (Recall that the principal way to rebut the presumption of equal contribution is to show that the property was a gift or inheritance intended for only one spouse.[121]) This part of the analysis, the court said, occurs as part of the next step in distributing property—determining what division of all the parties' assets is "just and proper."[122] The court synthesized and endorsed some court of appeals decisions that used this analysis:

> [T]he Court of Appeals frequently has applied commingling as a consideration when dividing property under ORS 107.105(1)(f), although not always at the same point in its analysis and not always with consistent results. In its decisions, that court generally has examined the facts of each case to discern whether a spouse had intended to retain the separately acquired asset as separate property or whether, instead, that spouse's treatment of the separately acquired asset demonstrated an intent for that asset to become a joint asset of the marital partnership (citation omitted). To discern the spouse's intent, that court has considered a number of different factors, including (1) whether the disputed property was jointly or separately held; (2) whether the parties shared control over the disputed property; and (3) the degree of reliance upon the disputed property as a joint asset (citations omitted). We agree with the Court of Appeals that, in deciding whether the court should include a separately acquired asset in the property division because of commingling, the court's inquiry properly focuses upon whether a spouse demonstrated an intent to retain that spouse's separately acquired asset as separate property or whether, instead, that spouse intended for that property to become the joint property of the marital estate. We further agree with the considerations, discussed above, that the Court of Appeals has applied to decide whether equity requires the court to include a separately acquired asset in the property division under ORS 107.105(1)(f) because of the integration of that asset into the shared fi-

[119] *See supra* notes 56-57 and accompanying text.

[120] *Kunze*, 337 Or. at 141, 92 P.3d at 112.

[121] *Kunze*, 337 Or. at 140, 92 P.3d at 111-12.

[122] *Kunze*, 337 Or. at 140, 92 P.3d at 112.

> nances of the marital partnership through commingling. We caution, however, that acts of commingling do not mandate in all cases the inclusion of separately acquired property in the property division. Instead, the court must evaluate the extent to which a spouse has integrated a separately acquired asset into the joint finances of the marital partnership and also evaluate whether any inequity would result from the award of that asset to that spouse as separate property.[123]

The Supreme Court's application of this analysis to the properties in *Kunze* illustrates and amplifies the tests. Like the court of appeals, the supreme court said that the Chaps Court property was a "marital" asset because the wife purchased it during the marriage, but it ruled that she rebutted the presumption of equal contribution by tracing it to her separate inheritance.[124] This analysis illustrates not only that tracing is permitted, but also that joint titling does not preclude tracing out separate property. The court next determined the "just and proper" distribution of the asset. The court concluded that the wife's treatment of the property indicated her intent to give the entire property to the marital estate.[125] The court pointed in particular to the facts that the property was always jointly titled and that the wife "introduced no evidence at trial that showed that she had intended to retain her separately acquired equity in that property as her separate property."[126] This analysis suggests that joint titling may be strong evidence of an implied intent to make a gift, evidence that will be sufficient to show such a gift unless the original owner produces persuasive evidence of a contrary intent.[127]

The court's analysis of the character of the Germantown Road property is consistent with its treatment of the Chaps Court property. The wife did not dispute that the increase in value of this asset was marital, apparently because of the husband's contributions to the upkeep and improvement of the property during the marriage.[128] However, she argued that the principal was her separate, premarital property even though she had added her

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123 *Kunze*, 337 Or. at 141-42, 92 P.3d at 112-13.

124 *Kunze*, 337 Or. at 143, 92 P.3d at 113.

125 *Kunze*, 337 Or. at 146-47, 92 P.3d at 115.

126 *Id.*

127 However, this cannot be definitely concluded from the case. Even though the supreme court did not say so in its opinion, the husband had presented other evidence that might have supported the finding of a gift, including the wife's dedication of the income from the property and of other joint funds to pay expenses on the property. *Kunze*, 337 Or. at 126, 92 P.3d at 104.

128 *Kunze*, 337 Or. at 127-28, 92 P.3d at 105.

husband's name to the title. The supreme court rejected the theory of the court of appeals that when the wife added the husband's name to the title, the property was then "acquired during the marriage."[129] Instead, the court traced the principal to its origin as separate property.

The court then considered, as part of the "just and proper" distribution analysis, whether the wife had intended to give a share of the principal in the property to the husband. He could have argued that she had this intent, based on the parties' use of the house as the family home in the early years of the marriage, his contribution of labor to the upkeep of the house, and the wife's having added his name to the title. However, the supreme court found as a matter of fact that she lacked this intent, emphasizing that for most of the marriage the property had been used as a rental and that the only reason she added the husband's name to the title was to obtain financing for his failed business venture.[130] The court concluded that the husband's work on the house was recognized by allowing him to share in the increase in value of the property.[131]

Agreeing with the court of appeals, the supreme court concluded that all of the National City property was the wife's separate property.[132] The court said that while National City was a "marital asset" because the wife acquired it during marriage, she rebutted the presumption of equal contribution to the principal by showing that she was the sole object of her aunt's donative intent.[133] The court examined the increase in value of the property during the marriage separately, as required by *Massee*. It agreed with the court of appeals that because neither party had to give much attention to the property during the marriage, the husband had no claim to it.[134] In other words, the court treated the increase in value as passive and therefore characterized it as separate.[135] The court also concluded that the wife had not treated the property in a way that indicated an intent to give any of it to her husband; he argued that her depositing income from the property into joint accounts showed such an intent, but the

[129] *Kunze*, 337 Or. at 133, 142-45, 92 P.3d at 108, 113-14.
[130] *Kunze*, 337 Or. at 144-47, 92 P.3d at 114-15.
[131] *Id.*
[132] *Kunze*, 337 Or. at 142-44, 92 P.3d at 113.
[133] *Id.*
[134] *Id.*
[135] *See supra* notes 26-27 and accompanying text.

court concluded that this was not enough to show an intent to give any of the principal to the husband.[136]

As this discussion shows, the supreme court in *Kunze* brought considerable clarity to the questions of the effect of commingling separate and marital property and of the character of increases in value of separate property. While commingling facts always raise the fundamental issue of whether the owner of separate property intended to convert it into property subject to equitable division, the first analytical step is determining in what sense the property was commingled. If separate and marital property were mixed (true commingling), the party who claims separate property bears the burden to produce convincing evidence to trace out the separate part of the asset. If the party cannot carry this burden, the entire asset is equitably divided. On the other hand, if labeling the property commingled means that the owner used the property in a way that suggests that he or she may have intended to commit it to marital uses, the question is whether this intent has been proven. The owner's having added the other spouse's name to the title is strong but not conclusive evidence of such an intent, and the circumstances under which title was changed as well as other evidence is relevant to determining intent.

The *Kunze* opinion also clarifies an issue left open after *Massee* regarding the treatment of increases in value of separate property. Such an increase is separate property if substantially attributable to inflation, interest received, or other passive forces not involving productive effort by either party. If it is substantially attributable to the efforts of either spouse after marriage, it is equitably divisible.

III

Property Division in Oregon: Remaining Questions

Five important questions about Oregon property division law remain unanswered after *Kunze*. Four are technical and follow from the opinion's analysis of the characterization of assets as separate or subject to division. The fifth (and most important) question concerns what evidence parties may submit to rebut the presumption that the spouses contributed equally to marital assets. The first part of this section briefly recaps the steps in a property division analysis after *Kunze*; the second examines the

[136] *Kunze*, 337 Or. at 144-45, 92 P.3d at 114.

remaining characterization problems, and the third discusses the rebuttable presumption issue.

A. The (Nearly) Complete Picture of Oregon Property Division Law

The Oregon Supreme Court's opinion in *Kunze* substantially completes the judicial enterprise of inferring a complete system for dividing property at divorce from Oregon statute 107.105(1)(f). The statute and cases create a system that is very similar to that used in most states today. The essential features are a series of definitions and a set of rules for division.

1. Definitions

A spouse's "separate property" includes property owned by the spouse before marriage.[137]

"Marital assets" are all property acquired after the marriage by either or both spouses, regardless of how titled. The spouses are rebuttably presumed to have contributed equally to marital assets; a spouse who claims to the contrary has the burden to establish the claim by a preponderance of the evidence.[138] A spouse may rebut the presumption by showing that he or she inherited or was given the property during the marriage;[139] or that he or she acquired the property during an extended period of mutual financial independence preceding dissolution of the marriage.[140] If a spouse successfully rebuts the presumption of equal contribution, the asset is treated as separate.

Where separate property and marital assets are commingled, if the party claiming that property is separate cannot trace it out, all of the property is a marital asset.[141]

The increase in the value of separate property during marriage is a marital asset, but a spouse can rebut the presumption of equal contribution by showing that the increase is substantially

[137] This is implicit in the language of OR. REV. STAT. § 107.105(1)(f) (2003); *see also In re* Marriage of Seefeld, 294 Or. 345, 657 P.2d 201 (1982).

[138] This definition is derived from the language of OR. REV. STAT. § 107.105(1)(f) and cases, which have established how the presumption of equal contribution can be rebutted.

[139] *In re* Marriage of Jenks, 294 Or. 236, 237, 656 P.2d 286, 289 (1982); *In re* Marriage of Pierson, 294 Or. 117, 121-22, 653 P.2d 1258, 1260-61 (1982).

[140] *In re* Marriage of Richardson, 307 Or. 370, 377, 769 P.2d 179, 184 (1989); *In re* Marriage of Lemke, 289 Or. 145, 148, 611 P.2d 295, 297 (1980).

[141] *In re* Marriage of Massee, 328 Or. 195, 206, 970 P.2d 1203, 1211 (1999); *see also Kunze*, 337 Or. at 137-39, 92 P.3d at 110-11.

attributable to inflation, interest received, or other passive forces not involving productive effort by either spouse. If the increase is substantially attributable to the efforts of either spouse after marriage, it is subject to equitable division.[142]

2. Principles for Dividing Property

Ordinarily, separate property of each party is awarded to that party.[143] Ordinarily, marital assets are divided equally.[144] A spouse who owns separate property may convert it into property that will be divided at divorce.[145] Evidence of this intent includes but is not limited to proof that the owner added his or her spouse's name to the title or that the owner integrated the separate property into the family's common financial affairs.[146] If the court finds that the owner of separate property intended that it be divided, it should be divided consistently with the owner's intent in making the gift.[147] Typically, the evidence shows that the owner intended the asset to be treated as family property, owned equally. This is particularly true if the owner adds his or her spouse's name to the title. In such a case, the asset is ordinarily divided equally.[148]

The court may deviate from these ordinary rules of division if necessary to assure that both parties to a long-term marriage have the resources for self-sufficient, post-dissolution life apart[149] or to provide for the children of the marriage.[150] Minor deviations from an equal division are allowed to preserve assets or avoid the continued financial entanglement of the parties.[151]

B. A Few Issues of Characterization

After *Kunze*, two issues regarding the effect of commingling

142 *Kunze*, 337 Or. at 142-45, 92 P.3d at 113-14.

143 *See supra* notes 10-14 and accompanying text.

144 *See id*.

145 *See Kunze*, 337 Or. at 135-44, 92 P.3d at 109-13.

146 While the *Kunze* court does not say this explicitly, it follows logically from the court's analysis. *Id*.

147 *Id*.

148 *Id*.

149 *See supra* note 13 and accompanying text; *In re* Marriage of Pierson, 294 Or. 117, 122-23, 653 P.2d 1258, 1261-62 (1982).

150 *See supra* note 13 and accompanying text; *In re* Marriage of Seefeld, 294 Or. 345, 352-53, 657 P.2d 201, 205 (1982).

151 *See, e.g.*, *Pierson*, 294 Or. at 122-23, 653 P.2d at 1261-62; *In re* Marriage of Haguewood, 292 Or. 197, 206-07, 638 P.2d 1135, 1140-41 (1981).

and two regarding the character of the fruits of separate property remain unanswered. The likely resolutions of most can be inferred from *Kunze*.

1. Commingling

The first of the two commingling issues is under what circumstances a spouse who claims that property includes separate as well as joint property may present evidence to trace out the separate property. *Kunze* makes clear that changing the title of separate property alone does not preclude tracing. On the other hand, the supreme court's treatment of the Chaps Court property suggests that a relatively modest number of additional transactions involving the property, particularly if they result in separate and marital property being combined in the same asset, will preclude tracing even if the claimant could produce records to show how much separate property was put into the asset.

A second issue raised by the court's treatment of these two assets is how much evidence is necessary to show that the owner of separate property intended to make a gift to the marital estate. The court's treatment of the Chaps Court and Germantown Road properties strongly suggests that if the owner adds the other spouse's name to the title of the property, he or she will need to produce substantial evidence to support a conclusion that a gift was not intended. On the other hand, the court's refusal to find that any of the National City property and the premarital value of the Germantown Road property had been converted to joint property indicates that contributing income from separate property to the family coffers is not enough to show a gift of the principal value. The court's discussion of why the National City property had not become joint property suggests evidence that would be more persuasive. The court observed,

> [The] wife had not integrated that property into the parties' joint financial affairs such that an equitable division required the inclusion of that property. In that regard, the trial court pointed out that wife had held that property separately and that the property was not included in any formal estate planning.[152]

From this, one can infer that evidence indicating the owner spouse had treated the property in such a way as to justify the

[152] *Kunze*, 337 Or. at 144-45, 92 P.3d at 114.

other spouse's relying on continued access to the asset is more likely to convince the court, particularly if the title to the property has not been changed.

2. Increases in Value and Income From Separate Property

Kunze and *Massee* together indicate that passive increases in the value of separate property should be characterized as separate, and that increases attributable to the productive efforts of either or both spouses are enough for the increase to be subject to equitable division. This is particularly important for division of the increase in value of businesses and investment property that a spouse brings into the marriage and continues to work on during the marriage. Moreover, this outcome is consistent with the fundamental principle that spouses share the economic products of the labor of both spouses during the marriage.[153]

The business or investment brought into the marriage that one or both spouses work on during the marriage presents one of the

[153] In *In re Marriage of Owens-Koenig*, 194 Or. App. 573, 95 P.3d 1152 (2004), the court was asked to decide whether the appreciation in the value of a pension that the wife had brought into the marriage was her separate property or divisible joint property. The court did not use the analysis suggested in the text. Instead, the court attempted to reconcile what it identified as two lines of cases, one, including *Massee*, in which spouses shared in the increase in value of separate property, and the other, including *Kunze*, in which the court held that such increases were separate. The court distinguished the two lines of authority on the basis that in the cases in which the increase was held to be divisible, the other spouse "makes a disproportionately greater nonfinancial contribution to the marital estate through homemaking, child care, or some other form of undercompensated service." *Owens-Koenig*, 194 Or. App. at 578-79, 95 P.3d at 1156. In the cases in which the increase in value was held to be separate property, the court said, both spouses worked and neither contributed undercompensated service to the family.

While this factual distinction might be employed to distinguish the cases, in principle it does not make sense to say that whether a spouse shared in the increase in value of separate property depends on whether he or she is a homemaker (or at least has provided undercompensated service to the family). The underlying basis for sorting property into separate and joint piles is to identify that property which is justly to be shared because it was produced by the efforts of one or the other or both spouses during marriage or because the owner of separate property chose to donate it to the family's common fund. *See supra* notes 10-13 and 120-24 and accompanying text. Neither of these criteria depends on whether the other spouse is or is not a homemaker. An example makes the problem clear. Assume that the husband is a successful small business owner before the marriage, who after the marriage, continues to work long hours in the business. In the first scenario, assume that the wife is a homemaker who does not work in the business. In the second scenario, assume she is a well-paid employee. Under *Owens-Koenig*, the wife in the first scenario would share in the increase in the value of the husband's business, while the wife in the second would not.

most complex characterization issues: how to divide any increase in value between separate (return on investment) and joint (representing compensation for labor) portions. Some community property states have developed a complex analytical solution,[154] but common-law property states have tended not to adopt this approach, leaving the question to judicial discretion. The latter approach avoids technical complexity, but its disadvantage is that a substantial amount of money may be at stake with little to guide the judge in the exercise of discretion.[155] Neither *Kunze* nor *Massee* sheds light on how this issue will be resolved.

The final question is how income from separate property, such as rent or interest, will be characterized. Apparently, it was uncontested in *Kunze* that income from the wife's various properties lost any separate character that it might have had when it was deposited into joint accounts and used for family expenses. What, though, if the wife had deposited the income in a separate account in her name only, from which no joint expenses were paid? While some jurisdictions treat income from and increases in the value of separate property differently,[156] this seems artificial, considering that whether any given piece of property produces income or increases in value is often a matter of the investment decisions that the owner makes.[157] Thus, it is likely that Oregon will treat income from separate property the same way that it treats increases in value of that property.

3. Rebutting the Presumption of Equal Contribution

The last important issue that is still unclear after *Kunze* is whether courts will inquire closely into the relative contributions of spouses in determining whether the presumption of equal contribution to marital assets has been rebutted. The issue arises because of the following language in *Massee:*

> In deciding whether either party has rebutted the presumption of equal contribution, the court may consider any admissible evidence that is probative of the question whether the parties contributed unequally to the acquisition of marital assets.

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[154] *See supra* note 31. **R**

[155] This is the reason that the ALI Principles ultimately opted to recommend use of the complex analysis, notwithstanding its difficulty. *See* ALI PRINCIPLES, *supra* note 8, § 4.05 cmt. b. **R**

[156] *See supra* note 27. **R**

[157] The ALI Principles apply the same rules to both kinds of fruits of separate property. *See* ALI PRINCIPLES, *supra* note 8, §§ 4.04-.05. **R**

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

Once the court has determined each spouse's overall contribution to the acquisition of marital assets, the court compares the respective contributions of the spouses. The ultimate question is whether the spouse seeking to rebut the presumption of equal contribution has proved, by a preponderance of the evidence, that the other spouse did not contribute equally to the acquisition of marital assets. If the court determines that the presumption of equal contribution is rebutted, the presumption drops from the case and the court divides the property according to the magnitude of each spouse's contribution to the acquisition of marital assets. In other words, the court distributes the marital assets without regard to any presumption, but in a manner that is just and proper in all the circumstances, including the proven contributions of the parties to the acquisition of marital assets.[158]

This language suggests that trial courts should examine and evaluate the spouses' conduct throughout the marriage to determine how much each contributed to acquisition of property by labor in the marketplace and through their conduct at home. However, this interpretation is not required by Oregon statute 107.105(1)(f) and should not be adopted. Even though the statute refers to "contribution," implying that the parties' contributions are a factor in effecting the division of property, it does not say how courts should evaluate the parties' contributions or in what detail.[159] The issue remains one for judicial resolution in

[158] *In re* Marriage of Massee, 328 Or. 195, 204-05, 970 P.2d 1203, 1210-11 (1999).

[159] As the court said in *In re Marriage of Haguewood*, 292 Or. 197, 206, 638 P.2d 1135, 1140 (1981), "[The statute] requires that we presume a homemaker spouse to have contributed equally to the marital assets which suggests an equal division of assets if the division is based on contribution. It does not require division based on contribution and does not exclude other considerations." The court's inquiry into contributions should be limited to redressing cases of extreme financial misconduct by one party that significantly dissipates the marital estate.

light of precedent and the purposes and philosophy that underlie the statute.

Other decisions by Oregon courts and compelling policy reasons militate against interpreting *Massee* as requiring a close inquiry into the details of the parties' married life. Before *Massee*, Oregon Supreme Court cases construing section 107.105(1)(f) did not suggest that the statute called for a detailed inquiry into the parties' married life. Instead, they emphasized that spouses share their fortunes in marriage and contribute to the common good. For example, in a frequently quoted passage, the court in *In re Marriage of Jenks* said:

> When couples enter marriage, they ordinarily commit themselves to an indefinite shared future of which shared finances are a part. Acquisitions are made, foregone or replaced for the good of the family unit rather than for the financial interests of either spouse. Property is bought, sold, enhanced, diminished, intermixed and used without regard to ease of division upon termination of the marriage. All this may be modified by agreement, of course, but, by the nature of the marital relationship, couples ordinarily pledge their troth for better or worse until death parts them and their financial affairs are conducted accordingly.[160]

In *In re Marriage of Stice*, the wife argued that she should be able to rebut the presumption of equal contribution by showing that throughout the marriage she had been the "saver and purchaser," that the acquisition of the disputed asset had been the result of her "industry and frugality," and that the husband had been a self-indulgent "spender" who "used most of his income above that needed for the monthly expenses for his enjoyment and hobbies."[161] Citing *Jenks*, the court rejected her argument, saying, "In a long-term marriage in which the parties' properties were acquired during the marriage, the parties should separate on as equal a basis as possible."[162]

In cases decided after *Massee*, the court of appeals divided divisible property equally despite spouses' arguments that they had contributed more by working longer or harder during the marriage.[163] Finally, it is very significant that the court in *Kunze* did

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[160] 294 Or. 236, 242, 656 P.2d 286, 290 (1982).

[161] 308 Or. 316, 323, 779 P.2d 1020, 1024 (1989).

[162] *Stice*, 308 Or. at 327, 779 P.2d at 1026.

[163] In *In re Marriage of Hall*, 159 Or. App. 196, 977 P.2d 387 (1999), the court refused to examine closely the contributions of each spouse. The court said, "There is no measureable difference in 'kind' or 'magnitude' between the husband's contri-

not undertake this kind of analysis, even though the facts would have supported it.[164] The wife's brief to the supreme court strongly urged the court to find she had rebutted the presump-

bution . . . and the wife's contribution," and so the wife received half of the increase in value and income. 159 Or. App. at 204, 977 P.2d at 391. Similarly, in *In re Marriage of Ward*, 165 Or. App. 426, 998 P.2d 691 (2000), the court rejected the husband's invitation to undertake a close evaluation of whether he had "contributed" more to the marital assets when both spouses worked, even though the husband brought more property into the marriage and may have worked longer hours. 165 Or. App. at 429, 998 P.2d at 691. In *In re Marriage of Bidwell*, 170 Or. App. 239, 12 P.3d 76 (2000), it appears that the $57 million increase in value of the brokerage house owned by the husband during the marriage was assumed to be divisible, perhaps equally. 170 Or. App. at 241, 12 P.3d at 77. The court accepted the wife's proposal to take only a third of its value so that the company would not have to be sold. 170 Or. App. at 242, 12 P.3d at 78. The real dispute in the case concerned the form that the husband's payment to the wife would take. 170 Or. App. at 242, 12 P.3d at 77. *See also In re* Marriage of Van Horn, 185 Or. App. 88, 57 P.3d 921 (2002).

In two cases, the court of appeals upheld decisions dividing parties' assets on the basis of contributions, but each is odd in its own way. In *In re Marriage of Gilbert-Walters*, 177 Or. App. 133, 33 P.3d 709 (2001), the husband did not challenge the trial court's finding that the wife had overcome the presumption of equal contribution but simply argued that the trial court's division was "unfair." 177 Or. App. at 137-38, 33 P.3d at 712. The court of appeals affirmed, saying that because the husband did not contest that the wife had overcome the presumption of equal contribution, it could not fashion a division than was significantly preferable to that of the trial court. 177 Or. App. at 140-42, 33 P.3d at 713-14. *In re Marriage of Jacobs*, 179 Or. App. 146, 39 P.3d 251 (2002) (en banc), had very unusual facts. Although the parties were married for twenty-two years, they kept their finances absolutely separate, each did his or her own laundry, and neither cooked. 179 Or. App. at 148-49, 39 P.3d at 252. The wife bought and maintained the home in which the parties lived. When the husband made improvements on the home, the wife paid him. 179 Or. App. at 149, 39 P.3d at 252-53. The trial court held that the wife had rebutted the presumption of equal contribution and awarded her all the assets in her own name. 179 Or. App. at 150, 39 P.3d at 253. The husband represented at trial that he owned no bank accounts and no assets. 179 Or. App. at 148-49, 39 P.3d at 252-53. The unanimous appellate court said that it did not believe he had been candid with the trial court and affirmed the trial court's decision to award him any assets that were in his name, without specifying them, and none of the assets in the wife's name. 179 Or. App. at 149-50 & n.2, 153, 39 P.3d at 253, 255. While the court characterized this as a case in which the wife rebutted the presumption of equal contribution, the outcome is better explained either as recognizing and implementing an implied-in-fact contract between the parties to hold all assets separately or as fashioning an award to protect the wife from fraud.

A third case with unusual facts appears to have justified an unequal division based on relative need. The court in *In re Marriage of Wanless*, 168 Or. App. 238, 3 P.3d 179 (2000), awarded the great bulk of the equity in the parties' home, the only marital asset, to the wife. The husband was incarcerated and was expected to be released no earlier than 2022, and the court's decision effectively gave the wife the house free and clear, subject only to an obligation to pay the husband $2,500 in annual installments of $250. 168 Or. App. at 239, 3 P.3d at 180.

[164] *See supra* notes 86-87 and accompanying text.

tion of equal contribution to the marital assets because of her substantially greater economic and noneconomic contributions during the marriage.[165] Instead, as discussed above, the supreme court said that the presumption of equal contribution to marital assets was rebutted only as to property that the wife inherited or that was traceable to her inheritance.[166] The court simply did not discuss the wife's argument that she had worked harder and more productively during the marriage.

Avoiding an examination of whether one spouse's efforts were more valuable than the other's, except in extreme cases, furthers several policies that are inherent in the property division statute and other statutes. First, such an inquiry clashes with the abolition of fault as a consideration in economic decisions at divorce; the line between marital fault and less-than-wholehearted contributions would be difficult to draw, at best. Second, inquiring in detail about who made greater contributions to the family's well-being during the marriage may undermine the parties' willingness to set aside their own self-interest during the marriage in favor of the common good of the family. Third, as the supreme court has repeatedly said, section 107.105(1)(f) must always be construed to recognize the financial importance of both spouses' work and to ensure that homemakers and other spouses who forego career development to care for the parties' home and children share in the economic fruits of the marriage.[167] Requiring trial courts to evaluate the relative worth of the spouses' labors during the marriage could significantly undermine this policy.

When judges are given discretion to determine what share of property a homemaker should get, research shows that homemakers tend to come up short. This is especially true when judges are given discretion to evaluate the worth of the homemaker's

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[165] Respondent's Brief on the Merits, at 6-9, *In re* Marriage of Kunze, 337 Or. 122, 92 P.3d 100 (2004) (on file with author) (factual statement comparing economic contributions of wife and husband); *id*. at 9-10 (describing how wife did most of the homemaking as well); *id*. at 13-14 (trial court's findings commenting negatively on husband's efforts); *id*. at 18 (summary of argument, urging court to find that wife had rebutted the presumption of equal contribution); *id*. at 22-23, 33 (arguing that wife made greater contributions during the marriage because of the difference in spouses' work histories).

[166] *See supra* notes 124, 128-29, 132 and accompanying text.

[167] *See supra* notes 160-62 and accompanying text; *see also In re* Marriage of Massee, 328 Or. 195, 202, 970 P.2d 1203, 1210 (1999); *In re* Marriage of Engle, 293 Or. 207, 214, 646 P.2d 20, 23 (1982) (en banc).

labor.[168] Judges often find it particularly difficult to break away from the idea that he or she who earned property in the marketplace has a greater claim to that property than does the earner's spouse.[169]

To further the policies discussed above, and to maintain consistency with the supreme court's approach to property division issues in prior cases, including *Kunze*, Oregon courts should not examine the details of the parties' life together as part of determining whether the presumption of equal contribution has been rebutted.[170] Instead, the inquiry should focus on whether a spouse inherited or received an asset during the marriage under circumstances showing that the donor intended the asset for that spouse alone.[171]

IV

CONCLUDING THOUGHTS: THE TENSION BETWEEN COMMUNITY AND INDIVIDUALITY REVISITED AND THE ROLE OF JUDICIAL DISCRETION

In *Kunze*, the Oregon Supreme Court emphasized and applied the principles underlying its earlier property division decisions: that spouses ordinarily should share the economic fruits of their union but not property that they brought into the marriage or received gratuitously during the marriage, and that both market-

168 Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 805-07 (1999).

169 *Id*.

170 This should not preclude a court from taking into account one spouse's significant dissipation of marital assets. Most jurisdictions allow courts to consider "economic waste" in dividing property at divorce. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527 (2004). The definition of this concept varies. *See,* e.g., ARIZ. REV. STAT. ANN. §25-318(A) (West 1973) (prohibiting "excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common"); CAL. FAM. CODE § 2602 (West 1994) (prohibiting deliberate misappropriation of community property). Under statutes that do not address fault but include lists of factors, courts sometimes justify the consideration of economic fault on the basis that it pertains to the parties' contributions to the acquisition or dissipation of assets. The Illinois Court of Appeals finds economic misconduct where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown. Klingberg v. Klingberg, 386 N.E.2d 517, 521 (App. Ct. 1979). Courts in other states have generally adopted this definition of economic misconduct. *E.g*., Jeffcoat v. Jeffcoat, 649 A.2d 1137 (Md. Ct. App. 1994) (collecting and discussing cases); Kittredge v. Kittredge, 803 N.E.2d 306 (Mass. 2004).

171 *See supra* note 139 and accompanying text and cases cited therein.

place work and homemaking are valuable and support a claim to the shared resources. The court's treatment of the specific characterization issues in the case lies in the middle ground between the ideal of marriage as an economic community and as a union of two economically separate individuals. The court's approach stands in distinct contrast to that of the court of appeals, which would have resolved all the commingling issues in ways that strongly favor the marriage-as-community principle.[172] The supreme court's opinion leaves open the possibility that separate property will remain separate even if it is not carefully segregated, but it requires parties claiming that property is separate to prove that this is their intent and that they have not acted in such a way that their spouses reasonably believe that the separate property has been donated to marital purposes.

The *Kunze* court's approach to these problems is largely consistent with that of the ALI Principles of the Law of Family Dissolution, the most recent comprehensive statement of the existing law and proposed best practices at the national level.[173] However, the ALI Principles appear to go further than current Oregon law in favoring economic sharing during long-term marriages. In particular, section 4.18 of the Principles provides that in marriages of long duration, separate property should be recharacterized as marital property, unless the parties expressly contract to the contrary. The commentary to this section explains:

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

States that distinguish between marital and separate property generally do not have provisions under which the character of separate property changes with the passage of time. However, some states make no distinction between separate and marital

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[172] *See supra* notes 106-10 and accompanying text.

[173] *See supra* notes 35-41 and accompanying text (increases in value of separate property); *supra* notes 56-74, 151-62 and accompanying text (commingling).

property, and permit their courts to award any property owned by either spouse to the other. In practice, it appears that the longer the marital duration, the more likely are courts in these states to allocate a portion of ones spouse's premarital or inherited property to the other spouse. This section reaches a similar result in longer marriages without introducing the problems of discretionary adjudication inherent in such hotchpot propery systems.[174]

The ALI commentary indicates that a major reason for the recommendation is distrust of judicial discretion over property division at divorce, a theme that runs through the ALI Principles. For example, the Principles also recommend a strong presumption in favor of equal division of joint property.[175] The commentary to the section providing for this presumption explains in relevant part:

> Family law's traditional reliance on discretionary rules allowed it to avoid explicit choices among important policy alternatives. In consequence, the decisional variability often found today in equitable-distribution systems arises at least in part because trial courts apply different principles as often as they face different facts. Yet the resulting variability in the principles by which cases are decided is of course unjust. The unpredictability also breeds litigation and gives those willing to gamble a negotiating advantage over a more risk-averse spouse.[176]

Should the Oregon Legislature adopt the ALI approach? On balance, I would say no. Assuming, as the court in *Jenks* stated, that at the end of long-term marriages, parties should generally leave on as equal a footing as possible,[177] the difference between current Oregon law and the ALI approach is how much discretion the trial judge has to respond to the specifics of the parties' individual situation. The ALI Principles take an exceptionally strong stand against discretion, both because of distrust of how some judges will exercise their power and because the drafters believe discretionary rules make it less likely that parties will settle rather than litigate cases. However, overly rigid rules can create substantial injustice in extreme cases, creating a strong incentive for courts to contort other aspects of the law to avoid

[174] ALI PRINCIPLES, *supra* note 8, § 4.12 cmt. a. **R**

[175] *Id*. § 4.09.

[176] *Id*. § 4.09 cmt. a.

[177] *See supra* note 160 and accompanying text.

such outcomes. Therefore, Oregon would do better not to follow the ALI recommendation for a very strong presumption favoring equal division. The existing law, allowing courts to deviate from an equal division to provide for the needs of the spouses and children, grants courts discretion to achieve the goals that are the most important as a marriage ends.