

Analyzing Whether a Property Distribution Is Equitable and Moving Toward Equity in Property Division

by

Liisa R. Speaker¹ (with special credit to Mariah C. Ausbury²)

In divorce, the property division is based on the common idea that marriage consists of an equal partnership with contributions from both spouses.³ States that choose to follow this concept find that each spouse has an equal claim to the marital property at stake for division. Due to the equal claim idea, courts tend to focus more on what constitutes a fair distribution rather than simply dividing the assets in half.⁴ Courts that follow equitable distribution will typically include a list of factors to consider in dividing property.⁵ However, the first task is to determine whether a particular state is an equitable distribution state or an all-property state.

The case study included in this article shows a combination of errors that trial courts commonly make in their property distribution decisions. From a family law appellate attorney perspective, it is apparent that there needs to be a better system in place in order to track and fix these errors before they occur. Property division mistakes are often seen on appeal because trial courts are not accurately tracking what they are awarding each party

¹ Liisa R. Speaker is the owner and lead attorney of Speaker Law Firm, PLLCV in Lansing, Michigan and a Fellow of the American Academy of Matrimonial Lawyers. Speaker Law Firm is an appellate boutique firm focusing primarily on family law appeals.

² Mariah C. Ausbury is a third-year law student at Michigan State University College of Law and a law clerk at Speaker Law Firm, PLLC.

³ See Sarah C. Acker, *All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute A Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions*, 15 AM. U.J. GENDER SOC. POL'Y & L. 147, 151 (2006).

⁴ *Id.* ("These jurisdictions focus on what constitutes an equitable or 'fair' distribution of property as opposed to simply dividing the assets in half.")

⁵ See, e.g., *Valante v. Valante*, 429 A.2d 964, 966 (Conn. 1980); *Sparks v. Sparks*, 485 N.W.2d 893, 901 (Mich. 1992).

(both assets and liabilities) or not adding up the numbers associated with those assets and liabilities to know whether the division is equitable. Charts are one of the best ways to do so because they lay out visuals of all assets and liabilities assigned to each party, alongside the values of each, to show that a particular method of division would result in an equitable or inequitable distribution. By showing these charts to the trial court before the judgment of divorce is entered, there is less of a likelihood that there will be a need for an appeal. And if the trial court divides property without thoughtfully considering the amount of assets and liabilities being awarded to each party, then these charts will still help present a client's case at the appellate level.

Part I of this article discusses the different types of property division seen around the country and references why the dual-classification is a superior method and more widely utilized. Part II lays out the full case study that is referenced throughout this article. Part III addresses the classification of property as separate or marital and discusses the mistakes that can occur when a court improperly classifies property. This part further addresses the errors in classification as they are seen in the case study. Part IV notes the factors courts are to reference when dividing the marital estate, as well as showing how different states place more or less weight on different factors. Part V goes through the doctrine of dissipation by comparing how states interpret the doctrine in regards to what acts can qualify as dissipation. Part VI brings forth the argument that one way to fix these common errors is by creating charts for the courts to consider in an attempt to create an equitable distribution the first time. Further, examples are provided, such as a sample chart showing the court's distribution in the case study and a secondary chart that demonstrates what the distribution actually looks like when considering the multiple errors made by the court. The article concludes by encouraging practitioners to use charts to help the trial court equitably divide property.

I. Types of Property Division Across the United States

States generally fall into one of two methods of property division at divorce: dual-classification equitable distribution, and

all-property distribution (otherwise known as a unitary classification).⁶ These two methods of distribution each have their own strengths and weaknesses, but trends are beginning to show that all-property distribution is on the decline in favor of dual-classification equitable distribution.⁷

In all-property states, the court will consider and divide any property owned between the parties, regardless of whether the property was acquired during the marriage or before.⁸ By allowing courts to consider all property at the time of divorce, there are certain advantages to following this approach than a dual classification. For example, the courts no longer have to spend time classifying property as separate or marital.⁹ Moreover, because this classification grants the court a large amount of discretion in dividing property, it is more flexible than the dual-classification system because the courts are free to reach any result they choose.¹⁰ However, with the extreme flexibility offered by all-property classification comes extreme inconsistency. Because courts are given broad discretion, outcomes vary from case to case, even when courts are presented with similar facts.¹¹ The disparity from judge to judge creates a presumption that it is always best for the parties to attempt to settle the matters of property division instead of leaving the decision for the judge.

⁶ See generally Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69, 71 (2006) (using the terms “dual classification” and “all-property” throughout the article). These terms are utilized throughout this Article for cohesion.

⁷ *Id.* at 72.

⁸ *Id.* at 71.

⁹ *Id.* at 72.

¹⁰ *Id.* (noting that courts following the all-property classification are allowed to make unequal property divisions, which make this system extremely flexible).

¹¹ See Cicilie Gildersleeve, *Cutting Edge Issues in Family Law: Comment: Survey: Speculation on Future Tax Liability in Valuation of Marital Property*, 21 J. AM. ACAD. MATRIM. LAW 697, 706 (2008) (noting that, in Alaska, courts are given the discretion to consider additional factors as they see fit in any case, which demonstrates that the outcome of the case relies on whether the particular judge chooses to consider other factors); Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present, and Future*, 1990 WIS. L. REV. 807, 868–71 (explaining that property division under Connecticut’s all-property system is highly dependent upon the personal policies of the individual trial judges).

However, issues can arise when the parties' positions on division are far apart, and each party can cite precedent in support of their positions due to the legal uncertainty of distribution.¹² The lack of consistency and increase in litigation could be in large part why all-property classification is the minority method of property distribution.¹³

Dual-classification property distribution is the majority standard in the United States.¹⁴ Unlike all property distribution, dual-classification implements a system where the court divides assets as either separate property or marital property, and only considers marital property in the distribution.¹⁵ By not having to consider separate property, there is more predictability in dual-classification that reduces the probability of a highly unequal distribution.¹⁶ In fact, the current trend shows that a more equal division is tending to be the outcome in divorce cases.¹⁷ This trend can be attributed to the dual-classification system because it provides a greater sense of consistency and predictability, which is favored by courts across the country.¹⁸

¹² Sally Burnett Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. REV. 2017, 2025 (1998) (noting that “the greater the uncertainty in the law, the more likely it is that disputes will be litigated instead of settled”); *Schumaker v. Schumaker*, 439 N.W.2d 815, 818 (S.D. 1989) (explaining that, because South Dakota allows division of property “not created by the marital partnership,” it is likely that that decision is implementing greater litigation that would not occur if the state did not consider separate property).

¹³ *Turner*, *supra* note 6, at 71 n.8 (“There are fifteen all-property states: Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, Washington, and Wyoming.”).

¹⁴ *Id.* at 72 n.11 (“There are 29 dual-classification equitable distribution jurisdictions in the United States . . . There are seven dual classification community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas.”).

¹⁵ *Id.* at 71.

¹⁶ *Id.* at 74.

¹⁷ *Id.* at 75.

¹⁸ *Id.* (“The practical effect of this trend has been to increase greatly the predictability of the result, and therefore to encourage negotiated settlements.”).

II. Case Study: *Clarke v. Korn*

The case of *Clarke v. Korn* consisted of contentious litigation surrounding property at divorce. A four-day trial centered around numerous pieces of property. The trial ended with a judgment of divorce that inequitably divided the property in favor of the wife, Margaret Clarke. The husband, Lawrence David Korn, appealed the decision to the Michigan Court of Appeals, which affirmed the trial court's property distribution. This case demonstrates many of the errors surrounding property distribution in dual classification equitable distribution states and the facts of *Clarke v. Korn* will be used here as a case study for errors trial courts make in property division, how to avoid them, and how to increase the chances of reversing those mistakes on appeal.¹⁹

A. Facts

Korn practiced law as a divorce attorney for twenty-two years before having to cease practicing in May 2000 due to disability. Korn ran a successful law firm, but conflicts arose when his partner at the firm misappropriated millions of dollars. The partner was supposed to pay back the funds, but a disagreement arose, and a third person was then brought into the firm in an attempt to alleviate the issues. However, testimony from Korn shows that the third person only added to the problems within the firm. The partner and third person were aware that Korn was going to file a disability claim and they made an agreement to fire Korn once the claim was filed. The assumptions were true, as Korn subsequently filed his initial disability claim in November 2000, alleging that he was disabled from practicing law due to poor sleep habits and memory issues that made him unable to properly comprehend and perform law. Unfortunately, the disability claim was denied. But that did not stop the partner from firing Korn, which occurred just a few years later in late 2003.

Things only seemed to get worse for Korn. Shortly after he was fired from his own firm, the firm went into bankruptcy. At the bankruptcy trial, Korn testified that the firm was worth ap-

¹⁹ Although Speaker Law Firm did not represent either party in the divorce proceedings or appeal, attorneys at the firm worked on a related case and were generously granted access to documents involving the property division to use as a case study for this article.

proximately thirty-two million dollars and that he had invested upwards of six million dollars into building the firm. Even with all of this information, Korn only received a nominal \$300,000 settlement from the bankruptcy action. Getting fired, being denied disability, and losing his entire business with little renumeration forced Korn into foreclosure of his home in Northville, Michigan, and he then had to move back in with his parents.

Korn and his father had a rather tense relationship, making the living arrangements extremely difficult. Things began to look up when Clarke and Korn met in March 2005. Clarke worked as an IT specialist and lived in her West Bloomfield home with her three children from a prior marriage. Clarke and Korn began seeing one another socially, and shortly after, Clarke offered Korn a room in her West Bloomfield home, which Korn accepted.

After some time living together, the two began discussing the marital benefits of filing joint taxes, since Korn had a 1.8 million-dollar loss carryforward that Clarke could use on taxes as a way to reduce her tax liability for the forthcoming years. Due to this substantial benefit, the parties determined that marriage would be in their best interest, and they married in October 2009. The parties disagreed, however, as to whether this marriage was one formed out of love or strictly out of convenience.

Once Korn's second disability claim was approved, he approached Clarke and notified her that the payments were the missing piece that he needed to live on his own, and that they could now seek divorce. But further testimony provided that Clarke was upset about this decision and asked Korn to stay in the marriage. Reluctantly, Korn agreed, but made clear to Clarke that once he was approved for Medicare, the divorce would happen, and Clarke acquiesced.

While the parties were still married, Korn submitted his second disability claim based on the first claim that was filed in 2000, before the parties married. The second claim was approved in January 2011, awarding Korn monthly payments of \$25,600 as well as a back payment of \$117,000 for the prior five months. Korn additionally filed a legal malpractice claim against the attorneys that represented him in his initial disability claim in 2000, which resulted in a 2014 settlement payment in the amount of \$667,000 to Korn. These funds were deposited into a USAA sav-

ings account that was created during the marriage, where Clarke was the primary account holder and Korn was also listed on the account but was not provided access to the account due to his disability. In between receiving these payments, in approximately 2013, Clarke was unable to continue paying all of the household expenses and requested Korn to begin contributing toward the marital expenses. He agreed to do so and advised Clarke to take \$2,000 every month from his disability payments. Clarke additionally withdrew \$500 from Korn's account to pay his cell phone bill, truck insurance, and multiple website domains.

Clarke was able to withdraw these funds because she was in charge of managing Korn's money throughout the marriage. Some of her responsibilities included receiving and paying his bills. Most months, Korn would run out of money within ten days after receiving his disability check. He questioned how this happened, and asked Clarke to provide him with printouts showing where the funds were going, but her response was always "it would be a waste of time." Korn had even gone as far as emailing Clarke and requesting her to relinquish control of his money, but she did not take him seriously, and continued monitoring his funds.

While the parties were married, they traveled together to Brazil in 2011 so Korn could buy two dressage horses, one costing \$34,000 and the other costing \$28,000. While Clarke accompanied Korn, he testified that the horses were paid for with his own money from one of the lump sum settlement payments, and Clarke did not contribute any money towards the purchasing nor the upkeep of the horses.

Korn was in the process of writing a book when he and Clarke married. Clarke testified that she contributed a large amount of time into conducting focus groups and editing the book. Her estimate was that she expended about \$169,000 worth of time and energy into fixing the book. She initially testified that she wanted the \$169,000 in reimbursement, as well as 50% of all proceeds from the publishing of the book. However, once the court notified Clarke that she would also be obligated to pay 50% of any debt that would be incurred from the sale of the book, she decided that she no longer wanted a portion of the proceeds.

In 2013, Korn purchased a boat because Clarke's boat sank, for which she was awarded \$7,000 from the insurance company. The purchase of the new boat required a down payment of \$7,000, but Clarke stated she had no money and asked Korn to finance the boat that cost \$69,000. To do so, Clarke took out monthly increments of \$2,000 and \$2,500 from the joint USAA account to come up with the \$7,000 down payment. Korn also took out a loan in his name to pay for the boat, with monthly payments around \$500 that Clarke was in charge of paying through Korn's bank account. The payments were not being made on time, which Clarke blamed on the bank, but the late payments ended up lowering Korn's credit score by approximately 200 points. To rehabilitate his credit score, Korn paid off the boat in full in 2014, paying \$61,000. This lump sum payment was made directly from Korn's malpractice settlement, that reimbursed him for the initial 2000 disability claim that occurred prior to the marriage of the parties. Although all the financial aspects were under Korn's name, the boat was titled in Clarke's name to protect it from creditors.

Additionally, Korn contributed a significant amount of funds to the improvement of Clarke's West Bloomfield home. Korn testified that at least \$30,000, but upwards of almost \$50,000 from his malpractice settlement went to these improvements, including: replacing the lower balcony, replacing the front steps, replacing a pond and a fence, and adding wooden shutters to the home, among other things. The home was first appraised in 2009 with a value of \$295,000. After the renovations were completed at Korn's expense, a 2016 appraisal valued the home at \$365,000, showing that his contributions led to a \$70,000 increase in the value of the home.

Korn purchased a home in Florida in January 2013 where he wintered once he obtained his disability payments. Korn used his disability payments to pay the \$12,000 down payment for the home. Korn testified that Clarke played no role in the home. He intended to become a Florida resident once he received his Medicare funds, and even stabled a horse there. Clarke's name was on the title for the home to protect it from creditors, but Korn testified that there was an agreement that Clarke would quitclaim the title to Korn once the homestead exemption was properly recorded, but Clarke never quitclaimed the property.

The Florida home also underwent large improvements. Korn testified that approximately \$137,000 of his malpractice settlement was spent on renovating the Florida residence, with an additional \$68,000 on credit cards that also funded the renovations. Further, Clarke rendered services to assist in the renovation of the Florida home, but Korn testified that he was not aware that she would bill him \$37,000 for these services. This just went to show that “she always intended to take as much money as she could when a divorce came.”²⁰

B. Judgment of Divorce

After the trial ended, the court noted that it was not impressed with either party’s testimony and did not find either party credible. The court determined the parties’ marital assets included: the 2013 Nautique boat with a value of \$43,450; Korn’s book, with no data as to the potential value; the Florida home with a value of \$435,000, a mortgage of \$295,000, and remaining equity of \$140,000; Clarke’s premarital West Bloomfield home with zero equity; two dressage horses with a combined value of \$62,000; workout equipment; three oriental rugs; two paintings; and Clarke’s 403b retirement account that had a premarital value of \$63,000 and a current value of approximately \$166,000. The debts of the parties include the \$10,408 tax on the West Bloomfield home.

Pursuant to the judgment of divorce, Clarke was awarded the 2013 Nautique boat; the premarital West Bloomfield home with all personal property inside, excluding two paintings and three rugs; her two premarital pensions; the \$63,000 premarital portion of her 403b and 50% of the marital portion, equating to \$51,500; and her \$70,000 share in the Florida home. Clarke was also held to be solely responsible for the \$10,408 tax lien against the West Bloomfield home. Korn was awarded the two dressage horses; his book; his 50% marital portion of Clarke’s 403b, equating to \$51,500; the Florida home, minus the \$70,000 he would have to pay Clarke for her marital share in equity; and all personal property located within the Florida home.

²⁰ *Bench Trial Hearing – Volume III*, 272 (May 1, 2017).

C. Appeal

Korn appealed the divorce judgment and asserted numerous issues with the trial court's property division. Korn first argued that the trial court erred when it did not determine his disability payments, malpractice settlement, and the Florida home to be his own separate property. Korn alleged that the monthly disability income should be separate property because it was based on a disability that occurred in 2000, which occurred before the marriage began. The court of appeals upheld the trial court's decision because not only were the parties married when Korn began receiving the payments, but the benefits were also intended to replace his lost wages during the marriage, constituting them as marital property.²¹ Regarding the malpractice settlement, Korn argued that since it was to compensate him for lost wages accrued before the marriage, it should have been considered separate property. However, the court of appeals held that, although the funds were originally separate property, Korn deposited the payment into a joint account into which both parties deposited funds, which transmuted the settlement amount into marital property. Finally, in regard to the Florida home, the court of appeals ruled that, even though only Korn's money was used to purchase the home, it was bought during the marriage, Clarke's name was on the title, and she contributed "sweat equity into the . . . home."²² Since Clarke "significantly contributed to its improvement," the home was an invadable separate asset under Michigan Compiled Laws § 552.401.²³

Korn also alleged that the dressage horses should have been his separate property, but the court of appeals ruled that "to the extent the horses should have been considered separate property, defendant was awarded the horses, so there was no error."²⁴ With respect to the boat, the purchase contract revealed a trade-in, which Clarke testified was a trailer that belonged to her. This was enough for the court of appeals to hold that the plaintiff did contribute to the purchase of the boat, and the trial court did not err in classifying it as marital property.

²¹ *Clarke v. Korn*, No. 342144/343197, 2019 Mich. App. LEXIS 6534, at *26 (Ct. App. Oct. 22, 2019).

²² *Id.* at *28.

²³ *Id.*

²⁴ *Id.* at *27.

Finally, Korn argued that the trial court erred in making each party responsible for their own credit card debt. Specifically, Korn had a credit card that was only used to pay for the renovations on the Florida home. His argument was that, if the home was considered marital property, then the credit card debt associated with the home should be marital property as well. The trial court and the court of appeals disagreed, stating that any outstanding credit card debt was in each party's name exclusively, signifying that there was no joint debt to be considered marital property.

III. Classification of Property

In dual-classification states, the court is first tasked with classifying the property as separate or marital.²⁵ Courts define marital property as property that is “produced through efforts of the marital partnership,” while separate property is defined as property that is “unrelated to marital partnership efforts.”²⁶ If any property is deemed separate from the marital estate, it will belong to the owning spouse and cannot be subject to division by the courts. This includes inheritance and gifts given to one party, whether or not they were conveyed during the marriage. If property is found to be marital, then the court may divide that property between both spouses, regardless of who owns title to the property.²⁷ Additionally, income received from either party during the marriage is considered to be marital property.²⁸ Classification of property during divorce is a highly litigated area because of common issues surrounding property classification, such as when a court misclassifies separate property as marital or vice versa, and when separate property can be considered transmuted and part of the marital estate through commingling.²⁹

²⁵ Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115, 126 (1997) (discussing the process for property division in dual-classification states).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM.

A. *Misclassification of Property*

Misclassification occurs when a court incorrectly classifies separate property as marital property and includes it in the marital estate that is subject to division. Once the court misclassifies property, it cannot be cured simply by disbursing it back to the spouse whose separate property it actually is.³⁰ This is because the value of the separate property would then be included in the marital estate and artificially increase the overall value of the estate, which would then cause the spouse to receive less marital property than he or she is entitled to.³¹

In some instances, misclassification can mean the opposite, that the court failed to include assets that should have been deemed marital property. This issue is seen in *Ripley v. Ripley*.³² In this case, there were two assets at issue, a Pontiac GTO with a value of \$54,000, and a law firm's accounts receivable.³³ The husband still owed approximately \$30,000 on the GTO, which the court included in the liabilities section of the marital estate, but it failed to account for the equitable value of the vehicle and treated the equity as the husband's separate property.³⁴ In addition, the court determined the worth of the accounts receivable to be zero, even though the husband admitted to being able to collect approximately \$25,000 from it.³⁵ Since the court failed to put a value on these two assets, but nevertheless awarded them to the husband, his retained assets came out to approximately \$198,000 while the court only valued retained assets at \$120,000.³⁶ After including the liabilities for each party, the husband was awarded 400% of the marital estate due to the misclassification of the GTO and accounts receivable, creating a

LAW. 335, 340-48 (2003) (explaining the doctrine of transmutation in different respects, such as transmutation by commingling).

³⁰ *Neeley v. Neeley*, No. 16721, 1998 Ohio App. LEXIS 4461, at *4 (Ohio Ct. App. Aug. 28, 1998).

³¹ *See id.* at *4-5 (“Likewise, the total award to the spouse deprived of his or her separate property is undervalued, because that spouse then is entitled to receive less of the property that actually is marital.”).

³² No. 327285, 2016 Mich. App. LEXIS 1350, at *2 (Mich. Ct. App. July 14, 2016).

³³ *Id.* at *3.

³⁴ *Id.*

³⁵ *Id.* at *2.

³⁶ *Id.* at *3.

severely inequitable division of property.³⁷ The husband ended with such a high amount because he had significantly more assets than the wife, and once the liabilities of each party were included, the husband still had an amount of over \$100,000, while the wife ended up being in debt by almost \$50,000. Luckily, the court of appeals realized the “significant departure from rough congruence,” and remanded the case for specific findings as to why the inequitable division was proper.³⁸

Misclassification can also include the failure to include or not include debts and other liabilities into the marital estate. This form of misclassification was seen in the case of *Richards v. Richards*.³⁹ In this case, the parties each had their own business, owned five pieces of property, and had significant debt.⁴⁰ At trial, both parties presented evidence regarding the values of their businesses, with the husband’s auto sales business having a much higher gross profit than the wife’s hair salon.⁴¹ But the husband’s business also had a very high debt associated with it, including inventory on the lot.⁴² At divorce, the trial court found that, since sufficient evidence was not established in regard to valuation of either party’s business, they were left separate and awarded to each party individually.⁴³ However, the trial court decided to include the husband’s significant business debt in the marital estate, without including his business equity nor the wife’s business debt in the marital estate.⁴⁴ On appeal, the court of appeals determined that the property division was inequitable because “if the inventory and supply debt of one business were treated as separate or marital property, the same should be true of the other.”⁴⁵ The case was then remanded to either include the wife’s business debt or exclude the husband’s business debt from the marital estate.⁴⁶

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ See unpublished per curiam opinion of the Court of Appeals, decided Apr. 16, 2020 (Docket No. 34883).

⁴⁰ *Id.* at *1.

⁴¹ *id.* at *2.

⁴² *Id.*

⁴³ *Id.* at *3.

⁴⁴ *Id.*

⁴⁵ *Id.* at *5.

⁴⁶ *Id.*

Returning to the case study of *Clarke v. Korn*, similar issues of misclassification emerge throughout the decision. First, the trial court included the two dressage horses in the marital estate of the parties, with a combined value of \$62,000. Korn was ultimately awarded the two horses in the divorce, but the issue is that the horses should have been his separate property because he solely paid for the purchase and the upkeep of the horses, and Clarke never rode the horses nor received any enjoyment from the horses. As seen in the *Ripley* case, failing to properly distinguish separate property from marital property can result in a skewed property distribution that is actually inequitable because one party will be receiving less of the marital estate since separate property was incorporated.

The \$62,000 value of the dressage horses was included in the marital estate and upheld on appeal. The court of appeals noted that “to the extent the horses should have been considered separate property, defendant was awarded the horses, so there was no error.”⁴⁷ This analysis is incorrect. By including the \$62,000 in the marital estate when it should have been considered separate property, the division is skewed in a way that denied Korn additional marital funds because the value of the dressage horses was improperly included and awarded to him, as well as inherently awarded Clarke credit for half of the equity in the amount of \$31,500. The \$62,000 horses should have been deemed separate and not included in the marital estate.

Additionally, Korn argued that the trial court erred by deeming the Florida home as marital property but did not include all debts associated with it. The trial court included the Florida home and the mortgage as marital but did not include the approximate \$68,000 in credit card debt that contributed to the renovations of the home. The court of appeals reasoned that, since the credit card was solely in Korn’s name, it would be deemed separate property. This is an incorrect decision. As in the *Richards* case, the debt was attributed to a marital asset and therefore should have been considered in the marital estate as well. By not including the debt, the overall value on the Florida home was higher than it actually was, which improperly skewed the division in favor of Clarke.

⁴⁷ *Clarke*, LEXIS 65234, at *26.

Further, the trial court awarded the West Bloomfield home to Clarke and placed a value of zero dollars on the home due to the mortgage being higher than the equity of the home. However, the court failed to consider the sizeable contributions made by Korn that increased the value of the West Bloomfield home by \$70,000. This would be deemed as active appreciation, meaning that “the sharing and maintenance of a marital home affords both spouses an interest in any increase in its value (whether by equity payments or appreciation) over the term of a marriage.”⁴⁸ Since there was a large increase in the value of the West Bloomfield home, Korn should have been awarded his share of the appreciation, or, at a minimum, should have been credited for his monetary contributions made to the home. This is exactly what the court found in the Florida home, and by considering the appreciation in value, half of the equity was awarded to Clarke upon divorce. Clarke inherently received a \$70,000 appreciation bonus in the West Michigan home by keeping the overall value at zero and not having to pay any portion of that appreciation to Korn, which he should have been entitled to.

B. *Failure to Place a Value on Property*

Along with classifying property as separate or marital, the trial court has an affirmative duty to value property in a divorce proceeding.⁴⁹ Courts have held that if a trial court fails to place a value on a piece of disputed marital property, then it commits clear error.⁵⁰ A trial court cannot conclude that, because neither party submitted persuasive evidence of the value of disputed property, the parties are left to settle the value after judgment is entered.⁵¹ Once the trial commences, the trial court’s duty to ascertain a value is triggered, meaning there is no longer an obligation on the parties to come to an agreement.⁵² It is a general rule

⁴⁸ *Reeves v. Reeves*, 575 N.W.2d 1, 3 (Mich. Ct. App. 1997).

⁴⁹ *See Beaty v. Beaty*, 423 N.W.2d 262, 263–64, (Mich. Ct. App. 1988) (“As a prelude to this property division, a trial court must first make specific findings regarding the value of the property being awarded in the judgment.”).

⁵⁰ *See Steckley v. Steckley*, 460 N.W.2d 255, 257–58 (Mich. Ct. App. 1990) (holding that the trial court clearly erred in failing to determine the value of the plaintiff’s interest in the McDonald’s franchises).

⁵¹ *See Olson v. Olson*, 671 N.W.2d 64, 69–70 (Mich. Ct. App. 2003).

⁵² *See id.*

that “the party seeking to include the interest in the marital estate bears the burden of proving a reasonably ascertainable value; if the burden is not met, the interest should not be considered an asset subject to distribution.”⁵³ If the party fails to meet the burden and a value cannot be ascertained, the asset is determined separate property and left with the party who brought it into the marriage.

Texas also has rules regarding valuation of property at divorce. Once a court renders a judgment dividing the marital estate of the parties, the court shall state in writing its findings relating to “the value or amount of the community estate’s assets, liabilities, and offsets on which disputed evidence has been presented.”⁵⁴ During divorce proceedings, each party bears a responsibility to produce evidence regarding the value of various assets and liabilities in order to provide the trial court with a basis upon which to make a decision.⁵⁵ If a party fails to do so, that party cannot appeal the trial court’s decision under a basis of lack of information regarding value.⁵⁶ Texas has a different standard regarding valuation than Michigan, since an unascertained value in Michigan means the property must stay separate, while Texas holds that it is error on the part of the party for failing to produce adequate evidence, and that party can no longer appeal the valuation determination.

Referring back to the case study of *Clarke v. Korn*, the trial court included Korn’s book as marital property and awarded it to him in its distribution. However, this was done in error. First, this book was created before Korn and Clarke were married. This is the first piece of evidence dictating that the book should be separate property. Clarke attempted to argue that the book should be deemed marital property because she provided commentary and established focus groups to help improve the book. Her testimony was that \$169,000 was invested in the book during the marriage, and that this investment should deem the book to be marital property. The trial court agreed with Clarke’s reasoning

⁵³ *Wiand v. Wiand*, 443 N.W.2d 464, 469 (Mich. Ct. App. 1989).

⁵⁴ TEX. FAM. CODE ANN. § 6.711 (West Supp. 2017).

⁵⁵ *See Howe v. Howe*, 551 S.W.3d 236, 254 (Tex. Ct. App. 2018).

⁵⁶ *See id.* (“A party who does not provide the trial court with values for the property cannot complain on appeal of the trial court’s lack of information in dividing the community estate.”).

and made the book subject to distribution upon divorce. But the court specifically stated that “there was no reliable data presented as to the value or potential value of said book.”⁵⁷ According to the holding in *Wiand v. Wiand*,⁵⁸ that would mean that the book cannot be subject to division and should therefore remain Korn’s separate property, not to be included in the property division.

Further division of the marital estate showed that three oriental rugs and two paintings in the West Bloomfield home were awarded to Korn, but there was no agreed upon value of the items. These were items that were Korn’s separate property and he owned them prior to the marriage to Clarke. Clarke testified that the paintings were worth approximately \$500 each for a total of \$1,000. Korn testified that the rugs were worth at least \$35,000, but Clarke testified that the amount was far less than that. Either way, the trial court held that, since neither of the rugs nor the paintings were appraised, there was no clear value to them. Just like Korn’s book, the rugs and paintings should then be Korn’s separate property and not included in the marital estate since there is no ascertained value.

C. *Commingling and Reclassification of the Marital Estate*

Commingling occurs when the separate property of one party is mixed with the marital property of both parties during the marriage.⁵⁹ Commingling can be an issue at divorce because the party with the separate property is at risk of forfeiting some or all of the separate property once the marital property is divided.⁶⁰ There is a risk because states have held that “if tracing of the separate property could not be persuasively shown, commingling should be held to result in a transmutation of the whole to community property.”⁶¹

⁵⁷ See *Clarke v. Korn*, unpublished per curiam decision of the Court of Appeals 11, decided Oct. 22, 2019 (Docket Nos. 342144/343197).

⁵⁸ *Wiand*, 443 N.W.2d at 469.

⁵⁹ *Commingling*, Cornell Legal Information Inst., <https://www.law.cornell.edu/wex/commingling> (last visited Jan. 10, 2022).

⁶⁰ *Id.*

⁶¹ Carol S. Bruch, *Management Powers and Duties Under California’s Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 229, 267–68 (1982); J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 222 (1989) (“Under normal commingling rules, if sepa-

1. *California*

California is a dual classification community property state.⁶² This means that separate property will traditionally be awarded to the party who owns the property, unless the issue of commingling comes into play.⁶³ A typical issue that arises is when one spouse includes separate funds into a marital fund, which transmutes the separate money into marital money.⁶⁴ It can be very difficult to distinguish separate funds from marital funds upon divorce, because California holds a presumption that any property accumulated during the marriage is deemed community property.⁶⁵ The party that is responsible for the commingling of the funds is then responsible for proving what is separate property to keep it from becoming marital property.⁶⁶ Rebutting the presumption is difficult to accomplish, and most of the time leads to the spouse losing half of the separate property.⁶⁷

2. *Michigan*

In Michigan, courts have a duty to distinguish separate property from marital property, unless the separate property is commingled with the marital estate. Courts ruled that title alone is not determinative of property status and just because one party is the sole title holder does not mean that property is separate from

rate property and marital property are mixed and cannot be ‘uncommingled,’ the entire mass is deemed marital property.”).

⁶² See Linda Gach, *The Mix-Hicks Mix: Tracing Troubles Under California’s Community Property System*, 26 UCLA L. REV. 1231, 1236 (1979) (“Upon termination of marriage in California, community property is divided equally between the parties, while separate property is allocated to its owner.”).

⁶³ See *id.*

⁶⁴ See *id.* (“Often, however, at some point during the marriage, the separate funds of one or both of the marital partners may have become commingled with monies belonging to the community.”).

⁶⁵ See *id.* at 1237 (“When assets have been purchased with funds from a commingled account, a rebuttable presumption arises that the assets belong to the community.”).

⁶⁶ See *id.* (explaining that it is typically the actions of one party that commingles the property, and it is the responsibility of that party to rebut the presumption that the property is marital).

⁶⁷ See *id.* (“The application of the community property presumption may, at worst, result in denying the managing spouse half of his property.”).

the marital estate.⁶⁸ This idea is also true of the opposite circumstance, that a joint signing of property does not mean that the property will be deemed marital. This consideration was made in *Golowic v. Golowic*, where the parties jointly signed an oil lease, but there was no contribution made by the wife, and the court determined that the oil lease was separate property of the husband.⁶⁹

Although inheritance is typically considered to be separate property, it can be transmuted into marital property through the process of commingling.⁷⁰ In *Lagalo v. Lagalo*, the parties were married for 37 years, and the husband received an inheritance of \$125,000.⁷¹ He put the inheritance funds into a joint bank account, and \$95,000 from the joint bank account was used to pay off the marital home that cost the parties \$275,000 when they first purchased it.⁷² Once the parties divorced, the trial court carved out \$95,000 from the marital estate to award to the husband, but this was reversed by the court of appeals.⁷³ This case stands for the proposition that unless the inheritance is kept completely intact, it could be considered marital property.⁷⁴

But what if the inherited property is tangible property put on display? In *Rosenfeld v. Rosenfeld*, the husband inherited a collection of Holocaust artwork prior to the marriage.⁷⁵ Upon

⁶⁸ See *Kaiser v Kaiser*, , No. 311014, 2013 Mich. App. LEXIS 1778, at *7-8 (Mich. Ct. App. Nov. 5, 2013).

⁶⁹ See No. 298973, 2011 Mich. App. LEXIS 1824, at *6-7 (Mich. Ct. App. Oct. 18, 2011). (Docket No. 298973) (explaining that there was a short-term marriage and an interest in oil and gas leases, but the fact that both parties signed an oil lease did not alone make the lease marital property because the wife did not contribute at all).

⁷⁰ James J. Harrington III, *Family Law: Separate and Marital Property*, 93 MICH. B. J. 20, 21 (Feb. 2014) (“*Lagalo v. Lagalo* is fully consistent with both *Kaiser* and *Cunningham*, emphasizing the importance of a party’s treatment of separate property lest it lose its protected status through commingling or contribution.”).

⁷¹ No. 303929, 2012 Mich. App. LEXIS 1256, at *1 (Mich. Ct. App. June 26, 2012).

⁷² *Id.*

⁷³ *Id.* at *6-7.

⁷⁴ Harrington, *supra* note 70, at 21 (“unless preserved intact, inheritances may be regarded as marital property.”).

⁷⁵ No. 318084, 2014 Mich. App. LEXIS 2146, at *18-19 (Ct. App. Nov. 6, 2014).

divorce, the trial court ruled that the artwork was marital property and subject to division.⁷⁶ The husband presented evidence at trial noting that the art was displayed in the living room of the family home for 17 years.⁷⁷ On appeal, the court of appeals ruled that “the artwork was thereby commingled with a marital asset – the home – and became part of the marital estate.”⁷⁸ Further, evidence at trial established the idea that since the parties treated the home décor as marital property, it was not in error for the trial court to assume the same.⁷⁹

In the case study of *Clarke v. Korn*, the court of appeals ruled that Korn’s bankruptcy and malpractice settlement payments were part of the marital estate even though the payments were to compensate Korn for claims made before the parties married. Korn made the argument that, since the initial claims were filed before the marriage of the parties, and since it was only awarded to Korn, the settlements should not be included in the marital estate. The court of appeals declined to follow this line of reasoning because the settlement payments were supposedly put into a joint bank account accessible to both Clarke and Korn. Since the court could not trace back the remaining value of the settlement payments, it concluded that the entire amount was to be considered marital property.

Clarke was also awarded the 2013 Nautique boat at the divorce, valued at \$43,450. However, Korn was the one who financed the boat, paying the \$7,000 down payment as well as the lump sum payment of \$61,000 in 2014. Clarke only titled the boat in her name in order to protect it from creditors. However, since the \$61,000 payment came out of Korn’s malpractice settlement that was in the parties’ joint bank account, it is considered to be marital property. Even so, Clarke should be held liable to pay half of the equity in the boat to Korn, since it was considered a marital asset even though he paid the entire purchase price of the boat.

⁷⁶ *Id.* at *19, 20.

⁷⁷ *Id.* at *20.

⁷⁸ *Id.*

⁷⁹ *Id.* at *21.

D. Invasion of One Party's Separate Assets

Of the states that practice dual classification property division, some will allow for the invasion of one spouse's separate property if the marital estate alone would result in great hardship for the other party.⁸⁰ Courts are reluctant to invade the separate assets of parties, especially if both parties are of similar age, health, and economic station.⁸¹

1. Texas

Texas is one state that allows for invasion of separate property in order to establish equitable division of property.⁸² To determine whether invasion of separate property is "just and right," the court should first characterize property as either separate or marital.⁸³ After characterizations have been made, the court can then make a determination whether extraordinary circumstances exist that would justify the invasion of one spouse's separate property in order to benefit the other spouse.⁸⁴

Even though Texas courts are afforded wide discretion in the division of assets at divorce, courts are still reluctant to award separate property to the other spouse unless there is clear evi-

⁸⁰ See Oldham, *supra* note 61, at 219 ("The third type of system generally permits the division only of marital property at divorce, unless great hardship would otherwise result; in such a case, some of the normally nondivisible separate estate of one spouse can be awarded to the other spouse. Such a system could be called a 'hybrid' system.").

⁸¹ See Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 Nw. U.L. REV. 1623, 1655 (2008); *Wiegers v. Wiegers*, 467 N.W.2d 342, 346 (Minn. Ct. App. 1991) (holding that an invasion of nonmarital property was unwarranted because "both parties were elderly, in poor health, and neither had any likelihood of obtaining employment or acquiring additional assets, and thus, neither party could demonstrate that a hardship was created by a property distribution that did not include an award of either party's nonmarital property to the other.").

⁸² See *Muns v. Muns*, 567 S.W.2d 563, 567 (Tex. 1978) ("Invasion of separate personal property is proper only when necessary to a division that is 'just and right' under the circumstances.").

⁸³ See *id.* (explaining that classification of assets should always be the starting point when distributing property at divorce).

⁸⁴ See *id.* (noting that extraordinary circumstances need to be present that would justify an invasion of separate assets for the benefits of the opposing spouse).

dence that it is necessary to create a fair division of property.⁸⁵ In *Looney v. Looney*, the lower court did not award the wife a portion of the husband's property, even though she pleaded that it was necessary.⁸⁶ While the court noted that the wife's pleadings were sufficient to authorize action by the court, the pleading alone, without evidence in support, is not enough to invade the other spouse's separate assets.⁸⁷ This ruling was affirmed on appeal, depicting just how difficult it is to have a reasonable basis to invade separate assets.⁸⁸

2. Michigan

Michigan courts only authorize invasion of separate assets on two occasions.⁸⁹ The first instance is when the other spouse contributed to the property during the marriage, establishing commingling of the separate property under Michigan Compiled Laws § 522.401, otherwise known as the "invasion statute," which provides that:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, *if it appears from the*

⁸⁵ See *Looney v. Looney*, 541 S.W.2d 877, 879 (Tex. Ct. App. 1976) ("In the exercise of this discretion, the court may consider, among other things, the age and physical condition of the parties, their relative need for future support, fault in breaking up the marriage, benefits the innocent spouse would have received from a continuation of the marriage, the size of the estate and the relative abilities of the parties." (citing *Wilkerson v. Wilkerson*, 515 S.W.2d 52, 55 (Tex. Civ. App. 1974)).

⁸⁶ See *id.* at 877 (stating that after six years of marriage, the wife filed for divorce and sought a property division that awarded her a portion of the husband's separate property).

⁸⁷ See *id.* at 879 ("However, pleading alone is not enough. There must be some reasonable basis for doing so.").

⁸⁸ See *id.* at 877 ("Petitioner failed to demonstrate that an invasion of respondent's separate property for her benefit was necessary to divide their property justly and fairly. Considering all the relevant factors, there was no evidence that would authorize the trial court to award a portion of respondent's separate property to petitioner.").

⁸⁹ See *Peraino v. Peraino*, 329746, 2017 Mich. App. LEXIS 340, at *7 (Mich. Ct. App. Feb. 28, 2017)

*evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property.*⁹⁰

The only other way to invade separate property is “if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party” under Michigan Compiled Laws § 522.23(1).⁹¹

In *Peraino v. Peraino*, the wife argued that the lower court erred in not invading the husband’s separate Merrill Lynch IRA on the ground that she demonstrated a sufficient need for the invasion under Michigan Compiled Laws § 522.23(1).⁹² Her reason for establishing need was that she required \$2,500 per month to maintain her standard of living upon divorce, but this testimony was discredited due to the wife’s lack of documentation to evidence her proposed budget.⁹³ Because the wife failed to present clear testimony and evidence to support her assertions regarding financial need, the court of appeals ruled that the trial court did not err in refusing to invade the husband’s separate property.⁹⁴

Returning to the *Clarke v. Korn* case study, there are examples of invasion present throughout the case. For example, Korn began writing his book before the parties married, but Clarke alleged that the book and any proceeds from it should be marital property because she contributed \$169,000 into conducting focus groups to assist in editing the book. Clarke ultimately conceded and decided that the book could be awarded to Korn because she did not want to be held responsible for any debts associated with the book. However, if Clarke did pursue this claim, this would be considered invasion, since the book was Korn’s separate property and Clarke would then make the claim that she contributed to

⁹⁰ MICH. COMP. LAWS § 522.401 (1983) (emphasis added).

⁹¹ *Peraino*, LEXIS 340, at *7; MICH. COMP. LAWS § 522.23(1).

⁹² *Id.* at 8 (outlining the plaintiff’s argument that she demonstrated sufficient need to invade the separate IRA belonging to the defendant).

⁹³ *Id.* (“However, the trial court refused to credit the plaintiff’s testimony regarding her financial need, relying on the lack of documentary evidence provided by the plaintiff to support her proposed budget.”).

⁹⁴ *Id.* at *9 (“Considering the lack of clear and specific testimony and documentary evidence supporting the plaintiff’s assertions that her need exceeded her assets and monthly income, the trial court did not err by refusing to invade the defendant’s IRA pursuant to MCL 522.23(1) to provide for the plaintiff’s maintenance and support.”).

the improvement of the property, which would fall within Michigan Compiled Laws § 522.401.

Clarke made the same invasion argument regarding the Florida home. Although Korn purchased the home himself and Clarke had no financial obligation to the home, she added sweat equity in remodeling the Florida home shortly after it was purchased, again impacting the improvement of the property. Both the trial court and court of appeals agreed with this argument, since sweat equity can be considered regarding the improvement of a piece of property, which is why the Florida home was deemed marital property and Clarke was subject to a 50% share in the equity of the home.

IV. Factors to Consider when Dividing Marital Property

In dual classification states, courts vary with regard to how the marital estate should be divided. Most states provide statutes or case law that outline specific factors for courts to consider when dividing property.⁹⁵ Some of the most relevant factors include contribution to the marriage, one party's need for the estate, and sometimes, marital fault.⁹⁶ Other states will presume equal division of property that may be rebutted by one party under the claim that fairness requires unequal division.⁹⁷ In conjunction, some states will combine the prior two methods, and establish that equal division is the starting point, then apply factors appropriate for fairness.⁹⁸ However, the majority of states provide statutes or case law that instructs courts to apply a specific set of factors to determine what would qualify as a fair and equitable division.⁹⁹

Among the states that implement a set of factors for the court to consider, there is variation over what should be relied

⁹⁵ Acker, *supra* note 3, at 151–52 (“Many statutes list factors that a court should consider in an equitable distribution decision.”).

⁹⁶ Bell, *supra* note 25, at 126 (“Factors commonly include contribution to the marital unit, need, and to some extent, marital fault.”).

⁹⁷ *Id.* at 126–27.

⁹⁸ *Id.* at 127 (“Other states stop short of establishing a presumption but instruct divorce courts that equal division is a ‘starting point’ for applying factors controlling division.”).

⁹⁹ *Id.*

upon. For example, Michigan identified a list of factors in the case of *Sparks v. Sparks*.¹⁰⁰ In this case, the court determined that the property division by the lower court was error because it only relied upon the wife's marital fault, creating inequitable division.¹⁰¹ Instead of relying solely on marital misconduct, the court created a list of factors, commonly referred to as the "*Sparks factors*," which include the following:

- (1) the duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity.¹⁰²

These are not exhaustive factors, and the court is free to consider other factors it deems appropriate depending on the facts of the particular case at bar.¹⁰³ The court may assign more weight to one factor than another, but all relevant factors shall be considered when dividing marital property.¹⁰⁴

Even all-property states still have a set of factors to create equal property division. Connecticut, for example, created a statute that gives the court ample discretion to "assign either spouse all or any part of the estate of the other spouse."¹⁰⁵ Since all-property states consider both separate and marital property in the division, Connecticut courts have the authority to allocate one party's separate property to the opposing party if it would aid in creating equal division. In an effort to create the most equal division, Connecticut still implements a list of factors to consider when dividing property, including:

The length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and need of each of

¹⁰⁰ 485 N.W.2d 893, 901 (Mich. 1992).

¹⁰¹ *Id.* at 894 ("In this case we are left with the firm conviction that the award was inequitable because disproportionate weight was ascribed to fault.").

¹⁰² *Id.* at 900–01.

¹⁰³ *Id.* at 901 ("There may even be additional factors that are relevant to a particular case. . . The determination of relevant factors will vary depending on the facts and circumstances of the case.").

¹⁰⁴ *Id.* at 900–01 (discussing that the factors listed shall be considered when they are relevant in any particular case).

¹⁰⁵ CONN. GEN. STAT. § 46b-81(a) (2013).

the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.¹⁰⁶

Similar to Michigan, Connecticut emphasizes that no one factor is more important than any other factor, and Connecticut also does not require courts to give equal weight to each factor.¹⁰⁷ Although dual-classification and all-property jurisdictions are afforded varying discretion in what can be considered for division, evidence shows that both jurisdictions still generally implement factors to make the division as equitable and fair and possible.

In the case study of *Clarke v. Korn*, one of Korn's arguments on appeal was that the trial court "failed to address all of the 'required' property division factors in *Sparks v. Sparks*."¹⁰⁸ It is true that some of the listed *Sparks* factors will be irrelevant in many cases, and, courts are not required to give the factors equal weight. The court of appeals did not find that the trial court erred in this respect because the "defendant has failed to explain which *Sparks* factors were relevant that the trial court left unaddressed, or how such factors would have impacted the result."¹⁰⁹ While it could have been very likely that the trial court erred in this regard, as there is no explanation regarding why the property was distributed the way that it was pursuant to the *Sparks* factors, there must be an explanation on the part of the defendant, rather than leaving this task to the Court of Appeals.

An argument could be made that the trial court failed to take into consideration the health of the parties, since Korn had a disability and was put in a vulnerable state by putting such faith in Clarke to have complete control of his finances. Clarke, in controlling these finances, had a fiduciary duty to Korn which she violated when she spent the funds in ways that Korn did not authorize.¹¹⁰ This should have been recognized by the trial court and emphasized when dividing the marital estate.

¹⁰⁶ *Id.* § 46b-81(c).

¹⁰⁷ See *Valante v. Valante*, 429 A.2d 964, 966 (Conn. 1980); *Watson v. Watson*, 607 A.2d 383, 390 (Conn. 1992).

¹⁰⁸ *Clarke*, LEXIS 65234, at *24.

¹⁰⁹ *Id.*

¹¹⁰ See generally *Kar v. Hogan*, 251 N.W.2d 77, 79, 81-82 (Mich. 1976) (finding that fiduciary relationships can exist between husband and wife and a

V. Dissipation of the Marital Estate

One of the highly debated problems that arises in divorce cases is how courts are supposed to consider the expenditures of marital funds that occur during the time of the divorce when dividing property between the parties.¹¹¹ The doctrine of dissipation is defined as “one spouse using marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown.”¹¹² What the doctrine stands for is that the court has the discretion to include property that is no longer part of the marital estate when dividing the estate if the non-existence of the property is due to one party’s dissipation of marital property.¹¹³ The party alleging dissipation must present a prima facie case by satisfying the requisite elements, and, if that is successful, the burden then falls on the alleged dissipating party to prove the reasonableness for the expenditures.¹¹⁴ Dissipation of the marital estate can be considered once divorce proceedings are initiated, such as if one party begins spending large amounts of the estate as a way to decrease the overall estate and hinder the other party during the property distribution phase of the divorce proceedings.

The test for dissipation looks at whether the alleged assets were actually wasted or misused as a way to diminish the marital estate.¹¹⁵ States differ on what elements constitute a dissipation claim.¹¹⁶ For example, Indiana requires the following four elements for a dissipation claim: (1) the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage, (2) the timing of the transaction, (3) the expenditure was excessive or de minimis, and (4) the dissipating party in-

presumption of undue influence will exist so long as the necessary findings are made).

¹¹¹ Acker, *supra* note 3, at 152 (“One problem that inevitably arises in many cases is how to account for spousal expenditures of marital funds around the time of divorce when the court is attempting to separate property.”).

¹¹² *Id.* at 152.

¹¹³ *Id.* at 153.

¹¹⁴ *Id.* at 153–54.

¹¹⁵ See *Balicki v Balicki*, 837 N.E.2d 532, 540 (Ind. Ct. App. 2005) (“The test for dissipation is whether the assets were actually wasted or misused.”).

¹¹⁶ *Id.*

tended to hide, deplete, or divert the marital asset.¹¹⁷ While not all states have identical elements for dissipation, there is a commonality of what courts look for when determining whether dissipation is present, including: the purpose of the transaction, whether it fits the definition of a marital or non-marital purpose, and whether the transaction occurred before or after the marital breakdown.¹¹⁸ Unlike Indiana, not all states require a finding of intent to prove dissipation, because that would instead constitute fraud rather than dissipation.¹¹⁹

When considering dissipation of the marital estate, courts are conflicted on whether the use of the marital estate to pay for attorney fees constitutes dissipation.¹²⁰ This is because of the court's broad discretion when determining dissipation and how to divide the marital estate. A popular case depicting attorney fees and dissipation is *Allison v. Allison*.¹²¹ This case was decided without prior precedent, so the Maryland court considered many different state authorities and ultimately concluded that attorney fees would not constitute dissipation so long as the fees are reasonable.¹²²

Referring back to the case study of *Clarke v. Korn*, Korn testified that Clarke was committing fraud regarding the total remodeling cost of \$149,000 for the Florida home. The Florida home was paid for with the malpractice settlement, as were all renovations on the home, and Korn declared them separate property due to the malpractice occurring prior to the marriage. But since the settlements were placed in a joint account, they were commingled with the marital estate. Korn nevertheless tes-

¹¹⁷ See *Hardebeck v. Hardebeck*, 917 N.E.2d 694, 700 (Ind. Ct. App. 2009).

¹¹⁸ See BRETT TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 479–88 (Patrick McCahill et al. eds., 1994).

¹¹⁹ See *id.* at 479 (stating that courts do not require proof that the dissipating spouse acted with fraudulent intent in order to hold that the spouse dissipated assets).

¹²⁰ See *Head v. Head*, 523 N.E.2d 17, 21 (Ill. App. Ct. 1988) (holding that the husband's use of marital funds to pay attorney fees constituted dissipation when the wife had to borrow money to pay her attorney fees); *Decker v. Decker*, 435 S.E.2d 407, 412 (Va. Ct. App. 1993) (holding that expenditures from the marital estate for living expenses and attorney fees do constitute a valid marital purpose and are not dissipation).

¹²¹ See 864 A.2d 191, 191 (Md. Ct. Spec. App. 2004).

¹²² See *id.* at 196.

tified that Clarke was investing as much money as possible from the USAA account into the Florida home in order to increase the sale price and then claim the equity “was half hers” at divorce.

Moreover, Korn testified that once the parties separated and Korn was no longer living with Clarke in her West Bloomfield home, she was continuing to withdraw \$2,000 per month from Korn’s disability payment. Once the parties separated, Korn agreed to continue paying the \$2,000 per month in conjunction with the agreement to have a sixty-day divorce, but the divorce did not happen in sixty days, and Clarke still kept withdrawing funds every month for approximately 20 months after the parties separated. This amounted to \$40,000 that Clarke was taking out of the marital account and placing into her own separate account, so it could not be included in the property distribution. Clarke was therefore unjustly enriched by \$40,000 when she dissipated the marital estate in her own favor.

VI. How to Fix Inequitable Property Distribution

A proper analysis of property division in dual-classification states accurately shows that property division at divorce is often subject to inequitable distribution due to numerous different factors that a trial court fails to consider. If a court inaccurately distributes property that is either not valued or should not be part of the marital estate, the distribution will be skewed inequitably and, without sufficient justification for doing so, is clear error. One of the ways to address this issue that has seemed to be successful on appeal is to create a chart depicting the distribution. If the trial court already made its property distribution decision, an initial chart could be created showing the trial court’s distribution alongside a secondary chart encompassing the errors that the trial court made and how the property should be distributed when accounting for all classification factors, thereby showing the current distribution as inequitable.

A. Property Distribution Charts

As mentioned above, one of the best ways to avoid trial court errors in the property division, is to create a chart of the assets and liabilities assigned to each party. By creating charts depicting all assets and liabilities that *should* be included in the

marital estate – and by excluding separate property – there is a better chance that a court will be persuaded to follow that line of reasoning and create an equitable division of property. It is also imperative to provide as many values as possible for each of the liabilities and each of the assets. If a court is provided with a preliminary distribution of property chart, then it can significantly decrease the chances of coming out with an inequitable division of property at divorce.

1. *Ripley v. Ripley*

The failure to include the value of the GTO and accounts receivable made what seemed to be an equitable property distribution. However, once the values of these assets were included, as well as placing the value on all of the retained assets by each party, the chart below shows that the husband had significantly more assets awarded to him than the wife did.

Husband's Retained Assets		Wife's Retained Assets	
Description	Court's Value	Description	Court's Value
Husband's retained assets as itemized and valued by the trial court	\$107,570	Wife's retained assets as itemized and valued by the trial court	\$11,343
Plus Pontiac GTO	\$53,363		
Plus Law Firm Accounts Receivable	\$25,711		
Actual Total to Husband:	\$186,644 – 94.3% of all assets	Actual total to Wife:	\$11,343 – 5.7% of all assets

The above table demonstrates that, by looking at assets alone, the property division is severely skewed in favor of the husband. However, just because one party has more equity in assets than the other does not necessarily equate to an inequitable division. The high number of assets could be offset by a large amount of debt that is given to the party with the most assets in an attempt to even out the property division. The chart below

lays out the total debts assigned to each party, and includes the total amount of assets awarded to each party. The chart shows that, although the husband had more debts assigned to him than the wife did, she still had a significant amount that she was obligated to pay, on top of a minimal amount of assets awarded.

	Husband's Award	Wife's Award
Liabilities	(\$236,816)	(\$135,603)
Actual Retained Assets (From Above Table)	\$186,644	\$11,343
To-Be-Sold Assets	\$114,258	\$76,172
Total To Each Party	\$64,086 = 400% of Marital Estate	(\$48,088) = (300%) of Marital Estate

By including these two tables, the appellate attorneys were able to demonstrate that excluding marital property from the division can put one party at an advantage and the other party at a (sometimes severe) disadvantage, resulting in an inequitable property division.

2. *Richards v. Richards*

In *Richards v. Richards*, both parties had their own business and liabilities associated with the business. The trial court determined that neither business would be included in the marital estate, but the debts associated with the husband's business, equating to over \$400,000, would be included as a marital liability. This severely lowered the total amount in the marital estate. The chart below depicts the trial court's distribution of property, which actually makes it seem as though the wife walked away with more value in the marital estate than the husband did.

Wife's Assets and Debts		Husband's Assets and Debts	
Description	Court's Value	Description	Court's Value
409 Lake Linden Ave Laurium, MI	\$30,957.55	58352 Traprock Valley Rd, Calumet, MI	\$246,144.40
Mortgage Payments from Husband	\$44,042.45	55916 US Highway 41 Calumet, MI	\$61,383.77
Business Premises Debt	(\$2,456.37)	730 Lake Linden Ave Laurium, MI	\$94,858.82
		507 Lake Linden Ave Laurium, MI	\$29,121.97
		Mortgage Payments to Wife	(\$44,042.45)
		1997 Dodge Viper GTS	\$38,100.00
		Business Line-of-Credit	(\$273,578.42)
		Business Loan	(\$139,998.52)
Total to Wife	\$72,543.63	Total to Husband	\$11,989.57

This division is actually divided inequitably in favor of the husband because the trial court failed to consider the husband's business in the marital estate. Instead, the trial court included the husband's business debts but not the business equity, and also failed to include the wife's debts in the distribution of the marital estate. If the court were to consider all of those other assets and debts, the property distribution would be as follows:

Wife's Assets and Debts		Husband's Assets and Debts	
Description	Court's Value	Description	Court's Value
Total Trial Court Value (See Table Above)	\$72,543.63	Total Trial Court Value (See Table Above)	\$11,989.57
Certificate of Deposit	\$3,600	Business Loan	(\$20,000)
College Fund	\$10,000	Business Checking Account	\$75,988
Retirement Fund	\$3,000	Business Cash	\$28,108
GM Financial Loan	(\$12,470)	Business Inventory	\$457,104
Collection Account	(\$2,874)	Business Retained Earnings	\$270,444
Credit Card Debt	(\$14,641)		
Total to Wife	\$59,158.63	Total to Husband	\$823,632.80

The above chart shows a significant deviation from equitable division when the trial court divided the marital estate. Even though the court of appeals determined that it could not include the assets of either business due to a lack of evidence, this chart nevertheless helped the court of appeals see that the distribution was still inequitable because the wife's debts should be included in the marital estate to the same extent that the husband's debts were.

3. *Clarke v. Korn Case Study*

In Korn's case, the table below depicts the property distribution of the parties pursuant to the judgment of divorce. On its face, the division looks to be equal, even skewed slightly in Korn's favor. However, it is apparent that significant errors were made by the trial court, which in turn skews the division in Clarke's favor to the extent that it is an inequitable division of property. The table below depicts the property division pursuant to the judgment of divorce.

Clarke's Assets and Debts		Korn's Assets and Debts	
Description	Court's Value	Description	Court's Value
2013 Craft Nautique Boat	\$43,450.00	Book	\$0.00
West Bloomfield Home	\$0.00	Two Dressage Horses	\$62,000.00
403b Marital Portion	\$51,500.00	403b Marital Portion	\$51,500.00
Florida Home Equity	\$70,000.00	3 Oriental Rugs and 2 Paintings	\$0.00
Half Home Reimbursement from Korn	\$525.00	Florida Home	\$140,000.00
Insurance Reimbursement from Korn	\$465.00	Florida Home Equity Payment to Clarke	(\$70,000.00)
West Bloomfield Home Tax Lien	(\$10,408.00)	Florida Home Insurance Reimbursement	\$1,050.00
		Half Home Reimbursement Payment to Clarke	(\$525.00)
		Insurance Payment to Clarke	(\$465.00)
Total to Clarke	\$155,532.00	Total to Korn	\$183,560.00

The trial court did many things incorrectly that significantly affected the distribution of property, as seen by the table below. There were errors made in regard to misclassification of property, because Korn's book and personal property were not valued, leaving them as separate property. Additionally, the trial court erred by including the dressage horses in the marital estate. Even though they were awarded to Korn, that skews his property award because it accounts for personal property that cannot be included in the marital estate. The trial court further erred by including the equity of the Florida home into the marital estate without including the credit card debt associated with the costs to

renovate the home that contributed to the large amount in equity. There was also error because the trial court awarded Clarke the entire \$70,000 active appreciation on the West Bloomfield home when Korn should have been awarded half of that appreciation. Finally, the court failed to consider the fact that Clarke dissipated the marital estate by continuously taking \$2,000 per month out of the marital account and putting it into her own separate account so it would not be included in the distribution of property.

<u>Marital Property</u>				<u>Separate Property</u>
Clarke's Assets and Debts		Korn's Assets and Debts		Korn
Description	Court's Value	Description	Court's Value	Description
2013 Craft Nautique Boat	\$43,450.00	403b Marital Portion	\$51,500.00	Book
West Bloomfield Home	\$0.00	Florida Home	\$140,000.00	Two Dressage Horses
Florida Home Equity Share	\$70,000.00	Florida Home Equity Payment to Clarke	(\$70,000.00)	3 Oriental Rugs and 2 Paintings
403b Marital Portion	\$51,500.00	Florida Home Credit Card Debt	(\$68,000)	
West Bloomfield Home Active Appreciation	\$70,000.00	Florida Home Insurance Reimbursement	\$1,050.00	
Half Home Reimbursement from Korn	\$525.00	Half Home Reimbursement to Clarke	(\$525.00)	
Insurance Reimbursement from Korn	\$465.00	Insurance Reimbursement to Clarke	(\$465.00)	
West Bloomfield Home Tax Lien	(\$10,408.00)			
Monthly Installments from Korn after Separation	\$40,000.00			
Total to Clarke	\$265,532.00	Total to Korn	\$53,560.00	

B. *Rules of Evidence and Admissibility*

While appellate attorneys certainly can create the charts for appellate briefs, it is even better if trial counsel submits the charts to the trial court before entry of the judgment of divorce. The asset and liability charts can be admitted into evidence in contemplation of a divorce because they are both relevant and material.¹²³ They satisfy the probative value requirement because there is no issue of unfair prejudice since the goal is to obtain equitable property distribution for both parties.¹²⁴ They are also both relevant because property division is material to every divorce case, and these tables would aid the fact-finder to find in favor of equitable distribution over distribution skewed in favor of one party. Additionally, they are admissible as demonstrative evidence because “demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case.”¹²⁵ These are all arguments to keep in mind if opposing counsel attempts to make an objection in regard to the evidentiary requirements.

Conclusion

Although property division differs from state to state, the case study of *Clarke v. Korn* depicts the common errors made by Michigan trial courts when it comes to distribution of the marital estate. The most effective way to combat these errors is to create charts outlining the assets and liabilities that should be included in the marital estate, along with proposed values and considerations of what is separate property and should not be included in the marital estate. By introducing these charts to the trial court prior to the entry of the judgment of divorce, the property division is more likely to be an equitable distribution, meaning there is less possibility of an appeal.

¹²³ MICH. R. EVID. 401; FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

¹²⁴ MICH. R. EVID. 403; FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

¹²⁵ *People v. Bulmer*, 662 N.W.2d 117, 119 (Mich. Ct. App. 2003).