The Challenge of Dividing "Hybrid" Real Estate

"The land is the only thing in the world worth working for, worth fighting for, worth dying for, because it's the only thing that lasts"
Gerald O'Hara
Gone with the Wind, Margaret Mitchell

by
Julie A. Auerbach*

When real estate is comprised of both marital and non-marital portions, separating these portions and determining the division of these hybrid assets can be tricky undertakings.[1] While state statutes and case law articulate approaches to divide the two portions, considerable discretion is granted to courts.

There are fifteen "all property" states.[2] "All property" states presume that regardless of source all property at the date of separation is marital. The remaining thirty-five states are "dual property" states.[3] These states exclude certain assets from the marital estate and treat them as non-marital. Prior to dividing assets, "dual property" states must first characterize real property as either separate or marital. "All property" states do not have to engage in this characterization.

However, "all property" and "dual property" states both look to the donative intent of the individual who contributed the real property to determine whether a "gift" was made to the marital estate. For "dual property" states, donative intent will deter-

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* Julie A, Auerbach, Esquire, is an equity partner at Astor Weiss Kaplan & Mandel, LLP, in Philadelphia.

1 Many assets, not just real estate, are hybrid assets. This article will focus solely on hybrid real estate assets, though much of the discussion in this article is also applicable to non-real estate assets.

2 Brett Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. Am. Acad. Matrim. Law. 69 (2006). These states are Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, Washington and Wyoming.

3 All community property states, with the exception of Washington, are dual property states.

mine whether the asset is totally or partially marital.[4] For "all property" states, donative intent will be a consideration in dividing the asset between the parties.[5]

"Dual property" states apply one of four different approaches in determining donative intent and in separating the marital and non-marital portions of the real estate. In this article, these approaches will be referred to as "inception of title," "source of funds," "title/not intent," and "intent/not title."

The "inception of title" approach, adopted only by Washington, D.C., at present, provides that the status of property as separate or marital is fixed at the time acquired and despite later contributions by a spouse, remains separate.[6] The "source of funds" approach separates the marital from the separate contributions and returns these contributions pro rata to the marital estate and the contributing spouse.[7]

In the third approach, "title/not intent," donative intent is determined by the titling of the asset.[8] However, regardless of titling of the asset, equitable considerations may be applied to the division of the asset. Since implied intent is irrelevant, this article refers to this methodology as "title/not intent."

The fourth approach looks to both the express and implied donative intent of the parties to determine whether the asset is treated as marital or separate.[9] This methodology will be referred to as "intent/not title." Some of the intent/not title states use the term "transmutation" to describe this approach. However, because many states use the term "transmutation" regardless of which approach they follow and regardless of whether

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4 *See generally* Green v. Green, 29 P.3d 854 (Alaska 2001); McBride v. McBride, 990 N.E. 1184 (Ill. App. Ct. 2013); Winters v. Winters, 512 A.2d 1211 (Pa. Super. Ct. 1985)

5 *See generally In re* McDermott, 827 N.W. 671 (Iowa 2013); Fobar v. Vonderahe, 771 N.E.2d 57 (Ind. 2002); In the Matter of Routhier, 280 A.3d 260 (N.H. 2022)

6 Araya v. Keleta, 65 A.3d 40 (D.C. Ct. App. 2013).

7 Thomas v. Thomas, 377 S.E.2d 666 (Ga. 1989); Boschert v. Boschert, 73 S.W.3d 869 (Mo. Ct. App. 2002).

8 *In re* Marriage of Begian & Sarajian, 31 Cal. App 5th; 242 Cal. Rptr. 3d 692 (2018); Burrow v. Burrow, 100 A.3d 1104 (Me. 2014); Winters v. Winters, 512 A.2d 1211 (Pa. Super. Ct. 1985).

9 *Green*, 29 P.3d 854; *In re:* Marriage of Cupp, 730 P.2d 870 (Ariz. 1986); *McBride*, 990 N.E. 1184.

they are "dual property" or "all property" states, use of the word "transmutation" to define this approach may cause confusion. The intent/not title approach will also apply equitable considerations when dividing the asset.

For "all property" states, while the characterization step is not required, in deciding upon the division of the asset, these states will follow an approach similar to intent/not title states. They will first determine donative intent through express or implied actions and then apply equitable considerations when dividing the asset.

This article will discuss the standards employed by the fifty states to classify and divide hybrid real estate. Part I offers a brief lexicon of relevant terms. In Part II, the article will discuss the approaches used by "dual property" states to divide the marital from the non-marital portions of the real estate. Part III describes the various equitable considerations used by all property states to divide the real estate between the spouses.

Part IV compares the outcomes of the various approaches and considerations, noting the different results that occur. Part V suggests how these approaches and considerations may be used to advance a particular position, regardless of the law of any given state.

I. Relevant Terms

An understanding of the use of certain terms relative to hybrid real estate in both this article and case and statutory law is necessary. When this article uses the term "approach," it is referring to one of the four approaches used by "dual property" states to divide the separate from the non-marital portions of real estate. When this article uses the term "consideration" it is referring to the equitable factors all courts look to when determining how to allocate hybrid assets between the parties.

When discussing hybrid assets in case and statutory law, the terms "commingling," "tracing" and "transmutation" are regularly used. While the definition of "tracing" is mostly consistent throughout the states, "commingling" and "transmutation" are sometimes used interchangeably and/or defined differently by different jurisdictions. The inconsistent use of these terms creates confusion and can result in the inconsistent application of law. However, understanding the definitions assigned to these

terms by any particular state and how these terms are applied to any given case is important to a clear understanding of the law regarding hybrid assets.

Some examples of these different definitions are as follows: Tennessee case law explains the difference between commingling and transmutation in this way: Commingling occurs when property that was separate is "inextricably mingled with marital property or with the separate property of the other spouse."[10] However, if the separate property can be traced, there is no commingling.[11] Transmutation occurs when the "separate property is treated in such a way as to give evidence of an intention that it become marital property."[12]

Arizona's distinction between "transmutation" and "commingling" is as follows: "Transmutation of separate property to community property occurs only when the identity of the property as separate or community is lost."[13] Commingling occurs when separate property can still be traced and identified even though it is combined with community property.[14] In Oregon, "Commingling occurs when parties' shared financial decisions are made in reliance on the separate asset without consideration of whether it was separately acquired."[15] In Hawaii, transmutation is "the conversion of separate property into marital property by express or implied acts."[16] Noting the inconsistent use of the term "transmutation" in the state's case law, the Wisconsin Supreme Court specifically rejected the continued use of the term "transmutation."[17]

Given the different definitions and uses of the terms "commingling, and "transmutation," this article will avoid use of these terms when possible to avoid the confusion that they create.

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10 Keeble v. Keeble, No. E2019-01168-COA-R3-CV, 2020 WL 2897277, at *8 (Tenn. Ct. App. June 3, 2020).

11 *Id.*

12 *Id.*

13 *Cupp*, 730 P.2d at 873.

14 *Id.*

15 Matter of Marriage of Brush, 509 P.3d 124, 130 (Or. Ct. App. 2022).

16 Gussin v. Gussin, 836 P.2d 484 (Haw. 1992).

17 Derr v. Derr, 696 N.W.2d 170 (Wis. Ct. App. 2005).

II. Dual Property States

Dual property states engage in a three-step process when dividing assets: identification, classification, and distribution. In classifying and distributing hybrid assets, these states apply one of the four approaches discussed above. All of these approaches apply equitable considerations when dividing the asset between the parties.

Donative intent is defined a bit differently depending upon which of the four approaches ("inception of title," "source of funds," "title/not intent," or "intent/not title") is applied. Each approach, including its definition of donative intent and equitable considerations will be discussed in detail.

A. *Inception of Title*

Only Washington, D.C. still follows the inception of title approach. As stated in *Yeldell v. Yeldell*, "property acquired prior to the marriage is the sole and separate property of the spouse who originally owned it and must be assigned to that spouse upon divorce."[18]

In *Araya v. Keleta*, the husband owned a property prior to marriage.[19] During the marriage, he purchased the adjoining property and opened up walls between the two properties. The court affirmed the inception of title approach, but did not apply it. The court found that given that the two properties were essentially merged into one property, the separate character of the premarital property was changed and/or transformed into marital property.[20] Other states initially followed the inception of title approach but later rejected it.[21]

B. *Title/Not Intent*

Just three states, California (a community property state), Maine and Pennsylvania (both equitable distribution states) follow the title/not intent approach since the title of the asset con-

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18 551 A.2d 832, 834 (D.C. 1988).

19 65 A.3d 40.

20 *Id.* at 44-45.

21 Two such states were Maine and Maryland. For an extensive discussing of the "inception of title" approach, see *Harper v. Harper*, 448 A.2d 916 (Md. 1982).

trols how it is characterized. Donative intent to gift the asset to the marital estate is determined by the express language of the deed (Maine and Pennsylvania) or a written document providing that a change of ownership is intended (California). The step of characterization of the asset is simple under this approach. If the deed is titled jointly (or in the case of California, if there is a written document to gift the real estate to the marriage), the donative intent is clear, and a gift to the marital estate was intended. The real estate is thus characterized as marital. However, as in all states, these states will look to various equitable considerations when determining how to allocate the real estate between the parties.

In the Maine case of *Burrow v. Burrow*[22] the court explained the evolution of its adoption of the "title/not intent" approach. The court noted that Maine applied the source of funds rule prior to 1980. In 1980, Maine began to apply the transmutation doctrine. This doctrine provided that when property is transferred from individual to joint names, a gift to the marital estate was intended. Thereafter, in 1997, Maine courts held that once property was transferred into joint names, intent was not relevant.

The case went on to provide that while a tracing no longer becomes relevant in determining whether the asset is marital or separate, a tracing can be considered when dividing the asset.[23] The wife in *Burrow* bought her grandmother's home prior to the marriage. Also prior to the marriage, both the husband and the wife contributed money and sweat equity to improve the home. Additionally, the wife's mother contributed money to add a two-car garage to the home. After the marriage, the wife deeded the home into their joint names with her husband. Over the years, the parties spent $184,000 to improve the home. Relying on the joint titling of the deed and applying the "title/not intent" approach, the court found that the entire value of the property was marital. However, in consideration of the wife's separate contributions, the court returned to the wife the amount of money that the court determined had been gifted to the wife by her mother and grandmother.

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22 100 A.3d 1104 (Me. 2014).

23 *Id.* at 1108.

In *Winters v. Winters*,[24] Pennsylvania specifically rejected the theories of "inception of title," "source of funds," and "transmutation of property." Instead, the court held that the title of the property controls whether it is marital. Pennsylvania looks at the time the asset is acquired, not the manner of acquisition. The spouses' efforts and/or financial contributions are not relevant to the characterization of the asset.[25]

Further, the increase in value of the asset, whether due to market forces or the efforts of either or both spouses, is a marital asset. In the insightful opinion of *Anthony v. Anthony*, the court explained this rationale:

> The existence of a premarital asset may discourage or prevent the parties' obtainment of a comparable marital asset and lull the non-owning spouse into a false sense of security. This is especially likely to occur where, as in the appeals sub judice, a residence has been obtained by one spouse prior to the parties' marriage and has been occupied by both spouses after the parties' marriage. Since it was not acquired during the parties' marriage, the residence does not qualify under section 401 as marital property. Yet the parties' use of the premarital home acts as a disincentive to the parties' acquisition of equivalent marital property and therefore affords the non-owning spouse little opportunity to attain interest in marital property. Non-recognition of the increase, during the period of the parties' marriage, in the value of the residence would unjustly deprive the non-owning spouse of any economic benefit derived from the parties' use of the premarital residence.[26]

Pennsylvania, like Maine, will apply equitable considerations when dividing the asset.[27] While the considerations courts should look to are not clearly defined in the case law, courts will often rely upon the considerations set forth in the various equitable distribution factors. The most relevant of these factors are "the contribution . . . of each party to the acquisition, preservation, depreciation or appreciation of the marital property"[28] and the "value of the property set apart to each party."[29]

At least one county in Pennsylvania, Bucks County, will consider the length of time that the non-marital property has

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24 Winters v. Winters, 512 A.2d 1211 (Pa. Super. Ct. 1985).
25 Anthony v. Anthony, 514 A.2d 91 (Pa. Super. Ct. 1986).
26 *Id.* at 94-95.
27 *Id.*
28 23 PA. CONS. STAT. § 3502 (a)(7).
29 *Id.* § 3502(a)(8).

been mixed with marital property when deciding how to allocate the real estate between the parties. This county has developed a methodology known as the "vanishing/diminishing credit." In applying this credit, the Bucks county courts use a twenty year look back period and deduct five percent per year for every year the separate asset is commingled. The deducted amount is returned to the contributing spouse prior to the division of the remaining value of the real estate. For example, if a husband's parents gifted $50,000 towards the down payment of the marital residence and the marital residence was purchased 10 years prior to the parties' separation, the husband would receive a credit of 50% (5% a year x 10 years) of his parents' contribution to the down payment ($25,000). This $25,000 would first be returned to him and then the remaining equity would be divided between the parties. This methodology is inconsistently not typically applied in other counties in Pennsylvania but its use has been approved by the Superior Court.[30]

In California, a community property state, the relevant code section addresses the contribution by a spouse of non-marital property to the marital estate:

> Married persons may transmute the community property of either spouse into separate property by agreement or transfer, subject to compliance with other code sections. The writing needs to be an express declaration of the change in character of the property. While no specific language is required, the writing must reflect a transmutation on its face and eliminate the need to consider other evidence in divining the intent. Strict formalities are required to prevent transmutation by accident.[31]

Where a husband added his wife's name to a partnership agreement for the purpose of obtaining financing for a bank, the California court held that the modification of the partnership agreement did not meet the requirements of the transmutation statute because it did not contain an express declaration that the characterization or ownership of the property was being changed. "A valid transmutation requires more than simply naming one or both spouses as the owner in a title document.

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[30] Neff v. Neff, 2011 Pa. Dist. & Cnty. Dec. LEXIS 513, *aff'd* without opinion by Neff v. Neff, 50 A.3d 240 (Pa. Super. Ct. May 11, 2012).

[31] *In re* Brace, 470 P.3d 15 (Cal. 2020); Begian & Sarajian, 31 Cal. App. 5th 506; 242 Cal. Rptr. 3d 692. *In re* Marriage of Lafkas, 237 Cal. App. 4th 921, 188 Cal. Rptr. 3d 484 (2015).

Additional language is required to show that the adversely affected party understands that the character of his or her property is being changed."[32]

In these three states, either the titling of the asset or a written declaration that the character of the property is being changed, will determine whether the asset is treated as marital or non-marital. The court will not look at extrinsic evidence to determine intent. However, after the characterization, i.e., donative intent, of the real estate is determined, all three states will apply principals of equity when dividing the marital portion of the real estate and may return all or part of the non-marital contributions to the contributing spouse.

C. *Source of Funds*

The "source of funds approach" is followed by six states.[33] These states will characterize an asset as marital or separate by looking at the express or implied donative intent of the contributing spouse. If donative intent to contribute the asset to the marital estate is found, the asset is treated as marital. If no donative intent is found, the approach provides that property is both separate and marital in proportion to the contributions (monetary or otherwise) separately and jointly provided. These six states employ the following formula to determine the parties' marital and nonmarital portions of real estate:

> Nonmarital property = nonmarital contribution divided by equity total contribution
> Marital property = marital contribution divided by equity total contribution[34]

To apply the source of funds rule, the court must be presented with the source of the funds that created the value as well as the values of the real estate at the date of marriage and the date of the hearing.

Kentucky created a four-part test in *O'Neill v. O'Neill* to determine donative intent, i.e., whether a gift is made to the marriage or to only one spouse. Kentucky courts must consider 1) the source of the money; 2) the intent of the donor at the time of

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32 *Lafkas*, 237 Cal. App. 4th at 940, 188 Cal. Rptr. 3d at 498.

33 Arkansas, Georgia, Kentucky, Maryland, Missouri, and North Carolina.

34 *Boschert*, 73 S.W.3d 869.

the intended use of the property; 3) the status of the marriage relationship at the time of the transfer; and 4) whether there was a valid agreement to exclude the property from the marital estate.[35] Additional prongs to the test were added in *Sexton v. Sexton* when the gift is from a third party, not one of the spouses – 1) whether the purported donor received compensation for the transfer and 2) whether the donor's intent was to make a joint gift or an individual gift.[36]

In the Kentucky Supreme Court case of *Barber v. Bradley,*[37] the court determined that the husband gifted money to the marital estate when he used monies received from his parents for the down payment of the jointly titled residence. The husband received $250,000 in cash from his parents to partially finance the construction of the marital residence. The checks were written to the husband only and given to him along with a letter stating that it was an advance on his inheritance. The husband then used the funds to finance the purchase of the marital residence. The husband argued that the money was a gift to him only, not to husband and wife jointly. The court rejected this argument, finding that a gift was made to the marital estate.[38]

Not only did the husband use the funds to partially finance the marital residence, he made promises to the wife that she would have a joint ownership in the residence and went so far as to title the residence in joint names. The court found that the entire value of the marital residence should be divided equally between the parties and the husband was not entitled to the return of any of his contributions to the purchase of the residence. Because the court concluded that the non-marital contribution was gifted to the marital estate, the court did not need to reach application of the source of funds rule.

In *Thomas v. Thomas*,[39] the Georgia Supreme Court found that applying the source of funds rule as articulated in Maryland case law assures "that property accumulated during the marriage is fairly distributed between the parties while at the same time preserving separate property for the benefit of the spouse to

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35 O'Neill v. O'Neill 600 S.W.2d 493 (Ky. App. 1980).
36 Sexton v. Sexton, 125 S.W.3d 258 (Ky. 2004).
37 505 S.W.3d 749 (2016).
38 *Id.* at 759.
39 377 S.E.2d 666 (Ga. 1989).

whom it belongs."[40] In that case, the marital home was titled in the wife's name, having been purchased by her shortly before the marriage. She used separate monies for the down payment and obtained a mortgage in her name only. After the parties' separated, the house was sold. Both non-marital and marital funds were used to reduce the mortgage debt against the home. The court found that the reduction in the mortgage principal during the marriage was a marital asset as was the appreciation in value. It allocated the increase in value of the home in proportion to the respective separate and marital contributions and applied the source of funds formula to determine how to allocate the marital and non-marital contributions.[41]

North Carolina, also a source of funds state, provides that property acquired in exchange for separate property shall remain separate property regardless of whether title is held in joint names, unless a contrary intent is expressly stated in the conveyance. In the North Carolina case of *Goldston v. Goldston*,[42] the husband owned a house and lot prior to the marriage. He moved the house to another lot owned jointly by the parties. Then he later deeded the first lot into joint names. The trial court found that the house was "transformed" into marital property. The court of appeals reversed, finding the house to be separate property even though moved to a jointly titled lot. The appellate court determined that there was no evidence that the husband intended to gift the house to the marital estate. The placing of the house on the jointly titled lot was not sufficient evidence of a gift to the marital estate.[43] The court ruled that the source of funds formula should be applied to the proceeds of sale of this property.

The source of funds approach is similar to the intent/not title states that will be addressed below in that it characterizes marital assets by determining either the express or implied intent of the contributing party. Unlike the other approaches,[44] once it is determined that there was no donative intent to gift the asset to the

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40 *Id.* at 670.

41 *Id.*

42 582 S.E. 685 (N.C. Ct. App. 2003).

43 *Id.* at 688.

44 With the exception of the vanishing/diminishing credit applied by Bucks County, Pennsylvania.

marital estate, the source of funds approach applies a set formula to parse the marital from the non-marital portions.[45]

D. *Intent/ not title*

Just as in "source of funds" states, states applying the "intent/not title" approach characterize assets as marital or non-marital by looking to the express or implied donative intent of the contributing spouse.

1. *Donative intent*

Some of these states have created tests to determine donative intent. Alaska determines donative intent by a consideration of various factors: 1) use of property as a personal residence, 2) the ongoing maintenance and management of the property by both parties, 3) placing title in joint ownership, and 4) using the credit of the non-titled owner to improve the property.[46] Illinois looks to the following factors to determining donative intent: 1) making improvements to the property, 2) payment of taxes and mortgages, 3) occupancy of the property as a home or business, and 4) extent of control of the property.[47]

a. *Titling of asset*

Titling of an asset is a consideration in determining donative intent, but it is not dispositive. As explained below state statutes and/or case law will often find that the joint titling of an asset creates a presumption that the asset is marital. However, different states allow the presumption to be rebutted differently. Florida holds that to overcome the presumption that jointly titled property is marital, there must be evidence that a gift to the marital estate was not intended.[48] In Florida, the wife's contribution of the down payments to two jointly titled pieces of real estate was insufficient evidence to overcome the presumption that the

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45 While other states have developed various formulas, equitable considerations often provide a basis for deviation from any one formula. *But see* Steven J. Willis, *How a Spouse Can Profit by Paying Partner's Principal*, 49 N.M. L. Rev. 283, 292 (2019), which discusses formulas used by nineteen states when marital assets are used to pay non-marital mortgages.

46 *Green*, 29 P.3d 854.

47 *McBride*, 990 N.E. 1184.

48 Chatten v. Chatten, 334 So. 3d 633 (Fla. Dist. Ct. App. 2022).

wife made a gift to the marital estate. More evidence was needed that a gift was not intended. Therefore the wife was not entitled to an unequal division of assets.

In Arizona, a court found that regardless of the joint titling of the real estate, there was no donative intent to gift the real estate to the marriage. There, the wife used the proceeds of her worker's compensation commutation to purchase real estate titled in joint names with her husband. The court found that the wife overcame the presumption that the property was that of the community. The wife testified that she placed the property in joint names only as a testamentary device to avoid probate in the event of her death and to protect the future of the parties' four children.[49]

Even if the real property is not jointly titled, a court might find it was gifted to the marital estate based upon the actions of the parties. In a Michigan case, while two separately titled pieces of real estate were never transferred into joint names, they were treated as marital property by the parties. The properties were lived in by both the parties and their children during the marriage. The non-owner spouse paid for renovations to both properties and cared for the two properties more than the owner spouse did. Based upon this evidence, the Michigan Court of Appeals held that the two properties were properly treated as marital.[50]

b. *Family use*

In some states, use of property as a marital home is an important consideration when determining donative intent. In a Delaware case, when the parties' were engaged the husband purchased a residence and titled it in his name only. The wife testified that it was done that way because the wife had questionable credit and putting it in one name would allow the parties to avail themselves of a homeowner's assistance program. Delaware applies a contemplation of marriage doctrine which provides that "equitable considerations may well overcome the statutory presumption under circumstances where the property was purchased in contemplation of marriage but title held in the name of one

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[49] *Cupp*, 730 P.2d 870.

[50] Dollen v. Dollen, Nos. 316457, 318813, 2014 WL 6067658 (Mich. Ct. App. Nov. 13, 2014).

spouse alone."[51] The court must look to the intent of the parties at the time the property was purchased. In that case, the court found the property to be marital.

Mississippi law provides that separate property may become marital through family use and the family use doctrine will almost always apply to the family home.[52] New Jersey considers use of the home for the family as well. In a New Jersey case a house was acquired before marriage with the intention that it would become the marital home, even though the house was titled in one person's name only. The parties made substantial improvements to the house before and during the marriage. The court found that there was an implied contract between the parties that the house would be a marital asset, holding that the statute:

> should be construed, to the extent feasible, to effectuate public policy underlying the equitable distribution law, which is to recognize that marriage is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership . . . . a date prior to the marriage ceremony can, in appropriate circumstances, qualify as the date of commencement of a marriage for purposes of deciding whether the asset is subject to equitable distribution.[53]

In West Virginia a wedding gift of the marital residence to a husband and a wife was treated as a gift, not a loan.[54] But this conclusion drew a strong dissenting opinion that would hold that the residence should not be treated as marital property because the house was built on land in the husband's name only that was his non-marital property and the house was always titled only in the husband's name.[55]

c. *Use of separate property as collateral*

Courts have generally rejected the argument that use of separate property as collateral provides evidence of donative intent. The act of pledging separate property as collateral to obtain a loan for marital purposes did not automatically turn separate

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51 A.J.A. v. R-L R. T-A-F, No. CN04-08058, 2005 WL 4674277 (Del. Fam. Ct. Nov. 15, 2005).

52 Rhodes v. Rhodes, 52 So. 3d 430 (Miss. Ct. App. 2011).

53 Weiss v. Weiss, 543 A.2d 1062 (N.J. Super. Ct. 1988).

54 Jonathan R. v. Katie R., No. 15-0400, 2016 WL 1735265 (W. Va. Apr. 29, 2016).

55 *Id.* at *12 (Davis, J., dissenting).

property into marital property according to a Colorado court.[56] Interspousal gifts are presumed to be marital property unless rebutted by clear and convincing evidence. If separate property becomes so commingled with marital property that a tracing is not possible, it becomes marital property. This was not the situation under the facts of the Colorado case, because tracing was possible. This opinion relied upon similar opinions entered in Virginia, Alaska, and Florida.[57]

Borrowing against non-marital property did not create a presumption of commingling in the Florida case of *Rennert v. Rennert.*[58] There a husband bought four properties. During the marriage, the husband purchased an additional property by increasing the debt on separate property. The mortgage on the separate property was paid down with marital income. The husband then sold all of the parcels and used the proceeds to pay off the mortgage. The court held that borrowing against non-marital property to obtain marital property or paying down the mortgage with marital funds did not cause it to lose its separate character.[59]

And finally a Wisconsin court found that "without more, the act of putting property at risk by using it as collateral for a marital loan does not create a presumption that the owning spouse intended to donate part or all of the property to the marriage."[60]

2. *Considerations applied when donative intent not found*

a. *Use of special formulas*

If there is no donative intent, some states have created special equitable formulas to parse the non-marital from the marital portions. Virginia's statute is very detailed and specific as to how to characterize marital and non-marital assets.[61] The statute addresses six different ways that separate and marital assets become mixed. First, income from separate property is marital only to the extent it is attributable to personal efforts of either party.[62]

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56 Corak v. Corak, 412 P.3d 642 (Colo. App. 2014).
57 *Id.* at 645-46.
58 Rennert v. Rennert, 307 So. 3d 1021 (Fla. Dist. Ct. App. 2020).
59 *Id.* at 1023.
60 *Derr*, 696 N.W.2d 170.
61 Va. Code § 20-107.3.
62 *Id.*

Second, the increase in value of separate property is marital property only to the extent that other marital property or the personal efforts of either party contributed to the increase in value of the separate property.[63] The personal efforts must be significant and result in a substantial appreciation of the separate property. "Personal effort" is defined as "labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional or marketing activity applied directly to the separate property of either party."[64]

Third, when marital and non-marital assets are combined, if there is a loss of identity of the contributed property, that property is changed to the category of the property receiving the contribution.[65] If the contribution is traceable and is not a gift, the contribution retains its original classification. Fourth, when marital and non-marital assets are combined into new property, if there is a loss of identity of the contributing properties, the combined property is marital.[66] If contributions are traceable and not a gift, the contributions retain their original classification.

Fifth, when separate property is retitled in joint names, the retitled property is marital property.[67] However, if the separate property is traceable and not a gift, the retitled property retains its original classification. The sixth and final scenario is when the separate property of one party is commingled with the separate property of the other party. To the extent it is traceable and not a gift, each party shall be reimbursed the value of the contributed property.[68]

Minnesota has utilized the "Schmitz formula" to determine the extent of marital and nonmarital interests.[69] The formula is as follows:

> The present value of a nonmarital asset used in the acquisition of marital property is the proportion the net equity or contribution at the time of acquisition bore to the value of the property at the time of purchase multiplied by the value of the property at the time of separa-

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63 *Id.*

64 *Id.*

65 *Id.* § 20-107.3.A.3.d.

66 *Id.* § 20-107.3.A.3.e.

67 *Id.* § 20-107.3.A.3.f.

68 *Id.* § 20-107.3.A.(3)g; *See also* Dwoskin v. Dwoskin, 2020 Va. Cir LEXIS 494 (2020); Prizzia v. Prizzia, 707 S.E.2d 461 (Va. Ct. App. 2011)

69 Schmitz v. Schmitz, 309 N.W.2d 748 (Minn. 1981).

> tion. The remainder of equity increase is characterized as marital property. . . . Brown v. Brown, 316 N.W. 2d 552, 553 (Minn. 1982).

This formula is similar to the source of funds formula, but note that the "Schmitz formula" need not be strictly applied.[70] Years later, the Minnesota Court of Appeals explained and expounded on the formula:

> Proper calculation of wife's current nonmarital interest in the homestead requires that the court first divide her nonmarital contribution to the down payment by the purchase price of the house. Next, the cost of repairs and improvements must be subtracted from the current value of the house in order to determine the increase in value of the property due solely to appreciation. Finally the net appreciated purchase price in order to determine wife's nonmarital interest in the homestead.[71]

The principle of apportionment, used by community property states, is described by a New Mexico court as "the principle courts apply when an asset is acquired during the marriage using both separate and community monies."[72] There is no one method of apportionment. The apportionment must be done in a way to achieve substantial justice.

A formula set forth in *Malmquist v. Malmquist*[73] explains how Nevada apportions community and separate shares in the appreciation of a separate or a community residence. The complicated formula provides that the credits to the community and separate shares should be divided according to the number of monthly payments made with separate or community property. The formula applies only when the "separate property has increased in value through community efforts or, conversely, community property value has been enhanced by separate property contributions."[74]

In the unpublished Nevada case of *Gafforini v. Gafforini*,[75] the husband took out a second mortgage on his premarital residence and used the money as a down payment on the marital residence. In finding the entire value of the marital residence to be a marital asset, the court found that "where a spouse makes a

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70 Kerr v. Kerr, 770 N.W.2d 567 (Minn. Ct. App. 2009).
71 Dorweiler v. Dorweiler, 413 N.W.2d 572, 576 (Minn. Ct. App. 1987).
72 Dorbin v. Dorbin, 731 P.2d 959, 961 (N.M. Ct. App. 1986).
73 792 P.2d 372 (Nev. 1990).
74 Kerley v. Kerley, 893 P.2d 358, 361 (Nev. 1995).
75 467 P.3d 15 (Nev. Ct. App. 2020).

conscious choice to use his or her separate property to pay community expenses, the use of separate property constitutes a gift to the community.[76]

The husband also owned a cabin acquired prior to the marriage that had a mortgage on it. During the marriage, community assets were used to pay down the mortgage. The court noted that "where community funds are used to make payments on separate property, the community is entitled to a pro tanto interest in such property in the ratio that the community payments bear to the payments with separate funds."[77] In addition to the loan contributions, the *Gafforini* court held that "the community is also entitled to any appreciation in the value of the cabin that can be attributed to community efforts.[78]

b. *Non-economic contributions*

Some intent/not title states will give consideration to non-economic contributions by a spouse to separate property. A Mississippi court determined that 20% of a husband's premarital rental properties was marital in light of the wife's non-economic contribution to the maintenance and upkeep of properties.[79] In another Mississippi case, the husband received land from his father during the marriage. The parties built a home on the land. The wife spent extensive time on the design and construction of the residence. The court found that her non-financial contributions offset the husband's non-marital financial contributions, making the house marital. The gift of land was treated as a gift to the marriage, not a gift to just the husband. However, in dividing the asset, the court found that the husband was entitled to a greater share of the value of the home.[80]

Louisiana statute, article 2368, provides that if the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of the other spouse, the other spouse is entitled to be reimbursed from the spouse whose property has increased in value.[81] In a Louisiana case, the hus-

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76 *Id.* at *4.

77 *Id.* at *5, citing to Robinson v. Robinson, 691 P.2d 451 (Nev. 1984).

78 *Gafforini*, 467 P.2d 15 at *5.

79 Pettersen v. Pettersen, 269 So.3d 466 (Miss. Ct. App. 2018).

80 Castle v. Castle, 266 So. 3d 1042 (Miss. Ct. App. 2018).

81 La. Stat. Ann. art. 2368.

band purchased the property prior to the marriage but during the marriage the wife provided design services along with supervisory services.[82] The court found that the property became community property as a result of a pattern of commingling and treating the property as a community asset throughout the marriage.

Tennessee recognizes the substantial contribution doctrine. This doctrine provides that the increase in value of separate property could be marital if each party contributed to its preservation and appreciation. Substantial contribution includes but is not limited to direct or indirect contribution of a spouse as homemaker, wage earner, parent, or family financial manager, together with such other factors as the court may determine.[83] A court found that real estate purchased prior to the marriage became marital property because the parties used it as their primary residence and marital monies were used to pay the mortgage. The court did, however, give the husband a credit for his down payment to the residence.

But note that a South Carolina court rejected the wife's contributions to the management of the husband's inherited property as sufficient evidence to establish donative intent to gift the property to the marriage.[84] Expenditure of time and labor alone is not enough. Further the use of income from the property for marital purposes did not establish a gift of the property to the marriage.

c. *Active v. passive appreciation*

Some intent/not title states will differentiate between active and passive appreciation. A Nebraska case involved various pieces of real estate acquired before and during the marriage. Each piece of real estate had marital and non-marital components. These components were made up of pre-marital property, marital property, property sold during the marriage, property commingled/transmuted during the marriage, and non-financial contributions to the property.[85]

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82 Seidler v. Jones, 611 So. 2d 193 (La. Ct. App. 1992).

83 Keeble v. Keeble, No. E2019-01168-COA-R3-CV, 2020 WL 2897277, at *8 (Tenn. Ct. App. June 3, 2020).

84 Wilburn v. Wilburn, 743 S.E.2d 734 (S.C. 2013).

85 Parde v. Parde, 979 N.W.2d 788 (Neb. Ct. App. 2022).

The case articulated the "active appreciation rule," which is the test to determine to what extent marital efforts caused any part of an asset's appreciation or income.[86] Active appreciation is caused by marital contributions. Passive appreciation is caused by separate contributions and nonmarital forces. The burden is on the owning spouse to prove the extent to which marital contributions did not cause appreciation or income.

One of the properties, a fertilizer plant, was purchased by the husband and his first wife. The date of marriage value was $70,000. The date of separation value was $400,000. Only the increase in value was marital, even though marital funds were used to maintain the property.

The marital home was located on five acres that were previously part of the fertilizer plant. The husband argued that because the land on which the home was built was premarital property the value of the land at marriage should be deducted from the total value of the property. The wife argued that the use of marital income to build the home and improve it caused the land to lose its premarital character. The state supreme court agreed with wife. The court declined to value the land separately from the home, finding that "separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse."[87]

Another farm, referred to as the Holmesville Farm, was purchased during the marriage. A portion of the purchase price was paid for with the funds from the sale of other farms. The remaining portion was financed through a bank. Because the premarital portion of one of the farms was already accounted for in the valuation of the farm, an additional allocation was not warranted. But the husband was entitled to an additional set off of $42,500 for the premarital equity that was traceable to a non-marital portion of a previously owned property.

Since the above case involves many properties with marital and separate assets commingled in different ways, it is a good example of the challenges courts face in effectuating a fair division of assets by considering the marital and non-marital portions of each asset.

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86 *Id.* at 789.

87 *Id.* at 801.

Texas, a community property state, also distinguishes between active and passive appreciation in the context of determining the amount of reimbursement one spouse is entitled to for her contributions to a non-marital asset. "Reimbursement is an equitable claim that arises when the funds of one estate are used to benefit and enhance another estate without receiving some benefit. A claim for reimbursement includes capital improvements to property other than by incurring debt."[88] The reimbursement will be the difference in value before and after the improvements were made. Mere increased value over time is not sufficient.

In summary, intent/not title states will look at many equitable considerations when determining how an asset should be characterized and how the asset should be divided. While some of the same considerations are applied in several of these states, there is a general lack of uniformity among these states when applying equitable considerations to dividing hybrid assets.

III. ALL PROPERTY STATES

In "all property" states, there is no need to first characterize property as marital or non-marital; all assets at the time of separation are generally marital regardless of when acquired. However, all property states will give consideration to the source of the property when determining a fair and equitable division. That consideration requires courts to determine the donative intent of the person contributing the property to the marital estate. These states also look to some of the same considerations that the intent/not title states take into account when determining a fair division of the hybrid real estate.

A. *Donative Intent*

Donative intent is determined differently depending upon the particular all property state. In the Washington case of *In re Marriage of Watanabe*,[89] the supreme court found that inherited property transferred from the wife's name only to the joint names of the husband and wife was not community property. The court noted that there are many reasons to place property in

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88 *In re* Marriage of McCoy, 488 S.W.3d 430, 434 (Tex. App. 2016).

89 506 P.3d 630 (Wash. 2022).

joint names other than to make a gift of the asset to the community estate. In this case the wife transferred title to obtain a loan on her inherited property to purchase another jointly titled property. Because the wife used her separate inheritance to purchase the jointly titled real estate, the supreme court affirmed the lower court's decision to return to the wife most of the value of the inheritance.[90]

In Vermont, there must be evidence of an "intent to confer an immediate, beneficial ownership," and joint titling of property without consideration does not establish a gift.[91] A wife's property that was jointly titled with her mother was not marital property where the wife's mother placed the wife's name on the deed only to avoid probate. The wife's mother still retained full authority to sell or dispose of the property.[92]

Oregon, by statute, provides that "property acquired by gift to one party during the marriage and separately held by that party on a continuing basis from the time of receipt is not subject to a presumption of equal contribution."[93] However, a court found that the transfer of the husband's parents' business to him was not a gift as defined under the statute where the parties had completely integrated the husband's interest in the business into the parties common marital finances.[94] Instead the business was marital.

The Iowa case of *In re McDermott*[95] addressed division of inheritance and gifts. First, the court noted that all assets that exist at the time of divorce are marital except for gifts and inheritances to one spouse.[96] Premarital property may be divisible since the existence of the property prior to the marriage is just one factor to consider and the property does not automatically get awarded to the person who brought it into the marriage.[97] Gifts or inheritance are generally not dividable unless refusal to divide it is inequitable to the other party or the children of the

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90 *Id.* at 635.

91 Brousseau v. Brousseau, 927 A.2d 773 (Vt. 2007).

92 Mizzi v. Mizzi, 889 A.2d 753 (Vt. 2005).

93 Or. Rev. Stat. § 107.105 (1)(f)(D).

94 Schwindt & Schwindt, 414 P.3d 859 (Or. Ct. App. 2018).

95 *In re* McDermott, 827 N.W.2d 671 (Iowa 2013).

96 *Id.* at 678.

97 *Id.* at 678-79.

marriage.[98] "The donor's intent and the circumstances surrounding the inheritance or gift are controlling factors used to determine whether the inherited property is subject to division as marital property. "[99] Courts look to whether the donor intended the party to be the sole recipient.[100]

In *McDermott*, the husband lived and worked on the farm owned by his parents at the time of the marriage. The property had been in the family since 1943. After marriage, the parties lived on the farm, they had six children, and the husband worked to support the family. His parents later sold the farm to him and the wife for one-half of the value of the farm. The understanding was that the husband would not receive any inheritance from his parents in consideration of this. The parties then acquired the husband's uncle's adjacent farm.

The court articulated various considerations in deciding whether to exempt the gift or inheritance:

> 1) contributions of the parties towards the property, its care, preservation or improvement; 2) the existence of any independent close relationship between the donor or testator and the spouse of the one to whom the property was given or devised; 3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; 4) any special needs of either party; and 5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee.[101]

After consideration of the above factors, the court found that the gifted and inherited properties were made to both the husband and the wife and were marital.

B. *Source of Property*

Some states look at the source of the property when deciding whether to divide it. Kansas takes into consideration the "time, source and manner of acquisition of property."[102] The court can consider how the parties acquired the marital property

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98 Iowa Code § 598.21 (5)(b).

99 *McDermott*, 827 N.W. at 679.

100 *Id.*

101 *In re* Marriage of Goodwin, 606 N.W.2d 315, 319 (Iowa 2000).

102 Kan. Stat. Ann. § 23-2802(c).

and can return to a party property that was acquired by gift or inheritance.[103]

Indiana law presumes that an equal division of marital property between the parties is just and reasonable.[104] However the court "may deviate from the 50-50 statutory presumption if property was brought separately into the marriage, was never commingled with other marital assets, and was never treated as marital asset."[105] Inheritance of one party may be a reason to effectuate an uneven division of property.[106]

Regardless of source, in "all property" states courts often have discretion to divide the separate or inherited property equally when looking at all of the relevant circumstances of the parties. A Massachusetts court held that a husband's interest in a trust was subject to division between spouses.[107] The husband was the beneficiary of a trust, which was comprised of real estate. The parties lived in one apartment in the real estate and the husband's sister lived in the other. The Massachusetts Supreme Court found that the husband had a beneficial interest in the real estate and according to the trust terms he had a vested right to the future receipt of a share in the trust property. Because his interest was vested, it was determined to be a divisible marital asset.[108]

New Hampshire divided separate property in the following situation. The husband and his parents acquired property during the marriage. The husband's parents financed the property by securing a home equity line of credit on their house. Neither the husband nor the wife contributed any money to the purchase of the property. The deed was titled in the husband's and his parents' names. The superior court determined that it had jurisdiction to divide the husband's interest in the real estate even though it was jointly owned with his parents. It was error for the trial court to exclude the property from the marital estate.[109]

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103 *In re* Ballinger, 404 P.3d 355 (Kan. Ct. App. 2017).

104 IND. CODE § 31-15-7-5.

105 Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002).

106 *Id.* at 60.

107 Lauricella v. Lauricella, 565 N.E.2d 436 (Mass. 1991).

108 *Id.* at 439.

109 In the Matter of Routhier, 280 A.3d 260 (N.H. 2022).

These cases illustrate that the primary focus is on achieving an equitable result even if it requires looking beyond the title or the source of the property.

C. *Use of Property*

Real property used by both spouses and/or the children is a consideration in some "all property" states, just as it is in some "intent/not title" states. The court in *Vardaman v. Vardaman*[110] noted that the relevant Alabama code provided that if inheritance or gifts are not used for the common benefit of the parties, the court must not consider them when making a property division. However, conversely, there is no requirement that the court consider the gifts or inheritance even if used for the common benefit of the parties.[111]

D. *Monetary Contributions*

Some courts will consider the substantial contributions of one spouse to pre-marital property of the other spouse when dividing the asset. In a Connecticut case, prior to the marriage, a husband purchased a lot for snowmobiling. He took out a mortgage and later a construction mortgage. The land was used by the wife, and it was cleared by the wife, the husband and their friends. A house was built on the property that was designed by both the husband and the wife. Both parties worked on improving the house. The wife asked the husband to put her name on the property, but the husband refused. The court noted that the wife also made substantial contributions to the paydown of the mortgages. In light of the wife's contributions, the court properly found that the property was divisible and awarded the wife 40% of the value.[112]

E. *Non-monetary Contributions Considered*

Non-monetary contributions to a marriage are a consideration when deciding whether to divide pre-marital, gifted or inherited property. In *In re Marriage of Watkins* the wife brought three properties into the marriage and the husband brought one.

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110 167 So. 3d 342 (Ala. Civ App. 2014).

111 *Id.* at 347.

112 Moyher v. Moyher, 232 A.3d 1212 (Conn. App. Ct. 2020).

Both parties made contributions to the other party's properties that were both monetary and non-monetary.[113] The court found that the husband's nonmonetary contributions to two of the wife's properties, in the form of labor and improvements to the properties, increased the value of these properties. The court found that the wife's minor contribution of flooring and assisting the husband with repairs did not increase the value of the property and therefore did not warrant consideration.

South Dakota also looks to contributions of a non-owner spouse as a factor to consider. In the case of *Halbersma v. Halbersma*,[114] the parties married in 1955. The wife inherited real estate in Brandon, South Dakota in 1986. In 2003, the parties sold their farm and moved into the Brandon residence. The wife filed for divorce two years later. In deciding whether to include inherited property in the marital estate, the court can consider evidence such as "the origin and treatment of inherited or gifted property and the direct or indirect contributions of each party to the accumulation and maintenance of the property." The court noted that the property should be treated as non-marital only when the other spouse has not made any contributions to its acquisition or maintenance and has no need for support.[115] The circuit court awarded the husband one-half of the value of the inherited residence, but excluded the remainder of the inheritance from the marital estate.

F. *Special Consideration to Preserve a Family Farm*

Special considerations have been applied to preserve a family farm in some states.[116] The court in North Dakota recognized the "importance of preserving the viability of a business operation like a family farm and liquidation of an ongoing farming operation or business is ordinarily a last resort."[117] The purpose is to avoid economic hardship if it is sold or divided. Similarly in Wyoming, the family farm was awarded to a husband when it had

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113 *In re* Marriage of Watkins, 501 P.3d 932 (Mont. 2022).

114 775 N.W.2d 210 (S.D. 2009).

115 *Id.* at 215.

116 Tara J. Miller, Note, *Divorce & Farmland: What Is the Best Solution?*, 22 Drake J. Agric. L. 89 (Spring 2017).

117 Rebel v. Rebel, 882 N.W. 256 (N.D. 2016).

been in his family for generations.[118] However, not all decisions reach this conclusion, even within a state. For instance, in a different Wyoming case, *Odegard v. Odegard*, where the husband's grandmother gave a gift of a farm to both the husband and the wife, the Wyoming Supreme Court ruled that the farm was not improperly awarded to the wife.[119]

IV. COMPARING OUTCOMES USING DIFFERENT APPROACHES

This part evaluates the ways in which the different approaches and considerations discussed above compare to one another. Even given all of the equitable considerations, it will become apparent that the various approaches still result in different outcomes. In fact, the use of one approach over the other could result in substantially different monetary awards to each spouse.

For purposes of illustration, consider the application and outcomes of the various approaches and considerations to the following hypothetical:

- Prior to marriage, a husband owns land in his name only.
- The land is worth $200,000 on the date of marriage and there is no mortgage.
- During the marriage, a mortgage in the amount of $200,000 is taken out in the husband's name only to build a marital residence.
- The deed remains titled only in the husband's name.
- Marital assets are used to pay down the mortgage.
- At the date of separation, the marital residence is worth $300,000 and the land is worth $400,000.
- The mortgage loan balance at the date of separation is $100,000.
- The parties lived in the house with their three children for ten years prior to separation.
- Assume that all states would apply a 50/50 division of the assets to the case.

A. *Inception of Title*

Under the inception of title approach, the result would be as follows:

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118 Carter-Wallop v. Wallop, 88 P.3d 1022 (Wyo. 2004).

119 Odegard v. Odegard, 69 P.3d 917 (Wyo. 2003).

- The value of the lot at the date of separation is the husband's separate property- $400,000;
- The value of the house at the date of separation is marital property - $200,000.

The husband receives $500,000 and the wife receives $100,000.

B. *Source of Funds*

Under the source of funds approach, the result would be as follows:

- The value of the lot at the date of separation remains the husband's separate property - $400,000;
- The creation of equity in the residence through the paydown of the mortgage principal and the increase in value of the residence is marital property - $200,000.

The husband receives $500,000 and the wife receives $100,000.

C. *Title not Intent*

Under the title/not intent approach, the result would be as follows:

- The value of the lot at the date of marriage is separate property - $200,000;
- The increase in the value of the lot is marital - $200,000
- The net value of the house is marital property - $200,000

The husband receives $400,000 and the wife receives $200,000.

D. *Intent/not Title*

Under the intent/not title approach, both the lot and the marital residence are 100% marital since both were intended for use by the family. Depending upon the other assets and circumstances of the marriage, the husband may or may not be entitled to a greater share of the value.

E. *All Property States*

In the all-property states, the property is 100% marital property. Depending upon the other assets and circumstances of the marriage, the husband may or may not be entitled to a greater share of the property.

The different outcomes are set forth in the below chart:

	Inception of title	Source of funds	Title not intent	Intent not title	All property states
Husband receives	$500,000	$500,000	$400,000	$300,000	$300,000
Wife receives	$100,000	$100,000	$200,000	$300,000	$300,000

The different methods could result in sizably different amounts of money awarded to each party. While the "inception of title" and "source of funds" states reach the same result in this hypothetical, the two theories are slightly different in that "inception of title" determines the character of property by looking at title at the time the asset is acquired. "Source of funds" recognizes that a property can be both marital and non-marital regardless of when acquired.

While the "intent/not title" and "all property" states may both include all of the property in the marital estate, depending upon the particular state, other factors could cause different divisions. Therefore the results will not always be the same in these two categories of states either. Courts are given considerable discretion and often so long as no abuse of discretion is found, the judges can use their own sense of fairness and equity in dividing the assets.

V. USING CONSIDERATIONS FROM OTHER STATES

All fifty states have discretion to divide the marital assets (and in some states non-marital assets) to effectuate equity and fairness. Therefore, regardless of whether the real estate is characterized as marital or non-marital, the discretion of the state courts provides an opportunity for family law practitioners to use considerations of other states to support their position in their own state. The considerations of the different approaches to hybrid assets are generally 1) how title is held[120]; 2) whether a gift to the marital estate was intended[121]; 2) use of the real estate by

120 *Burrow*, 100 A.3d 1104.

121 Chatten v. Chatten, 334 So.3d 633 (Fla. Dist. Ct. App. 2022).

both spouses and the family[122]; 3) the length of time the asset is comprised of both marital and non-marital portions[123]; 4) the source of the funds used to acquire the asset[124]; 5) the non-economic contributions of either spouse to the preservation, maintenance, and improvement of the real estate,[125] 6) whether the real estate's appreciation is passive or active[126]; and 7) the financial resources of each party.[127]

While not all of these considerations are clearly articulated in each state's case and statutory law, almost any of these considerations could be presented in another state as a factor to be considered when determining how the asset gets divided. For example, in a title/not intent state, while non-economic contributions are not relevant to the character of the asset, arguably they could be considered when determining the percentage division of the asset. Consider the situation where the parties lived in a husband's non-marital real estate during the marriage and the wife contributed her sweat equity to the maintenance and improvement of the residence. A court could weigh these non-economic contributions in the wife's favor when deciding how best to divide the increase in value of this asset.

The Pennsylvania court in *Anthony v. Anthony*,[128] recognized the availability of such arguments when it noted that even though the increase in value of a non-marital asset was treated as a marital asset, it did not necessarily follow that the court was required to equally divide the increase in value. Considerations set forth in the statutory equitable distribution factors could result in a disproportionate division of the assets.[129]

Alternatively, any one of the formulas used in the different states could be presented in a state that does not have a set formula for parsing marital and non-marital portions. The vanishing credit articulated in Bucks County, Pennsylvania could be

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122 A.J.A. v. R-L R. T-A-F, No. CN04-08058, 2005 WL 4674277 (Del. Fam. Ct. Nov. 15, 2005).

123 *Neff*, 2011 Pa. Dist. & Cnty. Dec LEXIS 513.

124 *Boschert*, 73 S.W.3d 869.

125 Pettersen v. Pettersen, 269 So. 3d 466 (Miss. Ct. App. 2018).

126 Parde v. Parde, 979 N.W.2d 788 (Neb. Ct. App. 2022).

127 *Burrow*, 100 A.3d 1104.

128 514 A.2d 91 (Pa. Super. Ct. 1986).

129 *Id.* at 92, n.2.

presented as a methodology to calculate marital and non-marital portions in either all property states or intent/not title states.[130]

Finally, when a particular issue has not been addressed by a state, citing to cases and statutes from other states and explaining the reasoning and rationale behind this law can be used to bolster attorneys' positions in their own state.

These are just some examples of creative advocacy that practitioners can employ to achieve the best possible result for their clients. With a comprehensive understanding of the laws applied to hybrid real estate, practitioners can use this information to further their clients' position.

VI. CONCLUSION

Understanding the different approaches used for hybrid real estate throughout the country adds to the tools in the practitioner's arsenal when making equitable arguments on behalf of a client. While a particular approach may not apply in any given state, advocating for a particular consideration used in other states is an effective means of advocating for the client to achieve fairness and equity.

130 *Neff,* 2011 Pa. Dist. & Cnty. Dec. LEXIS 513.