Taming Transmutation: A Guide to Illinois' New Rules on Property Classification and Division upon Dissolution of Marriage

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Taming Transmutation: A Guide to Illinois' New Rules on Property Classification and Division upon Dissolution of Marriage

This article analyzes the amendment to Illinois' rules on the classification and division of property on dissolution of marriage — explaining its genesis, detailing its provisions and suggesting guidelines for its interpretation in light of the current trends in other states.

By James H. Feldman and Charles J. Fleck[1]

Introduction

House Bill 544, enacted as Public Act 83-129 and effective August 19, 1983, was the response of the state legislature to the Illinois Supreme Court's decisions in *In re Marriage of Smith*[2] and its progeny.[3] These decisions enunciated an extreme theory of transmutation which provided insufficient protection for nonmarital property upon the dissolution of marriage. Mr. Feldman, a critic of these decisions,[4] and Mr. Fleck, former presiding judge of the Domestic Relations Division of the Circuit Court of Cook County, were requested by counsel to the Illinois House Judiciary I Committee to aid in drafting an amendment to section 503 of the Illinois Marriage and Dissolution of Marriage Act[5] (hereafter referred to as IMDMA) that would provide adequate protection to nonmarital property while equitably balancing the interests of both marital partners. The authors worked closely with the legislature throughout the drafting process and the committee hearings.

This guide introduces the amendment to both practitioners and the courts.[6] Many of the questions likely to arise in the early stages of the amendment's applicability are anticipated and answered.[7] The authors' suggestions embody concepts long used in community property states which have more recently been adopted by equitable distribution states.

The decisions in *Smith* and its progeny undercut the property distribution scheme of IMDMA. The cornerstone of this scheme is the "dual system" of property classification, under which property upon dissolution of marriage is classified as belonging to either the nonmarital estate of a spouse or to the marital estate.[8] There are similar systems of classification in all community property states and in many equitable distribution states.[9] In dual classification jurisdictions, each spouse is entitled to retain his or her nonmarital property upon dissolution of a marriage, while the marital property is distributed according to the court's discretion.

This dual system of property classification reflects the partnership theory of marriage, which is at the heart of IMDMA.[10] Marriage is viewed as a partnership between the spouses and all property generated by that partnership is deemed marital and subject to distribution. But property not generated by the partnership, including property acquired by a spouse before the marriage or property acquired by one spouse through gift or inheritance, is treated as separate or nonmarital property and reserved to that spouse.

The benefits of this dual system are many. It comports with the usual expectations of the parties involved. It

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1. The authors gratefully acknowledge the assistance of Jenner & Block associates Robert D. Nachman, Susan B. Cohen, and Joseph G. Gavin in preparing this article.

2. In re Marriage of Smith, 86 Ill. 2d 518, 427 N.E.2d 1239, 56 Ill. Dec. 693 (1981).

3. *See, e.g.*, In re Marriage of Lee, 87 Ill. 2d 64, 430 N.E.2d 1030, 58 Ill. Dec. 779 (1981).

4. *See* J. Feldman & T. Maher, *Classification of Property Upon Dissolution of Marriage: Suggestions for Maintaining Our "Dual System" in the Aftermath of Smith*, ILL.B.J. 100 (1982).

5. ILL. REV. STAT. ch. 40, §§101-802. (Several amendments have been made to IMDMA since its enactment; references herein will be to IMDMA as amended.)

6. H.B. 544 was amended on the House floor at second reading to include the residency requirements of section 401(1) which the authors did not aid in drafting. Thus, the amendment to section 401(1) is not addressed in this guide.

7. This amendment applies to all pending actions on which a judgment disposing of marital and nonmarital property issues has not been entered. *See*, § 801(b).

8. The property's classification is also referred to as its "character" in the case law, and will sometimes be referred to as such in this guide. The term "estate" of property refers to the total pool of marital property and each spouse's pool of nonmarital property; this terminology was used by the Illinois Supreme Court in In re Marriage of Olson, 96 Ill. 2d 432, 451 N.E.2d 825, 71 Ill. Dec. 671 (1983).

9. The dual system is becoming ever more popular among equitable distribution jurisdictions. New Jersey, North Carolina and Pennsylvania adopted it by statute within the last two years. Other jurisdictions utilizing this statutory system include Colorado, Delaware, Kentucky, Maine, Missouri and the District of Columbia. Still others give various forms of protection to nonmarital property, whether by statute or case law. *See, e.g.*, Alaska, Arkansas, Iowa, Maryland, Minnesota, New York, Oklahoma, Rhode Island and Wisconsin.

10. *See*, Historical and Practice Notes to IMDMA, ILL. ANN. STAT. ch. 40 § 503 (Smith-Hurd 1980).

respects the intentions of donors and testators whose gifts or bequests to one spouse will remain the property of the intended beneficiary even if the marriage should dissolve. Moreover, the dual system leads to greater predictability regarding ultimate property distribution, since nonmarital property is generally outside the court's sphere of discretion. Under this system, couples are not dissuaded from getting married by the fear of losing their premarital assets should the marriage fail.[11]

The statutory protection given nonmarital property by dual classification was seriously threatened by the doctrine of transmutation announced in *Smith*. *Smith* held that a commingling of marital and nonmarital property presumptively transmutes the nonmarital property into marital property — all of which is then subject to the court's power of discretionary distribution. The *Smith* rule jeopardized nearly all nonmarital property. Almost every item of property brought into a marriage, or acquired by gift or inheritance during marriage, requires some expenditure for its preservation during marriage. If marital funds were used to maintain or improve the nonmarital property, a transmutation might occur and the owner-spouse could lose the property upon dissolution.

Smith shows how even a small contribution may cause the transmutation of a much larger item of property. In *Smith*, the expenditure of $3,800 in marital funds to improve Mr. Smith's nonmarital building was held to transmute the $45,000 building into marital property. Under the *Smith* rationale, the use of a spouse's salary to make a mortgage payment on a nonmarital house could transmute the entire asset into marital property, regardless of the discrepancy between the slight value of the contribution and the far greater value of the asset.[12] Such a rule renders the concept of nonmarital property illusory.[13]

The *Smith* decision's unprecedented extension of transmutation to the detriment of nonmarital property was widely criticized.[14] In response to these criticisms, the Supreme Court of Illinois attempted to diminish the impact of its decision in *Smith* in *In re Marriage of Olson*.[15] There, the court was faced with a husband who claimed that expending his own labor and investing marital funds to remodel and make mortgage payments on his wife's nonmarital house had transmuted the house to marital property. The court qualified *Smith* by formulating a new test for transmutation:

> The commingling of marital and nonmarital assets, and the contribution of marital assets to nonmarital property must be *sufficiently significant* to raise a presumption of a gift of the property to the marital estate. Thus, the making of or paying for repairs and maintenance on the house that do not materially add to its value or payments that do not reduce the indebtedness of the mortgage should not raise the presumption of transmutation.[16]

This "sufficiently significant" test was an insufficient response. The court set no workable standards for determining the proper threshold of significance, thereby undermining predictability and inviting inconsistent adjudications by poorly guided lower courts.[17] Furthermore, the test did nothing to alter the severity of transmutation. If a trial court finds no transmutation, the original owner is unjustly enriched, able to keep the property plus the contributions of the other spouse; if, on the other hand,

11. This latter consideration is not to be underestimated. It has been projected that almost one-half of the marriages entered into during the 1980s will end in divorce. *See*, Feldman & Maher, *supra* note 4 at 104.

12. *See*, In re Marriage of Smith, 102 Ill. App. 3d 769, 430 N.E.2d 364, 58 Ill. Dec. 422 (1st Dist. 1981); In re Marriage of Parr, 103 Ill. App. 3d 199, 430 N.E.2d 656, 58 Ill. Dec. 624 (2d Dist. 1981). *See also*, Hofmann v. Hofmann, 94 Ill. 2d 205, 446 N.E.2d 499, 68 Ill. Dec. 593 (1983) (wife's labor and funds used to improve husband's nonmarital farm would presumptively transmute the farm to marital property).

13. *See, e.g.*, Feldman & Maher, *supra* note 4 at 101; In re Marriage of Olson, 96 Ill. 2d 432, 440, 451 N.E.2d 825, 829, 71 Ill. Dec. 671, 675 (1983) (strict reading of *Smith* would render the concept of nonmarital property illusory).

14. *See, e.g.*, Feldman & Maher, *supra* note 4; Hall v. Hall, 462 A.2d 1179, 1182 (Me. 1983) (*Smith* approach described as "Procrustean"); Hearings before the Illinois House Judiciary Committee on H.B. 544; *cf.*, Harper v. Harper, 249 Md. 54, 448 A.2d 916 (1982) (*Smith* transmutation theory rejected).

15. In re Marriage of Olson, 96 Ill. 2d 432, 451 N.E.2d 825, 71 Ill. Dec. 671 (1983).

16. *Id.* at 440, 451 N.E.2d at 829, 71 Ill. Dec. at 675 (emphasis added).

17. Indeed, the tests in *Olson* are inconsistent. Repair or maintenance expenditures must *materially* add to the value of property to raise the presumption of transmutation, while mortgage payments need only reduce the indebtedness of the mortgage. A mortgage payment that reduces the principal by a minuscule amount will thus presumptively transmute the mortgaged property.

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Taming Transmutation

(Continued)

the property is transmuted, the original owner may lose all.

The new amendment tames the concept of transmutation as set forth in *Smith* and *Olson*. It alters the rules governing initial classification of property to reflect the partnership theory of marriage. It prevents the otherwise unavoidable transmutation of most nonmarital property by providing that, when marital funds are contributed to nonmarital property, the nonmarital property retains its classification and the marital funds are transmuted to nonmarital. Conversely, if nonmarital funds are contributed to marital property, the marital property retains its classification and the nonmarital funds are transmuted. Then, to fairly compensate for contributions by one estate to another, and eliminate the unfairness of transmutation, the amendment provides rights to reimbursement for the contributing estate.

Specifically, the amendment changes former law by providing that:

1. The increase in value of nonmarital property, however achieved, is classified as nonmarital property, subject to the right to reimbursement. (§ 503(a)(7))
2. The income from nonmarital property, if not attributable to the personal effort of a spouse, is also nonmarital. (§ 503(a)(8))
3. When property from one estate has been contributed to property from another estate so that the contributed property loses its identity, the contributed property is transmuted into the character of the recipient estate, subject to a right to reimbursement. (§ 503(c)(1))
4. When items of property from different estates have been commingled into newly acquired property so that each loses its identity, the newly acquired property is marital property, subject to a right to reimbursement. (§ 503(c)(1))
5. When one estate of property, whether marital or nonmarital, has contributed property to another estate, the contributing estate is entitled to reimbursement from the recipient estate, provided that the contribution is traceable and was not a gift. (§ 503(c)(2))
6. When one spouse has contributed personal effort to nonmarital property, the marital estate shall be entitled to reimbursement if the effort was significant and resulted in substantial appreciation of the nonmarital property. (§ 503(c)(2))
7. The rights to reimbursement are not affected by any transmutation of the character of property provided for in section 503(c)(1). (§ 503(c)(2))
8. Reimbursement may be made out of the marital property to be divided or by imposing a lien on nonmarital property. (§ 503(c)(2))

"The statutory protection given nonmarital property by dual classification was seriously threatened by the doctrine of transmutation."

I. Classifying Property

General Scheme: Under the amendment, as under the original statute, each item of property is classified as belonging to one and only one estate.[18] The character of an item is fixed as of the time it is first acquired,[19] and it retains that classification unless transmuted by gift or by commingling with property from another estate. Section 503(c)(1) specifies which types of commingling bring about transmutation and section 503(c)(2) specifies which types of transmutation give rise to rights to reimbursement.

Underlying Rules of Classification: Income and Appreciation: Section 503(a) sets forth the basic rules of classification. Two new sections have been added. Section 503(a)(7) provides that the increase in value of nonmarital property will be nonmarital, though there may be a right to reimbursement if the increase in value is caused by the contribution of marital property or the efforts of a spouse during marriage. Section 503(a)(8) provides that income from nonmarital property is nonmarital, unless that income resulted from the labor of a spouse during marriage.[20] These provisions reflect the partnership theory of marriage in that the fruits of marital efforts or property are deemed to belong to the marital estate since they are products of the partnership, while appreciation and income not resulting from marital effort or property remain nonmarital.

Examples: (1) Nonmarital property, valued at $10,000 at the time of marriage, has appreciated in value to $15,000 due solely to inflation and

18. This point was made explicit in In re Marriage of Komnick, 84 Ill. 2d 89, 417 N.E.2d 1305, 49 Ill. Dec. 291 (1981) and Bentley v. Bentley, 84 Ill. 2d 97, 417 N.E.2d 1309, 49 Ill. Dec. 295 (1981).

19. The literature discussing division of marital property identifies two competing rules for classifying property as marital or nonmarital. The "inception of title" rule fixes the classification of property as of the time title is first acquired; this classification is unaffected by subsequent contributions to the property. Under this rule, each item of property must be completely marital or completely nonmarital. The "source of funds" rule regards the acquisition as taking place over time, so that each contribution to an item of property is treated as a new acquisition whose character is determined by the source of funds used to make the contribution. Under this rule, both the marital and the nonmarital estates may have a percentage ownership interest in the same item of property.

A given state's property division scheme usually includes one of these rules of property classification and other rules regarding establishing and valuing rights to reimbursement. A state's approach to property classification can only be evaluated in light of all of its rules working together. Thus, Illinois' "inception of title" rule of property classification, combined with the new amendment's rules regarding rights to reimbursement, yields results very similar to those that would be found in many "source of funds" states. For example, assume that a husband purchased a house before marriage by making a small downpayment and taking out a large mortgage. During marriage, mortgage payments are made out of marital funds. Under Illinois law, the entire house would be classified as nonmarital upon dissolution, but the marital estate would have a right to reimbursement measured, under the rules recommended in part III *infra*, by the percentage of the equity in the house paid for by marital funds. In most "source of funds" states, each mortgage payment would be deemed to have purchased marital equity in the house, and the marital estate's ownership interest in the house would equal the percentage of total equity represented by the marital contributions. In either case, the division of assets between the marital and nonmarital estates will be essentially the same, though determined by different methods. *See generally*, W. De Funiak & M. Vaughn, *Principles of Community Property* (2d Ed. 1971); W. S. McClanahan, *Community Property Law in the United States*, chapter 6 (1982); 15A *Am. Jur. 2d Community Property* (1976); W. Reppy & C. Samuel, *Community Property in the United States* (2d Ed. 1982); Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157 (1978); Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. Rev. 247 (1983).

20. This is the so-called American Rule, which is the law in Arizona, California, Nevada, New Mexico and Washington. Illinois law has been inconsistent on this subject. *Compare*, In re Marriage of Reed, 100 Ill. App. 3d 873, 427 N.E.2d 282, 56 Ill. Dec. 202 (5th Dist. 1981) (income from nonmarital property classified as marital property) *with* In re Marriage of Jones, 104 Ill. App. 3d 490, 432 N.E.2d 1113, 60 Ill. Dec. 214 (1st Dist. 1982) (income generated by nonmarital trust and reinvested in trust classified as nonmarital).

other market forces. The $5,000 appreciation is nonmarital and not reimbursable to the marital estate, since the appreciation was due to factors external to the marriage.

(2) Same as example 1, but the appreciation resulted from a new addition funded out of the marital estate. The marital estate is entitled to reimbursement.

(3) A nonmarital certificate of deposit produces $5,000 annually in interest income. This income is nonmarital.

(4) Husband and/or wife work on the wife's nonmarital farm, which produces $5,000 in income. This income is marital property.

When the classification of property changes: Interspousal gifts have always been acknowledged under Illinois law, and are permitted under the property scheme of IMDMA.[21] Actual gifts between spouses, or between one spouse and the marital estate, will bring about transmutation in accord with the parties' intentions. In determining whether an interspousal transfer is a gift, consider the presumptions concerning gifts discussed in part II below.

Aside from actual gifts, property may be transmuted in two other ways under section 503(c)(1).[22] First, if an item of property from one estate is contributed to an item of property from another so that the contributed property loses its identity, the contributed property is transmuted into the character of the recipient estate. Second, if items of property from two different estates are combined to acquire new property resulting in loss of identity of the original contributions, the new property is marital. In either case, the contributing estate may be entitled to reimbursement notwithstanding the transmutation.

Examples: (1) A husband's nonmarital funds are used to improve the family home which is marital property. The husband's contribution is transmuted to marital property.

(2) A husband and wife each sell their nonmarital homes and use the sale proceeds to jointly purchase a new home. The new home is transmuted to marital property.

Identity and transmutation: Section 503(c)(1) applies only to those transfers in which the contributed property loses its identity. If the contributed property retains its identity, then it is transmuted only if found to be a gift. Fungible property, such as cash, loses its identity whenever combined with or contributed to other like property. However, where nonfungible items are combined, it is possible for each item to retain its identity and its classification. Thus, when an item is deemed to have retained its identity, there is no right to reimbursement created in favor of the contributing estate since the item itself can be returned to the contributing estate.

Examples: (1) A nonmarital cow with the wife's brand is sent to graze with the marital herd. No gift is intended. The cow remains the wife's nonmarital property since it remains identifiable by its brand.

"If the contributed property retains its identity, then it is transmuted only if found to be a gift."

(2) The husband deposits his nonmarital cash into a marital bank account. The cash, being fungible, is no longer identifiable and is transmuted to marital property, subject to a possible right to reimbursement to the husband's nonmarital estate.

(3) The wife deposits her salary checks into her nonmarital bank account. This money is transmuted to nonmarital property, subject to a possible right to reimbursement to the marital estate.

II. Establishing Rights to Reimbursement

Section 503(c)(2) provides: "When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to nonmarital property," a right to reimbursement is created in favor of the contributing estate, "provided that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift . . ."[23] This language suggests a two-step inquiry in determining whether a right to reimbursement has been created. First, was there a contribution made by one estate of property to another which can be *traced* by clear and convincing evidence? Second, if a clearly traceable contribution has been made, was it intended as a *gift?*

Tracing: Tracing focuses on identifying the source of funds used to acquire the ultimate asset remaining at the time of division of the property. The initial source of funds may still control the asset's ultimate classification, even though several transformations may have occurred between the initial acquisition and the ultimate division. Principles of tracing are used in many other branches of law, such as commercial and probate, and have also been recognized in equitable proceedings.[24]

Section 503(c)(2) places the burden of proof on the spouse seeking to establish the right to reimbursement. That spouse must be able to trace the contribution from either the marital property or the nonmarital property by clear and convincing evidence.[25]

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21. *See, e.g.*, In re Marriage of Severns, 93 Ill. App. 3d 122, 416 N.E.2d 1235, 48 Ill. Dec. 713 (4th Dist. 1981).

22. Section 503(c)(1) refers to the commingling of marital and nonmarital property, and was intended to comprehend situations where one spouse's nonmarital property is commingled with the other's nonmarital property.

23. The right to reimbursement is an important part of the property division law of most other states. It also has a remote analogue in the special equities doctrine of pre-IMDMA Illinois law. (ILL. REV. STAT. ch. 40, § 18 (1975).) However, the special equities doctrine was based upon the common law title system rather than the equitable distribution system, which has at its heart the partnership theory of marriage. Therefore, it is not expected that special equities case law will be applicable as precedent under the new amendment.

24. Tracing proceeds provided for in the Uniform Commercial Code allows a secured party to maintain initial security interest in a debtor's property even though the ultimate asset is several steps removed from the collateral which the debtor initially pledged. (UCC 9-306.) In probate proceedings, the court looks to the source of funds used to acquire property held in joint tenancy to determine how much of the property should be included in the decedent's gross estate for tax purposes. (Internal Revenue Code, section 40.) Under Illinois trust law, a constructive trust may be imposed on funds which can be traced to the bank account of a gratuitous transferee, even though other funds have been commingled in the account. LaBarbera v. LaBarbera, 116 Ill. App. 3d 959, 452 N.E.2d 684, 72 Ill. Dec. 431 (1st Dist. 1983).

25. "[C]lear and convincing evidence is considered to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense." In re Estate of Ragen, 79 Ill. App. 3d 8, 14, 398 N.E.2d 198, 203, 34 Ill. Dec. 523, 528 (1st Dist. 1979). The recent amendment to section 610 of IMDMA provides that a "clear and convincing" standard be used to evaluate requests for modification of child custody judgments. ILL. ANN. STAT. ch. 40, § 610(b) (Smith-Hurd Cum. Supp. 1983-84). *See also*, In re Marriage of Wechselberger, 115 Ill. App. 3d 779, 450 N.E.2d 1385, 71 Ill. Dec. 506 (2d Dist. 1983).

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Gift Presumptions: Where a particular item of property has received a contribution of property from another estate, and the contribution is traced, it must still be determined whether that contribution was a gift, for the contributing estate will only be entitled to reimbursement if its contribution was not a gift. On the subject of interspousal transfers generally, since the donative intent of the contributing spouse is often difficult to ascertain, courts and legislatures have developed gift presumptions which are controlling unless rebutted by clear and convincing evidence.

Under Illinois law, it is expected that two different presumptions will operate, in the context of the new amendment, to determine whether a contribution from one estate of property to another is a gift — in which case there would be no right to reimbursement. First, at common law, transfers between spouses are presumed to be gifts, unless proved otherwise by clear and convincing evidence.[26] Second, under section 503(b), "property acquired by either spouse after the marriage . . . including nonmarital property transferred into some form of coownership between the spouses, is presumed to be marital property."

Applying these presumptions to contributions between estates, when *marital* property is contributed to nonmarital property, the presumption of marital property overcomes the common law presumption of gift, and the contribution will be presumed not to be a gift.[27] The marital estate is presumptively entitled to reimbursement, the measure of which is discussed in part III which follows. Conversely, when *nonmarital* property is contributed to marital property or to nonmarital property of the other spouse, there is no associated presumption of marital property to consider; thus, the common law presumption of gift controls and there is presumptively no right to reimbursement.

Simply stated, these rules may be formulated as follows:

Recommended Rules: A contribution of marital property to property of another estate is presumed not to be a gift and thus reimbursable to the marital estate; but a contribution of nonmarital property to property of another estate is presumed to be a gift which is not reimbursable.

Examples: (1) A husband uses his nonmarital funds to make mortgage payments on the family home, which is held in joint tenancy and is marital property. These payments are presumed to be gifts to the marital estate, and the husband must rebut this presumption by clear and convincing evidence to establish a right to reimbursement.

(2) A wife uses her salary earned during marriage (marital property) to make mortgage payments on her husband's nonmarital vacation home. These payments are presumed not to be gifts because of the overriding presumption of marital property; the marital estate presumptively will be entitled to reimbursement.

(3) A husband uses his nonmarital funds to build a room addition to his wife's nonmarital home. The contribution will be presumed to be a gift to the wife's nonmarital estate. The husband may establish a right to reimbursement by proving that he did not intend his contribution as a gift.

III. Valuing Rights to Reimbursement

After the court has established a right to reimbursement, it must determine the amount to be reimbursed. All community property states and several equitable distribution states, such as Kentucky, Maine, Maryland and Missouri, have developed rules for valuing the amount of reimbursement. These rules are usually not in the form of strict mathematical equations, nor are they ironclad principles from which courts never deviate. Instead, they are used primarily as guidelines for the courts to follow as they try to do "substantial justice" between the parties.[28] Illinois courts will likely adopt similarly flexible approaches to reimbursement that: (1) fairly compensate the estate which has contributed funds or efforts to the property of another estate; (2) effectuate the usual expectations of spouses, and (3) keep the law as simple as possible.[29] Based on these three considerations, and in light of precedents from other states,[30] this guide recommends valuation rules for several frequently encountered situations requiring reimbursement: improvements, discharge of indebtedness, maintenance expenses, fungible assets such as bank accounts, and personal efforts.[31]

A. Improvements

Recommended Rule: Where property of one estate has been improved by a contribution from

26. Scanlon v. Scanlon, 6 Ill. 2d 224, 127 N.E.2d 435 (1955); In re Marriage of Severns, 93 Ill. App. 3d 122, 416 N.E.2d 1235, 48 Ill. Dec. 713 (4th Dist. 1981); Coates v. Coates, 64 Ill. App. 3d 914, 381 N.E.2d 1200, 21 Ill. Dec. 656 (3d Dist. 1978).

27. This rule accords with the marital property presumption of section 503(b), which is central to the IMDMA property distribution scheme. Prior Illinois decisions have held, likewise, that the section 503(b) marital property presumption overcomes the common law presumption of gift. Thus, property acquired in co-ownership during marriage which is later placed in the name of one spouse, is presumed to be marital. In re Marriage of Wittenauer, 103 Ill. App. 3d 53, 430 N.E.2d 625, 58 Ill. Dec. 593 (5th Dist. 1981); In re Marriage of Severns, 93 Ill. App. 3d 122, 416 N.E.2d 1235, 48 Ill. Dec. 713 (4th Dist. 1981).

Other equitable distribution jurisdictions have similar rules. *See, e.g.*, Carter v. Carter, 419 A. 2d 1018 (Me. 1980); Conrad v. Bowers, 533 S.W. 2d 614 (Mo. App. 1975). Some of the equitable distribution states have provided by statute that interspousal gifts are presumed to be marital property. *See* N.Y. D. R. L. § 236(d)(1) (McKinney Supp. 1981); N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1982).

28. *See, e.g.*, Honnas v. Honnas, 133 Ariz. 39, 648 P.2d 1045, 1046-1047 (1982); Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878, 881-883 (1981).

29. Although for clarity's sake this guide uses examples in which property is valued at a specific dollar amount, the courts need not be this precise in valuing rights to reimbursement. The amendment is likely to be construed consistent with the well established rule that there is no requirement that the court place a specific value on each item of property, but only that there be competent evidence of value and that the court's division of property be supported by the evidence. *See, e.g.*, In re Marriage of Miller, 112 Ill. App. 3d 203, 208, 445 N.E.2d 811, 815, 68 Ill. Dec. 167, 171 (1st Dist. 1983).

30. Because the authors view the "inception of title"/"source of funds" distinction as being of little significance in determining reimbursement rules applicable to commingled property, and because most states do not draw firm distinctions in their own opinions, we do not distinguish between these jurisdictions in the footnotes that follow. Precedents from a "source of funds" state may be equally applicable as those from an "inception of title" state.

The distinction between "equitable distribution" in common law states and "community property" is of much older vintage than the inception of title/source of funds distinction, and may reflect a more fundamental difference in orientation. For this reason, we have separated precedents from these two types of jurisdictions in the succeeding footnotes. However, since there has been increasing convergence between the two systems, the community property states' decisions should be regarded as of equal precedential value as those from other states.

31. Pension rights have not been treated as a separate topic in this guide because their classification is unaffected by the new amendment: pension rights accrued before marriage are nonmarital property, while rights accrued during marriage are marital property. *See, e.g.*, In re Marriage of Wisniewski, 107 Ill. App. 3d 711, 437 N.E.2d 1300, 63 Ill. Dec. 378 (4th Dist. 1982). *See also*, In re Marriage of Rister, 512 S.W.2d 72 (Tex. Civ. App. 1974); Donovan v. Donovan, 25 Wash. App. 691, 612 P.2d 387 (1980).

another estate, the contributing estate will be reimbursed for the value added to the recipient property as a result of the contribution.

This rule provides that the contributing estate be reimbursed the "value added" or the enhancement in value caused by the improvements. In the usual instance, the value added is calculated when property rights are determined by the court. This rule accords with the partnership theory of marriage by permitting the contributing estate to receive the benefits of its contribution unlimited by amount expended. Indeed, a contrary rule would prevent the marital estate, which has contributed to a nonmarital estate, from sharing in any increase in value of the nonmarital property, and might encourage a more sophisticated spouse to divert marital funds into improving his or her nonmarital property at the expense of the marital estate. The recommended rule is followed by most states which have considered the issue.[32]

"The value-added rule accords with the partnership theory of marriage, permitting the contributing estate to receive the benefits of its contribution, unlimited by amount expended."

Example: A wife uses $10,000 of her nonmarital funds to add a room addition to the family house which is marital property. At the dissolution, the house has appreciated to $100,000 and the evidence at trial establishes that roughly 20 percent of this value is due to the room addition. Under the value-added approach, the wife's right to reimbursement would be valued at 20 percent of the ultimate value of the house — which is 20 percent of $100,000 — or $20,000.

B. *Discharge of indebtedness*

Recommended Rule: Where property from one estate has been used to discharge indebtedness of property of another estate, the contributing estate will be reimbursed its proportionate share of the equity in the property.

This rule reimburses to an estate which has paid the mortgage or otherwise helped discharge the indebtedness of another estate its proportionate share of the equity in the property upon the dissolution of the marriage. Like the recommended rule for improvements, this rule accords with the partnership theory of marriage; it entitles the contributing estate to its share of any increase in value by allowing it a proportionate return on its investment. And because the rule permits the marital estate a proportionate return on its investment, it creates no incentive for a spouse to divert marital funds toward payment of indebtedness on his or her own nonmarital property. In addition, this rule is more equitable than one limiting the amount of reimbursement to amounts expended, since it recognizes the effects of contemporary economic conditions, such as inflation.[33]

In determining the amount of equity in property which has been partially paid for with funds from a separate estate, payments for interest and taxes have usually not been included, since they do not increase the amount

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32. Although few equitable distribution states have addressed this question of reimbursement for improvements, recent supreme court decisions of Maine and Maryland have followed the valued added-approach to reimbursement. *See.* Hall v. Hall, 462 A.2d 1179 (Me. 1983); Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982). Most community property states follow the value-added approach as well. *See, e.g.*, Honnas v. Honnas, 133 Ariz. 39, 648 P.2d 1045 (1982); Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979); Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976); Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973); Portillo v. Shappie, 97 N.M. 59, 636 P.2d 878 (1981); Burton v. Bell, 380 S.W.2d 561 (Tex. 1964); Villarreal v. Villarreal, 618 S.W.2d 99, 101 (Tex. Civ. App. 1981); Daniels v. Daniels, 490 S.W.2d 862 (Tex. Civ. App. 1973); Elam v. Elam, 97 Wash. 2d 811, 650 P.2d 213 (1982). *See generally,* Bartke, *Yours, Mine and Ours — Separate Title and Community Funds,* 21 BAYLOR L. REV. 137, 147-48 (1969); De Funiak & Vaughn, *supra* note 19 at § 73; McClanahan, *supra* note 19 at 615.

33. A proportionate approach to reimbursement for mortgage payments has been followed in several of the equitable distribution states. *See, e.g.*, Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. App. 1981) (parties' interests are proportional to their respective contributions to the total equity in the property); Woosnam v. Woosnam, 587 S.W.2d 262, 264 (Ky. App. 1979); Harper v. Harper, 294 Md. 54, 448 A.2d 916, 929 (Md. App. 1982); Rickelman v. Rickelman, 625 S.W.2d 901 (Mo. App. 1981). *See also,* Landay v. Landay, 429 So. 2d 1197 (Fla. 1983) (proportional approach to reimbursement applied under special equities doctrine); M. Kalcheim & I. Shapiro, *Transmutation and Commingling: The Supreme Court's Rebuttable Presumption of Marital Property,* 71 ILL. B.J. 220 (1982). Several community property states have also followed this approach. *See, e.g.*, In re Marriage of Moore, 28 Cal. 3d 366, 371-72, 168 Cal. Rptr. 662, 664, 618 P.2d 208, 210 (1980); In re Marriage of Jafeman, 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483, 491 (Cal. App. 1972); Elam v. Elam, 97 Wash. 2d 811, 650 P.2d 213, 216 (1982).

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of equity in the property. Such payments have been reimbursed, however, as maintenance expenditures. (See section C of this part III, which follows.[34])

Example: A husband purchases a $50,000 home just prior to marriage with $10,000 of nonmarital funds as a downpayment and a $40,000 mortgage. All mortgage payments are made with marital funds. Upon the dissolution, the principal mortgage balance is reduced by $20,000, and the house is valued at $80,000 — creating an equity of $60,000. The nonmarital estate has contributed $10,000 to the equity in the home; the marital estate has contributed $20,000. Therefore, the nonmarital and marital estates have a 1/3 and 2/3 interest in the home, respectively, and the marital estate would be reimbursed $40,000 — its proportionate share of the $60,000 equity in the home.

C. *Maintenance expenses*

Recommended Rule: Where property of one estate has been maintained by a contribution from another estate, the contributing estate will be reimbursed the amount of the contribution if and only if it has not already been compensated.

This rule permits reimbursement for contributions by one estate of property to another for maintenance expenditures so long as the contributing estate has not been otherwise compensated. Maintenance expenditures are those used to keep up or preserve property rather than to improve property, and include payments for such things as taxes, interest, insurance and repairs. Reimbursement for maintenance expenses will be denied in most cases, since an estate paying for maintenance will usually have derived some benefit from its contribution; reimbursement would otherwise give the contributing estate a double recovery.[35] Where the contributing estate has received no benefit from the contribution, reimbursing the estate the amount of its contribution should be adequate compensation.[36]

Examples: (1) A wife uses her nonmarital funds to pay taxes on the family home, which is marital property. A husband uses his nonmarital funds to pay for routine home repairs. Since both spouses benefit from the home, neither is entitled to reimbursement.

(2) The husband owns a nonmarital house in which his parents live rent-free. Marital funds used to repair or maintain the house will be reimbursed because the marital estate has not received a benefit from the house.

D. *Bank accounts and other fungible assets*

Recommended Rule: When one estate contributes fungible assets to like assets of another estate, as when nonmarital funds are deposited in a marital bank account, and withdrawals have been made from the commingled mass, the contributing estate is entitled to reimbursement in the amount of its contribution less any withdrawals made for the benefit of the contributing estate.[37]

Fungible assets which have been contributed to fungible assets of another estate may be reimbursable to the contributing estate. To calculate the amount to be reimbursed, subtract from the total amount of one estate's contributions the amount of withdrawals for the benefit of that estate.[38] If the purpose of a particular withdrawal cannot be ascertained, it should be presumed that withdrawals during the marriage are for marital purposes. Just as all property acquired during marriage is presumed to be marital property, this rule presumes that all funds expended during marriage are used for marital purposes. The presumption is, of course, rebuttable. These rules accord with the practice of many community property states.[39]

Examples: (1) At dissolution of marriage, the parties have a joint bank account with a $10,000 balance. The joint account is presumed to be marital property under section 503(b). This account was opened during the marriage with the husband contributing $8,000 of inherited funds (his nonmarital property) and the wife contributing $6,000 she had saved from her salary earned during marriage (marital property). Of this $14,000 total, $4,000 was withdrawn from the account to pay family expenses — leaving the $10,000 balance. Since none of the account was used for the husband's nonmarital purposes, his nonmarital estate will be entitled to an $8,000 reimbursement (plus a proportionate share of any interest earned on these funds).

(2) Same as example 1, except that the $4,000 in withdrawals was used to make mortgage payments on the husband's nonmarital property. Such withdrawals will reduce the amount reimbursable to the husband's nonmarital estate from $8,000 to $4,000.

34. The rationale for excluding payments for interest and taxes has been articulated as follows:

> Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage. The value of real property is generally represented by the owners' equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it.

In re Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208, 211; Krauskopf, *Marital Property at Marital Dissolution*, 43 Mo. L. Rev. 157, 180 (1978).

35. This rule is supported by former Illinois law, which provided that making or paying for repairs and maintenance did not raise the presumption of transmutation. In re Marriage of Olson, 96 Ill. 2d 432, 451 N.E.2d 825, 71 Ill. Dec. 671, 675 (1983). In addition, because spouses are obligated under law to support the family, this rule avoids a rule at odds with legal obligations for support.

36. Such a reimbursement approach exists in those community property states which follow the new Illinois rule that income from nonmarital property is nonmarital (except for income from personal efforts). *See, e.g.*, Tester v. Tester, 123 Ariz. 41, 597 P.2d 194 (1979); Hanrahan v. Sims, 20 Ariz. App. 313, 512 P.2d 617 (1973); In re Marriage of Moore, 28 Cal. 3d 366, 168 Cal. Rptr. 662, 618 P.2d 208 (1980); Merkel v. Merkel, 39 Wash. 2d 102, 234 P.2d 857 (1951); Baxter, *Community Property* § 16:2 at 246 (1973). In those community property states where income from nonmarital property is marital property, maintenance expenses are always denied on the ground that the community has been compensated by receiving the income from the property. *See* Bartke, *supra* note 32.

37. If the assets have been drawing interest which has been reinvested, the right to reimbursement should be enhanced by the share of the interest earned by the contributions from the contributing estate.

38. Courts may look for guidance on the definition of marital purpose to the Family Expense Statute and cases decided thereunder. Ill. Ann. Stat. ch. 40, § 1015 (Smith-Hurd 1980, 1983-84 Cum. Supp.). *See also*, Lyman v. Harbaugh, 117 Ill. App. 3d 732, 453 N.E.2d 906, 73 Ill. Dec. 81 (4th Dist. 1983).

39. *See*, McClanahan, *supra* note 19, at 6:8; Comment, *Community Property: Commingled Accounts and the Family-Expense Presumption*, 19 Stan. L. Rev. 661 (1967); Harris v. Ventural, 582 S.W.2d 853, 855 (Tex. Civ. App. 1979); 15A Am. Jur. 2d § 64 at 689. What constitutes a community purpose has frequently depended on the wealth and standard of living of the spouses. Hicks v. Hicks, 211 Cal. App. 2d 144, 160, 27 Cal. Rptr. 307, 317 (1962). Likewise, if commingled funds are used to retire separate (i.e., nonmarital) obligations, the separate funds are presumed to have been expended, with the community funds remaining in the account. *Id.*, Blaine v. Blaine, 63 Ariz. 100, 159 P.2d 786 (1945); *Hicks*, 211 Cal. App. 2d at 158, 28 Cal. Rptr. at 316. *See*, Estate of Goodhew, 174 Cal. App. 2d 75, 344 P.2d 63 (1959) (separate expenditures include repayment of loans of separate funds, payment of taxes on separate income, payment of premiums on separately owned life insurance policies and the construction of improvements on separate land).

E. *Personal efforts*

Recommended Rule: Where significant personal efforts have been expended on nonmarital property during marriage, resulting in substantial appreciation of the nonmarital property, the marital estate will generally be reimbursed for these efforts.

The recommended rule allows the marital estate to be reimbursed for the efforts of the spouses expended on nonmarital property during marriage. To avoid *de minimus* claims, the legislature provided that no reimbursement may be made unless the personal effort "is significant and results in substantial appreciation of the nonmarital property." (§ 503(c)(2))

If there have been significant personal efforts which have resulted in substantial appreciation, the court must determine what reimbursement is due to the marital estate. In making this determination, courts in community property states usually apply one of two principal methods to determine the amount of reimbursement to the community. Both methods follow the general rule that if the spouse's labor or industry has contributed to the increase in value, then the community should share in the increase in proportion to the community's contribution to the increase. The choice of method has usually depended on which approach would best achieve substantial justice between the parties.[40]

These community property methods derive their names from California case law. The *Pereira* rule[41] assumes that the separate property has produced interest income at a reasonable rate of return and allocates to the separate property such reasonable interest; any greater increase in value is community property.[42] The *Van Camp* rule[43] assumes a reasonable wage or salary has been earned and allocates to the community property the accumulation of that salary; any greater increase in value is separate property.[44]

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40. *See.* W. De Funiak & M. Vaughn, *Principles of Community Property* § 72 at 165-168 (2d ed. 1971).

41. *See.* Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909).

42. *See also,* McElyea v. McElyea, 49 N.M. 322, 163 P.2d 635 (1945); Beam v. Bank of America, 6 Cal. 3d 12, 19, 98 Cal. Rptr. 132, 142 (1971); 15A Am. Jur. 2d *Community Property,* § 38 at 661.

43. *See.* Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921).

44. *See.* Tassi v. Tassi, 160 Cal. App. 2d 680, 325 P.2d 872 (1958); Beam v. Bank of America, *supra* note 42; McClanahan, *supra* note 19 at 357-358.

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Thus, reimbursement for personal efforts under the *Van Camp* rule frequently depends on whether the party has already been compensated.[45]

The *Van Camp* approach assures the community estate of a minimum return (fair salary) even if gains are very small, but does not let the community share in exceptionally large gains. The interest of the separate estate "floats" with the comparative profit-success of the business. *Van Camp* is unfavorable to the community if the business has been unusually profitable. *Pereira*, however, limits the separate estate's return and lets the community's return "float" with the ups and downs of the business. *Pereira* is favorable to the separate estate in times of small gain and to the community when profits are large.[46]

Examples: (1) A husband labors to build a room addition to his wife's nonmarital property with materials paid for out of her nonmarital property. If, upon dissolution of marriage, the addition is valued at $10,000 more than the cost of materials adjusted for inflation, the marital estate has a right to reimbursement of $10,000.

(2) During marriage, a wife works at her business, acquired before marriage, and is paid a salary of $50,000 per year by the business. Under the *Pereira* rule, the court would award the nonmarital estate a reasonable rate of return, and would grant the marital estate a right to reimbursement equal to the excess increase in value which is attributed to the wife's efforts. Under the *Van Camp* rule, if the salary is reasonable compensation for the wife's efforts, the nonmarital business need not further reimburse the marital estate, since the wife's salary during marriage is marital property and the marital estate has thus already been compensated.

(3) A husband works a full-time job and spends a few hours each week managing an investment portfolio of nonmarital stocks. This effort should not be considered sufficient to make any part of the dividend income marital property, or to create a right to reimbursement to the marital estate for any of the increase in value of the portfolio.

IV. Division of Property

Section 503(d) directs the court to assign the nonmarital property to the appropriate spouse, and then to equitably divide the marital property. The new right to reimbursement created by the legislature preserves this basic scheme, although achieving the property division differs in certain respects. We recommend a four-step process in dividing the property consistent with the amendment:

STEP 1: The court first values all property and classifies it into its proper estate.[47] The court will employ the definitions in section 503(a) and (b), and the principles of transmutation in section 503(c)(1). (The classification of property is discussed in part I, above.)

Example 1: At trial, the evidence reveals the following at the time of dissolution:

(a) The wife acquired a house before marriage, which is valued at $100,000. Under section 503(a)(6), the house is the wife's nonmarital property.

(b) An $8,000 car was purchased during marriage with a downpayment of marital funds. The car is held in the husband's name only. Under section 503(b), the car is presumed to be marital property. Assuming that the husband has not been able to prove that the car was intended as a gift to him, the car is marital property.

(c) A bank account held by the parties in joint tenancy is valued at $20,000. Under section 503(b), property held in co-ownership is presumed to be marital. Thus, unless the presumption is rebutted, the account is marital property, regardless of the origin of the money in the account.

(d) Home furnishings purchased during marriage are worth $15,000. Barring evidence to the contrary, they are marital property.

(e) $10,000 was inherited by the wife during marriage and these funds were invested separately in a treasury bill. Although this property was acquired during the marriage, and is presumed marital under section 503(b), assume that the wife has proved that she acquired the treasury bill in exchange for her inheritance. Thus, she has rebutted the presumption of marital property by complying with section 503(a)(2), and so these funds are the wife's nonmarital property.

(f) A business which the husband owned and operated before marriage is valued at $70,000. Under section 503(a)(6), this is the husband's nonmarital property.

The initial classification and valuation of property may thus be depicted as shown in Table 1 below.

45. *See*, Baum v. Baum, 120 Ariz. 140, 584 P.2d 604 (1978); Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979); Luçini v. Lucini, 97 Nev. 213, 626 P.2d 269 (1981); Michelson v. Michelson, 89 N.M. 282, 551 P.2d 638 (1976); Hamlin v. Merlino, 44 Wash. 2d 851, 272 P.2d 125 (1954), McClanahan, *supra* note 19 at 358.

46. In the equitable distribution state of Kentucky, one of the few such states which has explicitly considered this question, the measure of reimbursement is the increase in value of the nonmarital property attributable to the personal efforts. *See, e.g.*, KY. REV. STAT. §403.190(2)(e); Stalllings v. Stallings, 606 S.W.2d 163, 164 (Ky. 1980); Smith v. Smith, 497 S.W.2d 418 (Ky. 1973); Sharp v. Sharp, 491 S.W.2d 639, 64[illegible]y. 1973); Allen v. Allen, 584 S.W.2d 599, 601 (Ky. App. 1979).

47. Both the marital and the nonmarital property must be valued. *See, e.g.*, In re Marriage of Thornton, 89 Ill. App. 3d 1078, 412 N.E.2d 1336, 45 Ill. Dec. 612 (1st Dist. 1980). However, specific findings of value are not required, and the valuation may be approximate. *See*, note 29 *supra*.

Table 1: Initial Classification of Property

	Marital Estate	*Husband's Nonmarital Estate*	*Wife's Nonmarital Estate*
(a)			$100,000 (house)
(b)	$ 8,000 (car)		
(c)	20,000 (bank account)		
(d)	15,000 (furnishings)		
(e)			10,000 (treasury bill)
(f)		$70,000 (business)	
	$43,000	$70,000	$110,000

STEP 2: The court then determines the rights to reimbursement due to each of these estates and adjusts the value of each estate accordingly. (The determination and valuation of these rights to reimbursement are discussed in parts II and III.)

Example 2: Assume that the court has classified assets as in step 1 above. At trial, the evidence discloses the following additional facts:

(g) Regarding the wife's nonmarital house, marital funds were used to pay 10% of the equity of the home in mortgage payments. Under the proposed gift presumptions, using marital funds to improve or discharge the indebtedness on nonmarital property is presumed to create a nongift contribution with a right to reimbursement to the marital estate. Under the proposed rules for valuing rights to reimbursement, mortgage payments with marital funds which contribute 10 percent to the equity result in the right to reimbursement to the marital estate of 10 percent of the value of the house upon dissolution — which is 10 percent of $100,000, or $10,000.

(h) Also regarding the wife's nonmarital house, marital funds were used to build a room addition to the house — enhancing its value by $15,000. As in (g) above, absent any proof that the marital funds were intended as a gift, the marital estate is entitled to reimbursement for $15,000.

(i) The husband's nonmarital funds were used to pay off the $2,000 loan on the marital car. Under the proposed gift presumption rules, a contribution of nonmarital funds toward discharging the indebtedness on marital property is presumed to be a gift to the marital estate. Here, though, assume that the husband rebutted this presumption, and thus established a right to reimbursement from the marital estate. Assume that the original purchase price of the car was $16,000 and that the husband's nonmarital contributions completely paid off the $2,000 loan. Under the proposed valuation rule for discharge of indebtedness, the husband's estate is entitled to a proportionate share of the equity in the property. The husband's nonmarital estate has contributed $2,000 of the $16,000 purchase price — or ⅛ of the total contributed. Assuming that the car is now worth $8,000, the husband's nonmarital estate is entitled to ⅛ of the $8,000 equity — or $1,000.

(j) The wife expended significant efforts to improve the husband's business, drawing no salary. The wife's labor is marital property, and the use of marital property to improve nonmarital property is presumed to create a right to reimbursement to the marital estate. Under the proposed valuation rules for personal efforts, the right to reimbursement is measured, broadly stated, by the value added to the marital property as a result of the efforts. In this case, assuming that the wife's efforts added $5,000 to the value of the husband's business, the marital estate is entitled to a reimbursement of $5,000.

(k) The only money in the $20,000 joint bank account that is traceable to a nonmarital source is $4,000, which came from the hus-

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band's inherited funds.[48] However, depositing these nonmarital funds into the joint account raises the presumption of a gift to the marital estate. Here, assuming the husband has been unable to rebut the presumption, his nonmarital estate is not entitled to any reimbursement.

As a result of the determination and valuation of rights to reimbursement, the adjusted valuation of each estate is as shown in Table 2.

STEP 3: The court then calculates the division of marital property, as adjusted for reimbursements, under the standards of section 503(d).

Example 3: Assume the same situation as in examples 1 and 2 above. Table 2 shows that property worth $85,000 must be assigned to the wife; property worth $66,000 must be assigned to the husband. The remaining $72,000 worth of marital property must be equitably divided by the court in accordance with the factors listed in section 503(d). Assume that the court, taking into account all of these factors, decides to divide the marital property by awarding property worth $40,000 to the wife and $32,000 to the husband. In the final property distribution, the wife will receive $85,000 plus $40,000 — or $125,000 worth of property. The husband will receive $66,000 plus $32,000 — or $98,000 worth of property. This calculation is reflected in Table 3.

STEP 4: The court then actually assigns all property to achieve the result calculated in step 3 above.

The court is encouraged to fashion its property distribution to grant plenary relief and avoid the need for post-decree enforcement. As stated in the case of *In re Marriage of Hellwig:* "In distributing property, courts should seek a high degree of finality so that parties can plan their futures with certainty and are not encouraged to return repeatedly to court."[49] If possible, the court should seek to make reimbursements due under section 503(c)(2) by an appropriate adjustment in the division of marital property, rather than by ordering reimbursement out of nonmarital property. It is expected that resort to marital property will usually simplify the property division process, since marital property has to be divided in any event. Moreover, resort to marital instead of nonmarital property furthers a primary goal of the amendment, which is to preserve the integrity of nonmarital property to the greatest extent possible, consis-

Table 2: Recalculated Value Of Estates Adjusted For Reimbursements

	Marital Estate	*Husband's Nonmarital Estate*	*Wife's Nonmarital Estate*
Initial Value (Step 1)	$43,000	$70,000	$100,000
(g)	+ 10,000		- 10,000
(h)	+ 15,000		- 15,000
(i)	- 1,000	+ 1,000	
(j)	+ 5,000	- 5,000	
(k)	-	-	-
Adjusted Value	$72,000	$66,000	$85,000

TABLE 3: Apportioning The Marital Property

	Husband	*Wife*
Apportionment Of $72,000 In Adjusted Marital Property (Step 3)	$32,000	$ 40,000
Adjusted Value Of Nonmarital Estates (Step 2)	66,000	85,000
Total Property Award	$98,000	$125,000

Table 4a: Dividing The Marital Property (Marital Property Sufficient)

	Marital Estate	*Husband*	*Wife*
Total Property Award (Step 3)	Zero	$98,000	$125,000
Initial Classification (Step 1)	$43,000	70,000	110,000
Property To Be Transferred To Achieve The Total Property Award	- $43,000	+ $28,000	+ $15,000

Table 4b: Dividing The Marital Property (Marital Property Insufficient)

	Marital Estate	*Husband*	*Wife*
Total Property Award (Step 3)	Zero	$138,000	$85,000
Initial Classification (Step 1)	$43,000	70,000	110,000
Property To Be Transferred To Achieve Total Property Award	- $43,000	+ $ 68,000	- $ 25,000

tent with equitable principles and other objectives of IMDMA.

To arrive at the correct division of the marital property, the court should begin with the final determination arrived at in step 3, subtract from this the values assigned to each estate of the initial classification in step 1, and thus determine the amount of marital property each party is to receive.

Example 4a: Assume that the court has already performed steps 1, 2 and 3, with the results given in examples 1, 2 and 3 above. If the marital property is sufficient, the final division of marital property would be as shown in Table 4a.

The court will assign the nonmarital property to the appropriate spouse: the wife will receive the house and her treasury bill; the husband will be assigned his business. The marital property, consisting of the car, the home furnishings and the joint bank account, will be distributed $28,000 to the husband and $15,000 to the wife. The court may either assign this property directly, or may order the property to be sold and the proceeds divided.

If, however, the marital property is *not* sufficient to achieve the court's final property distribution while making all necessary reimbursements, or it is not practical or advisable to utilize all marital property to do so, the court may order reimbursement from items of nonmarital property which received a reimbursable contribution from another estate.

Example 4b: Assume the facts as in examples 1 and 2 above. Assume further, however, that the court, in apportioning the marital property in step 3, has decided to award all of the marital property to the husband. The court would then perform the step 3 calculation, which would result in the following final distribution of property:

	Husband	*Wife*
Apportionment Of $72,000 In Adjusted Marital Property (Step 3)	$ 72,000	Zero
Adjusted Value Of Nonmarital Estates (Step 2)	66,000	$85,000
Total Property Award	$138,000	$85,000

The court would then calculate how much property must be transferred to achieve this total property award as shown in Table 4b.

In this case, since the marital property is insufficient to achieve the desired property distribution, the wife's nonmarital estate would be required to reimburse the husband's marital estate $25,000, even after all of the property in the original marital estate had been apportioned to the husband.

Section 503(c)(2) provides that the court may secure a right to reimbursement by imposing a lien upon nonmarital property which received contributions from other estates.[50] This power to impose a lien upon such items of nonmarital property was intended to qualify the section 503(d) directive that the court assign to each spouse his or her nonmarital property; as qualified by the amendment, section 503(d) directs the court to assign the nonmarital property only after adjusting each nonmarital estate for any rights to reimbursement.

"Under the proposed valuation rules for personal efforts, the right to reimbursement is measured by the value added as a result of the efforts."

Liens should be imposed upon as few items as possible to secure reimbursement rights. By "pooling" all rights to reimbursement onto the fewest items of property for the purpose of imposing a lien, the court will preserve the integrity of the nonmarital estate to the greatest extent possible and will also simplify the reimbursement process. Of course, cautious selection of an item of property upon which to impose a lien would require consideration of the overall purposes of IMDMA, substantial fairness to the parties and the rights of third parties who may have an interest in the property.

In imposing the lien, the court may specify the amount of the reimbursement secured by the lien and the time in which payment must be made to avoid enforcement of the lien by judicial sale.[51] To prevent a spouse from selling or otherwise disposing of the lien-burdened property pending payment of the sums to be reimbursed, the court may consider equitable remedies such as injunctions, sequestration or holding the property in escrow. If the reimbursement has not been paid within the time ordered by the court, the court may order the property sold at a judicial sale, and distribute the proceeds to satisfy the right to reimbursement.[52] Of course, the lien may also be enforced through sale or conveyance ordered pursuant to post-decree supplementary proceedings, or pursuant to execution and levy or foreclosure.[53] Enforcement proceedings may be brought in the same action in which a judgment of dissolution was granted, pursuant to section 511 of IMDMA.

Conclusion

House Bill 544 was enacted primar-

48. The contributions were traced as follows: The husband deposited $4,000 in the account. The bank account balance was never less than $4,000 after the deposit. There is no proof as to the purpose of the withdrawals from the bank account. Since withdrawals from an account during marriage are presumed to be for marital purposes, $4,000 of the $20,000 in the account is traceable to the husband's nonmarital funds.

49. In re Marriage of Hellwig, 100 Ill. App. 3d 452, 453, 426 N.E.2d 1087, 1088, 55 Ill. Dec. 762, 763 (1st Dist. 1981); *See*, Historical and Practice Notes to IMDMA, ILL. ANN. STAT. ch. 40 § 503 (Smith-Hurd 1983 Supp. at 42).

50. The lien created by section 503(c)(2) is a statutory lien that arises only upon the judgment imposing the lien. The lien creates rights in the nonmarital property which may be enforced as against unsecured creditors and subsequent purchasers having notice of the lien. The imposition of the lien by itself establishes priority over subsequent claimants who have notice of the lien. Burnex Oil v. Floyd, 106 Ill. App. 2d 16, 245 N.E.2d 539 (1st Dist. 1969); St. Boniface Building & Loan Ass'n v. Demopoulos, 302 Ill. App. 614, 24 N.E.2d 171 (1st Dist. 1939). To perfect a reimbursement lien on real property against subsequent purchasers without notice, the party protected by the lien should record the judgment with the recorder of deeds of the county in which the property is located, per ILL. REV. STAT. ch. 110, § 12-101, or, if the property is held in torrens, comply with ILL. REV. STAT. ch. 30, § 45, *et seq.* This gives constructive notice of the lien to potential purchasers and thus prevents them from being deemed *bona fide* purchasers.

51. *See*, In re Marriage of Hellwig, *supra* note 49; Robinson v. Robinson, 100 Ill. App. 3d 437, 429 N.E.2d 183, 57 Ill. Dec. 432 (2d Dist. 1981).

Taming Transmutation

(Continued)

ily to eliminate the inequities of transmutation and to reinforce our dual system of property division upon dissolution of marriage. The doctrine of transmutation in *Smith* has been tamed — no longer can the contribution of marital funds to improve a nonmarital building transmute the entire building to marital property — yet the marital estate will be reimbursed fairly for its contribution.

House Bill 544 makes some new rules and procedures necessary. In suggesting the most appropriate rules and procedures in light of the objectives of the bill and the overall purposes of IMDMA, the experiences of those community property and equitable distribution jurisdictions which utilize similar systems of property distribution have been extracted. The suggestions here — and the numerous case references which support them — should therefore be evaluated by courts and practitioners in light of the legislature's goal of creating a fairer, more predictable system of property distribution; one which respects the integrity of nonmarital property while it protects the legitimate interests of the marital partnership.

52. The court is expressly authorized to sell marital property under the newly-added section 503(h). The court's power to direct the sale of nonmarital property, while not explicit in the amendment, should necessarily arise as incident to a reimbursement lien, which *is* expressly authorized. Illinois courts' power to order the sale of property without express statutory authorization has been upheld in a variety of equitable proceedings where necessary to fashion appropriate relief. *See, e.g.*, Pope v. Speiser, 7 Ill. 2d 231, 130 N.E.2d 507 (1955) (sale may be ordered if necessary to enforce equitable lien); Robinson v. Robinson, 100 Ill. App. 3d 437, 429 N.E.2d 183, 57 Ill. Dec. 532 (2d Dist. 1981) (sale may be ordered if necessary to enforce equitable lien). *See also*, Stegeman v. Smith, 67 Ill. App. 2d 451, 214 N.E.2d 597 (4th Dist. 1966) (sale of individually-owned property is authorized to enforce order in a partition action.) Further, the court's power to fashion an appropriate order enforcing the reimbursement lien usually will not be limited by the Partition Act, ILL. REV. STAT. ch. 110 § 17-101, *et seq.*, since that act applies only to property held in some form of co-ownership (ILL. REV. STAT. ch. 110 § 17-101; Ylonen v. Ylonen, 2 Ill. 2d 111, 117 N.E.2d 98 (1953)) and nonmarital property generally is not held in co-ownership. Of course, any sale would be subject to existing laws or rights or claims of third parties, who must be joined as parties to the proceeding if their rights are to be affected. Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382, 17 Ill. Dec. 801 (1978). Finally, the sale must comply with the statutory provisions governing judicial sales. *See.* ILL. REV. STAT. ch. 110, § 12-101, *et seq.*

53. *See.* ILL. REV. STAT. ch. 110, § 2-1402; ILL. REV. STAT. ch. 110, § 12-101, *et seq.*