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## Long v. Long: Law Court Ruling Changes the Disposition of Joint Real Property on Divorce

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# **LONG V. LONG: LAW COURT RULING CHANGES THE DISPOSITION OF JOINT REAL PROPERTY ON DIVORCE**

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# LONG V. LONG: LAW COURT RULING CHANGES THE DISPOSITION OF JOINT REAL PROPERTY ON DIVORCE.

## I. INTRODUCTION

In *Long v. Long*<sup>1</sup> the Maine Supreme Judicial Court, sitting as the Law Court, affirmed a district court divorce decree dividing the parties' residence of thirteen years as marital property,<sup>2</sup> even though the majority of the funds used for its purchase were traceable to non-marital property the husband had acquired prior to the marriage.<sup>3</sup> The governing statute instructed the district court to make an "equitable" disposition of all property acquired by the spouses during marriage, but required that it first "set apart to each spouse the spouse's [separate] property," including property acquired during marriage by a spouse "in exchange for property [he] acquired prior to the marriage."<sup>4</sup> The issue in *Long* was whether

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1. 1997 ME 171, 697 A.2d 1317.

2. Marital property is statutorily defined. It consists of property in which both spouses have an ownership right, regardless of who holds title. See ME. REV. STAT. ANN. tit. 19-A, § 953(2), (3) (West 1998). A helpful way of conceptualizing the property classifications that exist in marriage is to think of them as three in number: the two separate estates and the marital estate or, plainly speaking, yours, mine, and ours.

3. See *Long v. Long*, 1997 ME 171, ¶¶ 1, 2, 697 A.2d at 1319.

4. ME. REV. STAT. ANN. tit. 19-A, § 953(1) & (2)(B) (West 1998) (formerly ME. REV. STAT. ANN. tit. 19, § 722-A (West 1981)). Title 19-A, section 953(1)-(5), (9) provides:

§ 953. Disposition of property

1. Disposition. In a proceeding for a divorce, for legal separation, or for disposition of property following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse the spouse's property and shall divide the marital property in proportions the court considers just after considering all relevant factors, including:

- A. The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- B. The value of the property set apart to each spouse; and
- C. The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live in the home for reasonable periods to the spouse having custody of the children.

2. Definition. For purposes of this section, "marital property" means all property acquired by either spouse subsequent to the marriage, except:

- A. Property acquired by gift, bequest, devise or descent;
- B. Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;
- C. Property acquired by a spouse after a decree of legal separation;
- D. Property excluded by valid agreement of the parties; and
- E. The increase in value of property acquired prior to the marriage.

3. Acquired subsequent to marriage. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety or community property. The presumption of marital

jointly owned real property acquired during marriage with a mix of marital and non-marital funds is subject in its entirety to division as marital property or whether that part of it traceable to contributions of non-marital funds must be set aside as the separate property of the contributing spouse.<sup>5</sup> The Law Court held that where a spouse contributes his separate, premarital property toward the acquisition of jointly held real property, the district court must treat the joint property, for purposes of disposition, as the property of the marital estate, and may not set apart the property, or a portion thereof, as the non-marital property of the contributing spouse.<sup>6</sup>

This ruling overturned nearly two decades of precedent. In 1979 the Law Court held in *Tibbetts v. Tibbetts* that the instruction of the governing statute to "set apart to each spouse" property "acquired in exchange for property acquired prior to the marriage" must be understood as requiring the court to set aside for a spouse that portion of property that could be traced back to a contribution of his non-marital property.<sup>7</sup> This rule is known as the "source of funds rule."<sup>8</sup> *Long* thus carved out an exception to the source of funds rule established in *Tibbetts* specifically for real property acquired by spouses as joint tenants.<sup>9</sup> The Law Court claimed that its decision to limit the application of the source of funds rule as it applies to joint real property accomplished primarily four goals: (a) ending the "conflicting and inequitable results" of inconsistently recognizing "the legal significance of joint ownership" in Maine's precedents; (b) "providing greater certainty and clearer guidance to litigants, family law practitioners, and trial courts"; (c)

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property is overcome by a showing that the property was acquired by a method listed in subsection 2.

4. Disposition of marital property. If both parties to a divorce action also request the court in writing to order disposition of marital property acquired by either or both of the parties to the divorce prior to January 1, 1972, or nonmarital property owned by the parties to the divorce action, the court shall also order disposition in accordance with subsection 1.

5. Decree contents. If the final divorce decree disposes of real property, it must name the party or parties responsible for preparing and recording the decree of divorce or abstract of the decree and paying the recording fee after the clerk has prepared or approved the abstract. The decree may name different parties to be responsible for different parcels. . . .

9. Omitted property. If a final divorce decree fails to set apart or divide marital property over which the court had jurisdiction, the omitted property is deemed held by both parties as tenants in common. On the motion of either party, the court may set aside or divide the omitted property between the parties, as justice may require.

5. See *Long v. Long*, 1997 ME 171, ¶ 1, 697 A.2d at 1319.

6. See *id.*

7. See *Tibbetts v. Tibbetts*, 406 A.2d 70, 75 (Me. 1979).

8. See *id.*

9. See *Long v. Long*, 1997 ME 171, ¶ 16, 697 A.2d at 1324 ("We overrule the *Young* and *Tibbetts* line of cases to the extent that they treat jointly owned real property as separate property.").

achieving the underlying purposes of "the statutory scheme"; and (d) "effectuat[ing] the reasonable expectations of wives and husbands acquiring jointly owned property."<sup>10</sup>

This Note presents the legal background of the *Long* decision and evaluates the change *Long* will effect in the future application of title 19-A, section 953 of the Maine Revised Statutes.<sup>11</sup> This Note addresses the likely effectiveness of the *Long* ruling for achieving the court's stated goals as well as the usefulness of the rule for advancing the development in Maine of a fairer divorce law. This Note concludes that: (a) *Long* mitigates, but does not end, the inconsistent recognition of the legal significance of joint ownership, (b) it provides less certainty, not more, to litigants, practitioners, and the courts, but (c) it is more in tune with the statutory scheme and (d) it must be understood as effectuating the reasonable expectations of married joint tenants. In the process, this Note discusses some of the broader concerns that factor into an equitable disposition of property—broader, in any event, than merely resolving the "inconsistent [recognition of] the legal significance of joint ownership"<sup>12</sup> and the other consequences of *Long* enumerated by the Law Court.<sup>13</sup> This Note ends with a legislative recommendation encouraging a partial revision of title 19-A, section 953 in order to clarify its language and incorporate the court's ruling in *Long* respecting joint property, and with an argument in favor of a more fundamental redefinition of marital property so as to better insure that the interest of the marital estate is fully recognized in property dispositions pursuant to divorce.

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10. *Id.* ¶ 6, 697 A.2d at 1320.

11. Shortly after *Long* was decided, title 19-A became effective and supplanted title 19. While *Long* was decided under section 722-A of title 19, all citations in this Note are to the substantially identical provisions of title 19-A, section 953.

12. *Long v. Long*, 1997 ME 171, ¶ 6, 697 A.2d at 1320.

13. For instance, the amount of discretion allowed Maine district courts over property held by spouses, separately or jointly, will have significant impact on the ability of the courts to ensure adequate support for dependent children and spouses following divorce through one-time property division, thereby lessening dependence on periodic support payments. For more on the desirability of avoiding alimony through one-time property division so as to prevent "continued financial interaction between the parties," see *Berry v. Berry*, 658 A.2d 1097, 1099 (Me. 1995). As noted by Maine District Court Judge John C. Sheldon, "the literature on alimony reveals a furious, nationwide debate on the subject." John C. Sheldon, *The Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 7, 26 (1996). Though clearly related to the disposition of property on divorce, the issue of alimony is not addressed in this Note because it was not at issue in *Long*. For a view of the nationwide debate as it exists at the local level, see *id.* at 26 (questioning the justification and need for alimony in the modern era); Laurie C. Kadoch, *Five Degrees of Separation: A Response to Judge Sheldon's The Sleepwalker's Tour of Divorce Law*, 49 ME. L. REV. 321, 353 (arguing that changes in divorce law should be the product of a "social dialogue" involving "the community, the legislature, and the courts," rather than judicial discretion). Kadoch's primary issue of contention with Sheldon's article concerns the appropriate process of legal change. See *id.* at 322-23. She does not, however, provide a principled argument in favor of alimony.

## II. BACKGROUND

A. *The Maine Marital Property Act*

Maine first adopted the Maine Marital Property Act in 1971 under the title "An Act Relating to the Division of Real and Personal Property by the Court under a Decree of Divorce."<sup>14</sup> With the passage of the Act, Maine joined an increasing number of states adopting the provisions of the Uniform Marriage and Divorce Act (Uniform Act) and leaving behind inequitable common-law divorce systems that focused on status of title and determinations of fault for the division of marital property.<sup>15</sup> The Maine Act, an adoption of section 307 of the Uniform Act,<sup>16</sup> ended

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14. P.L. 1971, ch. 399, § 2. See *supra* note 4 for the language of the statute.

15. See Comment, *The Maine Marital Property Act: The Duties of Divorce Courts and the Right to an Equitable Share of Marital Assets*, 31 ME. L. REV. 333, 334-37 (1980); UNIF. MARRIAGE AND DIVORCE ACT (amended 1973), 9A U.L.A. 147 (1987). Maine's adoption of the Uniform Act was not comprehensive. The Maine Act represents an adoption of section 307 of the Uniform Act only, and in truncated form. See ME. REV. STAT. ANN. tit. 19-A, § 953 (West 1998); UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. at 240. The Maine Legislature chose not to enact the fifteen related sections, leaving it to Maine's courts to resolve whatever definitional and constructional gaps might arise. See Comment, *supra*, at 334-37. The legislative history of the Maine Act does not reveal why Maine did not adopt the additional provisions.

The Maine Act replaced rules of property disposition, rooted in the common law, which had been codified in 1961. See ME. REV. STAT. ANN. tit. 19, § 721 (West 1961) (repealed 1997); ME. REV. STAT. ANN. tit. 19, § 723 (West 1961) (repealed 1971). Under the common law, "the spouse without title was not entitled to any of the property on divorce and was left with only the uncertain support of alimony." *Carter v. Carter*, 419 A.2d 1018, 1020 (Me. 1980). The spouse determined to be at fault in a divorce would surrender a one third interest in all real estate in which he or she was seized during coverture. See *Leavitt v. Tasker*, 107 Me. 33, 35, 76 A. 953, 955 (1910). "Coverture" is defined as the "condition or state of a married woman" characterized by "the legal disability which formerly existed at common law . . . whereby the wife could not own property free from the husband's claim or control." BLACK'S LAW DICTIONARY 366 (6th ed. 1990). As one commentator noted: "The common law institutions can have the anomalous result of providing a widow who has married a wealthy husband a few weeks before his death with a windfall, but leaving a wife of thirty years standing penniless." Richard W. Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379, 379 (1969). State adoption of Married Woman's Property Acts brought an end to coverture. Maine first adopted the Married Woman's Property Act through P.L. 1844, ch. 117, § 2, which provided that, "when any woman possessed of property, real or personal, shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband." See also, e.g., *Haggett v. Hurley*, 91 Me. 542, 40 A. 561 (1898); *Allen v. Hooper*, 50 Me. 371 (1862); *Southard v. Plummer*, 36 Me. 64 (1853).

16. In 1971, at the time of Maine's adoption of section 307 of the Uniform Act, the commissioners in charge of the Uniform Act had promulgated only one version of section 307. Subsequently, in 1973, the commissioners amended the Uniform Act and provided two alternative provisions. Alternative A, "recommended generally for adoption," makes available for the court's distribution all property held by either spouse or both spouses together, however acquired. See UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. at 238-39. Alternative B, which was more in line with the original version adopted by Maine, limits the funds to be redistributed at divorce to the marital acquets, as opposed to all property. See *id.* at 239. The commissioners offered Alternative B for those community property states unwilling to do away with their long-standing

the common-law concept of property ownership within the marital union by establishing a presumption that property acquired during marriage by either spouse is marital property, property in which both spouses have an ownership right, regardless of who holds title.<sup>17</sup> The new presumption reflected a shift for Maine, and other common-law jurisdictions which adopted the Uniform Act, toward an understanding of marriage as a partnership in which spouses contribute their separate abilities and resources toward the common good. Making the couple's acquets during marriage the property of the marital partnership was not a novel idea. The concept had long been at work in this country in community property jurisdictions, which took their property law from the Spanish and the French.<sup>18</sup>

The presumption of marital property found in the Maine Act is subject to certain defined exceptions, among them that property acquired by an individual spouse "by gift, bequest, devise or descent" and "[p]roperty acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent" is to be excluded from the marital estate.<sup>19</sup> The spouse having ownership of property falling under one of the exceptions retains sole ownership in such property.<sup>20</sup> In essence, the definition of marital property that the

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limitation of the divorce courts' authority to divide only the community, and not the separate, assets. See *id.* § 307 cmt., 9A U.L.A. at 239-40; see also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 227-28 (1989). Compare the Maine Act with section 307, Alternative A, of the Uniform Act, the alternative form favored by the commission for adoption:

§ 307. [Disposition of Property]

(a) In a proceeding for dissolution of a marriage . . . the court, without regard to marital misconduct, shall . . . finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and the general welfare of any minor, dependent, or incompetent children of the parties.

UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. at 238-39.

17. See ME. REV. STAT. ANN. tit. 19-A, § 953(2), (3) (West 1998).

18. See Howard W. L'Enfant, Jr., Comment, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78, 84-87 (1964). Scholars have traced the origin of community property back more than four thousand years to Greece, Babylonia, and Egypt. See *id.* at 78.

19. ME. REV. STAT. ANN. tit. 19-A, § 953(2)(A), (B).

20. See *id.* § 953(1).

statute provides is a negative one: it amounts to all property that is not defined as the separate property of a spouse under subsection 2.

Upon divorce, the process utilized by Maine courts in dividing property is as follows: (1) the court determines what of the parties' properties is marital and what is non-marital, including the contributions each may have made to the acquisition of the marital property, and recognizing the contribution of a spouse as a homemaker; (2) the court sets apart to each that spouse's non-marital property; and (3) the court divides the marital property between them in such proportion as the court deems just.<sup>21</sup> To determine the just division of the marital property, the statute instructs the court to consider "all relevant factors."<sup>22</sup> The statute lists only three required considerations: (A) the relative "contribution" of each party, "including the contribution of a spouse as homemaker," toward the acquisition of marital property; (B) the value a spouse's non-marital property; and (C) the "economic circumstance" a spouse will be left in upon finalization of the divorce, including "the desirability of awarding the family home . . . to the spouse having custody of the children."<sup>23</sup> The statute ascribes no weight to any particular consideration, nor does it limit the court's ability to consider other factors.<sup>24</sup>

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21. See *Grishman v. Grishman*, 407 A.2d 9, 11 (Me. 1979). Though the parties to a divorce may succeed in reaching a private agreement respecting the disposition of their property, Maine law requires a judicial hearing before the termination of the marriage. See ME. R. CIV. P. 80(f). One commentator on Rule 80 has characterized this requirement as "a time-consuming charade" in cases where it is applied to uncontested divorce cases. See Sheldon, *supra* note 13, at 16 (arguing that Rule 80 should be amended "to drop the need for a hearing in uncontested divorces"). But see Kadoch, *supra* note 13, at 335 (arguing that "unsuspecting couples are signing settlement agreements without fully understanding possible future ramifications of the terms of their contract").

22. See ME. REV. STAT. ANN. tit. 19-A, § 953(1).

23. *Id.* From the perspective of common-law tradition, the recognition of the economic value of a homemaker's contribution was as groundbreaking as the recognition of the shared interest in property acquired during marriage. The economic value of such contributions should be evident to most readers.

24. It is noteworthy that the Maine Legislature, upon adopting the Maine Act, omitted the language "without regard to marital misconduct" found in section 307 of the Uniform Act.

Whether, and to what extent, fault remains a relevant factor to consider in a disposition of property remains an open question. See *Boyd v. Boyd*, 421 A.2d 1356, 1358 (1980). In *Boyd*, the court commented on the omission of the "without regard to marital misconduct" language:

The Maine disposition of property statute was based on an act with the stated purpose of eliminating the entire conceptual structure of divorce based on fault. It is clear from the enumerated "relevant factors" in Section 722-A(1) that the primary emphasis is economic: present economic circumstances and past contributions to the marriage, either financial or translatable into financial terms, such as the contribution of a spouse as homemaker. At most, the Legislature may have hesitated to absolutely preclude the court from considering "marital misconduct" in the division of marital property when the "marital misconduct" was of a financial nature. We intimate no opinion as to whether a court has discretion to consider marital misconduct in the disposition of marital property when the misconduct has had an economic impact, e.g., nonsupport or gifts from the marital estate to a paramour.

*Id.* (citation omitted).



The issue that the *Long* court faced, and that this Note addresses, concerns step one of the statutory scheme outlined above: the determination of what property is separate and what property is marital. Subsections 2 and 3 of the Maine Act govern the process of separating the non-marital property from the marital property. Subsection 3 provides that "[a]ll property acquired by either spouse [during marriage] is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of coownership . . . ." <sup>25</sup> This presumption of marital property "is overcome" if the property at issue falls under an exception in subsection 2. Subsection 2 lists five types of property that are excluded from the definition of marital property:

- A. Property acquired by gift, bequest, devise or descent;
- B. Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;
- C. Property acquired by a spouse after a decree of legal separation;
- D. Property excluded by valid agreement of the parties; and
- E. The increase in value of property acquired prior to the marriage. <sup>26</sup>

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The brief enumeration of factors to be considered in the disposition of property in divorce is striking when compared to the lengthy list of factors that are to be considered in the determination of an award of spousal support (formerly known as alimony):

1. Factors. The court shall consider the following factors when determining an award of spousal support:

- A. The length of the marriage;
- B. The ability of each party to pay;
- C. The age of each party;
- D. The employment history and employment potential of each party;
- E. The income history and income potential of each party;
- F. The education and training of each party;
- G. The provisions for retirement and health insurance benefits of each party;
- H. The tax consequences of the division of marital property, including the tax consequences of the sale of the marital home, if applicable;
- I. The health and disabilities of each party;
- J. The tax consequences of a spousal support award;
- K. The contributions of either party as homemaker;
- L. The contributions of either party to the education or earning potential of the other party;
- M. Economic misconduct by either party resulting in the diminution of marital property or income;
- N. The standard of living of the parties during the marriage; and
- O. Any other factors the court considers appropriate.

ME. REV. STAT. ANN. tit. 19-A, § 951. It is difficult to understand why, in particular, the duration of the marriage, the earning potential of the partners, the tax consequences of the decision, and the educational factors are considered a significant factor in spousal support but not in the disposition of property.

25. ME. REV. STAT. ANN. tit. 19-A, § 953(3).

26. *Id.* § 953(2).

Subsection 2(B) excludes from the marital estate property "acquired in exchange for property acquired prior to the marriage."<sup>27</sup> In other words, the exclusion in 2(B) allows a spouse to sell, modify, trade, or otherwise exchange non-marital property without forfeiting an interest in it to the marital estate. A spouse owning separate property is not required to hold that property dormant in order to maintain separate ownership. Even where a spouse sells non-marital property that has appreciated in value, subsection 2(E) allows the capital gain from that exchange to be kept as non-marital property by the selling spouse.<sup>28</sup>

Though seemingly straightforward, the language of subsection 2(B) provides uncertain guidance in the circumstance where a spouse contributes non-marital property toward the acquisition of new property taken by both spouses in joint tenancy. Under the common law, taking title in joint tenancy is treated as conferring equal ownership in both joint tenants.<sup>29</sup> However, subsection 3 provides that all property acquired during marriage is, upon divorce, "presumed to be marital property regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy."<sup>30</sup> The only exceptions to the subsection 3 presumption of marital property are those covered in subsection 2.<sup>31</sup> Thus, upon divorce, there are really only two kinds of property ownership for a divorce court to address: separate ownership and marital ownership. All the same, considerations of the legal significance of joint title have been at the crux of judicial treatment of the statute.

Another interpretive problem with the statute is the meaning to be given to the phrase "acquired in exchange" in subsection 2(B). Confusion arises in the situation where a spouse has contributed non-marital property toward the partial acquisition of new property. Put another way, it is the situation where a couple acquires new property and gives in exchange a mix of marital and non-marital property, often referred to as a commingling of assets. The question is whether the partial contribution of non-marital property is to be given the same effect that a contribution of the entire exchange price would be given. If "acquired in exchange" is construed to mean only the full acquisition of title in new property through exchange of non-marital property, without any contribution of marital property, then contributions of non-marital property that satisfy only a portion of the purchase price will likely be treated as gifts to the marital estate and not be recoverable by the contributing spouse as his or her separate property. On the other hand, if "acquired in exchange" is understood to include the acquisition of a proportional interest in property, then a spouse who contributes non-

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27. *Id.* § 953(2)(B).

28. *Id.* § 953(2)(E).

29. See Comment, *supra* note 15, at 338.

30. ME. REV. STAT. ANN. tit. 19-A, § 953(3).

31. See *id.* § 953(2).

marital property toward the partial acquisition of new property should be able to extract as separate property the value of that contribution at the time of divorce, even if title is in joint tenancy. Whatever value might remain in property acquired through such a mix of assets would belong to the marital estate.

*B. Judicial Construction of Subsections 2 and 3 of the Maine Act*

The Law Court first encountered the latent interpretive problem in title 19, section 722-A (now title 19-A, section 953) in 1974 in *Young v. Young*.<sup>32</sup> In *Young*, the husband and wife contributed funds acquired individually and prior to marriage for the purchase of their new home, financing the balance with a home mortgage loan and taking title as joint tenants. Mr. Young contributed \$11,765 and Mrs. Young contributed \$500 toward the purchase.<sup>33</sup> Seventeen months after marriage, Mrs. Young instituted an action for divorce. In its divorce decree, the superior court applied section 722-A and ordered that the home be sold and the proceeds divided equally between Mr. and Mrs. Young.<sup>34</sup> On appeal, the husband argued that the language of subsection 2 had been contravened, that his \$11,765 investment in the property should be set aside as his separate estate because it was acquired in exchange for property he had acquired prior to the marriage.<sup>35</sup> The wife, on the other hand, urged the court to adopt the principle of "transmutation" as a way of interpreting section 722-A.<sup>36</sup> Under this doctrine, an exercise of "actual intention objectively manifested" may serve to transmute non-marital property into marital property.<sup>37</sup> Mrs. Young contended that a conveyance in joint tenancy should be presumed to constitute an objective manifestation of each spouse's intent to "transmute" his or her property into the marital estate.<sup>38</sup> In ruling for the husband, the Law Court sidestepped entirely the question of the proper construction of the statute because of a technicality: the conveyance that transferred the property to the couple had been recorded prior to the effective date of the Act.<sup>39</sup> Because the transfer occurred before the concept of marital property was recognized in Maine, it was impossible, the court reasoned, for the husband to have objectively intended to transmute his property into the marital estate.<sup>40</sup>

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32. 329 A.2d 386 (Me. 1974).

33. *See id.* at 387.

34. *See id.* at 387-88.

35. *See id.* at 388.

36. *See id.*

37. *See id.* at 389; *see also* Comment, *supra* note 15, at 348.

38. *See Young v. Young*, 329 A.2d at 389.

39. *See id.* at 390.

40. *See id.*

Such an easy out was not available in 1979 when the issue reappeared in *Tibbetts v. Tibbetts*.<sup>41</sup> The *Tibbetts* court was required to construe the statutory language "acquired in exchange for" in subsection 2(B). In *Tibbetts*, the wife contributed \$5000 she acquired prior to marriage toward the purchase of property taken in joint tenancy during the couple's marriage.<sup>42</sup> The superior court interpreted subsection 2(B) to mean that, because the wife had contributed \$5000 in non-marital funds toward its purchase, the entire property was therefore non-marital.<sup>43</sup> On appeal, the Law Court overruled this interpretation, observing that it was illogical to conclude that because the statutory language excluded property "acquired in exchange for property acquired prior to the marriage" an entire property must be set aside where only a portion of it was acquired in exchange for non-marital funds.<sup>44</sup> The court stated that the "crux of the interpretive problem" at issue was the "application and meaning of the words 'acquired in exchange for'" found in subsection 2(B) of the Maine Act.<sup>45</sup> The court determined that the "fundamental purposes" of the statute as "originally promulgated" required it to adopt a "dynamic interpretation of the term 'acquisition'" rather than a static interpretation.<sup>46</sup> Thus, the court held that "acquisition" was an ongoing process not limited to the moment when the title in property is transferred. The court explained:

[P]roperty is non-marital to the extent that it was acquired in exchange for property acquired prior to marriage. Thus a single item of property may be to some extent non-marital and the remainder marital. Accordingly, where property is acquired in exchange for both marital property and non-marital property, the portion attributable to each must be determined. That *portion* of the property acquired in exchange for non-marital property must then be "set apart" as directed by 19 M.R.S.A. § 722-A(1).<sup>47</sup>

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41. 406 A.2d 70 (Me. 1979).

42. See *id.* at 73.

43. See *id.* at 74.

44. See *id.*

45. *Id.*

46. *Id.* at 75-76. In support of this interpretation, see UNIF. MARRIAGE AND DIVORCE ACT § 307 cmt., 9A U.L.A. 147, 239-40 (1987); 1971 *Midyear Report and Recommendation of The Family Law Section to the ABA House of Delegates on the Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 133, 138 (1971).

47. *Tibbetts v. Tibbetts*, 406 A.2d at 75. The court provided the following illustration: For \$20,000 a husband and wife acquire a parcel of real estate. A down payment of \$5,000 is contributed by the wife from property acquired prior to the marriage and the remaining \$15,000 is financed through credit. One-quarter of that parcel is the wife's non-marital property. If the property appreciates in value to \$30,000 and the parties contribute an additional \$5,000 of marital property toward its purchase, the following division would be required. One-quarter of the value of the parcel or \$7,500 is non-marital property to be set apart to the wife. Assuming a remaining mortgage of \$10,000, since \$10,000 in total has been contributed toward purchase of the parcel

Under this construction, the marital interest in property acquired with a mix of assets amounts to that portion of the estate not acquired through the exchange of non-marital assets.<sup>48</sup> In adopting the source of funds rule, the court recognized that it was making an equitable exception to the inception of title rule, which characterizes property at divorce as either separate or marital based on the state of the title when it was first taken, even where marital assets are expended on improvements, maintenance, or toward purchase.<sup>49</sup> Under the inception of title rule, a spouse acquiring title to property prior to marriage without satisfying the entire purchase price would maintain sole title in the property after marriage even though the balance of the purchase price was paid after marriage with marital funds.<sup>50</sup>

The source of funds exception was warranted, the court stated, given that the statute, based upon the Uniform Act, was founded upon a partnership theory of marriage.<sup>51</sup> The equity of the exception lay in its assurance that inception of title considerations would not prevent a spouse from recovering his or her fair, pro tanto interest in the overall estate.<sup>52</sup> The court recognized that tracing the relative contributions of the separate and marital estates back to their source would involve problems of proof and complicated analyses of relative equity interests, but concluded that "in fairness to both spouses 'acquisition' must not arbitrarily and finally be fixed on the date that a legal obligation to purchase is created."<sup>53</sup> Though the pure inception of title rule was far simpler to apply, the source of funds doctrine provided "the flexibility needed to achieve the equitable result sought by the drafters of the Uniform Act's property division provisions."<sup>54</sup> As essentially equitable principles, the provisions of the Uniform Act were designed to bring an end to pure considerations of legal title in the disposition of property on divorce. For instance, just as sole title in one spouse should not foreclose the marital estate—and by extension the non-titled spouse—from accruing interest in a piece of property over time, joint title in both spouses should not foreclose the individual spouse from maintaining his private, non-marital interest.<sup>55</sup>

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valued initially at \$20,000, there will remain an equity of \$12,500 of marital property to be divided.

*Id.* at 75 n.5.

48. *See id.*

49. *See id.* at 76. The *Tibbetts* court recognized that with its adoption of the source of funds rule it was joining a minority of jurisdictions, but believed the rule offered "a more flexible and more equitable approach." *Id.*

50. *Id.*

51. *See id.* at 77.

52. *See id.*

53. *Id.*

54. Comment, *supra* note 15, at 348.

55. For similar treatment see *Cain v. Cain*, 536 S.W.2d 866, 872 (Mo. Ct. App. 1976). Consider also that the equitable powers of the court allow it to reshape legal title when necessary to ensure equity. Thus, rather than forcing the sale of property held by a couple in joint tenancy,

It did not take long for this clear statement of policy to become muddled. In the 1980 case of *Carter v. Carter*,<sup>56</sup> the court had to determine the proper disposition of property that the husband had acquired prior to marriage, and had held sole title to, but which he had since reconveyed to himself and his wife as joint tenants.<sup>57</sup> The wife in *Carter*, like the wife in *Young*, sought to persuade the court to adopt the transmutation doctrine and treat the husband's transfer of property into joint tenancy as manifesting the husband's intent to make a donative transfer to the wife of one half of his interest. Because her interest would thus be one "acquired by gift," she reasoned, the court would be required to set her interest aside as her separate property.<sup>58</sup> In support of this argument, she cited the Maine common-law case of *Greenburg v. Greenburg*,<sup>59</sup> which held that such transfers must be presumed to constitute a gift to the grantee.<sup>60</sup> The husband countered by arguing that the property must be set aside as his separate property pursuant to subsection 2(B) and the *Tibbetts* source of funds rule because the current title in joint tenancy was "acquired in exchange for property acquired prior to the marriage."<sup>61</sup> Moreover, he countered his wife's argument for the presumption of donative intent with the argument that the transfer into joint tenancy was, in fact, only evidence of the couple's intent to avoid probate and estate taxes.<sup>62</sup>

The court was not moved by either of the husband's arguments. Instead, following a line of reasoning used by the Missouri Court of Appeals in a similar case,<sup>63</sup> the court held that the property was part of the marital estate because the transfer into joint tenancy "must be understood as evidencing an intention to transfer the property to the marital estate."<sup>64</sup> The *Carter* court reasoned that the source of funds rule would work an injustice in this circumstance because

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a divorce court also has discretion to transform the couple's legal interest into a tenancy in common, with a life estate in one spouse, thus enabling a dependent to maintain his or her residence. See *Bryant v. Bryant*, 411 A.2d 391, 393 (Me. 1980); *Tibbetts v. Tibbetts*, 406 A.2d at 77 n.11. Indeed, it is noteworthy that the divorce decree "may divest title and itself act as the conveyancing instrument." Comment, *supra* note 15, at 351; see ME. REV. STAT. ANN. tit. 19-A, § 953(7) (West 1998).

56. 419 A.2d 1018 (Me. 1980).

57. See *id.* at 1020.

58. See *id.*

59. 141 Me. 320, 43 A.2d 841 (1945).

60. See *id.* at 322, 43 A.2d at 842.

61. ME. REV. STAT. ANN. tit. 19-A, § 953(2)(B) (West 1998); see *Carter v. Carter*, 419 A.2d at 1020.

62. See *Carter v. Carter*, 419 A.2d at 1020. Real estate practitioners generally do give such advice to their clients. The great benefit in holding real estate in joint tenancy is in the right of survivorship—the last surviving tenant takes the property as sole owner without any formal transfer of interest, thus freeing the property from the publicity and expense of probate proceedings. See 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY, ch. 51, ¶¶ 615, 617 (1997).

63. See *Conrad v. Bowers*, 533 S.W.2d 614 (Mo. Ct. App. 1975).

64. *Carter v. Carter*, 419 A.2d at 1022.

it would mean that a spouse owning property prior to the marriage could exchange that property, place such exchanged property in joint names and after many years of happy marriage, defeat the right of the other spouse in such property with the result that the other spouse would have no interest whatsoever in the property held in joint names.<sup>65</sup>

Based on this claim, the *Carter* court held that a transfer from one spouse to both in joint tenancy must be understood as an intentional transfer of the property to the marital estate and not to the grantee spouse.<sup>66</sup> Thus with *Carter* Maine acquired two rules. On the one hand, property "dynamically" acquired in exchange for premarital property would still be divided so as to reflect the individual contributions of non-marital property, irrespective of joint title. On the other hand, property acquired entirely by one spouse would be considered marital property if it had later been transferred into joint tenancy during the marriage.

The 1990 decision of *Dubord v. Dubord*<sup>67</sup> provided another variation that further stymied the emergence of a clear, concise rule. In *Dubord*, the wife contributed \$10,000 of her non-marital funds in order to speed the retirement of a mortgage on the couple's first home and another \$20,000 in non-marital funds to secure the down payment on a second home.<sup>68</sup> Both properties were held in joint tenancy. The *Dubord* court rejected the husband's *Carter* argument that, because his wife took the second home as a joint tenant with him, she intended to make a donative transfer of the \$20,000 to the marital estate.<sup>69</sup> The court distinguished *Carter* because there one spouse, who had acquired the property prior to marriage, transferred it to both spouses in joint tenancy during the marriage.<sup>70</sup> In rejecting the application of the *Carter* presumption of donative intent, the court stated:

Were we to apply the *Carter* presumption to the present facts, we would effectively abandon the source of funds rule and hold that *the mere act* of taking property in joint names results in a gift to the

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65. *Id.* at 1021 (quoting *Conrad v. Bowers*, 533 S.W.2d at 622).

66. *See id.* The *Carter* court asserted that the justification for this rule arose out of the partnership and shared enterprise theory that underlay the Uniform Act. *See id.* at 1022. Whether this is true or not, the presumption of donative intent is a long recognized common-law rule. *See Greenburg v. Greenburg*, 141 Me. 320, 323, 43 A.2d 841, 842 (1945). The difference is that under the common-law rule joint tenancy mandates a one-half interest to each spouse. *See id.* Under the *Carter* rule, however, the gift is to the marital estate rather than to the spouse. *See Carter v. Carter*,

419 A.2d at 1022. Because the donation is to the marital estate instead of the spouse, the divorce court has the authority to divide the property along equitable grounds. *See id.* at 1023.

67. 579 A.2d 257 (Me. 1990).

68. *See id.* at 258-59.

69. *See id.* at 259.

70. *See id.* at 260.

marital estate of any separate property used as part of the purchase price. We refuse to do so.<sup>71</sup>

Thus, the source of funds rule established in *Tibbetts* determined the outcome of *Dubord*. The *Dubord* court reinforced the notion found in *Tibbetts* that equity requires more than a "mere" consideration of title in the disposition of property in a divorce.<sup>72</sup> Suggestive of the firm footing that the source of funds rule now had, the *Dubord* court expressly limited the *Carter* presumption of donative intent to apply only to "an interspousal transfer creating a joint tenancy."<sup>73</sup> Thus, absent a separate interspousal transaction that evidenced a clear objective intent to confer a joint interest in the contributing spouse's non-marital property, the spouse contributing non-marital property would be allowed to recover the value of that investment upon divorce. In essence, a couple would have to affirmatively establish, through an interspousal transfer or other evidence, that the contributing spouse was relinquishing his or her ownership over separate property. This presumption would protect spouses by allowing them to make contributions freely to the economic unit, without jeopardizing their separate estates.

### III. *LONG V. LONG*

Mary Long filed suit to divorce her husband, Richard, in June of 1993.<sup>74</sup> In addition to seeking a ruling on the custody and support of two minor children, the parties needed to resolve the disposition of the family residence in Blanchard, Maine.<sup>75</sup> Though the couple had acquired the subject property during their marriage, Richard could trace \$35,000 of the \$38,000 purchase price to the sale of a home he had owned in Pennsylvania at the time he and Mary were married.<sup>76</sup> To complicate matters slightly, however, the Pennsylvania property was still under a mortgage at the time the couple married, and they lived in it together for a time, during which they made the monthly mortgage payments with marital funds.<sup>77</sup> After selling the Pennsylvania property, to which Richard held sole title, for \$38,234.38, Richard put \$35,000 of the proceeds into a joint savings account payable to both him and Mary.<sup>78</sup> In December of 1979, they applied the \$35,000 to the purchase of their Maine residence, which they took as joint tenants.<sup>79</sup> Shortly after purchasing the residence, the couple took out a \$10,000 home

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71. *Id.* (emphasis added).

72. *See id.* at 259.

73. *Id.* at 260 (quoting *Smith v. Smith*, 472 A.2d 943, 947 n.5 (1984)).

74. *See Long v. Long*, 1997 ME 171, ¶ 3, 697 A.2d 1317, 1319.

75. *See id.*

76. *See id.* ¶ 2, 697 A.2d at 1319.

77. *See id.*

78. *See id.*

79. *See id.*



equity loan and commenced making monthly payments with marital funds.<sup>80</sup>

At the time of their divorce, the Longs were able to agree that the home was worth \$47,500.<sup>81</sup> Because a \$3700 balance remained on the home equity loan, the couple's equity in the property amounted to \$43,800.<sup>82</sup> The district court ruled that the entire property would be disposed of as marital property because Richard had transferred the funds from his Pennsylvania home into a joint account with Mary, thus manifesting a gift to the marital estate.<sup>83</sup> As a result, the court ruled that the Longs purchased the Maine premises entirely with marital funds.<sup>84</sup> The court gave the residence to Richard, conditioning the disposition on Richard's purchase of Mary's equity in the home, calculated at \$21,900, or half of the couple's equity.<sup>85</sup> Richard appealed that judgment, alleging error in the failure of the court to apply the source of funds rule and for conditioning the disposition of the residence to him on an "unreasonable timetable for purchasing Mary's equity."<sup>86</sup> The superior court affirmed the district court's ruling.<sup>87</sup>

On further appeal, the Law Court unanimously affirmed the ruling and overturned *Young and Tibbetts* "and their progeny," holding that "jointly owned real property is subject to division as marital property pursuant to 19 M.R.S.A. § 722-A (1981), even though parts of it were acquired with non-marital funds."<sup>88</sup> The court appealed to the legislative intent and partnership theory underlying the Maine Act to aid its construction of the statutory language.<sup>89</sup> The court determined that the text of the statute could "shed no light" on the problem and that the partnership theory could only be enhanced by treating all property acquired jointly during marriage as marital property.<sup>90</sup> The court noted:

By recognizing the legal significance of joint ownership, we do not resurrect the inflexibility and inequities of the prior law, nor do we deviate from the text of the statute. By holding that joint ownership results in marital property, we correct the interplay between subsections 2 and 3 and advance the statutory purpose of subjecting shared assets to the court's equitable powers of division.<sup>91</sup>

The court further supported its conclusion by noting that dividing jointly held property as marital property would be consistent with the

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80. *See id.*

81. *See id.* ¶ 3, 697 A.2d at 1319.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* ¶ 3, 697 A.2d at 1319-20.

86. *Id.* ¶ 1, 697 A.2d at 1319.

87. *See id.*

88. *Id.*

89. *See id.* ¶¶ 6-7, 697 A.2d at 1320.

90. *Id.* ¶ 15, 697 A.2d at 1323.

91. *Id.* ¶ 17, 697 A.2d at 1324.

fact that, during marriage, each spouse had rights to the joint property that allowed him or her to effect an immediate transfer of his or her interest.<sup>92</sup> The court could not determine why a spouse's surrender of half ownership of property during marriage should be treated as though it had failed to create divisible rights upon divorce.<sup>93</sup> Moreover, it would be inconsistent, reasoned the court, to allow consideration of contributions to give the married joint tenant an ability to recapture property rights at divorce that no other joint tenant would have in any other context.<sup>94</sup> The court further noted:

Any unfairness pursuant to the new rule is addressed by the court's consideration of all relevant factors, in dividing marital property, including the length of the marriage and the relative contribution of the spouses. Section 722-A relies on an equitable division rather than an inflexible system of classification to achieve justice in complex circumstances.<sup>95</sup>

With *Long*, then, the district courts have acquired additional authority over the division of spousal property not previously allowed. The ability of a spouse to trace back the acquisition of a partial interest in jointly held property to an exchange of premarital, separate property will not work to set apart the exchanged amount from the equitable discretion of the divorce court. Instead, the entire jointly held property will be subject to the court's equitable discretion to divide marital property under the Maine Act. The divorce courts are still directed to take into consideration the "contribution of each spouse to the acquisition of the marital property"<sup>96</sup> in the course of determining what constitutes equitable division, but that consideration will be weighed against other important considerations which may diminish the relative significance of the source of funds.<sup>97</sup>

The *Long* court left certain questions unanswered. The narrow holding of *Long* is that it overruled the "*Young and Tibbetts* line of cases to the extent that they treat jointly owned real property as separate property."<sup>98</sup> Does this mean that the court rejected the "dynamic" acquisition interpretation of the statutory language and that the source of funds rule is still applicable to cases where ownership is other than joint ownership? Is the divorce court still authorized to trace the source of funds contributed by the marital estate toward the purchase price of non-marital property, the circumstance for which the source of funds rule of construction was originally designed?<sup>99</sup> Read strictly, *Long*

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92. See *id.* ¶ 15, 697 A.2d at 1323.

93. See *id.* ¶ 16, 697 A.2d at 1323.

94. See *id.* ¶ 16, 697 A.2d at 1323-24 (citing *Boulette v. Boulette*, 627 A.2d 1017, 1018 (Me. 1993)).

95. *Id.* ¶ 16, 697 A.2d at 1324.

96. ME. REV. STAT. ANN. tit. 19-A, § 953(1) (West 1998).

97. See *Long v. Long*, 1997 ME 171, ¶ 16, 697 A.2d at 1324.

98. *Id.*

99. See *Tibbetts v. Tibbetts*, 406 A.2d 70, 76 (Me. 1979).

seems to answer the latter question in the affirmative. Thus, the use of the source of funds rule as an equitable exception to the inception of title rule is apparently still an available option for Maine divorce courts.

#### IV. DISCUSSION

##### A. Options Available to the Long Court

To begin an evaluation of the Law Court's ruling, it is important to note that the facts of *Long* did not require the court to overturn the source of funds rule. The court had at least two viable alternatives available to it. One possible resolution would have been to apply the presumption of donative intent for interspousal transfers in joint tenancy, as established in *Carter*, and maintain the status quo by leaving the source of funds rule to apply to a narrower class of joint tenancy cases. Like the course followed by the *Long* court, this would have resulted in affirmance of the judgment of the lower court. Another option would have been to apply the source of funds rule, overturn the *Carter* presumption of donative intent for interspousal transfers in joint tenancy, and reverse the district court's ruling with, perhaps, the inclusion of some guidelines for separating property acquired with mixed assets through the source of funds rule.

The first alternative suggested above would have been the easiest to apply and would have avoided any rejection or limitation of precedent. On the basis of its prior cases, the *Long* court could have simply affirmed the district court's decree outright. In *Carter*, the Law Court had already carved out an exception for interspousal transfers in joint tenancy.<sup>100</sup> In *Long*, the husband had put all the proceeds from the sale of his Pennsylvania home into a joint bank account. This act could have triggered the *Carter* exception to the source of funds rule. In fact, that is precisely the approach taken by the district court in *Long*.<sup>101</sup> Thus, the Law Court could have summarily affirmed, maintained the source of funds rule, and insured an identical outcome for the case.

The court also could have utilized the source of funds rule to resolve the case. Recall that the rule was first adopted to assure that the marital estate could recover all contributions of marital resources toward the acquisition of new property during marriage, even where one spouse held sole title.<sup>102</sup> Tracing the source of the contributions in *Long* would result, initially, in the setting aside of \$35,000 of the \$43,800 home value as Richard's separate property, leaving \$8800 in marital property. Because of the discretion granted to divorce courts by the Maine Marital Property Act and the instruction to take into consideration the value of property set apart as one spouse's non-marital property, the \$8800 could

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100. See *Carter v. Carter*, 419 A.2d 1018 (Me. 1980); *supra* text accompanying notes 56-66.

101. See *Long v. Long*, 1997 ME 171, ¶ 3, 697 A.2d at 1319.

102. See *Tibbetts v. Tibbetts*, 406 A.2d at 76-77; Comment, *supra* note 15, at 346-48.

very well go entirely to Mary.<sup>103</sup> The Longs, however, also took out a home equity loan in the amount of \$10,000.<sup>104</sup> Of this liability, \$6300 was paid for with marital funds, bringing the marital contribution toward the home to a total of \$15,100. Again, considering the divorce court's discretion in dividing marital property, a reasonable outcome would be \$15,100 to Mary, leaving \$28,700 for Richard. In other words, over twenty years of marriage, Mary would acquire a \$15,100 interest in the marital residence with a minimal initial contribution,<sup>105</sup> while Richard would lose \$6300 over the same period from his initial investment of \$35,000. To some, such a resolution might appear to be equitable and the product of a fair application of the statutory language. Perhaps the strongest feature of such a resolution is that it would allow spouses some assurance that a contribution of separate property toward acquisition of new property, such as a marital residence, would be recoverable in the event of a failed marriage. It would also guarantee to the marital estate the ability to recover all contributions of marital resources by treating the proportionate marital contribution toward "property acquired [during] marriage," as marital property, a result fully consistent with subsection 3.<sup>106</sup> But to achieve this result in *Long*, the court would have been forced to reexamine the *Carter* presumption of donative intent for interspousal transfers in joint tenancy. Because Richard deposited the proceeds from the sale of his Pennsylvania residence into a joint account, suggestive of an interspousal transfer, the court would have been forced to abandon the presumption of donative intent established by the *Carter* court.

### *B. Resolving Inconsistencies in the Treatment of Joint Ownership*

That the use of the source of funds rule in *Long* would have required the abandonment of the *Carter* donative presumption supports the *Long* court's assertion that the preexisting rules were based on inconsistent treatment of the "legal significance of joint ownership."<sup>107</sup> For the *Tibbetts* court, the source of funds rule would achieve equity precisely because it allowed the court to disregard the form of legal title, whether joint title, sole title, or otherwise. On the other hand, the *Carter* court's donative presumption for interspousal transfers in joint tenancy focused on the form of title and the mode of title transfer in determining whether property was to be treated as marital or not. The *Young* and *Tibbetts* line of cases has produced a situation where one piece of jointly held property might be treated as marital while another piece of jointly held

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103. See ME. REV. STAT. ANN. tit. 19-A, § 953(1) (West 1998).

104. See *Long v. Long*, 1997 ME 171, ¶ 2, 697 A.2d at 1319.

105. Mary's initial economic contribution is not specified. It may have been nothing or it may have been up to \$3000. The record does not indicate the source of \$3000 that was applied to the purchase. See *id.*

106. See ME. REV. STAT. ANN. tit. 19-A, § 953(3).

107. *Long v. Long*, 1997 ME 171, ¶ 6, 697 A.2d at 1320.

property might be treated as both marital and separate simply because of the formalities surrounding the transfer of title. With *Carter*, an interspousal transfer during marriage by one spouse to both spouses as joint tenants came to have a different legal significance (inclusion in the marital estate) than a partial contribution of separate property toward acquisition of new property taken by the spouses as joint tenants (source of funds tracing allowed). Why, after all, should the timing of the transfer of title be of primary significance and the form of title of secondary significance in the characterization of property ownership? The "*Young* and *Tibbetts* line of cases" produced another inconsistency in the legal significance of joint property.<sup>108</sup> The *Long* court noted that in all circumstances taking title in joint tenancy confers on each joint tenant property rights that are immediately transferable.<sup>109</sup> Thus, a spouse holding property as a joint tenant could freely transfer a one-half interest to another person during marriage, irrespective of that spouse's contribution toward the joint property. Yet, upon divorce, *Tibbetts* allowed a married person to recapture what he or she had willingly relinquished during marriage.<sup>110</sup> A married joint tenant thus received preferential treatment, as compared with an unmarried joint tenant, if he or she had contributed a majority of the purchase price of joint property.

Among the strongest features of the rule announced in *Long* is that it lessens these several inconsistencies by making all joint property presumptively marital, a result in harmony with the language of subsection 3 of the Maine Act. The universal presumption that joint property is a part of the marital estate handily dispatches with the tension between *Tibbetts* and *Carter*. The joint tenancy created through an interspousal transfer will now be of equal significance to a joint tenancy acquired by the spouses with a mix of marital and non-marital property. The *Long* ruling has a lesser impact, however, on the disparity in the treatment of married versus unmarried joint tenants. Under *Long*, the married joint tenant recovers an equitable share of joint property on divorce, whereas the unmarried joint tenant recovers an equal share through partition. The equitable disposition of property, by definition, does not promise the married joint tenant an equal share in joint property. Equal division is particularly unlikely under current law where there is a dependent spouse or children who require support upon the termination of the marriage and where the joint property, particularly if it is the marital home, is the only asset of significant value held by the couple. In such circumstances the married joint tenant will likely receive a greater or lesser part of joint property than an unmarried joint tenant would receive through partition. On the other hand, because the *Long* rule allows the

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108. *Id.* ¶ 16, 697 A.2d at 1324.

109. *See id.* ¶ 16, 697 A.2d at 1323.

110. *See id.* ¶ 16, 697 A.2d at 1324; *see also* *Boulette v. Boulette*, 627 A.2d 1017, 1018 (Me. 1993) (disallowing consideration of contributions in a partition action between unmarried joint tenants).

divorce court to consider such factors as the relative contribution of spouses toward the acquisition of marital property, the divorce court is able to divide joint property equally if appropriate.

One question that should be asked, which the *Long* court did not address, is whether inconsistent treatment of married and unmarried joint tenants is a cause for concern. If one answers yes to this question, it is likely because one views the economic relationship of marital partners as characterized by essentially dispassionate, arm's length transactions (taking the analogy of the business partnership too far, perhaps). This perspective is naïve. Economic transactions between marital partners are typically characterized by underlying emotional considerations, rather than objective business considerations, and by forms of reliance not found generally in transactions involving unmarried joint tenants, except those in cases where the unmarried joint tenants are living as de facto marital partners or where transactions are entered into between and among family members. But the marriage relationship, essentially an underlying contract between the parties, introduces unique factors. Most fundamentally, the basic assumption on which marital partners rely when entering into joint or interspousal transactions is that the marriage will endure.<sup>111</sup> The likelihood that defeated expectations and other reliance factors will exist in the termination of a marriage supports the *Long* court's decision to expand the equitable authority of the divorce court over a greater portion of the spouses' total property holdings. In any event, given that the equity aspect of proceedings involving the disposition of property at divorce makes them fundamentally different from property partition cases at law, the *Long* court's concern that a married joint tenant would have different rights than any other joint tenant is misplaced.<sup>112</sup>

### C. *The Limitations of the Source of Funds Rule*

The source of funds rule originated in community property jurisdictions as an equitable exception to the inception of title rule.

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111. The primary elements of marriage have been classified as intended duration, sexual exclusivity, and social legitimacy. See GLENDON, *supra* note 16, at 11-12. The element of intended duration is, one might say, compromised to some extent given the prevalence of divorce in Western nations. See *id.* at 193. Moreover, while the universal prohibition on polygamy in the several states reflects our strong cultural acceptance of sexual exclusivity during marriage, there is no legal consequence to entering into as many consecutive marriages as one wishes, even though prior marriages may impose significant burdens related to the support of dependents. In fact, the freedom to marry is a right that has gained constitutional protection. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). Professor Glendon refers to this phenomenon as "serial," as opposed to "simultaneous" polygamy. See GLENDON, *supra* note 16, at 52-53.

112. With respect to the special weight divorce bears upon the effect of legal arrangements made by spouses during marriage, consider that the Maine Probate Code prevents a former spouse from remaining a beneficiary to a will created by the other spouse during marriage, though the testator otherwise fails to amend the testamentary instrument. See ME. REV. STAT. ANN. tit. 18-A, § 2-508 (West 1998).

Under the Spanish and Mexican civil law governing marriage and divorce, on which numerous American jurisdictions base their community property regimes,<sup>113</sup> all property was either fully separate or fully communal. Whatever property a man or woman brought into a marriage was treated as his or her separate property during marriage, even if community funds were later contributed toward improvements or the satisfaction of obligations related to the purchase of the property. One commentator notes:

Despite favoring community ownership, Spanish-Mexican law had an even stronger preference for unified ownership as expressed in the "inception of title" doctrine. In most families the most significant separate property asset was the family home and surrounding lands, which the law sought to have pass generation by generation to the eldest son, always remaining in the blood line. If the family home were even partly community rather than Husband's separate property, half the community share would be owned at Husband's death by the widow, who might remarry and give birth to a child not related to the deceased husband who might in turn inherit a fractional ownership in the "family" estate. For similar policy reasons . . . use of community funds to build structures on or otherwise improve separately owned land did not give the community an interest in the property.<sup>114</sup>

As economic developments made this agrarian-based legal policy increasingly outmoded, community property jurisdictions began developing exceptions that gradually eroded the inception of title doctrine.<sup>115</sup> Among these doctrines was the source of funds rule, designed to reimburse the community for its contributions toward property held separately by one spouse.<sup>116</sup>

Though the source of funds rule originated as a method of reimbursing the communal interest, in time it was used in some jurisdictions as a means of objectively determining the "ratio of community and separate investment in . . . property."<sup>117</sup> When so used, the source of funds rule would appear to allow partners in marriage to pool their individual, non-marital assets in order to acquire property together that they could not acquire on their own, while preserving to each the ability to recapture their non-marital property if the joint venture should fail.

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113. The American states having community property regimes based on French or Spanish law are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 366 (3d ed. 1993).

114. William A. Reppy, Jr., *Acquisition with a Mix of Community and Separate Funds: Displacing California's Presumption of Gift by Recognizing Shared Ownership or a Right of Reimbursement*, 31 IDAHO L. REV. 965, 973-74 (1995).

115. See Bartke, *supra* note 15, at 385 (describing the primary approaches taken by community property jurisdictions to resolve the inception of title problem: a doctrine of reimbursement, or the construction of equitable liens favoring the community).

116. See *id.*

117. *Tibbets v. Tibbets*, 406 A.2d 70, 76 (Me. 1979).

But where certain common facts are present, the source of funds rule is a poor vehicle for achieving an equitable division of property. These facts are three in number: the marriage is of significant duration; the joint property at issue is the most valuable asset the couple owns (typically the marital residence); and a majority of the funds used for its acquisition have their source in the non-marital property of one spouse.<sup>118</sup> Cases presenting these facts highlight the inherent conflict in the two basic principles of the partnership conception of marriage: on the one hand, "the community is entitled to all the fruits of the labor and efforts of both spouses" while, on the other hand, "the separate property of the spouses continues . . . so long as it can be identified."<sup>119</sup> In such cases, the formulaic application of the source of funds rule works poorly because it can deprive the marital estate of the opportunity to recover the fair value of its contributions of labor as well as payments for maintenance, taxes, and the like. One basic assumption is that the value of the spouses' combined labor and financial contributions exceeds the value of their enjoyment in the property during the marriage. Another assumption is that the spouse benefited by the strict application of the source of funds rule has also been benefited over the years by the partner's labor contributions and expenditures of resources, all of which could have been expended by the partner toward other, equity-building activities. Where the primary contributions of the disadvantaged partner were made as a homemaker, the opportunity costs are most severe. Such a spouse has not only failed to build capital equity, but has also failed, more often than not, to develop skills and experience transferable to the workplace. In contrast, the wage-earning spouse has maintained not only a capital investment during the marriage but also a career, both with the aid of his or her partner.<sup>120</sup> In order to arrive at an equitable

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118. See GLENDON, *supra* note 16, at 234. Professor Glendon observes that most divorces involve younger couples with minor children and that young couples "typically have few assets other than the family dwelling, which may be leased, mortgaged, or owned." *Id.* In response, most Western nations have developed "mini-regimes" of marital property addressed solely to the treatment of the marital residence and household goods. *See id.* "One way or another, courts everywhere, with more or less aid from legislation, endeavor to preserve the marital home or its use for the needed period of time for the custodial spouse and children." *Id.* For a large number of other individuals, "government entitlements and job-related rights such as salaries, pensions, insurance, and other benefits have become more important than land . . ." *Id.* at 135.

119. Bartke, *supra* note 15, at 383.

120. [T]oday more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank created, once a profession or job is secure.

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964). A 1987 article notes that "[t]he first empirical study of the effects of introducing increased autonomy in collection and spending of income has concluded that such rules regularly disadvantage the economically weaker spouse." GLENDON, *supra* note 16, at 134 n.147 (citing Monique Gysels et al., *(In)Equality of Husband and Wife in Patrimonial Matters: An Empirical Investigation of the Effects of a Progressive Matrimonial Law in Belgium*, 15 INT'L J. SOC. L. 29 (1987)).



resolution in a case characterized by these facts, a divorce court must have more flexibility than the source of funds rule provides.

*D. Including in the Marital Estate All Contributions  
toward Joint Property*

Subsection 3 of the Maine Marital Property Act provides: "All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of . . . title . . ." <sup>121</sup> Where one spouse becomes a joint tenant during marriage, whether with a third party or with his or her marital partner, it seems obvious that that spouse has "acquired" ownership in property. What that property is is most fundamentally a function of what rights the owner has acquired over the property. Where a person has no rights in a thing, that thing is not the person's property. Conversely, rights in a thing imply ownership, exclusive or shared. The law makes it clear that the joint tenant acquires immediate rights in joint property upon transfer, one of which is to dispose of those rights by conveying them to another. <sup>122</sup> Where the spouse has realized the power to dispose of property, will it not be said that he or she has acquired ownership over that property? And by extension, if the spouse has acquired property, must it not be recognized as marital property because it was "acquired . . . subsequent to marriage"? <sup>123</sup> And yet the history of the Law Court's treatment of this statute, until *Long*, has been that the exception of subsection 2(B) swallows the rule of inclusion of subsection 3.

With *Long*, the consensus has come to be not that one subsection is manifestly of greater weight but that, as first propounded by Justice Harry Glassman: "[I]t is fruitless to endeavor to determine the meaning of subsections 2 and 3 . . . by a mere textual analysis." <sup>124</sup> Whether or not the statute truly sheds no light, including all contributions toward the acquisition of joint property in the marital estate is the appropriate method for handling the disposition of such property at divorce. In the first place, such an arrangement is consistent with the manner in which the private parties chose to arrange ownership during marriage. They chose, basically, to share ownership. <sup>125</sup> Where it can be shown to the

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121. ME. REV. STAT. ANN. tit. 19-A, § 953(1) (West 1998).

122. See *Long v. Long*, 1997 ME 171, ¶ 16, 697 A.2d 1317.

123. ME. REV. STAT. ANN. tit. 19-A, § 953(2).

124. See *Long v. Long*, 1997 ME 171, ¶ 15, 697 A.2d at 1323 (quoting *Grant v. Grant*, 424 A.2d 139, 144 (Me. 1981) (Glassman, J., concurring)).

125. Noting a 1961 law review article which presents a contemporaneous study showing over 85% of all deeds of real property to husbands and wives were in joint tenancy, one commentator writes that "the usual manner of taking title to real property in California by husband and wife is in joint tenancy, for reasons apparently quite distinct from the legal incidents of such ownership." See Donald C. Knutsen, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, at 253-54 (1966) (noting Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 88 (1961)).

court that the intention of the parties was contrary to the presumption, it can be rebutted. This result conforms with the statutory grant of power giving spouses the freedom to make private arrangements and enter into contracts with one another with respect to the disposition of property at divorce.<sup>126</sup> Additionally, the flexibility of the *Long* rule allows the divorce court to reimburse contributions of non-marital property toward joint property in those circumstances where it is warranted, as in very brief marriages where the contributing spouse relied on assurances that the marriage would endure.<sup>127</sup> Finally, the extension of the divorce courts' authority under *Long* conforms with the partnership theory of marriage adopted by the drafters of both the Uniform Act and the Maine Act, who intended that the partners in marriage be understood as a single economic unit rather than as independent economic actors.<sup>128</sup>

### V. LEGISLATIVE RECOMMENDATION

The *Long* court's judicially-crafted presumption that joint property is marital property provides a useful construction of subsections 2 and 3 of

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The major reason that marital property is taken in joint tenancy . . . is that real estate salesmen and brokers generally recommend this title form as the least expensive. Some cases suggest that there are reasons other than the layman's lack of awareness of the legal significance of the form or character of title [such as] where [a] husband successfully testifies that joint tenancy was "forced upon him against his will by the banks, title companies, or other parties to the transactions."

*Id.* at 254 n.98 (citing *Jones v. Jones*, 286 P.2d 908, 913 (Cal. 1955)). See generally Griffith, *supra*.

As Professor Glendon has characterized the problem:

[I]n the course of living together, husbands and wives jointly acquire assets, make gifts to each other, and use many items in common—all in serene disregard of such notions as title and without keeping track of the precise contributions each has made. Thus considerable uncertainty surrounds the ownership rights of the spouses during marriage.

GLENDON, *supra* note 16, at 125.

126. See ME. REV. STAT. ANN. tit. 19-A, § 953(2)(D).

127. See *Long v. Long*, 1997 ME 171, ¶ 16, 697 A.2d at 1324.

128. See Comment, *supra* note 15, at 339.

The law used to be in the case of a divorce that the wife was entitled to one-third of the husband's estate as far as real estate is concerned. We know that in the modern society this is not a fair distribution because in many cases the woman works and she has contributed fully as much to the estate as has the husband. So what this law does is that it assumes that, unless evidence is introduced to the contrary, that the property which the couple accumulated during their marriage is joint property and should be divided equally.

2 Legis. Rec. 3410 (1971) (statement of Sen. Harding, before the State Senate).

Senator Harding was wrong on two counts: the presumption is that property is marital property, not joint property, and that it should be divided equitably, not equally. If the presumption were for joint property, then each spouse would have an equal interest and the divorce court would be required to divide it equally. However, the statute provides for equitable division of marital property, which need not result in even division. See ME. REV. STAT. ANN. tit. 19-A, § 953(1) (requiring that "the court shall set apart to each spouse the spouse's property and shall divide the marital property in proportions the court considers just after considering all relevant factors").

the Maine Act and promises divorcing spouses that the division of their joint property will be governed by equitable considerations aimed at recovering for each party his or her fair share of an asset's value. In the interest of clarity the Legislature should revise the Act to incorporate this presumption. Presumably, such an amendment would be made to that part of the marital property definition found in subsection 2(B). Onto the current language that excludes from the marital property definition "[p]roperty acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent,"<sup>129</sup> should be appended "unless such property is held by the spouses as joint tenants."

While this terse amendment to the statute would greatly clarify the interplay of subsections 2 and 3, the fundamental question would still remain as to whether the current statutory scheme adequately protects the foremost interest of the marital estate. As discussed in Part IV.C., the operation of the current law can in certain cases undercut the ability of the marital estate to recoup its true investment in the marital partnership. This is in part due to the fact that the setting aside of the separate property mandated by subsection 1 potentially removes the vast majority of the assets from the equitable discretion of the judge.<sup>130</sup> With fewer assets available for the judge to divide along just or equitable lines, there is less ability to redress inequitable circumstances through the disposition of property. But more important, this problem is due, once again, to the poor definition of marital property found in subsection 2. Ideally, section 953 should provide a method for measuring the fair monetary interest of the marital estate in the gross estate (the marital estate plus the combined separate estates) that does not treat the marital estate as a remainder interest. In other words, the determination of the value of the marital estate should be the primary task for the court. The setting aside of separate property should occur secondarily, only after the objective value of the marital estate has been determined. Otherwise, as is the case under the current statutory scheme, the marital estate is only a remainder interest.

To prevent the marital estate, which is the preferred estate under the partnership concept of marriage, from being disenfranchised in those circumstances where one spouse's separate property comprises the majority of the gross estate, the law should require that the value of the marital estate be established prior to tracing and setting aside separate property. In other words, the value of the marital estate should be established positively rather than negatively. Would its value differ if it were established in this manner rather than as a remainder? Yes. The value arrived at in this manner would differ from the remainder value currently arrived at under Maine law because it would require the court to determine, among other things, the value added to the separate estates

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129. ME. REV. STAT. ANN. tit. 19-A, § 953(2)(B) (West 1998).

130. See *id.* § 953(1).

through contributions of marital time, labor, and assets in the form of maintenance, improvements, modifications, and the like.

To illustrate how this approach would differ in result from the current operation of section 953, consider an asset such as a summer cottage brought into a marriage by the wife which is owned by her separately and free of any obligation on the purchase price. Over the years marital funds are expended on upkeep, landscaping, taxes, utilities, and advertisements for summer rentals. Initially, tenants are few and far between. By the time of the divorce, however, every week of the summer is reserved and the property is bringing in several thousand dollars in annual rents. In addition to this income realization, the market value of the cottage has increased significantly. Will this increase in value be treated under the current system as partially owned by the marital estate? Not necessarily. Under the current system, the cottage would be set aside as the separate property of the wife. Only if the marital estate were valuable enough could the marital estate be reimbursed at the time of divorce. On the other hand, a system that addressed the interest of the marital estate prior to setting aside the separate estates would have to determine exactly what portion of the value of the cottage was the product of contributions made with marital funds and marital labor. By recognizing the stake of the marital partnership in the cottage, as distinct from the individual partners, the value of the marital estate is enhanced and more property is available for the court to dispose of along equitable lines. In other words, the current system of property disposition fails to assess adequately the real economic value of the marital estate. This is due to the fact that the current method of disposition treats the marital estate as a residuary interest and not as the primary interest.

The remaining questions, then, are how the true value of the marital estate ought to be determined and, once it has been determined, how the marital estate ought to be divided. How the marital estate is to be valued will depend on how the marital estate is defined. The negative definition of marital property found in subsection 953(2), that marital property is "all property acquired . . . during the marriage, except"<sup>131</sup> the enumerated classes of separate property, should be discarded. The marital estate should, instead, be positively defined. One possible definition might be "all property acquired by the marital partners during marriage, including property held jointly by the spouses and all increase in value during the marriage of both the marital property and the separate property of the spouses." Such a definition would surely be in harmony with the partnership theory of marriage and the conception of the marital partners as engaged in a single economic endeavor, assuming that these characterizations are desirable ones. The value of the marital estate could be determined in different ways. It could be arrived at very generally by subtracting the value of the gross estate at the time of marriage from the

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131. *Id.* § 953(2).

value of the gross estate at the time of divorce. Alternatively, the value of the overall marital estate could be obtained by determining the sum of its ownership interests in the individual assets and liabilities of the partners. As for the division of the marital estate between the partners, there is really no reason why it would not remain a function of the court's equitable discretion. One possible alternative, much simpler to apply, would be to divide the marital estate in half.<sup>132</sup> Once the disposition of the marital estate is resolved, the court would be free to set aside the remainder of the separate estates to the separate parties.

The greatest strength to an approach such as this is that it recognizes what is objectively the case: over time contributions of marital assets do inure to the benefit of the separate property holdings of each spouse. This accession to the value of the separate property should be recognized in the form of a buy-in to title on the part of the marital partnership. Because such an approach requires consideration of the impact of time and maintenance upon the value of assets, it provides a more objective and fair approximation of the marital portion of spouses' gross estate. Marriages of short duration will yield relatively smaller stakes in the separate holdings of the spouses, while marriages of great duration will yield more considerable equity positions. By addressing the valuation problem inherent in the marital estate prior to the set aside of separate property, the court will gain equitable discretion over a larger piece of the overall estate held by the spouses. This would enable the court to better address whatever equitable considerations or extraordinary circumstances may arise and, accordingly, achieve a more "just" disposition.

Marc J. Veilleux

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132. This approach resembles the system at work in the German *Zugewinn*. See GLENDON, *supra* note 16, at 133. The *Zugewinn* is the increase of the monetary value of the spouses' estates that occurs during marriage. In Germany "[t]he increase, if any, of one spouse's estate is compared with the increase, if any, of the estate of the other. A partner whose increase is greater than the other's must pay to the other one-half the difference." *Id.*