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TOWARD A COHERENT INTERPRETATION OF MAINE'S MARITAL PROPERTY ACT

John C. Sheldon*

I. INTRODUCTION

Interpreted literally, Maine’s Marital Property Act (MPA)¹ extends its application to both pre- and post-marital property. The statute reads in its entirety:

1. Disposition. In a proceeding: (a) for a divorce, (b) for legal separation, or (c) for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of said property, the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems 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 therein for reasonable periods to the spouse having custody of any children.

2. Definition. For purposes of this section only, “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 co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety and community property. The presumption of marital 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 such disposition in accordance with subsection 1.

* Judge, Maine District Court. I extend my sincere thanks to the Honorable D. Brock Hornby, Judge of the United States District Court of Maine, for his many insightful comments on the arguments I make in this article. I also thank my brother, Dr. Frederick H. Sheldon, of the Academy of Natural Sciences in Philadelphia, for his help on the mercurial scientific method.


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cludes all wedding gifts from the marital estates of divorcing spouses. Wedding gifts received before a wedding are nonmarital because they were not received during the marriage.\(^{2}\) Wedding gifts received after a wedding are nonmarital because they were gifts, which appear to be expressly excluded from the marital estate by the statute's definition of marital property.\(^{3}\) In short, a literal reading of the MPA prevents Maine's divorce courts from exercising any discretion in the distribution of what must, by any measure of common sense, be quintessential examples of marital property.\(^{4}\)

This curious state of affairs is the product of inadequate draftsmanship of § 307 of the Uniform Marriage and Divorce Act\(^{5}\) (UMDA), of which § 722-A(1) of the MPA is virtually the verbatim derivative.\(^{6}\) While those deficiencies have drawn plenty of fire from within and without Maine,\(^{7}\) it is not the purpose of this article to

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5. Decree content. If the final divorce decree disposes of real property, it shall name the party or parties responsible for preparing and recording the decree of divorce or abstract thereof and paying the recording fee. The decree may name different parties to be responsible for different parcels.

6. 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, which may be made at any time, the court may set aside or divide the omitted property between the parties, as justice may require.

2. Id. Section 722-A(1) and (2), in combination, permit a divorce court to "divide the marital property in such proportions as the court deems just" but then limit the definition of "marital property" to property "acquired by either spouse subsequent to the marriage."

3. Id. Section 722-A(1) and (2)(A), in combination, authorize the divorce court to exercise discretion in dividing marital property, but then exclude from the definition of "marital property" property received by gift.


If the statutory definition—which explicitly excludes both inherited and gift property from the definition of marital property—is read literally by the court, then it might exclude all such property from the judicially divisible estate, even if that property had been deeded to both spouses in some form of joint ownership during the marriage.

Id. (footnotes omitted).


6. Section 722-A(1) of the MPA differs substantively from the UMDA only "in that it omits the phrase 'without regard to marital misconduct.'" Boyd v. Boyd, 421 A.2d 1355, 1357 (Me. 1980).

7. "[T]he lack of clarity in the drafting makes textual analysis a tenuous basis for discerning the meaning of the statute." Grant v. Grant, 424 A.2d 139, 144 n.l (Me. 1981) (Glassman, J., concurring). Commenting on a virtually identical Illinois statute, Professor William Gregory has noted that:

[t]he Illinois Supreme Court faces a difficult task as it begins to clarify the language of the [Illinois Marriage and Dissolution of Marriage Act] concerning the distribution of property. The efforts so far have been promising,
add to that literature. Instead, this article treats the MPA as a fait accompli: the Legislature chose to adopt it years ago, and has scarcely changed any of its principal provisions since, so it is probably here to stay. The challenge, then, is not to criticize it but to work with it: to advance its apparent objectives without stumbling over its many idiosyncrasies.

This article attempts to resolve the problem of one of those idiosyncrasies. First, the article focuses on the narrow question of wedding gifts in an effort to identify an interpretation of the MPA that permits a reasonable solution to that problem that is compatible at least with the spirit of the statute. Such an interpretation is available. The statute may be construed as giving trial judges authority to determine what should and should not be marital property, thereby granting them the flexibility to avoid results that offend common sense. Having described this interpretation of the MPA, the article then compares it with appellate case law precedent to determine whether there is case law authority for it.

although many areas of the Act are still unclear.

... It seems unfortunate that the common-law method of filling in the details of statutes places such an extreme burden on the litigants.


When the Uniform Marriage and Divorce Act draft of § 307 (which Maine adopted as the MPA) was first proposed to the National Conference of Commissioners on Uniform State Laws, the delegates who reviewed it decided that, before it could be adopted, the term "marital property" needed more definition. 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, 179 (1971). In addition, the idea of limiting "marital property" to property acquired after marriage, and the scheme of exemptions from "marital property" for gifts, inheritances, and the like drew substantial fire. See Podell, The Case for Revision of the Uniform Marriage and Divorce Act, 7 FAM. L.Q. 169, 176 (1973). As a result, § 307 was substantially redrafted, and the version adopted in 1973 omitted the "presumption" that has so bedeviled the Law Court. See UNIF. MARRIAGE AND DIVORCE ACT § 307; Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979).

8. The MPA was adopted by the Maine Legislature as P.L. 1971, ch. 399, § 2 (effective January 1, 1972).


10. "In interpreting a statute courts must presume that the Legislature did not intend unreasonable or absurd consequences nor results inimical to the public interest." Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980).

11. While I acknowledge that the approach of this article—positing a theory and then testing it against existing case law—is unorthodox in the law review world, it is not an unprecedented methodology. Rather, it is a rough approximation of the deduc-
There is some case law directly on point, but none from Maine. However, the relevant case law, even in Maine, implicitly and amply demonstrates that the interpretation offered by this article is needed, because the Maine Supreme Judicial Court’s repeated efforts to interpret the MPA have failed to produce any consistent results. That the court has been bravely battling to make sense of the MPA for almost nineteen years, without victory so far and without reasonable hope for success in the foreseeable future, suggests that it may be time to reinterpret the MPA.  

II. Wedding Gifts Received Before the Marriage

In its essential outline, the MPA defines the boundaries of a divorce court’s discretion to divide up the property of divorcing spouses. A divorce court has broad discretion to disperse what is called “marital” property: any property “acquired by either spouse subsequent to the marriage and prior to a decree of legal separation.” Property declared to be marital may be distributed to either party or to both parties in virtually any manner or proportion that the divorce court chooses, subject only to the court’s exercise of sound discretion.

...
A party seeking to prevent the divorce court's discretionary disposition of any of the parties' property acquired after marriage must prove that such property is "nonmarital." The MPA identifies a variety of methods by which property may be acquired during a marriage but remain nonmarital: property acquired by gift, devise or inheritance; property acquired in exchange for property owned prior to the marriage or in exchange for property obtained by gift, devise or inheritance after the marriage; property acquired after legal separation; property excluded by valid agreement of the parties; and the increase in value of otherwise nonmarital property—all these are deemed nonmarital. Upon satisfactory proof that any property is nonmarital, the divorce court loses the authority to dispose of it at the court's discretion, but must "set [it] apart" to the spouse who claims title to it.

The problem of wedding gifts that appears in the introduction to this article provides a framework for a discussion of the impact of these statutory provisions on divorcing parties and their property. A party who opposes the divorce court's discretionary authority over any wedding gift (for purposes of this discussion, I will call it a vase) must show that it is nonmarital property. One way to do that is to show that the vase was acquired before the marriage, since the MPA limits the divorce court's discretionary authority to property obtained after the marriage. Hence, if a party can demonstrate that the vase was received before the wedding, that party prevents the divorce court from exercising any discretion over it. For example,
if the vase was deposited in the church lobby by latecomers who arrived after the wedding ceremony began but just prior to the exchange of vows, it is not marital property despite all logic to the contrary.  

III. WEDDING GIFTS RECEIVED AFTER THE MARRIAGE

It would make sense that wedding gifts deposited in the lobby after the exchange of vows should be deemed to be marital property, but if one takes the MPA literally that is not so. The Act “presumes” that property acquired during the marriage is marital.  

That “presumption” is rebuttable; a party who opposes the divorce court’s discretionary disposition of any of the spouses’ post-marital property may “overcome” the “presumption” with proof that the property was acquired by one or more of the nonmarital methods described above.  

Returning again to the wedding gift illustration, if a party can prove that the vase was a gift, that party prevails on the argument that it is nonmarital even if it was received after the marriage. This means that, all logic to the contrary notwithstanding, if the vase was deposited in the church lobby at any time after the exchange of vows, it is still nonmarital property.

The party having the risk of nonpersuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence; and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of nonpersuasion).

9 J. Wigmore, Evidence in Trials at Common Law, § 2487, at 293 (rev. ed., 1981) (footnotes omitted). From that point of view, therefore, it is up to the party who asserts that the vase is marital to demonstrate that it was received after the marriage, and until such a showing the property is automatically deemed nonmarital—or, at least, the court has no discretionary authority over it. Thus, technically, the party who wants to argue that the vase is nonmarital need do nothing until and unless the other party suggests its marital character.

However, in the case of wedding gifts, common sense automatically suggests the marital character of the property; thus, as a function of common sense, the burden is on the person who opposes declaring the property marital to make sure that the factfinder understands that the property was obtained before the wedding. Thus, although the text of this Article is technically at odds with the statute on this point, the text presents the problem as it can be expected to arise at trial.

19. This discussion assumes no issues of delivery and acceptance. See Brackett v. Larrivee, 562 A.2d 138, 139 (Me. 1989), for the elements of inter vivos gifts.


21. “The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2 [listing exceptions to marital property such as gifts, devises, etc.].” Id.

22. An argument can be made that a gift to both spouses during marriage is different from a gift to “either spouse,” and therefore falls outside of the specific statu-
As is evident from the foregoing discussion, under one interpretation of the MPA, proof that property was acquired by any nonmarital method or from any nonmarital source is conclusive of the issue of the court's discretion over the property: such proof absolutely cuts off such discretion. The explanation for this absolute is twofold. First, the MPA's definition of "marital property" appears to compel the result that property like the vase, received after marriage, is nonmarital. Second, even if the statutory definitions do not compel that result, the statute's "presumption" does. For reasons that will appear as I proceed, it is best to examine the second issue—the statute's "presumption"—first.

IV. The "Presumption" That Isn't

According to some authorities, the MPA's "presumption" is an evidentiary device controlled by the Rules of Evidence. That is, when

tory exception to marital property contained in § 722-A(2)(A). Although this argument is compelling, it was rejected by half of the Law Court in Grant v. Grant, 424 A.2d 139, 142-43 n.2 (Me. 1981) (separate opinion of Wernick, J.) (discussing Forsythe v. Forsythe, 558 S.W.2d 675, 678 (Mo. App. 1977)).

23. See Dubord v. Dubord, 579 A.2d 257 (Me. 1990) ("[O]nce [the wife] established in the present case that she made the payments from her non-marital property, the statutory presumption was overcome and the presiding justice was obligated to set aside to her the non-marital portion of the equity.") Id. at 259 (emphasis added).

The court's cited authority for that conclusion is its decision in West v. West, 550 A.2d 1132 (Me. 1988), in which the court stated that "[n]on-marital property must be set apart, and to the extent practicable, transferred to the spouse owning it without the court exercising any discretion." Id. at 1133. However, Dubord's reliance on West is slightly off-center, because there is a subtle but important distinction between what West said and what Dubord said it said. The point in West is that nonmarital property is exempt from the discretionary power of the court. The point in Dubord, on the other hand, is that (1) when the "presumption" is "overcome" the property must be deemed nonmarital, and (2) nonmarital property is exempt from the discretionary power of the court. Dubord correctly relied on West for the second proposition, but not for the first.

Dubord is the first case in which the Law Court expressly stated that when the "presumption" is "overcome" the property must be declared nonmarital. However, it intimated that interpretation of the statute as early as 1974 in Young v. Young, 329 A.2d 386 (Me. 1974), when it reversed a divorce court's treatment of "$530.00 worth of . . . newly purchased furniture." Id. at 391. The trial court had deemed all of the parties' furniture "commingled" and marital, but the Law Court decided that an identifiable portion of it had been acquired in exchange for the husband's pre-marriage property, and should have been set aside exclusively to him. By so ruling, the court implicitly ruled that the trial court had no discretion over property as to which the "presumption" had been "overcome."


As a civil presumption, the operation of the marital property presumption is governed by Rule 301 of the Maine Rules of Evidence. . . . Once it has been demonstrated that a particular item of property was acquired during marriage, the property must be presumptively regarded by the trial court to be marital property. Rule 301(a) shifts the burden of proof to the opposing party to prove by a preponderance of the evidence that the prop-
the MPA talks about "presuming" that property is marital, it must be referring to Rule of Evidence 301, which governs the operation of presumptions in civil cases. 25

Rule 301 inexorably produces the absurd result described above. Upon proof that the vase was received by newlyweds, the MPA attaches a marital tag to it. Under Rule 301, the opponent to the presumption must then persuade the judge that the vase was a gift. Once the judge is convinced that the vase was obtained by a nonmarital method, the party opposing the presumption has met his or her burden of persuasion, the presumption has been rebutted, and the judge must declare the property nonmarital. 26

If that result seems reasonable, then there is nothing wrong with letting Rule 301 control such issues. But if, as has been suggested above, that result is unsatisfactory, then it is necessary to look for another interpretation of the MPA's "presumption." In other words, if Rule 301 works an absurdity, it should play no part in litigation under the MPA.

Actually, a close study of Rule 301 suggests that it has no role to play under the MPA anyway. The Rule provides for the determination of one fact upon the proof of another: "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." 27 What that bulletproof phraseology means is that one fact may be used to prove the existence of another fact. 28 Thus, for example, if someone proves that a letter was mailed after having been

25. M.R. Evid. 301(a) reads as follows:
   (a) Effect. In all civil actions and proceeding[s], except as otherwise provided by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

26. This assumes the interpretation of the definitions in the MPA that the Law Court has adopted. See Dubord v. Dubord, 579 A.2d 257, 259 (Me. 1990), and infra text accompanying notes 35-36.

27. M.R. Evid. 301(a).

28. See 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 300(01) at 300-1:
   There is a general consensus that the term "presumption" should only be used to mean a procedural rule which requires the existence of fact B (presumed fact) to be assumed when fact A (basic fact) is established . . . .

See also M.R. Evid. 301 advisers' note, quoted in R. Field & P. Murray, supra note 24 at 49:
   [T]he word presumption should be reserved for the convention that when a designated fact . . . exists, another fact . . . must be taken to exist in the absence of adequate rebuttal. It has that meaning in this rule.
properly addressed and stamped, that person is deemed to have proved that it was received by the addressee (unless the opponent proves otherwise). The proving the first fact relieves the person of having to provide additional evidence in support of the second—the presumed—fact.

The MPA’s “presumption,” however, is a different kind of beast. What the MPA “presumes” is not a fact at all, but a category: upon proof that the vase was received after the wedding was over, it is categorized as marital and falls into the divorce court’s discretionary hotchpot. To retrieve the vase from the hotchpot, a party must show that it is specifically exempted. This arrangement is nothing more than a rule, or norm, with specified exceptions. The fact that the burden of proving an exception is assigned to the party who urges it does not make the scheme an evidentiary presumption; it merely means that somebody has to prove something to escape the operation of the general rule. And the fact that the MPA calls its scheme a “presumption” means only that the drafters of the statute were imprecise—not an uncommon occurrence.


30. The Uniform Probate Code provides a scheme of assigning burdens of producing evidence and persuasion as to particular issues, without calling everything a “presumption.” See Me. REV. STAT. ANN. tit. 18-A, § 3-407 (1981):

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

Since § 3-407 does not provide that any fact or group of facts is prima facie evidence of another fact or group of facts, its use of the term "prima facie" does not imply an evidentiary presumption. See M.R. Evid. 301(b).

31. For example, in Maine’s new child support guidelines statute, there is a “rebuttable presumption that the parental support obligation derived from the support guidelines is the amount ordered to be paid, unless support is established under [the section of the statute authorizing deviations from the guidelines].” P.L. 1990, ch. 834, Part A (effective April 17, 1990). Without commenting on the obvious anchormism in the wording of the statute, let it be said that this is no evidentiary presumption at all. The guidelines establish the norm; the party who opposes the norm bears the burden of persuading the trial judge to deviate from it. Id. § 317.

There was a time when there was a second “presumption” hovering around the MPA: the “presumption” that an equitable division of property was one that split the property equally between the spouses. See Boyd v. Boyd, 421 A.2d 1356, 1359 n.5 (Me. 1980). Like the MPA’s “presumption” and that in the child support statute, this one had nothing to do with finding a fact upon the proof of another fact. Happily, before this particular “presumption” could befuddle evidence students, the Law Court rejected it. See Robinson v. Robinson, 554 A.2d 1173 (Me. 1989). It continues to thrive elsewhere. See I. Ellman, P. Kurtz & A. Stanton, Family Law: Cases, Text,
Since the MPA's scheme is not an evidentiary presumption, we may analyze its operation free from the undesirable effect of the Rules of Evidence, which do not apply. If a solution to our wedding gift problem is to be found, we may look elsewhere. However, we need not search for devices external to the MPA to lever a reasonable solution out of the statute if the statute itself can be interpreted so as to provide a satisfactory result. In fact, a reconsideration of the substantive definition of the "presumption" itself, and a close inspection of the statute's definition of "marital property," will do just that.

V. RECONSIDERING THE MPA

A. The "Presumption"

The MPA states, in pertinent part, that "[t]he presumption of marital property is overcome by a showing that the property was acquired by a [nonmarital] method . . . ."32 That phrase is deceptively simple. At first glance, it appears to mean that when a party proves a nonmarital method of acquisition, the property must be declared nonmarital. That is certainly how the Law Court has interpreted it to date.33

However, the phrase is susceptible of another interpretation: the phrase could provide that the nonmarital methods identified by the MPA are the exclusive means of overcoming the "presumption"—and nothing more. An analogy to other phraseology may help explain the point. The phrase, "The game of baseball is won by scoring runs," means that runs are the only things that count toward victory; hits do not count, walks do not count, errors and strikeouts do not count. But scoring runs does not guarantee victory; the phrase does not say that whoever scores runs wins. The phrase merely identifies runs as the exclusive means to victory.

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32. See supra note 23 and accompanying text.
Likewise, the MPA’s subject phrase can be interpreted as providing that the nonmarital methods of acquiring property listed in the statute are the only things that a party who opposes the marital presumption\(^\text{34}\) can rely on to defeat it. Thus, for example, a party may not expect to prevail against the presumption by proving that he or she acquired the property during the marriage by winning the Irish Sweepstakes. Such a fact is not permitted by the statute to overcome the presumption. On the other hand, proof that property was obtained during the marriage by gift from a third party is permitted to overcome the presumption. The emphasis in the foregoing sentences, of course, is on the word “permitted.” The crucial point is that the MPA’s language under scrutiny here does not have to be interpreted as compelling any particular result, but only as permitting it. The subject phrase can, without strain, be interpreted as meaning that proof of a nonmarital method of acquisition may overcome the presumption.

**B. The Definitions**

By excluding the presumption’s adverse procedural consequences, we reduce to one the statutory impediments to a resolution of the vase problem; we still must contend with the definitions in the MPA, which also may be interpreted as requiring the exclusion of the post-marital vase from the newlyweds’ marital estate. However, an inspection of the statute’s definitions reveals that they, too, may be construed to provide trial judges with leeway to avoid the absurd.

Subsection 2 of the MPA, labelled “Definition,” states, “‘marital property’ means all property acquired by either spouse subsequent to the marriage except” gifts and inheritances, among other things.\(^\text{35}\) One implication of that language is that gifts, inheritances and the like, which are not marital, simply have to be “nonmarital.” This is certainly the most obvious interpretation of the phrase.

There is another way to interpret the phrase, however. The statute may also mean that all property acquired after marriage must be treated as marital unless it falls into one of the statute’s exceptions, in which case the obligation to treat it as marital dissolves. It is important to note that the MPA does not expressly denominate the exceptions to marital property as nonmarital, so it does not ex-

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\(^{34}\) Having made the point that the MPA’s “presumption” is not a presumption in the true, evidentiary sense, I will drop the quotation marks for the rest of the article.

\(^{35}\) Me. Rev. Stat. Ann. tit. 19, § 722-A(2) (1981) (emphasis added). For convenience in this article, I frequently refer to the exceptions in the “Definition” section of the MPA as “nonmarital sources” or property, or as “nonmarital modes of acquisition,” or as other “nonmarital” concepts. I do not mean to suggest by such usage that the exceptions are necessarily nonmarital creatures of statute. I only mean to keep the phraseology simple.
pressly obligate a judge to treat them as such. In other words, the exceptions in the definition need not serve as an absolute exclusion: property that is initially excepted from the term "marital" is neither expressly nor necessarily excluded from the marital category for all time.

This point may be illustrated by the following sentence: "The term 'night' means the hours of darkness, except in the Arctic Circle." If the exception were exclusive in that sentence, then the term "night" could never refer to the hours of darkness in the Arctic Circle. Obviously, however, it can and does. What the sentence means is that, in the Arctic Circle, the term "night" can refer to both the hours of darkness and hours of light (as at the summer solstice, when even at midnight the sun does not set). The "except" serves to qualify the first phrase, but not to segregate it exclusively from the second one.

Likewise, in the MPA the exception may be read as other than an absolute exclusion. Simply stated, since the statute does not expressly declare that gifts received after marriage are nonmarital, it may be read to mean that all property received after marriage is necessarily marital except gifts (and so forth), which are not necessarily marital. This interpretation dovetails neatly with the preceding interpretation of the MPA's presumption: gifts are not necessarily marital, but may be deemed such if the party opposing their marital character fails to "overcome" the presumption by persuading the judge to treat them as nonmarital. To put it another way, the exceptions identify property, or modes of acquisition, to which resort may be had to escape the marital hotchpot, but those exceptions do not guarantee the escape. The burden of persuasion remains on the person urging the exception.36

The adoption of this interpretation of the statute immediately solves the wedding gift problem. Upon one party's proof that the vase was received during the marriage, it goes into the marital pot unless the other party satisfies the judge that it should not. Proof that the thing was a gift is, by statute, relevant to the issue, but not conclusive of it; the trial judge may permit such proof to overcome the presumption, but is not required to do so. Since under the circumstances of our example there is no good reason to declare the vase nonmarital, the party opposing the court's discretionary power over it would probably lose.

This view of the MPA's language also helps resolve another property problem, heretofore unresolved by an equally divided Law Court. In Grant v. Grant,37 the court tried to decide how to categorize property that had been devised to a married couple, during

36. See supra text accompanying note 30.
their marriage, by a third party. Writing for half of the four-justice court, Justice Wernick preferred to call the devise nonmarital, justifying his position on a literal reading of the MPA.\(^{38}\) Writing for the other half of the court, Justice Glassman argued that it is "fruitless" to attempt a textual analysis of the language of the MPA; he chose to call the property marital because it seemed consistent with the purpose of the MPA to do so.\(^{39}\) Employing the interpretation of the MPA suggested here, one is driven to neither extreme: one need not employ the literal interpretation that Justice Wernick advocated but that produces the wedding gift conundrum discussed above, and one need not reject outright a textual analysis of the statute as Justice Glassman proposed. Instead, the issue is simply submitted to the trial judge for a decision that may be influenced, but not controlled, by the MPA's specified exceptions. As with our well-worn vase, one would expect the Grant property to be treated as marital, because there is no persuasive justification for doing otherwise—in other words, because it simply makes sense.

VI. TRYING DIVORCES IN THE DIVORCE COURT

The immediate procedural consequence of this interpretation of the MPA is that it takes the primary authority for deciding what is and is not marital property away from the appellate court and gives it to the trial court. The advantage of this fact to litigants and jurists alike is enormous. Heretofore, the Law Court has viewed the MPA's exceptions to the marital norm as strict rules of law, and has reserved to itself the ultimate authority to define marital property: the vase either is or is not marital, as a matter of law.\(^{40}\) The problem with that approach is that the MPA's few formal exceptions to the marital norm are so imprecise and unsophisticated, in comparison to the complex property issues that can develop during marriage, that it is frequently impossible to determine how the law should be applied to the facts on other than a case-by-case basis.\(^ {41}\) And as is often true with case-by-case jurisprudence, the results that the individual cases generate may be broadly inconsistent.\(^ {42}\) In fact, attempts at establishing consistency in this field may be as fanciful as alchemy.

The history of the Law Court's attempts to interpret the MPA demonstrates that this has been precisely the court's experience.

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38. *Id.* at 141-42.
39. *Id.* at 144.
40. "To prevail on appeal . . . the plaintiff must show that the District Court either erred in deciding what is marital property or abused its discretion in dividing that property." Smith v. Smith, 472 A.2d 943, 945 (Me. 1984). *See infra* note 23.
41. *See infra* text accompanying note 76.
42. This is because the combination of legal and equitable issues in individual property cases are unpredictably variable. *See infra* text following note 74.
The court has been struggling for eighteen years to fit a variety of increasingly exotic property pegs into the few spartan holes that the MPA provides, with increasingly inconsistent results. This experience demonstrates that, if the court is still hoping to find a unifying thread, it is ignoring the fact that property is too complex a subject to submit to the limited legal criteria that the MPA offers. Inconsistency is going to be the rule in this field; it would be better to surrender to that inevitability by turning over to the trial courts the primary responsibility for defining what is marital and what is nonmarital property. The alternative is to make those litigants who can afford to do so try their divorce cases in the Law Court, and as the following history demonstrates, that costly approach offers no advantage to anyone.

VII. The Law Court Meets the Tar Baby

It is appropriate to focus the discussion of the court's textual analysis of the MPA on its 1980 decision in *Carter v. Carter,* because it was with that case that the court acknowledged for the first time that strict loyalty to the MPA's text could produce undesirable results. Prior to that time, the court had been willing to work within the text of the statute—to interpret its terms rather than to abandon them. For example, in the 1979 decision of *Tibbetts v. Tibbetts,* the court worried extensively about what it means to "acquire" property, without ever suggesting that the use of that term in the statute is simply ingenious.

*Carter* marked a departure from the forced interpretation approach. In *Carter,* the husband had owned a parcel of real estate before the marriage, and after he married he deeded the property to himself and his wife as joint tenants. Under a strict interpretation of the MPA the wife's interest was nonmarital—she paid no consideration for it, so it was a gift received during the marriage. Like-

44. Examples of the increasingly exotic property issues that the court has dealt with include whether goodwill in a business is marital "property," Lord v. Lord, 454 A.2d 880 (Me. 1983), and whether a professional license is marital "property," Sweeney v. Sweeney, 534 A.2d 1290 (Me. 1987).
45. 419 A.2d 1018 (Me. 1980).
46. 406 A.2d 70 (Me. 1979).
47. Id. at 74-75.
49. *See Brackett v. Larrivée,* 562 A.2d 138 (Me. 1989). The Law Court defined a gift as requiring three elements: "donative intent, delivery with intent to surrender all present and future dominion over the property, and acceptance by the donee." *Id.* at 139. A fourth element, lack of consideration, is implicit. It is arguable—but only barely—that transfer of an interest in real estate by a sole owner into joint tenancy with another is not a complete surrender of "future dominion," since upon the death of the donee of the interest his or her claim to the property is extinguished, and the
wise, the husband’s interest should have remained nonmarital because the MPA expressly states that the property’s marital or nonmarital character is not affected by the manner in which title is held.\textsuperscript{50} Thus it should have made no difference that he now shared an interest in the property as a joint tenant instead of owning it outright. Furthermore, he obtained his joint tenancy in direct exchange for his sole, nonmarital interest. This is another plain indication that his new interest ought to be deemed nonmarital.\textsuperscript{51}

The Law Court, however, declared that the entire parcel was marital. Borrowing a rule from the Missouri Court of Appeals,\textsuperscript{52} the court declared that whenever a spouse deeds nonmarital property to himself or herself and his or her spouse, during the marriage and as joint tenants, the title of both parties is “transmuted” into marital property.\textsuperscript{53} Transmutation, of course, is nowhere to be found in the MPA.\textsuperscript{54} Yet the court was willing to forgo adherence to the literal text of the statute to produce a desirable result.

It must have come as some surprise to observers of the Law Court’s jurisprudence, therefore, when about a year later, half of the four-justice court advocated strict loyalty to the text of the MPA in the \textit{Grant} case, discussed earlier.\textsuperscript{55} In that case Justice Wernick, writing for himself and Chief Justice McKusick, deferred to the precise language of the MPA when he argued that a devise to both spouses during marriage is like a gift, and must therefore be nonmarital. This, of course, is precisely the same analysis that the

donor gets his or her sole interest back. \textit{See} Irvin L. Young Found. v. Damrell, 511 A.2d 1059, 1070 (Me. 1986). Against that argument is the rule that the donee can deed his or her new interest to a third party at any time, thus severing the tenancy in common and destroying any design the donor might have on the donee’s interest. \textit{See} Maine Sav. Bank v. Bridges, 431 A.2d 633, 635-36 (Me. 1981).


52. The Missouri decision that the Law Court relied on was \textit{Conrad v. Bowers}, 533 S.W.2d 614 (Mo. Ct. App. 1976).

53. \textit{Carter v. Carter}, 419 A.2d 1018, 1022 (Me. 1980) (“[C]ommentators have equated the conveyance of property into joint tenancy and the Missouri court’s treatment of that action with the community property doctrine of transmutation.”).

54. Transmutation is a product of Missouri common law.

Application of the statutory language would result in an immediate presumption that the property was marital because acquired during marriage. A reclassification as separate would occur when it was shown that the source of the funds used to buy it was separate property. . . . The dissent in \textit{Conrad v. Bowers} criticized the holding for modifying the statutory structure. However, the majority had to deal with the common law presumption, long recognized in Missouri, that when one marital partner titles property in the names of both, he intends a gift to or settlement upon the other.

55. \textit{See supra} text accompanying note 37.
court had rejected when considering the wife's interest in Carter. Justice Wernick's opinion in Grant certainly dealt a blow to those who had viewed Carter as the entire court's acknowledgment that the language of the MPA is deceivingly simple, and simply unreliable. Furthermore, it must have provoked uncertainty about when, and under what circumstances, the court would again abandon the MPA's text in search of a good result.

The court dealt another blow to admirers of Carter two years later when, in Hall v. Hall, it limited Carter to "documentary transaction[s]." In Hall, the husband had owned a home before marriage. After marriage, he and his wife spent some of their marital money on improvements to the home, which nevertheless remained in his name only. The wife argued that, irrespective of title, the dedication of marital funds to the home transmuted it into marital property. She had the support of Illinois precedent, which had applied this reasoning to a similar fact situation controlled by a statute nearly identical to the MPA.

The Law Court, however, spurned Illinois' analysis and rejected the argument, stating that "[t]o permit nonmarital property to be 'transmuted' into marital property and thus to be subject to equitable distribution deprives a spouse of nonmarital property contrary to legislative intent." One wonders how the husband in Carter would have felt had he read that, and discovered that the Law Court made not the slightest attempt to distinguish Carter on other than the factual basis described above. The conclusion in Hall necessitated suspicion of the license that Carter had taken with the MPA's language; after the double whammy of Grant and Hall one might have expected that Carter's approach to the MPA's text was moribund.

But in 1988 Cummings v. Cummings proved that Carter's cavalier spirit was alive and well. In Cummings, the court decided that a lump-sum workers' compensation award received after divorce may not be marital property even if the injury for which the award is made occurred during the marriage. In pertinent part the court held that:

\[\text{because the compensation award is property acquired after the dissolution of the marriage, the marital presumption does not apply. Consequently, it is burden [sic] of the wife, as the party assert-}\]

56. 462 A.2d 1179 (Me. 1983).
59. This is the court's entire comment on the subject: "Carter is distinguishable from the instant case, in which there is no such documentary transaction." Id. at 1181.
60. 540 A.2d 778 (Me. 1988).
In other words, proof by one party that the property is received outside of the period of the marriage places upon the other party the burden of persuading the judge that the property is marital.

That decision opens a Pandora's box of uncertainties. Although the point is not clear in Cummings, the award must be marital (if at all) because the cause of action arose—was "acquired"—during the marriage.\(^\text{62}\) One assumes that this is what the court meant, because otherwise Cummings must be read to hold that any property acquired after divorce, under any circumstances, is subject to a marital property claim by a former spouse;\(^\text{63}\) that the court intended that result is unlikely. However, Cummings departed from precedent when it inverted the MPA's presumption, placing the ultimate burden of persuasion upon the party who asserts that the property realized after a marriage is marital, rather than upon the party who opposes that conclusion. If the MPA's presumption were interpreted as it had been before, all the wife in Cummings had to do was to show that the cause of action arose during the marriage; such proof is supposed to label the property marital and place the burden of persuasion to the contrary on the husband.\(^\text{64}\) However, Cummings provides that some property received after marriage is nonmarital and requires the party who objects to that characterization to prove otherwise.\(^\text{65}\)

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\(^{61}\) Id. at 780.

\(^{62}\) The court had previously declared that personal injury causes of action are "property" subject to the MPA. See Moulton v. Moulton, 485 A.2d 976 (Me. 1984).

\(^{63}\) The husband in Cummings "acquired" the settlement award after divorce. 540 A.2d at 779. If all property "acquired" after divorce is marital, then the MPA works an obvious absurdity. Therefore, the Law Court cannot have meant that property acquired after divorce is marital; it must have meant that elements of property that were acquired during marriage may be obtained after divorce and still be subject to a marital property claim.

\(^{64}\) Moulton v. Moulton, 485 A.2d at 978. See Van De Loo v. Van De Loo, 346 N.W.2d 173, 177 (Minn. App. 1984):

The burden of proving the purpose of part or all of the recovery, however, is on the party seeking a nonmarital classification. That party must produce demonstrable proof that the amount of the recovery was awarded for his personal injuries and not for replacement of property marital in nature. Absent such proof, the proceeds recovered for any injury occurring during the marriage will all be treated as marital property.

\(^{65}\) It may be helpful to work through the argument step by step to see why this is so. In Cummings the husband's work-related injury occurred during the marriage, so his right to claim compensation for the injury also arose during the marriage. See Me. Rev. Stat. Ann. tit. 39, § 51 (1989). However, the court's discussion of this property issue focused not on the date when the claim arose, but on the date when the claim would be paid and the money received; in Cummings, that was after the parties' divorce. 540 A.2d at 779. In other words, the property that was acquired for purposes of
Cummings brought the Law Court back full circle to where it had

MPA analysis was not the cause of action, but the money settlement itself. Thus the court held that "the compensation award is property acquired after the dissolution of the marriage." Id. at 780.

The court then declared that, because this "property" would be "acquired" after the marriage ended, "the marital presumption does not apply." Id. Therefore, the court concluded, the wife, "as the party asserting that the award is marital," had "to establish that the lump-sum includes . . . reimbursement for an expenditure of marital assets." Id. That language is more than the mere assignment of a burden of producing evidence (which is all that the wife would have under a conventional interpretation of the MPA, see note 18 supra). The court required her to establish that some portion of the settlement had a marital character, and it expressly pulled the marital presumption out from under her. Thus the wife was now unsupported by any statutory assignment to her husband of the burden of persuading the trial judge that the property was nonmarital, so she necessarily bore entirely upon herself the burden of persuasion that it was marital. If one may define "burden of proof" as a combination of the burdens of producing evidence and of persuasion, see J. Wigmore, supra note 18, §§ 2485-2488 at 283-300; 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 300[01] at 300-2 (1990), then it must be said that Cummings assigned the entire burden of proof to the wife.

There is reason to doubt the court's logic. First of all, the court never explained why the "property" was the settlement rather than the cause of action. Previously the court had expressly held that "[e]aches in action, rights and other interests, the benefits of which may be receivable now and in the future are classifiable as intangible personal property." Moulton v. Moulton, 485 A.2d at 978. Without discussing or distinguishing that specific holding, however, the court in Cummings simply concluded that because workers' compensation lump-sum benefits are compensation for future earnings, "benefits that accrue and are paid after the termination of the marriage are no more a part of the marital property than are the worker's future earnings." Cummings v. Cummings, 540 A.2d at 780. That makes sense, of course, but it doesn't make such lump-sum payments separate "property"; they remain the fruit of the original cause of action, the work-related injury. See In re Marriage of Dettore, 408 N.E.2d 429, 431 (Ill. App. 1980) ([i]f the claim for a [workers'] compensation award accrues during the marriage, the award is marital property regardless of when received”). But the court never paused to analyze that fact (at least in its published opinion). Instead, the court invented a burden of proof, assigned it ex post facto to the wife, and ruled that she had not met it.

None of that was necessary. The court could have produced precisely the same result, with substantially less rearranging of the statutory furniture, had it simply held that the post-divorce award was given in exchange for post-marital income, and that the MPA was never intended to apply to such stuff. To be sure, the MPA never expressly addresses this issue—the statute's perspective on nonmarital property is almost exclusively premarital, see Me. Rev. Stat. Ann. tit. 19, § 722-A(2), another of the drafters' many oversights—but there is plenty of authority for it, not the least of which is common sense. See also In re Marriage of Johnson, 40 Colo. App. 260, 576 P.2d 188 (Colo. App. 1978) (property acquired after a divorce decree is not divisible by the divorce court). Had the court ruled this way, it could merely have stated that the wife properly generated the issue of the marital nature of the award by demonstrating that the cause of action arose during the marriage, and that the husband successfully overcame the presumption by showing the nature of the award itself.

Viewed this way, the wife's failure to demonstrate the marital nature of the award is merely a failure to respond with evidence to a convincing evidentiary presentation put on by her husband—in other words, she lost because her husband's evidence was better. This result would have been consistent with all of the court's previous case
left off with *Carter* eight years earlier: abandonment of the specific statutory language in pursuit of a desirable result. Having zigged back toward *Carter* in 1988, however, the court zagged away again in 1990. In *Dubord v. Dubord* the court decided to limit *Carter* "‘only to an interspousal transfer creating a joint tenancy' in real estate." Mrs. Dubord had used some $20,000 from her nonmarital funds to contribute to the down payment for a home that the parties purchased in joint tenancy during their marriage. The trial court declared that those funds had been contributed to the marital estate, and declared the residence fully marital. But the Law Court reversed because, “[h]aving found that these funds were non-marital property, the Superior Court could not properly avoid setting aside a portion of the equity in the home as non-marital property merely by labeling these funds ‘contributions.’" In other words, the wife's use of funds from a nonmarital source to purchase a jointly titled asset, during the marriage, did not transmute those funds into marital property. The funds, and the growth they naturally enjoyed as an investment in an appreciating asset, remained hers.

*Dubord* appears to limit *Carter* to its facts: transmutation only applies to the postmarital transfer, without consideration, of nonmarital real estate into joint tenancy. But close analysis suggests that the attempted limitation fails, because *Dubord* was incomplete: the court did not explain why the wife's contribution to the down payment of a jointly titled asset should not be considered a gift of half of the down payment to the husband, and therefore at least partly his nonmarital property. This was the argument that the wife had made in *Carter*: when the husband's nonmarital asset became jointly owned by the spouses, without the exchange of consideration, she had received a gift of half of that asset, and such a gift must be deemed nonmarital under the MPA. *Carter* rejected that argument: the wife's resulting interest was not a gift to her; rather it and the husband's remaining interest were transmuted into a marital asset, the property of the marital enterprise. In other words, transmutation superseded the MPA's gift exception to the marital property

law on the presumption (except *Carter*), as well as with *Moulton*, the sole concession being that the statute's drafters overlooked the possibility that someone might try to make a claim against property realized after divorce. One must wonder why the court felt compelled to engage in such massive and unnecessary statutory reconstruction.

67. *Id.* at 260 (quoting Smith v. Smith, 472 A.2d 943, 947 n.5 (Me. 1984)).
68. *Id.* at 259.
69. *See Oldham*, *Tracing, Commingling, and Transmutation*, 23 *FAM. LQ* 219, 239 (1989) ("If a court determines that a gift occurred [by one spouse's titling nonmarital property in both spouses' names], it normally is considered a gift to the marital estate, so the property is marital property, not 50 percent the separate property of each spouse.") (citing *Carter v. Carter*, 419 A.2d 1018 (Me. 1980)).
presumption. When transmutation applies, the gift exception does not.

Dubord rejected transmutation but it did not reinstate the MPA’s gift exception. Instead, by implication Dubord followed Carter’s lead: it apparently rejected the argument that Mrs. Dubord’s $20,000 contribution was a partial gift to her husband. Thus to a certain degree Dubord is consistent with Carter, because both of those decisions disembowel the MPA’s treatment of gifts received during marriage. Thus, and to that same degree, Carter continues to have an influence that is broader than its facts. For whatever reason, one spouse’s transfer of a nonmarital asset into joint tenancy during marriage and without consideration either is not a gift to the other spouse of the latter’s resulting interest, contrary to the apparent purpose of the MPA (Dubord), or it is a gift that, contrary to the MPA’s express language, becomes marital (Carter).

If that is so, then Dubord has one of two divergent consequences. On the one hand, it seems intended to limit Carter’s influence by expressly limiting the applicability of transmutation, but on the other hand it actually invigorates Carter by impliedly preserving Carter’s dilapidation of the MPA’s gift exception to the marital property presumption. Applying this conclusion to the theme of this article, Dubord tells us at once either that Carter’s high-handed method of interpreting the MPA is discarded, or that it is affirmed.

If all of this seems complicated, it is. In fact, it is too complicated, and that is precisely my quarrel with the MPA: the MPA’s simple rules produce hopelessly arcane problems. Unfortunately, however, it gets worse, because Dubord leaves us with a grim dilemma. The lawyers and judges who deal with divorce daily, and who have a recurring need to understand the law and to predict its application, must now decide how to interpret this latest jog in the MPA’s tortuous history. Was Dubord’s omission about the possible gift to the husband an oversight, or was it intended?

The former alternative is the less attractive, because it suggests that the court was not thorough. Unfortunately, that same conclu-

70. And, from Carter’s husband’s point of view, the exchange-for-nonmarital-property exception.

71. There is nothing in the official Comment to the original version of § 307 of the UMDA that suggests that the drafters intended other than the ordinary law of gifts to apply to the "gift" exception to the presumption. See HANDBOOK, supra note 15 at 204. That being so, Mrs. Dubord’s use of $20,000 toward the purchase of an asset titled in her and her husband’s name should have been a gift of $10,000 to him. See supra text accompanying note 49.

72. See supra text following note 46.

73. Oddly, in Dubord the court repeatedly discussed the concept of “donative intent” without ever discussing whether the wife made a gift to the husband. The court held that:

The Carter presumption of donative intent, which may be overridden
sion is available about another of the court's recent decisions, *Cum-
nings*. A persuasive argument can be made that the court did not 
need to shift the burden of proof to the wife in that case, but that it 
did so simply because it misunderstood how the MPA's presumption 
should operate.\(^7\)\(^4\) If this is true of both of those decisions, then one 
must wonder whether the MPA is simply too arcane for the Law 
Court itself, and anyone who longs for reliable rules and predictable 
results in this field must rue the possibility that future Law Court 
decisions will vary—unpredictably, of course—with the court's abil-
ity to untangle the Act and the Act's case law progeny. Naturally, 
the court must take the heat if this is so, but ultimately the problem 
lies not with the court but with the MPA itself. And it should go 
without saying that if the MPA bamboozles the Law Court, then it 
is certainly inappropriate for everyday use by parties, trial lawyers 
and trial judges.

An alternative interpretation of *Dubord* and *Cummings* is that the 
court fully intended every facet of its decisions in those cases. If this 
is so, then those wishful loyalists who pursue reliability, predictabil-
ity and dependability in divorce property law must accept this in-
delible lesson of the past decade: the Law Court's jurisprudence 
under the MPA is frequently but unpredictably result-oriented. *Carter* 
made no bones about it: the court readily acknowledged that its 
decision was intended to "avoid . . . illogical and inequitable re-
results . . . ."\(^7\)\(^5\) *Cummings*, too, has the ring of equity to it. One 
senses that the court wanted to entitle a wife, who had been living 
with her husband's work-related injury since two months after their 
marrige, to pursue at least a portion of her husband's award, but 
feared allowing marital property claims to linger after divorce;\(^7\)\(^6\) thus

only by clear and convincing evidence, must be strictly limited to situations 
where the presumed gift to the marital property is to be necessarily inferred 
from the factual predicate, as it was in the circumstances of the *Carter* 
case. 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 marital estate 
of any separate property used as part of the purchase price.

*Dubord v. Dubord*, 579 A.2d at 260. The court was prepared to talk about gifts to the 
marital estate, but not about gifts to the person. A review of the Law Court briefs 
shows that the parties did not argue that the wife had made a gift to the husband, 
but only that she had "manifested a clear intention to contribute to the [marital]
partnership." Brief for Appellee at 13, *Dubord v. Dubord*, 579 A.2d 257 (Me. 1990) 
(No. KEN-90-22). That means that, for appellate purposes, they waived the issue of a 
gift to him. However, the Law Court's failure even to acknowledge that omission, 
and to warn its readership that the incomplete posture of the issues necessitated an 
incomplete decision, means that the court was most likely unaware that an important 
issue had been overlooked by counsel.

74. See *supra* text accompanying note 68.
75. 419 A.2d 1019, 1022 (Me. 1980).
76. Consider the problem of the personal injury cause of action that accrues to 
one party during the marriage, but for which the settlement award is not paid until
the court may have balanced the equities by making the wife do the proving.

The problem with this kind of approach to the MPA, obviously, is that it establishes no broadly reliable body of law. All that it does, rather, is to suggest that whenever the MPA fails to dictate a clear and reasonable result, the ultimate rule will be wholly unpredictable. Over the past decade the court has demonstrated that different cases, involving not only different legal issues but also different equities, may generate rules of law that are at least inconsistent, and perhaps unique. In other words, in that decade the court failed to find any golden, unifying thread in the MPA, and gave rise to dismal doubt that such a thing is even worth pursuing.

It takes little imagination to drive this point home; the problem may be illustrated by the following fictional fact pattern. A husband owned a parcel of land before he got married. During the marriage he leased the property to a lessee for twenty years, and during the term of the lease the lessee built a fine log cabin on the property—a permanent improvement that will undoubtedly remain there after the expiration of the lease. The lease will expire three years after the parties' divorce, which is now being litigated. Neither the husband nor the wife had any knowledge that this improvement had been made to the property until the wife inspected the lot in preparation for the divorce.

Will the Law Court declare the increased value of the property marital or not? The arguments based on the text of the MPA go either way: the increased value is marital because it is the product of the lease, which was the product of marital effort and is therefore marital property;77 the increased value is nonmarital because the husband gave no consideration for it so it was a gift.78 To what extent will equitable issues play a role in the court's decision: does it make any difference whether it is fair to let the husband lay sole claim to a substantially enhanced piece of property? How will the presumption operate? Is it the husband's obligation to prove that the enhanced value is nonmarital, or (in view of the fact that the husband will "acquire" the cabin from the lessee after the marriage is over) is it up to the wife to prove that that value is marital?

The ultimate answer to these questions is beyond this author's ability to provide, because I have no crystal ball—and that is the

77. See Macdonald v. Macdonald, 532 A.2d 1046, 1050 (Me. 1987).
point. The MPA tells us nothing about how to decide this issue, and
case law is hardly more helpful. The only way to be sure is to appeal
the trial court's decision to the Law Court, and have the justices tell
us what the MPA means in this particular circumstance. In any
event, no matter how the court decides the question, it will lay to
rest none of the uncertainties discussed above. In fact, if the history
of the MPA over the past decade is any indication, such a decision
will probably generate even greater confusion.

VIII. DELAWARE OFFERS A SOLUTION

As suggested above, it is not difficult to postulate a property prob-
lem for which there is no apparent solution either in the MPA or in
case law. Property is a broad and complex subject, far too compli-
cated and subtle for the few simple tools the MPA gives us to deal
with it. Practically all lawyers can draw from their own daily expe-
riences to develop a fact pattern for which neither the MPA nor local
judicial precedent offers a rule.79 Delaware has taken a different ap-
proach from the Law Court to the problem of developing such rules
under its version of the same Uniform Act upon which the MPA is
based. That approach is worth some attention because it offers a
solution to this problem.

The facts that inspired the Delaware Supreme Court to handle its
own marital property act differently involved shares of stock in a

79. Here are three quick examples:
1. The husband is the beneficiary under his mother's testamentary trust, and is also
one of two trustees. He and the other trustee (his brother) manage the assets of the
trust and each may (but is not required to) receive up to $10,000 annually from trust
income. Is the $10,000 marital property? (Note that the official Comment to § 307 of
the UMDA states that "income from . . . non-marital property acquired after the
marriage is marital property." See HANDBOOK, supra note 15 at 204). Does the hus-
band have to exercise his power of appointment and "acquire" the money from the
trust before it becomes marital, or is it marital as it accrues? Can the husband be
compelled to exercise his power of appointment to produce marital property?
2. If a nonmarital asset increases in value as the result of "marital effort," the in-
crease in value is marital property. Macdonald v. Macdonald, 532 A.2d 1046, 1050
(Me. 1987). Is the converse true? If, as a result of marital effort, the value of a
nonmarital asset declines, is that loss in value chargeable against the marital estate?
3. Is a monetary award for a personal injury that occurred during marriage marital
("The husband's personal injury settlement does not fit within any of the exceptions
to marital property enumerated in the Act . . . . In accordance with the statutory
presumption [identical to Maine's] the personal injury settlement proceeds must be
deemed marital property.") with Weakley v. Weakley, 731 S.W.2d 243, 245 (Ky. 1987)
("[W]hen the injury occurs during the marriage, the injured party, prior to marriage,
was free of the pain for which damages are awarded . . . . [A]s to pain and suffering
resulting from an injury sustained during the marriage, the injured party has simply
exchanged property acquired before the marriage, i.e., good health, . . . for the
money received as compensation for the loss.").

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closely held corporation. In *J.D.P. v. F.J.H.*, the husband owned more than half of the outstanding common stock in each of two Delaware corporations at the time of marriage. During the marriage the retained earnings of the corporation increased substantially, and the parties could not agree whether those earnings were marital or not.

The husband argued that the retained earnings were not marital property as a matter of law and relied on a Missouri decision for authority. (Missouri has a statute nearly identical to those of Delaware and Maine.) The Missouri court approached its statute just as the Law Court has approached Maine's: the statutory exceptions are strictly applied to each and every item of property presented, and each item is deemed marital or nonmarital as a matter of law. But Delaware rejected this approach, which it called "rigid" and "dogmatic," preferring to allow the trial judge to consider evidence about how the property should be categorized, and then to rule as he or she is persuaded by the evidence.

Thus on the subject of

80. 399 A.2d 207 (Del. 1979).
81. Davis v. Davis, 544 S.W.2d 259 (Mo. App. 1976).
82. According to the Delaware court in *J.D.P., Davis*

applied the literal language of a statute comparable to § 1513(b)(3) [Delaware's version of the Uniform Act's § 307] and refused to declare that corporate assets acquired prior to the marriage were community property. To the extent that our statute is regarded as comparable to Missouri's, we can only say that, in our opinion, our General Assembly intended that cases under our statute should be governed by equitable principles in accordance with the tradition of domestic litigation and the remedial purpose of the whole Act.

83. In *Davis* the husband owned three-fourths of the outstanding stock of a small corporation that operated a retail gasoline station and sold and delivered gasoline, fuel oil and propane to area residents. The wife was a vice president of the corporation and on the board of directors. The husband had owned all his stock before the marriage.

The Missouri Court of Appeals ruled that the husband's stock ownership was nonmarital:

The evidence showed that the appellant's interest in the Knob Noster Oil Company, Incorporated, was acquired before his marriage to respondent. There was no evidence to show that the status of that property changed during the marriage and the trial court should not have considered it marital property and should not have allotted respondent an interest in the corporate assets.

Davis v. Davis, 544 S.W.2d at 264.
84. In pertinent part, the court provided this explanation for its decision:

[T]he current law is substantially different from the predecessor statute . . . Unlike the prior law, § 1513, on its face, does not favor the wife over the husband. Rather, there is a broad definition of marital property and a wide discretion vested in the Family Court to assign any of that property to either or both of the spouses.
retained earnings the Delaware Supreme Court declared that a judge might consider (among other things) whether the shareholder-spouse had managed the corporation during the marriage, thereby being in large part responsible for producing the earnings himself or herself; whether the spouse had directed them to be retained and, if so, whether this was done to prevent his or her spouse's access to them through the divorce; and what the tax consequences might be to the spouses and to the corporation of any order the court might issue.\(^{85}\) In other words, the court gave the trial judge the authority to decide whether the retained earnings of a close corporation should be deemed marital or nonmarital property based on considerations of evidence and (ultimately) common sense rather than on a strict reading of the MPA.

The Delaware court was not completely comfortable with this new rule, acknowledging that "it is far easier to announce this construction of [Delaware's statute] than it is to apply it."\(^{86}\) Obviously, the court was concerned about the possibility that this new approach might open jurisprudential floodgates. To date, the Delaware court has not allowed that to happen. Relevant subsequent Delaware case law indicates that the discretionary authority conferred in \(J.D.P.\) has not been extended to other issues; under Delaware's version of the MPA, the \(J.D.P.\) rule applies only to retained earnings of close corporations. Thus, in one respect, the \(J.D.P.\) rule is scarcely differ-

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Against that background, we consider the contention of the husband that the Court should rule, in effect, that retained earnings of a corporation controlled by one of the spouses cannot be, that is, can never be, marital property, as a matter of law.

Given the broad, remedial purpose of the Act, with its mandate to the Court to equitably divide all property which spouses acquired after marriage (with few exceptions), and to do that in a way which will mitigate potential harm to the spouses (caused by the divorce), we must reject the rigid and dogmatic construction of the statute for which the husband argues. To hold otherwise would seriously limit the Court in the exercise of its equitable powers and invite evasion of the property division law and consequent injury to a spouse and, at the same time, deny a remedy to that spouse.

This is to say that if retained corporate earnings were regarded in every instance as a [statutory] exemption from "marital property," then the spouse who controls the corporation (including, for example, its salary and dividend practices) would have the power to determine whether earnings are to be retained and thus insulated from all legal and equitable claims of the other spouse. Certainly a statute which commands a Court to "equitably divide" . . . property between spouses is not intended to give that sort of unilateral control to one of them. . . .

We hold that an increase, during the marriage, in retained earnings of a corporation controlled by a spouse may be included in the calculation of the couple's marital property.

\(^{85}\) J.D.P. v. F.J.H., 399 A.2d at 210-11 (footnote omitted).

\(^{86}\) Id. at 211.

\(^{86}\) Id.
ent from the “rigid and dogmatic” rule that the Delaware court rejected, because, once again, a court developed a specific rule to cover specific property; such a rule has no broad precedential value until and unless the court that developed it allows its application to other issues.

Yet, in another respect, J.D.P. is a significant precedent, because it represents an important court’s repudiation of the case-by-case, item-by-item approach that our Law Court has employed. In J.D.P., Delaware recognized that the authority to categorize a complicated property issue as marital or nonmarital must be delegated to the trial court. Delaware, of course, did not adopt or even suggest the interpretation of the statutory language that this article proposes; the court there relied on broad, prefatory language apparently unique to their version of the Uniform Act.87

Nevertheless, the Delaware court made it clear that the MPA as it is currently applied in Maine is inadequate for the purpose.

IX. Entrusting Trial Judges with the Flexibility of Common Sense

It is the thesis of this article that Maine should adopt the J.D.P. approach for all property acquired after marriage. But having suggested that the Law Court’s case-by-case, item-by-item approach to the MPA is frustrating at best, and self-destructive at worst, it remains to be asked whether the alternative would really be better. Is it a good idea to endow trial courts with broad authority to decide what is marital property and what is not? Can we trust our trial courts to do it “right”?

One answer is that in all other facets of domestic relations law Maine trial courts exercise virtually the same authority urged for them here. In determining issues of custody, child support, alimony, and (of course) the distribution of marital property, the trial courts utilize broad powers of equity that are reviewable only for abuse of discretion.88 To allow trial courts to define which property acquired after marriage is marital and which is not would be to give them powers consistent (although not precisely equivalent) with those that they otherwise exercise in family law cases.89

87. The Delaware act provides that it is to be “liberally construed” to promote its purposes, including the mitigation of “potential harm to spouses . . . caused by the process of legal dissolution of marriage.” DEL. CODE ANN. tit. 13, § 1502 (1981).
88. Shirley v. Shirley, 482 A.2d 845, 847 (Me. 1984) (citing Gardner v. Perry, 405 A.2d 721, 725 (Me. 1979)).
89. Trial judges exercise their powers to award alimony, assign child support, determine custody of children, and the like, as an exercise of discretion. See Gardner v. Perry, 405 A.2d 721 (Me. 1979). Under my interpretation of the MPA, a judge would determine whether to declare property marital or nonmarital as a function of his or her determination of the evidence—i.e., as a finding of fact. The appellate standard for review of such a finding is clear error. See M.R. Civ. P. 52. I do not maintain that
A second answer deals more specifically with the relationship between alimony and the distribution of marital property. Given the recent change in Maine’s alimony statute, it may now make far less sense to worry about the fine distinctions between marital and nonmarital property. For an understanding of this conclusion, it is necessary to review the common history of Maine’s alimony statute and the MPA.

When what became the MPA first appeared in the Uniform Marriage and Divorce Act (as § 307), it was closely associated with the following section (§ 308), which dealt with alimony.\(^9\) The two statutes combined to express a clear preference for addressing post-divorce financial need with disproportionate awards of marital property rather than with awards of alimony.\(^9\) The theory for this

the appellate standards for the exercise of discretion and for the finding of fact are the same; there is certainly a difference of definition between abuse of discretion and clear error. However, there is no quantitative difference between the two; it is no more difficult for an appellant to establish an abuse of discretion than it is to establish clear error, and vice versa. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990).

The doctrine of “clear error” applies only to a trial court’s factual findings; it does not apply to the trial court’s application of the facts to the law, or to mixed questions of fact and law, when there is an error of law. In such cases, the trial court’s decision is reviewable de novo on the issue of the legal impropriety of the decision. 5A J. Moore, Moore’s Federal Practice ¶ 52.03(2) (2d ed. 1990). In other words, while the appellate court must hesitate to overrule particular findings of fact, it need not do so for the legal conclusions the trial court draws from its factual findings. Thus, in Dubord v. Dubord the Law Court could not change the trial court’s factual determinations, but could and did reverse because it disagreed about the legal conclusion the trial court drew in calling the disputed property marital. To put it another way, the Law Court’s majority deferred to the trial court’s determination that the disputed property was derived from one of the nonmarital methods listed in the definition section of § 722-A (over the objection of the two dissenting justices). However, the majority of the Law Court disagreed with, and overruled, the trial court’s decision to declare the property marital, because that was an issue of pure law.

In my view, that issue is not one of pure law. The trial court in Dubord had the authority to call the property marital as an issue of fact, because it had the right to conclude that the wife’s money ought to be deemed marital. That decision should be reviewable only for clear error.

90. See Handbook, supra note 15, § 308 comment at 205:

The dual intention of this section and Section 307 is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

... Here, as in Section 307, the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in [the statute].

91. See, e.g., Kujawinski v. Kujawinski, 71 Ill. 2d 653, 576, 376 N.E.2d 1382, 1388 (1978) (“the legislature ... sought to replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of mar-
preference was that if divorce was to be a final severing of ties, that object was better achieved by a means that terminated the spouses' financial dependence on each other.\textsuperscript{92} Although Maine never adopted Section 308, by adopting Section 307 Maine necessarily incorporated the objectives of that statute's drafters, including their goals for the use of marital property instead of alimony.\textsuperscript{93}

For years after the UMDA was drafted, alimony was a disfavored concept, due in significant part to the theory that spousal needs after divorce should be dealt with primarily by awards of marital property.\textsuperscript{94} In the late 1970's and early 1980's, however, studies were conducted and published that indicated that many women were suffering financially after divorce precisely because they had not been

\footnotesize{ital property and assets'). Illinois had adopted a version of the UMDA nearly identical to the MPA. Id. at 571-72, 376 N.E. 2d at 1386.}

\footnotesize{92. See, e.g., Corder v. Corder, 546 S.W.2d 798 (Mo. Ct. App. 1977).}


This discretion in the division of marital property must be limited by acknowledgment of the underlying policies and goals of the Uniform Act. Thus a division must fairly recognize the economic and non-economic contributions of each spouse. . . . A division of property which avoids the necessity of decreeing alimony is most desirable. But see Levy, supra note 9, at 8-7: "section 722-A does not incorporate the Uniform Act's directive that the division of marital property was to be the primary tool for providing for the parties' respective financial needs, and that alimony was only to be employed if the marital property proved insufficient for this purpose."

94. See Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 FORDHAM L. REV. 827, 844 n.79 (citing L. Weitzman, Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) (citations omitted):

[S]tudies of alimony reveal declining awards. For example, Professor Weitzman's study of divorce in California revealed a decline in alimony from 20% to 15% in the short period from 1968 to 1972. No-fault divorce went into effect in California in 1970. These numbers assume even more significance when one realizes that there has also been a shift from permanent awards to transitional awards. By 1977, two-thirds of the alimony awards in the study were transitional, limited awards. The average duration of these awards was only two years.

95. See Reynolds, supra note 94, at 834 (footnotes omitted): "[C]ommentators involved in the reform movement apparently assumed that property awards would remain nonmodifiable and extolled the virtues of property division as the superior means of making economic adjustments at divorce largely on the basis of its nonmodifiability." Nonmodifiability was said to end controversy between the spouses by forcing each spouse to make financial plans independent of the other, and to improve judicial economy. Id. at 837.
awarded any alimony. It was shown that the divorce reforms of the previous decade (like the UMDA) which relied on the scheme of marital property plus child support, instead of alimony, were severely disadvantaging divorced women with children; thus arose the term "the feminization of poverty." As a result, calls for reform of the 1970's divorce reforms have become increasingly insistent, and have drawn increasing attention.

Maine may have joined the trend: in 1989 the Maine Legislature amended Maine's alimony statute, and appears significantly to have broadened the authority of judges to award alimony. Previous limitations on the availability of alimony appear to have been dramatically reduced; no longer, for example, is alimony limited to a "prospective" purpose (post-divorce financial support); now, alimony may apparently be awarded to compensate a spouse for contributions made during the marriage, to overcome expected financial difficulty after divorce, and for virtually any other reason the trial court "considers appropriate." In other words, alimony may now be awarded for any reason or purpose heretofore reserved to the

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96. A major University of Michigan study found that seven years after divorce, the real purchasing power of men's income in relation to a standardized index of family need improved by 17%, while the real purchasing power of women's income in relation to need declined by 7%. . . . Lenore Weitzman's more recent California study found that a year after divorce, men's standard of living rose by 42%, while women's standard of living dropped by 73%.


97. See Reynolds, supra note 94, at 829.

98. See generally Reynolds, supra note 94; Goldfarb, supra note 96.

99. Me. Rev. Stat. Ann. tit. 19, § 721 (Supp. 1990-91). I say that Maine has "apparently" joined the trend toward alimony reform because, while the amendment to the statute does amount to reform, it cannot be said that the amendment was necessarily produced by the same broad policy concerns that are discussed in the text. According to attorney Judith Andrucki, one of the drafters of the legislation, the same policy concerns did inspire the drafters. However, whether the Legislature intended to propel Maine to the cutting edge of divorce reform by adopting the proposed amendment probably cannot be determined. The following is the entire "Statement of Fact" accompanying the bill when it was introduced in committee: "This bill enumerates the factors a court must consider when determining an alimony award." L.D. 656, Statement of Fact, (114th Legis. 1989).

100. For an application of the former rule, see, e.g., Skelton v. Skelton, 490 A.2d 1204, 1209 (Me. 1985) ("[A]llimony is a substitute for future support, not compensation for past contributions. . . . "). For the traditional view of the purpose of alimony in Maine, see Strater v. Strater, 159 Me. 508, 166 A.2d 94 (1963).

award of marital property.102 And since marital property may be awarded to either party for virtually any reason that a judge

102. In contrast, one could argue that by requiring the trial court to consider "the contributions of either party as homemaker" in the new alimony statute Me. Rev. Stat. Ann. tit. 19, § 721(1)(K) (1989), the legislature did not intend to allow alimony to be used to compensate for such contributions, but only to remind trial judges to think about them when deciding whether or not to award alimony. This interpretation would be consistent with Skelton: "though the District Court may not use 19 M.R.S.A. § 721 to 'compensate' Dorothy Skelton for eighteen years of marriage, it may consider the ramifications of her occupation during those years, just as it may consider the more traditional factors in making its award." Skelton v. Skelton, 490 A.2d at 1208. In other words, if Mrs. Skelton's current earning power was diminished by the number of years she spent raising children at the expense of developing professional skills and experience, alimony may be used to lessen the present economic disadvantage, but not to compensate for those years of familial service. K. Ainsworth, Esq., Maine State Bar Association seminar on the Economic Issues in Divorce (March 30, 1989).

That argument seems to unreasonably restrict the new alimony provisions. The statute instructs the trial judge to "consider" any "factors" that the judge "considers appropriate." Me. Rev. Stat. Ann. tit. 19, § 721(1) (1989). This directive is undoubtedly limited by the court's reasonable exercise of discretion (the standard boundary beyond which no judge should go). However, it is not limited by case law precedent. Thus one of the factors a judge may now consider is precisely the one prohibited by Skelton: whether the spouse needs or deserves compensation in the form of alimony for contributions made to the marital enterprise as a homemaker, or in any other nonmarketable fashion. If the answer to the question is yes, then it follows that the judge must be empowered to make the award; to hold otherwise is to dismember this broad statutory mandate, which would thereby require the judge to consider and approve of the remedy without authorizing the judge to act on it.

It should be added that the theory of alimony is not settled. In a recent persuasive article Professor Ira Ellman argues that alimony should be awarded only to compensate for what he calls "marital investment" (which includes such things as a homemaker's contributions to the marital enterprise), irrespective of the spouse's postdivorce need. Defining "marital investment" as "claimworthy conduct giving rise to a compensable loss in earning capacity," I., Ellman The Theory of Alimony, 77 Cal. L. Rev. 1 (1989), he argues that alimony should "reallocate the postdivorce financial consequences of marriage in order to prevent distorting incentives." Id. at 50. The idea is to "compensate[] the wife who has disproportionate postmarriage losses arising from her marital investment . . . ." Id. at 51. The theory does not compensate for mere financial need:

An alimony law based upon this conception would therefore ask whether the wife invested in her marriage and is thereby economically disadvantaged upon divorce; it would not inquire into need per se. The wife who invested little or whose need arose from events unrelated to her marriage would have no claim against her former husband. Her relief, if she was in need, would be a societal obligation. By the same token, the wife who suffers economically from the divorce as a result of her marital investment would have a claim even if her financial situation did not place her "in need."

Id. at 52. It would appear that the recent, all-inclusive amendment to the alimony statute would authorize a judge to do just as Professor Ellman suggests. It is doubtful that a carefully considered alimony award based both on the broad license of Maine's new alimony statute and on Professor Ellman's studied formula could be deemed an abuse of discretion.
chooses, it may be said that, except for the potential longevity and amendability of alimony, alimony and marital property are now virtually indistinguishable: a divorce court may award alimony to accomplish any purpose that an award of marital property might serve, and vice versa.

This fact has an important consequence for the fine legal distinctions between marital and nonmarital property: since all marital property is available for post-divorce support, and since all property declared nonmarital may be recaptured for the poorer spouse in the form of alimony, the distinction in cases involving alimony between what is marital and what is nonmarital becomes insignificant. In such cases, all the property of both spouses is available for the benefit of either for practically any purpose that the divorce court sees fit (in its reasonable exercise of discretion, of course). Thus in cases in which a trial court might award alimony, there is no reason to reject the interpretation of the MPA offered here: the indistinguishable nature of awards of property and alimony endow divorce courts with precisely the same discretion that this article advocates for them under the MPA. The differentiation of marital and nonmarital property in such cases is an inconsequential distinction.

Although that argument does not directly apply to cases that do not involve alimony issues (for example, where the spouses have been married only a short time, are both financially independent and have no children), the reasoning overlaps. Now that alimony is becoming a more popular remedy, the frequency of cases in which marital and nonmarital property are functionally distinguishable is decreasing. Given the blurring of the lines of distinction between the two, it makes little sense to devote litigants’ money and judicial energy to the continued refinement of rigid legal rules of dubious viability and decreasing applicability.

There is, finally, a fundamental reason to alter our approach to the MPA, one that returns to the theme that has been stated again and again in this article: the Law Court’s approach to the MPA isn’t working. To be sure, the search for a consistent, reliable body of case law governing the MPA may eventually succeed. But, as recent


104. In many respects, alimony and marital property are distinguishable. The tax consequences of the two are different (see Levy, supra note 9, at 7-52 to 53, 8-15 to 20); a marital property obligation may be dischargeable in bankruptcy, whereas an alimony obligation is not (see 11 U.S.C. § 523(a)(5) (1988); Sylvester v. Sylvester, 85 F.2d 1164 (10th Cir. 1989)); alimony is modifiable whereas an award of property is not (Smith v. Smith, 419 A.2d 1035 (Me. 1980) (alimony modifiable); Cyr v. Cyr, 469 A.2d 836 (Me. 1983) (awards of marital property not modifiable)). The point is that the power of the trial court to award either is equally unlimited.

history proves, it is unlikely to succeed in the near future. It will take years—perhaps decades—for our Law Court to develop a comprehensive, consistent, and reliable approach to the MPA. In the meantime, divorce lawyers and judges must grapple on a daily basis with inconsistent, barely-understood, and often nonexistent precedent in a virtually blind effort to advise clients and decide cases. All of this groping suggests to me an infantry company in combat that cannot predict where its general staff is aiming the artillery; the company’s officers may have a fair idea of their objective, but getting there can be hazardous. One never knows when the Law Court will lob a round right into territory that the troops thought was safe.

Maine needs a better approach now. One alternative, the amendment of the MPA, does not appear to be imminent. In the meantime, the only other choice is to make the price of uncertainty less costly. Instead of making litigants take their chances in the Law Court, let them take their chances in the trial court. By giving the divorce courts the authority to decide, as a function of evidence rather than of strict rules of law, whether spouses’ property ought to be deemed marital or nonmarital, the Law Court would essentially be limiting the field of battle to the trial level. The advantage to the litigants is that it would cost them a lot less to find out what the MPA means in their cases. And the concession that the Law Court would have to make to do this is small: given the dearth of Maine precedent on the MPA, the court would merely be legiti-

106. This is based on a discussion with Attorney Michael Asen, chair of the Maine State Bar Family Law Section, in the spring of 1990. Mr. Asen expressed to me a dissatisfaction with the present statute based on what I interpreted to be grounds similar to the concerns I have expressed in this article. He indicated that the Family Law Section would be discussing statutory alternatives, but that there was no consensus on an alternative, and no replacement statutes under consideration at that time.

107. The importance of this point is illustrated by a recent case that I presided over in the Livermore Falls District Court, Docket No. 88-DV-42. The parties were married for only eight years (and lived together for only six), but their premarital assets increased in value precipitously during their marriage, so by the time of their divorce the marital estate was worth, by my rough estimation, about $450,000. The only issue in the case, other than the divorce itself, was the valuation and division of marital property. The tracing problems were complex to an extreme, and the attorneys’ fees shown by affidavit exceeded $45,000 total—more than 10% of the entire marital estate. As any practicing attorney knows, the costs of appealing my decision to the Superior Court and then to the Law Court would have sharply increased those fees.

108. By my count, the Law Court has decided between 60 and 70 cases involving the MPA since its adoption. (The figure will vary depending on whether one counts decisions in which the MPA is only briefly or tangentially discussed. See, e.g., Norton v. Norton, 443 A.2d 75 (Me. 1982) in which the court upheld, as a matter of trial court discretion, the trial court’s disposition of the marital property.) Of those decisions, only 16 appear to me to contribute significantly to the body of law discussed in this article: Dubord v. Dubord, 579 A.2d 257 (Me. 1990); Cummings v. Cummings, 540 A.2d 778 (Me. 1988); West v. West, 550 A.2d 1132 (Me. 1988); Bishop v. Bishop,
mizing that which trial courts across the state are now having to do anyway virtually every day of the week.

X. SEVEN OBJECTIONS TO THIS PROPOSAL

It is never easy to change eighteen years' worth of statutory interpretation. For one thing, people will object to a new proposal simply to avoid having to change; for another, there is the insidious assumption that what is tried is true. As I wrote (and rewrote) this article I naturally kept raising objections to my thesis in an effort both to anticipate and parry them. Many of those objections I treated in the body of the text above, or in its accompanying footnotes, but a few I reserved for the end of the article, either because they did not fit readily into the argument above or because they deserved special attention. I address them in the order in which they occurred to me, not in an order that suggests their importance.

1. The interpretation of the MPA proposed here would discourage settlement. This objection seems to be based on the theory that unpredictability encourages trials and appeals rather than settlements. The objection is flawed for three reasons. First, that which contributes to the decision to go to trial rather than to settle is far more complicated than the mere unpredictability of the outcome. It involves, among other things, the personalities and emotions of the parties, the personalities and emotions of their attorneys, the reputation and personality of the judge, the nature, value and quantity of the issues at stake, the cost of the litigation, and the wealth of the parties. To say that people are more likely to go to trial because the law is vague or the outcome uncertain is to ignore how complicated the chemistry of litigation really is.

Second, the objection ignores the fact that the MPA is already vague and the outcome already largely unpredictable. For reasons discussed at length above, the meaning of the MPA in many cases cannot be known until an appeal has been taken; all the interpretation of the MPA urged in this article does is to acknowledge that uncertainty and to assign it to the forum where it can most quickly, and least expensively be resolved.

2. The drafters of the MPA never intended this interpretation. Who knows what the drafters intended? Did they intend to exclude

541 A.2d 930 (Me. 1988); Macdonald v. Macdonald, 532 A.2d 1046 (Me. 1987); Moulton v. Moulton, 485 A.2d 976 (Me. 1984); Smith v. Smith, 472 A.2d 943 (Me. 1984); Hall v. Hall, 462 A.2d 1179 (Me. 1983); Grant v. Grant, 424 A.2d 139 (Me. 1981); Bryant v. Bryant, 411 A.2d 391 (Me. 1980); Carter v. Carter, 419 A.2d 1018 (Me. 1980); Grishman v. Grishman, 407 A.2d 9 (Me. 1979); Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979); Zillert v. Zillert, 395 A.2d 1152 (Me. 1978); Fournier v. Fournier, 376 A.2d 100 (Me. 1977); Young v. Young, 329 A.2d 386 (Me. 1974). Assuming that this listing is complete (which may be more a function of art than of science), it involves less than one significant decision per year.
all wedding gifts from the definition of marital property? Did they intend to label as a “presumption” that which is not a presumption at all? Did they intend all of the ambiguities that the Law Court has so painfully struggled with since the statute’s inception? The official Comment affixed to the original § 307 of the UMDA makes no effort to define what the phrase “overcome the presumption” means, and the fact that the statute mistakenly refers to a “presumption” at all suggests that nobody really thought about it.

And who really cares? Not the Law Court, which in the last ten years has twice unanimously ignored the plain language of the statute in search of a preferable result. In fact, the interpretation of the MPA advanced here requires trial judges faithfully to adhere to the spirit of the statute when its letter is ambiguous, toward the end that litigation costs will decline. It is doubtful that any drafter of the MPA or its predecessor in the Uniform Act can quarrel with that objective.

3. If this interpretation is such a good idea, why has it not been adopted elsewhere? The answers are many, and probably none of them is totally satisfactory.

First, at least one other state with marital property act provisions similar to Maine’s has built into its statute what amounts to a buffer, giving its trial courts broader discretion and dampening the necessity for reform. In Minnesota, the legislature added to the Uni-

109. This is what the Comment to § 307 says, in pertinent part: “A spouse seeking to overcome the presumption has the burden of proof on the issue of identification. The presumption is overcome by a showing that the property (1) was acquired prior to the marriage . . . .” Handbook, supra note 15 at 204. The Comment merely parrots the statute, without trying to explain its terms.

110. Nor has the Law Court. See supra text accompanying note 23, discussing how the court arrived at its present interpretation of the effect of “overcoming” the presumption.

I have researched high and low for any case law or other authority that closely analyzes the operation of the MPA’s presumption. The only such authority that I have found is Gregory, supra note 7, at 171: “[T]he section that established this presumption also provides for the destruction of the presumption upon a showing that the property was acquired by devise or in exchange for devised property.” Professor Gregory was discussing Illinois’ version of the MPA, which in pertinent part is identical to the MPA. The language that “provides for the destruction of the presumption” is the phrase “[t]he presumption of marital property is overcome by a showing,” which is word for word the language of the MPA that this article discusses. When I first started pondering the MPA, I agreed with Professor Gregory that a showing of a nonmarital source of property destroyed the presumption, à la Professor Thayer’s famous bursting bubble. See Weinstein’s Evidence, supra note 31, ¶ 301[01], at 301-3. However, I then realized that the presumption is no evidentiary presumption at all, and that it would do more harm than good even to analogize to the operation of evidentiary presumptions.

111. The decisions to which I refer are Carter v. Carter, 419 A.2d 1018 (Me. 1980) and Cummings v. Cummings, 540 A.2d 778 (Me. 1988). If you accept my argument that Dubord v. Dubord is actually an extension of Carter, then that makes three such decisions in the last 10 years, although Dubord was not decided unanimously.
form Act's § 307 a provision allowing a trial court to award up to one-half of one spouse's nonmarital property to the other spouse "to prevent unfair hardship." Such a provision allows trial courts to fudge by softening the hard lines between property over which a court may exercise discretion and property over which it may not. Thus there is less pressure on the appellate courts to draw the hard lines that the Law Court has had to draw, and, ultimately, less incentive to demand a reconsideration of the statute when the lines are drawn inconsistently.

Second, populous states with statutes like the MPA—such as Illinois—produce such a wealth of appellate law that it is possible to develop consistent rules for a wide variety of property issues quickly. Those states do not experience the same delay in the production of appellate rules of interpretation that we do; their many appellate courts are unravelling the Uniform Act's DNA all the time. Unfortunately, we in Maine do not enjoy that luxury. We have few appellate decisions to rely on from within the state and, because the Law Court has so visibly rejected precedent from other states, reliance on foreign precedent is dangerous. Thus the pressure to reform our view of the Uniform Act is different here than elsewhere, because at the present pace of things it may take decades, if not generations, to produce a comprehensive and consistent body of rules for applying the MPA.

Third, the judiciaries of other states that are less populous than Illinois, and that share our dearth of appellate interpretation of the Uniform Act, may be less independent-minded than our Law Court, and more inclined to rely on foreign precedent in formulating their own rules of interpretation. In those states there is more, reliable precedent upon which to base decisions at trial level, and hence less pressure to change how the local version of the Uniform Act is


113. In Grant v. Grant, 424 A.2d 139, 142 n.2 (Me. 1981), half of the court rejected as "untenable" a Missouri decision that a gift to both spouses during marriage qualifies under Missouri's version of the Uniform Act § 307 as a gift to "either spouse" thereby rendering it marital property. (Had the court adopted the Missouri interpretation, it would have avoided the wedding gift problem described in the text above.) In Hall v. Hall, 462 A.2d 1179, 1181 (Me. 1983), the entire court rejected Illinois precedent when it limited transmutation to "documentary transaction[s]." In Cunnings, discussed supra in the text accompanying notes 60-65, the court never mentioned Illinois precedent that declared all workers' compensation awards marital property, whenever received (see supra note 65). And Dubord never even discussed the following decision from Missouri:

If, during the marriage, a party sells property he owned prior to the marriage and, in addition, sells marital property, and then commingles the proceeds from these sales to purchase new property, ... the newly acquired property so purchased constitutes marital property...

interpreted.

In the final analysis, however, asking why this interpretation of our MPA has not surfaced elsewhere may be a bit like asking why, if peanut butter tastes good, it isn’t popular in England. Maine’s experience with the MPA is undoubtedly unique, and we may need to develop unique tools to deal with it.

4. If this interpretation were adopted, all Law Court precedent would immediately become obsolete. This contention is untrue; only Dubord would have to be reconsidered, because it is the only case that has expressly held that property which derives from one of the statutorily exempted sources must be declared nonmarital.114 Dubord ought to be reconsidered anyway, so a reassessment of its treatment of the presumption would amount to no great hardship. If, on the other hand, stare decisis prohibits that, then the other obvious approach is to rewrite the statute. I advocate rewriting the case law only because, as I mentioned above,115 there is no statutory amendment on the horizon, but if the MPA were revised and improved as the result of this article I would have accomplished much of my objective.

5. Judges will be inclined to declare property marital whenever possible in order to avoid having to trace assets. The Law Court has recognized that an individual item of property may have both marital and nonmarital characteristics.116 Thus, for example, if a person owns an antique car before marriage, but after marriage invests marital funds to have it spruced up, its resulting value is partly marital and partly nonmarital. If prior to divorce the person has sold the car and bought a boat, the divorce court would have to “trace” the marital and nonmarital proportions of the car to the boat, in deciding how much of the value of the boat the court has discretion to disperse.117

Most judges view tracing as a headache, because over the duration of a long marriage the turnover of assets can be frequent and the tracing complicated. Yet of greater significance than judges’ discomfort is the fact that the tracing of multiple assets through a long marriage is fertile cause for reversible error. It is easy for a trial judge, who only hears the testimony once and almost never gets to contemplate a transcript, to misunderstand the testimony and get

114. See supra note 23 and accompanying text.
115. See supra note 106.
116. See Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979). “Where the marital estate chooses to invest its funds in certain property together with non-marital funds, the marital estate is entitled to a proportionate return on its investment. The marital and non-marital estates have each made investments from which they are entitled to the full benefit and return.” Id. at 77 (citations omitted).
117. This assumes that there was no transmutation of the partly nonmarital asset into a wholly marital asset. See Tibbetts v. Tibbetts, 406 A.2d at 75 n.5, for a discussion of the arithmetic of tracing.
the assets, or the percentages, mixed up.\textsuperscript{118} (It is also easy for reasonable people to disagree about how complicated transactions should be traced.) It would not be surprising if trial judges, faced with tough tracing problems, took the side exit out by declaring all the property that would be hard to trace to be marital property.

That would be fine. There is no need to perpetuate a doctrine that, in complicated cases, invariably produces arguable if not reversible error. In fact, the Law Court adopted the transmutation doctrine in part to prevent trial courts from having to trace assets.\textsuperscript{119} Of course, the MPA as interpreted in this article would still produce tracing problems in cases involving property owned before marriage, but to the extent that tracing can be diminished litigation is simplified and everybody benefits. Finally, one must keep in mind that a judge who declares property marital does not thereby withhold it from the party who has the stronger claim to it. Whether or not a judge evades the drudgery of tracing, he or she still has the obligation to make a fair distribution of the property.\textsuperscript{120}

\textsuperscript{118} The tracing problem increases if counsel come to trial ill-prepared. Unfortunately, the MPA puts attorneys on the horns of a dilemma: prepare well and the attorney's fees for trial expand exponentially, but the appeal opportunity is reduced; prepare poorly and the fees remain manageable at trial level, but the chances of confusing the judge and producing an appellate issue rise dramatically. In the case discussed supra at note 107, the attorneys' fees exploded because the attorneys prepared for trial meticulously; no appeal was taken.

\textsuperscript{119} Carter v. Carter, 419 A.2d 1018, 1022 (Me. 1980) ("we avoid the illogical and inequitable results, as well as the complications, application of the 'tracing' doctrine would produce in situations like that in the case at bar . . . ").

One court simply threw up its hands over the problem. In Ranik v. Ranik, 383 N.W.2d 431 (Minn. App. 1986), the husband complained that the trial court committed error by ignoring case law requiring it to trace the inheritance that he had received during the marriage. Finding no abuse of discretion but without addressing the merits of the argument, the court simply stated, "[t]he precedential value of comparing the particular facts in one case to the facts in another case is slight at best." \textit{Id.} at 435. Apparently, the court had no logical answer to the husband's argument, but wanted to discourage the appeals of tracing issues.

\textsuperscript{120} In a recent article, Professor Oldham defends retaining the distinction between marital property and separate property—and therefore retaining tracing of assets upon divorce—on three grounds. First, he argues that absent such a distinction, settlement of cases is discouraged. Second, the distinction is perceived generally as fair. Third, by maintaining such a distinction the healthy would be encouraged to marry—or at least would not be discouraged from marrying—these of lesser means. See Oldham, supra note 68, at 250-51.

I reject the first contention, on the basis of the argument I make in the text in my discussion of the first of the seven objections to my thesis. I reject the second because the alternative—a hotchpot of marital property—is not perceived as unfair. I have never read that transmutation, which shortcircuits the marital-nonmarital property distinction and obviates tracing, is deemed unfair. In fact, when the Commissioners on Uniform Laws redrafted Section 307 in 1973 (deleting from it the same provisions that Maine adopted as our MPA), they adopted two alternative provisions, one of which creates the hotchpot that Professor Oldham condemns. See Oldham, THE UNIF. MARRIAGE AND DIVORCE ACT § 307 Alternative A, 9A U.L.A. 238-39 (1973). Finally, I
6. The proposal in this article does not cure the problem of defining "property". That's right. There are no panaceas for a poorly drafted statute. I propose a cure for those of the MPA's symptoms that derive from its use of an evidentiary and procedural misnomer (the "presumption"), and from some of the inadequacy of its definitions, but I fear that it will take a long time to work all the kinks out of the statute.

7. This article is an attempt by a trial judge to aggrandize his power. Living day to day as I do on the front lines, I find it disconcerting not to know where the artillery is pointing most of the time. Given the inconsistency of the Law Court's aim over the past eighteen years, I think that it would be better to let the troops in the trenches direct the fire.

XI. Conclusion

At best, the MPA proves that there are no simple answers to complex problems. Unfortunately, the interpretation the Law Court gives to the MPA forces the court to keep trying to prove that there are. The court should abandon its search for that holy grail. The text of the MPA offers us an alternative to the Law Court's current approach, an approach that cannot reduce the statute's inherent ambiguities but that can at least reduce litigation costs. To the extent that this statute was a product of the 1970's divorce reform movement, and to the extent that that movement attempted to facilitate rather than to complicate divorce, the approach suggested

reject Professor Oldham's third argument because I find it less persuasive than the thesis of "Romeo and Juliet" (love usually conquers all) and because those who do not share that preference can protect themselves with prenuptial agreements.

121. Under the interpretation suggested by this article, the task of determining whether something constitutes property at all would remain the difficult task it is now. See Cummings v. Cummings, 540 A.2d 778 (Me. 1988) (workers' compensation payments, not claim, are property to be categorized); Sweeney v. Sweeney, 534 A.2d 1290 (Me. 1987) (professional license is not property under Me. Rev. Stat. Ann. tit. 19, § 722-A (1981)); and Lord v. Lord, 454 A.2d 830 (Me. 1983) (insurance agency "goodwill" is property). See also supra note 61 and accompanying text.

122. See HANDBOOK supra note 15, at 178:

In its provisions on dissolution of marriage, the [Uniform Marriage and Divorce] Act has totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse based on the marital fault of the other spouse which has not been connived at, colluded in, or condoned by the innocent spouse. Consideration was given to alternative methods of creating a non-fault device for terminating marriages, including the ground of voluntary separation for a period of time now recognized by many states. The Conference came finally to the conclusion . . . that the legal dissolution of a marriage should be based solely on a finding that factually the marriage is irretrievably broken. This standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation.
here seems to advance that original objective.\textsuperscript{123}

\textsuperscript{123} It has been over a year since I began writing this article. During that time the Family Law Section of the Maine Bar Association has worked faster than I; according to a letter I received from Attorney Dana Prescott in early March, 1991, "revision of the Marital Property Statute . . . will be one of the linchpins of our legislative proposals for the 1992 Legislative Session." By the time I received that information, it was too late to revise this article to accommodate that fact.

I admit that I wince at the prospect that some of the ideas in my article (the product of many pre-dawn ruminations) may soon become obsolete, but I hope that the tenor of the article will inspire the Family Law Section, and the Legislature, to accelerate their statutory reforms.