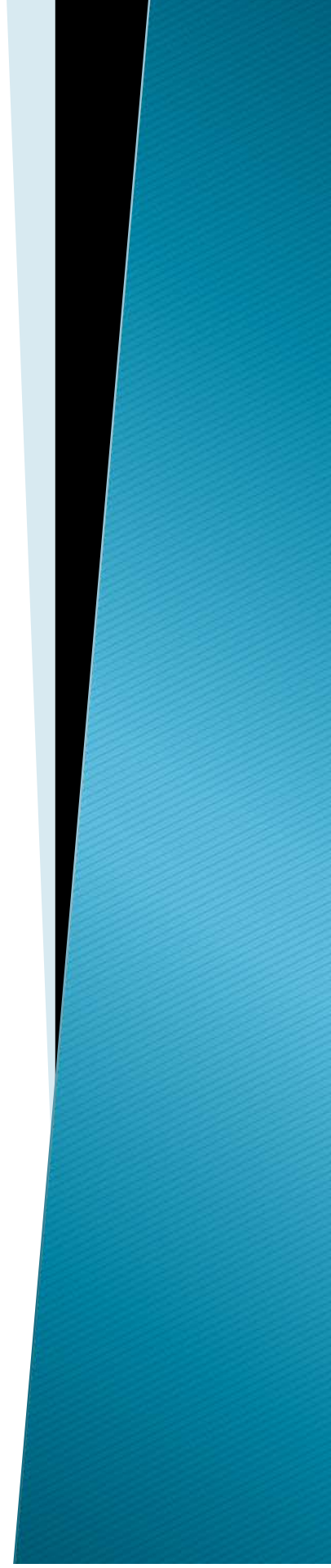


# Identifying and Measuring Marital Separately Owned Assets

Presented by:

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# Statutory Rule for Separate Property

Property Acquired prior to the marriage or by gift or inheritance, and increase in value thereof during the marriage, is not marital property. *Ark. Code Ann § 9-12-315*



# For Every Rule, An Exception:

- ▶ An exception to the general rule articulated in the statute has been carved out by case law where one spouse or the other, or both, make significant contributions of time, effort and skill directly attributing to the increase in value, creating a presumption that such increase belongs to the marital

**estate.** *Layman v. Layman* 292 Ark, 539, 543, 731 S.W.2d 771, 774 (1987), and its progeny



## ....Or Two

- ▶ There is also long standing authority for providing a marital benefit to the non-owner spouse when marital funds were expended to improve an asset, or to reduce debt on the other spouse's asset. *Camp v Camp*, 18 Ark. App. 87,710 S.Wd 842 (1986), *Williford v Williford*, 280 Ark. 71, 655 S.W. 2d 398 (1983), *Box v Box*, 312 Ark. 550, 851 S.W.2d 437 (1993, et al.



# Marital Efforts = Marital Assets

- ▶ Owner Spouse Working in Separately Owned Business – with or without reasonable compensation
- ▶ Non Owner Spouse working in Separately Owned Business – with or without compensation
- ▶ Non Owner, Non Working Spouse providing household services which “free up” owner to work in business



# ALL OR NOTHING?

- ▶ MARITAL EFFORTS AND MONETARY CONTRIBUTION DO NOT HAVE TO RESULT IN A FINDING THAT ALL OF THE APPRECIATION IS MARITAL.
- ▶ PASSIVE APPRECIATION IS THAT WHICH IS NOT ATTRIBUTED TO EITHER MONETARY CONTRIBUTIONS OR THE EFFORTS OF ONE OF THE PARTIES, AND, IF PROVEN, SHOULD NOT BE INCLUDED IN THE MARITAL ESTATE.



# PROOF AND MEASUREMENT THE KEY

SO, YOU THINK YOU HAVE A SITUATION  
WHERE MARITAL EFFORTS HAVE CREATED A  
MARITAL ASSET?

*How do you prove it?*

*How do you measure it?*



# BURDEN OF PROOF

	<u>OWNER</u>	<u>NON-OWNER</u>
FACT OF SEPARATE OWNERSHIP	X	
FACT OF APPRECIATION DURING MARRIAGE		X
MARITAL EFFORTS CONTRIBUTED TO VALUE		X
MARITAL CASH/ASSETS CONTRIBUTED		X
AMOUNT OF APPRECIATION		X
PORTION ALLOCABLE TO THIRD PARTIES	X	
PORTION ALLOCABLE TO MARKET FACTORS	X	





# MEASUREMENT

- ▶ FIRST STEP IS TO VALUE THE ASSET AT DATE OF MARRIAGE.
- ▶ SECOND STEP IS TO VALUE IT AT AS DATE OF DIVORCE.
- ▶ ASSUMING THERE IS AN INCREASE, THE THIRD STEP IS TO APPORTION THE INCREASE AMONG VALUE CREATED FROM MARITAL AND NON-MARITAL CONTRIBUTIONS TO VALUE.



ARKANSAS CASE LAW ON ALLOCATION OF APPRECIATION BETWEEN MARITAL AND NON-MARITAL FACTORS:

**“SLIM TO NONE”**

AND TENDS TO BE:

**“ALL OR NOTHING\*\*”**

**\*\*** AND IS SOMETIMES, IF NOT USUALLY, IS MODIFIED BY UNEQUAL DIVISION OF RESULTING ASSET.



**SO, WHERE TO NEXT?**



# IDENTIFY OTHER VALUE DRIVERS

- ▶ CHANGES IN MARKET CONDITIONS
- ▶ CHANGES IN DEMOGRAPHICS SERVED
- ▶ CHANGES IN REGULATIONS WHICH CREATE OR EXPAND MARKETS, OR OTHERWISE CREATE OR DETRACT FROM VALUE
- ▶ CHANGES IN MARKET MULTIPLES
- ▶ EFFORTS OF THIRD PARTIES
- ▶ MARKET RETURNS ON INVESTED CAPITAL AT DATE OF MARRIAGE; INFLATION; CHANGE IN KEY INPUT OR OUTPUT PRICING.



# RE-WRITING CASE LAW WITH RELEVANT AND PERSUASIVE DATA

- ▶ 2008 SUPREME COURT CASE – BROWN V BROWN
  - FINDING: 100% OF APPRECIATION IN A STOCK PORTFOLIO WAS HELD TO BE A MARITAL ASSET BASED ON THE FACT THAT IT WAS MANAGED BY THE OWNER-SPOUSE, WHO WAS EMPLOYED ELSEWHERE ON A FULL TIME BASIS.
  - Data that could have been helpful in allocation of increase to non-marital contributions of skill and effort:
    - Benchmark returns of professional managers
    - Benchmark returns of monkey throwing darts (an actual study)
    - Benchmark returns of S & P 500 and other broad market indices; Index fund yields.



# RE-WRITING CASE LAW WITH RELEVANT AND PERSUASIVE DATA

HAZEL DAVIS V. WILLIAM DAVIS – 2002 COURT OF APPEALS

FINDING: 100% OF APPRECIATION IN VALUE OF FARM LAND, ACQUIRED 49 YEARS AGO, WAS MARITAL PROPERTY

Data that could have been helpful in allocation to non-marital appreciation:  
Benchmark increase in overall Arkansas farm land value – U OF A Cooperative Extension Service Study published annually; goes back to 1950.

[http://www.uaex.edu/Other\\_Areas/publications/PDF/FSA-35.pdf](http://www.uaex.edu/Other_Areas/publications/PDF/FSA-35.pdf)

- Review farm records to pinpoint existing improvements to segregate value of improvements versus land without comparable improvements. Consult real estate appraiser to quantify based on market comps.
- In other improved or developed real estate, compare market values of improved versus unimproved property of like kind, in same market area.



# PROVING APPRECIATION FROM OTHER SOURCES - SOME FIXES

- ▶ CAP RATES BASED ON DATE OF MARRIAGE VERSUS THOSE IN EFFECT TODAY - VALUE “BUT FOR” THE CHANGE IN CAP RATES. EASY TO DO IN STANDARD BUILD UP WHERE YOU START WITH A RISK FREE RATE AND ADD POINTS FOR PUBLIC MARKET RETURNS AND INDUSTRY SPECIFIC FACTORS.
- ▶ ADJUST CASH FLOW FOR AMOUNTS THAT CAN BE TIED TO MARKET DRIVEN EVENTS - CALCULATE WITH AND WITHOUT IMPACT OF SUCH EVENTS.



## Protecting Separate Property - Lessons Learned

A well crafted ante-nuptial agreement is the best way to ensure that a family owned business, and the wealth it represents, remains in the hands of the family that created it.





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