CLASSIFICATION OF PROPERTY IN DIVORCE
A Step-By-Step Guide With Cases

John H. Kitzmann
Davidson & Kitzmann, PLC
211 E. High Street, Charlottesville, VA 22902
www.dklawyers.com
(434) 972-9600

1. STEP ONE: IDENTIFY THE PROPERTY THAT IS POTENTIALLY SUBJECT TO EQUITABLE DISTRIBUTION

A. Property subject to equitable distribution

i) Property must be "of the parties"

Most forms of property owned by the parties are subject to equitable distribution. Virginia Code § 20-107.3(A) states that "[T]he court . . . shall determine the legal title . . . the ownership and value of all property . . . of the parties."

Kelln v. Kelln, 30 Va. App. 113, 127-128 (1999)
Property transferred into a revocable *inter vivos* trust are treated as if owned by the settlor spouse, and remain subject to equitable distribution.

ii) Practice good will of business may be marital property

Howell v. Howell, 31 Va. App. 332, 334 (2000)
"Practice goodwill (also designated as business or commercial goodwill) is attributable to the business entity, the professional firm, and may be marital property."

B. Property not subject to equitable distribution

i) Property owned by third parties

Scarberry v. Scarberry, 2009 Va. App. LEXIS 28 (2009)
Certificates of deposit that had been transferred to husband's father were no longer owned by the husband and therefore were not subject to equitable distribution.

Johnson v. Johnson, 2006 Va. App. LEXIS 442 (2006)
"Property which is owned by third parties, including a corporation owned entirely by the parties, is generally not marital property subject to equitable distribution."

Showalter v. Showalter, 2009 Va. App. LEXIS 78 (2009)
"When husband transferred his land into the corporation, the land was no longer part of the marital estate. It ceased to exist as an asset owned by

either of the parties."

Mezzy v. Mezzy, 2000 Va. App. LEXIS 21 (2000)
Property held in the children's name was not subject to equitable distribution.

ii) Property owned by third parties may be subject to equitable distribution if third party received the property via a fraudulent transfer

Buchanan v. Buchanan, 266 Va. 207, 211 (2003)
Trial court may void a fraudulent transfer of property to third parties under Code § 55-80 and thus reestablish jurisdiction over the property for equitable distribution. The transfer must have been made with "intent to delay, hinder or defraud" the other spouse of property that she "may be" lawfully entitled to. The statute's use of "may be" means that "the entitlement of one alleging a fraudulent conveyance need not be judicially established or reduced to judgment at the time of the challenged conveyance". *Id.* At 212.

iii) Personal good will of business is not subject to equitable distribution

Howell v. Howell, 31 Va. App. 332, 334 (2000)
"The value of goodwill can have two components. Professional goodwill (also designated as individual, personal, or separate goodwill) is attributable to the individual and is categorized as separate property in a divorce action. Practice goodwill (also designated as business or commercial goodwill) is attributable to the business entity, the professional firm, and may be marital property."

iv) Professional degrees are likely not subject to equitable distribution

No Virginia appellate decision has addressed this issue. At least one circuit court has held that professional degrees are not marital property (*Palmer v. Palmer*, 21 Va. Cir. 112 (Fairfax Co. 1990).

v) Military disability benefits are not marital property

Mansell v. Mansell, 490 U.S. 581 (1989); *Lambert v. Lambert*, 10 Va. App. 623 (1990).

2. STEP TWO: INITIALLY CLASSIFY PROPERTY AS MARITAL OR SEPARATE AS OF DATE OF ACQUISITION

A. Most property is initially classified as marital or separate – not hybrid

Duva v. Duva, 55 Va. App. 286, 299 (2009)
"One acquires property either as separate or marital. We begin with the premise that property acquired during the marriage is presumed to be marital and property acquired before marriage is presumed to be separate. Any analysis of hybrid property must begin with these presumptions."

i) Exceptions

a) Personal injury awards

(1) Personal injury award is initially hybrid

Chretien v. Chretien, 53 Va. App. 200, 206 (2008)
"The statute expressly provides that a personal injury recovery is part marital and part separate property. . .."

(2) Personal injury award is marital property to the extent it is attributable to lost wages or medical expenses accruing during the marriage and before the last separation of the parties.

Chretien v. Chretien, 53 Va. App. 200, 206 (2008)
The marital share is that part of the total personal injury or worker's compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance accruing during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent. *Citing* Va. Code § 20-107.3(H).

(3) Personal injury award is separate property to the extent it is not attributable to lost wages or medical expenses accruing during the marriage and before the last separation of the parties.

Chretien v. Chretien, 53 Va. App. 200, 206 (2008)
"The statutory scheme also makes clear that the remainder of the [personal injury] recovery is separate property." The remainder is that portion not "attributable to lost wages or unreimbursed] medical expenses".

(4) The party seeking to prove that a portion of a personal injury award is separate bears the burden of proof

Chretien v. Chretien, 53 Va. App. 200, 206 (2008)
Wife was injured in a motorcycle accident during the marriage and received a settlement of approximately $150,000. The trial court held that the entire award was wife's separate property. The Court of Appeals reversed the trial court, holding that "[D]ue to the overall presumption in favor of marital property . . .wife bore the burden of proving that some or all of the personal injury recovery was separate property." The wife had offered several letters from the insurance companies, but none of them identified whether any part of her recovery was for lost wages or uncompensated medical expenses. Accordingly, the Court of Appeals held that the wife had

failed to overcome the presumption that the personal injury award was marital.

b) Pension, profit-sharing, deferred compensation plan or retirement benefit may initially be hybrid

(1) Va. Code § 20-107.3(A)(3)(b) specifically provides that pensions, profit-sharing plans, deferred compensation plans, and retirement benefits have both a marital and a separate share. The Code defines the "marital share" as the portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent. Va. Code § 20-107.3(G)(1).

B. **Property is initially classified as of the date is was acquired**

Wagner v. Wagner, 4 Va. App. 397, 404 (1987)
"The character of property classified pursuant to Code § 20-107.3(A) is initially ascertained as of the date that it is acquired."[1]

Stratton v. Stratton, 16 Va. App. 878, 881 (1993)
"Generally, the character of property at the date of acquisition governs its classification pursuant to Code § 20-107.3."

i) Date of acquisition for specific types of property

a) Stock options are acquired when actions giving right to options occur

Shiembob v. Shiembob, 55 Va. App. 234, 242 (2009)
When a right to obtain stock vests only upon a spouse's continued employment, and where that continued employment did not occur until after separation, the stock was acquired after separation and thus is separate property.

Dietz v. Dietz, 17 Va. App. 203 (1993)
Stock options made contingent on continued employment are akin to "deferred compensation". The portion "which was earned during the marriage and before the last separation of the parties" from "any . . . deferred compensation plan or retirement benefit," constitutes marital property. *Citing* Va. Code § 20-107.3(A)(3)(b) & 20-107.3(G).

Cirrito v. Cirrito, 44 Va. App. 287 (2004)
Because the condition necessary for the vesting of husband's right to exercise the stock options (i.e., his continued employment) was

[1] *Wagner* was decided prior to the 1990 amendment to Code § 20-107.3(A). However, because the concept of hybrid property is not material to initial classification, the 1990 amendment to the statute has no effect on the holding of *Wagner* as it applies to the acquisition issue discussed herein.

not fulfilled until after the parties' marriage, husband "earned" the right to exercise the stock options "during the marriage.

b) Severance pay intended to compensate efforts during the marriage is acquired during the marriage; severance pay intended to compensate efforts after the marriage is acquired post-separation.

Luczkovich v. Luczkovich, 26 Va. App. 702 (1998)
Husband negotiated and received severance pay two years after separation. Court held that the severance pay was the husband's separate property. "The touchtone of the classification is whether the severance pay was intended to compensate the employee for efforts made during the marriage or to replace post-separation earnings." *Id.* at 708-09. "[S]everance pay is 'a mere expectancy,' it has no value until the termination of employment." *Id.* at 709.

c) Real estate is acquired as of date title is received

Wagner v. Wagner, 4 Va. App. 397, 404 (1987)[2]
Real estate was purchased by wife during the marriage with money loaned to her by her father. The loan was later forgiven. Wife argued that the property was not "acquired" when she obtained title, but rather when she obtained equity by the forgiveness of the note. The Court rejected her argument. "The fact that [wife's] father later forgave the note . . . did not alter the character of the property on . . . the date it was acquired."

Duva v. Duva, 55 Va. App. 286, 299 (2009)
Wife argued that when husband purchased the property prior to the marriage, he had no equity in the property, and therefore the property was not "acquired" prior to the marriage but during the marriage when equity was acquired. The Court rejected "wife's argument that the acquisition of equity is the triggering event to determine whether the property was acquired. Under the facts of this case, the date of acquisition is a fixed date and is determined when husband took title to the property."

d) Real property is not acquired when equity is created

Duva v. Duva, 55 Va. App. 286 (2009)
Husband acquired title to property in Rhode Island prior to the marriage. During the marriage, the parties paid the mortgage using marital funds. Wife argued that the portion of the equity created with marital funds was "acquired" during the marriage. The Court rejected her argument. "We therefore reject the source of funds rule as an initial classification concept. We further reject wife's argument that the acquisition of equity is the triggering event to determine whether the property was acquired. *Id.* at 299.

[2] See Note 1.

e) Income is acquired as it is earned

Taylor v. Taylor, 9 Va. App. 341, 345 (1990)
"We agree with wife's contention that a spouse's income earned from services he or she rendered during the marriage is marital property."[3]

Cirrito v. Cirrito, 44 Va. App. 287 (2004)
Income received during the marriage based on husband's forbearance of work during the marriage under a non-competition agreement is marital property.

f) Property acquired as of date it is placed into revocable trust

Kelln v. Kelln, 30 Va. App. 113 (1999)
During the marriage, husband and wife entered jointly into a revocable living trust agreement which created a separate trust for wife and a separate trust for husband. The Court of Appeals held that the funds in trust were marital because they were acquired during the marriage and the record did not contain clear and unambiguous evidence that either party intended to relinquish his or her interest in marital property and to create separate estates.

g) Property received by gift during the marriage is acquired during the marriage

Theismann v. Theismann, 22 Va. App. 557, 579 (1996)

C. **The following property is initially classified as marital**

i) Property acquired during the marriage through the date of separation that is not separate property. Va. Code § 20-107.3(A)(2).

ii) Property titled in the name of both parties. *Robinson v. Robinson*, 46 Va. App. 652 (2005).

iii) Separate property re-titled in the joint names of the parties. *Robinson v. Robinson*, 46 Va. App. 652, 664 (2005).

iv) Pensions. *Van Dam v. Gay*, 280 Va. 457, 463 (2010). The Supreme Court held that "[I]n divorce proceedings all pensions are presumed to be marital property in the absence of satisfactory evidence that they are separate property and the court may direct payment of the marital share of such benefits whether they are "vested or nonvested" as they become payable."

The Supreme Court cites to Virginia Code § 20-107.3(A)(2) as support for its holding. That Code section, however, is not as broad as the Court asserts. The Code section reads: "All property including that ***portion*** of pensions, profit-sharing or deferred compensation or retirement plans of whatever nature, ***acquired by either spouse during the marriage***, and before the last separation of the parties . . . is presumed to be marital

[3] Care should be taken citing this case for other holding because many of the holdings relied explicitly on *Smoot v. Smoot*, 233 Va. 435 (1987), which was superseded by the 1990 amendment of the equitable distribution statute.

property in the absence of satisfactory evidence that it is separate property." Thus, only the portion of a pension that is acquired during the marriage is presumed marital.

Moreover, Code § 20-107.3(G)(1) acknowledges that the marital portion of retirement likely makes up only a share of the whole: "The court may direct payment of a percentage of the ***marital share*** of any pension, profit-sharing or deferred compensation plan or retirement benefits . . .."

Finally, the Supreme Court's holding is directly at odds with multiple holdings of the Court of Appeals. For instance, in *McGinniss v. McGinniss*, 49 Va. App. 180, 187 (2006), the Court of Appeals held:

> "Under Virginia law, it is well established that the marital portion of a defined benefit plan is distinguished from the separate portion by the application of a fraction, the numerator of which represents the total time the pensioner is employed during the parties' marriage, and the denominator of which represents the total time the pensioner is employed through the date of retirement. The fraction diminishes the marital share in relation to the number of years that pre-and post-marital contributions are made. Thus, as applied, the fraction effectively excludes from the marital share the income earned by pre-and post-marital contributions to the pension."

D. **The following property is initially classified as separate**

i) Property acquired before the marriage. Code § 20-107.3; *Barnes v. Barnes*, 16 Va. App. 98, 104 (1993).

ii) Property acquired after separation. *Luczkovich v. Luczkovich*, 26 Va. App. 702, 712 (1998).

iii) Property acquired by bequest, devise, descent, survivorship or gift from a source other than the other party. *Dowling v. Rowan*, 270 Va. 510, 520 (2005); Va. Code § 20-107.3(A)(1).

iv) Property acquired during the marriage in exchange for or from the proceeds of sale of separate property provided it is maintained as separate property. Va. Code § 20-107.3(A)(1).

v) Income received from separate property. Va. Code § 20-107.3(A)(1).

vi) Increases in the value of separate property. Va. Code § 20-107.3(A)(1); *Martin v. Martin*, 27 Va. App. 745, 754 (1998).

3. STEP THREE: ATTEMPT TO REVERSE THE INITIAL CLASSIFICATION

A. **Attempt to prove property initially classified as marital is in fact wholly separate**

i) Standard and burden of proof

a) Standard of proof is "satisfactory" evidence.

Stratton v. Stratton, 16 Va. App. 878 (1993)
The party claiming that property should be reclassified as separate property has the burden to produce satisfactory evidence to rebut the presumption that the property acquired during the marriage is marital.

Robinson v. Robinson, 46 Va. App. 652, 665 (2005)
A home, two vehicles and bank accounts were acquired during the marriage, and thus were initially presumptively marital. The husband carried his burden of proving that all of the property had been purchased with funds from his pre-marital trust account.

b) Party claiming that property is separate bears the burden

Courembis v. Courembis, 43 Va. App. 18, 34 (2004)
"The party claiming that property acquired during the marriage is separate property bears the burden of rebutting this presumption."

c) The party claiming that the property should remain marital bears the burden to prove the existence of a gift by clear and convincing evidence

Theismann v. Theismann, 22 Va. App. 557, 565-66 (1997)
If separate property is retitled in the names of both spouses, and a party successfully traces the property to a separate source, the non-owning spouse must then prove the existence of a gift by clear and convincing evidence to re-classify the property as marital.

ii) Available methods

a) Property acquired during the marriage will often be initially classified as marital[4]; however, if the property was acquired in exchange for or from the proceeds of sale of separate property and maintained as separate property, it can be re-classified as separate. Va. Code § 20-107.3(A)(1).

Fowlkes v. Fowlkes, 42 Va. App. 1, 7-9 (2003)
Wife owned a house before the marriage, and she kept the home titled solely in her name during the marriage. During the marriage, the parties added an addition. Husband argued that since the addition was acquired during the marriage, it was marital property. Neither party used marital funds to pay for the construction of the addition. The trial court held that the addition was marital property. The Court of Appeals reversed, holding that the addition was separate property because, although it was acquired during the marriage, separate funds had been used for the acquisition.

[4] Also the Court in *Davis* initially classified the property as marital, in other cases the Court has initially classified property acquired during the marriage in exchange for or from the proceeds of the sale of separate property as separate property.

Davis v. Davis, 2010 Va. App. LEXIS 26 (2010)
Husband purchased two certificates of deposit during the marriage. The Court held that "The CDs in question were purchased during the marriage. Therefore, they are presumed to be marital property." The Court then analyzed whether the husband had put on sufficient evidence to trace the funds in the CD to a separate source. Arguably, Va. Code § 20-107.3(A)(1).

b) Super gift or agreement giving property to spouse

McDavid v. McDavid, 19 Va. App. 406, 411 (1994)
Property that is acquired during the marriage by a spouse is presumptively marital. "However, property which is marital may become separate only through "a valid, express agreement by the parties."

(1) Deed of gift containing specific language sufficient (super gift)

McDavid v. McDavid, 19 Va. App. 406, 411 (1994)
The wife signed a deed of gift to husband during the marriage stating that the husband was to take the property in his "own right as his separate and equitable estate as if he were an unmarried man . . . free from the control and marital rights of this present . . . spouse and with full and complete power to dispose of the property during his lifetime." Although the property was acquired during the marriage, and thus presumptively marital property, the Court found the language in the deed sufficient to transform the property into the separate property of the wife.

(2) Revocable trust agreement not sufficient

Kelln v. Kelln, 30 Va. App. 113 (1999)
During the marriage, husband and wife entered jointly into a revocable living trust agreement which created a separate trust for wife and a separate trust for husband. The trial court held that the trust constituted a completed gift of marital property into the separate property of each of the spouses. The Court of Appeals reversed, holding that the record did not contain clear and unambiguous evidence that either party intended to relinquish his or her interest in marital property and to create separate estates. *Id.* At 120.

(3) Marital agreement

Shenk v. Shenk, 39 Va . App. 161, 170 (2002)

The burden of proving a contractual transfer is upon the party who asserts it. "Wife had the burden to prove to the trial court that such an agreement existed".

Shenk v. Shenk, 39 Va. App. 161, 170-177 (2002)
The parties acquired a home during the marriage. The property was initially marital. Husband and wife executed a deed of gift transferring the wife's interest to husband. The deed provided that the property was to be held by husband "in his own right as his separate and equitable estate as if he were an unmarried man . . . free from the control and marital rights of his present . . . spouse" and "with full and complete power . . . [to] dispose of the . . . property . . . during his lifetime . . . [or by] devise." The Court held that the deed was in essence a marital agreement under Va. Code § 20-155, and that the property was the husband's separate property.[5]

The parties also acquired several businesses during the marriage. Wife presented a written "assignment" to the trial court. The Court held that the assignment" was a valid marital agreement under Va. Code § 20-155. The Court also held that the "language of the "assignment" plainly gives wife "all of [husband's] right, title, and interest" in the businesses. The preamble of the agreement expresses husband's desire to "withdraw as an owner" in all the businesses. The contract was not intended to transfer only bare legal title, as husband suggests, but transferred "all" of his rights." As a result, the Court held that the property was the wife's separate property.

B. **Attempt to prove that property initially classified as separate is in fact wholly marital**

i) Burden of proof

Duva v. Duva, 55 Va. App. 286 (2009)
Funds earned during the marriage were used to pay the mortgage on husband's separate property. The Court held "marital funds, by paying the mortgage on the separate property, were commingled with the Rhode Island property (the receiving property) and were transmuted into the separate property. The burden would then be on the wife to trace the contribution for the marital funds to retain the classification of marital property." *Id.* at 294.

[5] Code § 20-155 is part of the Premarital Agreement Act and provides as follows: Married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution.

ii) Property acquired after separation may be marital if obtained with marital funds

Luczkovich v. Luczkovich, 26 Va. App. 702, 712 (1998)
After separation, husband opened three mutual funds. As such the funds were presumptively husband's separate property. Wife offered evidence that husband opened the accounts with money transferred from the parties' marital account. The trial court found that the mutual funds were marital property and the Court of Appeals affirmed the trial court's holding.

iii) Property acquired by bequest, devise, descent, survivorship or gift from a source other than the other party[6]

Rein v. Rein, 1994 Va. App. LEXIS 699 (1994)
Wife failed to prove that three mobile home parks inherited by husband were marital when husband had not re-titled or otherwise transmuted into marital property.

iv) Property acquired during the marriage in exchange for or from the proceeds of sale of separate property may be marital property if not maintained as separate property

Courembis v. Courembis, 43 Va. App. 18 (2004)
Husband was a shareholder in a corporation that owned two buildings prior to the marriage. During the marriage, the corporation sold the buildings and husband received a large amount of cash. Wife argued that the husband had failed to keep the proceeds of the sale separate. Wife asserted that she was an officer and director of the corporation that owned the buildings, she maintained banking records and prepared financial documents for both properties, and she had transfer authority over the proceeds. She also asserted that that she managed the proceeds because she advised and directed husband towards certain investments after interviewing twelve different venture capital prospects. Husband testified that the proceeds had remained in his name only, subject to his ultimate control. The Court of Appeals held that the evidence established that the husband had "maintained the proceeds as his separate property." *Id.* at 39.

Gilman v. Gilman, 32 Va. App. 104, 110 (2000)
Prior to the marriage, husband owned shares of stock in Southern States. Husband testified that during the marriage, he sold the Southern States stock and purchased Overnight Transportation stock with the proceeds. Wife testified that she was unsure how the Overnight Transportation stock was purchased. The Overnight Transportation stock were held to be husband's separate property.

Stratton v. Stratton, 16 Va. App. 878, 881-882 (1993)

[6] As a practical matter most of the methods by which separate property is transmuted into marital property would cause the property to be *initially* classified as marital. For example, if separate property is jointly titled, gifted from one spouse to the other, or commingled in a marital account, the property would not be initially classified as separate.

Husband had a separate interest in a partnership named Stratton Properties. During the marriage, husband received a distribution from Stratton Properties, and used the money to purchase land in Louisa County. The trial court classified the property as marital. The Court of Appeals reversed the trial court, holding that because the property was acquired during the marriage in exchange or from the proceeds of sale of separate property, the property was husband's separate property.[7]

Baer v. Baer, 1996 Va. App. LEXIS 73, 5-7 (1996)
Husband purchased property during the marriage. The record demonstrated that the parties came to the marriage with separate assets and took care to segregate and maintain separate property throughout their marriage. Husband proved that separate funds were used for the down payment and husband was solely liable for the construction financing. Wife admitted she made no financial contributions to either the acquisition or renovation of the property. The trial court, however, classified the property as marital because it had been acquired during the marriage. The Court of appeals reversed, holding that the property was husband's separate property because it had been acquired during the marriage in exchange for or from the proceeds of sale of separate property and had been maintained as separate property.

v) Income received from separate property may be marital if due to the personal efforts of either party

Moran v. Moran, 29 Va. App. 408, 415-416 (1999)
Husband had $17,489 in a retirement fund at the time of marriage. Husband argued that the passive growth (not due to the efforts of either party) during the marriage was "income received from separate property". The trial court ruled against husband. The Court of Appeals overturned the trial court holding "passive income earned on pre-marital contributions to a defined contribution pension plan is separate property."

[7] Because Va. Code § 20-107.3 also classifies property acquired during the marriage as marital, there is an apparent conflict regarding burden of proof. Immediately prior to holding that the property was husband's separate property, the court stated that "all property acquired by either spouse during the marriage is presumed to be marital property in the absence of satisfactory evidence that it is separate property. The party claiming that property should be classified as separate has the burden to produce satisfactory evidence to rebut this presumption." *Stroop* at 615. Therefore, it is unclear whether the property was initially marital and husband put on satisfactory evidence that it was separate property, or if the property was initially separate and the wife failed to prove that the husband had not maintained the property as separate property.

4. STEP FOUR: PROVE PROPERTY INITIALLY CLASSIFED AS WHOLLY MARITAL OR WHOLLY SEPARATE ACTUALLY HAS BOTH MARITAL AND SEPARATE PARTS (I.E. THE PROPERTY IS HYBRID)

A. Attempt to prove property initially classified as marital has a separate component.

i) Separate property that has been transmuted into marital property by commingling, contribution or joint titling can be retraced

When separate property is contributed to marital property, commingled with marital property, or titled in the joint names of the spouses, the separate property is transmuted (or transformed) into marital property. If the party claiming a portion of the transmuted property is separate he or she can try to retrace that portion to a separate source. If the retracing is successful, and the transmutation didn't amount to a gift, the separate property can retain its original classification.

a) Burden of proof for retracing

Von Raab v. von Raab, 26 Va. App. 239, 248 (1997)
"The party claiming a separate interest in transmuted property bears the burden of proving retraceability."

b) Successful retracing

Rowe v. Rowe, 24 Va. App. 123 (1997)
Husband sold the home he owned from before the marriage, and contributed the proceeds to purchase a home during the marriage. The new home was jointly-titled. The Court found husband's evidence sufficient to retrace the property he claimed was separate. *Id.* at 136.

Hart v. Hart, 27 Va. App. 46, 68 (1998)
Husband and wife opened an account during the marriage. The wife proved that she had deposited $20,500 from an inheritance into the account. The evidence established that no withdrawals were made from the account after wife deposited the inheritance money. The Court of Appeals held that the $20,500 deposit was wife's separate property.

Holden v. Holden, 31 Va. App. 24, 26-30 (1999)
The parties purchased a home during the marriage. Husband claimed $17,000 of the value could be traced to the sale of comic books which were his separate property. Husband conceded that the $17,000 had been commingled with marital funds when he deposited the sum into the parties' joint bank account two months before the purchase of the home. Husband introduced into evidence copies of two checks payable to him for the comic books, as well as the bank records of the parties' joint checking account showing $ 9,000 and $ 8,000 deposited on February 4, 1992, and

February 14, 1992, respectively. Absent the $17,000 deposited into the joint account by husband, the parties would have had insufficient funds to purchase the land. The Court of Appeals held that husband had successfully retraced the $17,000 to the sale of his separate property.

Robinson v. Robinson, 46 Va. App. 652, 657 (2005)
During the marriage, the parties purchased two automobiles and titled them jointly. The husband proved that funds from his separate trust were used in the purchase. The Court classified the vehicles as husband's separate property.

Blevins v. Blevins, 2002 Va. App. LEXIS 281 (2002)
Wife owned a certificate of deposit since before the marriage. Wife re-titled the certificate of deposit jointly with husband. Wife testified that she did not intend to make a gift to husband, removed husband's name from the certificate of deposit after their separation and placed the accrued interest into a personal account. The trial court found that wife did not intend to give husband a gift when she re-titled the certificate of deposit and the entire corpus of $85,000 was retraceable and remained her separate property.

Westfall v. Westfall, 2008 Va. App. LEXIS 34 (2008)
The parties jointly owned a home. Wife made payments on the mortgage after separation. The Court of Appeals upheld the trial court's determination that the post-separation payments were a contribution of separate property to marital property, and that wife had retraced her separate contributions.

c) Unsuccessful retracing

McIlwain v. McIlwain, 52 Va. App. 644, 657 (2008)
Both marital and separate funds were contributed to a joint account. The husband argued that a portion of the funds were his separate property. The trial court found that the husband failed to retrace the funds. The Court of Appeals agreed, holding that the separate funds of the parties were so commingled with the marital funds as to no longer permit tracing of any separate property out of the account. For example, the Court found that there was no evidence whether the multiple withdrawals from the account were taken from wife's separate proceeds, husband's separate proceeds, the marital proceeds, or some combination thereof. "To trace his separate assets, husband needed to do more than prove that at one point he had deposited approximately 60% of the source funds for the account."

Ranney v. Ranney, 45 Va. App. 17 (2005)
The parties purchased a boat and a home during the marriage. Wife attempt to prove at trial that her separate funds were used, in part, to purchase these assets. The trial court found that the wife had commingled her separate funds with marital property and thus transmuted her separate funds into marital property. The Court of Appeals held that wife's evidence was insufficient to prove, by a preponderance of the evidence, that an identifiable portion of her separate funds was used to purchase these assets. The Court held that the wife's failure to produce financial records or other documentation sufficient to trace an identifiable portion of the purchase price to an expenditure of her separate funds meant that her separate funds had been "hopelessly commingled with marital funds". *Id.* at 36-37.

Barker v. Barker, 27 Va. App. 519, 533 (1998)
Husband and wife purchased a series of homes during the marriage, using the proceeds from one to fund the next. Husband argued at trial that both marital and his separate funds had been used to purchase a home early in the marriage, and when that home was sold and the proceeds used, in part, to purchase later homes, he should be repaid the separate funds. The Court of Appeals disagreed with husband. They held that the husband was attempting to establish "multiple source tracing," in which marital and separate property are combined to acquire a single piece of hybrid property, and "multiple destination tracing," in which only a portion of hybrid property is used to acquire or invest in additional properties, either simultaneously or successively. After some of the houses were sold, the proceeds were placed for a time into various bank accounts, before additional funds were withdrawn from those bank accounts to purchase another house. The parties also deposited their paychecks into the same bank accounts. The Court of Appeals held that husband could not identify his separate funds throughout the multiple investments and withdrawals.

Rahbaran v. Rahbaran, 26 Va. App. 195, 210 (1997)
In 1983, prior to the marriage, husband's father made a wire transfer of $34,382.56 to him from a foreign account. Husband used this money to open Royal Shoe, his first business. In 1986, after the parties married, husband moved the Royal Shoe inventory to a new location and opened Kami, Inc. He also used marital funds in opening Kami, Inc. Husband testified that he freely commingled money from his business with his personal funds. The Court of Appeals held that the husband had failed to identify any specific funds in Royal Shoe or Kami, Inc. that originated from the 1983 wire transfer.

Robbins v. Robbins, 48 Va. App. 466 (2006)
During the marriage, husband purchased shares in a medical practice for $11,000 inherited money and $15,000 of marital funds. Thus some of the shares were separate and some marital. Over the years, husband sold a number of his shares to doctors joining the practice. Husband did not make any effort to identify whether a share sold to a new doctor was one of the separate ones or one of the marital ones. Eventually, husband had sold ½ of his original shares. Husband's expert opined that all of the shares sold by husband had been the marital ones, leaving almost all of the remaining shares separate. The trial court held that the remaining shares were 93% separate. The Court of Appeals reversed, holding that husband had failed to prove which shares – separate or marital – had been sold to the incoming doctors, and which of the remaining shares were separate or marital. The Court of Appeals used the analogy of a jar of marbles. If a jar originally holds 50 blue marbles and 50 red marbles, and 50 marbles are removed, the remaining 50 marbles could as easily be all red or all blue or some mixture of both.

The husband also argued that the pro rata method of withdrawals should be applied. In other words, since the shares were originally 60% marital and 40% separate, the 60/40 ration should be applied to the shares that were sold and the shares that remained. The Court rejected the husband's argument, saying that there was no evidence that the husband had intended to sell shares in 60/40 ratio. Accordingly, the entirety of the remaining shares were classified as marital.

Asgari v. Asgari, 33 Va. App. 393 (2000)
Husband deposited his separate funds into a joint checking account. Thereafter, marital funds were also deposited into and withdrawn from the same account, with the balance regularly ebbing and flowing for months. Thereafter the parties withdrew funds from the account to purchase a home. The trial court held that the identity of husband's separate funds had been lost in countless unspecified transactions involving marital funds, resulting in the irreversible transmutation of separate into marital property.

d) If retracing is successful, the other party can attempt to that the retraced property was a gift

(1) Burden of proof for gift

Once a party claiming a separate interest in transmuted property proves re-traceability, the burden shifts to the other party to prove that the transmutation of the separate property resulted from a gift.

von Raab v. von Raab, 26 Va. App. 239, 248 (1997)
If the other party wishes to re-classify the property back into marital property, he or she then bears the burden of proof that the transfer was a gift.

Utsch v. Utsch, 266 Va. 124, 128 (2003)
"The . . . law does not presume a gift and where a donee claims title to personal property by virtue of a gift *inter vivos*, the burden of proof rests upon him to show every fact and circumstance necessary to constitute a valid gift by clear and convincing evidence."

(2) Elements of a gift

Robinson v. Robinson, 46 Va. App. 652, 665 (2005)
The party seeking to establish the existence of a gift must prove by clear and convincing evidence three elements: (1) the intention on the part of the donor to make the gift; (2) delivery or transfer of the gift; and (3) acceptance of the gift by the donee.

(a) No presumption of gift arises from a decision to title a property in both parties' names

Robinson v. Robinson, 46 Va. App. 652, 665 (2005)
"No presumption of gift arises from husband's decision to title his separate property in both parties' names."

Lightburn v. Lightburn, 22 Va. App. 612, 616-617 (1996)
"Virginia does not presume a gift simply by virtue of jointly titling or retitling property."

(b) Use of parol evidence

Utsch v. Utsch, 266 Va. 124, 129 (2003)
"When the language of a deed is 'clear, unambiguous, and explicit,' a court interpreting it 'should look no further than the four corners of the instrument under review.' "A deed titled "deed of gift", containing the recitation that the conveyance is for "love and affection," and containing a reference to Code § 58.1-811(D) permitting exception from recording taxes for gifts is unambiguous on its face and proof of donative intent. *Id.*

(3) Gift proven

Theismann v. Theismann, 22 Va. App. 557 (1996)
Gift found where Mrs. Theismann presented evidence that Mr. Theismann memorialized the transfers of title in cards that he sent to her, which indicated that the Leesburg farm was now "our home" and that the money was hers to spend. Mrs. Theismann testified that Mr. Theismann bragged that he had made her a "millionaire."

Rowe a Rowe, 24 Va. App. 123 (1997)
The husband contributed separate funds to a home held in joint title. The home was used a marital residence for a growing family with children, and the "wife testified that husband had said to her that his property was also her property." The trial court held that the conveyance was a gift, and the Court of Appeals affirmed.

(4) Gift not proven

Turonis v. Turonis, 2003 Va. App. LEXIS 130 (2003)
The husband placed separate funds into a jointly titled account. He denied having donative intent, and the wife offered no evidence to support her claim that he did have donative intent. The wife's testimony that the husband never said the funds were separate property did not show lack of donative intent. "This evidence established, at most, that husband was silent on the issue of whether he intended a gift of the funds to wife." The court also did not find evidence of donative intent in the fact that the wife participated in discussion as to how the funds should be invested, or the fact that funds from the account were used to pay off a short-term joint loan used to purchase the marital residence.

Cirrito v. Cirrito, 44 Va. App. 287, 304-306 (2004)
During the marriage, the husband purchased four properties with his separate funds and titled each property jointly in both husband's and wife's names. He testified that the purpose for joint titling was for protection against creditors. He said he never intended for wife to have any interest in the property upon a divorce. With regard to one property, he denied telling wife the property was her Christmas present. Wife claimed that joint titling of the real estate for "asset protection" establishes his intent to gift her an interest in that property. The trial court found that there had not been a gift, and the Court of Appeals affirmed.

(5) If gift proven, property classified as marital

Theismann v. Theismann, 22 Va. App. 557 (1996)
Husband owned a farm since before the marriage. Shortly after the marriage, husband directed that the farm be deeded jointly to himself and his wife. Husband could clearly trace the farm to its premarital state. However, wife presented evidence that husband memorialized the transfers of title in cards that he sent to her, which indicated that the farm was now "our home" and that the money was hers to spend. Wife testified that husband bragged that he had made her a "millionaire." Court found that husband intended to make a gift of the property to his wife and that the separate property had been transmuted into marital property. *Id.* at 566.

ii) The increase in value of marital property is unlikely to be re-classified as separate

Virginia Code Section 20-107.3 does not provide a direct remedy when the value of marital property increases after the parties' separation due to the efforts of one of the parties. While, the Code speaks of increases in the value of separate property due to marital efforts, it does not speak of increases in the value of marital property due to post-separation efforts. The Court in *Mitchell v. Mitchell*, 4 Va. App. 113 (1987) stated "if the value of marital property increases [after the parties' separation] due to the efforts of one of [the parties], values determined upon the date of trial may result in a monetary award which is not 'fair and equitable' as required by Code § 20-107.3." *Id.* at 118. The remedy in such an event is to seek a valuation date prior to the separate efforts. *Pearson v. Pearson*, 2006 Va. App. LEXIS 334 (2006).

B. **Proving property initially classified as separate property has a marital component**

i) Marital property that has been transmuted into separate property by commingling can be retraced if it was not a gift. Va. Code § 20-107.3(A)(3)(d).

a) Burden of proof for retracing

Duva v. Duva, 55 Va. App. 286, 294 (2009)
Marital funds used to pay the mortgage on husband's separate property were transmuted into the separate property. The burden would then be on the wife to trace the contribution for the marital funds to retain the classification of marital property.

b) Successful retracing

Moran v. Moran, 29 Va. App. 408 (1999)
When the parties married, wife owned a home. During the marriage, the parties used marital funds to pay the monthly

mortgage obligation. The Court held that this commingling transmuted the marital funds into separate property, but that the husband had traced a reduction in mortgage principal of approximately $6,000 to the expenditure of marital funds. As a result, the $6,000 retained its marital classification.

Mezzy v. Mezzy, 2000 Va. App. LEXIS 21 (2000)
Wife opened an IRA prior to marriage. During the marriage the wife contributed approximately $17,000 into the IRA. The trial court held that the funds were transmuted into the wife's separate property, but that the funds earned and contributed by wife during the marriage were retraceable as marital property.

c) Unsuccessful tracing

Rowe v. Rowe, 24 Va. App. 123, 136 (1997)
Husband owned a house as his separate property. Wife argued that she had contributed her separate money and time and energy to the home. The trial court found that 50% of the value of the home was marital property. The Court of Appeals reversed, holding that the record contained no evidence of the value of wife's contributions. Accordingly her contributions were transmuted into husband's separate property when they were commingled with husband's separate property.

Duva v. Duva, 55 Va. App. 286, 294 (2009)
Marital funds used to pay the mortgage on husband's separate property. The trial court found that the use of marital funds to pay the mortgage transmuted the property into marital property. The Court of Appeals reversed, holding that the marital funds were in fact transmuted to separate property when they were contributed to the separate asset.

ii) Income received from separate property may be marital if attributable to the personal efforts of either party. Va. Code § 20-107.3(A)(1).

Mann v. Mann, 22 Va. App. 459 (1996)
Passive income earned on pre-marital contributions to a defined contribution pension plan is separate property. Husband had retirement account worth $23,370 when the parties married and $163,467 when they separated. Based on these figures, the court classified husband's $23,370 pre-marital contribution as separate property. The pre-marital contributions grew to $61,097 during the marriage as a result of passive earnings. The increase was husband's separate property.

Davis v. Davis, 2010 Va. App. LEXIS 26 (2010)
Husband owned a company as his separate property. Income from the property was used to purchase certificates of deposit. The court found that the income from the company was marital property because it resulted

from husband's efforts during the marriage and that the CDs purchased with that income were also marital.

iii) The increase in value of separate property may be marital if due to the addition of marital property or the significant personal efforts of either party. Va. Code § 20-107.3(A)(1).

a) Three step analysis

(1) First step

Cirrito v. Cirrito, 44 Va. App. 287, 295-297 (2004)
"First, an owner must prove the property is separate property as defined in Code § 20-107.3(A)(1)."

Dietz v. Dietz, 17 Va. App. 203 (1993)
"The owner of the separate asset first has the threshold burden of proof to establish the initial separate classification of the property. This then creates a presumption that the property is the separate asset of said spouse."

(2) Second step

Cirrito v. Cirrito, 44 Va. App. 287, 295-297 (2004)
The non-owning spouse has the burden to prove (i) contributions of marital property or personal efforts were made and (ii) the separate property increased in value. If the increase is attributable to personal efforts, the non-owning spouse must prove that the personal efforts were significant and resulted in substantial appreciation.

"Personal effort" is defined as "labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional or marketing activity applied directly to the separate property of either party." Va. Code § 20-107.3(A)(3)(a).

Gilman v. Gilman, 32 Va. App. 104 (2000)
The burden of establishing that the increase in value of separate property during the marriage is marital rests on the "non-owner spouse" to prove that said increase in value was attributable or are traceable to marital funds. Husband owned investment properties as his separate property. Wife argued that husband's personal efforts during the marriage increased the value of these properties. The Court of Appeals held, however, that as wife presented no evidence regarding the scope of husband's activities with regard to his separate investment properties, and as husband had testified that his fellow shareholders handled the day-to-day

development and operation of the various investment properties, the evidence was insufficient to prove that Pettus contributed "significant" personal effort that was the proximate cause of "substantial appreciation" in the value of these assets.

Martin v. Martin, 27 Va. App. 745, 753 (1998)
"The increase in value of the retraceable separate funds shall be separate unless the non-owning party proves that all or a portion of the increase was due to the contribution of marital funds or significant personal effort." The parties purchased a home during the marriage. Husband made a down payment of $26,000 using his separate funds. Wife argued that her use of her real estate knowledge in convincing her husband to invest his $26,000 in the home was a significant personal effort that resulted in the immediate appreciation of his separate interest. The court found that the wife had failed to prove that her efforts resulted in an increase in the value of the husband's separate property. "Wife offered no evidence as to the value of the property before or after the parties purchased the house. She offered no appraisal, tax records, or proof of comparable sales to establish the value. She offered no evidence that she had training or experience in real estate valuation, or that she was capable of appraising real estate or preparing a market study or comparison of sales to determine the fair market value of the property. Wife's unsubstantiated assertion that she "felt" the house was worth $ 79,000 should be accorded no weight. Other than her conclusory assertion that she had some real estate "acumen," wife offered no evidence to prove the property was more valuable than the price paid or that husband relied upon her "personal efforts" in investing in the property." Furthermore, the painting, wallpapering, and carpeting she had done were not significant enough efforts to cause substantial appreciation in the value of the home. Rather, these were simply customary maintenance.

Robinson v. Robinson, 46 Va. App. 652, 668 (2005)
During the marriage, husband received substantial amounts of income from a trust. The income was used to purchase various assets. Wife argued that the husband would have squandered the trust money but for her efforts, and thus the money the parties saved during the marriage (and all assets purchased with that money) resulted from her "personal efforts" and, thus, should be classified as marital property. The trial court agreed, but the Court of Appeals reversed,

holding that wife's actions to keep husband from spending the trust income had not caused them to increase in value. The Court also held that preserving and maintaining an asset is not necessarily equivalent to enhancing the value of that asset.

Congdon v. Congdon, 40 Va. App. 255, 267 (2003)
Husband obtained stock before the marriage. Durint the marriage, the value of the stock increased substantially. The wife argued that the full appreciation of the stock during the marriage should be considered marital property. The trial court disagreed, finding that the increase was largely due to passive growth and the efforts of others. "[S]eparate property that has appreciated in value due to forces other than either party's efforts, such as passive appreciation or the personal efforts of others, remains separate property."

Hart v. Hart, 35 Va. App. 221, 234 (2001)
"A party is entitled to the passive growth of [his] separate property . . .."

Rowe v. Rowe, 33 Va. App. 250 (2000)
Prior to the marriage, husband acquired stock in a newspaper. During the marriage, the husband worked at the newspaper and the value of the stock increased dramatically. The husband produced evidence that the population in the area had increased during the marriage, his brother was more responsible for the increase in value of the paper than husband. Husband's brother was solely responsible for the three expansions of the newspaper plant and was in charge of every other activity and function of the paper, with the exception of the news department. Based on this evidence, the Court of Appeals held that the trial court erred in finding that the entire increase in the value of husband's newspaper stock was due to his personal efforts. The increase classifiable as marital should reflect only that attributable to husband's personal efforts and not those of husband's brother or passive factors, such as population growth and minimal inflation.

Moran v. Moran, 29 Va. App. 408 (1999)
When the parties married, wife owned the a home. During the marriage, the parties paid the mortgage on the home using marital funds and the parties spent $30,000 of marital funds renovating the property. Husband claimed that the expenditure of $30,000 of marital funds to renovate the property transmuted the property to a hybrid classification. The trial court disagreed and the Court of Appeals affirmed

the trial court. The Court found that the evidence failed to prove the extent to which the "contributions" of marital funds to the renovations caused any of the home's appreciation in value. "Absent evidence that the renovations contributed to a specific increase in value, the husband failed to satisfy his initial burden of proof . . . and to that extent the appreciation cannot be classified as marital property." "[T]he expenditure of marital funds in connection with a separate asset does not, without more, justify classifying an increase in value or appreciation of that asset as marital rather than separate property." "The significant factor, however, is not the amount of effort or funds expended, but rather the fact that value was generated or added by the expenditure or significant personal effort."

Courembis v. Courembis, 43 Va. App. 18, 33 (2004) "Here, wife's testimony regarding her contributions to the Route 50 property [husband's pre-marital property] was insufficient as a matter of law. She testified that "she set up all the details of the auction, collected the deposit, and signed everybody in, and helped …conduct the auction." She testified that the time she expended in preparing the auction amounted to "probably a couple of days." Her testimony gave no indication, moreover, that her personal efforts generated the increase in value."

Bchara v. Bchara, 38 Va. App. 302, 312 (2002)
During the marriage, wife used her inheritance to purchase a home. The home was presumptively marital, but the trial court found that the house was wife's separate property as she had traced all the funds used to build the home to her inheritance. Husband argued that his personal efforts increased the value of the home, resulting in substantial appreciation of the property and giving him an interest in the home. The trial court found that the husband did not meet his burden of proof. Although husband proved that he spent a significant amount of time at the construction site and physically contributed to the building of the home, the only evidence offered by husband as to the value added by his efforts was testimony that it would take $29,000 to build a retaining wall. The trial court held that this contribution was not significant. The trial court's opinion letter explained, "there was an almost complete lack of proof on the value of Husband's contribution [from his work at the site]." Other evidence indicated that husband's work was faulty and had to be redone by others, and was inadequate and counterproductive. Finally, husband argued

that his negotiations with suppliers resulted in substantial savings during the construction of the home. The Court of Appeals held that "those efforts are not the type of "personal efforts" required to transmute a portion of separate property into joint property under Code § 20-107.3(A)(3)."

Moran v. Moran, 29 Va. App. 408 (1999)
When the parties married, wife owned a home. During the marriage, the parties spent $30,000 of marital funds renovating the property. Husband argued that as the property had appreciated in value over the course of the marriage, the $30,000 spent on renovations should be classified as marital property. The Court of Appeals disagreed, holding that husband had not offered any evidence to prove the extent to which the contribution of marital funds to the renovations caused any of the home's appreciation in value.

(3) Third step

Cirrito v. Cirrito, 44 Va. App. 287, 295-297 (2004)
Once the non-owning spouse overcomes the presumption of separateness of the increase in value, the burden shifts to the owning spouse to prove that the increase in value or some portion thereof was not caused by contribution of marital property or significant personal effort.

C. Property may contain the separate property of each party

Virginia Code Section 20-107.3(A)(3) was recently amended to add a new subsection (g) that provides: "When the separate property of one party is commingled into the separate property of the other party, or the separate property of each party is commingled into newly acquired property, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, each party shall be reimbursed the value of the contributed property in any award made pursuant to this section."

The only case that mentions the new subsection (g) is *Olsen v. Mackay*, 2010 Va. App. LEXIS 155, 21-24 (2010). The parties jointly owned, as tenants by the entireties, a single-family home. The parties disputed whether a $10,000 earnest money deposit came from wife's separate property and whether $50,000 of the down payment was his separate property. The trial court held that the wife had traced the $10,000 to her separate IRA, but that the husband had failed to trace the $50,000 to a separate source.

Because the home was jointly titled, it was presumptively marital. Accordingly, rather than apply the new subsection (g), arguably subsection (d), which allows a party to retrace separate property that has been transmuted by contribution to marital property, should have been applied. Subsection (g) seems designed,

rather, to apply to a situation such as found in *Fowlkes v. Fowlkes*, 42 Va. App. 1 (2003). In that case, prior to their marriage, wife owned a home. Prior to the marriage, the parties contracted to have certain improvements, including an addition, made to the home. During the marriage, both parties made contributions of separate funds to pay for the addition. No marital monies were contributed to the home. The trial court found that the addition was marital property because it had been acquired during the marriage, that it had been transmuted into separate property when commingled with the separate home, but that the addition could be retraced. Accordingly, the trial court classified the addition as marital property. The trial court further held that the husband had contributed $30,000 of his separate funds to the construction of the addition and awarded him $25,000. The Court of Appeals overturned the trial court, holding that the addition was not presumptively marital, but rather, as it had been acquired during the marriage in exchange for or from the proceeds of sale of separate property and had been maintained as separate property it was presumptively separate. The Court held that Virginia Code Section 20-107.3 only addressed the commingling of marital property and separate property, not the commingling of separate property with separate property. Accordingly, the wife was able to retain the $30,000 contributed by husband to the addition.

5. ALLOCATING THE INCREASE IN VALUE OF HYBRID PROPERTY

When a hybrid property increases in value, that increase can be allocated between the separate and the marital portions.

Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981)
The Brandenburg Rule determines each party's separate share and the marital share as follows: The husband's percent equity is the sum of his separate contributions divided by the sum of the separate contributions of each party plus all marital contributions. The wife's percent equity is the sum of her separate contributions divided by the sum of the separate contributions of each party plus all marital contributions.

Hart v. Hart, 27 Va. App. 46 (1998)
The Virginia Court of Appeals held that the Brandenburg formula was an acceptable method of determining appreciation of separate property that has been commingled with marital property under Code § 20-107.3(A)(3).

Martin v. Martin, 27 Va. App. 745, 753 (1998)
"We have not adopted an exclusive method for determining how to apportion the increase in value of retraced separate property."

Keeling v. Keeling, 47 Va. App. 484 (2006)
The parties purchased a house during the marriage for $394,000. The husband made a down payment using $79,000 of his separate money. During the marriage, husband made an additional $29,000 of separate contributions. There were marital contributions of only approximately $9,000. If the Brandenburg Rule was applied the husband would have received more than 96% of the total equity in the home. The court determined that applying the Brandenburg Rule produced a harsh and inequitable result. The Court simply looked at what percentage of the purchase price originated from the husband's

separate contributions and applied that same percentage to the equity. Specifically, the husband's $108,000 separate contribution was 27.5% of the original purchase price and so the court awarded him 27.5% of net equity in the home.

Rinaldi v. Rinaldi, 53 Va. App. 61, 72 (2008)
"The trial court's application of the *Keeling* approach to calculate the marital equity in the riverfront property while using *Brandenburg* to calculate the equity in the Floyd Avenue property also did not constitute an abuse of discretion because, again, the result was equitable."

VanWormer v. VanWormer, 2006 Va. App. LEXIS 221, 6-7 (2006)
The trial court classified the marital residence as of the date of trial, and as a result included the parties' payments made on the monthly mortgage payments after their separation as separate contributions under the Brandenburg Rule. The Court of Appeals reversed holding that "To allow post-separation mortgage reduction to affect the classification of the marital residence would allow the spouse in better financial standing to skew classification of the marital home in his or her favor. The spouse with more financial resources could disproportionately reduce the mortgage [after separation], simultaneously increasing his or her separate share of the property. We conclude that this result is one not contemplated as an appropriate result under the statutory scheme. Thus, the trial judge erred by not classifying the home as of the parties' separation."