# THE COMMUNITY "CHEST": SHOULD COSMETIC SURGERY DEBT OR THE VALUE OF ENHANCEMENTS BE CONSIDERED MARITAL PROPERTY UPON DIVORCE

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[1] The "community chest" reference is to the traditional board game Monopoly. When a player lands on the community chest space, that player draws a card from the community chest pile that traditionally bestows a monetary reward upon the player. The reference is meant to symbolize the question of whether cosmetic surgery should be separate or marital property in a divorce, or in more common language, whether the value of cosmetic surgery enhancements should benefit one spouse or rather bestow a monetary reward on both spouses.

## INTRODUCTION

Imagine a conference room on the top floor of a well-established law firm. The table spans the length of the room, but only four seats are filled. Mr. and Mrs. Smith sit directly across from one another and each party's respective attorney. After twenty years of marriage, two children, and a dog, Mr. Smith filed for divorce, claiming irreconcilable differences. The children are grown, neither spouse is seeking alimony, and Fido has since passed away, so all that remains to be determined is the division of twenty years' worth of marital property. While going through the property and debt listing that each party filled out, Mrs. Smith notices that Mr. Smith assigned a value of $6,000 to the breast implants that Mrs. Smith received five years earlier.

Mrs. Smith immediately objected, arguing that the breast implants are her separate property, and they have no place being in a listing of the property included in the Smith's marital estate. Mr. Smith, however, argues that since the breast augmentation was performed during their marriage, and Mrs. Smith will take the value of the breast implants with her after the divorce, he should be compensated for a portion of their value. The Smiths both look to their attorneys to answer the question, but the attorneys have no answer since this is an issue that has never been addressed by a state or federal court, including the United States Supreme Court.

Though the facts in this hypothetical are just that, hypothetical, the problem this scenario presents is quite real. Courts have not provided guidance on how to classify cosmetic surgery

enhancements or the debt accompanying cosmetic surgery upon divorce. With the increase in cosmetic surgery and the increase in divorce percentages in recent years, courts will soon be forced to answer this question of first impression. They will be unable to rely on dissipation of property or procedural deficiencies as they have in the past. Rather, they will be forced to either decide that the value of cosmetic surgery enhancements are marital property, or they will have to tell the spouse, no you cannot pass GO; you cannot collect $200.

This Paper attempts to compare cosmetic surgery to other forms of recently debated assets and predict how courts may rule if faced with a spouse claiming the value of another spouse's cosmetic surgery as marital property. It theorizes that cosmetic surgery can be thought of in two separate ways: as outstanding debt, and if the debt is paid off, as the intangible value of the cosmetic surgery enhancement itself. This Paper theorizes first that if cosmetic surgery is performed during an ongoing marriage, any outstanding debt from an *essential* cosmetic surgery should be considered part of the marital estate, as it is comparable to medical debt, which is almost always considered marital property. Second, the Paper argues that if cosmetic surgery is performed during an ongoing marriage, any outstanding debt from a *non-essential* cosmetic surgery could be considered part of the marital estate if the decision to have surgery contributed to the joint benefit of both parties. If the liability is paid off, however, this Paper argues that the value of the enhancement itself should not be considered part of the marital estate because it is uniquely personal and separate "property."

Part I of this Paper will begin by giving a background of the basic approaches that states take to determine the ownership of property both during marriage and upon divorce.[2] It will discuss how property is generally characterized as marital or separate.[3] Then the background

[2] *See infra* Sections I.A-B.
[3] *See infra* Subsection I.C.1.

will discuss specific property interests that are similar in nature to cosmetic surgery and discuss how those property interests have been treated, as separate or marital.[4] Finally, the background will discuss the treatment of cosmetic surgery thus far in courts and the rise of cosmetic surgery in society.[5] Part II will discuss the *Isaacson v. Isaacson*[6] case that was recently decided by the North Dakota Supreme Court.[7] It is one of the first cases to actually consider the argument that cosmetic surgery could be marital property, as opposed to other cases that focused on dissipation of property claims post-separation. Part III, the analysis portion of the Paper, will do three things. First, it will discuss the *Isaacson* case and analyze the shortcomings of its reasoning.[8] Second, the analysis will make the argument that most cosmetic surgery debt should be considered marital property.[9] Finally, the analysis will compare cosmetic surgery enhancements to other forms of "new property" already considered by courts in divorce litigation and argue that cosmetic surgery enhancements are more relatable to the new properties that have been deemed separate property, as opposed to those that have been found to be marital property.[10] Thus, the Paper finds, the value of cosmetic surgery enhancements are purely separate property.

## I. BACKGROUND

### A. Property Classification During the Marriage - Community Property vs. Title Theory: A Large Difference in Classification

There are two main forms of property classification during marriage: community property and title theory. During marriage, community property and title theory states treat property disposition very differently. In community property states, during the course of the

[4] *See infra* Subsections I.C.2-3.
[5] *See infra* Section I.D.
[6] Isaacson v. Isaacson, 777 N.W.2d 886 (N.D. 2010).
[7] *See infra* Part II.
[8] *See infra* Section III.A.
[9] *See infra* Subsection III.B.1.
[10] *See infra* Subsection III.B.2.

marriage, each spouse has a vested one-half interest in all property acquired during the marriage.[11] In title theory states, spouses hold individual title to their earnings unless and until divorce proceedings commence, at which point the earnings are classified as marital.[12] The majority of states are title theory jurisdictions. Only eight states are community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.[13] Because the majority of states are title theory jurisdictions, this Paper focuses on title theory states. Community property principles, if mentioned, will only be done for purposes of comparison. However, in order to understand the distinctions among jurisdictions, a brief introduction to the principles of both title theory and community property is discussed.

1. *Community Property Principles*

The community property system in America has its origins from the Visigoths by way of Spain.[14] The principle of community property was developed by the Visigoth tribes because it was common for men and women to work side by side to build and keep up the home and property.[15] The equality of work among men and women, and the mutual loyalty and burdens, was a prime factor for the creation of community property in Spain.[16] This system was introduced in western states during the Spanish possession of North America, but the reason that it continued in some of the states was that "the factors that originally produced [community

[11] WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 117 (2d ed. 1971).
[12] *Id.*
[13] Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 149 n.24 (2004). Wisconsin is a community property state during marriage. Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769 (1990). Upon divorce, however, Wisconsin applies a "kitchen sink" approach. DOUGLAS E. ABRAMS ET. AL, CONTEMPORARY FAMILY LAW 471 (Thomson Reuters 2006).
[14] DEFUNIAK & VAUGHN, *supra* note 11, at 16. There are also some French origins from the influence of French-based civil law on Louisiana. DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 470.
[15] DEFUNIAK & VAUGHN, *supra* note 11, at 24. Women in the tribes participated in battles, migrations, and councils of government with their spouses. *Id.*
[16] *Id.*

property principles] were closely approximated."[17] That is, men and women were partners in the care and upkeep of the family and home – and the system thrived in states where men and women were seen as equal contributors to the success of the marriage.[18]

The general rule with community property is that during marriage, each spouse has a present, vested one-half interest in all property, earnings, and gains (and also generally marital debt) acquired during the marriage, regardless of whose labor produced the assets or who holds legal title to the property.[19] During marriage, neither spouse may dispose of community property without the consent of his or her spouse, as both have a joint interest.[20] There are some assets, though, that are considered separate in community property states, but those assets are limited to: property acquired before the marriage, property acquired after the dissolution of the marriage, gifts from spouse to spouse, and inheritance intended for one spouse.[21] These assets can be independently disposed of by the spouse who owns the property. All other assets are presumed to be community property, but this presumption is rebuttable.[22] One of the key principles of community property is the understanding that contribution is considered in a broad sense, to the marriage as a whole, and not to the specific assets contributed.[23]

2. *Title Theory Principles*

The title theory – also known as "separate property" – system evolved from British and

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[17] *Id.* at 25.
[18] *Id.*
[19] Kelly, *supra* note 13, at 150; *see also* DEFUNIAK & VAUGHN, *supra* note 11, at 114, 384. Spouses in most community property states are still allowed to trump the presumption of community status of property by signing a pre- or post-nuptial agreement. DEFUNIAK & VAUGHN, *supra* note 11, at 114. The effect of these contracts, however, is outside of the scope of this Paper.
[20] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 471.
[21] Kelly, *supra* note 13, at 150; *see also* DEFUNIAK & VAUGHN, *supra* note 11, at 130, 141.
[22] DEFUNIAK & VAUGHN, *supra* note 11, at 118. The burden of proof to overcome this presumption is generally something equating "clear and convincing evidence." *See, e.g.*, Porter v. Porter, 416 P.2d 564 (Ariz. 1966) (en banc); Stahl v. Stahl, 430 P.2d 685 (Idaho 1967); Tarver v. Tarver, 394 S.W.2d 780 (Tex. 1965).
[23] Kelly, *supra* note 13, at 150.

American common law.[24] Under the title theory of marriage, property remains titled in the name of the nominal earner.[25] Under common law, the husband owned all property acquired during marriage, and therefore it was the husband who had rights to all marital property.[26] In the mid-nineteenth century, many states enacted statutes pertaining to the rights of married women in marital property, allowing women to retain separate property during marriage and at divorce, thus changing the common law.[27] However, this did not affect title theory states, which continued to adhere to the common law tradition, both during marriage and at divorce.[28] If the wife had not caused the divorce, she was generally granted relief in the form of alimony, but most women did not have property interests in marital assets.[29]

The title theory approach to property distribution has a tendency to result in quite inequitable distributions in divorce.[30] As a result, all states have abandoned the title theory approach for the disposition of marital property upon divorce.[31] Title theory remains, however, the dominant approach to property disposition during the marriage.[32] Therefore, in title theory states, the spouse holding title to the property has no legal obligation to consult with his or her

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[24] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 469.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 469-70.
[28] *Id.* at 470.
[29] *See* Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163 (2007); Ferguson v. Ferguson, 639 So. 2d 921, 926 (Miss. 1994) (discussing why Mississippi adopted equitable distribution over title theory – due to the inequitable distribution to a wife who had title to little marital property). In title theory states, alimony to the non-wage-earning spouse was based on future projected needs rather than retroactive entitlement; it was not tied to the amount of property acquired during the marriage nor conceived as compensation for the non-wage earner's income. *See* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY §3.02[1] (2006). But contrary to the popular view that at least half to two-thirds of women received alimony upon divorce, alimony was often limited. Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 366-67 (1989) ("In 1986, fewer than 15% of women who had been divorced had been awarded alimony.").
[30] This was especially true in the traditional family situations where most property was titled to the husband while the wife was a homemaker with no salary. *See Ferguson*, 639 So. 2d at 926.
[31] *See* DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 470.
[32] *Id.*

spouse when dealing with that property.[33]

B. Distribution of Property Upon Divorce - Community Property vs. Equitable Distribution: A Small Difference?[34]

In today's society, the differences between property classifications are more noticeable during a marriage than at its dissolution.[35] On the other hand, the way property is classified upon divorce, as opposed to during the marriage, is often far more controversial and contested. There are currently two regimes that govern property distribution upon divorce: equitable distribution – the majority approach; and community property – the minority approach.[36]

Today, forty-two states and the District of Columbia, though they apply title theory during the marriage, are equitable distribution states at divorce.[37] This makes equitable distribution the overwhelming majority approach to property disposition upon divorce.[38]

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[33] *Id.*

[34] A minority of fourteen states also employ a variation of the model under the Uniform Marriage and Divorce Act, known as "hotchpot," when distributing property upon divorce. DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 474. These states are: Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, and Wyoming. *Id.* at 474, n.3. This Act permits courts to consider and divide all property of spouses, regardless of when or how it was acquired. *Id.* at 474. Thus, under this system, there is no distinction between separate and marital property. This approach is referred to as "hotchpot" or "kitchen sink," and as all property is up for grabs, it eliminates the need for courts to classify property as marital or separate during a divorce. *Id.* Since this approach allows all assets of the marriage to be considered in divorce, it would follow that the debt incurred from cosmetic surgery or the actual value of the cosmetic surgery enhancements would be considered as up for the taking in the distribution of property upon divorce. Because this minority system is an all-in approach and does not rely on a system of classification like the majority of jurisdictions, it is ignored for purposes of this Paper. The system is mentioned here in the interest of presenting a comprehensive overview of the regimes of marital property distribution.

[35] *Id.* ("Today, the two regimes that govern property distribution at divorce–equitable distribution and community property–lead to virtually indistinguishable results."); *see also* Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1630 (2008) (arguing that since the advent of equitable distribution, most states – both community property and non-community property – have essentially "identical paradigms" of property classification and distribution upon divorce).

[36] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 471.

[37] *Id.* at 472.

[38] It should also be noted that equitable distribution statutes have survived constitutional challenges in a number of states. A series of New Jersey cases in the 1970s resolved several constitutional claims raised to its equitable distribution statue, and these cases have been relied upon by subsequent jurisdictions to support the conclusion that equitable distribution statutes are constitutional. *See* Rothman v. Rothman, 320 A.2d 496 (N.J. 1974) (finding retroactive application of equitable distribution statute does not deprive spouse of due process of law); Chalmers v. Chalmers, 320 A.2d 478 (N.J. 1974) (finding that the equitable distribution statute did not violate state constitutional provision that required every law only cover one object expressed in the title); Painter v. Painter, 320 A.2d 484 (N.J.

Equitable distribution espouses a partnership theory, whereby since both spouses make valuable contributions to the marriage and home, both spouses should be fairly compensated in a divorce.[39] This "partnership theory" is very similar to community property tenets.

State statutes are the guiding authority in equitable distribution jurisdictions, as they provide the factors that courts consider when both classifying and distributing marital and separate assets.[40] Courts, in turn, are given much deference to classify and value property.[41] Although nuances may be different from state to state, generally the overall approach to distribution is similar in equitable distribution jurisdictions: harmonizing the conflicting goals of fair allocation as to the needs of each spouse with a desire to compensate proportionally based on the contributions of the spouses.[42] Similar to community property states, most equitable property jurisdictions characterize gifts, inheritance, and property acquired before marriage as separate.[43]

Three community property states require division of all community property into equal shares upon divorce: California, Louisiana, and New Mexico.[44] The five other community

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1974) (finding that the equitable distribution statute was not impermissibly vague and finding rather that the statute simply gave the courts discretion to resolve the situation equitably).

[39] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 472; *see also* Ferguson v. Ferguson, 639 So. 2d 921, 927 n.4 ("[I]t is impossible to give a precise definition to the phrase 'equitable distribution.' Basically, the doctrine refers to the authority of the courts to award property legally owned by one spouse to the other spouse, and recognizes that a non-working spouse's efforts contribute to the acquisition of the marital estate.").

[40] *See, e.g.*, Stephanie Giggetts, *Family Law: Dissolution of Marriage: Chapter 5: Allimony, Disposition of Property, and Other Allowances*, 15 SUMM. PA. JUR. 2D FAMILY LAW § 5:64 ("In making equitable distribution, a trial court must not presume a 50/50 distribution, but must consider all relevant factors contained in the equitable distribution statute. The list of factors . . . serves as a guideline for consideration, although the list is neither exhaustive nor specific as to the weight to be given the various factors, and the court has flexibility of method and concomitantly assumes responsibility in rendering its decisions."); Wajda v. Wajda, 570 A.2d 1308 (N.J. Ch. 1989) (holding that equitable distribution is not a common-law remedy, but a remedy created and controlled by statute, which provides that equitable distribution is to be awarded only in actions for divorce).

[41] JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 1-7 (1989).

[42] *Id.*; *see also* GREGORY, *supra* note 41, at 1-6. Gregory summarizes equitable distribution as follows:

> The hallmarks of the [equitable distribution] system are broad discretion for trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property.

*Id.*

[43] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 472.

[44] *Id.* at 471 n.2.

property states require an equitable distribution, rather than a complete one-half division, upon divorce.[45] It should be noted, though, that even though the results in many community property states are "equitable," there is still a fundamental difference between community property and equitable distribution jurisdictions. In essence, equitable does not always mean equal; and where equitable distribution states look to a system of factors, including the background of the marriage and the behavior of the married couple, a community property state cannot.[46] For purposes of this Paper, when discussing the approach to classification of property, an equitable distribution method will be used because it is the majority approach.

C. The Process of Property Division Upon Divorce in Equitable Distribution States

In equitable distribution states, there is a three-step process for dividing property that the couple shares by virtue of their marriage.[47] These steps are: (1) identifying and characterizing each asset as marital or separate; (2) valuing the marital property; and (3) distributing all divisible assets equitably or equally.[48] The important step for purposes of this Paper is the first, classifying property as marital or separate, as it is unclear from court decisions and state statutes whether or not the debt incurred from cosmetic surgery or the actual value of the cosmetic surgery enhancement would be considered marital or separate property. If classified as marital property, the valuation and distribution of cosmetic surgeries would fall in line with the approach courts have taken to classify other marital property. Therefore, the classification prong is the focus of this Paper.

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[45] *Id.* at 472.
[46] Swiderski v. Swiderski, 18 So. 3d 280, 288 (Miss. Ct. App. 2009) ("Equitable distribution does not always mean an equal division of property.").
[47] *Id.* at 472.
[48] *Id.*; *see also* GREGORY, *supra* note 41, at 2-2.

1. *Classification in General*

In all equitable jurisdiction states, statutes are in place that give state courts the power to determine which property is separate and which property is marital.[49] Most states model their statutes after the Uniform Marriage and Divorce Act (UMDA) as originally promulgated in 1970.[50] Though only adopted in eight states, the UMDA as a guide has been identified as the cause of the "rapid spread through the United States of two important divorce law trends: 1) 'no-fault divorce' . . . ; and 2) 'equitable distribution of marital property' – the concept that marriage should be treated as a partnership whose assets must be fairly distributed between the spousal partners at divorce without regard to their formal ownership."[51] The general format of Section 307 of the UMDA states that courts are to assign separate property to the appropriate spouse and divide marital property, defined as all property acquired subsequent to marriage, subject to certain exceptions.[52]

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[49] Wajda v. Wajda, 570 A.2d 1308 (N.J. Ch. 1989) (holding that equitable distribution is not a common-law remedy, but a remedy created and controlled by statute, which provides that equitable distribution is to be awarded only in actions for divorce).

[50] GREGORY, *supra* note 41, at 2-3; Unif. Marriage & Divorce Act § 307 (1970). The Uniform Marriage and Divorce Act was approved by the National Conference of Commissioners on Uniform State Laws in 1970 and by the American Bar Association on February 5, 1974. It was amended in 1971 and again in 1973.

[51] Robert J. Levy, *A Reminiscence about the Uniform Marriage and Divorce Act – and Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 44 (1991). The eight states that have adopted the UMDA in full or part are: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.

[52] Unif. Marriage & Divorce Act § 307 (1970). In full, § 307 provides:

> (a) In a proceeding for dissolution of the marriage, or for legal separation, or in a proceeding 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 the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:
>
> (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
>
> (2) value of the property set apart to each spouse;
>
> (3) duration of the marriage; and

In equitable distribution actions, the spouse claiming that certain property is marital has the burden of proving that the property was acquired by either or both spouses during the marriage, before the date of separation, for the joint benefit of the spouses.[53] If that burden is met, then the burden shifts to the spouse claiming that the property is separate to show that the property meets the definition of separate property.[54] This includes showing that the property was acquired outside the marriage, retains its separate identity, and retains its separate character.[55]

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> (4) economic circumstances of each spouse when 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.
>
> (b) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (1) property acquired by gift, bequest, devise, or descent;
>
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (3) property acquired by a spouse after a decree of legal separation;
>
> (4) property excluded by valid agreement of the parties; and
>
> (5) the increase in value of property acquired before the marriage.
>
> (c) All property acquired by either spouse after the marriage and before 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 (b).

*Id.* Section 307 of the UMDA was amended in 1973 to provide for two alternatives: "Alternative A" and "Alternative B." Alternative A (for common-law states) does not use the concept of "marital property," but provides that the divorce court "shall . . . equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both," – commonly known as a hotchpot method. Unif. Marriage & Divorce Act § 307 [Alternative A] (1973). Under this language, the varying types of contributions which a spouse might make include the duration of the marriage, any prior marriages of either party, any antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties both currently and in the future, and the contribution of a spouse as a homemaker or to the family unit. *Id.* Alternative B retains the distinction between marital and separate property. It states that separate property should be given to each spouse accordingly, and community property should be divided based on the following factors: (1) the contribution of each spouse to the acquisition of the marital property; (2) the value of the property set apart to each spouse; (3) the duration of the marriage; and (4) the economic circumstances of each spouse when the division of property is to become effective. Unif. Marriage & Divorce Act § 307 [Alternative B] (1973).

[53] Fountain v. Fountain, 559 S.E.2d 25, 29 (N.C. Ct. App. 2002).

[54] *See Fountain*, 559 S.E.2d at 29.

[55] Unif. Marriage & Divorce Act § 307 (1970).

Other factors may support the claim that property be classified as separate, such as: its status as a gift, who owns the title, traceability to its original purpose, the timing of acquisition, and comingling, or lack thereof, with other marital property.[56] If the party claiming separate status meets his or her burden, the court will classify the property as separate; if the party fails, then the property retains its status as marital property.

2. *Debt*

Just as assets must be divided upon divorce, so must liabilities. The reasoning is that if assets are to be divided between the parties, debts incurred in obtaining those assets should also be allocated between the parties.[57] Liabilities include indebtedness created through borrowing (such as a home mortgage or car loan), business debts, and obligations under contracts and judgments.[58] It is within the court's discretion to determine which liabilities are marital and which are separate. In at least one jurisdiction, debts incurred during the marriage are not considered marital liabilities.[59] But in a majority of jurisdictions, classification of debt upon divorce occurs just as the classification of assets,[60] and the classification and distribution itself revolves around determining whether the expenditure was for the benefit of the marriage or for completely separate purposes, and also what is equitable under the circumstances.[61] "Marital

[56] *Id.*
[57] *See, e.g.*, Hansen v. Hansen, 302 N.W.2d 801 (S.D. 1981).
[58] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 499.
[59] Lawrence v. Lawrence, 938 S.W.2d 333 (Mo. Ct. App. 1999) (finding that debts incurred during marriage are not marital property).
[60] *See generally* Rodriguez v. Rodriguez, 894 N.Y.S.2d 147 (App. Div. 2010) (finding that expenses incurred prior to the commencement of a divorce action constitute marital debt to be equally shared by the parties); Leever v. Leever, 919 N.E.2d 118 (Ind. Ct. App. 2009) (finding that marital property to be divided in a dissolution proceeding includes both assets and liabilities); Clark v. Clark, 974 A.2d 33 (Conn. App. Ct. 2009) (finding that allocation of liabilities and debts is a part of the divorce court's broad authority in the assignment of property).
[61] *See generally* Fashingbauer v. Fashingbauer, 19 So. 3d 401 (Fla. Dist. Ct. App. 2009) (finding that when determining whether to reimburse a party for payment of marital property-related expenses, the court must evaluate each spouse's ability to pay, taking into consideration whether one spouse used marital funds to pay the expenses); Faerber v. Faerber, 13 So. 3d 853 (Miss. Ct. App. 2009) (finding that courts classify debts incurred for the benefit of the marriage as marital debt). *But see* Lowry v. Lowry, 25 So. 3d 274 (Miss. 2009) (finding that debts incurred by a spouse pursuing goals other than the general welfare of the marriage are considered separate debt). In recent case

debt," generally, is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties.[62]

An important consideration of this Paper is medical debt, as there is a strong argument that debt incurred from cosmetic surgery is relatable to medical debt and in this form could be considered a marital liability.[63] The general consensus of state courts is that all medical debt – ranging anywhere from mental health[64] to cancer treatment[65] – is considered a marital liability if the debt arises during the marriage.[66] On the other hand, medical debt that arises post-separation is considered a separate liability, which the individual spouse must absorb completely.[67] For example, in *Carpenter v. Burr*, a wife underwent dental work during the separation from her husband.[68] The court found that due to the timing of the medical procedure, it was a separate liability.[69] Even in heart-breaking circumstances, courts hold true to the tenet that the marital pot closes on the date of dissolution. In *Fuehrer v. Fuehrer*, the wife was diagnosed with a deadly

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law, even Missouri, which previously held that debt was not a marital liability found that debt, just like assets, must be apportioned to the parties proportionately in a way that is just under all circumstances. Skaggs v. Skaggs, 301 S.W.3d 72 (Mo. Ct. App. 2009).

[62] *See supra* cases cited in note 61. *See also* Becker v. Becker, 489 S.E.2d 909 (N.C. Ct. App. 1997); Hickum v. Hickum, 463 S.E.2d 321 (S.C. Ct. App. 1995).

[63] *See infra* Section III.B.

[64] J.D.H. v. P.A.H., 882 N.E.2d 348 (Mass. App. Ct. 2008) (finding that inclusion of wife's uninsured medical bills for mental health treatment into marital debt was proper).

[65] Marriage of Gochanour, 4 P.3d 643 (Mont. 2000) (finding it was within trial court's discretion to determine that wife's medical costs incurred during marriage for her cancer treatment were marital debt to be shared equally with her and husband).

[66] *See* Patterson v. Patterson, 20 So. 3d 65, 72-73 (Miss. Ct. App. 2009) (finding that allocation of half, but no more, of wife's medical debt was the course the trial court should have taken); *accord J.D.H.*, 882 N.E.2d 348; *Marriage of Gochanour*, 4 P.3d 643; Arey v. Arey, 651 A.2d 351 (Me. 1994) (finding medical bill incurred during marriage was medical debt subject to division upon divorce). *But see* Kamler v. Kamler, 213 S.W.3d 185 (Mo. Ct. App. 2007) (finding husband was solely responsible for medical debt accrued post-separation from wife, absent any evidence that wife was responsible for the debt).

[67] *See, e.g.*, Carpenter v. Burr, 673 S.E.2d 818 (S.C. Ct. App. 2009) (finding that wife was not entitled to payment of dental expenses by husband, as valid marital debts, upon divorce due to one-year separation the preceding year); Fuehrer v. Fuehrer, 651 N.E.2d 1171 (Ind. Ct. App. 1995) (finding that the marital estate closes on the date dissolution petition is filed, and debts incurred after this point, including medical debts, are not to be included in the marital estate); DeVane v. DeVane, 655 A.2d 970 (N.J. Super. Ct. App. Div. 1995) (allocating to husband his medical expenses incurred *pendent lite* was proper, since medical expenses incurred after separation are not marital debt); Beaty v. Gribble, 652 So. 2d 1156 (Fla. Dist. Ct. App. 1995) (finding appraisal fees and medical expenses incurred after separation were liabilities of husband alone).

[68] *Carpenter*, 673 S.E.2d 818.

[69] *Id.*

form of cancer after the dissolution petition had been filed.[70] She had extensive surgery to remove a malignant tumor, at least four series of chemotherapy treatments, and one course of radiation treatment.[71] This debt totaled almost $11,000, but the court refused to include it in the marital estate because it was incurred post-separation.[72]

Courts seem reluctant to hold that medical debt is not a marital liability, regardless of whether the surgery or treatment was an emergency or medically necessary, and there is a strong presumption that medical debt from a procedure performed during the marriage is a marital liability.[73] This is because courts generally hold that marital debts are those incurred during the marriage, and so if a procedure or treatment is performed during the marriage, the burden that the debt is marital is met.[74] This falls in line with the requirement that the property or liability be for the joint benefit of both parties because the general health of each spouse is important to the marriage.

For instance, in *Miner v. Miner*, the court found that the fact that the husband's shoulder operation was for the purpose of alleviating pain, rather than for a medical emergency, did not make it "elective" for purposes of determining whether the medical expenses were marital debt, subject to distribution at divorce.[75] And, in *Noel v. Noel*, the court found that the debt from a completely elective surgery, a tubal ligation, was marital because it was performed during the

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[70] *Fuehrer*, 651 N.E.2d at 1173.
[71] *Id.*
[72] *Id.* at 1174.
[73] Miner v. Miner, 727 So. 2d 1080 (Fla. Dist. Ct. App. 1999); *see also* J.D.H. v. P.A.H., 882 N.E.2d 348 (Mass. App. Ct. 2008) (extending definition of medical to include mental health and finding that inclusion of wife's uninsured medical bills for mental health treatment into marital debt was proper); Noel v. Noel, No. WD-09-006, 2009 WL 4893391, at *5-6 (Ohio Ct. App. Dec. 18, 2009) (finding that the debt incurred from a wife's elective surgery to have her tubes tied was marital because it was performed during the marriage). The court reasoned: "Although technically appellee's surgery may be considered a 'voluntary' medical procedure, we decline to classify such an expense as non-marital when obtained during a time when no divorce proceedings were pending. Therefore . . . the trial court did not err in determining it to be a marital debt." *Id.* at *6.
[74] *See, e.g.*, *Miner*, 727 So. 2d 1080; *Noel*, 2009 WL 4893391, at *6; cases cited in note 66.
[75] *Miner*, 727 So. 2d at 1081.

marriage.[76] The same presumption exists, even if the cause of the debt is due to the non-medically-related fault of one of the spouses. For example in *J.D.H. v. P.A.H.*, the court found that that the inclusion of the wife's uninsured medical bills as a marital liability was proper even though the debt was incurred because the wife lost her job and allowed insurance to lapse.[77] The court reasoned that the failure to communicate and reinstate insurance was the failure of both parties.[78] Thus, courts seem very willing to include medical debt as marital liabilities, so long as the requirement that it be incurred during the marriage is satisfied, regardless of whether the procedure was medically required.

3. *New Property*

Traditionally, parties in a divorce would only claim tangible property. Over time, however, society's perception of what is valuable has shifted dramatically. For example, a person's career is deemed highly valuable to that person and the family for whom that person provides. Things associated with that career, it follows, are also valuable. And so, the advent of giving marital property value to stock options, pension plans, paid vacation, professional degrees and licenses ensued.[79] Below, a few of the prime examples of "new property" and an explanation of how courts have treated them are discussed.

a. Human Capital vs. Student Loans[80]

Human capital includes the combination of education, opportunity, and enhanced earning potential.[81] In 1985, New York became the first state to treat a professional license as a marital

[76] *Noel*, 2009 WL 4893391, at *6.
[77] J.D.H. v. P.A.H., 882 N.E.2d 348 (Mass. App. Ct. 2008).
[78] *Id.*
[79] *Id.*
[80] Student loans are technically "debt," but they are considered here, as opposed to in the section discussing marital debt, because they are more closely tied to human capital, and a comparison between the two forms of "new property" is necessary.
[81] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 504.

asset.[82] However, though New York took the lead in this characterization, no other state has followed suit. The reasoning of the highest court in New York is that when a spouse contributes his or her income to the education of the other spouse, that spouse has an interest in the professional license or degree of the spouse he or she helped to support.[83] Other state courts that have addressed this issue, however, have found that professional licenses are not marital property, but the wage the spouse makes is considered in actual disbursement – usually through some form of alimony, reimbursement, or restitution.[84] These courts have found, rather, that the professional license and accompanying higher earning potential are not "encompassed even by the broad views of the concept of 'property.'"[85] Rather, a degree:

> does not have an exchange value or any objective transferrable value on an open market. It is personal to the holder. It terminates upon death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property.[86]

Human capital, however, must be distinguished from student loan debt, or the money that an individual takes out to further his or her education and attain his or her professional license. Student loans are potentially incurred for two purposes when one spouse is seeking higher education: to pay direct costs of education and to support the family while the student spouse is in school.[87] The component of loans making up the living expenses is normally classified as

[82] O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985). New York affirmed that decision in 2004 with *Holterman v. Holterman*, 814 N.E.2d 765 (N.Y. 2004).
[83] *Id.*
[84] Brenda Ruel Sharton, Note, *Spousal Interest in Professional Degrees: Solving the Compensation Dilemma*, 31 B.C. L. REV. 749, 751 (1990); *see also* DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 509.
[85] In re Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978).
[86] *Id.*
[87] Brett R. Turner, *Chapter 6: Specific Types of Property*, 2 EQUIT. DISTRIB. OF PROPERTY 3d § 6:97 (2009).

marital to the extent that the living expenses at issue were incurred during the marriage.[88]

The educational component of a student loan is a debt incurred for the purpose of increasing the student spouse's future earning capacity. Where the parties both had the benefit of the student spouse's increased earnings for a significant period of time after the debt was incurred, the educational component is normally classified as a marital debt.[89]

Where divorce occurs shortly following graduation, the cases are divided. One line of cases finds that because the spouse had no opportunity to enjoy the benefit of the increased income, the debt is not marital.[90] The other line finds that the student loans incurred during the marriage are always marital debts, even if the marital estate benefits from little or none of the increased earnings it expected to receive.[91] These courts then will take into consideration the individual factors of the case in order to equitably determine which party should be responsible for the majority of the debt.[92] As a general matter, then, student loan debt is considered a marital

[88] *See* In re Marriage of Speirs, 956 P.2d 622 (Colo. Ct. App. 1997) (treating student loan as marital debt); Pulliam v. Smith, 872 So. 2d 790 (Miss. Ct. App. 2004) (student loan used partly for living expenses was a marital debt); Hicks v. Kubit, 758 A.2d 202 (Pa. Super. Ct. 2000) (finding that student loans were marital debt, but allocating the portion of debt that paid for the educational services to wife); McDougall v. Lumpkin, 11 P.3d 990 (Alaska 2000) (finding it was an error to treat student loans as a non-marital debt, where at least some were used to pay living expenses during the marriage, and education was part of general family plan to improve wife's earnings); *see also* Hill v. Hill, 763 N.W.2d 818 (S.D. 2009) (finding that student loans, used to pay family expenses during a period of education, are marital property).

[89] *See* Schneider v. Schneider, 761 S.W.2d 760 (Mo. Ct. App. 1988) (finding that where wife acquired chiropractic degree during marriage and then practiced jointly with chiropractor-husband for several years, wife's student loans were a marital debt).

[90] Tasker v. Tasker, 395 N.W.2d 100 (Minn. Ct. App. 1986). In *Tasker*, the parties separated after the student-husband graduated but before he found permanent employment. Because the wife had had no chance to enjoy the increased earnings resulting from the husband's education, the court held that his student loans were the sole responsibility of the husband. *Id.* at 105. *See also* Van Bussum v. Van Bussum, 728 S.W.2d 538 (Ky. Ct. App. 1987). The parties were divorced just after the doctor-husband finished his residency. Because the debt had essentially been incurred to purchase the husband's degree and license, which were not marital assets, the court found the debt to be non-marital. *Id.* at 539.

[91] *See, e.g.*, Rogers v. Rogers, 12 So. 3d 288 (Fla. Dist. Ct. App. 2009); Forristall v. Forristall, 831 P.2d 1017 (Okla. Ct. App. 1992) (finding that the husband's student loans were a marital debt, even though parties were divorced only one year after husband started his practice); *see also* Veselsky v. Veselsky, 113 P.3d 629, 636 (Alaska 2005) (finding that wife's student loans incurred during the marriage were marital debts, because debts are presumed to be marital if incurred during marriage, and there was no evidence of a separate intent).

[92] *See supra* note 48 and accompanying text.

liability, unless the facts indicate that a spouse received no benefit from the increased salary or student loan in general.

b. Stock Options, Pension Plans, and Business Goodwill: Oh My!

Aside from professional licenses, which are uniformly considered separate property outside of New York, states differ dramatically in their approaches to other forms of new property. Some consensus, however, can be reached. One form of new property that receives quite a bit of attention is pensions, as these are often a couple's most valuable asset – aside from the marital home.[93] Every equitable property jurisdiction treats pension plans as marital property.[94]

Stock options are considered marital property to the extent that they constitute deferred compensation for work performed during the marriage. Thus, if the options are received during marriage and are acquired as a result of the efforts of either spouse during the marriage, stock options are properly classified as marital property, even if they cannot be exercised until a date after the parties' divorce.[95]

Finally, business goodwill – referred to as the gap between book value and actual value of a closely held business – is generally regarded as a divisible marital asset, though it is difficult to measure with exactitude.[96] Traditionally, "enterprise" goodwill is considered divisible, as this has actual monetary value.[97] Enterprise goodwill includes things such as reputation and past performance.[98] It is the marketable existence in a business of relations with employees, customers, suppliers, etc.[99] These are factors that directly impact the economic value of a

[93] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 509.
[94] *Id.*
[95] *See, e.g.*, Fountain v. Fountain, 559 S.E.2d 25 (N.C. Ct. App. 2002); Fisher v. Fisher, 769 A.2d 1165 (Pa. 2001).
[96] DOUGLAS E. ABRAMS ET. AL, *supra* note 13, at 513.
[97] *Id.*
[98] *Id.*
[99] *Id.*

business. Personal goodwill, the personal attributes of the individual owner or officer, is not generally considered a marital asset, however.[100]

In synthesizing the principles above, it seems as if when it comes to new property, courts are willing to consider property a marital asset when it gives a tangible monetary value to the marriage, as most examples of new property found to be marital are those related to a spouse's career and those factors that contribute to the best interest of a spouse's profession. Individual accomplishments or qualities, however, are not traditionally considered marital property.

D. The Rise in Cosmetic Surgery and its Place in Divorce Proceedings

In recent years, the stigma, cost, and painful scarring and recovery once associated with undergoing plastic surgery have been reduced, and a wide array of procedures that were formerly available to only a small, wealthy segment of society have become relatively mainstream.[101] According to the American Society for Aesthetic Plastic Surgery (ASAPS), there were 10.2 million cosmetic procedures performed in the United States in 2008.[102] And breast augmentations took the lead – over liposuction – as the most commonly performed surgical procedure.[103] Even facing recession in 2009, the overall cosmetic surgery rate only dropped two percent, and there were still nearly 10 million cosmetic procedures in the United States in 2009.[104] According to the ASAPS, which has collected statistics since 1997 on cosmetic

[100] *Id.*
[101] Kristen Nugent, *Cosmetic Surgery on Patients with Body Dysmorphic Disorder: Cutting the Tie That Binds*, 28 DEV. MENTAL HEALTH L. 77, 78 (2009).
[102] American Society for Aesthetic Plastic Surgery, *Liposuction No Longer the Most Popular Surgical Procedure According to New Statistics: American Society for Aesthetic Plastic Surgery Reports 10.2 Million Cosmetic Procedures in 2008*, (Mar. 16, 2009), http://www.cosmeticplasticsurgerystatistics.com/statistics.html#2008-NEWS.
[103] American Society for Aesthetic Plastic Surgery, *Trends and Demographic Date: Top Surgical and Nonsurgical Cosmetic Procedures Among Men and Women in 2008*, http://www.cosmeticplasticsurgerystatistics.com/statistics.html#2008-NEWS. In 2008, 355,671 breast augmentations were performed; at a close second, 341,144 liposuctions were performed. *Id.*
[104] American Society for Aesthetic Plastic Surgery, *Despite Recession, Overall Plastic Surgery Demand Drops Only 2 Percent From Last Year*, (Mar. 9, 2010), http://www.surgery.org/media/news-releases/despite-recession-overall-plastic-surgery-demand-drops-only-2-percent-from-last-year.

procedures, the overall number of cosmetic procedures has increased 147% since 1997.[105] Breast augmentations remain the overall most commonly performed cosmetic surgery.[106]

It is also a common misconception that the benefits of cosmetic surgery are limited to women. According to the ASAPS, in 2009 the number of procedures (surgical and nonsurgical) performed on men was more than 900,000, an increase of 9% from the previous year.[107] While surgical procedures decreased 3%; nonsurgical procedures increased 11%.[108] And since 1997, male nonsurgical cosmetic procedures have increased 290%.[109] Further, recent research has suggested that perceptions of the body are important to men's sense of confidence and that men see the body as a vehicle for personal improvement, often through cosmetic surgery.[110]

This trend in cosmetic surgery has been seen in recent divorce cases, as spouses in recent cases have used cosmetic surgery procedures to prove that their soon-to-be ex-spouse had dissipated the marital assets prior to divorce or had used marital funds to incur debt through cosmetic surgery procedures.[111] These cases, though not addressing cosmetic surgery procedures as marital property, show that courts are at least considering the implications of cosmetic surgery procedures in divorce proceedings and also are revealing the courts' attitudes towards including discussions of cosmetic surgery issues in divorce proceedings.

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[105] *Id.*

[106] *Id.* In 2009, the top surgical cosmetic procedures included: Breast augmentations – 311,957; Liposuction – 283, 735; Eyelid Surgery – 149,943; Rhinoplasty – 138,258; and Abdominoplasty – 127,923. American Society for Aesthetic Plastic Surgery, *Trends and Demographic Data: Top Surgical and Non-Surgical Cosmetic Procedures Among Men and Women in 2009*, http://www.surgery.org/media/news-releases/despite-recession-overall-plastic-surgery-demand-drops-only-2-percent-from-last-year.

[107] American Society for Aesthetic Plastic Surgery, *Trends and Demographic Data: Top Cosmetic Procedures for MEN*, http://www.surgery.org/media/news-releases/despite-recession-overall-plastic-surgery-demand-drops-only-2-percent-from-last-year (last visited May 8, 2010).

[108] *Id.*

[109] *Id.*

[110] Rosemary Ricciardelli & Kimberly Clow, *Men, Appearance, and Cosmetic Surgery: The Role of Self-Esteem and Comfort with the Body*, 34(1) CAN. J. OF SOCIOLOGY 105 (2009).

[111] Okada v. Okada, No. 27216, 2006 WL 1756671 (Haw. Ct. App. June 27, 2006) (dissipation of marital assets case); Morgan v. Morgan, No. 2006-CA-000426-MR, 2007 WL 2812600 (Ky. Ct. App. Sept. 28, 2007) (dissipation of marital assets case); K.S.B. v. F.J.B., No. CK06-02931, 2008 WL 1947871 (Del. Fam. Ct. Mar. 4, 2008) (marital debt case).

1. *Dissipation of Property Claims*

Normally, during a marriage in the dominant title theory states, each spouse is vested with authority to spend his or her own funds for his or her own enjoyment.[112] However, when the spouses are separated or pending divorce, and a spouse spends marital funds extravagantly (more legally referred to as "recklessly") or with a clear intent of depriving the other spouse of his or her marital share, this diminishes the amount of money available to be distributed as part of the marital estate, and can be considered dissipation of marital property by a court.[113] Some states have expanded this definition to expenditures for a spouse's benefit, for a purpose unrelated to the marriage, at a time when the marriage is in "serious jeopardy."[114] Common claims of dissipation include: intentional destruction of marital property, reckless management of marital property, selling marital property for much less than market value, gambling, and gifts to third parties involved in an affair with one of the spouses.[115]

Courts in equitable distribution states now treat dissipation in one of two ways. One method is to charge the dissipating spouse with the full amount of the loss resulting from the dissipation, and credit that amount to the other spouse in the divorce.[116] Other states consider dissipation to be one of the factors to be assessed when dividing the marital estate or awarding spousal support.[117]

Two equitable property jurisdictions have considered whether post-separation and pre-

[112] *See supra* note 33 and accompanying text.
[113] *Morgan*, 2007 WL 2812600, at *5.
[114] J. Thomas Oldham, *"Romance Without Finance Ain't Got No Chance": Development of the Doctrine of Dissipation in Equitable Distribution Jurisdictions*, 21 J. AM. ACAD. MATRIM. L. 501, 508 (2008). It should also be noted that a spouse cannot be liable for dissipating his or her own non-marital property. He or she can be responsible for dissipating his spouse's non-marital property, however. *Id.*
[115] *See* Oldham, *supra* note 114, at 509-14.
[116] *Id.* at 518, n.92.
[117] *Id.* at 518, n.93. Oldham advocates that the best approach to dissipation is to "fashion an approach so the dissipating spouse bears the total financial loss resulting from the dissipation. If there are no sufficient assets remaining, the court could award all the remaining assets to the non-dissipating spouse and also render a money judgment against the dissipating spouse in favor of the other spouse." *Id.* at 518-19. This, Oldham argues, is both fair and aids in deterring dissipation. *Id.* at 519.

trial cosmetic surgery is considered dissipation of marital assets, but the decisions lack explanation and factual background.[118] In *Okada v. Okada*, the Hawaii Intermediate Court of Appeals remanded part of a summary disposition order so that the lower court could consider whether the ex-wife's post-separation cosmetic surgery was a reasonably necessary marital expense. It if was not, the court ordered, without reasoning, that on remand the trial court "*shall*" include as a marital asset all money she used to pay for it.[119]

In *Morgan v. Morgan*, the court also ruled on a dissipation of property claim as applied to cosmetic surgery.[120] The court in *Morgan* found that $3,000 worth of cosmetic surgery expenditures that the husband made post-separation but before trial were correctly labeled dissipated funds by the trial court.[121] Though the court did not discuss details of why the cosmetic surgery debts were considered dissipation, they distinguished debts made by the husband for his personal gain – i.e. cosmetic surgery, campaign contributions, and a trip to the Democratic National Convention – with expenditures that he made pursuant to business necessity.[122]

Not much can be gained from these cosmetic surgery dissipation claims due to their lack of reasoning and factual background. What is clear from these decisions is that in dissipation cases the timeline is crucial.[123] In both *Okada* and *Morgan*, for example, the cases are classified as marital asset dissipation cases because the funds were spent by the spouse post-separation and pre-divorce proceeding.[124] Therefore, when dealing with cosmetic surgeries that occur after separation, the likely analysis will not be a classification of marital property claim, but rather it

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[118] *Okada*, 2006 WL 1756671; *Morgan*, 2007 WL 2812600.
[119] *Okada*, 2006 WL 1756671, at *3 (emphasis added).
[120] Morgan v. Morgan, No. 2006-CA-000426-MR, 2007 WL 2812600, at *5 (Ky. Ct. App. Sept. 28, 2007).
[121] *Id.*
[122] *Id.* Since there was no evident intent to dissipate funds for business purposes, but rather a requirement to continue his business practice, those funds did not fall under the category of dissipated. *Id.*
[123] *See* note 113 and accompanying text.
[124] *Okada*, 2006 WL 1756671, at *3; Morgan, 2007 WL 2812600, at *5.

will be a dissipation action.

2. *Marital Debt Claims*

Marital property dissipation cases have a unique timeline, that is, the expenditure must be post-separation but pre-divorce proceeding.[125] However, at least one equitable distribution state has held that debt incurred from cosmetic surgery during the actual marriage could be considered part of the marital estate.[126] Without specific discussion, in *K.S.B. v. F.J.B.*, the Family Court of Delaware included as marital property the wife's debt for three procedures completed by a dermatology and cosmetic surgery facility during the marriage.[127] This holding was in line with Delaware's Disposition of Marital Property Statute, which states that "[a]ll property acquired by either party subsequent to the marriage is *presumed to be* marital property."[128]

3. *Marital Property Claims*

*K.S.B. v. F.J.B.* is one of the best indications that courts are moving towards the trend of including at least the debt of cosmetic surgery as marital debt, but *K.S.B.* dealt specifically with current debt, and it was not clear whether the surgeries were actually cosmetic in nature or rather were dermatological. In the end, this may not be a significant difference, but at least one court has used this distinction in ruling that the actual value of the cosmetic surgery itself cannot be a marital asset: *Isaacson v. Isaacson*.[129] *Isaacson* is one of the first cases to deal specifically with the situation where cosmetic surgery enhancements were argued to be part of the marital estate,

[125] *See supra* Subsection I.E.1; *see, e.g*, Baker v. Baker, 733 N.W.2d 815, 824 (Minn. Ct. App. 2007) (finding that purchases pre-separation could be dissipation only if they were made in contemplation of divorce); Kittredge v. Kittredge, 803 N.E.2d 306, 318 (Mass. 2004) (finding that although the husband gambled throughout the marriage, the court could only consider gambling after the marriage broke down as dissipation); Smith v. Smith, 444 S.E.2d 269, 272 (Va. Ct. App. 1994) (finding that the amounts spent by the husband on his mistress before the marriage broke down were not dissipation).
[126] K.S.B. v. F.J.B., No. CK06-02931, 2008 WL 1947871 (Del. Fam. Ct. Mar. 4, 2008).
[127] *Id.* at *8.
[128] Del. Code Ann. tit. 13, § 1513 (2010) (emphasis added).
[129] Isaacson v. Isaacson, 777 N.W.2d 886, 891 (N.D. 2010).

and the court distinguished cases of cosmetic surgery debt and dissipation claims.[130] An overview of the *Isaacson* opinion, however, reveals that it only raises more questions, instead of presenting any real answers.[131]

## II. *ISAACSON V. ISAACSON*: CAN BREAST IMPLANTS BE CONSIDERED MARITAL PROPERTY? DOES THE COURT REALLY ADDRESS THE ISSUE AT HAND?

### A. Procedural History

*Issacson v. Isaacson* was a divorce proceeding that began in the District Court of Morton County in the South Central Judicial District of North Dakota after Erik Issacson filed for divorce, and his wife, Traci Isaacson answered.[132] The district court issued a memorandum opinion, findings of fact, and conclusions of law, and an order to judgment establishing, among other issues, the division of marital property.[133] Erik Isaacson appealed from the district court's ruling, and the Supreme Court of North Dakota heard the case.[134]

On appeal, Erik Isaacson argued that the trial court's valuation of the marital estate was clearly erroneous.[135] Therefore, the issue before the Supreme Court was whether the court properly struck Traci Isaacson's breast augmentation from the property and debt listing, not giving Erik Isaacson a chance to argue it was marital property.[136]

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[130] *Id.* at 890.
[131] *See infra* Section III.A.
[132] *Isaacson*, 777 N.W.2d at 887.
[133] *Id.*
[134] *Id.* Specifically, Erik Isaacson attempted to appeal from the district court's Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment establishing visitation, child support, division of marital property and spousal support. *Id.* Normally, orders and memorandum opinions are not appealable, but because there was a subsequently entered judgment that was consistent with the order and opinion, the appeal was proper. *Id.*
[135] Brief of Appellant at 2-3, Isaacson v. Isaacson, 777 N.W.2d 886 (N.D. 2010) (No. 20090114). Erik Isaacson also argued that the Court erred in making its custody determination, it deprived Erik Isaacson of his due process rights, and it erred by failing to require Traci Isaacson to produce information regarding the value of her trust. *Id.* The Supreme Court of North Dakota did, however, conclude that Erik Isaacson failed to preserve an adequate record with regard to the issues of due process violations and basing the valuation of Traci's trust on uncontested evidence. *Isaacson*, 777 N.W.2d at 887.
[136] *Id.* at 890; *see also* Reply Brief of Appellant at 6, Isaacson v. Isaacson, 777 N.W.2d 886 (N.D. 2010) (No. 20090114).

B. Facts

Erik Isaacson and Traci Isaacson were married in 1993 and have three minor children as a result of the marriage.[137] In 2007, Erik Isaacson filed for divorce, and Traci Isaacson answered.[138] The Isaacson's filed a property and debt listing with the district court in November 2008, and included in this list of property, under the category of personal property, were Traci Isaacson's breast implants.[139] Each party valued the breast implants differently, with Erik valuing the implants at $5,500 and Traci giving them no value.[140] At the outset of the divorce proceeding, the district court struck the breast implants from the property and debt listing, reasoning that breast implants are:

> the most ridiculous thing . . . ever seen listed on a property and debt listing . . . [and] is going to be stricken. . . . It just defies common sense. I don't know how you would expect me to award breast implants. Do you want me to have them cut out and given to Mr. Isaacson . . . . It's absolutely nonsense. Do not waste the Court's time with stuff like this.[141]

The trial lasted two days, and equal time was given to each party to present his or her case.[142] After the trial, both parties submitted briefs, and a determination was made by the district court.[143] Because the breast implants had been removed from the property and debt listing and any claim regarding their characterization as marital property was dismissed early in the proceeding, part of Erik Isaacson's appeal was the issue of whether the court properly dismissed his claims regarding the breast implants, considering that whether an asset of cosmetic

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[137] *Isaacson*, 777 N.W.2d at 887.
[138] *Id.* It is important to note that the divorce proceeding in *Isaacson* involved child custody, spousal support, and attorney fee disputes. For purposes of this Paper, those elements of the case will not be discussed in detail, as they are not important to the issue of marital property distribution.
[139] *Id.* at 888.
[140] *Id.* In addition, the property and debt listing included a trust in Traci Isaacson's name; Erik Isaacson assigned the trust $90,000 in value, while Traci assigned the trust no value. *Id.* Though this aspect of the dispute between the Isaacsons does deal with marital property distribution, it will not be discussed in detail because it does not relate to the relevant topic of cosmetic surgery enhancements.
[141] *Id.* at 888.
[142] *Id.*
[143] *Id.* at 889.

surgery can be part of the division of marital property was an issue of first impression, and the court did not even allow evidence to be presented, nor did it provide any basis for determining that breast augmentations were not a marital asset.[144]

C. Opinion

The Supreme Court of North Dakota upheld the district court, finding that the breast implants were not marital property.[145] The Court found that in order to be reversed, the decision of the lower court had to be clearly erroneous.[146] In so doing, the Court relied wholly on the procedural aspect of the claim, and did not consider the substantive arguments raised by Erik Isaacson in his brief. Namely, the Court found that it would not overturn the lower court's decision to remove Traci Isaacson's breast implants from the property and debt listing because: 1) Erik Isaacson did not object to the trial court's removal of the breast implants from the property and debt listing; 2) because he did not present the lower court with evidence that the breast implants could be considered marital property; and 3) because the court found the cases cited by Erik Isaacson to be off-point.[147]

## III. WHETHER EQUITABLE DISTRIBUTION STATES SHOULD CONSIDER COSMETIC SURGERY DEBT AND/OR THE VALUE OF COSMETIC SURGERY ENHANCEMENTS AS PART OF THE MARITAL ESTATE UPON DIVORCE

A. Implications of *Isaacson*: Too Quick to Dismiss?

*Isaacson* is an intriguing decision, as it managed to skate around an issue of first impression without having to substantively rule on the issue's merits. The Supreme Court of North Dakota, in its ruling in *Isaacson*, simply stated that the lower court's decision to exclude

[144] Brief of Appellant at 12, Isaacson v. Isaacson, 777 N.W.2d 886 (N.D. 2010) (No. 20090114).
[145] *Isaacson*, 777 N.W.2d at 892.
[146] *Id.* at 890. "'A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence we are left with a definite and firm conviction a mistake has been made.'" *Isaacson*, 777 N.W.2d at 891 (quoting Shields v. Shields, 656 N.W.2d 712 (2003)).
[147] *Id.* at 891-92.

breast implants from the marital estate was not clearly erroneous because "no evidence was presented and no argument was advanced warranting the inclusion of breast implants as marital assets."[148] In so deciding, the Court left open the possibility that breast implants and other forms of cosmetic surgery could be considered marital property. Therefore, *Isaacson*, can actually stand for the proposition that with the right evidence, and if the issue is properly raised in the trial court, real consideration would be given to the inclusion of cosmetic surgery in the marital estate.

B. Cosmetic Surgery Debt and Cosmetic Surgery Enhancements

*Isaacson* and other state court opinions that address cosmetic surgery in relation to a divorce have only done so in cursory manners, without regard to its value as "property."[149] There has been no case law or any statutory guidance that gives substantive treatment to the issue of the value of cosmetic surgery enhancements or their accompanying debt. With the rise in use of cosmetic surgery, and the rise in treatment of intangible property as marital assets, the time has come for a court to articulate a substantive rule, answering the question: how much do we value our nips and tucks?

1. *Cosmetic Surgery if a Debt*

There is a valid argument that cosmetic surgery debt would be considered marital debt upon divorce. This follows from the strong judicial presumption that any medical surgery that results in debt during the marriage is considered marital property, regardless of whether the surgery is necessary.[150] However, an underlying concern with this conclusion is the fact that medical procedures, even if not "emergency," are not "elective" in the sense that we consider

[148] *Id.* at 892.
[149] *See supra* Subsections I.D.1-3 and Part II.
[150] *See supra* note 73 and accompanying text.

cosmetic surgery.[151] The purpose of even "elective" medical procedures is to alleviate pain, prolong life, or otherwise improve one's quality of life. The election is not one of casual choice, but rather one of lasting impact. These life-altering reasons accompanying medical debt can easily analogize to the requirement that marital debt further the purpose of marriage – a long and healthy life with one another – and be for the joint benefit of both parties.[152]

Certain cosmetic surgeries could easily fall under the category of medical debt – those cosmetic surgeries that contribute to the well-being of a spouse, and therefore the overall well-being of a marriage. These include cosmetic surgeries like LASIK eye surgery, which is really more akin to a medical procedure, and cosmetic surgeries after life-altering accidents that are performed along with other medical procedures to save the victim's life and return the person as close to his or her previous image as before.[153] These procedures are so akin to medical debt that this Paper concludes they should be given the same treatment as medical debt: a strong inference for inclusion in the marital estate, subject to rebuttal under the circumstances of each case.[154]

More "elective" cosmetic surgery has a tougher hurdle to climb. Unlike non-essential medical surgery that is performed to prolong life or reduce pain, elective cosmetic surgery, it is argued, is for the sole benefit of one party, and therefore, it should be classified as separate property. There is an argument, however, that even elective cosmetic surgery – like breast augmentations, penile enhancements, or liposuction – are performed for the joint benefit of both parties in a marriage and should be considered marital debt. An important part of marriage is a healthy and continued sex life.[155] Two important keys to keeping a healthy love life is when

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[151] *See supra* notes 63-75 and accompanying text.
[152] *See supra* Subsection I.D.2.
[153] *See supra* notes 63-75 and accompanying text.
[154] *See supra* Subsection I.C.2.
[155] Dirk Selland, *Will Maryland Enter the Twenty-First Century in the Right Direction by Rescinding Its Ancient Sodomy Laws?*, 8 LAW & SEXUALITY 671, 693 ("Sex is a healthy part of having a healthy relationship between two adults."); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1010

each individual spouse is happy with his or her own body[156] and when each spouse finds sexual relations fulfilling. In terms of self-confidence, "people who are happy with their self-image are more likely to be self-confident, effective in work and social situations, and comfortable in their relationships. Those who are dissatisfied tend to be self-conscious, inhibited, and less effective in activities."[157] An increase in self-confidence is the intended result of many cosmetic surgeries, and a waning sex life can often be rejuvenated when a spouse undergoes a procedure that makes him or her look younger, bustier, larger, or even more distinguished.[158]

Further, recent research suggests that cosmetic surgery enhancements may also improve sex life and the ability to achieve orgasm due to the fact that increased self-confidence increases

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(2000) ("[P]roponents of companionate marriage in the 1920s and 1930s stressed the importance of female sexuality and spousal emotional mutuality as cornerstones of a healthy marriage.").

[156] It should be noted that there are different types of people that seek cosmetic surgery: appropriate candidates and inappropriate candidates. Psychological Aspects: Your Self-Image and Plastic Surgery, http://www.plasticsurgery.org/Patients_and_Consumers/Planning_Your_Surgery/Psychological_Aspects_Your_Self-Image_and_Plastic_Surgery.html (last visited May 5, 2010). Appropriate candidates are those with high confidence that have a flaw they want fixed or those that have waning confidence due to a flaw they want fixed. *Id.* Inappropriate candidates include those patients experiencing a life crisis, those with unrealistic expectations, those impossible to please, and those obsessed with a minor defect. *Id.* This Paper makes the assumption that persons who receive cosmetic surgery are those "appropriate" candidates who will feel more self-confident once their one or two physical flaws are fixed, and not those where the problem runs psychologically deeper. For those persons with deeper running psychological issues – the argument of cosmetic surgery improving self-confidence is not applicable. This is best summarized by the statement of Professor Laurie A. Casas, the spokeswoman for the American Society for Aesthetic Plastic Surgery:

> "Cosmetic surgery can change how you feel about yourself, but it won't change your self-esteem or who you are," she points out.
>
> "I would never say, 'Have your breasts enlarged so you can have a better sex life.' But if someone said, 'Doctor, I feel so bad about my tummy after having three kids, I am embarrassed to have sex with my husband' – then a body-contouring procedure may make them feel so much better. And it can give them the confidence to feel good about themselves in an intimate setting," she says.

*Cosmetic Surgery: A Better Sex Life?*, WEBMD HEALTH NEWS (Feb. 21, 2006), *available at* http://www.webmd.com/skin-beauty/news/20060221/cosmetic-surgery-better-sex-life.

[157] Psychological Aspects: Your Self-Image and Plastic Surgery, http://www.plasticsurgery.org/Patients_and_Consumers/Planning_Your_Surgery/Psychological_Aspects_Your_Self-Image_and_Plastic_Surgery.html (last visited May 5, 2010).

[158] *Id.* ("Plastic surgery – whether cosmetic or reconstructive – encourages and promotes a strong, positive self-image. Even a small change on the outside can create an extraordinary change on the inside, allowing an individual's self-confidence to flourish.").

one's desire to be sexual and to make relations more fulfilling.[159] Of 70 women who completed a recent survey, more than 95% reported improvements in body image regardless of the type of cosmetic surgery they had undergone.[160] After surgery, 81% of the 26 breast surgery respondents and 68% of the 25 body surgery patients said they experienced improvements in sexual satisfaction, including having orgasms more easily after the surgery.[161] The study also showed that this increased pleasure extended to the partners of cosmetic surgery patients. 73% of breast surgery patients and 56% of body surgery patients said that their partner's sex life had also improved as a result of their surgery.[162]

This author recognizes that in unique situations, it may be inequitable to charge a spouse with another's expensive elective surgery, only to file for divorce in a short time frame. However, this does not change the thesis of this Paper. This Paper argues that the debt should be given a strong presumption that it is marital liability, not that it is automatic.[163] Thus, if a court were faced with facts indicating a spouse used the marriage in order that the debt be divided among both spouses and then soon after filed for divorce, that presumption could be rebutted. Also, the court has another option. It could consider the debt a marital liability, but then use the factors in the second and third stages of property distribution – the actual valuing of the property and distribution – to more equitably divide the liability.[164] What is "equitable" in certain factual situations may be to charge one spouse with most, if not all, of the debt, even if it is marital.[165]

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[159] *Cosmetic Surgery: A Better Sex Life?*, WEBMD HEALTH NEWS (Feb. 21, 2006), *available at* http://www.webmd.com/skin-beauty/news/20060221/cosmetic-surgery-better-sex-life.
[160] *Id.*
[161] *Id.*
[162] *Id.* According to Professor Casas: "'I hear it over and over again after body-contouring surgery,' she says. 'Patients say, "I am so proud of my body. And my husband and I have so much more fun."'" *Id.*
[163] *See supra* notes 73 & 150 and accompanying text.
[164] *See supra* note 48 and accompanying text.
[165] *See, e.g.*, Hicks v. Kubit, 758 A.2d 202 (Pa. Super. Ct. 2000) (finding that student loans were marital debt, but allocating all of the portion of debt that paid for the educational services to wife).

How courts rule with regard to debt related to cosmetic surgery will likely be dealt with on a case-by-case basis. Equitable distribution courts that follow state statutes that explicitly provide that all medical debt, or debt in general, be classified as marital if it is created during the marriage are likely to find debt from cosmetic surgery included. Courts that have more leeway in their guiding statutes and are more restrictive in their interpretations of "marital" may limit their consideration of the debt to instances of necessary surgery, finding that the separate identity of most cosmetic surgery outweighs any inferential but not explicit joint benefit. A likely problem courts would be reluctant to inquire into is the question of how certain forms of cosmetic surgery benefited both parties – particularly if the benefit was more sexual in nature. Whether courts decide to continue to avoid the question, or find a way to frame it in the least invasive and most tactful way, is a question that has yet to be answered.

2. *The Value of Cosmetic Surgery Enhancements*

The debt of cosmetic surgery enhancements is likely to be considered a marital liability upon divorce. The same cannot be said for cosmetic surgery enhancements, however. The value of the surgery enhancements – once they are part of the body or removed from the body – are inherently separate property, and as such they should not be considered marital property upon divorce.

One may ask how the debt of cosmetic surgery enhancements can be considered a marital liability but the value of the enhancements is inherently separate. This is most easily answered by noting that courts do treat debt and property separately: the focus on debt was the purpose of purchase; the focus on property is its current and continuing character.[166] However, this does not answer the question of why, in this case, enhancements and debt should be treated differently. There are a few responses to this query that will be discussed in detail below: 1)

[166] *See generally supra* Part III.

cosmetic surgery enhancements lose their marital status once they are no longer "debt" but rather are part of the body; 2) cosmetic surgery enhancements are most relatable to professional licenses and personal goodwill, those forms of new property that are generally considered inherently separate; and 3) there are possible constitutional implications with valuing a person's body and then dividing that value among spouses.

It is difficult to give value to a cosmetic surgery enhancement since they do not have an easily identifiable, tangible economic value. As a general matter, though, complex valuation should not deter courts from finding that cosmetic surgery enhancements are marital property. For years society has been placing value on untraditional property like pension plans and stock options, the valuing of which is difficult for courts because they deal with future interests.[167] The difficulty of valuation, though, has not deterred courts from classifying this property as marital.[168] Valuation is the second step of property distribution in equitable distribution states, and this step is separate from classification, and they should not overlap.[169] Courts could apply traditional methods of valuation in order to give a concrete value to a surgery enhancement, just like is done with other forms of "new property."

Though courts *could* place a value on enhancements, it is likely the enhancements will not reach this second stage of analysis in divorce proceedings. In divorce proceedings the spouse claiming that property is marital has the burden of proving that the property was acquired by either or both spouses during the marriage for the joint benefit of the spouses.[170] A spouse claiming cosmetic surgery enhancements as marital could meet this burden – as discussed above. He or she could easily prove that the cosmetic surgery was paid for during the marriage, and he

[167] *See supra* Subsection I.C.3.
[168] *Id.*
[169] *See supra* note 48 and accompanying text.
[170] *See supra* note 53 and accompanying text.

or she could claim that the surgery was performed for either medical or for joint benefit purposes. Then the burden would shift to the spouse claiming that the property is separate to show that the property meets the definition of separate property.[171] A spouse could, at this point, show that the property is separate by proving that the cosmetic surgery enhancements lost their community identity.

In all areas of law and in society in general, there is something uniquely personal and separate about one's body.[172] By simply arguing that the enhancements became a part of and attached to (or removed from) the body and retain no marital identity, a spouse could show that this property lost its joint purpose and is inherently separate. Unlike a house or pension plan that both parties have a joint interest in even after divorce, enhancements of one's body do not. They can lose their marital identity.

In addition, cosmetic surgery is more relatable to the individual accomplishments or traits (like professional licenses or personal goodwill) that is held to be inherently separate property.[173] The best analogy that can be made is to that of student loan debt vs. human capital. Even though generally student loans are considered marital liabilities when incurred for the joint benefit of the

[171] *See supra* note 54 and accompanying text.

[172] This can be seen in two examples: informed consent and the search and seizure doctrine. The informed consent doctrine encourages medical patients to make informed or intelligent decisions about medical care before undergoing treatment or a procedure. Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather Than a Disability*, 1995 WIS. L. REV. 235, 265 (1995). Without securing informed consent, invasions of bodily integrity by medical professionals are tortious. *Id.* In supporting the notion that there is something uniquely personal about one's body, the informed consent doctrine "finds its roots in the most fundamental and basic rights of free people: the inviolability of the human body and the right of a person to exercise complete dominion over his or her own person." *Id.* (quoting JAMES M. MORRISSEY ET AL., CONSENT AND CONFIDENTIALITY IN THE HEALTH CARE OF CHILDREN AND ADOLESCENTS: A LEGAL GUIDE 13 (1986)). Second, in terms of search and seizure, the Supreme Court has recognized that the Fourth Amendment applies with its fullest vigor against any intrusion on the human body. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) (finding that the Supreme Court in *Brinegar v. United States* suggested that all invasions of personal security are governed by the Fourth Amendment, and holding that those invasions are worst when they affect one's body).

[173] *See supra* Subsections I.C.3.a-b.

parties, the resulting degrees are considered inherently separate.[174] Similarly, the debt of a cosmetic surgery, when incurred for the joint benefit of the parties, is a marital liability, while the physical results on one's body are separate. Like a professional degree, cosmetic surgery enhancements are unlike traditional "property." For the most part, any rights in the enhancements terminate upon the death of the holder; they are not inheritable; they are uniquely personal; they are not generally traded, assigned, transferred, or sold. And, though they are purchased by an expenditure of money, they only implicitly – if even that – assist in having an impact on the increased earning of an individual.[175]

Similarly, cosmetic surgery enhancements are more relatable to personal business goodwill. The "value" that enhancements give to an individual is personal.[176] Any increase in reputation that commands additional compensation as a result of cosmetic surgery, as a result, should be considered separate.

Even if one can make the argument that cosmetic surgery enhancements retain marital property status once they are part of a person's body, there may be constitutional implications. A person has no property rights in his or her body, and as such he or she cannot sell his or her body.[177] If a person is not able to value his or her body, it seems unconstitutional for the court – a state actor – to partake in the valuing and then dividing of enhancements that are a part of, or were removed from, one's body.

Just because the value of the cosmetic surgery enhancements is not marital property generally, however, a spouse is not "out of luck." A spouse can argue that equitably, under the circumstances, he or she should receive some sort of compensation for the cosmetic surgery

[174] *See supra* notes 87-92and accompanying text.
[175] *See supra* text accompanying note 86.
[176] *See supra* notes 96-100 and accompanying text.
[177] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 493 (Cal. 1990) (holding that a person has no property rights in his own excised cells and tissues).

enhancements. Just like courts have provided some sort of alimony, restitution, or other compensation for spouses who will not have the benefit of their former spouse's professional license and accompanying higher earning potential, a spouse could make the argument that he or she is entitled to some sort of alimony for the higher earning potential that his or her spouse may receive as a result of the physical improvements.[178]

## CONCLUSION

With the rising number of cosmetic surgeries performed each year, and the increasing value that society is giving to intangible property, the time has come for courts to set a substantive precedent indicating whether or not cosmetic surgery – both its debt and its subsequent intangible value – can be considered marital property or a marital liability upon divorce. When classifying property and debt in an equitable property jurisdiction, there is a presumption that the property or debt acquired during the marriage is marital, but if a party can show that the property or debt should be considered separate, the trial court has authority to exclude it.

Most debts acquired during marriage are considered marital debts – and this is especially true in cases of medical debt. Many of the factors one considers in choosing whether to have a non-essential medical surgery overlap with the factors considered for certain, more medically based, cosmetic surgeries. Further, an argument can be made for the non-medically related cosmetic surgeries, the "elective" surgeries, that though they are not medically necessary, they do contribute to the joint benefit of both parties in a marriage, making them marital debt. Therefore, there is a strong argument that debt relating to cosmetic surgery should be considered a marital debt. The value of cosmetic surgery enhancements, however, should not be considered a marital asset. Even if the original cost of the surgery was considered a marital liability, after

[178] *See supra* note 84 and accompanying text.

separation, there is no tangible or monetary value to most cosmetic surgery enhancements. Like professional licenses, spouses can appreciate the benefits during the marriage, but the actual property is purely separate once attached to or removed from one's body. It would be out of line with the purpose of equitable distribution, and perhaps unconstitutional, to award a spouse the value of such enhancements.

Courts may have to face uncomfortable questions and probe into personal matters in determining whether or not cosmetic surgery is a marital asset, but state legislatures have tasked courts in equitable distribution jurisdictions to do just that: to end the confusion that, like a traditional game of Monopoly, has gone on for too long.