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Labor, Luck and Love: Reconsidering the Sanctity of Separate Property

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Property acquired prior to marriage and property received by gift or devise during marriage is generally treated as belonging to each spouse separately. Regardless of how long spouses have been together, divorcing property owners have no obligation to share such separate wealth. This sheltering of premarital and unearned property would make sense under a regime in which property acquired during marriage through labor was also separate by default. But if wealth earned during marriage—"labor-generated property"—is divisible at divorce, a blanket rule designating all premarital assets and all unearned wealth received during marriage—"luck-generated property"—as external to the marriage is indefensible. Although this labor-luck divide permeates the overwhelming majority of scholarly, statutory, and judicial discussions of marital property law as a background presumption, it has gone largely unquestioned. This Article critiques the labor-luck divide and argues that if earnings are to belong to both spouses as a unit, a portion of what is currently classified as separate property should also be attributed to the marriage. Rather than focusing on labor alone, the standard for classifying property as marital should look at the parties' overall financial picture, attributing to the couple a shared level of risk and reward for the duration of the marriage. Specifically, marital property should include a percentage of premarital and unearned wealth based on the length of the marriage as well as on the age of the owner spouse. The guiding principle is to attribute to the marriage a fraction of the owner spouse's estimated lifetime financial capability, effectively recognizing that in marriage, labor, luck, and love are intertwined.