

Property Rights and Division



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ORS 107.105(1)(f)



For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. In determining the division of property under this paragraph, the following apply:

Change Alert



- ORS 107.105(1)(f) now has subparagraphs!
- The unruly, long and burdensome paragraph is out; organization is in
- No substantive changes, other than the addition of subparagraph D

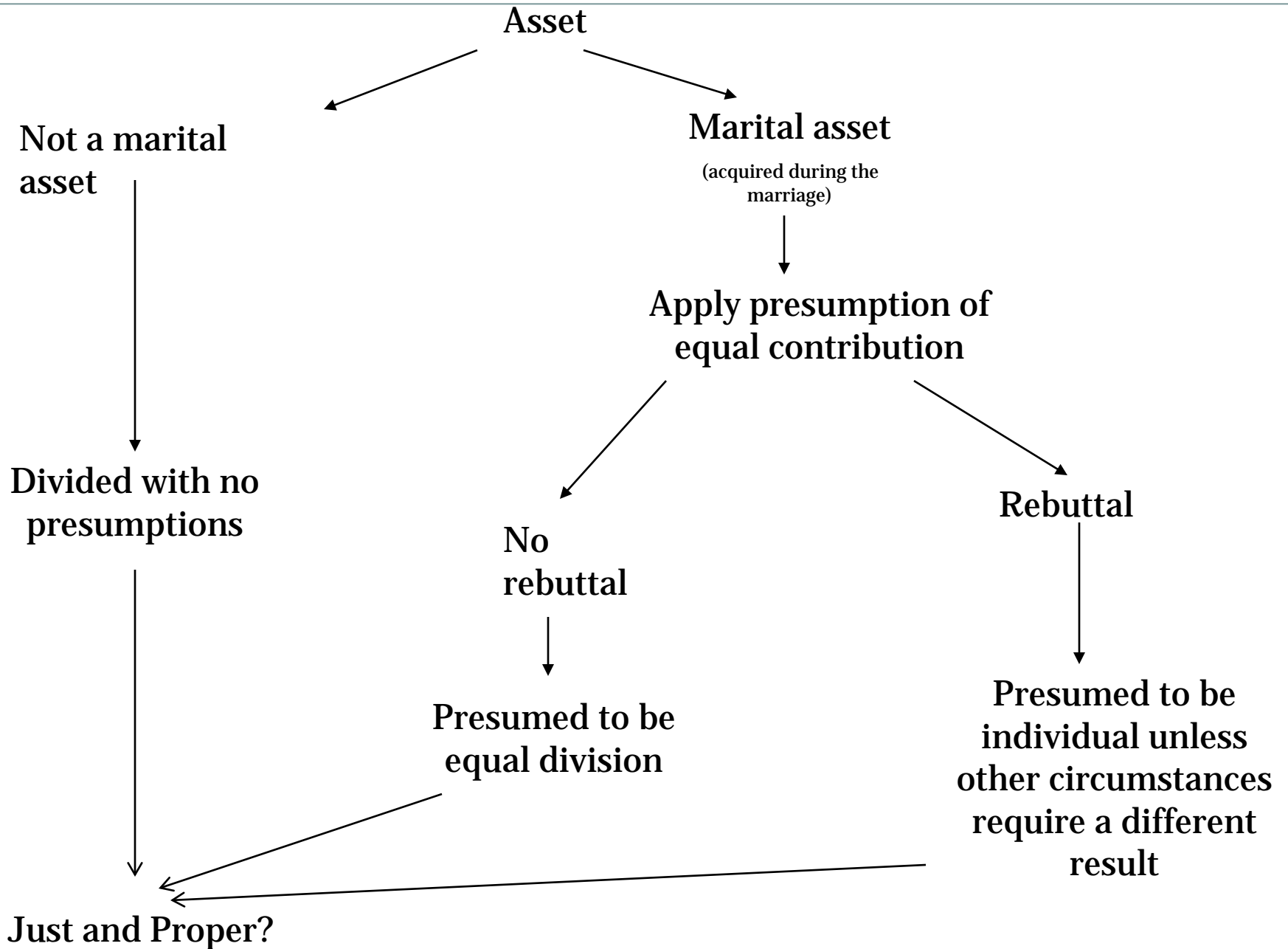
ORS 107.105(1)(f)



- (A) A retirement plan or pension or an interest therein shall be considered as property.
- (B) The court shall consider the contribution of a party as a homemaker as a contribution to the acquisition of marital assets.
- (C) Except as provided in subparagraph (D) of this paragraph, there is a rebuttable presumption that both parties have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held.



Kunze



Trends



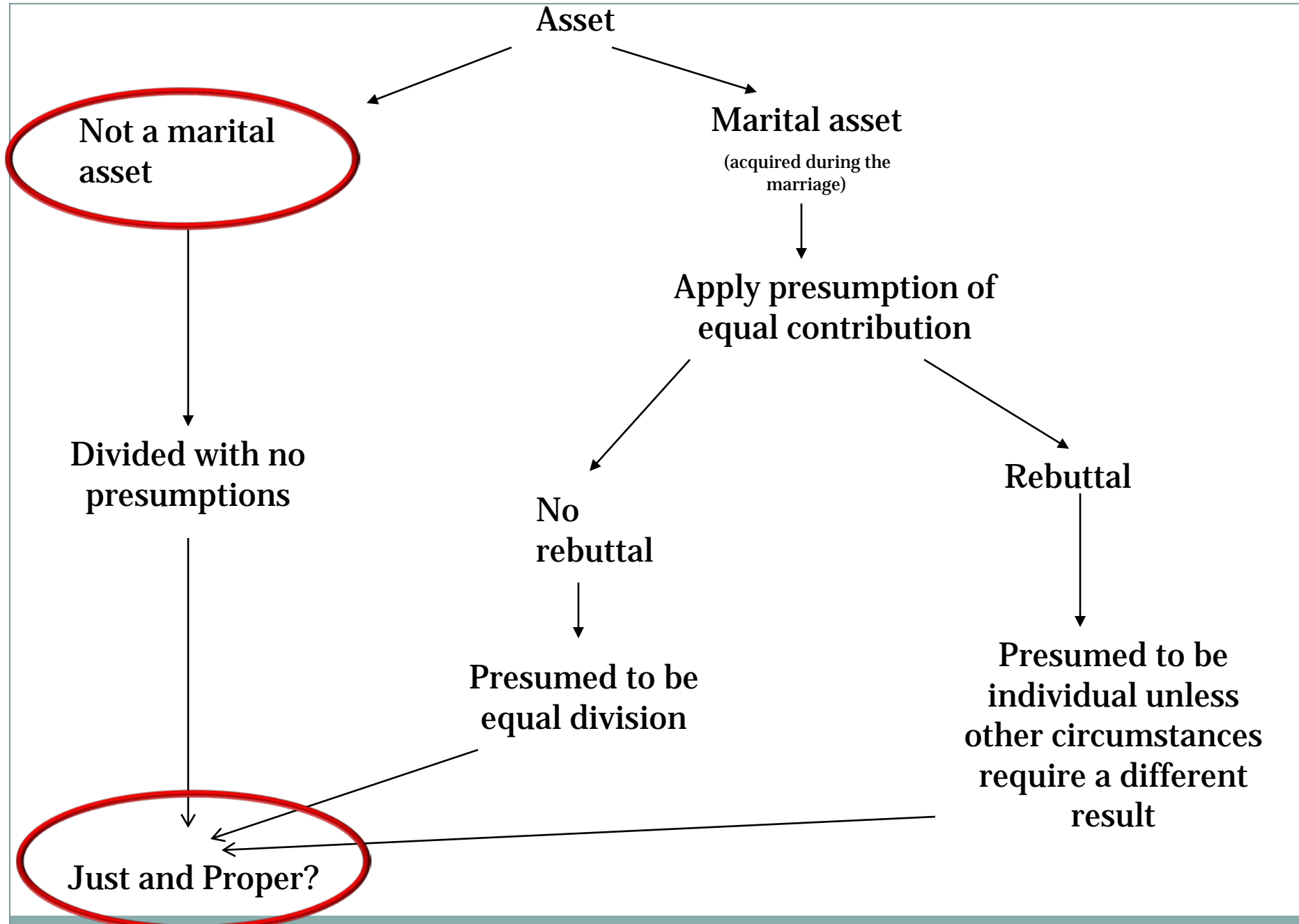
- Issues relating to assets acquired prior to marriage

Carlson and Carlson, 236 Or App 291, 236 P3d 810 (2010)

Rudder and Rudder, 230 Or App 437 (2009)

Baker and Andrews, 232 Or App 646 (2009) (domestic partnership)

Hanscam and Hanscam, 247 Or App 207 (2011)



Not a marital asset

Divided with no presumptions

Just and Proper?

Asset

Marital asset

(acquired during the marriage)

Apply presumption of equal contribution

No rebuttal

Presumed to be equal division

Rebuttal

Presumed to be individual unless other circumstances require a different result

Assets Acquired Prior to Marriage



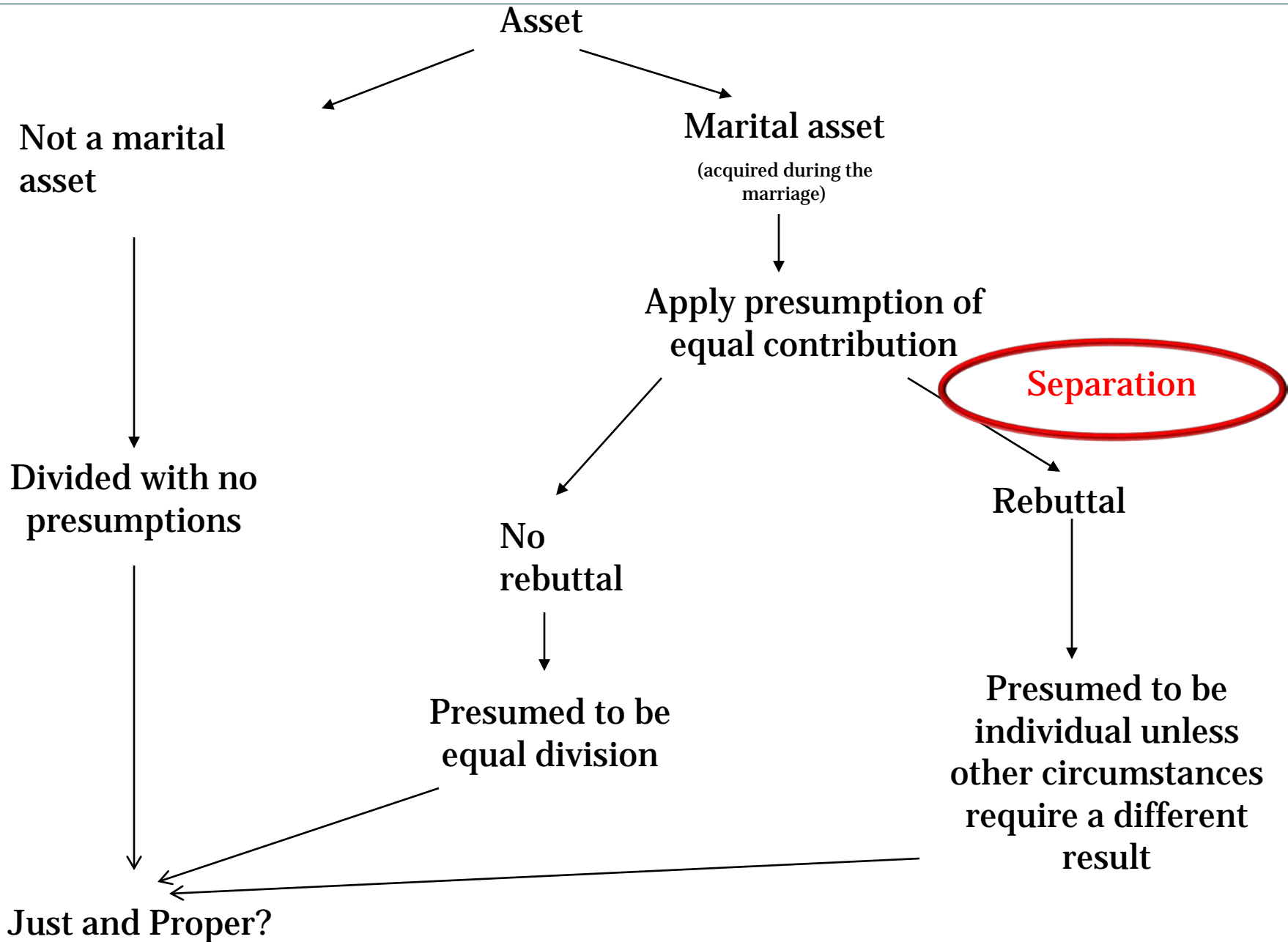
- **Assets acquired prior to the marriage are not subject to any presumptions. The court's goal is to determine if there was an intent to share. Intent can be different for different assets.**
- **Both the premarital asset, and the appreciation during premarital cohabitation can be considered in a just and proper division of property**

Trends



- Rebuttal of the presumption of equal contribution as to assets acquired after separation but before dissolution

*English and English, 223 Or App 196 (2008);
Deming and Deming, 240 Or App 447 (2011)*



Presumption During Separation



- "To rebut the presumption with respect to property acquired during the period between separation and dissolution, a party generally must make a showing of a long period of separation and mutual financial independence before the dissolution."

Presumption During Separation



- "The timeframe on which husband focuses is too limited. When determining whether a spouse has contributed to the acquisition of an asset acquired during a separation, we do not focus only on the activities of the spouse during the separation. Assets acquired during separation may have "roots extending far back into the marriage." Quoting *Clapperton and Clapperton*, 58 Or App 577 (1982).

Presumption During Separation



- The court is more likely to rebut the presumption of equal contribution during a period of separation if
 1. Longer rather than shorter (time is not enough)
 2. Mutual financial independence (this does not mean separate bank accounts; it focuses on reliance and support)
 3. Lacks “roots” in marital assets or activities

The “Olesberg Fix”



- Legislative reversal of *Olesberg and Olesberg*, 206 Or App 496, 501 (2006)
- Addresses the burden and sufficiency of evidence to rebut the presumption of equal contribution with regard to inheritance.

ORS 107.105(1)(f)(D)

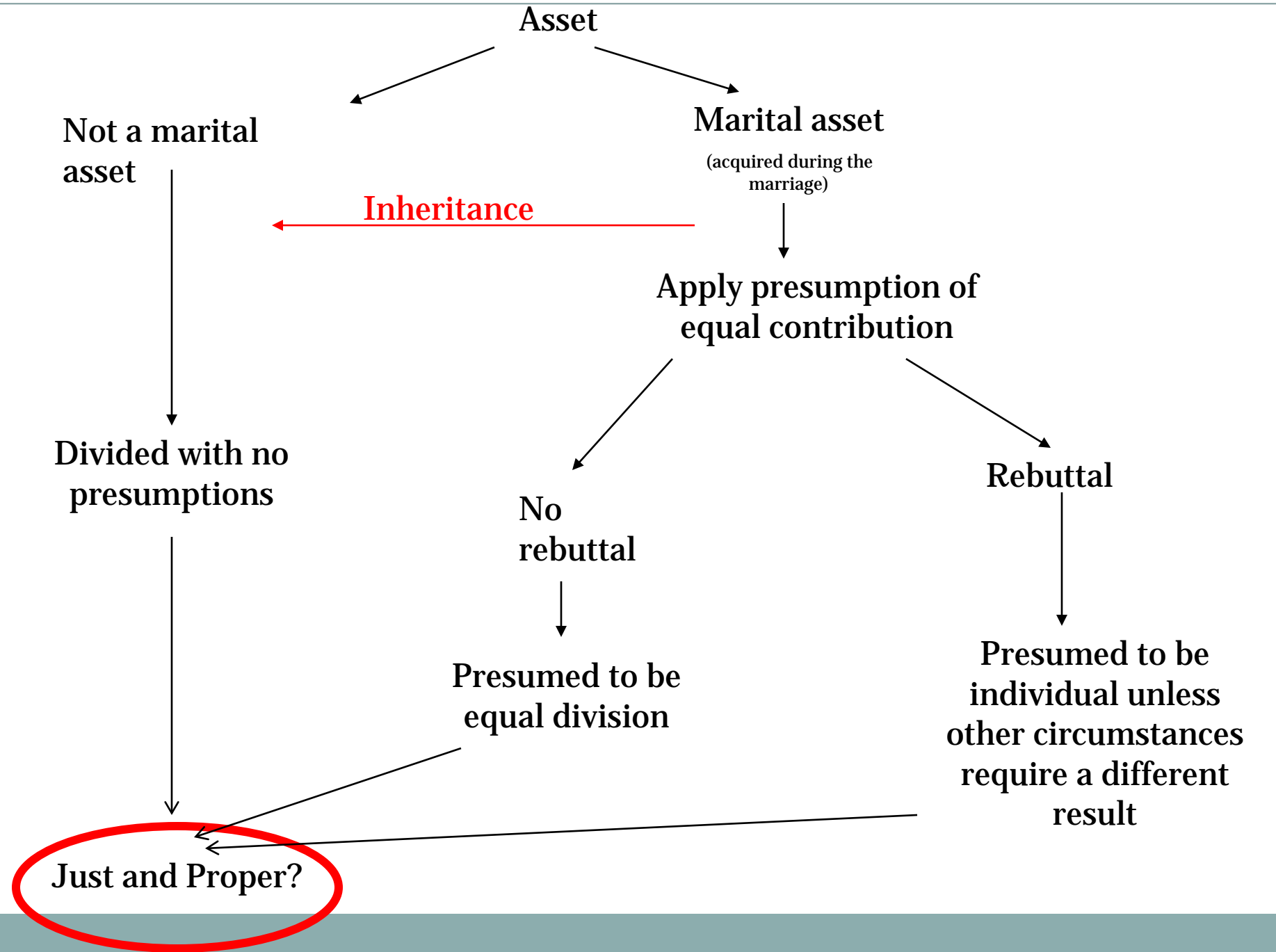


- (D)(i) Property acquired by gift to one party during the marriage and separately held by that party on a continuing basis from the time of receipt is not subject to a presumption of equal contribution under subparagraph (C) of this paragraph.
- (ii) For purposes of this subparagraph, “property acquired by gift” means property acquired by one party through gift, devise, bequest, operation of law, beneficiary designation or inheritance.

ORS 107.105(1)(f)(D)



- Analysis – does an asset fall within the scope of this statute?
- (1) Was the asset acquired as a gift?
- (2) Was the asset acquired as a gift *to one party*?
- (3) Was the asset kept separate upon receipt?
- (4) Was the asset kept separate *continually thereafter*?



Pre 2012 Inheritance Cases



- *Olson and Olson*, 218 Or App 1 (2008)
- Husband rebut the presumption of equal contribution, but the court awarded wife 25% of the value of the initial inheritance
- Quoting *Kunze*: “[b]ecause it is an equitable consideration, commingling is not an all or nothing proposition. Instead, commingling falls along a spectrum. In some cases, a particular asset may be commingled to such an extent that it would be inequitable to divide it in any manner other than equally. In other cases, an asset may be less commingled and therefore subject to a split into unequal shares

Pre 2012 Inheritance Cases



- ***Finear and Finear, 240 Or App 755 (2011)***
- Husband rebut the presumption of equal contribution as to inherited assets, he did not rebut the presumption as to appreciation (husband and wife lived on the property purchased with inheritance), which was evenly divided, giving wife 23% of marital estate.
- “Both wife and husband were completely dependent on the inheritance/trust funds throughout the latter part of their marriage. We conclude that husband's reliance on the inheritance property as his financial contribution to the marital partnership is a form of commingling”

Questions to be answered



- Whether or not use of a portion of the asset for marital purposes will remove the entire asset from protection under this section.
- → It is true, as husband argues, that the fact that a party uses funds from a separately held account does not convert the entire account into a marital asset, in the absence of evidence of an intention to treat the entire account as joint property. *Gano–Ridge and Ridge, 211 Or App 393(2007)*; see also *Winkler and Winkler, 200 Or App 524 (2005)*
- On the other hand, the statute clearly says “separately held by that party on a continuing basis from time of receipt”
- What does kept separate mean? Title? Control? Use?

Questions to be answered



- Whether or not reliance by both parties on the asset has any effect.
- Finear

Questions to be answered

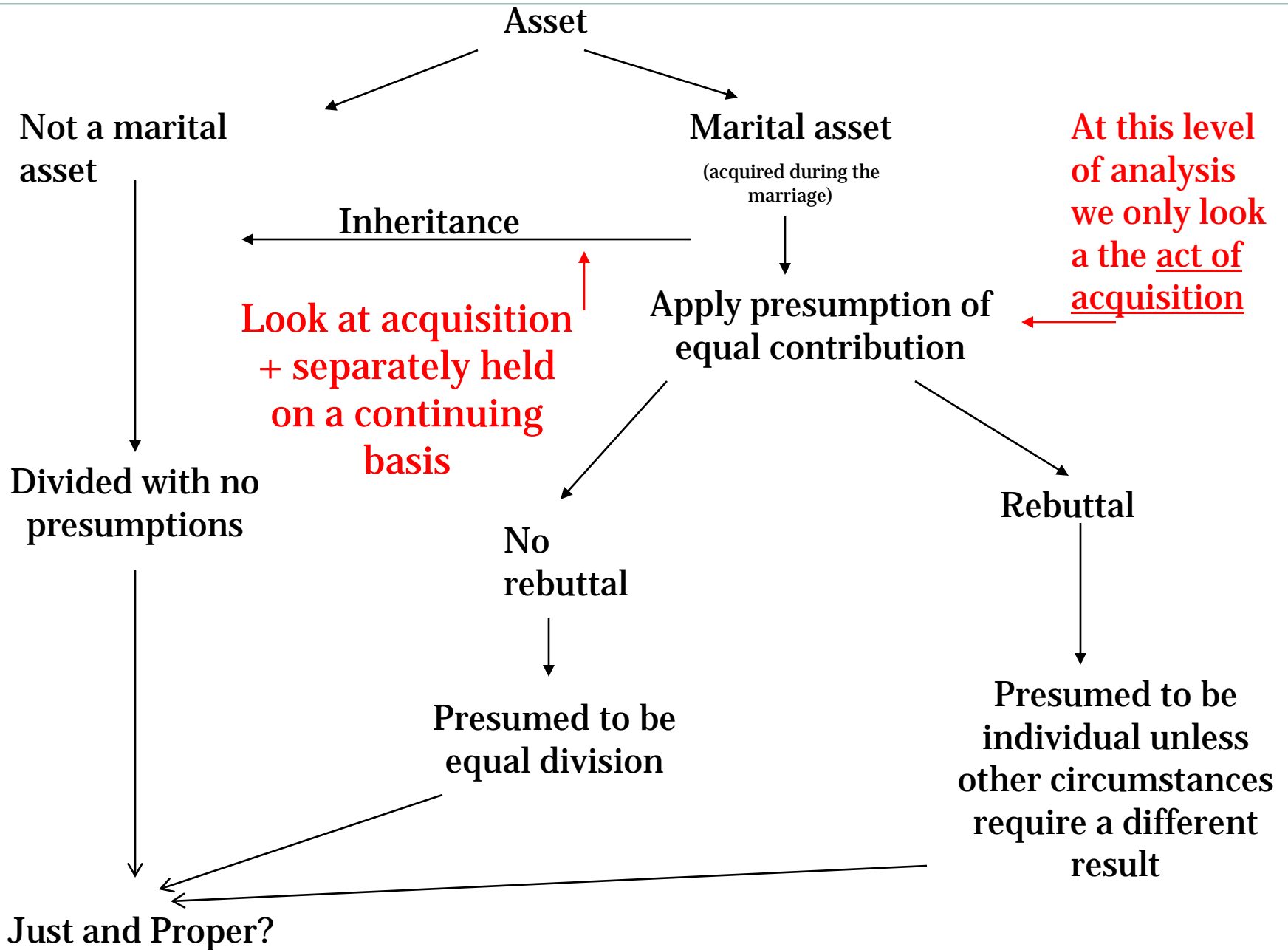


- Whether or not this statute will have any impact on the analysis for *appreciation on* a gifted/inherited asset.
- *Masse and Masse, 328 Or 191 (1999)*

Questions to be answered



- Whether or not the specific statutory language overrides the general framework and precludes a rebuttal argument as to assets acquired by gift or inheritance.
- Burden in rebuttal argument as compared with burden under ORS 107.105(1)(f)(D)



Hypothetical



- **Husband receives as inheritance an equal division of his father's estate and immediately transfers the funds to a separate account where the money is held until divorce.**

Hypothetical



- **Husband receives a \$100,000 cash gift from his father who wrote the check to Husband rather than Husband and Wife, and will testify that the money was intended for his son only. Husband deposits the money in the joint account for one month before transferring it to a brokerage account he set up in his own name after receiving the check.**

Hypothetical



- **Kunze: Chaps Court Property**
- **Wife used inherited funds to purchase real property, but she titled the land jointly with Husband.**
- **Query: In Kunze, Wife overcame the presumption of equal contribution by showing individual acquisition could she under ORS 107.105(1)(f)(D)? Or has the burden shifted?**

Trusts



- A beneficial interest in a "revocable trust" (one terminable or revocable at the will of the settlor, at any time and for any reason) is merely an expectancy and subject to the possibility that it could disappear at any time and for any reason. It therefore does not constitute property within the meaning contemplated in ORS 107.105(1)(f), and is not subject to division in a dissolution proceeding.

Githens and Githens and Moffett, 230 Or App 586, (2009)

Pension as an Income Stream



- Pension benefits must be treated as property under ORS 107.105, regardless of the fact that they are in pay-out status at the time of the divorce.
- *In re Marriage of Rushby, 247 Or App 528 (2011).*

Trends



- **The homemaker presumption**

Carlson and Carlson, 236 Or App 291, 236 P3d 810 (2010)

The Homemaker Presumption



- The fact that one spouse is a homemaker does not mean that the parties' overall contributions to acquisition of an asset (including appreciation on an asset) are equal.
- The court must determine the magnitude, and thus the legal effect, of a homemaker's contribution to the acquisition of marital assets in accordance with the evidence in each case

The Homemaker Presumption



- **How do you value the contribution?**
- **Not simply in terms of the economic value of child care**
- **Evaluating the extent to which such work enables the other spouse to devote time and energy to an endeavor**

The Homemaker Presumption



- How do you value the contribution?
- In cases in which the marital asset in dispute is a business, however, it is important to connect the work of the homemaker spouse directly or indirectly to the development of that business
- *English and English, 223 Or App. 196, 206, 194 P.3d 887 (2008)*

Trends



- Homemaker presumption applied to a business
- *Carlson and Carlson, 236 Or App 291 (2010)*
- *Hixson and Hixson, 235 Or App 570 (2010)*

The Homemaker Presumption



- The homemaker's less-than-equal contribution to the acquisition of an asset is not to be disregarded even if the presumption is rebutted – that contribution should still be considered in determining a just and proper distribution of that asset