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AN EMPIRICAL STUDY OF PROPERTY DIVISIONS AT DIVORCE

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Abstract

Much has been written about family law and how to fairly divide property between divorcing spouses. Without a good understanding of what courts are doing in the field, however, there is no baseline for theoretical frameworks. This Article fills the void by analyzing all divorce cases involving children that were filed in one county over several months. The resulting empirical data has implications for the meaning of fairness in divorce, the role of judicial discretion, and the incentives for contracting by couples. This Article also examines the underlying law in order to explore the correlation between the family law code and judicial outcomes.

I. INTRODUCTION

Each year, nearly two million people divorce in the United States, and over four million marry.[1] They have kids, and if nothing else, they venture into romantic relationships. Yet, they know little about the family laws that pick up the pieces of broken relationships and set the price of love. One woman did not even know that a divorce would end her marriage.[2] While that may be extreme, most people do not know that the law treats non-married couples like strangers, and many engaged couples think they have no chance of divorce—but nothing could be further from the truth.[3]

In a grey universe such as family law, where discretionary standards govern factually diverse cases, little can be measured.[4] This makes it more difficult for courts,

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1. *National Marriage and Divorce Rate Trends*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Mar. 22, 2017).

2. Tomas Jivanda, *Woman Claims Lawyers Should Have Told Her Divorce Would End Her Marriage*, THE INDEPENDENT (Jan. 10, 2014), http://www.independent.co.uk/news/uk/home-news/woman-claims-lawyers-should-have-told-her-divorce-would-end-her-marriage-9051550.html.

3. SONIA HARRIS-SHORT & JOANNA MILES, FAMILY LAW: TEXT, CASES, AND MATERIALS 109 (2d ed. 2011); Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757 (2009).

4. "[S]cholars and lawmakers have recognized that litigating under open-ended, amorphous standards [in family law] is unpredictable . . . ." Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2006 (2014). The field of family law is certainly no stranger to greyness. *See, e.g.*, Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167 (1986) ("Family law . . . is characterized by more discretion than any other field of private law."). In fact, the two major inquiries when a marriage ends relate to the division of property and child-related matters such as child custody and support. The latter is governed by the notoriously ambiguous

policymakers, lawmakers, and litigants to know what to do in a particular case.

Thus, this Article offers an empirical analysis of one set of data, which shows the actions of the courts and the outcomes for divorcing couples. Analyzing approximately 110 divorce cases filed over three months in 2008 in Marion County, this Article focuses on property divisions, specifically those of pensions and marital homes, which are the most significant assets that couples own.[5] In regards to these, this Article looks at the mandates of the Indiana legislature on property division and to what extent the courts are following them. Accordingly, Part II sets forth the Indiana legal framework against which divorces occur. Part III analyzes the data to examine how the courts are working within this legal framework. There may be a divergence between theory and practice, and empirical research measures it. The resulting empirical data has implications for the meaning of fairness in divorce, the role of judicial discretion, and the incentives and background for contracting by couples.

In many ways, Indiana is representative of other state approaches to property division.[6] For example, Indiana takes the majority approach of equitable distribution as opposed to community property.[7] Thus, the lessons learned from an

"child's best interests," while the former is governed by fairness. *See, e.g.*, William J. Howe & Hugh McIssac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents when the Interests of Children are at Stake*, 46 FAM. CT. REV. 78, 78-79 (2008) ("Virtually every jurisdiction . . . seeks to achieve the best interests of the child when resolving divorce, custody, or parenting disputes."); Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 58 (2011) ("All divorce property-distribution systems aim to achieve a fair division of spousal assets.").

5. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 614 (2016) ("In addition to the marital home, pension benefits constitute the most significant marital asset for many couples. They also serve as an important source of funds for meeting support obligations.").

6. However, state law governs divorce, making any generalization difficult. *See* Lehr v. Robertson, 463 U.S. 248, 256 (1983) ("Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships.").

7. *See infra* Part II.B.

empirical analysis of Indiana apply to other states and are essential given that in Indiana, as anywhere, the division of property is among the biggest issues when a couple divorces.[8] With continued high levels of divorce in the United States and around the world, it is important to study this area of law, particularly in respect to two significant implications.

First, the family law conversation has moved on from the question of unilateral or fault divorce, and now divorces occur freely, raising the question of what is fair in the property division at divorce.[9] Second, there has been a trend towards reducing family law to formulae, as seen in the child support guidelines and parenting time guidelines, but there are limits to this in the property division realm.[10]

II. LEGAL FRAMEWORK

Even statutorily, before the facts of a particular case muddy the equation, property division is notoriously grey. While other areas of law have clear guidelines to assist courts in reaching their decisions, a common guideline in divorce property division is the ambiguous notion of fairness.

To facilitate fairness, property division often proceeds in two stages. The first is applying state law to determine the assets to be divided, which is generally governed by state statutory law.[11] The second is the actual division of assets

8. "The fact that not just specialists and dedicated proponents, but also broad swaths of scholars, courts, and decisionmakers, are grappling with data is a sign of the empirical revolution's vitality." Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1202 (2013).

9. *See, e.g.*, Mirenda Watkins, *Divorce*, 7 GEO. J. GENDER & L. 1033 (2006) (exploring contemporary issues in divorce).

10. "Even if the contested issues in a divorce are limited to child custody and visitation, statutory child support guidelines and shared parenting requirements usually come into play." Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 912 (2012).

11. These statutes vary among the states. For example, the relevant Illinois statute divides only marital property. *See* 750 ILL. COMP. STAT. 5/503(a)-(b) (2017). Furthermore, there is a rebuttable presumption that property acquired during marriage is marital property that is divisible upon divorce. *Id.* Finally, property gained before marriage or by gift does not qualify as marital property. *Id.*

under state law,[12] with debts often treated the same way as assets.[13] If enforced by the court, a valid premarital agreement may change this framework.[14]

Indiana is no different:

> [T]he law governing the division of marital property . . . is a two-step process in Indiana. First, the trial court determines what property must be included in the marital estate. It is well established that all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts. This "one-pot" theory ensures that all assets are subject to the trial court's power to divide and award. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided. After determining what constitutes marital property, the trial court must then divide the marital property under the presumption that an equal split is just and reasonable. This presumption may be rebutted by a party who presents relevant evidence . . . .[15]

12. *See* Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115 (2010). The relevant Illinois statute is typical in listing the factors that courts should consider when dividing marital property. *See* 750 ILL. COMP. STAT. 5/503(a)-(b) (2017).

13. *See, e.g.*, Capehart v. Capehart, 705 N.E.2d 533 (Ind. Ct. App. 1999) (noting that the husband's premarital educational debt should have been included in the marital pot, but the fact that it was premarital rebutted the presumption of equal division).

14. The premarital agreement must be substantively and procedurally fair. *See, e.g.*, Margaret Ryznar & Anna Stepień-Sporek, *To Have and To Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27 (2009).

15. Estudillo v. Estudillo, 956 N.E.2d 1084, 1090 (Ind. Ct. App. 2011) (citations omitted). *See also* Love v. Love, 10 N.E.3d 1005, 1013 (Ind. Ct.

Each of these steps is considered next in turn.

A. *Defining Property Subject to Division*

The threshold question of any property division is the definition of property.[16] The Indiana Code provides some guidance, as does Indiana case law.[17] The most important division for many people is that of the marital house, which is often the most significant asset that people own other than their retirement accounts.

App. 2014) ("It is well-established that all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage, acquired by either spouse after the marriage and before final separation of the parties, or acquired by their joint efforts."). *See also* Hartley v. Hartley, 862 N.E.2d 274, 282 (Ind. Ct. App. 2007), which states:

> In determining the value of the marital estate, the trial court is required to include property owned by either spouse before the marriage, acquired by either spouse in his or her own right after the marriage and before final separation of the parties, or acquired by their joint efforts. This "one-pot" theory insures that all assets are subject to the trial court's power to divide and award.

Id. (citations omitted).

16. *See, e.g.*, O'Connell v. O'Connell, 889 N.E.2d 1, 10 (Ind. Ct. App. 2008) ("First, the trial court determines what property must be included in the marital estate."). For example, in Indiana, pets are treated as property, like in the majority of states. At least one Indiana court has recognized the gravity to couples of the division of their pets:

> Were we to judge the importance of these proceedings by such a fictitious standard of value we would be inclined to resent this appeal as a trespass on the court's time and an imposition on our patience, of which quality we trust we are possessed in reasonable degree. But we have in mind Senator Vest's immortal eulogy on the noble instincts of a dog so we approach the question involved without any feeling of injured dignity but with a full realization that no man can be censured for the prosecution of his rights to the full limit of the law when such rights involve the comfort derived from the companionship of man's best friend.

Akers v. Sellers, 54 N.E.2d 779, 779 (Ind. App. 1944).

17. IND. CODE § 31-9-2-98 (2016). This provision is particularly relevant to vested versus non-vested pensions and retirement plans.

1. Pensions

Pensions must be vested in order to be subject to division in an Indiana divorce.[18] A non-vested pension plan will not be considered a marital asset in Indiana, unlike in some other states.[19] However, "if the right to such benefits is fixed, such benefits are a valuable asset [for division] even though there is no present right to receive income."[20]

The question of when a pension vests can be unclear. Indiana case law offers some help in this regard. In one case, the Indiana Court of Appeals has determined that a clear test is whether a person can receive pension payments; in that case, because the husband could currently receive payments from his pension plan, the pension constituted divisible property.[21] In another case, the husband's "interest in the employer-contributed portion of his 401(k) plan was contingent upon his retirement at the company. Thus, [the husband's] interest was

18. *See* § 31-9-2-98(b). *See also* Bingley v. Bingley, 935 N.E.2d 152, 155 (Ind. 2010) ("[V]esting is both a necessary and sufficient condition for a right to a benefit to constitute an asset.").

19. 2 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 6:22 (3d ed. Supp. 2016). Almost all states consider vested pensions as marital property. Only a few states, including Indiana, exclude non-vested pensions from marital property division. *Id.* at 140. "There is no relevant distinction for equitable distribution purposes between retirement plans where the employer made all the contributions (*noncontributory* plans) and plans to which both the employee and employer contributed (*contributory* plans)." *Id. See also* Moyars v. Moyars, 717 N.E.2d 976, 980 (Ind. Ct. App. 1999).

20. *Moyars*, 717 N.E.2d at 980. Employee-funded IRA's are subject to similar rules. *See, e.g.*, Wortkoetter v. Wortkoetter, 971 N.E.2d 685, 689 (Ind. Ct. App. 2012), which states:

> [A]lthough the IRA was established by Husband before the marriage, most of the appreciation occurred during the marriage. Additionally, the trial court was not required to set aside to Husband the value of the IRA, even though Wife made no contribution to its acquisition. Rather, the trial court was required to follow the statutory presumption absent evidence that an equal division would not be just and reasonable. We conclude that the court acted within its discretion when, in accordance with the statutory presumption, it declined to award Husband his IRA exclusively and, instead, equally divided all property of the parties.

Id. (citations omitted).

21. Hill v. Hill, 863 N.E.2d 456, 461 (Ind. Ct. App. 2007).

not vested in the employer-contributed portion of the retirement plan. An unvested interest in property is not divisible as a marital asset."[22]

In determining a property division, courts may consider whether, and to what extent, the spouse acquired the pension prior to the marriage. Tax penalties for early withdrawal from the pension plan can also be considered.[23] Valuing a pension can be difficult and there are several approaches.[24]

22. Harris v. Harris, 690 N.E.2d 742, 745 (Ind. Ct. App. 1998).

23. *See* Qazi v. Qazi, 546 N.E.2d 866, 873 (Ind. Ct. App. 1989) (finding that it was reasonable to allow husband to keep possession of his retirement account in order to avoid the tax consequences of liquidating prior to retirement age; in order to offset this distribution, husband was ordered to pay scheduled cash payments to wife over time). *But see* Irvine v. Irvine, 685 N.E.2d 67, 71 (Ind. Ct. App. 1997). Unlike the situation in *Qazi*, where the court found that the tax consequences of the distribution were speculative, the *Irvine* court found that the tax consequences were not speculative because the trial court had ordered husband to pay an immediate lump sum amount to wife, rather than scheduled payments spread out over time. *Id.* The Court stated that:

> review of the assets of the parties subject to a division under the terms of the agreement reveals approximately $150,000 in cash—leaving almost a $250,000 difference [since husband was ordered to pay wife lump sum amount of $392,385 in case]. In order for [husband] to immediately obtain $250,000 in cash, [husband] would have to liquidate his $614,348.12 pension plan . . . [T]here are not sufficient assets in the marital pot to allow [husband] to meet the trial court's plan of immediate distribution without liquidating his pension plan. Rather, the terms of the trial court's distribution plan necessarily require [husband] to liquidate the plan. Therefore, the tax consequences of early liquidation were not speculative and should have been considered.

Id.

24. The Supreme Court of Arkansas in *Gray v. Gray* stated:

> There are several ways of valuing a pension plan. One is the "immediate offset" method, which is advocated by Dan Gray in this case and which consists of reducing the lifetime value of the pension benefits to present value and awarding the marital share of that present value to the non-owning spouse in the form of cash or other property. The other method is the "deferred distribution" method, where the trial court does not divide the pension immediately but instead determines a percentage of the monthly pension benefit that the non-owning spouse is entitled to; the non-

Most future earnings of contingent benefits are also not divisible in Indiana. These include workers' compensation benefits intended to replace future wages, eventual proceeds from pending personal injury actions, and many disability pensions.[25] Similarly, educational degrees are not divisible in most states, including Indiana.[26] This is consistent with the general clean break principle in family law.[27]

2. Marital Home

Similar to pensions and other retirement benefits, the marital home is a major portion of a couple's property. In dividing the home, courts may examine who earned the marital house, whether it was earned before the marriage, or whether there was commingling of the parties' assets to pay the

> owning spouse then enjoys that share when the owning spouse begins drawing retirement.

Gray v. Gray, 101 S.W.3d 816, 822 (Ark. 2003) (citations omitted). Like with anything, there are advantages and disadvantages to each. *Id*. (outlining the advantages and disadvantages of both approaches).

25. The Supreme Court of Indiana has stated:

> [A] future income stream may be a marital asset to the extent that either marital assets were used to acquire the future income or the income is future compensation for past services, as opposed to replacement for lost earning capacity due to disability. But if both factors are absent, a disability income stream is not a marital asset.

Severs v. Severs, 837 N.E.2d 498, 500 (Ind. 2005).

26. *See, e.g.*, *In re* Marriage of Roberts, 670 N.E.2d 72 (Ind. Ct. App. 1996); Lauren F. Redman, *Domesticity and the Texas Community Property System*, 16 BUFF. WOMEN'S L. J. 23, 28 (2008).

27. Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1209-10 (1999) ("[T]he law currently expresses a preference for a 'clean break' at divorce."). *See also* Caddo v. Caddo, 468 N.E.2d 593, 593-94 (Ind. Ct. App. 1984), which stated:

> In its division of property the [trial] court awarded the marital residence to the wife and awarded the husband $24,000, "[s]aid payment to be non-interest bearing until due and payable and to become due and payable upon the happening of the first of the following contingencies: Wife remarries; The marital home is sold; or, The youngest child becomes emancipated."

Id. The Appellate court found "that expressing this contingency in terms of 'emancipation' renders the judgment too uncertain to meet" the objective "that property rights be settled with certainty at the time of the dissolution." *Id*. at 594.

mortgage or make improvements.[28] In Indiana, the marital home is divisible and may be sold to facilitate an appropriate distribution of property.[29]

However, there is always the argument that the custodial parent should keep the home so that the children do not have to relocate. Thus, a factor that may affect the award of the marital home is the "desirability of awarding the family residence or the right to dwell in the family residence."[30] This is in line with the national trend of limiting post-divorce changes for children,[31] with the goal being to protect the

28. *See* Brett Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69 (2006). Turner states:

> This article will examine the current state of American matrimonial law on classification and division of the marital home. It will conclude that the general rule set forth in the case law is correct. The marital home should not always constitute marital property; rather, it should be classified under the same set of rules that apply to other assets. Treating the marital home as marital property will not result in a better division of the marital home between divorcing spouses. It will instead provide a strong incentive for spouses who own separate property to avoid investing that property in the marital home—a result which will harm all families, married as well as divorced. When all consequences are properly considered, a better policy result is reached by rejecting special rules of classification aimed only at the marital home.

Id. at 69-70 (citations omitted). On the issue of commingling, see *infra* Part II.B.2.

29. *See* IND. CODE § 31-15-7-4 (2016).

30. *See* IND. CODE § 31-15-7-5(3) (2016).

31. 27C C.J.S. DIVORCE § 958 (2017) ("The homestead may be awarded to the custodial parent, either unrestricted as to time, or until emancipation of the children or the youngest child reaches a specified age."). *See also* Lee R. Russ, Annotation, *Divorce and Separation: Effect of Trial Court Giving Consideration to Needs of Children in Making Property Division*, 19 A.L.R.4th 239 (1983). Russ stated:

> [C]ourts have considered the needs of the parties' children in determining how the parties' marital property should be divided. . . . In disposing of the family home, which is often the sole or major asset of the parties, the courts have considered such factors as the need of the parties' children for a stable environment during the time of the parents' divorce, the desirability of keeping the children in the same school, the fact that mortgage payments are often less than

children implicated by a divorce.[32]

Indiana courts have split on the question of whether the house should be awarded to the custodial parent. In one case, it was "a just and reasonable division of property" to "allow Wife to remain in the marital residence for the benefit of the parties' children."[33] However, while it may be desirable to award the marital home to the custodial parent, the court need not necessarily do it.[34] Indeed, the outcomes of divorce cases on this topic vary.[35] Occasionally, there is a transition period to allow one spouse time to move or to permit home repairs.[36]

> what the custodial parent would pay for similar housing, and the financial ability of the parties to maintain two households, and have reached, under the particular circumstances of each case, differing conclusions as to the propriety of awarding the custodial parent the exclusive right to use the family home during the minority of the children or for other periods of time.

Id. at §§1[a], 2[a] (citations omitted).

32. *See, e.g.*, Kara Francis, *A Remedy Beyond Reach: The Stringent Standard in Illinois for Exclusive Possession of the Marital Home During Divorce Proceedings*, 63 DEPAUL L. REV. 803 (2014) (offering a useful discussion on the need to grant one party exclusive possession of the marital home in certain high-conflict divorce situations while dissolution proceedings are underway).

33. Krasowski v. Krasowski, 691 N.E.2d 469, 474 (Ind. Ct. App. 1998).

34. *In re* Marriage of Rupp, 449 N.E.2d 1164, 1166 (Ind. Ct. App. 1983).

35. *See* Swinney v. Swinney, 419 N.E.2d 996, 999 (Ind. Ct. App. 1981), which stated:

> [While] custody may well be enough by itself to support the custodial parent's use of the family residence for a period of time, [the court] feel[s] that fact alone will not support an award of the residence to the wife when the residence is, in essence, the sole marital asset. Without some other offsetting factor, such an award is not just and reasonable.

Id.

36. The Court of Appeals of Indiana in *Keown v. Keown* stated:

> The trial court ordered [wife] to make the repairs because they were "necessary for sale." Thus, the repair costs are a direct result of the trial court's order requiring [wife] to sell the residence . . . It was within the trial court's discretion to determine whether to reduce the marital property's value by this amount after determining that the repairs were necessary for sale.

Keown v. Keown, 883 N.E.2d 865, 870 (Ind. Ct. App. 2008). *See also* Webb v. Schleutker, 891 N.E.2d 1144, 1155 (Ind. Ct. App. 2008) (allowing a wife to remain living in the marital home for three months after the final dissolution).

Thus, the courts have discretion to order the residence to be sold.[37]

B. *Property Division Methods*

The second question regarding property division is how to divide the property once it is identified. The main guideline is fairness to the divorcing spouses.[38] Lawmakers have implemented different approaches to achieving fairness in divorce.

1. General Approaches

Legislators around the world have searched for the meaning of fairness in property division at divorce. There are two main approaches in the United States: equitable division and community property.[39]

A minority of states utilize community property, under which approach spouses hold property together during the marriage.[40] At divorce, this often results in an equal property

37. *See, e.g.*, Herron v. Herron, 457 N.E.2d 564, 567 (Ind. Ct. App. 1983). In that case, the wife claimed that the sale should be delayed for eight years while the children were still in the home. *Id.* However, this would have required husband to "continue making house payments in the interim, in addition to child support payments." *Id.* The house was the most valuable asset to be divided, with relatively little other property to be divided. *Id.* ("Thus, the court could not have awarded [wife] the house outright without giving her the lion's share of the marital property."); s*ee also* Melissa J. Avery, *The Marital Residence and Other Black Holes: Dealing with Real Estate in Divorce*, 53 RES GESTAE 30 (October 2009) (describing the options available for disposition of the marital residence, particularly when the housing market was performing poorly; the options discussed include sale of the home, refinance of the mortgage in order to buy out one spouse, or sale of the property at auction).

38. *See* Ryznar, *supra* note 12, at 117.

39. The details vary by state. *See, e.g.*, Mary Moers Wenig, *Increase in Value of Separate Property During Marriage: Examination and Proposals*, 23 FAM. L. Q. 301, 303 (1989).

40. Wendy Goffe, Yours, Mine and Ours: An Introduction to the Laws of the U.S. Community Property States, Remarks at Estate Planning Essentials: Marital Deductions Post-DOMA and Community Property (July 9, 2014) (transcript available at http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/VCWB0709_chapter_02_thumb.pdf). Goffe stated:

> Nine states use a community property system to determine ownership and management of property of married couples . . . This outline identifies those core principles and

division between the spouses.[41]

However, most states are common law, where the spouses hold their property during the marriage separately by default.[42] For these states, the principle that governs property division is equitable distribution, "which seeks an equitable, but not necessarily equal, division between the spouses;"[43] in other words, fairness is sought in the property division.[44]

Equitable distribution is like partnership dissolution: although the partners have a partnership stake, the stakes are not necessarily equal.[45] At the dissolution, the partners receive shares equal to their contributions.[46] In the marital context, however, contributions need not be financial and include child care.[47]

In applying the equitable distribution approach, courts may consider the length of the marriage, the age and health of the spouses, as well as the vocational skills, income, liabilities, and needs of each spouse.[48] Courts have significant discretion in property division, with their decisions often being fact-specific.[49]

> points out the major variations in the different state systems. The outline addresses characterization of property as community or separate, management authority over the property by the spouses and, to a limited extent, creditor rights in the property.

Id. at 39.

41. *See, e.g.*, CAL. FAM. CODE §§ 2550-56 (2017). In the community property system, each spouse has an interest in the community property, as opposed to separate spousal property holdings. Ira Mark Ellman, O'Brien v. O'Brien*: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949, 951 (2007).

42. *See supra* Part II.B.1.

43. Ryznar, *supra* note 12, at 119.

44. Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4th 481 (1985). *See also* 2 MARITAL PROP. L. § 43:1 (2d ed. 2016) ("Most jurisdictions have enacted statutes calling for property to be divided equitably, justly, fairly, or the like, without regard to which party holds legal title.").

45. Ryznar, *supra* note 12, at 120. TURNER, *supra* note 19, at § 8:1.

46. Ryznar, *supra* note 12, at 120.

47. *Id.* at 120-21. *See also* TURNER, *supra* note 19, at § 8:10.

48. Ryznar, *supra* note 12, at 121. *See, e.g.*, CONN. GEN. STAT. §§ 46b-81-82 (2016); 750 ILL. COMP. STAT. 5/504 (2016). *See also* 3 BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY, Appendix A (3d ed. Supp. 2016).

49. Ryznar, *supra* note 12, at 121.

However, debate continues regarding the fairest property division at divorce.[50] Disagreement between spouses on this question has also fueled much litigation.[51]

2. Indiana Approach

Some jurisdictions have defaulted to the meaning of equitable as equality between the spouses, with the opportunity to rebut an equal division. These jurisdictions include some equitable distribution states, such as Indiana.[52]

According to the Indiana family law code,"[t]he court shall presume that an equal division of the marital property between the parties is just and reasonable."[53] Thus, the Indiana legislature has decided that the starting point should be an equal division, and that courts should attempt to achieve it.[54] An equal property division can be reached by several arrangements of property.[55]

50. *Id.* at 120.

51. *Id. See, e.g.*, Wendt v. Wendt, No. FA96 0149562 S, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998), *aff'd*, 757 A.2d 1225 (Conn. App. Ct. 2000).

52. Katharine Baker, Professor of Law at Chicago-Kent College of Law, stated:

> Gradually, though, courts have reached consensus on an understanding of equitable. It means equal—usually. Over time, relying in part on norms from some community property states, in part on various theories of partnership and promise, but also just craving a baseline from which to operate, many states have developed presumptions of a fifty-fifty split. Six states codify the fifty-fifty division presumption in their statutes, but many more have adopted the rules judicially.

Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 334 (2012).

53. IND. CODE § 31-15-7-5 (2016).

54. The adoption of the yardstick of equality by the House of Lords in *White v. White*, [2001] 1 A.C. (HL) 596, is among the most internationally recognized equality standards, resulting in London's reputation as the capital of divorce in the world. *See* Ryznar, *supra* note 12, at 115.

55. IND. CODE § 31-15-7-4 (b) states:

> (b) The court shall divide the property in a just and reasonable manner by:
>
> (1) division of the property in kind;
>
> (2) setting the property or parts of the property over to one (1) of the spouses and requiring either spouse to pay an

However, either spouse may rebut the presumption of equal division.[56] Specifically, there are five factors listed in the Indiana Code that may be presented to the court in order to rebut the presumption.[57] The trial court should consider all of these statutory factors in dividing property, but need not

> amount, either in gross or in installments, that is just and proper;
> (3) ordering the sale of the property under such conditions as the court prescribes and dividing the proceeds of the sale; or
> (4) ordering the distribution of benefits described in IC 31-9-2-98(b)(2) or IC 31-9-2-98(b)(3) that are payable after the dissolution of marriage, by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt.

Id.

56. *See, e.g.*, Weigel v. Weigel, 24 N.E.3d 1007, 1011 (Ind. Ct. App. 2015) ("The burden of proving the value of marital assets is, and should be, on the parties to the dissolution.") (quoting Houchens v. Boschert, 758 N.E.2d 585, 588 (Ind. Ct. App. 2001)); Morgal-Henrich v. Henrich, 970 N.E.2d 207, 211 (Ind. Ct. App. 2012) ("A party seeking to rebut the presumption of equal division of marital property bears the burden of proof in doing so."); 14 J. ERIC SMITHBURN, INDIANA PRACTICE, FAMILY LAW § 10:17 (Supp. 2016) ("The burden is on the parties, not the court, to produce evidence of the value of the marital property at the dissolution hearing.").

57. IND. CODE § 31-15-7-5 states:

> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
> (5) The earnings or earning ability of the parties as related to:
> (A) a final division of property; and (B) a final determination of the property rights of the parties.

Id. *See also* SMITHBURN, *supra* note 56, at § 10:8 (providing a useful discussion of marital property division factors).

explicitly address all of them in every case.[58]

The first statutory factor considers each spouse's contribution to the acquisition of the property, regardless of whether the contribution produced income.[59] The contribution to the marriage need not be financial, allowing courts to reward the caregiving role that one spouse may have undertaken in the marriage.[60] This is a common feature in other state laws as well.

The second factor to rebut an equal division in Indiana is if a spouse owned assets before the marriage, or received them through gift or inheritance.[61] However, it may be difficult to

58. For example, in one case, an appellate court could not infer from the trial court's orders:

> that it considered all of the statutory factors . . . There is nothing in either order to suggest that the trial court considered the present economic circumstances of each spouse, the future earnings ability of each spouse, or the conduct of the parties during the marriage as related to the disposition or dissipation of their property.

Montgomery v. Faust, 910 N.E.2d 234, 239 (Ind. Ct. App. 2009). Consequently, the Court found that the trial court had committed error and remanded the case. *Id.* at 240.

59. IND. CODE § 31-15-7-5(1) (2016).

60. For example, one Indiana court stated that:

> [t]he income-producing efforts and intangible contributions of both spouses unite to facilitate the acquisition of marital property. [Husband's] contribution of a greater share of funds to the marriage does not necessarily mean that he made a larger contribution to the acquisition of the marital property. Therefore, the trial court's unequal division of marital property cannot be sustained on the rationale that [Husband] earned more income than [Wife] during the marriage.

Maloblocki v. Maloblocki, 646 N.E.2d 358, 363 (Ind. Ct. App. 1995).

61. IND. CODE § 31-15-7-5(2) (2016). Examples in Indiana case law of equal division being rebutted due to the origin of the property—whether premarital or an inheritance—include a case where the disputed funds were acquired 11 years before entering in a four-year marriage that were never commingled with other assets; on the contrary, the funds were earmarked specifically for future medical expenses arising out of a back injury. Doyle v. Doyle, 756 N.E.2d 576, 580 (Ind. Ct. App. 2001). In another case, the Indiana Court of Appeals affirmed the lower court's award of 63% of the total assets to the husband's estate and only 37% of the assets to the wife when the husband had owned property worth approximately $440,000 before the marriage, and the wife owned property worth approximately $95,000 before the marriage. Beard v. Beard, 758 N.E.2d 1019, 1026 (Ind. Ct. App. 2001).

apply this factor in cases of transmutation, which is when separate property changes its classification to marital property, or vice versa.[62]

Transmutation can occur by agreement of the spouses, by retitling an asset in both spouses' names, or by giving a gift to the other spouse.[63] In a few states, transmutation may occur when both spouses use an asset owned separately by only one of the spouses.[64] A common form of transmutation results from

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In another Indiana case, the court found that:

> while Husband brought various furnishings and personal items into the marriage, Wife also contributed furniture and curtains to the marriage. There was no evidence documenting the value of the savings account at the time of the marriage aside from Husband's unsubstantiated recollection, let alone whether it was even in existence at the time of the divorce. Indeed, the majority of the items Husband had acquired prior to the marriage and for which he now seeks compensation had long since vanished and presumably, in the twenty-five years since then, been replaced by items acquired jointly by the parties . . . It was within the trial court's prerogative to determine that the value of the property Husband brought into the marriage was not of such great value as to substantially outweigh the other statutory factors and mandate an even greater disparity in the division of marital assets.

Akers v. Akers, 729 N.E.2d 1029, 1034 (Ind. Ct. App. 2000).

62. "Another factor that can complicate the classification of property is transmutation or commingling of separate property." Amanda Wine, Comment, *Treatment of Personal Injury Awards During Dissolution of Marriage*, 20 J. AM. ACAD. MATRIM. LAW. 155, 177 (2006).

63. Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW. 335, 340 (2003).

64. *See, e.g.*, *id.* at 341. For example, in one Rhode Island case, a husband placed some furniture he had inherited from his father in storage, and some he placed in the marital home. Quinn v. Quinn, 512 A.2d 848, 851 (R.I. 1986). The court subsequently held that the furniture in storage was his separate property because he had inherited it, whereas the furniture in his marital home had transmuted into marital property because the wife also used it. *Id.* Consequently, the wife was awarded all of the furniture in the home. *Id.* In many cases of transmutation, however, courts analyze the intent of the spouses and whether they desired the transmutation. For example, transmutation may be defeated by proof that separate deposits into marital accounts were made "as a matter of convenience, without the intention of creating a beneficial interest, and that the funds in the account originated solely in the separate property of the spouse who claims the separate interest." Chamberlain v. Chamberlain, 808 N.Y.S.2d 352, 356 (N.Y. App. Div. 2005) (citations omitted).

the commingling of separate and marital property to the extent that they lose their identities, such as money in bank accounts.[65] In such an event, all commingled property becomes marital property.[66] Simply stated, separate and marital property are commingled when the two types of property are mixed together such that they lose their identities, making all the resulting property marital property.[67]

Importantly, if a spouse can trace an existing asset through its mutations to its original separate property source, he or she may keep the asset as separate property.[68] Tracing is essentially a procedure that determines the origin of commingled property or the source of funds used to acquire an asset during the marriage. Property can be traced in several ways, depending on the methods permitted by each state.[69] Nonetheless, absent transmutation, a spouse could retain property at divorce that was owned before the marriage, or

65. J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989).

66. Morgan & Snyder, *supra* note 63, at 341.

67. However, some courts will not apply this commingling rule if the separate property significantly outweighs the marital property, which is the *de minimis* exception. *See* Oldham, *supra* note 65, at 220. Therefore, if a spouse deposits $10 of marital money into a separate bank account holding $10,000 of the other spouse's separate money, the courts will not consider the entirety of the account to have transmuted to marital property. *See id.* at 226.

68. In many states, the general rule is that commingled marital and separate funds become marital property unless a spouse can explicitly trace his or her separate property. Indeed, the natural course of a marriage often unintentionally produces complex commingling situations that obscure the character of the assets. *See id.* at 223-24.

69. *See, e.g.*, Joan F. Kessler et al., *Tracing to Avoid Transmutation*, 17 J. AM. ACAD. MATRIM. LAW. 371 (2001). The nine community property states have developed the most complex tracing rules, but these rules are also used in equitable distribution states. Each state may also use different tracing techniques in different circumstances. For example, a spouse may trace commingled property to separate property by showing that, at the time of purchase, there was no marital property, so the purchase must have necessarily been made with separate funds. Similarly, the "total recapitulation" method permits a spouse to prove that a specific asset was purchased with separate funds by showing that marital expenses exceeded marital income over the entire course of the marriage. *Id.* at 377. Alternatively, in "direct tracing," the sole-owning spouse can produce records showing that a particular purchase was made with separate funds. *See, e.g.*, *id.*

received through gift or inheritance.

The third statutory factor in Indiana used to rebut an equal division of property upon divorce is the economic circumstances of each spouse after the divorce.[70] This includes the desirability of awarding the family residence or its use to the spouse having custody of the children.[71] This factor facilitates judicial discretion regarding the appropriate property division between divorcing spouses.

The fourth factor to rebut an equal division upon divorce in Indiana is the spouses' conduct during the marriage in regards to the disposition or dissipation of their property.[72] Here, the vestiges of a fault regime are clear: bad behavior by a spouse used to impact property distribution at divorce.[73] Although there are still a few states that continue to allow fault to influence the property division, Indiana has joined the majority that does not consider fault when dividing assets,[74] except in the case of dissipation of marital assets.[75] This illustrates the

70. IND. CODE § 31-15-7-5(3) (2016).

71. *See supra* Part II.

72. IND. CODE § 31-15-7-5(4) (2016).

73. Professor Cohen of Ono Academic College, Law School, stated:

> In family law, vagueness surrounds this term ["fault"]. Nevertheless, "fault" can, in principle, be divided into three categories: "economic fault," expressed by inappropriate economic behavior, such as lack of contribution to the family effort, waste of the family's assets, etc.; "violent fault," expressed in physical or psychological violence of one spouse towards the other; and, finally, "sexual fault," expressed by inappropriate sexual behavior of one of the spouses, primarily a romantic extramarital relationship.

Yitshak Cohen, *Extramarital Relationships and the Theoretical Rationales for the Joint Property Rules—A New Model*, 80 MO. L. REV. 131, 133-34 (2015).

74. *See* Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 218 n.29 (2001) (citing Peter Nash Swisher, *Reassessing Fault Factors in No-Fault* Divorce, 31 FAM. L. Q. 269, 301-02 n.113 (1997)).

75. Nonetheless, the Indiana courts cannot take dissipation of assets to the extreme. One Indiana Court of Appeals reversed and remanded the trial court's decision, determining that:

> [t]he tenor of the court's statement is punitive and reflects that the court considered Husband responsible for the breakup of the marriage. However, the conduct of the parties during the marriage, aside from conduct relating to

uniqueness of economic fault, whose adverse effect on a spouse is worthy of a judicial remedy.

The Indiana Court of Appeals has characterized waste and misuse of marital assets as the hallmarks of dissipation, noting that the frivolous or unjustified spending of marital assets, including the concealment of marital property, qualifies as dissipation:

> The test for dissipation is whether the assets were actually wasted or misused. . . . In determining whether dissipation has occurred, a court should consider: (1) whether the dissipating party had the intent to hide, deplete, or divert the marital asset; (2) whether the expenditure benefited the marital enterprise or was made for a purpose entirely unrelated to the marriage; (3) whether the transaction was remote in time and effect or occurred just before the filing of a divorce petition; and (4) whether the expenditure was excessive or de minimis.[76]

The final factor in rebutting equal division between divorcing spouses in Indiana is the earnings or earning ability of the parties as related to a final division of property and a final determination of the property rights of the parties.[77] In this category, a spouse's health issues[78] or lengthy break from paid work to care for the family can have an impact on the property division.[79] This last factor concedes that the concept

> the disposition or dissipation of property, is irrelevant to the court's division of property.

Norton v. Norton, 573 N.E.2d 941, 944 (Ind. Ct. App. 1991) (citing *In re* Marriage of R.E.G., 571 N.E.2d 298, 301 (Ind. Ct. App. 1991)).

76. Estudillo v. Estudillo, 956 N.E.2d 1084, 1094 (Ind. Ct. App. 2011) (citing Goodman v. Goodman, 754 N.E.2d 595, 598 (Ind. Ct. App. 2001)).

77. IND. CODE § 31-15-7-5(5) (2016).

78. Irwin v. Irwin, 406 N.E.2d 317, 319 (Ind. Ct. App. 1980) (determining that the trial court did not err in considering the wife's ill health, which was relevant to her earning ability and economic circumstances).

79. *In re* Marriage of Snemis, 575 N.E.2d 650, 653 (Ind. Ct. App. 1991). Here, the trial court did not commit error by failing to award Husband more than 50 percent of the marital property, "considering Wife's long hiatus from

of fairness cannot be distilled into an oversimplified formula, and equal division is not necessarily the fairest approach in light of certain facts specific to individual marriages.

Thus, applying any of these factors may result in an unequal property division in an Indiana divorce.[80] In other words, despite the presumption of equal division, a more nuanced approach is possible with the various statutory factors to rebut it.

As a result, judges have significant discretion in Indiana on matters of property division, illustrating that an equal division may not achieve a fair result in every case. The lower court must only provide its reasons for an unequal division,[81] which receives deference on appeal.[82]

The division of assets between the spouses is final. Modification of a court's property award is difficult. Usually, there must be a significant reason, like fraud, for a court to set aside a property award.[83]

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the work force in order to serve as a homemaker, an exclusive role which Husband encouraged; Wife's homemaking contributions to the marriage; her physical limitations and age; and Husband's greater earning ability as a business owner." *Id.*

80. In one case, the appellate court affirmed an allocation of marital assets as consistent with these statutory factors, which supported an unequal property division. *See* Hitchcox v. Hitchcox, 693 N.E.2d 629 (Ind. Ct. App. 1998). The trial court determined that the wife merited more than an equal division of the marital property based on the extent to which she supported both parties during the marriage, that she had acquired "nearly all of the marital assets prior to the marriage, that her financial contributions to the maintenance of those assets exceeded [the husband's] contributions, that some marital assets were disposed of in [the husband's] unprofitable business, and that [the husband] now has some earning ability." *Id.* at 632.

81. *See* Berger v. Berger, 648 N.E.2d 378, 381 (Ind. Ct. App. 1995) ("[T]he trial court may divide the marital property unequally provided the court sets forth its reasons for so doing."). *See also* Campbell v. Campbell, 993 N.E.2d 205, 212 (Ind. Ct. App. 2013) ("A trial court may deviate from an equal division so long as it sets forth a rational basis for its decision.").

82. *See, e.g.*, Love v. Love, 10 N.E.3d 1005 (Ind. Ct. App. 2014).

83. *See, e.g.*, IND. CODE § 31-15-7-9.1 (2016) ("(a) The orders concerning property disposition entered under this chapter (or IC 31-1-11.5-9 before its repeal) may not be revoked or modified, except in case of fraud. (b) If fraud is alleged, the fraud must be asserted not later than six (6) years after the order is entered.").

C. *Alimony*

Alimony, known as spousal support or maintenance in some states including Indiana, is the payment of a lump sum or on a continuing basis by one spouse for the support and maintenance of the other spouse after divorce.[84] It is awarded in addition to property division and child support. Although it has gendered roots, either spouse may receive maintenance at divorce today.[85]

Alimony has become unpopular in many states, with limits placed on its availability. For example, in Indiana, maintenance is available only in three circumstances: 1) for as long as a spouse cannot support himself or herself due to a physical or mental incapacity, 2) for as long as appropriate when a spouse cannot support himself or herself due to a physically or mentally incapacitated child, or 3) up to 3 years of "rehabilitative maintenance" based on a) the educational level of each spouse, b) interruptions in a spouse's education, training, or employment based on homemaking or caregiving responsibilities, c) "the earning capacity of each spouse," and d) "the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment."[86] This represents the trend of limits placed on alimony by state legislatures in recent years.

Courts often prefer property division to alimony because it provides a clean break.[87] Unlike an alimony award, a property

84. *See, e.g.*, 24A AM. JUR. 2D DIVORCE AND SEPARATION § 668 (Supp. 2017).

85. In *Orr v. Orr*, 440 U.S. 268 (1979), the U.S. Supreme Court held that Alabama's sex-based alimony law, reflecting unjustified stereotypes, violates equal protection. *See id.*

86. IND. CODE § 31-15-7-2 (2016). However, this provision has not eliminated litigation on maintenance. For example, in the time period between October 1, 2012 and September 30, 2013, litigants brought several cases on maintenance in the Indiana courts. *See, e.g.*, Banks v. Banks, 980 N.E.2d 423 (Ind. Ct. App. 2012); Alexander v. Alexander, 980 N.E.2d 878 (Ind. Ct. App. 2012).

87. *See, e.g.*, Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1209-10 (1999). Professor Bryan stated:

> [T]he law currently expresses a preference for a "clean break" at divorce. At most, the wife is entitled to short-term rehabilitative maintenance; judges disfavor permanent maintenance because the wife's continued dependence on

award is not ongoing. Although it is not always easy for one spouse to be awarded alimony, modification or termination by the other spouse is difficult.[88]

III. EMPIRICAL ANALYSIS

Given this legal framework, the next step is to examine whether Indiana judicial decisions stay within this framework. In other words, the question is how the courts apply the statutory law. While individual cases have been decided on these issues, no data analysis on a compilation of them has been done. Yet, such an analysis is important because it shows the level of discretion courts use and how they use it.

> her husband interferes with the clean break between spouses. Wives, or their attorneys, cannot successfully negotiate for maintenance that judges will not award.

Id. *See also* Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L. Q. 105 (2007). Professor Glennon of Temple University stated:

> The coparenting approach to post-dissolution parenting falls into sharp conflict with the economic clean break model, under which divorced persons and cohabitants who part ways are entirely separate individuals, unencumbered by ongoing legal or financial relationships, free to build new lives and make a fresh start. Under this view, alimony after divorce is disfavored, and new economic disadvantages that arise from events that occur post-divorce are legally irrelevant.

Id. at 105-06.

88. *See, e.g.*, IND. CODE § 31-15-7-3 (2016):

> Provisions of an order with respect to maintenance ordered under section 1 of this chapter (or IC 31-1-11.5-9(c) before its repeal) may be modified or revoked. Except as provided in IC 31-16-8-2, modification may be made only:
> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
> (2) upon a showing that:
> (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

Id.

A. *The Empirical Data*

The data for this Article consists of divorces filed during three months in 2008 in Marion County, Indiana that involved minor children.[89] The number of these cases totaled approximately 110.[90]

These divorce records were coded for multiple variables. These include who filed for the divorce, who received the marital home, how the pension was divided, how many children resulted from the marriage, who received custody of the children, and how parenting time was divided.[91]

In approximately half of the cases in the sample, the marital home was owned.[92] There was no guaranteed link between child custody and the award of the home or its use.[93]

Approximately half of the couples in the sample had a pension to divide.[94] In approximately half of the couples with pensions, each member of the couple had an individual pension. In the vast majority of these cases, each member kept the full amount of that pension. In other words, pensions were generally not divided if each member of the couple had a pension. In many of the remaining couples with pensions, only one member of the couple had a pension, and it was divided between the divorcing spouses, often with each spouse taking half.[95]

When it comes to spousal support, out of the approximately 110 cases, the courts awarded it only in three cases.[96] All of the recipients of these awards were women.[97]

B. *The Implications*

Given the statutory background, the question is how the courts have been dividing property between divorcing couples

89. The data are on file with the author [hereinafter Data on file with author].
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. Data on file with author, *supra* note 89.
95. *Id.*
96. *Id.*
97. *Id.*

in the pursuit of fairness. Many people's wealth consists of two major assets: the marital home and retirement funds; thus, it is important to look at the data regarding these two factors when considering property division at divorce.[98]

As seen in the empirical data, the custodial parent did not necessarily receive the marital home. Thus, despite the option to link the house to child custody, courts more directly addressed children in child support determinations.

Regarding their retirement, divorcing spouses were generally able to keep their own pensions in full if both of them had a pension. Otherwise, the pension would often be divided equally between the divorcing spouses. This shows not only that the courts adhered to the Indiana legislature's understanding of fairness as an equal property division, but also that the proper division often required splitting the pension when there was only one.

Despite the trend towards equal property division, there was no formulaic approach that the Indiana courts generally used to divide the property between the spouses to achieve an equal distribution. It is clear that the details of the property division remained in the discretion of the courts today in Indiana, as in many other states.

The Indiana courts were far more mechanical in limiting spousal support, applying the restrictions set forth in the Indiana Code. Spousal support was awarded in only a few cases, with Indiana joining those states limiting it to special circumstances.

In sum, Indiana courts followed legislative guidance, both in terms of reducing maintenance and starting the property division at an equal division. While predictability and consistency are gained by legislative formulae, the courts can accomplish individual justice in divorce cases by having significant discretion, as seen through the property awards.[99]

98. *See supra* Part II.

99. "In deciding between a system of fixed rules and one of judicial discretion in family law disputes, the key issue on which to focus is the extent to which the family law system provides justice for the individual parties." Theodore K. Cheng, *A Call for a New Fixed Rule: Imposition of Child Support Orders Against Recipients of Means-Tested Public Benefits*, 1995 ANN. SURV. AM. L. 647, 653 (1996).

Furthermore, although the Indiana legislature has decided that an equal division is fairest to the divorcing couple, an equal property division can be reached by several arrangements of property, over which the courts maintained their discretion.

Indeed, individual justice is the aim of divorce law. Yet, the standard for property division in divorce is fairness, and there is no universal equation or definition of fairness.[100] Thus, legislative intervention in family law formulae has its limits because the facts vary among divorce cases.[101] While it is relatively straightforward to legislate an equal property division starting point, it is far more difficult to legislate beyond this because there are so many different property scenarios.

This necessarily preserves a role for the judiciary. Creating completely formulaic rules to property division at divorce, devoid of any judicial discretion, would be a major departure from the current law and would require a reimagining of the current approach to family law.[102] Indeed, family law is on the bridge between legislative formula and judicial discretion, with a role for each.

In addition to the role for the judiciary, there is a role for contracting by a couple, albeit with the court's oversight. Even couples with a settlement agreement must receive approval from the courts.[103] Just as the government regulates

100. *See supra* Part II.

101. *But see* Cheng, *supra* note 99, at 647 ("Throughout the 1980s, there was a growing consensus that the broad judicial discretion exercised in family law disputes was causing dire socio-economic consequences for the parties involved and undermining the orderly and equitable resolution of disputes in child custody, child support, alimony, and property distribution.").

102. For an excellent discussion of the reimagining family law, see JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014).

103. Professor Sharp of University of North Carolina at Chapel Hill stated:

> Within the past two decades, however, there has been an even greater demand for a minimizing of such state intervention and for a more unfettered application of simple contract principles to marital agreements . . . Separation agreements . . . have tended to be swept into both the argument and the conclusion that marital contracts should, in general, be accorded the same judicial treatment as any other contract.

marriage,[104] it regulates divorce.

Nonetheless, couples enjoy strong contractual autonomy in the United States,[105] and they have an incentive to use it in the current legal framework. As seen in the empirical analysis, it is far easier to predict that a property division will resemble an equal division than how that division will be achieved. The court's priority is to get an equal division, rather than any particular division. If couples want a particular property division guaranteed, then they should enter into a premarital agreement. However, often people's optimism about marriage prevents them from entering into such agreements.[106]

Alternatively, couples might be encouraged to settle their divorce after their marriage ends, instead of before, to retain control. These empirical results help illustrate for them what is fair in the property division according to the Indiana courts in the context of the statutory framework.

IV. CONCLUSION

This Article analyzes empirical data from divorce cases filed during three months in 2008 involving children in Marion County, Indiana to find patterns in the outcomes of divorce cases on property division, particularly in regard to retirement savings and the marital home. The goal is to examine not only what the courts are doing in family law, but also to highlight the underlying law to determine the correlation between the family law code and judicial outcomes.

The results of this empirical work are a helpful glimpse into the meaning of justice in divorce cases today. While it

Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1401-03 (1984).

104. For example, relatives closer than first cousins cannot marry, and first cousins can marry only once they reach sixty-five years of age. IND. CODE § 31-11-1-2 (2016). Other government regulations and restrictions on marriage have fallen over the decades. *See, e.g.*, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (holding state bans on same-sex marriage unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (holding state bans on interracial marriage unconstitutional).

105. *See* Ryznar & Stepień-Sporek, *supra* note 14.

106. *See* Williams, *supra* note 3, at 738.

does seem that Indiana courts are following the state statutes limiting maintenance awards and using an equal division as a starting point, there is no easy formula or pattern to predict exact property divisions. If couples want more predictability, they should enter into agreements, either at the beginning or end of their marriage. These lessons hold for many other states who have a similar legal framework as Indiana.

The results of an empirical analysis can help shape the policy debate and inform state legislators who might want to see how their laws are being implemented. Most importantly, they can help judges know what is happening in the landscape of family law, such as whether they are being consistent and whether they are doing justice in the way that they would like.