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NOTES

PROPERTY DIVISION AND ALIMONY AWARDS: A SURVEY OF STATUTORY LIMITATIONS ON JUDICIAL DISCRETION

INTRODUCTION

The emphasis in modern divorce statutes has shifted from the awarding of alimony to the division of property between the spouses. With the recent enactment of statutes in New York¹ and Pennsylvania,² every state in the Union now provides for some form of property division upon divorce.³ Under old statutory schemes, alimony was the norm and was given to the wife almost as a matter of course.⁴ Although alimony awards are still available in every state except Texas,⁵ various restrictions are now placed on them.⁶

The trend toward property division and away from alimony is a reflection of a fundamental change in society's conception of marriage and the duties running from one spouse to another.⁷ A married woman is "no longer seen as a subordinate in a master-servant relationship, but as a person who enters a voluntary association with the implication of equal rights, duties, and contributions."⁸ Today,

1. N.Y. Dom. Rel. Law § 236 pt. B (McKinney Supp. 1980-1981).

2. Pa. Stat. Ann. tit. 23, § 401 (Purdon Supp. 1981-1982).

3. See *infra* pt. III.

4. See *infra* notes 35-39 and accompanying text. Alimony awards cannot be said to have been the norm in community property jurisdictions, which have always divided the marital property rather than focusing on awards of alimony. See *infra* notes 41-52 and accompanying text.

5. See *infra* note 71.

6. See *infra* pt. II(A).

7. Several factors can be seen as having contributed to these changes, including: (1) the women's liberation movement, which stresses the equality of the sexes in all phases of American life, see generally C. Bird, *What Women Want* (1979); (2) the Supreme Court's decisions on the issue of sex discrimination, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (declaring statutes providing alimony only to the wife unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (prohibiting U.S. armed services from discriminating between male and female service members in methods used to award dependent's allowances); (3) the Uniform Marriage and Divorce Act, 9A U.L.A. 91 (1979); see *infra* pt. I(B); and (4) inflation, which has forced more and more women to work after marriage. In 1970, 40.8% of married women living with their husbands were employed. In 1979, the figure was 49.4%. U.S. Bureau of the Census, *Statistical Abstract of the United States* 402 table 668 (101st ed. 1980) [hereinafter cited as *Statistical Abstract*]. During the same time period, the dollar's purchasing power, as measured by the Consumer Price Index, dropped approximately 46%. See *id.* at 476 table 792.

8. Weyrauch, *Metamorphoses of Marriage*, 13 *Fam. L.Q.* 415, 418 (1980). As early as 1905, one court recognized two views of marriage and the obligations created by divorce: (1) A spouse acquires a right "of the same character as the right of

commentators,⁹ courts¹⁰ and legislatures¹¹ view marriage as a "partnership of co-equals,"¹² which on divorce is to be liquidated.

The new statutes, like the old ones, direct the court to exercise its judicial discretion in awarding alimony and making property divisions.¹³ "Judicial discretion is probably nowhere more intimately connected with human relations, nor is it given freer rein" than in this sensitive area.¹⁴ Although some of the new statutes more successfully circumscribe judicial discretion than did the old ones, abuse of discretion remains a problem. Appellate courts have noted that the problem

support . . . [lost] by the dissolution of the marriage;" (2) a spouse is entitled to a settlement of "the property rights of the parties and . . . a distribution of the assets of the *quasi* partnership thitherto existing." *Wilson v. Hinman*, 182 N.Y. 408, 411, 75 N.E. 236, 237 (1905), *discussed in* Kelso, *The Changing Social Setting of Alimony Law*, 6 Law & Contemp. Probs. 186, 194-95 (1939).

9. Freed & Foster, *Economic Effects of Divorce*, 7 Fam. L.Q. 275, 277 (1973) ("It is fair, to conclude that criteria for property distribution, and to a lesser extent alimony, has become 'non-fault' oriented, and the current emphasis is upon economic factors and the trend is toward an approach analogous to the dissolution of a partnership.") [hereinafter cited as Freed & Foster I]; Foster, *Divorce Reform and the Uniform Act*, 18 S.D. L. Rev. 572, 591 (1973) ("[M]odern marriage is a partnership of co-equals. The family assets accumulated during the marital partnership and attributable to its functioning and division of labor ordinarily should be equally divided upon divorce . . ."); Weyrauch, *supra* note 8, at 419 ("The ideal of equality of bargaining power merges inevitably into legal theories of marriage as not just a contract, but a copartnership for mutual benefit and profit."); Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. Rev. 493, 493 (1978) ("[T]he marital relationship involves an economic partnership in which the spouses equally share the burdens and responsibilities of both marriage and dissolution.") [hereinafter cited as *Rehabilitative Spousal Support*].

10. *E.g.*, *Neff v. Neff*, 386 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980) ("marriage may indeed be a partnership in the economic area"); *Wolfe v. Wolfe*, 46 Ohio 2d 399, 413, 350 N.E.2d 413, 422 (1976) (a divorce proceeding is "an action to dissolve, windup and distribute the assets and liabilities of a partnership").

11. *E.g.*, Cal. Civ. Code § 4800(a) (West Supp. 1981) (community property is to be divided equally on divorce in the absence of a written agreement or oral stipulation in open court to the contrary); Idaho Code § 32-712(1)(a) (Supp. 1981) (property to be divided equally unless compelling reasons exist); *see* Executive Memorandum from Governor Hugh L. Carey, *Husband and Wife—Equal Treatment in Support Obligations, Matrimonial Actions*, 1980 N.Y. Laws 1863 ("marriage relationship is also an economic partnership").

12. Foster, *supra* note 9, at 591; *cf.* Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. Fla. L. Rev. 221 (1974) (applying Uniform Partnership Act to liquidation of assets upon divorce, but limiting the discussion to the situation where the husband owns his own business, not where he is a wage earner).

13. *E.g.*, D.C. Code Encycl. §§ 16-910, -912 (West Supp. 1978-1979); Iowa Code Ann. § 598.21 (West Supp. 1981-1982); R.I. Gen. Laws §§ 15-5-16, -16.1 (Supp. 1980).

14. Cooley, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 Law & Contemp. Probs. 213, 213 (1939).

of unchecked discretion is aggravated by the inadequacies of the trial court records,¹⁵ caused by insufficient findings of fact and conclusions of law by the courts, and lack of statutory provision for financial disclosure. Some discretion is necessary because each case must be decided on its own facts and equity requires flexibility.¹⁶ Similar situations in the same state, however, should not lead to vastly different results depending on which judge or jury hears the case. Guidelines can and should be included in a divorce statute to provide for uniformity of decision within each state and to give lower court judges a framework within which discretion is to be exercised. These guidelines, however, should be addressed to the specific purpose that alimony or property division is to serve. As the Nebraska Legislature has stated,

[w]hile the criteria for reaching a reasonable division of property and a reasonable amount of alimony may overlap, the two serve different purposes The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate.¹⁷

The purpose of this Note is to examine the statutory powers granted to the courts to divide property and award alimony in the absence of a written settlement agreement.¹⁸ The Note analyzes the guidance provided by the alimony and property division provisions of the statutes on such questions as what marital property is and what property is to be divided between the parties. In addition, it discusses the restrictions placed on the granting of alimony and the factors to be considered in deciding the amount of alimony and in making the property division. The guidance provided by these factors is examined to determine whether or not they are appropriate considerations for an award of alimony or for a division of property. It is then suggested that certain restraints be placed on judicial discretion by including provisions for financial disclosure and written findings of fact in all divorce statutes, thereby providing a meaningful record for appellate review.

15. *Steele v. Steele*, 36 N.C. App. 601, 602, 244 S.E.2d 466, 468 (1978); *see In re Butler*, 543 S.W.2d 147, 149 (Tex. Civ. App. 1976), *overruled on other grounds*, *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977).

16. W. Walsh, *A Treatise on Equity* 43 (1930); *see R. Newman, Equity and Law* 15 (1961).

17. Neb. Rev. Stat. § 42-365 (Supp. 1980).

18. Every state in the Union allows a couple to settle the division of property by written agreement on divorce. *E.g.*, Ill. Ann. Stat. ch. 40, § 502 (Smith-Hurd 1980); Ind. Code Ann. § 31-1-11.5-10 (Burns Supp. 1979); N.Y. Dom. Rel. Law § 236 pt. B (3) (McKinney Supp. 1980-1981); *see H. Clark, Law of Domestic Relations* 521 (1968) [hereinafter cited as H. Clark I].

I. A BRIEF HISTORY OF ALIMONY AND PROPERTY DIVISION

The American law of alimony and property division derives from two separate bodies of law. Alimony had its origins in the English Ecclesiastical law.¹⁹ The community property concept, on the other hand, was part of the civil-law tradition in the French and Spanish territories of the American West and South.²⁰ Although alimony was available in all but one of the community property states,²¹ the concept of property division did not appear in the common-law jurisdictions of the United States until after 1969, when drafting began on the Uniform Marriage and Divorce Act.²²

A. *The Common-Law and Civil-Law Traditions*

Under English common law, a wife's interest in her husband's property did not arise unless he predeceased her.²³ Upon her marriage, however, control of a woman's real and personal property passed to her husband.²⁴ A married woman had no standing in the

19. H. Clark I, *supra* note 18, at 420-21.

20. Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. Rev. 211, 214-15 (1973).

21. See Younger, *supra* note 20, at 245. Alimony is still available in all the community property states, except Texas. Ariz. Rev. Stat. Ann. § 25-319 (1976); Cal. Civ. Code § 4801(a) (West Supp. 1981); Idaho Code § 32-705 (Supp. 1981); La. Civ. Code Ann. art. 160 (West Supp. 1981); Nev. Rev. Stat. § 125.150(1)(a) (1979); N.M. Stat. Ann. § 40-4-7(B)(1), -12 (1978); Wash. Rev. Code Ann. § 26.09.090 (Supp. 1981).

22. 9A U.L.A. 91 (1979); see *infra* pt. I(B).

23. C. Donahue, T. Kauper, P. Martin, *Cases and Materials on Property* 564 (1974) [hereinafter cited as C. Donahue]; W. Walsh, *A Treatise on the Law of Property* § 114 (2d ed. 1937). The wife's right, called dower, was inchoate and non-transferable during the marriage. Upon her husband's death, she acquired not seisin in her husband's real property, as he did in hers, but a right against her husband's heirs to have one-third of the land assigned to her for life. C. Donahue, *supra*, at 564; W. Walsh, *supra*, § 114.

24. C. Donahue, *supra* note 23, at 564. A wife's personal property could be sold by her husband, was subject to execution for his debts and, except for chattels real, could be disposed of by the husband in his will. Only if he predeceased her did her chattels become her own again. As far as her real property was concerned, "[u]pon marriage the husband obtained an estate *jure uxoris* . . . in all land of which his wife was actually seised or became seised during the marriage. This estate gave him the absolute right to all the rents and profits from that land, so long as both parties lived." *Id.* at 564; W. Walsh, *supra* note 23, § 130. Once a living child was born to them, the husband's estate, now known as *curtesy initiate*, was lengthened to an estate in her property for his life, even if she predeceased him. If a wife did predecease her husband, his estate became known as *curtesy consummate*, and he became solely seised of an estate for life in all her land. C. Donahue, *supra* note 23, at 564; W. Walsh, *supra* note 23, § 131.

law courts unless her husband was joined with her.²⁵ She therefore had no legal remedy if she wished to leave him and consequently was forced to go to equity for relief.²⁶ Prior to 1857,²⁷ the Ecclesiastical courts exercised jurisdiction in matrimonial actions.²⁸ These courts did not grant the parties a divorce as the term is understood today. They authorized only divorces *a mensa et thoro*,²⁹ allowing the husband and wife to live apart, but not ending the marriage bond.³⁰ Imposing alimony, therefore, was merely a way to continue the husband's common-law duty to support his wife.³¹ If the wife were the "guilty" party,³² no alimony was allowed; the husband's common-law duty of support lasted only so long as his wife cohabited with him or lived apart because of his misconduct.³³ The amount of alimony awarded was in the discretion of the Ecclesiastical judge, who considered such items as the wife's needs, the husband's ability to pay, the amount of wealth the husband acquired from the wife by the marriage and the extent of the husband's fault.³⁴

Although the English Ecclesiastical courts did not grant absolute divorces, American courts have done so since colonial times, and have granted alimony as an incident to absolute divorce.³⁵ The American courts' power to grant alimony was statutory in origin³⁶ and has been justified by the judiciary on various grounds: as a continuance of the

25. C. Donahue, *supra* note 23, at 563. "She could not, without her husband's being a party to the transaction, convey property *inter vivos* or by will or enter into contracts, nor could she sue or be sued without her husband being a party to the action." *Id.*

26. Kelso, *supra* note 8, at 191.

27. The Divorce Act of 1857, 20 & 21 Vict. ch. 85, stripped Ecclesiastical courts of divorce jurisdiction and established absolute divorce by judicial decree. Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 Law & Contemp. Probs. 197, 197-98 (1939).

28. Vernier & Hurlbut, *supra* note 27, at 197-98.

29. *Id.* at 197. A divorce *a mensa et thoro* is comparable to a modern judicial separation. The Ecclesiastical courts could also declare the marriage invalid ab initio, because of some impediment existing at the time of the marriage, by granting a divorce *a vinculo matrimonii*. A private act of Parliament could also dissolve a marriage, but very few were given. *Id.* at 197-98 & n.6.

30. H. Clark I, *supra* note 18, at 420.

31. *Id.*

32. Vernier & Hurlbut, *supra* note 27, at 199. Divorce *a mensa et thoro* was granted only for "very serious and aggravated types of marital transgressions." *Id.* at 198.

33. *Id.* at 199.

34. *Id.* at 198-99.

35. H. Clark I, *supra* note 18, at 421.

36. *Id.* at 421.

support to which the wife was entitled during the marriage,³⁷ as damages for the husband's wrongdoing,³⁸ or as a penalty imposed on a guilty husband.³⁹

The irony of continuing the ties of dependency after the bonds of the marriage have been severed "is not obviated by labelling alimony a 'substitute' for the wife's right to support. Why should there be such a substitute? Would it not be more logical to say that when the marriage is dissolved all rights and duties based upon it end?"⁴⁰

One way to achieve such finality is by division of marital property instead of an award of alimony on the dissolution of the marriage. Property division has long been the focus of the civil-law community property system, which predates common-law principles. The notion of marriage as a "community" is found in such ancient sources as "the Code of Hammurabi, the Twelve Tables of Gortyn and the Fuero Juzgo, or Visigothic Code."⁴¹ Having appeared in the United States as part of the civil-law system of the Spanish and French, it is the law today in eight states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.⁴²

37. *E.g.*, *Dayton v. Dayton*, 290 Ky. 418, 423, 161 S.W.2d 618, 621 (1942); *Wolfe v. Wolfe*, 124 N.E.2d 485, 489-90 (Ohio Ct. C.P. 1954); *Bray v. Landergren*, 161 Va. 699, 705-06, 172 S.E. 252, 254 (1934).

38. *Driskill v. Driskill*, 181 S.W.2d 1001, 1004 (Mo. Ct. App. 1944).

39. *E.g.*, *Lewis v. Lewis*, 202 Ark. 740, 741, 151 S.W.2d 998, 998-99 (1941); *Gussman v. Gussman*, 140 Ind. 433, 435-36, 39 N.E. 918, 918 (1895); *Poppe v. Poppe*, 114 Ind. App. 348, 352, 52 N.E.2d 506, 507 (1944).

40. H. Clark I, *supra* note 18, at 421.

41. Younger, *supra* note 20, at 214. In a footnote, Professor Younger quotes certain relevant provisions from the three codes. Section 152 of the Hammurabi Code provides: "If, after that woman has entered the man's house they incur debt, both of them must satisfy the trader." *Id.* at 214 n.15. Section 3 of the Twelve Tables of Gortyn reads: "If a man and woman separate, she shall have her own things, which she had when she went to the man, and the half of the fruit, if it be from her own goods, and . . . whatever it be [of] whatever she has woven." *Id.* The Visigothic Code, Book IV, tit. II, ¶ xvi states: "When persons of equal rank marry one another, and, while living together, either increase or waste their property, where one is more wealthy than the other; they shall share in common the gains and losses, in proportion to the amount which each one holds. If the value of their possessions is the same, neither has a right to assume superiority over the other. For, it is not unusual, where such property is equal in amount, for one party, in some way, to take advantage of the other. And if it should be evident that the possessions of one exceed those of the other in value, as above stated, there shall be an apportionment of it made, showing what either shall have the right to claim after the death of the other, and what either shall have a right to dispose of to his or her children, or to heirs, or in any other way that may be desired. This provision shall apply to, and be observed in, all cases relating to the estates of both husbands and wives." *Id.*

42. *Ariz. Rev. Stat. Ann.* § 25-211 (1976); *Cal. Civ. Code* § 5110 (West Supp. 1981); *Idaho Code* § 32-906 (Supp. 1981); *La. Civ. Code Ann.* art. 2338 (West Supp. 1981); *Nev. Rev. Stat.* § 123.22 (1979); *N.M. Stat. Ann.* § 40-3-8(B) (1978); *Tex. Fam. Code Ann.* tit. 1, § 5.01(b) (Vernon 1975); *Wash. Rev. Code Ann.* § 26.16.030 (Supp. 1981).

Under the community property system, property owned by a spouse before the marriage or acquired by gift, bequest, devise or descent during the marriage remains the separate property of the spouse.⁴³ Income earned by either spouse during the marriage, or property acquired with such income, is the joint property of both spouses.⁴⁴ Traditionally, the husband controlled the community property while the marriage lasted.⁴⁵ Within the last ten years, all community property states have modified their statutes to provide for joint management and control.⁴⁶

The "community property" concept suggests that the husband and wife are partners and that the property will be equally divided on divorce. As of 1973, however, only two of the eight community property states mandated an equal division of community property.⁴⁷ In the other six community property states, the wife could "thus lose what she supposedly owns or take twice as much."⁴⁸ Today, no community property state statutorily requires equal division in all cases.⁴⁹ Absent an agreement between the parties, the power to decide how the property is to be divided rests with the judge.⁵⁰ In resolving this issue, courts in community property states have employed factors similar to those considered by the English courts.⁵¹ Other items considered are peculiar to the community property system, such as sources and dates of acquisition of the property, and contributions each spouse made to the marital community.⁵²

The civil-law system is preferable to the common law in that each spouse has control of his or her separate property upon separation.⁵³

43. C. Donahue, *supra* note 23, at 569.

44. *Id.*

45. *Id.*

46. Ariz. Rev. Stat. Ann. § 25-214(B) (1976); Cal. Civ. Code §§ 5125, 5127 (West Supp. 1981); Idaho Code § 32-912 (Supp. 1981); La. Civ. Code Ann. art. 2346 (West Supp. 1981); Nev. Rev. Stat. § 123.230 (1979); N.M. Stat. Ann. §§ 40-3-13, -14 (1978); Tex. Fam. Code Ann. tit. 1, § 5.22 (Vernon 1975); Wash. Rev. Code Ann. § 26.16.030 (Supp. 1981). *See generally Community Property Symposium*, 39 La. L. Rev. 323 (1979) (Louisiana's joint management statute); Laughran, *Management and Control of Community Property in California: "Retroactive" Application of the 1975 Amendments*, 9 Loy. L.A. L. Rev. 493 (1976) (California's joint management statute); *Symposium: Equal Management of Community Property*, 13 Idaho L. Rev. 133 (1977) (primary emphasis on Idaho's joint management statute).

47. Younger, *supra* note 20, at 242.

48. *Id.*

49. *See infra* notes 166-67 and accompanying text.

50. DeRuwe v. DeRuwe, 72 Wash. 2d 404, 408, 433 P.2d 209, 212 (1967); Daggett, *Division of Property Upon Dissolution of Marriage*, 6 Law & Contemp. Probs. 225, 227-28; (1939); Younger, *supra* note 20, at 242-43.

51. *See* DeRuwe v. DeRuwe, 72 Wash. 2d 404, 408, 433 P.2d 209, 212 (1967); Daggett, *supra* note 50, at 227-28; *supra* text accompanying note 34.

52. *See* Daggett, *supra* note 50, at 227-29.

53. *See* Younger, *supra* note 20, at 227-28.

In addition, the adverse psychological effects of alimony on the payor and recipient⁵⁴ are alleviated by a division of property that does not require the payment of a weekly alimony check. Although civil-law jurisdictions have recently adopted the concept of joint management and control of community property,⁵⁵ the system remains far from perfect. The pervasive problem of unchecked judicial discretion and its possible abuse permeates property division⁵⁶ as it does alimony awards.⁵⁷

B. *The Uniform Marriage and Divorce Act*

Prior to 1969, few substantive changes were made in divorce statutes, "although criticism of the divorce law was constant, sharp and often well informed."⁵⁸ In that year, a report of the special committee on divorce appointed by the National Conference of Commissioners on Uniform State Laws was submitted and drafting soon began on the Uniform Marriage and Divorce Act (UMDA).⁵⁹ A final version of the Act was approved in 1971.⁶⁰

The UMDA embodied radical changes in traditional thinking. It adopted irretrievable marriage breakdown as the sole ground for divorce, rather than fault grounds such as adultery or desertion,⁶¹ and

54. Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 Law & Contemp. Probs. 283 (1939). Peele noted that "[a]limony is a concrete thing around which all the feelings concerning the divorce . . . are likely to gather [A]limony goes on after the divorce suit has been settled. Animosities that might otherwise have burnt out with the passing of time may be rekindled each time a check is mailed. . . . [T]he husband may find the paying of alimony a constant source of annoyance, while the wife may be irritated each time the check arrives because it is no larger." *Id.* at 283-84.

55. See *supra* note 46 and accompanying text.

56. Daggett, *supra* note 50.

57. Cooley, *supra* note 14.

58. H. Clark, *Cases and Problems on Domestic Relations* 9 (2d ed. 1974) [hereinafter cited as H. Clark II].

59. R. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* (undated) (unpublished report prepared for the Special Comm. on Divorce of the Nat'l Conf. of Comm'rs on Unif. State Laws); H. Clark II, *supra* note 58, at 10.

60. Uniform Marriage and Divorce Act (1971) (current version at 9A U.L.A. 91 (1979)); Nat'l Conf. of Comm'rs on Unif. State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws* 65 (1971) [hereinafter cited as 1971 Commissioners' Handbook]. The first draft of the UMDA was approved by the Commissioners in 1970. Nat'l Conf. of Comm'rs on Unif. State Laws, *Handbook of the National Conference of Commissioners on Uniform State Laws* 108 (1970). It was reviewed, amended and approved again in 1971. 1971 Commissioners' Handbook, *supra*, at 65.

61. Uniform Marriage and Divorce Act § 305, 9A U.L.A. 132 (1979). The trend away from fault grounds as the sole basis for a divorce began in 1969, when states began to list irretrievable marriage breakdown as a ground for divorce, though many retained fault grounds as well. H. Clark II, *supra* note 58, at 10. *But see* Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. Cin. L. Rev. 133-34 &

proposed new standards for alimony and property division. With respect to the latter, the UMDA advocated a community property type of property division as the "preferred method of providing for the financial needs of a spouse."⁶² Using the term "marital property," the UMDA's definition closely approximated the traditional community property definition. Non-marital property was defined as property acquired before the marriage, or after the marriage if acquired "(1) . . . by gift, bequest, devise or descent; (2) . . . in exchange for property acquired by gift, bequest, devise or descent; (3) . . . by a spouse after a decree of legal separation; (4) . . . by valid agreement of the parties; and (5) [by] the increase in value of property acquired before the marriage."⁶³ In addition, alimony was to be limited only to situations where a spouse lacked sufficient property for his reasonable needs and was unable to support himself through appropriate employment or was the custodian of a child and therefore could not work.⁶⁴ The thrust of these provisions of the UMDA was to limit judicial discretion, first, by allowing the court to divide only marital property, not the separate property of the spouses,⁶⁵ and second, by restricting alimony to situations where the above mentioned findings of fact are first made.⁶⁶

n.2 (1974) (arguing that the trend away from fault grounds began a century ago with the concepts of separation and incompatibility) [hereinafter cited as *Economics*]. Only two states, Illinois and South Dakota, still limit divorce to traditional "fault grounds." Ill. Rev. Stat. Ann. ch. 40, § 401(2) (Smith-Hurd 1980); S.D. Codified Laws Ann. § 25-4-2 (1976); Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 Fam. L.Q. 229, 241 (1981) [hereinafter cited as Freed & Foster II].

62. Note, *Property, Maintenance, and Child Support Decrees Under The Uniform Marriage and Divorce Act*, 18 S.D. L. Rev. 559, 566 (1973) [hereinafter cited as *Property*]; see Uniform Marriage and Divorce Act § 308 comment, 9A U.L.A. 161 (1979). Its critics accused the UMDA of importing an alien community property concept and forcing it upon non-community property states. See Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S.D. L. Rev. 601, 607 (1973).

63. Uniform Marriage and Divorce Act § 307(b), 9 U.L.A. 491 (1972) (amended 1973). Since the amendment in 1973, a definition of non-marital property no longer appears in the UMDA. Section 307 now has two alternative versions, each of which allows the court to divide both marital and separate property. The definition, therefore, is no longer necessary. Uniform Marriage and Divorce Act § 307 Alternative A, 9A U.L.A. 142 (1979); *id.* Alternative B, 9A U.L.A. 143 (1979).

64. Uniform Marriage and Divorce Act § 308(a), 9A U.L.A. 160 (1979).

65. *Property*, *supra* note 62, at 566. Barring courts from dividing separate property "[w]ithout question . . . does restrict the trial court's traditional freedom in decreeing a property settlement. That freedom is restricted in an attempt to cure what is viewed as excess, and sometimes abused, discretion." *Id.*

66. See *supra* note 64 and accompanying text.

The UMDA met with extensive criticism at the time of its promulgation.⁶⁷ Only five states enacted it.⁶⁸ The UMDA, however, has had a greater impact on present statutes than such lack of acceptance would indicate. The division of property is now the main thrust of most divorce statutes,⁶⁹ and alimony awards are subject to a myriad of restrictions.⁷⁰ While these basic premises of the UMDA are now embodied in the statutes of most states, each state has chosen its own method of dividing property, and each applies its own restrictions to the awarding of alimony.

II. ALIMONY

Alimony is available in every state but Texas,⁷¹ and can be awarded in addition to the property division. Most states now regard alimony

67. See Foster, *supra* note 9; Podell, *supra* note 62; *Property, supra* note 62, at 566-67; Note, *Reconciliation and the Uniform Marriage and Divorce Act*, 18 S.D. L. Rev. 611 (1973). Unhappy with the original version, the ABA Family Law Section drafted a revised version of the UMDA, which was adopted by the Family Law Section Council on November 9, 1972. A *Symposium On The Uniform Marriage And Divorce Act*, 18 S.D. L. Rev. 531, 693 (1973).

68. Ariz. Rev. Stat. Ann. §§ 25-311 to -381.24 (1976 & Supp. 1980-1981); Colo. Rev. Stat. §§ 14-2-101 to -113, -10-101 to -124 (1973 & Supp. 1978); Ill. Ann. Stat. ch. 40, §§ 101-707 (Smith-Hurd 1980); Ky. Rev. Stat. Ann. §§ 403.010, .110-.350 (Bobbs-Merrill 1972 & Supp. 1980); Mont. Rev. Codes Ann. §§ 48-301 to -341 (Supp. 1977). After the amendment to § 307 in 1973, see *supra* note 63, Alternative A was adopted in Arizona and Montana and Alternative B in Colorado and Kentucky. Ariz. Rev. Stat. Ann. § 25-318 (1976); Colo. Rev. Stat. § 14-10-113 (1974 & Supp. 1978); Ky. Rev. Stat. Ann. § 403.190 (Bobbs-Merrill Supp. 1980); Mont. Rev. Codes Ann. § 48-321 (Supp. 1977). Illinois' statute is based, for the most part, on the original § 307. See Ill. Ann. Stat. ch. 40, § 503 historical and practice notes (Smith-Hurd 1980).

69. See *infra* pt. III.

70. See *infra* pt. II(A).

71. Ala. Code § 30-2-51 (Supp. 1979); Alaska Stat. § 09.55.210(3) (Supp. 1981); Ariz. Rev. Stat. Ann. § 25-319 (1976); Ark. Stat. Ann. § 34-1211 (Supp. 1981); Cal. Civ. Code § 4801(a) (West Supp. 1981); Colo. Rev. Stat. § 14-10-114 (1974); Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Del. Code Ann. tit. 13, § 1512 (Supp. 1980); D. C. Code Encycl. § 16-912 (West Supp. 1978-1979); Fla. Stat. Ann. § 61.08 (West Supp. 1981); Ga. Code Ann. § 30-209 (Supp. 1981); Hawaii Rev. Stat. § 580-47(a)(2) (Supp. 1980); Idaho Code § 32-705 (Supp. 1981); Ill. Ann. Stat. ch. 40, § 504 (Smith-Hurd 1980); Ind. Code Ann. § 31-1-11.5-9(c) (Burns Supp. 1981); Iowa Code Ann. § 598.21(3) (West Supp. 1981-1982); Kan. Stat. Ann. § 60-1610(d) (Supp. 1980); Ky. Rev. Stat. Ann. § 403.200 (Bobbs-Merrill Supp. 1980); La. Civ. Code Ann. art. 160 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 19, § 721 (1981); Md. Ann. Code art. 16, § 1 (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Mich. Comp. Laws Ann. § 552.23(1) (Supp. 1981-1982); Minn. Stat. Ann. § 518.552 (West Supp. 1981); Miss. Code Ann. § 93-5-23 (Supp. 1981); Mo. Ann. Stat. § 452.335 (Vernon 1977); Mont. Rev. Codes Ann. § 48-322 (Supp. 1977); Neb. Rev. Stat. § 42-365 (Supp. 1980); Nev. Rev. Stat. § 125.150(1)(a) (1979); N.H. Rev. Stat. Ann. § 458:19 (1968); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); N.M. Stat. Ann. §§ 40-4-7(B)(1), -12 (1978); N.Y. Dom. Rel. Law § 236 pt. B(6) (McKin-

“as a supplement to what is derived from a distribution of marital property.”⁷² The trend is to use the term “maintenance,” as does the UMDA, instead of “alimony,” to describe “an award made in a [divorce] proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other.”⁷³ The change in terminology may be due to the negative connotations evoked by the historical background of alimony⁷⁴ and also to the radical change in the purpose of the award: Alimony today is rehabilitative in nature.⁷⁵ Its objective is providing the more needy spouse with the “ability to become financially independent,”⁷⁶ instead of fostering dependence upon the weekly alimony check from an ex-spouse. As a result, legislatures have begun to impose, as the UMDA advocated,⁷⁷ “a duty to seek employment, unless there is some reason to avoid that obligation.”⁷⁸ This trend is evident from the statutory restrictions now applied to the awarding of alimony.

A. Alimony Restrictions

Restrictions placed on alimony awards can be divided into three basic groups: those addressing the needs of the party seeking alimony;

ney Supp. 1980-1981); N.C. Gen. Stat. § 50-16.5 (1976); N.D. Cent. Code § 14-05-24 (1971); Ohio Rev. Code Ann. § 3105.18 (Page 1980); Okla. Stat. Ann. tit. 12, § 1278 (West Supp. 1980-1981); Or. Rev. Stat. § 107.105(1)(c) (1979); Pa. Stat. Ann. tit. 23, § 501 (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16 (Supp. 1980); S.C. Code Ann. § 20-3-130 (Law. Co-op. Supp. 1980); S.D. Codified Laws Ann. § 25-4-41 (Supp. 1980); Tenn. Code Ann. §§ 36-820(a)(1), (2), -821 (Supp. 1981); Utah Code Ann. § 30-3-5(1) (Supp. 1979); Vt. Stat. Ann. tit. 15, § 754 (Supp. 1981); Va. Code § 20-107 (Supp. 1981); Wash. Rev. Code Ann. § 26.09.090 (Supp. 1981); W. Va. Code §§ 48-2-15, -16 (1980); Wis. Stat. Ann. § 767.26 (West Supp. 1981); Wyo. Stat. § 20-2-114 (1977). See generally Freed & Foster II, *supra* note 61, at 252-57 (annual survey of family law statutes).

72. Freed & Foster I, *supra* note 9, at 277-78.

73. Minn. Stat. Ann. § 518.54(3) (West Supp. 1981); accord, e.g., Hawaii Rev. Stat. § 580-47(a)(2) (Supp. 1980); N.Y. Dom. Rel. Law § 236 pt. B(6) (McKinney Supp. 1980-1981); Wash. Rev. Code Ann. § 26.09.090 (Supp. 1981). Some statutes use neither the term alimony nor the term maintenance. Cal. Civ. Code § 4801(a) (West Supp. 1981) (an amount “for the support of the other party”); Iowa Code Ann. § 598.21(3) (West Supp. 1981-1982) (“support payments”); Or. Rev. Stat. § 107.105(1)(c) (1979) (“support of a party”).

74. See *supra* notes 23-40 and accompanying text.

75. See Fla. Stat. Ann. § 61.08(1) (West Supp. 1981) (“alimony may be rehabilitative or permanent in nature”); *Rehabilitative Spousal Support*, *supra* note 9, at 495-96 (The rehabilitative approach “benefits both parties. The recipient is provided with the means to acquire or regain the skills necessary for financial independence, thus promoting the earliest possible severance of the spouses’ economic ties.” (footnotes omitted)); 3 W. New Eng. L. Rev. 127, 135 (1980) (“Rehabilitative alimony recognizes that a marriage often imparts an economic disadvantage upon the supported spouse.” (footnote omitted)).

76. *Rehabilitative Spousal Support*, *supra* note 9, at 495.

77. See *supra* notes 64 & 66 and accompanying text.

78. *Property*, *supra* note 62, at 567.

those addressing the fault of the alimony seeker; and those placing arbitrary legislative restrictions on the courts' power to award alimony.

1. Need

Several states require the court, before awarding alimony, to find as a fact that the party seeking alimony lacks sufficient property to provide for his or her needs, including whatever share of marital property has been awarded, and that the party cannot find employment or cannot work because he or she has custody of the children.⁷⁹ New York requires a judge to find both that the party lacks sufficient property and income to provide for his or her needs and that the other spouse has sufficient property and income to provide for them.⁸⁰ Alabama, which has no provision for marital property division in its statutory scheme, will allow alimony on a finding that a spouse has no separate estate or that the separate estate is insufficient for self-support.⁸¹ The only property from which the alimony is payable, however, is that acquired during the marriage, exclusive of gifts and inheritances, unless it is also found that such property has been "used regularly for the common benefit of the parties during their marriage."⁸²

Restricting alimony by requiring the trial court to make findings of fact on the issue of need is consistent with the rehabilitative nature of alimony. It will, in addition, provide the appeals court with the foundation on which to base its review of the trial court's decision.

2. Fault

The presence of a fault ground still bars or diminishes an award of alimony in many states. Some statutes enumerate specific fault grounds, such as adultery⁸³ or desertion,⁸⁴ as complete bars to alimony. Others allow only an "innocent" spouse to receive alimony.⁸⁵ Still others provide that commission of a fault ground is a factor to be

79. Ariz. Rev. Stat. Ann. § 25-319 (1976); Colo. Rev. Stat. § 14-10-114(1) (1973); Ill. Ann. Stat. ch. 40, § 504(a) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.200(1) (Bobbs-Merrill Supp. 1980); Minn. Stat. Ann. § 518.552(1) (West Supp. 1980); Mo. Ann. Stat. § 452.335(1) (Vernon 1977); Mont. Rev. Codes Ann. § 48-322(1) (Supp. 1977); cf. Idaho Code § 32-705(1) (Supp. 1981) (child custody not explicitly considered in the fact finding); Pa. Stat. Ann. tit. 23, § 501(a) (Purdon Supp. 1981-1982) (same).

80. N.Y. Dom. Rel. Law § 236 pt. B(6) (McKinney Supp. 1980-1981).

81. Ala. Code § 30-2-51 (Supp. 1979).

82. *Id.*

83. Ga. Code Ann. § 30-201 (1980); N.C. Gen. Stat. § 50-15.6(a) (1976); S.C. Code Ann. § 20-3-130 (Law. Co-op. Supp. 1980).

84. Ga. Code Ann. § 30-201 (1980).

85. Idaho Code § 32-705(1) (Supp. 1981); La. Civ. Code Ann. art. 160 (West Supp. 1981); Va. Code § 20-107 (Supp. 1980).

considered and, therefore, may diminish an award of alimony.⁸⁶ With respect to fault grounds, each state must make a policy choice: to follow the common-law notion that the duty of support ends when a spouse is guilty of misconduct, or to base the alimony decision on need instead of guilt or innocence. Using fault grounds to bar or lower alimony awards hardly seems consistent with the present concept of alimony as a rehabilitative tool. If alimony is awarded on the basis of need, denying alimony for a fault ground will probably result in the party applying for state welfare payments. At most, then, fault grounds should diminish alimony only to an amount that would prevent the party from being eligible to receive welfare and no further. Otherwise, the burden of supporting the party will be placed on the state.⁸⁷

3. Time and Amount

Many of the present statutes allow courts, in their discretion, to limit alimony awards to a specific period of time.⁸⁸ Several states set specific time limitations on alimony awards. In Delaware, alimony can be awarded only for two years unless the couple has been married for at least twenty years;⁸⁹ in New Hampshire, alimony is limited to three years, but may be renewed for additional three year periods.⁹⁰ Absent specific findings of fact, courts in two states must set specific time limits on alimony. In Pennsylvania, the party receiving alimony has a reasonable time to meet his or her needs by obtaining employment or developing a marketable skill, unless the court finds that the party's ability to do so is "substantially diminished by reason of age, physical, mental or emotional condition, custody of minor children, or other compelling impediment to gainful employment."⁹¹ In Maryland, alimony can be awarded for an indefinite period only when the court "finds as a fact that: (i) The party seeking alimony, by reason of age, illness, infirmity, or disability, cannot reasonably be expected to make substantial progress toward becoming self-supporting; or (ii) Even after the receiving party will have made as much progress toward self-support as can reasonably be expected, the respective

86. Ala. Code § 30-2-52 (Supp. 1979); Md. Ann. Code art. 16, § 1(a) (1981); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); N.C. Gen. Stat. § 50-16.5(b) (1976); cf. Fla. Stat. Ann. § 61.08(1) (West Supp. 1981) (adultery only).

87. Daggett, *supra* note 50, at 234.

88. *E.g.*, Ariz. Rev. Stat. Ann. § 25-319(B) (1976); Cal. Civ. Code § 4801(a) (West Supp. 1981); N.Y. Dom. Rel. Law § 236 pt. B(6)(a) (McKinney Supp. 1980-1981).

89. Del. Code Ann. tit. 13, § 1512(a)(3) (Supp. 1980) (limited to cases where the divorce is not for mental illness).

90. N.H. Rev. Stat. Ann. § 458:19 (1968) (limitation applies only in cases where there are no children or the children have reached the age of majority).

91. Pa. Stat. Ann. tit. 23, § 501(c) (Purdon Supp. 1981-1982).

standards of living of the two parties will be unconscionably disparate."⁹²

Louisiana restricts not the time for receipt, but the amount: Alimony is limited to one-third of the other spouse's income.⁹³ Indiana allows maintenance to be paid only to a spouse who is "physically or mentally incapacitated . . . during any such incapacity."⁹⁴

Specific arbitrary limitations on the time or amount of an alimony award do not provide enough flexibility for case-by-case decision. On the other hand, allowing the court, in its discretion, to decide whether to impose a specific time limit is not conducive to uniformity of decision. Restrictions, such as those imposed by Pennsylvania and Maryland, can provide a framework within which discretion can be exercised. Such flexibility will avoid arbitrary limits that will not only be inequitable in some situations but also require the parties to return to the court repeatedly to have the alimony award reexamined, thus overcrowding court calendars.

B. Factors Considered in Alimony Awards

Once the property division has been made and a party has met whatever standard is necessary in a given state to be eligible for alimony, the court must determine the amount of the alimony award. Thirty states⁹⁵ list specific factors⁹⁶ for the court to consider in making this determination. No one factor of the twenty-eight listed is common to all the statutes.

92. Md. Ann. Code art. 16, § 1(c)(1) (1981).

93. La. Civ. Code Ann. art. 160 (West Supp. 1981).

94. Ind. Code Ann. § 31-1-11.5-9(e) (Burns Supp. 1981).

95. Ariz. Rev. Stat. Ann. § 25-319(B)(1)-(8) (1976); Cal. Civ. Code § 4801(a)(1)-(9) (West Supp. 1981); Colo. Rev. Stat. § 14-10-114(2)(a)-(f) (1973); Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Del. Code Ann. tit. 13, § 1512(c)(1)-(7) (Supp. 1980); Fla. Stat. Ann. § 61.08(1), (2)(a)-(f) (West Supp. 1981); Ga. Code Ann. § 30-209(a)(1)-(8) (Supp. 1981); Hawaii Rev. Stat. § 580-47(a)(1)-(13) (Supp. 1980); Idaho Code § 32-705 2(a)-(f) (Supp. 1981); Ill. Ann. Stat. ch. 40, § 504(b)(1)-(6) (Smith-Hurd 1980); Iowa Code Ann. § 598.21(3)(a)-(j) (West Supp. 1981-1982); Ky. Rev. Stat. Ann. § 403.200(2)(a)-(f) (Bobbs-Merrill Supp. 1980); La. Civ. Code Ann. art. 160 (West Supp. 1981); Md. Ann. Code art. 16, § 1(b)(1)-(11) (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Minn. Stat. Ann. § 518.552(2)(a)-(g) (West Supp. 1981); Mo. Ann. Stat. § 452.335(2)(1)-(7) (Vernon 1977); Mont. Rev. Codes Ann. § 48-322(2)(a)-(f) (Supp. 1977); Neb. Rev. Stat. § 42-365 (Supp. 1980); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(1)-(10) (McKinney Supp. 1980-1981); N.C. Gen. Stat. § 50-16.5(a) (1976); Ohio Rev. Code Ann. § 3105.18(B)(1)-(11) (Page 1980); Or. Rev. Stat. § 107.105(1)(c)(A)-(I), (2) (1979); Pa. Stat. Ann. tit. 23, § 501(b)(1)-(14) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16 (Supp. 1980); Va. Code § 20-107(1)-(6) (Supp. 1981); Wash. Rev. Code Ann. § 26.09.090(1)(a)-(f) (Supp. 1981); W. Va. Code § 48-2-16 (1980); Wis. Stat. Ann. § 767.26(1)-(10) (West Supp. 1981).

96. The following factors are listed in order of frequency of use, with parenthetical indications of the number of states using each factor: 1. the financial resources of

If alimony is to be a rehabilitative tool and to provide support to the ex-spouse only until he or she is capable of self-support,⁹⁷ all the factors considered in awarding alimony should address the issue of need. Only seventeen of the twenty-eight factors do so.⁹⁸ Significant factors include: the financial resources of each, including whatever share of marital property each was awarded;⁹⁹ age and health;¹⁰⁰ time needed for the education of the party seeking alimony;¹⁰¹ child support responsibilities;¹⁰² and the ability of the other spouse to pay.¹⁰³

each, including whatever share of marital property each was awarded (28); 2. duration of the marriage (27); 3. age and health (26); 4. station in life/standard of living (23); 5. time needed for the education of the party seeking support (20); 6. child support responsibilities, including the ability to work while having custody of the children (19); 7. earning capacity of each (16); 8. the ability of the other spouse to pay (14); 9. needs of the parties (11); 10. contribution to the marriage, including as a homemaker (11); 11. other just and equitable factors (10); 12. tax consequences (6); 13. the cause of the divorce (6); 14. occupation and vocational skills (6); 15. the educational level of the parties (5); 16. the contribution by one spouse to the other's education (5); 17. employment history (4); 18. retirement benefits (3); 19. agreements of the parties (antenuptial and/or separation) (3); 20. the property interests of each (3); 21. interruption of career or education (3); 22. expectancies and inheritances (2); 23. the property brought to the marriage (2); 24. the duration of the need of support (2); 25. the conduct of the party seeking support (2); 26. dissipation of assets (2); 27. insurance (1); and 28. excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of property held in common (1). See Appendix A for a chart of the factors, listed by state. Each number that appears in the vertical column of the chart identifies the factor introduced by the same number in this footnote.

97. If the ex-spouse is unemployable as a result of age or illness, however, permanent alimony is appropriate because rehabilitation is unlikely.

98. Those factors are: 1. the financial resources of each, including whatever share of marital property each was awarded; 2. age and health; 3. time needed for the education of the party seeking support; 4. child support responsibilities, including the ability to work while having custody of the children; 5. earning capacity of each; 6. the ability of the other spouse to pay; 7. needs of the parties; 8. occupation and vocational skills; 9. the educational level of the parties; 10. employment history; 11. retirement benefits; 12. agreements of the parties (antenuptial and/or separation); 13. the property interests of each; 14. interruption of career or education; 15. expectancies and inheritances; 16. the duration of the need of support; and 17. insurance.

99. *E.g.*, Cal. Civ. Code § 4801(a)(3) (West Supp. 1981); La. Civ. Code Ann. art. 160 (West Supp. 1981); Md. Ann. Code art. 16, § 1(b)(1) (1981).

100. *E.g.*, Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Fla. Stat. Ann. § 61.08(2)(c) (West Supp. 1981); Ill. Ann. Stat. ch. 40, § 504(b)(5) (Smith-Hurd 1980).

101. *E.g.*, Colo. Rev. Stat. § 14-10-114(2)(b) (1973); Iowa Code Ann. § 598.21(3)(e) (West Supp. 1981-1982); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(4) (McKinney Supp. 1980-1981).

102. *E.g.*, La. Civ. Code Ann. art. 160 (West Supp. 1981); Minn. Stat. Ann. § 518.552(2)(a) (West Supp. 1981); Pa. Stat. Ann. tit. 23, § 501(b)(7) (Purdon Supp. 1981-1982).

103. *E.g.*, Ky. Rev. Stat. Ann. § 403.200(2)(f) (Bobbs-Merrill Supp. 1980); Mo. Ann. Stat. § 452.335(2)(6) (Vernon 1977); Wash. Rev. Code Ann. § 26.09.090(1)(f) (Supp. 1981).

Two other factors are relevant to alimony determinations for different reasons. Tax consequences¹⁰⁴ should be considered in the interest of fairness because alimony is treated as income to the recipient and is deductible by the payor.¹⁰⁵ In addition, inclusion of a factor such as other just and equitable considerations¹⁰⁶ provides a convenient catch-all so that unusual situations can be adjusted fairly.

Because they relate to assets of the marriage, not the needs of the parties, five factors are more relevant to the question of property division than to alimony: contribution to the marriage, including services rendered as a homemaker;¹⁰⁷ the property brought to the marriage;¹⁰⁸ the contribution by one spouse to the other's education;¹⁰⁹ dissipation of assets;¹¹⁰ and excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of property held in common.¹¹¹ If one party has substantially dissipated the marital assets and the court in a particular state has no power to invade the separate property of the parties in making a property division,¹¹² however, consideration of one of the latter two factors in granting an alimony award becomes necessary to achieve equity between the parties.

104. Del. Code Ann. tit. 13, § 1512(c)(7) (Supp. 1980); Idaho Code § 32-705(2)(f) (Supp. 1981); Iowa Code Ann. § 598.21(3)(g) (West Supp. 1981-1982); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(7) (McKinney Supp. 1980-1981); Or. Rev. Stat. § 107.105(2) (1979); Wis. Stat. Ann. § 767.26(7) (West Supp. 1981).

105. I.R.C. §§ 71, 215 (1976). See generally Hopkins, *Tax Aspects of Divisions of Co-owned Property at the Time of Divorce*, 69 Ill. B.J. 488 (1981); Lewis, *Income Tax Planning at Divorce or Separation*, 5 Okla. City U. L. Rev. 445 (1980).

106. Cal. Civ. Code § 4801(a)(9) (West Supp. 1981); Fla. Stat. Ann. § 61.08(2) (West Supp. 1981); Ga. Code Ann. § 30-209(a)(8) (Supp. 1981); Hawaii Rev. Stat. § 580-47(a) (Supp. 1980); Iowa Code Ann. § 598.21(3)(j) (West Supp. 1981-1982); Md. Ann. Code art. 16, § 1(b)(11) (1981); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(10) (McKinney Supp. 1980-1981); Or. Rev. Stat. § 107.105(1)(c)(I) (1979); Va. Code § 20-107(6) (Supp. 1981); Wis. Stat. Ann. § 767.26(10) (West Supp. 1981). Several states provide for consideration of items not on their enumerated list by prefacing the list of factors with a directive that courts make a just award "after considering all relevant factors, including" those enumerated. *E.g.*, Ariz. Rev. Stat. Ann. § 25-319(B) (1976); Colo. Rev. Stat. § 14-10-114(2) (1973); Ill. Ann. Stat. ch. 40, § 504(b) (Smith-Hurd 1980).

107. Fla. Stat. Ann. § 61.08(f) (West Supp. 1981); Ga. Code Ann. § 30-209(a)(6) (Supp. 1981); Md. Ann. Code art. 16, § 1(b)(6) (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Minn. Stat. Ann. § 518.552(2)(g) (West Supp. 1981); Neb. Rev. Stat. § 42-365 (1978); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(8) (McKinney Supp. 1980-1981); Ohio Rev. Code Ann. § 3105.18(B)(11) (Page 1980); Pa. Stat. Ann. tit. 23, § 501(b)(12) (Purdon Supp. 1981-1982); Va. Code § 20-107 (5a) (Supp. 1981).

108. Ohio Rev. Code Ann. § 3105.18(B)(10) (Page 1980); Pa. Stat. Ann. tit. 23, § 501(b)(11) (Purdon Supp. 1981-1982).

109. Pa. Stat. Ann. tit. 23, § 501(b)(6) (Purdon Supp. 1981-1982); Wis. Stat. Ann. § 767.26(9) (West Supp. 1981).

110. N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(9) (McKinney Supp. 1980-1981).

111. Ariz. Rev. Stat. Ann. § 25-319(B)(7) (1976).

112. See *infra* notes 156-162 and accompanying text.

The rest of the factors are irrelevant to an award of alimony based on need. The duration of the marriage,¹¹³ for example, has little to do with financial need.¹¹⁴ The same is true of the parties' station in life/standard of living,¹¹⁵ as it is the rare case when either party alone can maintain the same standard of living as the two had when mar-

113. Ariz. Rev. Stat. Ann. § 25-319(B)(4) (1976); Cal. Civ. Code § 4801(a)(4) (West Supp. 1981); Colo. Rev. Stat. § 14-10-114(2)(d) (1973); Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Del. Code Ann. tit. 13, § 1512(c)(4) (Supp. 1980); Fla. Stat. Ann. § 61.08(2)(b) (West Supp. 1981); Ga. Code Ann. § 30-209(a)(2) (Supp. 1981); Hawaii Rev. Stat. § 580-47(a)(3) (Supp. 1980); Idaho Code § 32-705(2)(c) (Supp. 1981); Ill. Ann. Stat. ch. 40, § 504(b)(4) (Smith-Hurd 1980); Iowa Code Ann. § 598.21(3)(a) (West Supp. 1981-1982); Ky. Rev. Stat. Ann. § 403.200(2)(d) (Bobbs-Merrill Supp. 1980); Md. Ann. Code art. 16, § 1(b)(5) (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Minn. Stat. Ann. § 518.552(2)(d) (West Supp. 1981); Mo. Ann. Stat. § 452.335(2)(4) (Vernon 1977); Mont. Rev. Codes Ann. § 48.322(2)(d) (Supp. 1977); Neb. Rev. Stat. § 42.365 (1978); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(2) (McKinney Supp. 1980-1981); Ohio Rev. Code Ann. § 3105.18(B)(5) (Page 1980); Or. Rev. Stat. § 107.105(1)(c)(A) (1979); Pa. Stat. Ann. tit. 23, § 501(b)(5) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16 (Supp. 1980); Va. Code § 20-107(4) (Supp. 1981); Wash. Rev. Code Ann. § 26.09.090(1)(d) (West Supp. 1981); Wis. Stat. Ann. § 767.26(1) (West Supp. 1981).

114. Factors such as the age and health of the parties, occupational and vocational skills, educational level, time needed for retraining, employment history, and interruption of career or education can adequately provide for the party seeking alimony and are much more pertinent to the spouse's needs than is a consideration of how long a marriage lasted. Although one commentator has stated that duration of the marriage "is one of the most important factors courts utilize," she has recognized that "the length of the marriage measures the extent of the homemaker spouse's absence from the work force and the probable degree of difficulty she will encounter in attempting to enter or re-enter it." *Rehabilitative Spousal Support*, *supra* note 9, at 499 (footnote omitted).

115. Ariz. Rev. Stat. Ann. § 25-319(B)(3) (1976); Cal. Civ. Code § 4801(a)(8) (West Supp. 1981); Colo. Rev. Stat. § 14-10-114(2)(c) (1973); Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Del. Code Ann. tit. 13, § 1512(c)(3) (Supp. 1980); Fla. Stat. Ann. § 61.08(2)(a) (West Supp. 1981); Ga. Code Ann. § 30-209(a)(1) (Supp. 1981); Hawaii Rev. Stat. § 580-47(a)(4) (Supp. 1980); Ill. Ann. Stat. ch. 40, § 504(b)(3) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.200(2)(c) (Bobbs-Merrill Supp. 1980); Md. Ann. Code art. 16, § 1(b)(4) (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Minn. Stat. Ann. § 518.552(2)(c) (West Supp. 1981); Mo. Ann. Stat. § 452.335(2)(3) (Vernon 1977); Mont. Rev. Codes Ann. § 48-322(2)(c) (Supp. 1977); N.C. Gen. Stat. § 50-16.5(a) (1976); Ohio Rev. Code Ann. § 3105.18(B)(7) (Page 1980); Pa. Stat. Ann. tit. 23, § 501(b)(8) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16 (Supp. 1980); Va. Code § 20-107(3) (Supp. 1981); Wash. Rev. Code Ann. § 26.09.090(1)(c) (Supp. 1981); *cf.* N.Y. Dom. Rel. Law § 236 pt. B(6)(a)(6) (McKinney Supp. 1980-1981) ("where practical and relevant"). A commentator has said station in life/standard of living "best exemplifies what the former marital partners consider their reasonable needs to be." *Rehabilitative Spousal Support*, *supra* note 9, at 502. Does not including the needs of the parties as a factor more adequately take this consideration into account?

ried.¹¹⁶ Two other factors, the cause of the divorce¹¹⁷ and the conduct of the party seeking support,¹¹⁸ are attempts to consider fault in awarding alimony. Whether fault-related grounds should be considered is a policy choice to be made by the legislatures. They must decide whether the state welfare system or the other spouse should bear the burden of supporting a needy spouse.

Various factors have been considered by courts for years.¹¹⁹ By codifying case law, the legislatures of thirty states have listed specific items each considers important in awarding alimony, thus giving judges a convenient checklist of items they are to consider in reaching decisions. If, indeed, alimony is "to provide necessary sustenance, not support,"¹²⁰ the factors used should stress need, not such issues as how long the marriage had lasted or who was responsible for its end.

C. Termination of Alimony

Historically, the death of either party¹²¹ or the remarriage of the spouse receiving alimony¹²² terminated alimony payments. The same holds true in most states today.¹²³ The number of couples who live together openly today without getting married¹²⁴ may have prompted

116. See *Economics*, *supra* note 61, at 150.

117. Conn. Gen. Stat. Ann. § 46b-82 (West Supp. 1981); Md. Ann. Code art. 16, § 1(b)(7) (1981); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); Pa. Stat. Ann. tit. 23, § 501(b)(14) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16 (Supp. 1980).

118. Mo. Ann. Stat. § 452.335(2)(7) (Vernon 1977).

119. Cooley, *supra* note 14, at 217.

120. *Economics*, *supra* note 61, at 141.

121. H. Clark I, *supra* note 18, at 461-63.

122. "The remarriage of the divorced wife is generally assumed to relieve the alimony-paying husband of the duty of supporting her, inasmuch as assumption of this obligation by the second husband will usually wipe out the need for further payments." Desvernine, *Grounds for the Modification of Alimony Awards*, 6 Law & Contemp. Probs. 236, 244 (1939).

123. E.g., Ill. Ann. Stat. ch. 40, § 510(b) (Smith-Hurd 1980); Neb. Rev. Stat. § 42-365 (1978); Nev. Rev. Stat. § 125.150(5) (1979); *cf.* Ala. Code § 30-2-55 (Supp. 1979) (remarriage only); Cal. Civ. Code § 4801(b) (West Supp. 1981) (unless the parties otherwise agree in writing); Ga. Code Ann. § 30-209 (Supp. 1981) (remarriage only, "unless otherwise provided"). Georgia has a unique statute which provides that if either party dies prior to the court's order on the alimony issue, any rights of the other party to alimony survive and are considered a lien on the decedent's estate. Ga. Code Ann. § 30-201 (1980). Under New York law, any remarriage, whether valid or invalid, will terminate alimony. N.Y. Dom. Rel. Law § 236 pt. B (1)(a) (McKinney Supp. 1980-1981). In Utah, however, if the second marriage is annulled and found void ab initio and the former spouse is made a party to the annulment proceeding, the spouse may be able to resume receiving alimony payments. Utah Code Ann. § 30-3-5(2) (Supp. 1979).

124. The percentage of unmarried couples living together increased from 2.6% of non-family households in 1970 to 5% in 1979; from 523,000 couples in 1970 to 1,346,000 in 1979. Statistical Abstract, *supra* note 7, at 44 table 59.

six states to make specific provision in their alimony statutes to take into account cohabitation by the alimony recipient. In Alabama, alimony terminates if the recipient is "living openly or cohabiting with a member of the opposite sex."¹²⁵ In Illinois, the award terminates if the recipient is living with another "on a resident, continuing conjugal basis."¹²⁶ Alimony is also terminable in Utah unless the recipient establishes that the relationship "is without any sexual contact."¹²⁷ Oklahoma considers cohabitation as grounds to modify the alimony award,¹²⁸ and in California and Tennessee, cohabitation gives rise to a rebuttable presumption that the party's need for alimony has decreased.¹²⁹ Interestingly, while four of the statutes refer specifically to cohabitation with a member of the opposite sex,¹³⁰ two do not. Illinois uses the phrase "cohabits with another"¹³¹ and Tennessee "with a third person."¹³²

Cohabitation provisions address two separate issues: need and fault. California, Tennessee and Oklahoma appear to reason that if an alimony recipient is living with another person, the need for the alimony may have decreased because of the contributions to household expenses by the other party. This approach is valid if alimony awards are to be based on need. On the other hand, Alabama and Illinois provide that proof of cohabitation will result in the complete termination of alimony, thus punishing a party for "immoral" conduct, even if the need for alimony still exists.

III. PROPERTY DIVISION

Prior to making an award of alimony, the court should divide the marital property between the parties. Only then can a determination be made as to whether or not an alimony award is necessary. Today, every state provides for some form of property division upon divorce. The statutes of Mississippi, Virginia and West Virginia, however, permit only limited forms of property division.¹³³ Although there are

125. Ala. Code § 30-2-55 (Supp. 1979).

126. Ill. Ann. Stat. ch. 40, § 510(b) (Smith-Hurd 1980).

127. Utah Code Ann. § 30-3-5(3) (Supp. 1979).

128. Okla. Stat. Ann. tit. 12, § 1289(D) (West Supp. 1980-1981).

129. Cal. Civ. Code § 4801.5 (West Supp. 1981); Tenn. Code Ann. § 36-820(3) (Supp. 1981).

130. Ala. Code § 30-2-55 (Supp. 1979); Cal. Civ. Code § 4801.5 (West Supp. 1981); Okla. Stat. Ann. tit. 12, § 1289(D) (West Supp. 1980-1981); Utah Code Ann. § 30-3-5(3) (Supp. 1979).

131. Ill. Ann. Stat. ch. 40, § 510(b) (Smith-Hurd 1980).

132. Tenn. Code Ann. § 36-820(3) (Supp. 1981).

133. Miss. Code Ann. § 93-5-2 (Supp. 1980) (if the divorce is granted on grounds of irreconcilable differences, the parties must make a written agreement "for the settlement of any property rights between" them); Va. Code § 20-111 (1975) (the court can equally divide jointly held property, turning a tenancy by the entirety into a tenancy in common); W. Va. Code § 48-2-21 (1981) (the court can return to a party

no explicit property division provisions in the divorce statutes of Alabama,¹³⁴ Florida,¹³⁵ North Carolina¹³⁶ and South Carolina,¹³⁷ these states employ several theories to allow for a species of property division. These theories include the doctrine that a spouse may develop, by his or her contributions during the marriage, a special equity in property owned by the other,¹³⁸ and the presumption that a spouse has received a gift of one-half of the property held in joint name.¹³⁹ Alabama uses grants of lump sum alimony and periodic payments to effect both an award of alimony and a division of property.¹⁴⁰ In South Carolina, the court has jurisdiction to divide property only if the parties request the court to do so.¹⁴¹

In the rest of the states, specific statutory authority exists to allow the court to divide the property of the parties.¹⁴² These provisions vary greatly, however, on such issues as how marital property is defined, what property is to be divided, how the division is to be made, and what factors are to be considered in making the division.

property he owns that is in the possession or control of the other spouse). The special equity doctrine, *see infra* note 138 and accompanying text, is also available in West Virginia. *Pierce v. Pierce*, 274 S.E.2d 514, 515 (W. Va. 1981).

134. Ala. Code §§ 30-2-1 to -55 (1977 & Supp. 1979).

135. Fla. Stat. Ann. §§ 61.011-.20 (West 1969 & Supp. 1981).

136. N.C. Gen. Stat. §§ 50-1 to -19 (1976 & Supp. 1979).

137. S.C. Code Ann. § 20-3-10 to -230 (Law. Co-op. 1977 & Supp. 1980).

138. *Neff v. Neff*, 386 So. 2d 318, 319 (Fla. Dist. Ct. App. 1980); *Wilson v. Wilson*, 270 S.C. 216, 221-22, 241 S.E.2d 566, 568-69 (1978).

139. *McCready v. McCready*, 356 So. 2d 337, 338 (Fla. Dist. Ct. App. 1978).

140. *Hager v. Hager*, 293 Ala. 47, 299 So. 2d 743 (1974). The Alabama Supreme Court distinguishes between the purposes of alimony in gross and alimony in installments: " 'Alimony in gross' is the present value of the wife's inchoate marital rights—dower, homestead, quarantine, and distributive share. It is payable out of the husband's present estate as it exists at the time of divorce. . . . On the other hand, 'periodic alimony' is an allowance for the future support of the wife payable from the current earnings of the husband." *Id.* at 55, 299 So. 2d at 750.

141. *Moyle v. Moyle*, 262 S.C. 308, 312, 204 S.E.2d 46, 48 (1974).

142. Alaska Stat. § 09.55.210(6) (Supp. 1981); Ariz. Rev. Stat. Ann. § 25-318 (Supp. 1980-1981); Ark. Stat. Ann. § 34-1214 (Supp. 1981); Cal. Civ. Code §§ 4800, 4800.5 (West Supp. 1981); Colo. Rev. Stat. § 14-10-113 (1974 & Supp. 1978); Conn. Gen. Stat. Ann. § 46b-81 (West Supp. 1981); Del. Code Ann. tit. 13, § 1513 (Supp. 1980); D.C. Code Encycl. § 16-910 (West Supp. 1978-1979); Ga. Code Ann. § 30-118 (1980); Hawaii Rev. Stat. § 580-47(a)(3) (Supp. 1980); Idaho Code § 32-712 (Supp. 1981); Ill. Ann. Stat. ch. 40, § 503 (Smith-Hurd 1980); 1980 Ind. Acts 1573, 1573-74 (to be codified at Ind. Code Ann. § 31-1-11.5-11 (Burns)); Iowa Code Ann. § 598.21(1) (West Supp. 1981-1982); Kan. Stat. Ann. § 60-1610(c) (Supp. 1980); Ky. Rev. Stat. Ann. § 403.190 (Bobbs-Merrill Supp. 1980); La. Civ. Code Ann. art. 159 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 19, § 722-A (1981); Md. Ann. Code art. 16, § 25 (1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); Mich. Comp. Laws Ann. § 552.19 (Supp. 1981-1982); Minn. Stat. Ann. § 518.58 (West Supp. 1981); 1981 Mo. Legis. Serv. 546, 546-47 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330 (Vernon)); Mont. Rev. Codes Ann. § 48-321 (Supp. 1977); Neb. Rev. Stat. § 42-365 (Supp. 1980); Nev. Rev. Stat. § 125.150(1)(b) (1979); N.H. Rev. Stat.

A. How Property is Defined

The initial undertaking in a property division is the determination of what property is divisible. Legislatures have influenced this threshold consideration by designating certain property as marital and other property as separate. The standard definition of marital property is "[a]ll property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent."¹⁴³ This definition is varied in many statutes either by excluding additional items from the marital property or by adding items to it. By including a definition of marital property in its statute, a state can make explicit a policy decision on what items are or are not to be considered, thus providing the trial court with specific guidelines.

The following items are excluded from "marital property" in various states: those excluded by agreement of the parties;¹⁴⁴ increases in the value of a spouse's separate property during the marriage;¹⁴⁵

Ann. § 458:19 (1968); N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982); N.M. Stat. Ann. § 40-4-7(B)(4) (1978); N.Y. Dom. Rel. Law § 236 pt. B(5) (McKinney Supp. 1980-1981); N.D. Cent. Code § 14-05-24 (1971); Okla. Stat. Ann. tit. 12, § 1278 (West Supp. 1980-1981); Or. Rev. Stat. § 107.105(1)(e) (1979); Pa. Stat. Ann. tit. 23, § 401(d) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16.1 (Supp. 1980); S.D. Codified Laws Ann. § 25-4-44 (1976); Tenn. Code Ann. § 36-825 (1977); Tex. Fam. Code Ann. tit. 1, § 3.63 (Vernon 1975); Utah Code Ann. § 30-3-5(1) (Supp. 1979); Vt. Stat. Ann. tit. 15, § 751 (1974); Wash. Rev. Code Ann. § 26.09.080 (Supp. 1981); Wis. Stat. Ann. § 767.255 (West Supp. 1981); Wyo. Stat. § 20-2-114 (1977). On its face, the Ohio statute seems to provide for alimony alone. See Ohio Rev. Code Ann. § 3105.18 (Page 1980). The Ohio Supreme Court, however, has cited the statute to support its contention that a court's primary function in a divorce proceeding is to preside over the division of the marital property. *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 411, 350 N.E.2d 413, 421 (1976). See generally Freed & Foster II, *supra* note 61, at 249-52.

143. Ariz. Rev. Stat. Ann. § 25-211 (1976); see *supra* notes 43-44 and accompanying text.

144. Ark. Stat. Ann. § 34-1214(B)(4) (Supp. 1981); Colo. Rev. Stat. § 14-10-113(2)(d) (1973); Del. Code Ann. tit. 13, § 1513(b)(2) (Supp. 1980); Ill. Ann. Stat. ch. 40, § 503(a)(4) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.190(2)(d) (Bobbs-Merrill Supp. 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A(2)(D) (1981); 1981 Mo. Legis. Serv. 546, 547 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(2)(4) (Vernon)); N.M. Stat. Ann. § 40-3-8(A)(5) (1978); N.Y. Dom. Rel. Law § 236 pt. B(1)(d)(4) (McKinney Supp. 1980-1981); Pa. Stat. Ann. tit. 23, § 401(e)(2) (Purdon Supp. 1981-1982); cf. Minn. Stat. Ann. § 518.54(5)(e) (West Supp. 1981) ("valid antenuptial contract" only).

145. Ark. Stat. Ann. § 34-1214(B)(5) (Supp. 1981); Del. Code Ann. tit. 13, § 1513(b)(3) (Supp. 1980); D.C. Code Encycl. § 16-910(a) (West Supp. 1978-1979); Ill. Ann. Stat. ch. 40, § 503(a)(5) (Smith-Hurd 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A(2)(E) (1981); Minn. Stat. Ann. § 518.54(5)(c) (West Supp. 1981); 1981 Mo. Legis. Serv. 546, 547 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(2)(5) (Vernon)); Wyo. Stat. § 20-1-201 (1977); cf. Ky. Rev. Stat. Ann. § 403.190(2)(e) (Bobbs-Merrill Supp. 1980) ("to the extent that such increase did not result from the efforts of the parties during marriage"); N.Y. Dom. Rel. Law § 236 pt. B(1)(d)(3) (McKinney Supp. 1980-1981) ("except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse").

personal injury awards;¹⁴⁶ veteran's benefits;¹⁴⁷ the rents, issues and proceeds of separate property acquired during the marriage;¹⁴⁸ items exchanged for or purchased with funds acquired from separate property;¹⁴⁹ property designated separate by the court;¹⁵⁰ property acquired after the parties separate but before a final decree of divorce;¹⁵¹ and property disposed of or mortgaged in good faith before the divorce action is commenced.¹⁵² Minnesota includes pension benefits as part of the marital property,¹⁵³ while Iowa adds property acquired before the marriage.¹⁵⁴

Once it is determined which property is marital and which is separate, a court's next step is to determine what property is to be divided upon divorce. Instead of making a distinction between marital and separate property, some statutes give the court the power to divide all the property of the parties.

B. *What Property is Divided*

The most common method of dividing property is to return to each party his or her separate property and then to divide the marital

146. Nev. Rev. Stat. § 123.130 (1979); N.Y. Dom. Rel. Law § 236 pt. B(1)(d)(2) (McKinney Supp. 1980-1981); *cf.* Tex. Fam. Code Ann. tit. 1, § 5.01(a)(3) (Vernon 1975) ("except any recovery for loss of earning capacity during marriage"). California allows up to one-half of a personal injury award to be given to the uninjured spouse if "the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require" it. Cal. Civ. Code § 4800(c) (West Supp. 1981).

147. Pa. Stat. Ann. tit. 23, § 401(e)(6) (Purdon Supp. 1981-1982).

148. Wash. Rev. Code Ann. §§ 26.16.010, .020 (1961); Wyo. Stat. § 20-1-201 (1977).

149. Ark. Stat. Ann. § 34-1214(B)(2) (Supp. 1981); Colo. Rev. Stat. § 14-10-113(2)(b) (1973); Del. Code Ann. tit. 13, § 1513(b)(1) (Supp. 1980); D.C. Code Encycl. § 16-910(a) (West Supp. 1978-1979); Idaho Code § 32-903 (1963); Ill. Ann. Stat. ch. 40, § 503(a)(2) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.190(2)(b) (Bobbs-Merrill Supp. 1980); La. Civ. Code Ann. art. 2341 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 19, § 722-A(2)(B) (1981); Minn. Stat. Ann. § 518.54(5)(c) (West Supp. 1981); 1981 Mo. Legis. Serv. 546, 547 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(2)(2) (Vernon)); N.Y. Dom. Rel. Law § 236 pt. B(1)(d)(3) (McKinney Supp. 1980-1981); Pa. Stat. Ann. tit. 23, § 401(e)(1) (Purdon Supp. 1981-1982); Wis. Stat. Ann. § 767.255 (West Supp. 1981).

150. N.M. Stat. Ann. § 40-3-8(A)(3) (1978).

151. Ark. Stat. Ann. § 34-1214(B)(3) (Supp. 1981); Colo. Rev. Stat. § 14-10-113(2)(c) (1973); Ill. Ann. Stat. ch. 40, § 503(a)(3) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.190(2)(c) (Bobbs-Merrill Supp. 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A(2)(C) (1981); Minn. Stat. Ann. § 518.54(5)(d) (West Supp. 1981); 1981 Mo. Legis. Serv. 546, 547 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(2)(3) (Vernon)); N.M. Stat. Ann. § 40-3-8(A)(2) (1978); Pa. Stat. Ann. tit. 23, § 401(e)(4) (Purdon Supp. 1981-1982).

152. Pa. Stat. Ann. tit. 23, § 401(e)(5), (7) (Purdon Supp. 1981-1982).

153. Minn. Stat. Ann. § 518.54(5) (West Supp. 1981).

154. Iowa Code Ann. § 598.21(1) (West Supp. 1981-1982).

property "equitably."¹⁵⁵ In several jurisdictions, however, the separate property of each party is subject to division by the court. Arkansas will not return separate property if it would be "inequitable" to do so.¹⁵⁶ Courts in Maryland and New Hampshire are empowered to return to a wife the property she had when she married or whatever portion of it is deemed reasonable.¹⁵⁷ Five states allow assignment of all or part of one spouse's "estate" to the other;¹⁵⁸ and South Dakota provides that the property of either or both can be divided by the court if the divorce is granted on fault grounds.¹⁵⁹

Some statutes give courts power to divide all property acquired during the marriage, joint or separate,¹⁶⁰ or all property of the parties, however or whenever acquired.¹⁶¹ These statutes thus enable courts to disregard the distinction between marital and separate property. However, alimony, not property division, is designed to allow for invasion of one spouse's separate property to provide for the other.¹⁶² Any disparity in the amount of property ex-spouses would have upon divorce, due to differences in the size of their separate estates, can be corrected, in most cases, not by giving one spouse the other's property, but by giving the spouse a larger share, or all, of the marital property.

C. How Property is Divided

Most statutes contain no rules concerning the proportion of marital property to be assigned to each spouse. A court is to decide, in its discretion, on an equitable, just and reasonable division.¹⁶³ Certain

155. *E.g.*, Colo. Rev. Stat. § 14-10-113 (1973 & Supp. 1978); Nev. Rev. Stat. § 125.150(1)(b) (1979); Okla. Stat. Ann. tit. 12, § 1278 (West Supp. 1980-1981).

156. Ark. Stat. Ann. § 34-1214(A)(2) (Supp. 1981).

157. Md. Ann. Code art. 16, § 25 (1981); N.H. Rev. Stat. Ann. § 458:19 (1968).

158. Conn. Gen. Stat. Ann. § 46-b-81(a) (West Supp. 1981); Mass. Ann. Laws ch. 208, § 34 (Michie/Law. Co-op. 1981); N.H. Rev. Stat. Ann. § 458:19 (1968); R.I. Gen. Laws § 15-5-16.1 (Supp. 1980); *cf.* Minn. Stat. Ann. § 518.58 (West Supp. 1981) (if the court finds that the spouse's resources are insufficient, it can apportion up to one-half of the separate property of the other spouse to prevent undue hardship).

159. S.D. Codified Laws Ann. § 25-4-44 (1976).

160. Alaska Stat. § 09.55.210(6) (Supp. 1981); *cf.* N.J. Stat. Ann. § 2A:34-23 (West Supp. 1981-1982) (items acquired during marriage by gift, devise or descent, except for interspousal gifts, are excluded).

161. Hawaii Rev. Stat. § 580-47(a)(3) (Supp. 1980); 1980 Ind. Acts 1573, 1573-74 (to be codified at Ind. Code Ann. § 31-1-11.5-11(b) (Burns)); Kan. Stat. Ann. § 60-1610(c) (Supp. 1980); Mont. Rev. Codes Ann. § 48-321(1) (Supp. 1977); Or. Rev. Stat. § 107.105(1)(e) (1979); Vt. Stat. Ann. tit. 15, § 751 (1974); Wash. Rev. Code Ann. § 26.09.080 (Supp. 1981).

162. Alimony is paid out of earnings received after the divorce; property division is a division of the present value of the marital property. *See supra* note 17 and accompanying text.

163. *E.g.*, D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Hawaii Rev. Stat. § 580-47(a)(3) (Supp. 1980); Mich. Comp. Laws Ann. § 552.19 (Supp. 1981-1982).

state statutes specify that this equitable division is to be made "without regard to marital misconduct,"¹⁶⁴ while most are silent on the issue. Four states require the division of the marital property to be equal unless specific findings of fact are made: in Arkansas and Wisconsin, unless such division would be inequitable;¹⁶⁵ in Idaho, unless "compelling reasons" exist;¹⁶⁶ and in California, unless the parties have a written agreement to the contrary or make an oral stipulation in open court.¹⁶⁷

There can be great disparity in the value of the parties' separate estates. Leaving the proportion of marital property to be awarded each spouse to the court, rather than having the division strictly dictated by statute, therefore, is a better way to provide for equitable results. If a strictly equal division is mandated by statute, injustice could result for which the court will have to compensate in an alimony award. If property division is "the preferred method of providing for the financial needs of a spouse,"¹⁶⁸ mandatory equal division is unwise.

D. Factors Considered in Property Division

Statutes in twenty-one jurisdictions¹⁶⁹ specifically enumerate fac-

164. Ariz. Rev. Stat. Ann. § 25-318(A) (Supp. 1980-1981); Colo. Rev. Stat. § 14-10-113(1) (Supp. 1978); Del. Code Ann. tit. 13, § 1513(a) (Supp. 1980); Ill. Ann. Stat. ch. 40, § 503(c) (Smith-Hurd 1980); Ky. Rev. Stat. Ann. § 403.190(1) (Bobbs-Merrill Supp. 1980); Minn. Stat. Ann. § 518.58 (West Supp. 1981); Mont. Rev. Codes Ann. § 48-321(1) (Supp. 1977); Pa. Stat. Ann. tit. 23, § 401(d) (Purdon Supp. 1981-1982); Wash. Rev. Code Ann. § 26.09.080 (Supp. 1981); accord Alaska Stat. § 09.55.210(6) (1973) ("without regard to which of the parties is in fault"); Or. Rev. Stat. § 107.036(3) (1979) ("[T]he court shall not consider the fault, if any, of either of the parties.").

165. Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1981); Wis. Stat. Ann. § 767.255 (West Supp. 1981). Wisconsin, however, does allow consideration of additional enumerated factors to permit other than equal property divisions. *Id.*

166. Idaho Code § 32-712(1)(a) (Supp. 1981).

167. Cal. Civ. Code § 4800(a) (West Supp. 1981).

168. *Property, supra* note 62, at 566.

169. Ark. Stat. Ann. § 34-1214(A)(1)(1)-(9) (Supp. 1981); Colo. Rev. Stat. § 14-10-113(1)(a)-(d) (1973); Conn. Gen. Stat. Ann. § 46b-81(c) (West Supp. 1981); Del. Code Ann. tit. 13, § 1513(a)(1)-(11) (Supp. 1980); D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Idaho Code § 32-712(1)(b)(1)-(7) (Supp. 1981); Ill. Ann. Stat. ch. 40, § 503(c)(1)-(10) (Smith-Hurd 1980); 1980 Ind. Acts 1573, 1573-74 (to be codified at Ind. Code Ann. § 31-1-11.5-11(b)(1)-(5) (Burns)); Iowa Code Ann. § 598.21(1)(a)-(m) (West Supp. 1981-1982); Ky. Rev. Stat. Ann. § 403.190(1)(a)-(d) (Bobbs-Merrill Supp. 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A(1)(A)-(C) (1981); Minn. Stat. Ann. § 518.58 (West Supp. 1981); 1981 Mo. Legis. Serv. 546, 546 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(1)(1)-(4) (Vernon)); Mont. Rev. Codes Ann. § 48-321(1) (Supp. 1977); N.Y. Dom. Rel. Law § 236 pt. B(5)(d)(1)-(10) (McKinney Supp. 1980-1981); Or. Rev. Stat. § 107.105(1)(e), (2) (1979); Pa. Stat. Ann. tit. 23, § 401(d)(1)-(10) (Purdon Supp. 1981-1982); R.I. Gen. Laws § 15-5-16.1 (Supp. 1980); Wash. Rev. Code Ann. § 26.09.080(1)-(4) (Supp. 1981); Wis. Stat. Ann. § 767.255(1)-(12) (West Supp. 1981); Wyo. Stat. § 20-2-114 (1977).

tors¹⁷⁰ to be considered in making property divisions. As with the statutory guidelines for alimony, no one factor, of the total of thirty-eight, appears in all twenty-one statutes. If the purpose of a property division is "to distribute the marital assets equitably between the parties,"¹⁷¹ all the factors considered in property divisions should be addressed to an evaluation of such assets. Only twenty-six of the thirty-eight factors do so.¹⁷² Significant factors addressed to evalua-

170. The following factors are listed in order of frequency of use, with parenthetical indications of the number of states using each factor: 1. the economic circumstances of each party at the time of the division, particularly the amount and sources of income (18); 2. the contribution of each to the acquisition of the marital property, including contributions as a homemaker (17); 3. the duration of the marriage (15); 4. the age and health, both physical and emotional, of the parties (12); 5. the desirability of awarding the marital home to the spouse receiving custody of the children (11); 6. occupation and vocational skills (11); 7. employability (11); 8. the opportunity of each for future acquisition of capital assets and income (10); 9. whether the property division is in lieu of, or in addition to, alimony (10); 10. debts of the parties (9); 11. the value of the separate property of each (8); 12. station in life/standard of living (8); 13. the estates of the parties (7); 14. conduct of the parties, including its relation to the disposition or dissipation of the property (6); 15. prior marriages (6); 16. agreements of the parties (antenuptial and/or separation) (5); 17. tax consequences (5); 18. custody of the children (5); 19. the contribution of each in the acquisition, preservation or appreciation in value of the respective estates (5); 20. retirement benefits (4); 21. the contribution of one spouse to the other's education, training or increased earning power (4); 22. the income and property of each at the time of the marriage (3); 23. other just and equitable factors (3); 24. whether the property was acquired by gift, bequest, devise or descent (2); 25. the education of the parties (2); 26. job absence (2); 27. time needed by a spouse for training (2); 28. increases or decreases in the value of the separate property during the marriage (1); 29. the cause of the divorce (1); 30. depletion of separate property for marital purposes (1); 31. the loss of inheritance and pension rights (1); 32. the liquid or non-liquid character of the marital assets (1); 33. the difficulty of evaluating a component asset or an interest in a business (1); 34. the merits of the parties (1); 35. burdens imposed on the property for the benefit of either party or the children (1); 36. the nature and extent of the community property (1); 37. the nature and extent of the separate property (1); and 38. the party through whom the property was acquired (1). See Appendix B for a chart of the factors, listed by state. Each number that appears in the vertical column of the chart identifies the factor introduced by the same number in this footnote.

171. Neb. Rev. Stat. § 42-365 (Supp. 1980).

172. The factors are: 1. the economic circumstances of each party at the time of the division, particularly the amount and sources of income; 2. the contribution of each to the acquisition of the marital property, including contributions as a homemaker; 3. the duration of the marriage; 4. the desirability of awarding the marital home to the spouse receiving custody of the children; 5. the opportunity of each for future acquisition of capital assets and income; 6. debts of the parties; 7. the value of the separate property of each; 8. the estates of the parties; 9. conduct of the parties, but only as related to the disposition or dissipation of the property; 10. agreements of the parties (antenuptial and/or separation); 11. tax consequences; 12. retirement benefits; 13. the contribution of one spouse to the other's education, training or increased earning power; 14. the contribution of each in the acquisition, preservation or appreciation in value of the respective estates; 15. the income and property of each

tion of assets include: the contribution of each to the acquisition of the marital property, including contributions as a homemaker;¹⁷³ the opportunity of each for future acquisition of capital assets and income;¹⁷⁴ the value of the separate property of each;¹⁷⁵ and the contribution of each in the acquisition, preservation or appreciation in value of the respective estates.¹⁷⁶

Certain factors employed in property divisions, however, are inappropriate. For example, the age and health of the parties,¹⁷⁷ the time needed for retraining,¹⁷⁸ child custody,¹⁷⁹ and job absence¹⁸⁰ are more appropriate to an alimony determination, because they relate to the financial needs of the parties. Station in life/standard of living¹⁸¹ and

at the time of the marriage; 16. other just and equitable factors; 17. whether the property was acquired by gift, bequest, devise or descent; 18. increases or decreases in the value of the separate property during the marriage; 19. depletion of separate property for marital purposes; 20. the loss of inheritance and pension rights; 21. the liquid or non-liquid character of the marital assets; 22. the difficulty of evaluating a component asset or an interest in a business; 23. burdens imposed on the property for the benefit of either party or the children; 24. the nature and extent of the community property; 25. the nature and extent of the separate property; and 26. the party through whom the property was acquired.

173. *E.g.*, Ark. Stat. Ann. § 34-1214(A)(1)(8) (Supp. 1981); Colo. Rev. Stat. § 14-10-113(1)(a) (1973); Del. Code Ann. tit. 13, § 1513(a)(6) (Supp. 1980).

174. *E.g.*, D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Idaho Code § 32-712(1)(b)(6) (Supp. 1981); Ill. Ann. Stat. ch. 40, § 503(c)(10) (Smith-Hurd 1980).

175. *E.g.*, Ky. Rev. Stat. Ann. § 403.190(1)(b) (Bobbs-Merrill Supp. 1980); Me. Rev. Stat. Ann. tit. 19, § 722-A(1)(B) (1981); 1981 Mo. Legis. Serv. 546, 546 (Vernon) (to be codified at Mo. Ann. Stat. § 452.330(1)(2) (Vernon)).

176. *E.g.*, Conn. Gen. Stat. Ann. § 46 b-81(c) (West Supp. 1981); Mont. Rev. Codes Ann. § 48-321(1) (Supp. 1977); R.I. Gen. Laws § 15-5-16.1 (Supp. 1980).

177. Ark. Stat. Ann. § 34-1214(A)(1)(2) (Supp. 1981); Conn. Gen. Stat. Ann. § 46b-81(c) (West Supp. 1981); Del. Code Ann. tit. 13, § 1513(a)(3) (Supp. 1980); D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Idaho Code § 32-712(1)(b)(3) (Supp. 1981); Ill. Ann. Stat. ch. 40, § 503(c)(7) (Smith-Hurd 1980); Iowa Code Ann. § 598.21(1)(d) (West Supp. 1981-1982); Minn. Stat. Ann. § 518.58 (West Supp. 1981); N.Y. Dom. Rel. Law § 236 pt. B(5)(d)(2) (McKinney Supp. 1980-1981); Pa. Stat. Ann. tit. 23, § 401(d)(3) (Purdon Supp. 1981-1982); Wis. Stat. Ann. § 767.255(4) (West Supp. 1981).

178. Iowa Code Ann. § 598.21(1)(f) (West Supp. 1981-1982); Wis. Stat. Ann. § 767.255(6) (West Supp. 1981).

179. D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Ill. Ann. Stat. ch. 40, § 503(c)(8) (Smith-Hurd 1980); Iowa Code Ann. § 598.21(1)(f) (West Supp. 1981-1982); Wis. Stat. Ann. § 767.255(6) (West Supp. 1981).

180. Iowa Code Ann. § 598.21(1)(f) (West Supp. 1981-1982); Wis. Stat. Ann. § 767.255(6) (West Supp. 1981).

181. Ark. Stat. Ann. § 34-1214(A)(1)(2) (Supp. 1981); Conn. Gen. Stat. Ann. § 46b-81(c) (West Supp. 1981); Del. Code Ann. tit. 13, § 1513(a)(3) (Supp. 1980); Ill. Ann. Stat. ch. 40, § 503(c)(7) (Smith-Hurd 1980); Minn. Stat. Ann. § 518.58 (West Supp. 1981); Pa. Stat. Ann. tit. 23, § 401(d)(3) (Purdon Supp. 1981-1982).

prior marriages¹⁸² are irrelevant.¹⁸³ In addition, the cause of the divorce¹⁸⁴ and the "merits of the parties"¹⁸⁵ address the issue of fault, which is a policy decision appropriately left with the legislature.

A listing of factors gives invaluable guidance to the fact finder and the practitioner by providing a convenient checklist of the items that the state feels are of importance in making an equitable division of the property. Without such a list, there can be no predictability from case to case as to what will be considered in the division. A "catch-all," however, such as "other just and equitable considerations," should be included to take care of unusual situations. Although a "catch-all" is only listed as a factor in three states,¹⁸⁶ several other states accomplish the same result by urging their courts to consider all relevant factors in arriving at a just determination, not only those enumerated in their statutes.¹⁸⁷

IV. IN THE COURT'S DISCRETION

Despite great differences among the alimony and property division statutes in this country, all awards of alimony and property division are made by the court in the exercise of its discretion.

Appellate courts are designed to provide a certain amount of control over lower court decisions.¹⁸⁸ When, however, a statute does not list factors to be considered, but only provides that the property division or alimony award is to be "equitable," the appellate court has little information in the trial record on which to determine the propri-

182. Del. Code Ann. tit. 13, § 1513(a)(2) (Supp. 1980); D.C. Code Encycl. § 16-910(b) (West Supp. 1978-1979); Minn. Stat. Ann. § 518.58 (West Supp. 1981); Pa. Stat. Ann. tit. 23, § 401(d)(2) (Purdon Supp. 1981-1982); cf. Ill. Ann. Stat. ch. 40, § 503(c)(5) (Smith-Hurd 1980) (obligations and rights arising from a prior marriage).

183. For a discussion of the relevance of station in life/standard of living, see *supra* notes 115-16 and accompanying text. The only effect of prior marriages, in terms of a property division, is that the value of property received from the divorce of the previous marriage should be the separate property of that spouse. This factor may have been included, however, because all five jurisdictions consider all property acquired after the marriage to be marital property. Therefore, if after the marriage one spouse receives a payment from an ex-spouse as part of the property division of the first marriage, it would be presumed to be "marital property" of the second marriage. Using this factor, then, allows the judge to take such a possibility into account.

184. Conn. Gen. Stat. Ann. § 46b-81(c) (West Supp. 1981).

185. Wyo. Stat. § 20-2-114 (1977).

186. Iowa Code Ann. § 598.21(1)(m) (West Supp. 1981-1982); N.Y. Dom. Rel. Law § 236 pt. B(5)(d)(10) (McKinney Supp. 1980-1981); Wis. Stat. Ann. § 767.255(12) (West Supp. 1981).

187. E.g., Colo. Rev. Stat. § 14-10-113 (Supp. 1981); Del. Code Ann. tit. 13, § 1513(a) (Supp. 1980); Idaho Code § 31-712(1) (Supp. 1981); Wash. Rev. Code Ann. § 26.09.080 (Supp. 1981).

188. See Desvernine, *supra* note 122, at 236-37.

ety of the award. The effectiveness of appellate review is undermined in two additional ways. First, only a small percentage of the divorce cases heard each year reach the appellate level. The trial court's discretion, therefore, is "not often subject to check."¹⁸⁹ Second, the appellate courts frequently resort to presumptions to uphold the trial court's discretion, leading one commentator to suspect that insufficient evidence is available in the trial court record on which to base the decision.¹⁹⁰ These presumptions are still used today. One court has recognized "that the trial court has broad discretion," and therefore declined to "modify or set . . . aside [the property division and alimony award] unless it clearly appears that the trial court abused its discretion."¹⁹¹ Another court noted that "upon appeal it is presumed that the trial court exercised its discretion properly," and indicated it would reverse "only where there is a clear abuse of discretion."¹⁹²

The UMDA attempted to prevent abuse of judicial discretion by requiring that separate property be returned to each spouse and allowing the court to divide only marital property.¹⁹³ As noted, however, only five states enacted the UMDA,¹⁹⁴ and it cannot be said that the statutory changes enacted in recent years have corrected the problem. Appellate courts in many jurisdictions have been forced to overturn clearly excessive alimony and property division awards in the last three years.¹⁹⁵ For example, in *Petersen v. Petersen*,¹⁹⁶ the trial court awarded the wife alimony and child support payments totalling 75% of the husband's income.¹⁹⁷ In *In re McGrew*,¹⁹⁸ a woman with a net worth of \$329,829 was awarded maintenance of \$200 per month.¹⁹⁹ In *Blum v. Blum*,²⁰⁰ an alimony award of more than \$4,000 a month

189. Cooley, *supra* note 14, at 224.

190. *Id.* at 222-23.

191. *Hansen v. Hansen*, 273 N.W.2d 749, 751 (S.D. 1979) (per curiam) (citations omitted).

192. *In re Butler*, 543 S.W.2d 147, 149 (Tex. Civ. App. 1976), *overruled on other grounds*, *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977).

193. *See supra* note 65 and accompanying text.

194. *See supra* note 68 and accompanying text.

195. *E.g.*, *Wise v. Wise*, 396 So. 2d 111, 112-13 (Ala. Civ. App. 1981) (wife awarded \$890 per month in alimony and child support, leaving husband with \$110 per month); *Parham v. Parham*, 385 So. 2d 107, 108-09 (Fla. Dist. Ct. App. 1980) (wife with net worth of \$15,500 awarded \$650 a month, while husband with take home pay of \$448 per week had greater liabilities than assets); *Pettit v. Pettit*, 85 Ill. App. 3d 280, 284-85, 406 N.E.2d 899, 903 (1980) (working wife earning \$165 to \$250 per week awarded 40% of gross earnings of unemployed husband, who made \$125 per week when he did work).

196. 301 N.W.2d 592 (Neb. 1981).

197. *Id.* at 595.

198. 90 Ill. App. 3d 27, 412 N.E.2d 996 (1980).

199. *Id.* at 32-33, 412 N.E.2d at 1000-01.

200. 382 So. 2d 52 (Fla. Dist. Ct. App. 1980).

left the husband \$50 a week on which to live, without discharging any of his other obligations.²⁰¹

The best way to check abuse of discretion is to require by statute both financial disclosure by the parties and written findings of fact and conclusions of law by the judge. These provisions would serve a dual purpose: first, causing the lower court to be more careful in its reasoning and result, and second, ensuring that an appellate court will have a sufficient record on which to decide if discretion was abused.

It is inequitable for an appellate decision to be based on an incomplete record. The Texas Supreme Court, in a divorce case, stated that "[i]n the absence of findings of fact and conclusions of law, we must *assume* that the trial court took into consideration the entire circumstances of the parties."²⁰² An appellate court should never have to make such an assumption. The only recourse for an appeals court is to remand the case for further findings of fact.²⁰³ If written findings of fact are mandated by statute, however, the additional cost and time involved in further trial court proceedings would be unnecessary.

Financial disclosure is statutorily required in only three states.²⁰⁴ In three other states, statutes specify that the court may require such disclosure.²⁰⁵ Delaware and Florida require an affidavit of dependency from a party seeking alimony, which must specify the party's financial needs.²⁰⁶ While other courts may at times use financial information supplied by the parties to decide on a property division or alimony award,²⁰⁷ no other statutes specifically require either the court to use such information or the parties to produce it.

Few statutes require written findings of fact and conclusions of law. Of those that do, only New York, Washington and West Virginia require them in all cases.²⁰⁸ In Iowa, only the factors "relevant to the

201. *Id.* at 54-55.

202. Whittenberg v. Whittenberg, 523 S.W.2d 797, 798 (Tex. Civ. App. 1975) (emphasis added).

203. Steele v. Steele, 36 N.C. App. 601, 602, 244 S.E.2d 466, 468 (1978); Pierce v. Pierce, 274 S.E.2d 514, 515-16 (W. Va. 1981).

204. Ga. Code Ann. § 30-105(6) (1980); N.Y. Dom. Rel. Law § 236 pt. B(4) (McKinney Supp. 1980-1981); Or. Rev. Stat. § 107.105(1)(e) (1979).

205. Mich. Comp. Laws Ann. § 552.22 (Supp. 1981-1982); N.H. Rev. Stat. Ann. § 458:19 (1968); Vt. Stat. Ann. tit. 15, § 754 (Supp. 1981).

206. Del. Code Ann. tit. 13, § 1512(b) (Supp. 1980); Fla. R. Civ. P. 1.611(a) (Supp. 1981).

207. *E.g.*, *In re Hunt*, 78 Ill. App. 3d 653, 655-56, 397 N.E.2d 511, 513-14 (1979); *In re Schissel*, 292 N.W.2d 421, 422 (Iowa 1980); *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 178-79, 226 N.W.2d 518, 519 (1975).

208. N.Y. Dom. Rel. Law § 236 pt. B(6)(b) (McKinney Supp. 1980-1981); Wash. Rev. Code Ann. § 26.08.110 (1961); W. Va. R. Civ. P. 52(a) (1978). The New York statute goes so far as to expressly proscribe waiver of the requirement by the parties. N.Y. Dom. Rel. Law § 236 pt. B(6)(b) (McKinney Supp. 1980-1981).

case" need be in the written opinion.²⁰⁹ In Arkansas, the basis and reasons for the decision "should" be in writing if the marital property is not divided equally.²¹⁰ If, however, the court chooses to invade one spouse's separate property, the basis and reasons "must" be in writing.²¹¹ In Pennsylvania, the findings on the question of alimony, but not property division, must be written.²¹² In California and Oregon, the parties can request the court to enter written findings of fact on the question of alimony, and the court must do so if requested.²¹³

CONCLUSION

There is little uniformity in the United States in the law of alimony and property division. As is its prerogative, each state may choose to handle the division of property or the award of alimony in any way it deems proper.²¹⁴

Certain statutory provisions, however, aid the achievement of more equitable results in the complex area of divorce legislation. Therefore, the following recommendations are made:

1. Both alimony and property division statutes should include a list of factors to be considered in making the award. These factors will provide the courts guidance as to what items are considered important by the state.

2. Financial disclosure by both parties should be required by statute. If the court cannot evaluate the parties' assets, no equitable decision can be reached.

3. Written findings of fact and conclusions of law should be required with respect to both property division and alimony awards.

209. Iowa Code Ann. § 598.21(7) (West Supp. 1981-1982). If written findings are to limit judicial discretion and aid appellate review, permitting the lower court judge to decide which factors are "relevant to the case" is unwise. So subjective a standard invites the interjection of judicial prejudices that evade review.

210. Ark. Stat. Ann. § 34-1214(A)(1) (Supp. 1981).

211. *Id.* § 34-1214(A)(2).

212. Pa. Stat. Ann. tit. 23, § 501(d) (Purdon Supp. 1981-1982).

213. Cal. Civ. Code § 4801(a) (West Supp. 1981); Or. Rev. Stat. § 107.105(1)(c) (1979).

214. The Supreme Court has noted that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). As a result, the Court overrides state statutes and court decisions only when they are inconsistent with the Constitution or federal legislation. *E.g.*, *McCarty v. McCarty*, 101 S. Ct. 2728, 2736-37 (1981) (pensions of active service members in the U.S. military are separate, not community, property); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (sex discrimination in alimony statutes by awarding alimony only to wives unconstitutional); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (Railroad Retirement Act pensions are separate property); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (miscegenation statutes unconstitutional).

Such a requirement will both make the lower court more objective in reaching a decision and provide the appellate court with a firm foundation upon which to determine whether the lower court abused its discretion.

Implementation of these three recommendations should result in more uniformity of decision by courts within a state and ensure that equitable distribution is truly equitable.

Mary Jane Connell

APPENDIX A*

FACTORS TO BE CONSIDERED IN AWARDING ALIMONY

	AZ	CA	CO	CT	DE	FL	GA	HI	ID	IL	IA	KY	LA	MD	MA
1.	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
2.	x	x	x	x	x	x	x	x	x	x	x	x		x	x
3.	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
4.	x	x	x	x	x	x	x	x		x	x	x		x	x
5.	x	x	x		x	x	x		x	x	x	x	x	x	
6.		x	x	x	x			x		x	x	x	x		
7.	x	x		x			x				x		x	x	x
8.	x		x		x			x	x	x		x		x	
9.		x		x				x		x				x	x
10.						x	x							x	x
11.		x				x	x				x		x	x	
12.					x						x				
13.				x					x					x	x
14.				x				x			x				x
15.											x				
16.						x	x								
17.	x										x				
18.														x	
19.											x			x	
20.														x	
21.		x									x				
22.															
23.															
24.								x			x				
25.						x									
26.															
27.															
28.	x														

* See *supra* note 95 for citations to the relevant statutes of each state listed in this appendix. United States Post Office abbreviations for states are used in this chart.

FACTORS:

1. The financial resources of each, including whatever share of marital property each was awarded.
2. Duration of the marriage.
3. Age and health.
4. Station in life/standard of living.
5. Time needed for the education of the party seeking support.
6. Child support responsibilities, including the ability to work while having custody of the children.
7. Earning capacity of each.
8. The ability of the other spouse to pay.
9. Needs of the parties.
10. Contribution to the marriage, including as a homemaker.
11. Other just and equitable factors.
12. Tax consequences.

APPENDIX A (continued)

FACTORS TO BE CONSIDERED IN AWARDING ALIMONY

MN	MO	MT	NB	NJ	NY	NC	OH	OR	PA	RI	VA	WAW	WI	
x	x	x	x		x	x	x	x	x	x	x	x	x	1.
x	x	x	x	x	x		x	x	x	x	x	x	x	2.
x	x	x			x		x	x	x	x	x	x	x	3.
x	x	x			x	x	x		x	x	x	x		4.
x	x	x			x			x	x			x	x	5.
x	x	x	x		x		x	x	x			x	x	6.
					x	x	x	x	x		x		x	7.
x	x	x		x	x							x		8.
				x					x	x	x		x	9.
x			x		x		x	x	x		x			10.
					x			x			x		x	11.
					x			x					x	12.
				x					x	x				13.
										x			x	14.
							x		x		x		x	15.
					x				x				x	16.
								x					x	17.
							x		x					18.
													x	19.
											x	x		20.
			x											21.
							x		x					22.
							x		x					23.
														24.
			x											25.
x					x									26.
									x					27.
														28.

15. The educational level of the parties.
16. The contribution by one spouse to the other's education.
17. Employment history.
18. Retirement benefits.
19. Agreements of the parties (antenuptial and/or separation).
20. The property interests of each.
21. Interruption of career or education.
22. Expectancies and inheritances.
23. The property brought to the marriage.
24. The duration of the need of support.
25. The conduct of the party seeking support.
26. Dissipation of assets.
27. Insurance.
28. Excessive or abnormal expenditures, destruction, concealment or

APPENDIX B*

FACTORS TO BE CONSIDERED IN AWARDING PROPERTY DIVISION

	AR	CO	CT	DE	DC	ID	IL	IN	IA	KY	ME	MN	MO	MT	NY	OR	PA	RI	WA	WI	WY
1.	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x		x		x		x
2.	x	x		x	x		x	x	x	x	x	x	x	x	x	x	x	x		x	
3.	x		x	x	x	x	x		x	x		x		x	x		x	x	x	x	
4.	x		x	x	x	x	x		x			x		x	x		x			x	
5.		x		x			x	x	x	x	x		x		x				x	x	
6.	x		x	x	x	x	x		x			x		x			x			x	
7.	x		x	x	x	x	x	x	x			x		x			x				
8.	x		x	x	x	x	x					x		x	x		x				
9.				x	x	x	x		x			x		x	x			x		x	
10.	x		x	x	x	x	x					x		x			x				
11.		x		x			x			x	x		x				x			x	
12.	x		x	x			x		x			x		x			x				x
13.	x		x	x			x					x		x			x				
14.				x			x	x					x				x	x			
15.				x	x		x					x		x			x				
16.						x	x		x					x							x
17.	x			x					x							x					x
18.					x		x		x					x							x
19.			x		x		x							x					x		
20.						x			x								x				x
21.									x						x		x				x
22.									x						x						x
23.									x						x						x
24.				x					x												
25.									x												x
26.									x												x
27.									x												x
28.			x																		
29.				x																	
30.			x																		
31.															x						
32.															x						
33.															x						
34.																					x
35.																					x
36.																				x	
37.																				x	
38.																					x

* See *supra* note 169 for citations to the relevant statutes of each state listed in this appendix. United States Post Office abbreviations for states are used in this chart.

APPENDIX B (continued)

FACTORS TO BE CONSIDERED IN AWARDING PROPERTY DIVISION

FACTORS:

1. The economic circumstances of each party at the time of the division, particularly the amount and sources of income.
2. The contribution of each to the acquisition of the marital property, including contributions as a homemaker.
3. The duration of the marriage.
4. The age and health, both physical and emotional, of the parties.
5. The desirability of awarding the marital home to the spouse receiving custody of the children.
6. Occupation and vocational skills.
7. Employability.
8. The opportunity of each for future acquisition of capital assets and income.
9. Whether the property division is in lieu of, or in addition to, alimony.
10. Debts of the parties.
11. The value of the separate property of each.
12. Station in life/standard of living.
13. The estates of the parties.
14. Conduct of the parties, including its relation to the disposition or dissipation of the property.
15. Prior marriages.
16. Agreements of the parties (antenuptial and/or separation).
17. Tax consequences.
18. Custody of the children.
19. The contribution of each in the acquisition, preservation or appreciation in value of respective estates.
20. Retirement benefits.
21. The contribution of one spouse to the other's education, training or increased earning power.
22. The income and property of each at the time of the marriage.
23. Other just and equitable factors.
24. Whether the property was acquired by gift, bequest, devise or descent.
25. The education of the parties.
26. Job absence.
27. Time needed by a spouse for training.
28. Increases or decreases in the value of the separate property during the marriage.
29. The cause of the divorce.
30. Depletion of separate property for marital purposes.
31. The loss of inheritance and pension rights.
32. The liquid or non-liquid character of the marital assets.
33. The difficulty of evaluating a component asset or an interest in a business.
34. The merits of the parties.
35. Burdens imposed on the property for the benefit of either party or the children.
36. The nature and extent of the community property.
37. The nature and extent of the separate property.
38. The property through whom the property was acquired.