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# Step by Step: The Development of the Distibutive Consequences of Divorce in North Carolina

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# STEP BY STEP: THE DEVELOPMENT OF THE DISTRIBUTIVE CONSEQUENCES OF DIVORCE IN NORTH CAROLINA

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*In this Article, Professor Sharp examines recent changes and developments in North Carolina's alimony laws and Equitable Distribution Act. Multiple issues are addressed, including the effect of the new statutes on dependency, the integration principle, the definition of income, the role of marital fault, the determination of amount and duration of alimony, the determination of the standard of living, and the creation of postseparation support. Regarding equitable distribution, Professor Sharp reviews the new categorization of nonvested pensions as martial property and the significant changes likely to result from the creation of a new category of property—"divisible property." Although the author notes that many would not consider these changes to be ideal, she submits that they represent a welcome step forward in North Carolina domestic law.*



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## I. INTRODUCTION

A wholesale revision in North Carolina alimony laws in 1995,[1] coupled with critical amendments to the Equitable Distribution of

1. North Carolina General Statutes sections 50-16.1A to -16.9 became effective on October 1, 1995. *See* N.C. GEN. STAT. §§ 50-16.1A to -16.9 (1995). Although parts of the new statutes are perfectly straightforward, other sections create considerable confusion. *See, e.g., infra* Part II.C.2 and accompanying text (discussing "rehabilitative" alimony). Thus far there are no appellate cases addressing this confusion. The definitions of a dependent spouse and a supporting spouse under § 50-16.1A are virtually the only portions of the new alimony act, §§ 50-16.1A-to -16.9, that have remained in their original form. *But see infra* Part II.B.1 (concluding that the calculation of dependent or supporting spouse status may have broadened considerably under the new legislation). Specific findings of fact that one spouse is dependent and that the other is capable of providing support remain necessary elements of any support action. It should also be noted that North Carolina statutes rarely refer to "maintenance," but instead to "alimony" and "postseparation support," both discussed at length *infra* Parts II, III, and IV.

Property Act in 1997,[2] have combined to create extraordinary

2. Act of July 16, 1997, ch. 302, 1997 N.C. Adv. Legis. Serv. 57 (codified at N.C. GEN. STAT. §§ 50-20, -21 (Supp. 1997)). Sections 50-20 and 50-21 are the only two sections of the General Statutes dealing with distribution of property upon divorce. The two statutes are virtually always referred to as the "Equitable Distribution Act" and this Article will follow that practice. The adoption of equitable distribution in North Carolina, *see infra* Part V.A, and the virtually unheralded and unknown passage of true no-fault divorce that closely preceded it are the two major elements of what may be accurately termed a "revolution." North Carolina was one of only four states still strictly wedded to the common law "title only" system when the Act was first adopted in 1981. *See* Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. §§ 50-20, -21 (Supp. 1997)). Under the "title only" system, each spouse received only that which was titled in his or her name and whatever he or she had earned the money to buy. *See* Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979); *see also infra* note 3 (discussing development of equitable distribution).

Section 50-6 has long read that parties may be divorced, assuming one has resided in this state for six months, "if and when the husband and wife have lived separate and apart for one year." N.C. GEN. STAT. § 50-6 (1995). The appellate courts of this state had consistently interpreted this section, however, to *include* the common law defense of recrimination—i.e., that proof of marital fault by one spouse could defeat the other spouse's claim for divorce. *See, e.g.*, Pharr v. Pharr, 223 N.C. 115, 116, 25 S.E.2d 471, 472 (1943). More bluntly, "[r]ecrimination is the outrageous legal principle which ordains that when both spouses have grounds for divorce, neither may have a decree." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13.11, at 527 (2d student ed., 1988). Although the legislature amended § 50-6 in 1978 to bar the use of recrimination defenses in such a fashion, the use of recrimination as a defense to divorce continued to the point that appellate action became necessary to clarify the demise of the defense. *See, e.g.*, Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980). The effect of this interpretation, which was quite unrecognized by most commentators outside North Carolina, *see, e.g.*, Doris Jonas Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 250 (1981); Laura Gatland, *Putting the Blame on No-Fault*, A.B.A. J., Apr. 1997, at 50, was clearly to enable one spouse to preclude the other from obtaining a divorce, even though each had lived separate and apart for the requisite one year period. In 1979, however, the following amendment to the statute was passed: "A divorce under this section shall not be barred to either party by any defense or plea based upon any provision of G.S. § 50-5 or G.S. § 50-7 [setting forth the fault grounds for divorce for bed and board], a plea of *res judicata*, or a plea of recrimination." Act of May 30, 1979, ch. 709, § 1, 1979 N.C. Sess. Laws 775, 775 (codified as amended at N.C. GEN. STAT. § 50-6 (1995)).

As the cases cited above illustrate, it took several years for the appellate courts of the state to emphasize that the statutory amendment really meant what it said. Section 50-6 thus became what it had appeared to be all along—a true "no fault" divorce statute. However, North Carolina had absolutely *no provision* for distribution of marital property—indeed the term was unknown within the General Statutes—at the time that no-fault divorce became available. As noted previously, North Carolina was certainly one of the last "title only" states. *See* Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 198, 201 (1987). Other states once labeled as "title only" did in fact allow for the transfer of property *as* alimony, an option never before available in North Carolina. *See, e.g.*, De Milo v. Watson, 143 N.E.2d 707, 709 (Ohio 1957) (" '[S]uch alimony may be allowed in real or personal property, or both.' " (quoting OHIO REV. CODE ANN. § 3105.18

changes and potential developments in the domestic law of North Carolina.[3] Although these new developments still fall short of what most commentators in the field would regard as ideal,[4] they nonetheless symbolize a welcome recognition and understanding of the fundamental principles that underlie the economic consequences of divorce—redistribution of wealth[5] and minimization of loss for

(Anderson 1953))). Thus, the supporting or employed spouse might freely obtain a divorce, for which the only economic consequence might be alimony. *See, e.g.*, *Leatherman*, 297 N.C. at 622, 256 S.E.2d at 796 (denying even equitable rights to a wife in her husband's separately titled business, in which she had worked diligently throughout their long marriage). The possibility that a dependent spouse, not eligible for alimony, might be "discarded" by the other spouse, regardless of the degree to which the "non-owner" spouse had contributed to the business or the marriage, was so palpably apparent that the Equitable Distribution Act, extremely narrowly drawn in its original form, was an almost irresistible force at the time it was adopted in 1981. It should also be noted that the North Carolina General Assembly had narrowly defeated the Equal Rights Amendment in 1981. *See* Sharp, *supra*, at 196 n.6.

3. The Supreme Court of North Carolina initially played an extremely active and salutary role in the interpretation of the Equitable Distribution Act shortly after its enactment. *See* Sharp, *supra* note 2, at 210-20. And in many instances the court of appeals had already directed this development. *See* Wade v. Wade, 72 N.C. App. 372, 378-80, 325 S.E.2d 260, 267-68 (1985) (interpreting the statutory mandate in § 50-20(b)(2) (Supp. 1983)—that all income and increases in value of separate property would remain separate property—to apply to increases in value of such property that occurred during the marriage and that were deemed to be the product of "active" marital efforts). In more recent years, however, the supreme court has declined to heed many opinions, or dissents, from the court of appeals. The court of appeals thus has been relatively restricted in the scope of what it may do. See, for example, *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992), in which Judge Greene's concurrence failed to persuade the majority with its suggestion that the increase in value of a professional degree should receive treatment similar to other types of separate property. *See id.* at 255-57, 412 S.E.2d at 922-23 (Greene, J., concurring in the result).

4. For example, traditional marital fault has in no way been banished by the enactment of the new alimony statutes. *See infra* Part II.A.2. Moreover, distribution of pensions was strictly limited to those that were deemed "vested" by the employer (including the U.S. Military) until passage of § 50-20.1 in the summer of 1997. *See* Act of July 16, 1997, ch. 212, § 3, 1997 N.C. Adv. Legis. Serv. 57, 62 (codified at N.C. GEN. STAT. 50-20.1 (Supp. 1997)); *infra* Part V.B.1 (discussing this critically important revision which classified nonvested pensions as marital property); *see also* George v. George, 115 N.C. App. 387, 444 S.E.2d 449 (1994) (holding that because the husband had only served in the military for 17 years, his pension was "unvested" and that his wife was thus not entitled to any division of such pension rights as marital property). The new alimony statutes' continued insistence that a spouse meet the very technical definition of dependency, regardless of health or other circumstances, before even becoming eligible for an alimony award exemplifies the short-sighted approach of the legislature. There are many instances in which a spouse who is not technically dependent may nonetheless be deserving of maintenance. *See Sonek*, 105 N.C. App. at 255, 412 S.E.2d at 922 (Greene, J., concurring in the result) (noting that the non-dependent wife had " 'severe chronic active rheumatoid arthritis' " that would leave her totally disabled (quoting the trial court)).

5. It appears that no group has found a wholly satisfying definition of the "goals" of

both parties.[6]

Additionally, the new legislation lays the foundation for the development of many fundamental principles thus far unknown to, or underutilized by, North Carolina domestic law. A new category of property—divisible property[7]—has been created that largely

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distributing assets (through either alimony or property division) at divorce. The term "equitable distribution," for example, has very little meaning without reference to what may be or is divided. The rationales underlying alimony awards are even more at odds.

6. The American Law Institute has worked for many years, and with extraordinary diligence, to produce PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft Part I, 1997) [*hereinafter* ALI PRINCIPLES]. Part I deals solely with property division and spousal support. As the Foreword takes pains to make very clear, the "idea of [ALI] Principles gives greater weight to emerging legal concepts than does a Restatement." *Id.* at xiii. The significance of this thoughtful and analytically sound work by the Institute cannot be over-estimated. It is the product of many of the leading scholars in the field of family law, and it is hoped that it will indeed help bring some consensus, at least as to general principles, in the notoriously confused disarray in family law among the states. This disarray is particularly evident in the area of alimony, for which no principled analytical foundation has ever really been developed. Although need ("a residual category to provide remedies . . . that do not share any consistent pattern that can be captured in a sensible definition of *need*," *id.* at 8) is the guiding principle in most states, the ALI PRINCIPLES have developed the concept of "loss" instead; i.e., allowing alimony or maintenance, at an analytical level, to function as a vehicle for replenishing what a spouse has "lost" through divorce—education, lost earning capacity, pension and medical benefits, etc. In short, the "payment's true justification is as a remedy for an unfair loss allocation." *Id.* The loss principle seems particularly appropriate in marriages wherein the parties have made a joint decision to concentrate marital resources on the career of one spouse, at the expense of the other's career opportunities, including decisions that one spouse will be a homemaker or will work to afford the other the funds for a professional degree or license, etc.

7. *See* N.C. GEN. STAT. § 50-20(b)(4) (Supp. 1997). This is not to be confused with what is often referred to as "new property." *See* Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 707 (1987) ("[T]he 'old property' of tangible assets is declining in importance while the 'new property' of entitlements—against insurance companies, employers, and the state—has become the focus of attention on divorce."); Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 576 & nn.242, 577 (1990) (listing four states, Arkansas, Michigan, New York, and Pennsylvania, that had recognized professional degrees, goodwill, licenses, or partnerships as marital property, but noting that states that allow recovery only to spouses who have *financially* contributed to their partner's acquisition of education or skills are rewarding " 'breadwinners' at the expense of 'homemakers' "); Helen A. Boyer, Recent Development, 60 WASH. L. REV. 431, 441 & nn.78-81 (1985) (noting jurisdictions that have held career assets such as a law practice (Todd v. Todd, 78 Cal. Rptr. 131, 135 (Ct. App. 1969); Litman v. Litman, 463 N.E.2d 34 (N.Y. 1984)), an accounting practice (Heller v. Heller, 672 S.W.2d 945, 947 (Ky. Ct. App. 1984)), partnership interests (Balogh v. Balogh, 356 N.W.2d 307, 311-12 (Minn. Ct. App. 1984)), and employee stock options (Callahan v. Callahan, 361 A.2d 561, 563 (N.J. Super. Ct. Ch. Div. 1976)), to be property subject to distribution); *see also* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981) (discussing the failure of family law in this country and others to reflect the realities of family economic structure); Susan Klebanoff, Comment, *To Love and Obey 'Til Graduation Day—The Professional Degree*

ameliorates one of the more draconian features of existing property division law. Indeed, the very definition of property itself has arguably been expanded not just by statute, but, oddly enough, through the revised alimony statutes, to include the value of health insurance.[8] It also has clearly been extended to include unvested pension benefits[9] and many employment benefits received after separation as marital or divisible property.[10] The alimony statutes create both a new category of support[11] and opportunities for the imposition of disclosure duties,[12] a less restricted definition of dependency,[13] a critical departure from reliance upon the previous standard of living as the sole guide for amounts of alimony,[14] greater flexibility in determining the amount and duration of alimony,[15] and a decreased emphasis upon fault.[16]

In the aggregate, these changes and potential changes are nothing short of breathtaking, creating an impact that can best be appreciated by a knowledge of (1) the arcane and woeful state of previous alimony laws in North Carolina,[17] and (2) the exceptionally narrow definition of marital property that was inherent in the original version of the statute and that had become even more deeply

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*in Light of the Uniform Marital Property Act*, 34 AM. U. L. REV. 839 (1985) (tracing the inability of American law to take into account the "losses" of one spouse who has supported the other through a professional degree, only to receive a divorce summons as a reward).

8. For a discussion of the importance of medical insurance coverage, see *infra* Part III.C.2.

9. *See* N.C. GEN. STAT. § 50-20(b); *see also infra* Part V.B.1 (discussing these changes); *supra* note 4 (discussing *George*).

10. *See* N.C. GEN. STAT. § 50-20(b)(4); *see also infra* Part V.C (discussing divisible property). One of the more salutary effects of these amendments is that the following observation is no longer correct: "The North Carolina statute is the least protective of a homemaker spouse and the statute least likely to carry out the objectives of equitable distribution." Emily Osborn, Comment, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 925; *see also* Sally Burnett Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247, 253 (1983) (observing that North Carolina then had the broadest definition of separate property among all states).

11. *See infra* Part IV (discussing postseparation support).

12. *See infra* Part III.B.3 and accompanying text.

13. *See infra* Part II.B.1. For the proposition that a spouse deemed non-dependent on the date of separation may well, as a result of divisible property accrued after that date, qualify as a dependent spouse by the date of distribution, see discussion *infra* text accompanying notes 98-103.

14. *See infra* Part III.C.3.

15. *See infra* Part III.C and accompanying text (discussing factors to be considered in determining amount and duration of alimony).

16. *See infra* Part II.A.1.

17. *See infra* notes 19-20 and accompanying text.

embedded in case law since the initial enactment of equitable distribution in North Carolina.[18] The latter, in particular, invited not only unconscionably unjust "equitable" distributions of property,[19] but created almost endless opportunities for "divorce planning" to accomplish the same unjust results.[20] Such laws and opportunities, used and misused of course, were hardly wasted upon the growing number of exceptionally skilled domestic practitioners in this state.[21] Gradually, however, North Carolina legislation and case law—never notable for being on what one might call the "cutting edge" of divorce law[22]—have begun to reflect a somewhat lesser emphasis

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18. The entrenched position that only property actually received before the date of separation may be marital property is perhaps the best example of this statement. *See infra* notes 512-20 and accompanying text (discussing *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988)). In several respects, however, a generous interpretation of the original statute by the courts had already obviated portions of the Equitable Distribution Act that, if interpreted literally, would have changed the previous "title only" status of property upon divorce very little, if at all. *See, e.g.*, Sharp, *supra* note 10, at 259-63.

19. Unquestionably, the worm in the "apple" of equitable distribution has long been the statutory mandate in § 50-21 requiring, as do virtually no other states, that marital property "shall be valued as of the date of the separation of the parties." N.C. GEN. STAT. § 50-21(b) (Supp. 1997). For example, in *Nye v. Nye*, 100 N.C. App. 326, 396 S.E.2d 91 (1990), the value of the husband's business at the date of separation was zero. *See id.* at 327, 396 S.E.2d at 92. By the date of divorce, the business was valued at approximately $500,000, none of which was considered marital, and thus divisible, property. *See id.* at 326-27, 396 S.E.2d at 91-92.

20. One of the most egregious examples of divorce planning is well illustrated in *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992). A gynecologist in private practice closed down his practice shortly before separation, becoming a salaried employee of a gynecological clinic (thus shedding any goodwill assets he would have had in his private practice), and then reopened his own practice within a few months of the division of property. *See id.* at 248-49, 412 S.E.2d at 918.

21. As of 1996, there were 86 Board Certified Family Law Specialists in the state, the largest number among the 14 areas of specialization recognized by the North Carolina State Bar. *See* FAMILY LAW SECTION, NORTH CAROLINA BAR ASSOCIATION, MEMBERSHIP DIRECTORY 79-84 (1996). This number reflects not the litigiousness of the family law bar, but the complexity and confusion of much of the law in this area. As examples of their ingenious use of the statute to create manifestly unjust results, see *Chandler v. Chandler*, 108 N.C. App. 66, 69-70, 422 S.E.2d 587, 590 (1992) (holding that over $140,000 in rental income from marital assets, received and controlled exclusively by the husband after separation, could only be considered as a factor in distributing marital property equitably but could not be distributed as marital property), and *Smith v. Smith*, 336 N.C. 575, 579, 444 S.E.2d 420, 423 (1994) (requiring the trial court to make a written finding of whether postseparation appreciation of marital property is passive or results from the efforts of one or both spouses) The post-separation increase in value in *Smith* was over $6,000,000. *See id.*

Many of this author's comments throughout this Article derive from her long-standing and varied roles within the Family Law Section of the North Carolina Bar Association and her close and rewarding association with these fine lawyers.

22. *See supra* note 10 (observation of Osborn); *see also supra* notes 19-20 and

upon fault in the area of spousal support, at least in the early stages of the divorce process,[23] and have incorporated many potentially exciting and expansive maintenance concepts and property division principles that have been sorely lacking in this state.[24] Thus, the revisions and amendments that form the focus of this Article may well be far from incremental.

The amendments to the Equitable Distribution Act not only rectify what have been the major deficiencies in property divisions, and reflect principles that are clearly more consistent with the stated purposes of property distribution goals,[25] but additionally include more expansive definitions of property subject to division, according to principles that have long been accepted by the overwhelming majority of states.[26] The new statutes also reflect the growing sophistication of the judiciary regarding property distribution and the growing frustration of the public and the bar with the blatant

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accompanying text (providing additional examples).

23. See *infra* Parts IV.A-B (discussing postseparation support and the elimination of date of postseparation marital misconduct).

24. See, for example, the discussion of concealment of assets, *infra* Part III.B.3, and the analysis of valuation of medical benefits, *infra* Part III.C.2. There continue to be exceptions to this favorable development, of course. For example, from the author's own knowledge, in the summer of 1997, the Family Law Section of the North Carolina Bar Foundation could find no legislator willing to introduce a bill, already approved by the governing board of the state bar association, that would have abolished the archaic torts of alienation of affections and criminal conversation.

25. Most authors in this field argue that no laws governing the distributional consequences of divorce will ever be truly "equitable" so long as the "human capital" concept is not included in the context of both maintenance and property definitions. It has been noted that many states have "devised doctrines that permit courts to compensate a spouse in some manner for helping to increase the human capital of the other partner, most commonly by bearing the costs of putting the partner through professional school." David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 478 n.128 (1996) (citing Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 774, app. tbl. 5 (1996) (listing 24 states as considering "contribution to education" in determining property division)); *see also* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV 1, 40-53 (1989) (arguing that alimony should compensate a spouse for losses in earning capacity caused by the economically rational allocation of marital duties, in which the wife typically makes household-related investments of little market value that enable the husband to invest in his earning capacity); Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 440, 454 (1987) (characterizing human capital as an asset owned by an individual and recommending an approach to divorce settlement that focuses on compensating a supporting spouse for her sacrifice of human capital to the marriage). Also particularly important in this context is the ALI PRINCIPLES' concept of alimony as a means to compensate for "loss"—particularly including human capital. *See* ALI PRINCIPLES, *supra* note 6, § 5.02, at 259, § 5.15, at 383-87.

26. *See, e.g.*, *infra* Part V.B.1. (discussing "nonvested" pension rights).

inequities built into the core of the prior statutory scheme.[27]

Moreover, the concepts and principles embodied in the new laws, particularly after judicial clarification and interpretation, will obviously shape the overwhelming number of divorce settlements reached through private agreements between the parties. It is a legal and common sense truism that private agreements are virtually always negotiated "in the shadow of the law."[28] Reason would seem to dictate, and experience in other states supports the proposition, that the greater the uncertainty in the law, the more likely it is that disputes will be litigated instead of settled.[29] Conversely, greater certainty in the law clearly promotes more private settlements. In this sense, it is the law that "deals the cards" that parties to divorce may play.[30] In part in recognition of this, and in part as a result of considerable public pressure,[31] the new legislation has dealt

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27. *See supra* notes 19-20.

28. The now famous phrase derives from the landmark article by Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

29. A good comparison that bears out this conclusion is the experience that North Carolina and other states have had with child support guidelines. One study illustrated that the national experience with these guidelines has been that they "have reduced the number of cases litigated; those that the parties do not settle are litigated more quickly and with less expense." Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 242 (1991); *see also* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIMONIAL L. 103, 126-27 (1990) (noting that "many states have seen a substantial shift from judicial participation to an administrative or quasi-judicial approach, using referees, court trustees or hearing officers to set child support").

The author's caveat to this proposition, however, is that utter uncertainty in the law may have the opposite effect: lawyers may shy away from litigation under new statutes until there exists at least some appellate guidance.

30. This is not to say, of course, that parties always "play" the cards they are dealt. Absent egregious unconscionability, almost always accompanied by what Arthur Leff called "bargaining naughtiness," Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 539 (1967), parties may freely contract to reflect their own motivations, and often to their own economic detriment, to be as vengeful, guilty (and thus overly generous), or even as stupid as they please. *See* Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1451 (1984). But without a fair "dealing" of the cards, parties have precious few options in any bargaining process.

31. A four day series of newspaper articles in a major state newspaper is just one example. *See* Nancy Stancill, *Starving the Wife*, CHARLOTTE OBSERVER, Oct. 23, 1994, at 1A; Nancy Stancill, *Starving the Wife: N.C. Alimony Is a Question of Blame*, CHARLOTTE OBSERVER, Oct. 24, 1994, at 1A; Nancy Stancill, *Starving the Wife: Divorce Lawyers' Tactics Go Largely Unchecked*, CHARLOTTE OBSERVER, Oct. 25, 1994, at 1A; Nancy Stancill, *Starving the Wife: Forsyth Speeds Divorce-Court Property Cases*, CHARLOTTE OBSERVER, Oct. 26, 1994, at 1A. This series greatly helped to galvanize groups of women throughout the state who did, in fact, become quite effective lobbyists for the recent changes in the Equitable Distribution Act.

significantly more equitable and realistic, albeit somewhat confusing, cards to the parties to divorce.[32]

Although this Article will in no fashion enter the fray begun many years ago as a result of the work and conclusions of Lenore Weitzman,[33] it is certainly beyond dispute that women and children

32. The "card game analogy" is by no means intended to minimize the often traumatic experience of divorce. In particular, the confusion almost always created by new laws leads, more often than not, to increased legislation and expenses for both parties. *See* Mnookin & Kornhauser, *supra* note 28, at 979.

33. The conclusion reached in LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985) that, largely as a result of the widespread enactment of no-fault divorce beginning in California in the 1960s, the standard of living of women decreased by 73% in the year following divorce, whereas that of men increased by 42%, *see id.* at 337-56, has been the subject of severe criticism, especially with regard to the cause and effect relationship she purported to find, and careful scrutiny. The latter has, in broader terms, generally confirmed that divorce hardly enriches women and children. For extensive criticism of Weitzman's study, see Jed H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251, 296 (1989) (asserting Weitzman's study is flawed by "skewed statistical analyses, unfounded working assumptions, one-sided presentations of the evidence, and hostility toward husbands and fathers"); and Richard B. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (arguing persuasively that the means/income ratio is but 10% higher for men in the year subsequent to divorce and 27% lower for women). However, other commentators at least agree with Weitzman's conclusion that women and children are clearly economically disadvantaged by divorce. *See, e.g.*, Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 271 & n.65 (1989) (citing additional sources and noting that even critics of Weitzman's figures differ on amount, but not on the significant disparity in the standard of living between ex-husbands and ex-wives); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 391, 395-96 (1987) (concluding from a New Haven study that "[b]y any measure, men emerge from their divorces in far better economic shape than their wives do," but that the decline in the value of settlements is better explained by changing perceptions of the earning capacity of women than by the passage of a no-fault divorce statute); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2426 n.14 (1994) (noting that while "the results of Weitzman's studies have been questioned, a number of more recent studies have confirmed her basic conclusion—that women and children are disproportionately disadvantaged in financial terms as a consequence of divorce"); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1103-14, 1121 (1989) (agreeing that the economic consequences of divorce are far more devastating for women and children than for men, but rejecting that the no-fault divorce revolution is the primary cause). For further support of Weitzman's findings, see Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 281-85, 299-308, 318 (1988) (finding consistencies between Montgomery County study results and Weitzman's California study results, and concluding that "unless the problems [of the system] are identified ... poverty will become the special resting place for these [displaced homemakers and the financially dependent] women and children"); and Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 96-97 (1986) (explaining that the data from a Vermont study "suggest post-divorce living standard changes in Vermont are similar to changes found by Weitzman in California"). *See also Review Symposium on Weitzman's* DIVORCE REVOLUTION, 1986 AM. B.

bear the brunt of the economic losses[34] consequent to divorce. In addition, because women are indeed more likely to receive the primary custody of children of a marriage,[35] it follows that greater harm is caused to children of divorce whose standard of living is drastically lowered by the distributional consequences of that process. Partly as a result of this decreased standard of living, children of divorce face infinitely more psychological difficulties than do children whose economic lifestyles are relatively unaffected.[36] The new alimony and postseparation laws hold out great promise that throughout and beyond the divorce process, much of this economic loss, and consequent harm, may be alleviated by the changes in the distributional consequences of the breakup of marriages.[37]

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FOUND. RES. J. 757 (providing additional critiques); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2227 n.1 (1994) (listing additional critiques in a summary of the controversy over Weitzman's conclusions).

34. These losses include not merely the other spouse's income, but a cumulative loss of earning capacity, medical benefits, opportunities, etc. Many of these "losses" are now recognized quite explicitly by the new alimony factors. *See infra* Part III.C.

35. Commentators have reported for years that approximately 90% of divorcing mothers receive custody of their children. *See* Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 FAM. L.Q. 293, 293 n.2 (1992) (citing WEITZMAN, *supra* note 33, at 358); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 385 n.135 (1994). This figure is, of course, misleading without a recognition that at least 90% of all custody issues are settled between the parties. *See* Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1263 (1982).

36. The number of studies that reflect this hardly surprising conclusion is virtually overwhelming. *See, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29-37 (1990); Cheryl Springer & Judith S. Wallerstein, *Young Adolescents' Responses to their Parents' Divorces*, *in* CHILDREN & DIVORCE 15, 15-27 (Lawrence A. Kurdek ed., 1983); Judith S. Wallerstein, *Child of Divorce: An Overview*, 4 BEHAV. SCI. & L. 105, 112-16 (1986); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 784-88 (1985); Judith Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 85-90 (1981). It should also be noted that the "income shares" model for establishing child support, adopted in the majority of states, *see* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765, 805 app. tbl.3 (1997), clearly does not take into account non-income producing property such as home ownership and, in the great majority of states, makes no provision for higher education, *see id.* (listing only 11 "income shares" states that make provisions for college support and 34 states that have adopted the income shares model).

37. According to the State Center for Health Statistics, the total number of divorces per year in North Carolina remained relatively steady from 1992 through 1996:

1992: 35,906 divorces
1993: 34,839 divorces
1994: 36,161 divorces

Part II of this Article will examine potential problems and possibilities with the new alimony statutes, including particular emphasis upon postseparation support, dependency issues, the integration principle, expansion of the definition of income, and marital fault.[38] The fifteen statutory factors to be used in determining the amount and duration of alimony present especially interesting opportunities for expansion of the law in this area,[39] most notably including the conclusion that the "previous standard of living" can no longer function as the "ceiling" for the amount of an alimony award.[40] Although postseparation support and alimony are often difficult to discuss separately, Part III will nonetheless discuss alimony and the role of fault,[41] while Part IV will focus on postseparation support, including again the role of fault, procedural issues, termination events, and cohabitation.[42] Finally, Part V will examine the changes in the Equitable Distribution Act, including nonvested pension and other employment enhancements, the potentially expansive concept of "divisible property," and the much expanded freedom for truly equitable distributions now available with "in kind" property divisions.[43] The combination of the revisions to the alimony and equitable distribution statutes constitutes a sizable and exciting, if none too gradual, move forward in North Carolina domestic law. Without exception, the changes are challenging, welcomed, and largely overdue.

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1995: 36,943 divorces
1996: 36,634 divorces
*See* STATE CENTER FOR HEALTH STATISTICS, N.C. DEP'T OF ENV'T, HEALTH, & NATURAL RESOURCES, 1 NORTH CAROLINA VITAL STATISTICS 2-1 (yearly editions for 1992 through 1996). These figures represent, of course, only the tip of the iceberg with regard to domestic cases in general.

38. *See infra* notes 44-198 and accompanying text.

39. *See infra* notes 292-374 and accompanying text.

40. It had long been the rule that the previous standard of living formed, in effect, a "ceiling" with regard to spousal support. *See* Long v. Long, 71 N.C. App. 405, 407, 322 S.E.2d 427, 429 (1984). *But see infra* notes 364-68 and accompanying text (noting that this ceiling is no longer determinative under the new statutes).

41. *See infra* notes 199-374 and accompanying text.

42. *See infra* notes 374-466 and accompanying text.

43. *See infra* notes 467-659 and accompanying text.

## II. NEW RULES FOR AN OLD GAME—ALIMONY

### *A. General Background*

#### 1. Marital Fault—Old and New

The history of the domestic laws of the State of North Carolina presents an interesting, albeit somewhat unusual, pattern of stability that lasted for decades, followed by the interjection of radically new laws and different jurisprudential concepts.[44] The same pattern is quite clear with alimony laws, which remained essentially unchanged from the nineteenth century until the major codification and revision in 1967.[45] That law, in turn, underwent only minor changes for at least three decades[46] before it was basically replaced in October 1995.[47]

At this point in the Article, however, it is critical to note that the new statutes apply *only* to cases that were initially filed after October 15, 1995.[48] The "old" 1967 laws remain applicable to all actions filed before that date.[49] The rather burdensome effect of this statutory mandate is two-fold, the latter easily being the more burdensome: (1) there has been no small amount of confusion as to what

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44. In the domestic law area, treatment of antenuptial agreements also follows this pattern. For example, until passage of the Uniform Pre-Marital Agreement Act in 1987, Act of June 25, 1987, ch. 473, 1987 N.C. Sess. Laws 644 (codified as amended at N.C. GEN. STAT. § 52B-1 to -11 (1987 & Supp. 1997)), which imposes few to no restrictions upon freedom to contract prior to marriage, North Carolina continued to follow the rule that any antenuptial agreement that "looked" to divorce, rather than to death of one of the parties, was void as contrary to public policy. *See, e.g.*, Motley v. Motley, 255 N.C. 190, 193, 120 S.E.2d 422, 424 (1961) (holding invalid a provision that neither party would demand any form of support from the other in the event the marriage terminated for any reason other than by death).

45. *See* 2 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW (5th ed. forthcoming 1999) (alimony chapter).

46. *See* 2 *id.*

47. *See* Act of June 21, 1995, ch. 319, 1995 N.C. Sess. Laws 641 (codified at N.C. GEN. STAT. §§ 50-16.1A to 16.9 (1995). This replacement involved the repeal of several portions of Chapter 50, including § 50-16.1 (alimony pendente lite), § 50-16.2 (grounds for alimony), and § 50-16.3 (grounds for alimony pendente lite), plus the addition of several new sections (§§ 50-16.1A to 16.3A), and revisions of §§ 50-16.4 to 16.8. Overall, however, the enactment of §§ 50-16.1A to 16.3A constitutes the heart of the "new" alimony laws.

48. *See* Act of June 21, 1995, ch. 319, § 12, 1995 N.C. Sess. Laws 641, 649 (noting that each of the new statutes, or portion hereof, "shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 15, 1995").

49. *See id.*

constitutes an "action" filed before the new laws went into effect,[50] and (2) the "old" laws will continue to be applicable for motions to modify or terminate alimony awards or actions that were rendered or pending before October 15, 1995.[51] Thus, practitioners and judges must contend with two sets of potentially applicable alimony laws. As to the first issue, what constitutes an action or an independent action has often created confusion in North Carolina, but sensible statutory interpretation has resolved the issues.[52] Even given the frequently extraordinary length of time that transpires between the filing of an action and its completion,[53] time will certainly alleviate the first problem. Motions to modify permanent alimony awards entered under the previous law, however, will undoubtedly continue to haunt this area, perhaps for decades to come.[54]

A brief discussion of the major statutory goals regarding the role of fault in general is also necessary in order to understand better the purposes of the new alimony laws[55] and as an introduction to a closer

50. The basis for this confusion arises from the unsettled question of whether, for example, a spouse who filed for equitable distribution (clearly an independent action under the 1995 version of § 50-21, which states that the action "may be filed, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes," N.C. GEN. STAT. § 50-21 (1995) (amended 1997)) prior to October 15, 1995, could file for alimony under the new statutory provisions after that date. Under § 50-19(b), it appears that alimony may also be brought as an independent action. *See* N.C. GEN. STAT. § 50-19(b) (1995). *But see* N.C. GEN. STAT. § 50-16.3A(a) (1995) (stating that in "an action brought pursuant to Chapter 50 . . . either party may move for alimony").

51. *See supra* note 48 (quoting this requirement).

52. *See supra* note 50. The "sensible statutory interpretation" is simply the one adopted by virtually all district courts.

53. In a manuscript presented to the state district court judges in October, 1994, A Search for Solutions: A Report Prepared by the Committee to Assess Equitable Distribution Procedures and Dispositions in the North Carolina District Courts, it was reported that *after divorce* (a process requiring that the parties live separate and apart for one year *before* a complaint for absolute divorce can be filed under § 50-6), the average age of pending equitable distribution cases was 290 days in fiscal year 1984-85. By 1993-94, the average age of pending cases was 395.8 days. In many instances, cases have lasted for a considerable number of years. *See, e.g.*, Tucker v. Miller, 113 N.C. App. 785, 440 S.E.2d 315 (1994) (7.81 years); Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139 (1994) (3.11 years); Minter v. Minter, 111 N.C. App. 321, 432 S.E.2d 720 (1993) (4.42 years); Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (4.46 years); Prevatte v. Prevatte, 104 N.C. App. 777, 411 S.E.2d 386 (1991) (7.12 years).

54. *See supra* notes 48-53 and accompanying text.

55. *See* Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) (presenting a fair, but generally quite negative, assessment of the role of fault). The initial assumption about the role of fault is that one *can identify* the "fault" and the party which caused the break-up of the marriage. In *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980), the Supreme Court of North Carolina rather blithely made the following assumption:

examination of the new laws. Clearly North Carolina has been unwilling to separate itself from the long-embraced concepts that (1) marital "fault" can be identified, a proposition with which most courts and commentators would strongly disagree,[56] and (2) such fault should, in most circumstances, maintain most of its traditional role as the single most critical factor, at least in alimony determinations.[57] A more painstaking analysis of what these new laws may—or may not—portend for the State is all the more necessary, given the lack of appellate guidance dealing specifically with the new laws thus far.[58] It is clear, however, that in many instances case law and principles developed under previous law will still be applicable.[59] It is also clear that in many instances the previous case law will be totally inapplicable to the new statutes[60]—because the new laws repeal much of previous law and because they add principles, concepts, and directives that are inconsistent with previous case law and with which our courts have never before been confronted. What remains both perilously and promisingly unclear, however, is the continuing viability of the often inconsistent case law in the large middle ground between the two extremes. The appellate courts now have the opportunity not only to reconcile previous inconsistent case law, but also to utilize both the concepts and tools barred under previous case law,[61] to develop the many new concepts and laws embodied in the new statutes.

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> Nor do we find the option of fault repugnant to sound public policy . . . [which] would dictate that the party who violated that binding [marriage] contract should continue to bear its financial burden when he or she can reasonably do so and where that is necessary to prevent a relatively greater economic hardship on the party without fault.

*Id.* at 188, 261 S.E.2d at 859.

56. *See In re* Cosgrove's Marriage, 103 Cal. Rptr. 733, 739 (Ct. App. 1972); CLARK, *supra* note 2, § 17.5, at 256 ("Since facile judgments about who is responsible for the breakup of a marriage are notoriously unreliable, basing alimony awards upon such marital fault risks being guided by nothing more substantial than prejudice or sentimentality."); Ellman, *supra* note 55, at 808-09.

57. *See Williams*, 299 N.C. at 188, 261 S.E.2d at 859.

58. *Cf. supra* note 2 (discussing the development of no-fault divorce).

59. *See infra* notes 150-78 and accompanying text (discussing *Potts v. Tutterow*, 340 N.C. 97, 455 S.E.2d 156 (1995) (per curiam)), regarding the long-standing principle of reciprocal consideration).

60. The now-repealed "recapture" provision for alimony pendente lite awards is an unlamented example of this. *See* N.C. GEN. STAT. § 50-16.11 (1995), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641.

61. There are countless examples of this: the classification of nonvested pensions as separate property, *see infra* Part V.B.1, the inability of courts to divide property in kind, and the treatment of increases or decreases in value of property after the date of separation. These issues and many more are discussed in detail in Part V of this Article.

As with most things in life and the law, the "old" alimony law certainly reflected its age, particularly with regard to its preoccupation with fault. Although there had been occasional revisions of the previous laws prior to 1995,[62] alimony remained, without equivocation and without exception,[63] totally fault-based.[64] Assuming proper procedure and pleading, alimony[65] was available to a spouse regardless of any conceivable set of circumstances[66] only upon a finding of (1) dependency[67] (a determination that remains the

62. Surprisingly enough, there were no specific grounds for alimony until 1967, although it was certainly available so long as a wife proved that she was entitled to an absolute divorce or a divorce from bed and board (i.e., proved that she was the "innocent" spouse and that her husband was at fault). *See* 1 SUZANNE REYNOLDS, LEE'S NORTH CAROLINA FAMILY LAW § 6.3, at 542-47 (5th ed. 1993).

63. This is not to imply, of course, that imaginative lawyers could not "stretch" the traditional fault grounds for alimony. In *Ellinwood v. Ellinwood*, 94 N.C. App. 682, 381 S.E.2d 162 (1989), for example, a physician's extraordinary lengthy absences from the home, coupled with his almost total withdrawal of care of, or interest in, his wife and family, were held to constitute constructive abandonment, *see id.* at 684-85, 381 S.E.2d at 164—a common fault ground (in this case for a divorce from bed and board), but one which had previously required findings of considerably more offensive behavior from the defendant spouse and the lack of provocation on the part of the complaining spouse. *See* 1 REYNOLDS, *supra* note 62, § 6.14, at 574-77.

64. In the majority of other states, and in North Carolina now, consideration of fault in determining the eligibility for, or amount of, alimony or maintenance is certainly permissible. *See* Elrod & Spector, *supra* note 36, app. tbl. 1 at 804 (listing 27 states that permit consideration of fault).

65. The rules were virtually the same for alimony pendente lite.

66. A common example of this strict rule—possibly not even changed by the new statutes, incidentally—is well illustrated by the case of *Kuder v. Schroeder*, 110 N.C. App. 355, 430 S.E.2d 271 (1993), in which a wife supported her husband through business school, law school, and a failed attempt to set up his own legal research business. After he obtained a lucrative position with a large law firm, she was nonetheless held to be the "supporting spouse" because he had not yet begun his new job. *See id.* at 357, 430 S.E.2d 272-73.

67. A dependent spouse, under § 50-16.1(3), essentially unchanged by § 50-16.1A(3), is and was defined as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. GEN. STAT. § 50.16.1(3) (1987) (repealed 1995); N.C. GEN. STAT. § 50-16.1A(3) (1995). This rule establishes a two-part eligibility test: "Actually substantially dependent" continues to mean that the spouse "must be entirely without the means to maintain the pre-separation accustomed standard of living." Hunt v. Hunt, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993); *see also* Lamb v. Lamb, 103 N.C. App. 541, 547, 406 S.E.2d 622, 626 (1991) (same holding). "Substantially in need" considerably reduces the burden of proof of dependence. It also, however, requires a much more detailed inquiry into the precise previous standard of living, the assets, and the incomes of the parties. *See* Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980). In *Williams*, a wife with substantial property of her own was nonetheless held to be dependent, on the grounds that she could not be forced to deplete her assets in order to maintain her previous standard of living. *See id.* at 187, 261 S.E.2d at 858. For a more detailed illustration of this point, see 2 REYNOLDS, *supra* note 45 (alimony chapter). *See also infra* Part II.A.2

province of the judge[68]), (2) a finding that the other spouse was the supporting spouse,[69] and (3) by a further finding, by either a judge or a jury,[70] that the supporting spouse had committed one of the ten, largely traditional, fault grounds set forth under the now repealed North Carolina General Statutes § 50-16.2.[71] Even with such findings, a dependent spouse's claim to alimony might still be defeated by

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(providing further discussion of the dependency issue).

68. *See* Vandiver v. Vandiver, 50 N.C. App. 319, 328, 274 S.E.2d 243, 249 (1981). The basic rationale behind this rule is that the issues of dependency and supporting are mixed questions of fact and law. *See id.*; Long v. Long, 71 N.C. App. 405, 408-09, 322 S.E.2d 427, 430-31 (1984) (clarifying that the correct procedure is to "allow the jury to render its verdict on the 'fault' issues of divorce, and then, and only then, to move to a bench hearing on dependency and the proper amount, if any, of alimony"); *see also* N.C. GEN. STAT. § 50-16.8 (1995) (providing that upon application for postseparation support "the court may base its award on a verified pleading, affidavit, or other competent evidence").

69. *See infra* note 87. Jury trials for alimony hearings, under both the old and new laws, are not mandatory, but either party may request (and be granted) such. *See* N.C. GEN. STAT. § 50-10(c) (1995).

70. Section 50-16.3A(d) allows either spouse to request a jury trial on the issue of marital misconduct. *See* N.C. GEN. STAT. § 50-16.3A(d) (1995). Jury trials have never been mandatory. As a practical matter, however, a lawyer representing a supporting spouse faced with an alimony claim may often request a jury. There is no reason to expect this practice to change under the new laws. When there is clear proof of a spouse's adultery, most parties will simply stipulate that grounds for alimony exist.

71. *See* N.C. GEN. STAT. § 50-16.3 (1987) (repealed 1995). These grounds, many of which are incorporated into the new statutes, were as follows:

> (1) The supporting spouse has committed adultery.
> (2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.
> (3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.
> (4) The supporting spouse abandons the dependent spouse.
> (5) The supporting spouse maliciously turns the dependent spouse out of doors.
> (6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.
> (7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.
> (8) The supporting spouse is a spendthrift.
> (9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.
> (10) The supporting spouse willfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

N.C. GEN. STAT. § 50-16.2 (1987), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641.

common law defenses, most commonly, recrimination.[72] More notably, a finding that a dependent spouse had committed adultery, during the marriage or even during the one-year separation waiting period, would automatically bar such spouse from obtaining an award of alimony,[73] regardless of dependency, health, or any other factor.[74]

### 2. Adultery and the Irrelevance of Need

As noted previously, the new alimony laws have not shed themselves of the notion of fault,[75] and in particular the role of adultery.[76] Need on the part of a non-adulterous dependent spouse, for example, may still be rendered somewhat irrelevant in determining both the duration and amount of a support award, depending upon what other forms of marital misconduct the adulterous spouse may have committed.[77] More to the point, however, need may be trumped altogether by proof that such spouse committed adultery on the day of separation or at any time prior to the parties' separation.[78]

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72. *See infra* note 73.

73. *See, e.g.*, Adams v. Adams, 92 N.C. App. 274, 278-79, 374 S.E.2d 450, 452-53 (1988) (making the not quite corollary point that adultery by the supporting spouse after the date of separation but before divorce would give rise to a ground for alimony). Adultery by the supporting spouse was never a statutory guarantee of alimony for an otherwise eligible dependent spouse, however. *But see infra* note 205 and accompanying text (discussing § 50-16.3A(a), which mandates an alimony award to the dependent spouse if a supporting spouse has committed adultery). Section 50-16.4 of the General Statutes does provide for "reasonable attorney fees" for a dependent spouse, but only after it is determined that such spouse would be entitled to postseparation support or alimony. *See* N.C. GEN. STAT. § 50-16.4 (1995).

74. In one case with which the author was involved, for example, a dependent wife undergoing kidney dialysis three times a week was denied alimony on the basis that she had committed adultery. *See also Coombs v. Coombs*, 121 N.C. App. 746, 468 S.E.2d 807 (1996). In *Coombs*, the wife was denied permanent alimony, after obtaining a divorce from bed and board from her husband, because she had committed adultery during the separation period. *See id.* at 748-49, 468 S.E.2d at 808-09.

75. *See supra* notes 2, 4. A settlement or separation agreement between the parties would, however, so long as the parties were in compliance with it, *insulate* the parties from the effects of adultery, either as a bar to or ground for alimony. Section 50-16.6(b) states that "[a]limony, postseparation support, and counsel fees may be barred by an express provision of a valid separation agreement or premarital agreement so long as the agreement is being performed." N.C. GEN. STAT. § 50-16.6(b) (1995)

76. Section 50-16.3A(a), for instance, continues to bar alimony to a dependent spouse who has committed "an act of illicit sexual behavior ... prior to or on the date of separation." N.C. GEN. STAT. § 50-16.3A(a) (1995). What is strikingly new under § 50-16.3A(a), is that if the supporting spouse is the adulterous party, it is mandatory that the dependent spouse be awarded alimony. *See* N.C. GEN. STAT. § 50-16.3A(a); *see also* discussion *infra* note 205 and accompanying text (quoting statute).

77. *See* N.C. GEN. STAT. § 50-16.3A(b)(1).

78. *See id.* § 50-16.3A(a). The only caveat to this statement, now codified under the

Despite this tenacious obsession with adultery, however, the 1995 statutes certainly have diminished the role of fault, at least in the early stages of the divorce process,[79] when dependent spouses are most likely to suffer economically and are often almost totally unable to confront the other spouse on anything approaching an equal footing.[80] Most significantly, the new statutes limit admission into evidence only that fault (as defined in § 50-16.3A(b))[81] that occurred before or on the date of separation, a radical and extremely salutary change from previous law.[82] Because the date of separation of the parties has consistently been used as symbolic of and virtually identical with, the cessation of the marriage,[83] the new rule governing the effects of the behavior of the parties during the one-year waiting period prior even to filing for divorce[84] represents both consistency and common sense. At both a practical and analytical level, it is a development long overdue in North Carolina jurisprudence[85]—and

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new Act, is that adultery that was "condoned" by the innocent spouse could not be used against the offending spouse. *See infra* Part III.B.1 (discussing condonation).

79. *See infra* Part IV (discussing postseparation support).

80. *See supra* notes 33-34 (discussing the decline in economic circumstances for women, who are much more likely than not to be the dependent spouse).

81. Section 50-16.3A(b) lists 15 factors to be considered in determining the amount and duration of alimony, including "[a]ny other factor relating to the economic circumstances of the parties that the court finds to be just and proper." N.C. GEN. STAT. § 50-16.3A(b) (1995). For a complete listing of these factors, see *infra* text accompanying note 295.

82. In effect, there is no "legal separation" in North Carolina, unless or until one party obtains a bed and board divorce, or until the parties execute a separation agreement. *See* Benfield v. Pilot Life Ins. Co., 82 N.C. App. 293, 294, 346 S.E.2d 283, 284 (1986). When one party separates from the other, with or without the other's consent, the necessary "separation" has occurred. *See supra* note 2 (discussing N.C. GEN. STAT. § 50-6 (1995). The change is also quite consistent with the policy expressed in the rule that marital property must be determined and valued as of the date of separation. *See infra* note 83. If the marriage ends for purposes of accumulation and valuation of marital property, the same rationale should certainly apply to the parties' non-economic behavior as well.

83. *See* N.C. GEN. STAT. § 50-21(b) (1995) (amended 1997) ("For purposes of equitable distribution, marital property shall be valued as of the date of separation of the parties."). The recently amended version of this statute is basically the same. *See* N.C. GEN. STAT. § 50-21(b) (Supp. 1997).

84. *See* N.C. GEN. STAT. § 50-16.2A, -16.3A (1995) (limiting respectively acts of "marital misconduct" (for postseparation support) and acts of "illicit sexual behavior" (for alimony) to those acts that occur "during the marriage and prior to or on the date of separation").

85. Allowing parties to separate at the will of one, *see supra* note 82, and to file for equitable distribution at any time after separation under § 50-21(a), *see* N.C. GEN. STAT. § 50-21(a) (1995) (amended 1997), yet punishing them for forming a relationship after separation has long been a glaring inconsistency in North Carolina law. Absent a separation agreement, adultery after separation clearly fell into the "a rose is a rose" category. *See, e.g.*, Coombs v. Coombs, 121 N.C. App. 746, 748-49, 468 S.E.2d 807, 808-09

one that is likely to be welcomed equally by both spouses. At a minimum, the mandate that postseparation fault may not be considered for either postseparation support or alimony[86] brings North Carolina one step closer to a considerably more rational, non-punitive approach to spousal support.

### *B. Definition Changes*

#### 1. Alimony—Old and New

Although the actual definitions of dependent and supporting spouses[87] are precisely the same under the new laws as they formerly were,[88] these terms nonetheless warrant considerable discussion, beyond that already provided,[89] for at least two reasons. First, the intricacies of the law of dependency were somewhat unclear under the old laws and are even more unclear in some respects now.[90] Secondly, apart from the definitional section, other portions of the new act do appear to answer some of the older issues, while simultaneously raising new ones—very prominently including an expansion of the manner in which dependency itself is determined, discussed more fully in Part III of this Article.[91] Leaving that core issue aside for now, also of particular importance is the issue of when,

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(1996) (applying § 50-16.6(a) to hold that voluntary sexual relations with a non-spouse during separation pursuant to a decree of divorce from bed and board constituted adultery and thus was a defense to the payment of permanent alimony).

86. There is a caveat to this statement, however. Both § 50-16.2A(e) (postseparation support) and § 50-16.3A(b)(1) (alimony) state, "Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation." N.C. GEN. STAT. §§ 50-16.2A(e), -16.3A(b)(1). Thus, embarking on a Caribbean cruise with one's paramour the day after separation is still ill-advised.

87. Although there must be a finding of fact that one spouse is the supporting party, as a practical matter, the dependency issue is much more significant. In *Long v. Long*, 71 N.C. App. 405, 406-07, 322 S.E.2d 427, 429 (1984), for example, the court of appeals squarely held that the issue was not whether the alleged supporting spouse had the ability to pay, but whether the spouse seeking support was in fact dependent. Moreover, intentional depression of one's income in order to avoid being the supporting spouse will likely result in the application of the earning capacity standard. *See* Beall v. Beall, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976).

88. *See supra* notes 1, 67.

89. *See supra* notes 67-69.

90. *See, e.g.*, Cunningham v. Cunningham, 121 N.C. App. 771, 468 S.E.2d 466 (1996), *rev'd on other grounds*, 345 N.C. 430, 480 S.E.2d 403 (1997); *infra* text accompanying notes 106-10 (discussing *Cunningham*).

91. *See* discussion *infra* Parts III.C.2-3 (discussing other alimony factors).

or possibly how often, dependency must be proven.[92]

Dependency is a requirement that is, at a minimum, "first among equals" as a prerequisite for obtaining either alimony or postseparation support.[93] But assuming that an order for postseparation support for a period of six months is entered, and that no further progress is made towards resolution of equitable distribution or other issues remaining in the case by the termination of the six month award, does that postseparation award automatically terminate?[94] Clearly, a reservation of continuing jurisdiction over the issue would resolve the question in the negative.[95] Indeed, it is analytically reasonably safe to conclude that courts already have such jurisdictional power, as they clearly do with all issues of continuing support for a spouse or child.[96] Assuming such jurisdiction exists, if a dependent spouse filed a motion to extend the time frame for a postseparation support award, or, even a new motion for postseparation support, would the dependency finding from the original motion have some kind of res judicata or "carry-over" effect in the second?[97]

It would appear that the logical solution would be to simply extend the protection of the changed circumstances standard to the

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92. This is an issue that generally did not arise under the old alimony pendente lite statute, N.C. GEN. STAT. § 50-16.3 (1987) (repealed 1995). That law specifically stated that the amount and payment of alimony pendente lite "shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which application is made." *Id.* Thus, a termination of alimony pendente lite at a "date certain" was impossible under the old statutes. *See* Hunt v. Hunt, 112 N.C. App. 722, 730, 436 S.E.2d 856, 861 (1993) (stating specifically that North Carolina does not recognize the concept of rehabilitative alimony). Postseparation support, as previously noted, however, may be brought "[i]n an action brought pursuant to Chapter 50." N.C. GEN. STAT. § 50-16.2A(a) (1995). And it may clearly be ordered for a specific time period only. *See id.*

93. *See* N.C. GEN. STAT. §§ 50-16.2A(c), -16.3A(a) (1995).

94. It seems obvious that the duty to pay will terminate at the conclusion of the specified time period—one of the few instances in which "self-help," cessation of payment, unaccompanied by any motion to modify, can operate in the area of support.

95. *See infra* text accompanying notes 106-07.

96. Although postseparation support is a new statute, not a revision of or replacement of the now-repealed alimony pendente lite statute (N.C. GEN. STAT. § 50-16.3 (1987), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641), the analogy to alimony pendente lite cannot be ignored, nor can the substantial body of case law developed under the former action. Alimony and child support may be modified at any time, upon a showing of changed circumstances. *See e.g.*, N.C. GEN. STAT. §§ 50-13.7, 50-16.9 (1995).

97. The term "res judicata" here is used in a very limited and loose form. As in other contexts in family law, notably child support and custody, "findings" never have a true res judicata effect and are always subject to change upon a showing of changed circumstances. *See* N.C. GEN. STAT. § 50-13.7 (1995) (entitled "Modification of Order for Child Support or Custody").

initial dependency finding to any subsequent postseparation support action or to a motion to extend an initial award for a set period of time, particularly if one spouse were intentionally foot-dragging to delay the process.[98] This conclusion would appear to be strongly supported, and limited in its effect, by the fact that if events that would "disqualify" one as a dependent spouse had occurred,[99] a supporting spouse could always move to modify or terminate any award of postseparation support.[100] The same somewhat tenuous effect would of course operate in reverse, in the event that a non-dependent spouse became dependent during the one-year separation period. Thus, not only would the moving spouse have the burden of proof and the opportunity to contest the dependency issue at any time in any event, but denying the dependency issue a "quasi" res judicata effect could certainly lead to a rather large, and unnecessary, expenditure of judicial resources.[101] The same logic does not indicate that a judicial finding of dependency at the postseparation support stage would sustain the dependency characterization through an alimony hearing as well.[102] Thus, it appears clear that a dependency finding will be subject to re-examination prior to the final alimony hearing; what remains unclear is if such a new finding will be

98. The discovery process is most often the source for such delays. Granting of continuances is also a culprit. A strong analogy may be found in the sanctions to be imposed in an equitable distribution action for similar types of recalcitrant behavior. *See id.* § 50-21 (Supp. 1997).

99. Section 50-16.9 states in part:

> (a) An order of a court of this State for alimony or postseparation support ... may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested....
>
> ....
>
> (b) If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

N.C. GEN. STAT. § 50-16.9 (1995). Of course, acquisition of substantial amounts of money, through an equitable distribution award, inheritance, etc., may constitute "changed circumstances" and thus render a spouse no longer dependent. *See, e.g.*, Sayland v. Sayland, 267 N.C. 379, 383, 148 S.E.2d 218, 222 (1966).

100. *See* N.C. GEN. STAT. § 50-16.9(a).

101. This is in fact a supposition—but one well supported by the experience of anyone involved in this area of the law: if parties *can* fight about something, they will surely do so. Unnecessary repeated litigation of the dependency issue would also greatly increase attorney fees, usually to the detriment of the dependent spouse.

102. *See* N.C. GEN. STAT. § 50-16.9. *But see infra* note 103 (explaining why two hearings may be necessary). In many cases, parties will simply stipulate as to dependency.

required.[103]

Support for the proposition that dependency status must surely be redetermined at the time of an initial alimony hearing or after a final distribution of property derives as well from the "entitlement" section of the new alimony statute.[104] This section not only authorizes a hearing on the merits of an alimony claim prior to the entry of an order for equitable distribution, but goes on—quite significantly—to state that if alimony is awarded, "the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim."[105] It is also worthy of great note that this portion of the statute would appear to end the controversy created by the recent decision in *Cunningham v. Cunningham*,[106] in which the court of appeals rather mysteriously held, in effect, that once adjudicated "dependent," a spouse would not lose that status, even though she might have alimony reduced to zero.[107] This holding, contradicted by previous case law,[108] would be tantamount to treating a dependency finding at least at the alimony stage of the divorce process as an unremovable birthmark. More noteworthy is the point that the new statutes authorize a revisitation of the dependency issue, at least in an alimony claim, only after equitable distribution of property has been effected—a redundancy of sorts, in view of the fact that a property distribution sufficient to disqualify a party as dependent is simply a changed circumstance.[109] The critical point is that the issue of

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103. The issue may be the same, but the actions—postseparation support and alimony—are clearly different, so that it appears likely that a new hearing on the dependency issue might well be required. This conclusion draws support from the facts that postseparation hearings are often quite limited in scope and that the parties will obviously have had no meaningful opportunity for discovery prior to the postseparation support hearing.

104. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995).

105. *Id.*

106. 121 N.C. App. 771, 468 S.E.2d 466 (1996), *rev'd on other grounds*, 345 N.C. 430, 480 S.E.2d 403 (1997). For a further discussion of this case, see *infra* note 240.

107. *See id.* at 774, 468 S.E.2d at 468.

108. *See supra* notes 99-100 and accompanying text (quoting relevant statutory provisions).

109. *See* N.C. GEN. STAT. § 50-16.3A(*l*). In some instances, moreover, it is impossible to identify the factors that the court is directed to consider in determining the amount and duration of an alimony award until after an equitable distribution is concluded. Both statutes make specific reference to modification of alimony, for example, after entry of an equitable distribution judgment. The statutory provision governing entitlement to alimony states that "if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." *Id.* The Equitable Distribution Act also provides that "[a]fter the determination of an equitable distribution, the court, upon request of either

dependency may still be revisited (certainly after a property division has occurred, including any divisible property that has accrued), or may disappear altogether in the event that other statutory termination events occur.[110]

Thus, there are two points being made: (1) that courts have continuing jurisdiction over a postseparation or alimony award whether or not the award specifies a particular termination date (assuming that courts do not already have such power, they can certainly create it in any or all orders), and (2) that for reasons of common sense and judicial economy, dependency status should be afforded the protection of quasi "res judicata" principles, unless the law specifies to the contrary, or circumstances of the parties have undergone a significant change to warrant revisiting the issue. Both law and principle dictate that these points become a part of North Carolina's jurisprudence. Moreover, the last thing that our already overburdened courts need is an additional burden imposed upon them.[111] In brief, continuing jurisdiction over any "specified term" award of postseparation support or alimony would appear to be a "win-win" situation: if continuation of either is warranted,[112] state public policy and statutory goals would be better served by the adoption of such a position, particularly in the postseparation support context. If not warranted, the burden lies on the spouse seeking continuation beyond the "specified term" to explain and justify his or her continuing need.[113] It is well worth noting, that this issue, at least in the postseparation support context, could be avoided by initial awards specifying continuance until the date of distribution or final alimony hearing.[114]

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party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7." *Id.* § 50-20(f) (Supp. 1997). And a dependent spouse who is not entitled to alimony will clearly have fewer resources, which is a factor in determining whether or not an equal division of property is equitable under § 50-20(c). It is obvious that one cannot know the extent of one's assets, or dependency status, until after equitable distribution is concluded.

110. *See* N.C. GEN. STAT. § 50-16.9 (1995).

111. In fiscal year July 1, 1995, to June 30, 1996, for example, there were over 158,000 civil actions filed in the district courts of North Carolina. Some 50,000 of these involved child support collection, but 59,370 were "other domestic relations" actions—divorce, alimony, property division, etc. Of that number, 21,529 of the actions were still pending as of June 30, 1996. *See* N.C. ADMIN. OFFICE OF THE COURTS, SUMMARY OF JULY 1, 1995—JUNE 30, 1996 NORTH CAROLINA TRIAL COURT CASELOAD (1996).

112. *See supra* text accompanying notes 98-100.

113. This is, in fact, the position that the majority of courts have taken. *See infra* Part II.B.2, dealing with rehabilitative alimony, but closely akin, both practically and analytically, to postseparation support.

114. Section 50-16.1A(4) already specifies that a postseparation support award will be

### 2. Procedural Issues

The more important and more glaring changes within the new alimony laws have necessitated a more subtle, although very significant, revision of the definition of alimony itself. In fact, to a somewhat surprising degree, many of the more profound changes wrought by the new alimony laws lie within the basic definition changes themselves. For instance, the new § 50-16.1A(1) states that alimony is "an order for payment for the support and maintenance of a spouse or *former spouse, periodically or in a lump sum for a specified or for an indefinite term* in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce."[115] A remarkable number of issues arise from what appears to be a rather simple revision of the definition section of the statute, and the first two of these issues are procedural.

First, the action for alimony without divorce was repealed in 1967,[116] a point that seems to have escaped the attention of virtually all judges, lawyers, and legislators. In one sense, the practical and economic effects of this overlooked repeal are rather negligible.[117] Nonetheless, if orders awarding alimony or postseparation support are available only incident to an absolute divorce, or to a divorce from bed and board, certain problems—at least at an analytical level[118]—are created by this section. Perhaps the more obvious difficulty is that, unless a "qualified"[119] dependent spouse has lived separate and apart for one year, such spouse will not be able to file

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continued until a final alimony hearing. *See* N.C. GEN. STAT. § 50-16.1A(4) (1995). Because equitable distribution orders may render a spouse non-dependent, in most instances a post-separation support order should endure until the time of distribution. This suggestion has the added advantage of creating incentives to speed up the often protracted equitable distribution process.

115. N.C. GEN. STAT. § 50-16.1A(1) (1995) (emphasis added). The italicized portion of the statute reflects the new portions. The former section, now repealed § 50-16.1(1), referred only to "a spouse, either in lump sum or on a continuing basis." N.C. GEN. STAT. § 50-16.1 (1987) (repealed 1995). Note as well that alimony without divorce was repealed in 1967, thus apparently leaving only absolute divorce and divorce from bed and board as the only actions in which alimony may be ordered. *See* N.C. GEN. STAT. § 50-16 (1966), *repealed by* Act of July 6, 1967, ch. 1152, § 1, 1967 N.C. Sess. Laws 1766, 1766.

116. *See* N.C. GEN. STAT. § 50-16 (1966), *repealed by* Act of July 6, 1967, ch. 1152, § 1, 1967 N.C. Sess. Laws 1766, 1766.

117. One can still obtain an award of alimony or postseparation support and never seek to obtain a divorce. As we have seen, however, either spouse may sue for a divorce after living separate and apart for one year. *See* N.C. GEN. STAT. § 50-6 (1995); *supra* note 2.

118. *See infra* notes 119-21 and accompanying text.

119. *See infra* Part III.A (discussing the role that "marital misconduct" may play in the context of qualification of a dependent spouse).

for absolute divorce, thus leaving a divorce from bed and board—available solely on fault grounds[120]—as the only apparent basis for an award of alimony. This apparently common-sense reading of the new statute leaves an award of postseparation support prior to absolute divorce still held firmly in the embrace of the traditional fault grounds for bed and board divorce—a result clearly at odds with the goals of the new laws.[121] As a practical matter, however, one can clearly file for alimony—ignoring the now-repealed "alimony without divorce" action—and postseparation support simultaneously, as the next paragraph will explain.

In part because the interpretation initially discussed above appears clearly to undermine one of the major purposes of the new laws, a very different statutory construction may arise when the definition of alimony under § 50-16.1A(1)—apparently limiting an order for alimony to actions for divorce or divorce from bed and board—is compared with § 50-16.2A(a)[122] and § 50-16.3A(a), both of which authorize bringing an action for postseparation support or alimony "[i]n an action brought pursuant to Chapter 50."[123] Although the elementary statutory construction rule is that the more specific provision is preferred over the more general,[124] both types of actions for support may well be interpreted as being brought under "any action brought pursuant to Chapter 50"[125]—an outcome much preferred over the more limited option and much more consistent with the purposes of the new law. The specific-over-general statutory construction rule, moreover, has frequently yielded to the principle that the broader statutory purposes should not be undermined by

120. *See* N.C. GEN. STAT. § 50-7 (1995).

121. An award of postseparation support, however, may be brought in "an action brought pursuant to Chapter 50 of the General Statutes." *Id.* § 50-16.2A(a).

122. *See infra* note 377 (discussing § 50-16.2A(a)).

123. N.C. GEN. STAT. §§ 50-16.2A(a), -16.3A(a). These provisions are clearly and considerably broader than the definitional provisions.

124. *See* Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) ("Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with this situation controls over the statute of more general applicability."); *see also* National Food Stores v. North Carolina Bd. of Alcoholic Control, 268 N.C. 624, 629, 151 S.E.2d 582, 586 (1966) (explaining that two statutory provisions "can be harmonized with a view to giving effect to a consistent legislative policy by holding, as we do, that the specific provisions ... prevail over the general provisions").

125. N.C. GEN. STAT. §§ 50-16.2A(a), -16.3A(a); *see, e.g.*, Sharp, *supra* note 10, at 271-73 (discussing at length the freedom with which the supreme court interpreted the Equitable Distribution Act—an interpretation certainly necessary to fulfill the basic purposes of the statute).

strict adherence to the general rule of interpretation.[126]

A somewhat similar construction problem exists within the definition of alimony, which states that payments may be made "periodically or in a lump sum, for a specified or for an indefinite term."[127] Although these forms of payment are discussed in more detail further in this Article,[128] it is important to recognize that a later part of the statute, and one which quite specifically deals with the determination of the amount and duration of alimony, could well appear to be inconsistent with the four payment options above. That section directs that "[t]he duration of the award may be for a specified or for an indefinite term."[129] Thus, the broader list of what appears to be four payment options is narrowed to only two options in the more specific portion of the statute.

In this instance, however, the more common "specific-over-general" rule of statutory interpretation may well be the preferred solution to this apparent inconsistency. The rationale underlying this interpretation, however, does not rest solely upon such statutory interpretation principles.[130] Under previous law, it was clear that "periodic" alimony payments were in fact payments for an "indefinite" term,[131] so these two provisions are likely to be interpreted as simply duplicative of one another.

At first glance, the authorization of lump sum alimony in the definitional portion of the statute and the omission of the lump sum payout option in the latter and more specific section, may appear to be more difficult to reconcile.[132] However, it appears that reconciliation is indeed quite reasonable, again relying in part upon

126. *See, e.g.*, Merritt v. Edwards Ridge, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) (stating that the general rule of statutory construction should be applied "absent a clear legislative intent to the contrary"); Hayes v. Fowler, 123 N.C. App. 400, 404-05, 473 S.E.2d 442, 445 (1996) ("The basic requirement is that we 'ascertain and effectuate the intent of the legislative body' as indicated by 'the language of the statute . . . the spirit of the act, and what the act seeks to accomplish.' " (quoting Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980))).

127. N.C. GEN. STAT. § 50-16.1A(1) (1995).

128. *See infra* notes 145-78 and accompanying text.

129. N.C. GEN. STAT. § 50-16.3A(b).

130. *See supra* notes 124-26 and accompanying text.

131. *See* Williams v. Williams, 299 N.C. 174, 189, 261 S.E.2d 849, 859 (1980) (vacating the trial court's designation of its order for alimony of $1000 per month, among other awards, as "permanent lump-sum alimony" and holding that "[c]learly, the trial court here has ordered periodic payments"); White v. White, 37 N.C. App. 471, 478, 246 S.E.2d 591, 595-96 (1978) (recognizing an order for the husband to pay the wife $100 per week until her remarriage or death to be an award of periodic permanent alimony payments).

132. *See* N.C. GEN. STAT. § 50-16.3A(b) ("The duration of the award may be for a specified or for an indefinite term.")

the above analysis.[133] Under the predecessor statute, alimony payments could be made only via lump sum awards or "on a continuing basis."[134] But well-established case law on lump sum alimony awards—to the effect that an award of alimony for a specified period is clearly a "lump sum" award[135]—should resolve the apparent ambiguity or inconsistency. Thus, it is not unreasonable to suggest that lump sum awards are virtually synonymous with awards for a specified term and that because indefinite term alimony must clearly be paid periodically, the seemingly inconsistent statutory terminology may be reconciled. The result is that there are in fact only two options for the method of payment of alimony, lump sum (specific term) and periodic (indefinite term). Greater simplicity, logic, and previously established law would all appear to recommend this resolution of what is actually only an apparent conflict in the types of alimony payment options.

### *C. Other Alimony Issues*

#### 1. Integration Revisited

At some risk of repetition, not to mention the dangers of reopening what has long been a Pandora's box of sorts, a discussion of lump sum alimony cannot avoid another issue about which there has been considerable controversy.[136] The core of the problem is the true meaning of "lump sum" alimony: whether or not in substance and in particular, such alimony may be subject to judicial modification. This question was the subject of considerable controversy even under the previous law.[137] But the combination of a

133. *See supra* notes 127-31.

134. N.C. GEN. STAT. § 50-16.1(1) (1987), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641.

135. *See* Mitchell v. Mitchell, 270 N.C. 253, 257, 154 S.E.2d 71, 74 (1967) (determining an order that plaintiff pay defendant a specified sum on the fifth of each month for a specified period, while not denominated "alimony," to be an award of alimony in gross or lump sum alimony, "which is fundamentally the award of a definite sum of money for the wife's support and maintenance"); Potts v. Tutterow, 114 N.C. App. 360, 367, 442 S.E.2d 90, 94 (1994) (Greene, J., dissenting) (explaining that "an award of a definite sum payable over a specified period of time . . . is an award of lump sum alimony" (citing *Mitchell*, 270 N.C. at 257, 154 S.E.2d at 74; Whitesell v. Whitesell, 59 N.C. App. 552, 552, 297 S.E.2d 172, 173 (1982))), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995); *see also infra* notes 145-78 (discussing lump sum alimony as part of a property division).

136. *See* Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319 (1991).

137. *See infra* notes 146-58 (discussing the controversy).

careful analysis of existing case law and the new definition of alimony offers considerable, and much needed, guidance in this area.[138]

To start at the beginning, however, and with the fervent hope that this long-standing confusion may be resolved, case law in North Carolina had long held that a lump sum payment to a spouse or ex-spouse could in fact be paid out in periodic form.[139] So long as these payments were *actually* alimony, they would be treated as such and thus could always be terminated or modified on motion in the cause and upon a showing of changed circumstances.[140]

"Actual alimony" was meticulously defined in *Marks v. Marks*[141] to require two elements: (1) that there must be an order of a court, and (2) that the order must in fact be for the support of a dependent spouse and *not* part of a property settlement.[142] In stating this rule, the supreme court merely reiterated and clarified a well-established principle in North Carolina and other jurisdictions: that an "integrated" separation agreement that becomes an order of the court—i.e., an agreement in which the payments labeled "alimony" are in fact reciprocal consideration for a property division[143]—will not be considered "true" alimony, and thus not subject to the exigencies of termination and modification that almost always accompany conventional alimony payments.[144]

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138. The author of this Article is much tempted to say "solution."

139. *See, e.g.*, Marks v. Marks, 316 N.C. 447, 449, 342 S.E.2d 859, 860 (1986); Rogers v. Rogers, 111 N.C. App. 606, 612, 432 S.E.2d 907, 910 (1993); Hayes v. Hayes, 100 N.C. App. 138, 142, 394 S.E.2d 675, 679 (1990). True alimony, like other support duties, is virtually always modifiable. This is a principle to which the public policy of North Carolina is strongly devoted. *See* Rowe v. Rowe, 305 N.C. 177, 183-84, 287 S.E.2d 840, 844 (1982), *appeal on remand*, 74 N.C. App. 54, 327 S.E.2d 624 (1985); Frykberg v. Frykberg, 76 N.C. App. 401, 410, 333 S.E.2d 766, 772 (1985); Acosta v. Clark, 70 N.C. App. 111, 113-14, 318 S.E.2d 551, 553 (1984).

140. *See* Morrison v. Morrison, 102 N.C. App. 514, 519, 402 S.E.2d 855, 858 (1991); cases cited *supra* note 139.

141. 316 N.C. 447, 342 S.E.2d 859 (1986).

142. *See id.* at 452-54, 342 S.E.2d at 862-64. For a time the confusing, and confused, decision of *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), cast doubt on the validity of the integration principle. For a detailed discussion that concludes that the principle fully retained its viability after *Walters*, see Sharp, *supra* note 136, at 331-41.

143. *See* Sharp, *supra* note 136, at 341-47.

144. This principle had been well-settled in North Carolina case law since the 1940s. *See, e.g.*, Stanley v. Stanley, 226 N.C. 129, 133, 37 S.E.2d 118, 120 (1946). However, it received considerable elaboration in later years. For example, in *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979), the supreme court carefully explained that periodic payments, even if labeled alimony, "may not be alimony within the meaning of the statute . . . if they and other provisions for a property division between the parties constitute reciprocal consideration for each other." *Id.* at 666, 252 S.E.2d at 701. The *White* court went on to hold that in the absence of a clear indicia to the contrary, provisions for support and property division should be presumed to be non-integrated. *See id.* at 672, 252 S.E.2d at

Such a common sense principle, well-rooted in contract law,[145] but mistakenly deemed to have been undermined by a 1983 North Carolina Supreme Court decision,[146] is an eminently sensible solution to the common problem that one spouse's share of marital property, were it mandated to be paid in true lump sum, could well have the effect of, for example, forcing a sale of a profitable business, or creating such a debt load that the business would fail in any event.[147] The solution to avoiding an impossible or possibly ruinous one-time payment was patently obvious: an economic entitlement that was in fact part of a property division that could be structured to be paid out over a specific period of time.[148] Another clear advantage of this integration principle is that a property division falling under the "support" or alimony rubric may be treated as alimony for federal income tax purposes, regardless of state law, so long as the Internal Revenue Code's functional and definitional requirements for "alimony" are met.[149]

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704. That presumption made considerable sense at a time when there was no provision for any property division upon divorce—but would make considerably more sense if it were reversed now. *See* Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964), *overruled in part* by Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983). In fact, the *Walters* decision does not mention the integration principle and makes no reference at all to *White*.

145. Consideration is a necessary element of contracts, and "[t]he essence of consideration ... is legal detriment, that has been bargained for by the promisor and exchanged by the promisee in return for the promise of the promisor." JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 4-2(c), at 189 (3d ed. 1987) (footnotes omitted).

146. *See* Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983). That poorly analyzed, confusing, and internally inconsistent case was initially treated as having overruled the integration, or reciprocal consideration, principle. Later cases have begun to rectify that error. *See, e.g.*, Marks v. Marks, 316 N.C. 447, 342 S.E.2d 859 (1986); Morrison v. Morrison, 102 N.C. App. 514, 402 S.E.2d 855 (1991). For a laborious treatment of the *Walters* case and the ensuing confusion it engendered, see Sharp, *supra* note 136, at 333-41.

147. As I have frequently cautioned my classes, no matter how heinous a goose may be, do not kill it so long as it continues to lay eggs—gold or otherwise.

148. *See* Sharp, *supra* note 136, at 341-47.

149. *See* I.R.C. §§ 71(b), 1041 (1994) (setting forth the requirements for "alimony" treatment of periodic payments). Probably the most significant points to note in this context are the absence of any requirement that the payments cease upon remarriage of the recipient and the requirement under § 71(b)(1)(D) that payments must not survive the death of the payor. Agreements incorporated or merged into a decree that payments will continue after the remarriage or death of the payee are classic indicia of true property settlements, but payments that survive remarriage will *not* disqualify a periodic payment from receiving treatment as "alimony" under the Internal Revenue Code ("I.R.C."). It is thus not difficult to suggest that the I.R.C. has implicitly recognized affixing the alimony label to what is clearly a property division, assuming the other requirements of § 71 are met.

As soon as the renewed vitality of the integration principle had begun to take place,[150] the supreme court handed down *Potts v. Tutterow*,[151] a case that not only seems strongly to solidify the integration principle,[152] but that may also provide some guidance for the interpretation of the effects of the payment options under the new statute. The danger in the *Potts* case, however, is that, without careful analysis, it might just as easily engender yet more, albeit needless, confusion and thus it warrants further discussion.[153]

The supreme court's per curiam opinion in *Potts* necessarily compels an analysis of the more lengthy opinion of the court of appeals, in which the central issue was the nature of a district court order that the plaintiff husband pay " 'lump-sum alimony of $54,240, payable in semi-monthly installments of $452.' "[154] The lower court noted in its conclusions of law that the above sum, " 'together with the equity in the house and lot shall be the only and entire alimony obligation of Plaintiff.' "[155] Defendant wife remarried just under a year after this order was entered, plaintiff ceased making the bi-monthly payments, and his ex-wife filed for contempt, contending

150. *See, e.g.*, *Marks*, 316 N.C. at 455, 342 S.E.2d at 864; Williams v. Williams, 120 N.C. App. 707, 715, 463 S.E.2d 815, 821 (1995).

151. 340 N.C. 97, 455 S.E.2d 156 (1995) (per curiam). The case itself is similar to *Hayes v. Hayes*, 100 N.C. App. 138, 394 S.E.2d 675 (1990). In *Hayes*, the husband ceased making "alimony" payments as provided for in a consent judgment upon the wife's remarriage. *See id.* at 140, 394 S.E.2d at 676. The trial court found that the payments were reciprocal consideration for a property division, were part of a property division, and thus were nonmodifiable. *See id.* at 145, 394 S.E.2d at 679. The court of appeals remanded for an evidentiary hearing on the issue of the intentions of the parties, but unequivocally held that the integration principle was the governing rule on this issue. *See id.* at 146-48, 394 S.E.2d at 679-80.

152. *See infra* note 153. As the leading authority has aptly put the matter, "[i]f the spouses' separation agreement contains both property division provisions and alimony provisions, and both types of provision are 'integrated,' that is each is arrived at in consideration for the other, then neither the property division nor the alimony is modifiable when the agreement is merged in the divorce decree." CLARK, *supra* note 2, § 19.14, at 466.

153. *Potts* simply upheld the court of appeals ruling that a wife's lump sum alimony could be terminated upon her remarriage. *See Potts*, 340 N.C. at 97-98, 445 S.E.2d at 156-57. In so doing, it affirmed the court of appeals which had held that the wife's payments were not integrated and so could be modified. *See* Potts v. Tutterow, 114 N.C. App. 360, 365, 442, S.E.2d 90, 93 (1994), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995). The critical fact is not that a lump sum award was modifiable, but that the payments were so structured as not to overcome the *White* presumption of the severability of support and property division. *See supra* note 144 (discussing *White*). As discussed *infra* note 156, the court's introduction of the concept of "vesting" into this area, at the same time as it disavows any insurance analogy, might prove to be confusing. *See Potts*, 114 N.C. App. at 364, 442 S.E.2d at 92-93.

154. *Potts*, 114 N.C. App. at 361, 442 S.E.2d at 91 (quoting district court order).

155. *Id.* (quoting district court order).

that the lump-sum alimony was "vested"[156] at the time it was ordered and therefore not subject to termination, as the district court had ruled it was.[157]

The court of appeals wisely rejected the dissent's[158] attempt to characterize the issue as whether or not the original order was in the nature of a "lump sum" or a "periodic payment."[159] Instead, the majority correctly focused upon whether the award was "vested" or not—and used as the touchstone for that determination the issue of whether the lump-sum amount of the award was in fact "alimony" or was in fact part of a property settlement.[160] In what is probably the most critical but overlooked portion of its opinion, the court of appeals went on to state that North Carolina courts "have held that support payments which constitute reciprocal consideration for a property settlement are not alimony in the true sense of the word and are not subject to modification."[161] In other words, integrated agreements, whether or not payments of money to a spouse in a lump sum, periodic payments, or both, are not modifiable precisely because they are not alimony in the first instance.[162] The brief

156. The term "vested" is frequently used by courts in other states. "Vesting" in other states, however, is basically defined in a fashion identical to integration. *See, e.g.*, Cheek v. Cheek, 500 So. 2d 17, 18 (Ala. Civ. App. 1986) (identifying "alimony in gross" as a property settlement (and thus nonmodifiable) and stating the rule that alimony in gross must satisfy two requirements: "(1) the time of payment and the amount must be certain, and (2) the right to alimony must be vested"); Skvarch v. Skvarch, 876 P.2d 1110, 1112 (Alaska 1994) ("Alimony" is not modifiable " 'where the award is an integral part of a property settlement and thus a property right vested in the dependent spouse.' " (quoting Voyles v. Voyles, 644 P.2d 847, 850 (Alaska 1982))). As in *Potts*, the wife in *Cheek* satisfied the first requirement, but not the integrated agreement principle.

157. *See Potts*, 114 N.C. App. at 363, 442 S.E.2d at 91-92.

158. *See id.* at 366-67, 442 S.E.2d 93-94 (Greene, J., dissenting).

159. Obviously, the award was a periodic payment of a lump sum amount labeled alimony, thus lending strong support to the suggestion that the central issue was somewhat miscast by the dissent. The issue, it should be emphasized, is whether the payments are integrated or not integrated with a property division—not whether they are "periodic" or "lump sum."

160. *See Potts*, 114 N.C. App. at 364-65, 442 S.E.2d at 92-93.

161. *Id.* at 365, 442 S.E.2d at 93. The great majority of states agree with this principle. As noted by Clark, "if the decree orders the payments as a means of carrying out a division of the parties' property, under many statutes and the majority of cases, it may not be modified." CLARK, *supra* note 2, § 16.5, at 657; *see also id.* § 18.8, at 784; Keffer v. Keffer, 852 P.2d 394, 397 (Alaska 1993) (Rabinowitz, J., dissenting) ("Integration ... is grounded on the theory that spousal support was, at least in part, negotiated as a 'trade off' [for other property benefits] ...."); Williams v. Williams, 120 N.C. App. 707, 715, 463 S.E.2d 815, 821 (1995) (reaffirming the integration principle and emphasizing the critical importance of the specific language necessary to overcome the *White* presumption of severability); *infra* notes 169-70 (discussing the importance of clear wording).

162. The author must confess that the majority of these "other words," insofar as North Carolina law is concerned, are her own. *See* Sharp, *supra* note 136, at 333-51.

supreme court opinion in no way undermined the affirmation of the integration principle, but elaborated slightly on payments that would otherwise be treated as modifiable unless vested—i.e., true alimony payments, whether lump sum or periodic, that have been ordered, not paid, and were due and owing at remarriage of the recipient spouse are "vested."[163] On the other hand, those payments that are integrated with a property settlement are already a *vested* right, due and owing, whether a lump sum or not, and thus not subject to termination.[164]

Thus, *Potts* should be viewed as an affirmation of the traditional rule that lump sum "alimony," even if paid out periodically, may nonetheless be nonmodifiable *so long as it is in fact part of a property division.* As a corollary, "true alimony"—as payments in *Potts* were, and as the earlier court in *Marks* took great pains to define[165]—may be modified or terminated, under both the old and new statutes, so long as the statutory requirements for such modification or termination are met.[166] This rule prevails whether the alimony payments are lump sum, periodic, for a specified period, or for a nonspecific period.[167] So long as there exists a court order (whether entered by consent or not) and a provision truly intended to provide for maintenance of a spouse (whether denominated alimony or postseparation support), a court will treat the provision, as it should, as "true" alimony, complete with all the incidents thereto.[168]

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Somewhat unfortunately, the majority also relied on a weak analogy that only past due alimony could support execution. *See Potts*, 114 N.C. App. at 364, 442 S.E.2d at 92-93. The court was certainly not incorrect in this statement. Indeed, under § 50-16.7(i) of the North Carolina General Statutes, past due alimony payments must be reduced to judgment before becoming a lien on real estate. *See* N.C. GEN. STAT. § 50-16.7(i) (1995). Quite fortunately, the gravamen of the *Potts* decision does not rely upon this portion of its analysis.

163. This statement is not inconsistent with holdings of other states. *See supra* note 156 (citing cases).

164. *See* Potts v. Tutterow, 340 N.C. 97, 97-98, 455 S.E.2d 156, 156-57 (1995) (per curiam). Again, this follows well established law on arrearages. *See, e.g.*, N.C. GEN. STAT. § 52C-3-305(b)(4) (1995) (authorizing a court to determine support arrearages (for child support or alimony) and a method for compliance). This is part of the Uniform Interstate Family Support Act. *See id.* § 52C-1-100.

165. *See supra* notes 141-44 and accompanying text (discussing *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986)).

166. This refers largely to the issues of dependency and the absence of compelling "illicit sexual behavior" on the part of that spouse. *See infra* Part III.A (discussing illicit sexual behavior).

167. The "lump sum" in *Potts* was terminated only because it was true alimony—albeit in a form that more commonly points to a property division. *See infra* note 172 and accompanying text.

168. Although less likely to occur, postseparation support does fit within this analysis,

Conversely, if payments to a dependent spouse or ex-spouse are *in fact* part of a property division (and if they are, any agreement certainly ought to so state in no uncertain terms[169]), then the payments become reciprocal consideration for the property division. When this occurs, the payments become part of an integrated agreement—and are not modifiable, nor terminable upon the remarriage of the payee,[170] although the payments may yet receive alimony treatment by the Internal Revenue Service.[171]

Owing to the fact that North Carolina's rules for what is or is not "true" alimony are actually rather simple, there is no reason whatsoever to overreact to the *Potts*[172] decision. The supreme court

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because it too may be terminated by a dependent spouse's cohabitation. *See* N.C. GEN. STAT. § 50-16.9; *infra* Part IV.D (discussing cohabitation).

169. Unlike years past, there are no "magic words" involved in this admonition. The admonition itself, it should be recalled, stems from the *White* presumption, discussed *supra* note 144, that the property and support provisions of a settlement agreement are separable. A simple statement to the effect that "in return for [or in consequence of, or in consideration for] the wife's agreement to relinquish any and all rights in XYZ Company that may have arisen from the marriage, husband promises to pay wife the sum of $1,000,000 [during the next five years, two years, 48 months, or $100,000 per year]" should easily establish that the "alimony" payments are part of a property division. If the agreement itself bluntly denominates the payments "as property division," of course, the payor would lose the right to claim the payments as alimony. *See* I.R.C. § 71(b) (1994); *supra* note 149 (discussing § 71(b)). For examples of such clauses, see *infra* note 170.

170. An excellent example of an integrated agreement clause appears in *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E.2d 657 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983), in which the agreement provided simply that it was an " 'integrated agreement of the parties, that each provision contained herein is intended to be in consideration for each of the other provisions.' " *Id.* at 507, 286 S.E.2d at 659 (quoting consent judgment). For a nonintegration provision, see *Britt v. Britt*, 36 N.C. App 705, 711, 245 S.E.2d 381, 385 (1978): " 'The provisions for the support . . . of wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be . . . integrated with a property settlement of the parties.' " *Id.* at 711, 245 S.E.2d at 385 (quoting separation agreement). In *Jones v. Jones*, 42 N.C. App. 467, 256 S.E.2d 474 (1979), the court recognized that the following factors were indicia of the parties' intent to create an integrated agreement: that the payments were contingent upon the wife's leaving the house and conveying her half of the house to her husband, that the payments were limited to 32 months duration, that there was no finding that grounds for alimony existed, and that there was no finding that the wife was a dependent spouse. *See id.* at 471, 256 S.E.2d at 476.

171. In essence, then, the Service has virtually invited parties, to some degree to structure property divisions as alimony, without so much as any consideration of what various state laws require for a payment to qualify as alimony. The anti-frontloading provisions of I.R.C. § 71(f) (1994) do limit the degree to which a spouse can transfer cash to the other spouse during the first three years after divorce and still have such payments qualify, under IRS rules, as alimony. At the same time, the section is also a clear recognition that property divisions are often structured as alimony.

172. Potts v. Tutterow, 114 N.C. App. 360, 364, 442 S.E.2d 90, 92-93 (1994), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995). Many practitioners, however, have in effect over-reacted to the decision, largely because most lump sum "alimony" payments are

merely restated the requirements for what is not true alimony and held, in complete conformity with previous law, that remarriage will terminate all "true" alimony payments that have not already become due, including lump sum awards.[173] Although most lump sum payments are more often than not actually reciprocal consideration for a property division[174] and thus not true alimony, the payments in *Potts* were not part of a property division, as the lower court held and the supreme court affirmed.[175] There would appear to be, moreover, no statutory or analytical reason why these same rules should not apply with alimony for a specified term,[176] in lump sum, or on a periodic basis.[177] The manner of payment is neither indicative of what the substance of the payment truly is, nor of the intentions of the parties. Rather, it is the intention of the parties as to the true

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actually property divisions. As the decision by the court of appeals made clear, however, the payments in *Potts* were deemed not to be part of a property settlement. *See id.*

173. *See* Potts v. Tutterow, 340 N.C. 97, 98, 455 S.E.2d 156, 156-57 (1995) (per curiam); *see, e.g.*, White v. White, 296 N.C. 661, 665-66, 252 S.E.2d 698, 700-01 (1979). *White* is the leading case, but because there was no equitable distribution at the time it was decided, its holding was that there is a presumption that the support and property division portions of a settlement agreement are not integrated. *See id.* at 672, 252 S.E.2d at 704. The presumption should either be reversed or done away with altogether now that alimony and property have become almost interchangeable with one another in so many instances. *See* Rowe v. Rowe, 305 N.C. 177, 183, 287 S.E.2d 840, 844 (1982) (holding that whether or not payments labeled "alimony" could be enforced by contempt depended solely upon whether or not there was a court order, not upon whether the agreement was integrated or not), *appeal on remand*, 74 N.C. App. 54, 327 S.E.2d 624 (1985); *Henderson*, 55 N.C. App. at 512, 286 S.E.2d at 662 (1982) (same).

174. The very nature of true alimony—providing for the needs of a dependent spouse on a continuing basis—usually involves indefinitely continuing payments. There are certain non-contingent events, however—for example, reaching retirement age or receiving the corpus of a trust—that would render lump sum awards for support both sensible and appropriate.

175. *See Potts*, 340 N.C. at 97, 455 S.E.2d at 156.

176. Several states do in fact authorize modification of rehabilitative alimony awards, either expressly by statute, or by reserving jurisdiction over the action. *See* CLARK, *supra* note 2, § 16.4, at 653-54. Indeed, Professor Clark goes on to emphasize that in "cases involving installment payments the alimony-property distinction is neither sensible nor workable and in fact is largely illusory." *Id.* at § 18.8, at 785. *But see* Skvarch v. Skvarch, 876 P.2d 1110, 1112 (Alaska 1994) (holding that a rehabilitative alimony award was in fact nonmodifiable because it was part of an integrated agreement).

177. The new alimony laws do not, unfortunately, authorize awards of what are often called "restitutional" or "reimbursement" payments. See discussion *supra* note 66, of *Kuder v. Schroeder*, 110 N.C. App. 355, 430 S.E.2d 271 (1993), wherein the wife was not only denied alimony but also unjust enrichment, quantum meruit, or other equitable remedies, on the alternative grounds that her services (supporting husband through two advanced degrees) were either presumed to be a "gift" to her husband or were rendered as part of her duty of support. *See id.* at 356-57, 430 S.E.2d, at 272-73. *But see Suggs v. Norris*, 88 N.C. App. 539, 543-44, 364 S.E.2d 159, 162-63 (1988) (holding that such equitable remedies were available upon the death of the plaintiff's long-time cohabitant).

nature of the payments ("true" alimony or part of a property settlement) within an incorporated separation agreement that controls the modifiability, or non-modifiability, of payments labeled as "support" or alimony.[178]

### 2. "Rehabilitative" Alimony?

Beyond these admittedly elongated initial observations, the first significant point to note regarding the new definition of alimony is that it clearly authorizes awards[179] of alimony for a "specific term"[180]—a form of support quite similar to that known elsewhere as "rehabilitative alimony."[181] The concept was hailed in most other states as a mechanism by which dependent spouses, particularly those who have put the other spouses through a professional degree and/or had young children, could "rehabilitate" themselves and rejoin the marketplace as productive and no longer dependent citizens.[182] As

178. *See supra* note 170 for examples of appropriate language to indicate the intention of the parties.

179. There has never been any specific reference to "rehabilitative alimony" in the North Carolina General Statutes, although no section of the old statutes prohibited such an award. In fact, cases stretching from at least *Williams v. Williams*, 299 N.C. 174, 184, 261 S.E.2d 849, 856-57 (1980), to *Potts v. Tutterow*, 340 N.C. 97, 455 S.E.2d 156 (1995) (per curiam), have discussed alimony awards as being "rehabilitative" in nature. *See* Potts v. Tutterow, 114 N.C. App. 360, 362, 442 S.E.2d 90, 91 (1994), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995).

180. *See* N.C. GEN. STAT. § 50-16.1A(1) (1995). "Lump sum" alimony, specifically authorized by the old and new alimony statutes, may function in a fashion that is very similar to, if not identical with, rehabilitative alimony—i.e., a support award that is capable of being reduced to a sum certain and deemed sufficient to ease the dependent spouse through the transition period, after which she can pursue her own career.

181. *But see* Hunt v. Hunt, 112 N.C. App. 722, 730, 436 S.E.2d 856, 861 (1993) ("North Carolina law does not embrace the concept of 'rehabilitative alimony,' the purpose of which is to enable a spouse who has foregone economic opportunities during the marriage to acquire the market skills necessary to obtain employment which will allow her to support herself.").

182. *See* Mertz v. Mertz, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973) (characterizing rehabilitative alimony as assisting a divorced person "in regaining a useful and constructive role in society ... [and] preventing financial hardship on society or the individual during the rehabilitative process"); Turner v. Turner, 385 A.2d 1280, 1285 (N.J. Super. Ct. Ch. Div. 1978) (observing that rehabilitative alimony is a "valuable technique" and that a "judgment that will motivate a woman to seek employment" will bring societal and individual benefits); Molnar v. Molnar, 314 S.E.2d 73, 76 (W.Va. 1984) (explaining that the premise of rehabilitative alimony is to encourage self-reliance); *see also* Cynthia L. Greene, *Alimony is Not Forever: Self-Sufficiency and Permanent Alimony*, 4 J. AM. ACAD. MATRIMONIAL LAW 9, 14-19 (1988) (citing several cases treating permanent alimony negatively and favoring rehabilitative alimony); Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493, 500-01 (1987) (suggesting that by authorizing rehabilitative alimony, the law recognizes that women are capable of financial

happens so frequently with social and domestic law experiments, however, the best of intentions can go astray, and the tide and experience quickly turned against "rehabilitative" alimony, as its analytical foundations often proved to be baseless,[183] and its implementation on a practical level proved to be woefully inadequate.[184]

In part because of these deficiencies, many states allow rehabilitative alimony to be extended beyond the initial order, depending on a variety of circumstances that are impossible to anticipate[185] at the time of entry of the order.[186] Particularly because

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independence). *But see Arnold v. Arnold*, 901 A.2d 262, 262-63 (N.J. Super. Ct. App. Div. 1979) (disagreeing with *Turner*).

183. Reality dashed the hopes of many feminist writers in a very short time, as judges and commentators began to realize that rehabilitative awards are often based on unrealistic assumptions about a long-term homemaker's ability to reenter the work force successfully. *See* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 286 (2d ed. 1991); *see also* Belton v. Belton, 481 S.E.2d 174, 176 (S.C. Ct. App. 1997) ("Rehabilitative alimony should be approved only in exceptional circumstances ... because it seldom suffices to maintain the level of support the dependent spouse enjoyed as an incident to the marriage."); Katharine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1208-12 (1988) (noting the unfairness in forcing women to get retrained or re-educated at an age when many men are soon to enjoy pension plans and retirement, and the incentive for women to appear helpless and dependent in order to receive a larger award, undermining the principle of encouraging self-reliance); Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Term Alimony*, 21 FAM. L.Q. 573, 573-75 (1988) (citing several appellate court cases demonstrating the trend away from rehabilitative alimony awards and toward indefinite alimony awards); Linda Bailliff Marshall, Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 REV. LAW & SOC. CHANGE 667, 673 (1984-1985) (asserting that the true purpose of rehabilitative alimony is to release the supporting spouse "from a long term alimony obligation perceived as judicially imposed servitude," and that the terms "dependent" and "rehabilitation" imply laziness, weakness, and helplessness).

184. In most circumstances, rehabilitative alimony leaves women undercompensated, both in terms of the amount and duration of the award. *See* Baker, *supra* note 183, at 1208. Baker also criticizes the determination of rehabilitative alimony by courts that regularly ignore factors such as a woman's contribution and time spent raising children, and illustrates the difficulty in applying the rehabilitative maintenance standard. *See id.* at 1209-12; *see also* Krauskopf, *supra* note 183, at 573-75 (discussing the notable trend away from rehabilitative alimony awards in favor of indefinite awards); Marshall, *supra* note 183, at 689 (noting the failure of rehabilitative alimony to increase the frequency of support awards and the mislabeling of property or long overdue compensation for past services as rehabilitative alimony, which may then be reduced).

185. Unanticipated diagnoses of serious illnesses, accidents causing permanent disabilities, new responsibilities for aging parents, or the serious illness of a child are but a few of the disruptive events that could undermine any rehabilitative efforts.

186. Some jurisdictions require, at least for an extension of rehabilitative alimony, that the recipient spouse present a rehabilitative plan showing that good faith efforts have been made toward financial independence. *See* Glazner v. Glazner, 693 So. 2d 650, 652 (Fla. Dist. Ct. App. 1997) ("[I]n order to receive rehabilitative alimony, the former wife must have requested it and must have presented a rehabilitative plan to the court showing

the North Carolina statutes neither specifically authorize nor forbid such extensions,[187] there appears to be no reason whatsoever that our courts do not have continuing jurisdiction[188]—a point made at length earlier in this Article.[189] Even in the absence of a specific reservation of jurisdiction in the initial order, it requires no great analytical leap to imply the reservation of jurisdiction. The power to modify such an award—a power clearly reserved to courts in the new statute[190]—must surely be accompanied by a continuing power to extend the award, if circumstances so dictate.

Indeed, the approach taken in many states—requiring that the eligible spouse present a "rehabilitative plan" in the first instance and an even more elaborate plan when seeking an extension beyond the first award—would appear to be an eminently sensible and fair procedure to require in many awards of alimony for a limited term.[191]

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a plan to obtain a skill, education or rehabilitation in order to adjust to a new life." (citing Brock v. Brock, 682 So. 2d 682 (Fla. Dist. Ct. App. 1996))); Allison v. Allison, 692 So. 2d 1013, 1013 (Fla. Dist. Ct. App. 1997) (per curiam) (reversing extension of rehabilitative alimony award and remanding with instructions to make specific findings "addressing the objective of rehabilitation, the costs of the plan, and the projected period necessary for Former Wife to complete her rehabilitation"); *see also* Myers v. Myers, 927 P.2d 326, 328 (Alaska 1996) (explaining that a spouse's educational plan sufficiently supports a rehabilitative alimony award if the spouse identifies a career goal, a degree program aimed at achieving that goal, and a reasonable time frame for earning the degree); Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987) (allowing an award of rehabilitative alimony only after a finding that the recipient spouse "intends to apply the alimony toward job training"); Evans v. Evans, 559 N.W.2d 240, 248 (S.D. 1997) ("An award of rehabilitative alimony must be designed to meet an educational need or plan of action whose existence finds some support in the record." (citing Radigan v. Radigan, 465 N.W.2d 483, 486 (S.D. 1991); Ryken v. Ryken, 440 N.W.2d 300, 303 (S.D. 1989))).

187. Section 50-16.1A(4) provides that postseparation support is to be paid "until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." N.C. GEN. STAT. § 50-16.1A(4) (1995). Although it is conceivable that an initial order might contain no specified termination date, such a prospect is unlikely at best. Under § 50-16.9, either remarriage or cohabitation, *see infra* Parts IV.C-D, will also terminate postseparation support. *See* N.C. GEN. STAT. § 50-16.9. Finally, an award of equitable distribution under § 50-20(f) may constitute the basis for termination of support awards, on the grounds that the dependent spouse is no longer dependent. *See id.* § 50-20(f) (Supp. 1997); Capps v. Capps, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) ("This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it.").

188. *See supra* text accompanying notes 94-96. Additionally, the median age for women divorcing after their first marriage was 31.1 years in 1990. *See* Sally C. Clarke, *Advance Report of Final Divorce Statistics, 1989 and 1990*, MONTHLY VITAL STAT. REP., Mar. 22, 1995, at 1, 4.

189. *See supra* text accompanying notes 94-114.

190. *See* N.C. GEN. STAT. § 50-16.9 (setting forth conditions for modification of alimony and postseparation awards).

191. *See supra* note 186 (discussing rehabilitative plans).

Moreover, such procedures, particularly with attempts to extend an award, would be of great value in helping courts to avoid falling into the "up or out" trap into which many other states had so perilously and unjustly fallen.[192] Reservation of jurisdiction does not, of course, negate the dependency requirement.[193] Any specified term order for spousal support should, at a minimum, require that judges and lawyers fully bear in mind the statutory mandate that such spouse should be able to maintain *at least* his previous standard of living[194] after the expiration of the specified term.[195] Any specified term

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192. *See, e.g.*, Standage v. Standage, 711 P.2d 612, 617-18 (Ariz. Ct. App. 1985) (affirming the appropriateness of an indefinite rehabilitative award); *In re* Marriage of Dillnam, 478 N.E.2d 86, 89 (Ind. Ct. App.) (1985) (reversing rehabilitative award for the lower court's failure to appraise realistic employment opportunities in determining earning capacity); Lepis v. Lepis, 416 A.2d 45, 55 (N.J. 1980) (affirming intermediate appellate court that reversed decision failing to extend the time set for the original rehabilitative award).

193. The recent and somewhat bewildering opinion in *Cunningham v. Cunningham*, 121 N.C. App. 771, 468 S.E.2d 466 (1996), *rev'd on other grounds*, 345 N.C. 430, 480 S.E.2d 403 (1997), discussed *supra* text accompanying notes 106-10, complicates the issue of dependency. Although dealing with an alimony, and not a postseparation award, the *Cunningham* decision might be of value to those seeking to extend a postseparation support award. While the court's holding contradicts the entire body of case law on alimony termination, the court nonetheless held that the issue of dependency is not subject to reconsideration at a modification hearing. *See Cunningham*, 121 N.C. App. at 774, 468 S.E.2d at 468. The effect of this is to create a permanent "Cheshire cat"—sometimes you see it, sometimes you don't, but it is *always* there—so long as the dependent spouse does not die, reconcile before divorce, remarry, or "continuously and habitually cohabit" with a person in a "marriage-like" relationship. N.C. GEN. STAT. § 50-16.9 (1995); *see also supra* note 99 (quoting statute); *infra* Parts IV.C-D (discussing termination events and cohabitation).

194. It is critical to note the previous standard of living is but one of seven different statutory factors to be considered in determining the amount of postseparation support. *See* N.C. GEN. STAT. § 50-16.2A(b). Thus, it appears that North Carolina has at long last abandoned the "previous standard of living" as the sole guideline for setting support. *See infra* note 195.

195. Section 50-16.2A(b) states in full:

> In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

N.C. GEN. STAT. § 50-16.2A(b). Subsection (c) of the same statute states that a dependent spouse may receive an award "if, based on consideration of the factors specified in subsection (b) of this section, the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." *Id.* § 50-16.2A(c).

It should be noted, however, that the "accustomed standard of living" principle is qualified by a good many other factors, and that dependent spouses who have acquiesced

award predicated upon that assumption should be modifiable in favor of a dependent spouse should circumstances beyond the control of that spouse render such "rehabilitation" impossible.[196] The danger that such temporary or rehabilitative awards, intended to meet the needs of a newly separated or divorced dependent spouse, could be transformed into a punitive measure against a dependent spouse is very real indeed, as experience in other states has amply demonstrated.[197] Ironically enough, it appears that once again North Carolina's reluctance to revise its laws may have the advantage of allowing the State to learn from and avoid the difficulties that other states have experienced with similar laws.[198]

## III. THE TENACIOUS ROLE OF FAULT

### *A. Illicit Sexual Behavior*

The remaining changes in and issues raised by the new alimony statutes are considerably less complicated than those discussed thus

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in marriages of extreme frugality should often be entitled to something more than that to which they were "accustomed." This observation would appear to be all the more critical in cases in which the supporting spouse's income or assets are already more than sufficient to provide for a less parsimonious standard of living, or in instances in which the supporting spouse's income or assets undergo an appreciable raise after the date of separation. The "accustomed standard of living," in other words, should function as a floor, and certainly not a ceiling for the amount of either an alimony or postseparation support award.

196. In *Mori v. Mori*, 603 P.2d 85 (Ariz. 1979), for example, the Arizona Supreme Court reversed the trial court's order awarding $1000 per month for one year after a 23 year marriage, extended the award for an additional two years, and directed the lower court to reserve jurisdiction. *See id.* at 87-88. Also, in *In re Marriage of Morrison*, 573 P.2d 41 (Cal. 1978), the California Supreme Court cautioned against such awards, especially in the case of a long-term marriage, and noted carefully that the lower court should retain jurisdiction, indefinitely if necessary, "unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction." *Id.* at 52.

197. *See supra* note 192 (citing cases).

198. An excellent example of learning from the mistakes of other states is North Carolina's exclusion of professional degrees from categorization as marital property in the initial enactment of the Equitable Distribution statutes. *See* N.C. GEN. STAT. § 50-20(b)(2) (1995) (amended 1997). The issue of whether a professional degree or license should be considered marital property has been the subject of considerable litigation in other states. *See* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 9.02, at 9-4 to -29 (1998) (devoting an entire section to this subject). Oldham lists 35 states that have held either that a professional degree is not "property" or that it is not property subject to division. *See id.* § 9.02[1], at 9-4 n.1. Our own statute, however, completely obviates one of the difficulties faced in other states by clearly stating that such a degree or license is "property," albeit separate. *See* N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1997).

far in this Article. In part, this difference is true because many of the more significant points reserved for discussion partake of two characteristics: (1) they are similar to, and often identical with, previous statutory and case law, and (2) they are equally applicable to alimony and to postseparation support. For the latter reason in particular, several aspects of postseparation support and alimony may best be treated together and understood by way of comparison to one another. Alimony and its rather unique relationship with marital fault, however, deserves separate treatment.

While "marital misconduct" includes nine separate forms of fault,[199] it is important to reemphasize that the statute requires that any or all types of such marital misconduct must occur before or on the date of separation.[200] Because of its powerful effect on alimony, however, by far the most significant of the variety of marital faults is the category entitled "illicit sexual behavior."[201] Such dire behavior is specifically enumerated to include "illicit sexual behavior ... [including] acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse."[202]

Assuming for now that illicit sexual behavior refers largely to adultery (and whatever other forms of illicit sexual behavior that

199. *See* N.C. GEN. STAT. § 50-16.1A(3) (1995). Many such forms of marital misconduct are already well-fleshed out in earlier case law. *See infra* Part III.B.2.

200. *See* N.C. GEN. STAT. § 50-16.1A(3). *But see supra* note 86 (noting that post separation incidents can be considered as evidence of adultery before separation). As a practical matter, the reach-back provisions in both § 50-16.2A(e) and § 50-16.3A(b)(1) are probably limited to proving that adultery occurred before the date of separation.

201. N.C. GEN. STAT. § 50-16.1A(3)(a).

202. *Id.* The good news, some would say, is that deviant sexual behavior between spouses does not appear to fall within this definition. However, the alimony definition of "illicit sexual" behavior is quite inconsistent with Section 14-27.1(4) of the General Statutes, which reads as follows:

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

*Id.* § 14-27.1(4) (1993). This North Carolina statute certainly may not be faulted for lack of specificity. One observation of at least passing interest arises by way of comparison of the above statute with North Carolina's somewhat infamous "crime against nature" statute, which is not included within the definition of "illicit sexual behavior." Section 14-177 states that "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C. GEN. STAT. § 14-177. Inclusion of the latter statute might well have been deemed to be redundant, of course, but it is noteworthy that only the "crime against nature" statute criminalizes the behavior.

accompany it), proof that such act or acts[203] occurred prior to the date of the separation of the parties carries serious consequences indeed. Section 50-16.3A(a) ("Entitlement") explains that either party may move for alimony,[204] and that upon finding that the one spouse is dependent and the other is supporting and has committed adultery, the "court *shall* award alimony to the dependent spouse ... after considering all relevant factors" including, among fifteen other specifically listed factors, "illicit sexual behavior."[205]

To deal with this important issue in more detail, it is critical to note that the same statutory section continues to provide that proof of illicit sexual behavior by the dependent spouse prior to the date of separation *shall* bar any award of alimony.[206] The harshness of this bar is equally divided by the sentence immediately following: "If the court finds that the supporting spouse participated in an act of illicit sexual behavior ... during the marriage and prior to or on the date of separation, then the court *shall* order that alimony be paid to a dependent spouse."[207] This affirmative mandate that a proven adulterous supporting spouse be ordered to make alimony payments is completely new to North Carolina law. As a practical matter, however, such spouses have always been virtually defenseless against an alimony claim, and in any event, the court has fifteen other factors to consider in determining the amount and duration of any alimony award.[208]

203. The statute refers to "acts." N.C. GEN. STAT. § 50-16.1A(3)(b). It is extremely unlikely, however, that our appellate courts would interpret this so literally as to allow a party one "free" act.

204. This conceivably raises the question as to whether a supporting spouse already paying postseparation support might be able to "move" for alimony in order to reduce or terminate the existing support payments. This is obviously a strained, and probably unsustainable, interpretation of this portion of the statute, the clear intent of which is that a dependent spouse would file for alimony. It is suggested, therefore, that the dependency requirement is likely to be read into this section.

205. N.C. GEN. STAT. § 50-16.3A(a) (emphasis added); *see infra* Part III.C (discussing the other fifteen factors).

206. *See* N.C. GEN. STAT. § 50-16.3A(a). The continuation of this bar to alimony, regardless of need or any other circumstances, was in essence a trade-off within the General Assembly of North Carolina to secure passage of the remainder of the alimony statutes.

207. *Id.* (emphasis added).

208. *See id.* § 50-16.3A(b)(1)-(15).

### B. Other Marital Misconduct

#### 1. Condonation

Perhaps the oddest section of the new laws dealing with sexual misconduct is the statutory admonition that if the court finds that both spouses "participated in an act of illicit sexual behavior during the marriage ... then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances."[209] This section appears to be self-explanatory, although it has given rise to amused speculation by members of the Family Law Section of the North Carolina Bar Association as to whether one must now attempt to prove "aggravated adultery."[210] Odd as this section may be, however, the statute continues with the ominous and potentially quite destructive warning that "[a]ny act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court."[211]

Condonation is, of course, one of the major common-law defenses to the traditional fault grounds for divorce and/or

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209. *Id.* § 50-16.3A(a). One of the most interesting implications of the new Act is the issue of what effect the "on or after date of separation" might have on the much-used torts of alienation of affections and criminal conversation. It would be anomalous, to say the least, to "leave harmless" a technically adulterous relationship begun six months into separation and yet to allow the other spouse to sue the third party for criminal conversation. This blatant inconsistency between the common law and the new legislation may in fact result in the implied elimination of this tort. Alienation of affections well after the date of separation might receive the same treatment. Certainly a marriage has "ended" for purposes of accumulation of marital fault and property between the parties at the date of separation; it should be deemed to have "ended" with regard to the behavior of any party.

210. Oddly enough, case law in alienation of affection actions does provide examples of "aggravating" factors in adultery sufficient to support an award of punitive damages. *See, e.g.*, Jennings v. Jessen, 103 N.C. App. 739, 744, 407 S.E.2d 264, 267 (1991) (upholding award of punitive damages based on a finding that the adulterous affair "was replete with aggravating circumstances, specifically, that defendant had cohabited for several weeks with plaintiff's husband and was audacious enough to call plaintiff's home in an attempt to discover her husband's whereabouts"); Shaw v. Stringer, 101 N.C. App. 513, 517, 400 S.E.2d 101, 103 (1991) ("Aggravation, malice and willfulness were indicated by evidence to the effect that after being asked not to do so defendant persisted in visiting plaintiff's wife in the marital household and violating plaintiff's conjugal rights and even laughed when plaintiff's wife told him that plaintiff had learned of their affair."); Gray v. Hoover, 94 N.C. App. 724, 730-31, 381 S.E.2d 472, 475-76 (1989) (determining that evidence of defendant's acts, which included telling plaintiff that he was having sex with plaintiff's wife, driving up in front of plaintiff's business, blowing the horn, and kissing plaintiff's wife in the presence of plaintiff, was sufficient to support the punitive damages award).

211. N.C. GEN. STAT. § 50-16.3A(a).

alimony.[212] It is a conditional forgiveness, the condition being that the offense not be repeated,[213] and must be raised as an affirmative defense.[214] Beyond these elemental principles, the condonation defense—almost surely to be the focus of renewed litigation in North Carolina—is considerably more complicated.[215] Phrased differently, the issue is not merely what condonation is, but how to prove that condonation did in fact occur. The condonation defense, moreover, has taken on renewed significance[216] in the alimony context, because it invites the kind of sordid behavior from parties wherein one spouse in effect "sets up" the other to engage in behavior that might be

212. Condonation is usually said to be the forgiveness of a marital "sin" (that would otherwise constitute grounds for divorce) by the injured party, with knowledge of the offense. Homer Clark describes the confusion surrounding the condonation defense as follows:

> Condonation is ordinarily a question of fact. It has been variously defined in English and American law. The early English rule was that when a resumption of marital intercourse occurred with knowledge of the defendant's offense, the offense was presumed remitted and the plaintiff could not have a divorce. This definition includes the two elements of marital intercourse and forgiveness of the offense, but it fails to say whether both are essential for condonation. Some of the statutes indicate that either element is sufficient for condonation, some limit condonation to cases in which there has been a resumption of cohabitation, some require both elements to be present, and some are ambiguous. The case law is in similar confusion.

CLARK, *supra* note 2, § 13.17, at 526 (footnotes omitted). Also, in *Howell v. Tunstall*, 64 N.C. App. 703, 308 S.E.2d 454 (1983), the court held that condonation may not be presumed by the fact the parties reconciled then separated again. *See id.* at 706, 308 S.E.2d at 456. In *Howell*, the husband was attempting to set aside the divorce decree, granted on the day of his ex-wife's death on the grounds of condonation of his prior marital fault. *See id.* at 704, 308 S.E.2d at 455; *see also* 1 REYNOLDS, *supra* note 62, § 6.19(C), at 590-91 (explaining that cohabitation or reconciliation is treated "merely as rebuttable evidence of condonation"). Although case law is somewhat contradictory on the issue of whether sexual relations are also required for condonation, Professor Reynolds concludes that it is so required. *See* 1 *id.*

213. Thus, condonation is normally not a defense to patterns of behavior such as cruelty or indignities. *See* Privette v. Privette, 30 N.C. App. 305, 308, 227 S.E.2d 137, 140 (1976). *But see* Cushing v. Cushing, 263 N.C. 181, 187, 130 S.E.2d 217, 222 (1964) (stating, in dictum, that cruelty or indignities, like any marital fault, may be condoned). Condonation has also been called "temporary probation" for the offending spouse. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 215 (1993).

214. Failure to do so is fatal to the defense. *See* 1 REYNOLDS, *supra* note 62, § 6.19(A), at 588.

215. *See* CLARK, *supra* note 2, § 13.11, at 525-26 (discussing the confusion in case law about whether this common law defense still exists).

216. Since the abolition of fault grounds for divorce in 1983, *see* Act of June 24, 1983, ch. 613, § 1, 1983 N.C. Sess. Laws 548, 548, condonation has, until now, probably been most significant as a defense to a divorce from bed and board under § 50-7, all of the fault grounds of which are simultaneously grounds for marital misconduct under § 50-16.1A(3). *See* N.C. GEN. STAT. § 50-7 (1995). For further discussion of these grounds, see *infra* Part III.B.2.

regarded as condonation.[217]

It remains unclear in North Carolina just what type of behavior will constitute the defense—i.e., what evidence is necessary to prove that the offense was forgiven? In brief, (and assuming that the wronged spouse has full knowledge of the offense), is condonation proved by evidence that the parties merely slept together? That they lived together without conjugal relation? Or that they continued, or resumed, living together *and* had sexual intercourse? A clear answer appears to exist only with reference to the second and third questions: cohabitation, assuming that there is no evidence of sexual intercourse, does not constitute condonation,[218] and cohabitation plus the renewal or continuance of conjugal relations will almost certainly

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217. See Sally Burnett Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. REV. 819, 841-42 (1981), for a critique of a similar phenomena in North Carolina law involving reconciliation of separated spouses. As a result of two cases, *In re Estate of Adamee*, 291 N.C. 386, 392-93, 230 S.E.2d 541, 546 (1976) (holding that wife's moving back into the marital home to care for her dying husband constituted a reconciliation despite the fact that it was clear that the parties had not engaged in sexual relations), and *Murphy v. Murphy*, 295 N.C. 390, 397, 245 S.E.2d 693, 698 (1978) (holding that even an isolated act of intercourse between estranged spouses would constitute a reconciliation, and thus void their separation agreement), North Carolina developed an utterly unique rule. Either the resumption of living together *or* an isolated act of sex would constitute a reconciliation. The effect of the *Murphy* rule, in particular, led many lawyers to warn their non-adulterous clients never to attempt a reconciliation (especially if sexual intercourse were involved). As a corollary, many other lawyers strongly advised their adulterous clients to move heaven and earth to effect at least a sexual reconciliation, thus destroying any separation agreement into which the parties might have entered. Separation agreements, it should be pointed out, are the true "tarbabies" of North Carolina law: there is no judicial review of agreements, and, once signed, they are fully binding almost without regard to procedural or substantive unconscionability. *See* Sharp, *supra* note 30, at 1442-51.

The legislature finally disposed of this unwholesome practice by amending § 50-6 to read: "Whether there has been a resumption of marital relations during the period of separation shall be determined pursuant to G.S. 52-10.2. Isolated incidents of sexual intercourse between the parties shall not toll the statutory period required for divorce predicated on separation of one year." Act of July 24, 1987, ch. 664, § 2, 1987 N.C. Sess. Laws 1228, 1229 (codified at N.C. GEN. STAT. § 50-6 (1995)). Section § 52-10.2 was also amended to read that voluntary renewal of the husband and wife relation so as to constitute reconciliation may be shown by "the totality of the circumstances," and it continues and re-emphasizes that "[i]solated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." N.C. GEN. STAT. § 52-10.2 (1991).

218. *See* Privette v. Privette, 30 N.C. App. 305, 308, 227 S.E.2d 137, 140 (1976) (holding that no condonation occurs when parties lived under same roof, if it " 'affirmatively appears that they do not have sexual intercourse' " (quoting 1 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 87, at 333 (1963))); Jenkins v. Jenkins, 27 N.C. App. 205, 207, 218 S.E.2d 518, 519-20 (1975) (refusing to hold "that living under the same roof, without any evidence of sexual relations" was condonation as a matter of law).

indicate condonation, particularly with regard to adultery.[219]

As to the first query—whether sexual relations alone will constitute condonation—no clear answer can be derived from North Carolina cases. Certainly older cases have strongly indicated that sexual relations alone will suffice.[220] Such a holding, however, would almost certainly revive the byzantine rule of *Murphy v. Murphy*,[221] placing it this time in the context of condonation rather than reconciliation. Although reconciliation and condonation are of such close analytical kin, there are several reasons why the occurrence of one sexual act should not constitute condonation. Above all, the North Carolina General Statutes have already removed "isolated sex" incidents in determining when reconciliation occurs.[222] Moreover, the same strong public policy supporting the continuation of marriages applies equally to reconciliation and condonation. Public policy, frustrated for years by the *Murphy* rule,[223] strongly suggests that a finding of condonation will turn upon the same issue—whether, given the totality of the circumstances, true forgiveness has occurred.[224] The perils of doing otherwise are well expressed in an older case involving condonation: "Whether the benefits the courts derive from this exacting rule exceed the burdens it imposes upon both court and pleader is debatable" because frequently the rule "so distends pleadings that they strain both patience and belief, yet it is a rule so very old that the years have barnacled it in numberless cases upon our practice."[225]

### 2. Additional Factors

The remaining eight acts of "marital misconduct"—many of

219. As Professor Suzanne Reynolds points out, it is considerably more difficult to prove condonation when there is a course of conduct involved. *See* 1 REYNOLDS, *supra* note 62, § 6.19(C), at 592. The rationale supporting this position is basically one of public policy—that a spouse who has attempted to preserve the marriage, by living with a course of conduct such as cruelty, should not be punished by a condonation defense. *See* Adams v. Adams, 262 N.C. 556, 560, 138 S.E.2d 204, 207 (1964).

220. *See, e.g.*, Malloy v. Malloy, 33 N.C. App. 56, 60, 234 S.E.2d 199, 202 (1977). Clark observes that true condonation should require a true recommitment to the marital relationship, including sexual intercourse. *See* CLARK, *supra* note 2, § 14.11, at 62-63. He concludes nonetheless that some states require either one of the two elements and that this entire area is quite confusing. *See id.* § 14.11, at 61.

221. 295 N.C. 390, 397, 245 S.E.2d 693, 698 (1978); *see also supra* note 217 (discussing *Murphy*). For an extended discussion and criticism of *Murphy*, see Sharp, *supra* note 217, at 840-43.

222. *See* N.C. GEN. STAT. § 52-10.2 (1991); *supra* note 217 (discussing the statute).

223. *See* Sharp, *supra* note 217, at 840-43.

224. *See* N.C. GEN. STAT. § 52-10.2.

225. Cushing v. Cushing, 263 N.C. 181, 187, 139 S.E.2d 217, 222 (1964).

which are also rather "barnacled" upon our law—lend themselves to a considerably less painstaking analysis. Indeed, the next five enumerated acts are almost old friends, in that they are duplicates of the grounds set forth for divorce from bed and board.[226] These acts of marital misconduct[227] are as follows:

b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;

c. Abandonment of the other spouse;

d. Malicious turning out-of-doors of the other spouse;

e. Cruel or barbarous treatment endangering the life of the other spouse;

f. Indignities rendering the condition of the other spouse intolerable and life burdensome.[228]

These acts of marital misconduct should track quite naturally the already existing case law on grounds for divorce from bed and board. Similarly, "[e]xcessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome"[229] and "[w]illful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other spouse intolerable and life burdensome"[230] are also familiar as grounds for divorce from bed and board. One might well question the inclusion of the "willful failure" to support, however, in view of the otherwise strong legislative mandate that acts of marital misconduct mean any of the aforementioned acts that "occur during the marriage and prior to or on the date of separation."[231] *Brown v. Brown*,[232] the only case ever to deal with this ground for bed and board divorce, held that failure to support gave rise (as did adultery then) to a bed and board divorce action *after* the parties had separated. It would appear clear, however, that securing support after separation lies within the control

226. *See* N.C. GEN. STAT. § 50-7 (1995).

227. Our courts long have held that grounds (c) and (d) now mean precisely the same thing. *See* Medlin v. Medlin, 175 N.C. 529, 531, 95 S.E. 857, 857-58 (1918) ("It is understood with us that a suit for divorce because of being maliciously turned out of doors, under subsection 2, . . . is but an instance of a wrongful abandonment provided for in subsection 1 of the statute. . . .").

228. N.C. GEN. STAT. § 50-16.1A(3)(b)-(f) (1995).

229. *Id.* § 50-16.1A(3)(h).

230. *Id.* § 50-16.1A(3)(i).

231. *Id.* § 50-16.1A. The very definition of marital misconduct limits its application to "acts that occur during the marriage and prior to or on the date of separation." *Id.* § 50-16.1A(3).

232. 104 N.C. App. 547, 410 S.E.2d 223 (1991).

of a dependent spouse, who may readily bring an action for postseparation support. It is conceivable, however, that *Brown* might retain some validity in the event that it could be used to persuade courts to vary from the "accustomed standard of living" as a major basis for determining the amount of postseparation support or alimony.[233]

### 3. Concealment of Assets and the Duty to Disclose

The remaining ground of marital misconduct, however, is quite new to North Carolina law, certainly in the alimony context.[234] Subsection (g) lists "[r]eckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets"[235] as marital misconduct that may be considered in the determination of whether or not alimony is equitable.[236] This section raises several

233. *See infra* notes 364-68 and accompanying text. Excess frugality, which had kept a couple's standard of living lower than what it should have been, would be difficult to "condone," both because it is a course of conduct and because dependent spouses often have little or no control over how marital funds are spent. This is especially true with marriages in which physical or psychological battering occurs. *See* GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES 2 (1986) (noting that economic dependence can prevent a victim of domestic violence from leaving the abuser because "[a] woman without financial resources or a job outside the home may have to rely on the abuser to support herself and her children"); REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE, *reprinted in* 58 MO. L. REV. 485, 497 (1993) [hereinafter MISSOURI TASK FORCE] (" 'The most compelling reason for an abused woman to remain in the home subject to more abuse is her financial dependency; this is particularly true for the women with children.' " (quoting State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (citations omitted))); LENORE E. WALKER, THE BATTERED WOMAN 42-52 (1979) (explaining the theory of "learned helplessness," according to which battered women perceive things to be out of their control and thus become passive and submissive). *See generally* Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992) (discussing Battered Woman's Syndrome and tort law). Not surprisingly, it has also been observed that economic control significantly affects the course of litigation in domestic relations cases. *See* MISSOURI TASK FORCE, *supra*, at 529-30 (noting that the party who controls the finances " 'literally has such a significant advantage in my opinion that they cannot only control the litigation but also wind up with a great advantage on every issue and I think if played right can succeed in almost every issue.' " (footnote omitted) (quoting a Fellow of the American Academy of Matrimonial Lawyers).

234. Section § 50-20(c) has a similar provision that is to be used as a "factor" in determining whether an equal distribution of property would be equitable. *See* N.C. GEN. STAT. § 50-20(c) (Supp. 1997).

235. *Id.* § 50-16.1A(3)(g) (1995).

236. Such acts are not listed as considerations with postseparation support. *See* N.C. GEN. STAT. § 50-16.2A. For a condonation case, see Biggs v. Biggs, 253 N.C. 10, 17, 116 S.E.2d 178, 183 (1960) (allowing husband to introduce evidence to refute wife's attempted condonation defense to her admitted acts of adultery), *overruled in part by* Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967). The alleged condonation in *Biggs*, according to

issues that have the potential to form the basis of radically new law. First, "wasteful spending," much like cruelty or indignities, is precisely the kind of "course of conduct" that could easily be deemed to have been condoned by the non-wasting spouse.[237] Moreover, it must again be emphasized that this factor also lends support to the proposition that the previous standard of living should now be considered merely as one of fifteen factors in determining the amount of alimony and certainly not the first among equals.[238]

Although the new statutes allow for a hearing on an alimony claim "prior to the entry of a judgment for equitable distribution,"[239] the equitable distribution statute prohibits consideration of such an alimony award until after that procedure is completed.[240] The combination of these two sections, one mandatory and one permissive, clearly indicate a legislative contemplation of more than one alimony hearing, the second of which would almost certainly be

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wife's testimony, was that they had slept together in Homestead, Florida on Sunday night, October 18, 1959. *See id.* at 11, 116 S.E.2d at 179.

237. *See supra* note 212 (discussing condonation). It should be clear that the specific reference to condonation in § 50-16.3A(a) in no way restricts the use of this well-established defense to acts of illicit sexual behavior.

238. *See infra* text accompanying notes 364-68 (discussing this proposition).

239. N.C. GEN. STAT. § 50-16.3A(a) (1995). The statute also provides that "the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." *Id.* Section 50-20(f), however, still states that a court shall provide for an equitable distribution of property "without regard to alimony." N.C. GEN. STAT. § 50-20(f) (Supp. 1997). Thus, once again it appears that the "once-dependent-always-dependent" conclusion in *Cunningham v. Cunningham*, 121 N.C. App. 771, 468 S.E.2d 466 (1996), *rev'd on other grounds*, 345 N.C. 430, 480 S.E.2d 403 (1997), is thoroughly discredited.

240. *See* N.C. GEN. STAT. § 50-20(f) (Supp. 1997). In effect, § 50-20(f) authorizes motions to modify or terminate alimony, after an equitable distribution is concluded. Section 50-16.3A(a), however, goes further and specifically allows the issue of dependency to be reexamined as well after an equitable distribution proceeding is concluded. *See id.* § 50-16.3A (1995). At a minimum, this appears to put to rest the conclusion of the court of appeals in *Cunningham*, 121 N.C. App. at 774, 468 S.E.2d at 468. More specifically, and supported only by the briefest of dicta from one earlier case, the *Cunningham* court held that "[i]t is not appropriate to reconsider, in a modification hearing, the dependent spouse's entitlement to alimony, as the entitlement issue is 'permanently adjudicated by the original order.' " *Id.* (quoting Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982), *appeal on remand*, 74 N.C. App. 54, 327 S.E.2d 624 (1985)). In fact, *Rowe* did state, virtually as dicta, that the dependency status could not be relitigated. However, the real issue was whether or not the "partially integrated" consent judgment was subject to modification in any event. *See Rowe*, 305 N.C. at 183-86, 287 S.E.2d at 844-46. The case was actually remanded to the trial court for a determination of whether the "alimony" payments were integrated with the property division. *See id.* at 189, 287 S.E.2d at 847. The issue of dependency was mentioned only in passing and had no relevance to the outcome of the appeal. In any event, it appears that the possibility of two trials on the issues of dependency and amount and duration of alimony now exists.

focused on dependency status.[241] Moreover, the possibility of discovery of substantial concealed assets[242] sufficient to turn a previously adjudicated non-dependent into a dependent is very real indeed and could easily satisfy the changed circumstances standard for an increase or decrease, or vacation of an alimony award.[243]

The real potential of this section on marital misconduct is that it deals, for the first time in either the law of alimony or equitable distribution, with the ubiquitous problem of concealment of assets.[244] At one level, the questions, if not the answers, posed by concealment of assets are simple. If, for example, an alimony trial occurred before an equitable distribution settlement or trial, and concealed marital or distributive assets were discovered or uncovered before a final property division, it is virtually certain that such assets would be included in the equitable distribution.[245] Presumably, if the concealed assets were of sufficient value, a motion to increase alimony might be appropriate. But if the concealment were of a lesser magnitude, could the discovery of such assets nonetheless reopen the alimony case itself on the grounds that the additional marital misconduct might itself be a sufficient change of circumstances?[246] Any attempted answer to this question inevitably raises the issue of whether this element of marital misconduct, particularly when combined with the relatively new disclosure affidavits required under § 50-21,[247] might well be interpreted to create an affirmative *duty to disclose* assets—marital, divisible, and separate.[248]

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241. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995).

242. For further discussion on discovery of concealed assets, see *infra* Part III.B.3.

243. *See* N.C. GEN. STAT. § 50-16.9 (1995).

244. *See* Sharp, *supra* note 30, at 1424-28. Case law in other states is replete with examples of concealment or outright misrepresentation of assets. *See id.* at 1424-27. Public policy would seem to indicate strongly that encouragement of agreements between parties should be balanced with penalties for such deceptive acts. Inability to remedy concealment or misbehavior would leave spouses with virtually no alternative other than to pursue discovery vigorously.

245. *See infra* notes 551-64 and accompanying text (discussing assets that are wasted or that simply "disappear"). In the cases discussed there, such assets were simply poured back into the marital "pot" and distributed to the spouse who had already disposed of them.

246. The new statute certainly allows evidence after the date of separation to support a claim that adultery had occurred before or on that date. *See* N.C. GEN. STAT. § 50-16.2A(e) (1995).

247. N.C. GEN. STAT. § 50-21 (Supp. 1997). Although the goal of the detailed requirements for submitting affidavits at specific times was in fact to create mechanisms by which the equitable distribution process might be somewhat streamlined, and the affidavits are not binding at trial, the enactment of these sections would appear to envision a duty on the part of both parties to make full disclosure.

248. Both the statutory law and well-established case law make it clear that separate

Thus the issue becomes whether or not the concealment of assets, or income which are specifically denominated as an act of marital misconduct,[249] may implicitly impose a duty *not to conceal*—i.e., a duty to disclose. A powerful argument based upon both public policy[250] and the General Statutes can be made that such a duty does and should, exist, especially as to marital property.[251] Not only do the alimony marital fault factors lead towards this conclusion,[252] but § 50-21 also implicitly looks towards the creation of the same duty.[253] Additionally, § 50-20(k) states that spousal rights "to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation."[254] Although this section was designed to enable divorcing couples in North Carolina to escape the burdens of the capital gains tax, "common ownership" of property in other states has often been held to give rise to common law fiduciary duties regarding

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property must be taken into account in alimony and equitable distribution cases. *See* N.C. GEN. STAT. § 50-16.3A(b)(4), (11) (1995) (establishing as factors in determining the amount and value of alimony: income from all sources of each spouse, and property brought to the marriage).

249. *See* N.C. GEN. STAT. § 50-16.1A(3)(g) (describing "[r]eckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets").

250. *See infra* notes 258-59 and accompanying text. Public policy strongly supports separation agreements. These contracts are predicated on the existent of full disclosure and some measure of fairness. *See also infra* note 273 and accompanying text (citing cases).

251. *See* Talent v. Talent, 76 N.C. App. 545, 555, 334 S.E.2d 256, 263 (1985) ("In determining an equitable division of the marital property, the court must consider the separate property owned by each party at the time the property division is to become effective.").

252. *See* N.C. GEN. STAT. § 50-16.1A(3)(g).

253. Section § 50-21 deals at length with the financial affidavits that the parties must prepare, time limits on such affidavits and discovery procedures, and specifically authorizes sanctions against the party who "has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery." N.C. GEN. STAT. § 50-21(e)(1) (Supp. 1997).

254. *Id.* § 50-20(k). This section of the Equitable Distribution Act has long been almost dismissed by the judiciary on the ground that it was enacted before the current I.R.C. § 1041, from the Tax Reform Act of 1984, to attempt to gain—as did Colorado in *Imel v. United States*, 375 F. Supp. 1102 (D. Colo. 1974), *aff'd by* 523 F.2d 853 (10th Cir. 1975)—community property treatment of nonrecognized capital gains as a part of transfers pursuant to divorce. The logic of this argument is almost certainly deeply flawed, however: Attempting to secure the tax treatment benefits always enjoyed by community property states must surely entail imposition of the burdens as well—the fiduciary duties that accompany "common ownership." For an extensive treatment of this issue, see Sharp, *supra* note 30, at 1414-24. Fiduciary duties arise from common ownership and are analytically quite different from confidential relationship duties. *See id.*

the property so owned.[255]

The distinctions between fiduciary and confidential relationships[256] and the common-law duties (prominently including full disclosure) that derive from each are often blurred or ignored, especially in non-community property states.[257] Fiduciary duties, however, arise not from any relationship of trust and confidence between the parties, but from one spouse's control and management of the assets of the marital community. As one California court succinctly explained:

> The confidential relationship and obligations arising out of it are ... dependent upon the existence of confidence and trust, but the husband's fiduciary duties in respect to his wife's interest in the community property continue as long as his control of that property continues, notwithstanding the complete absence of confidence and trust .... The key factor in the existence of a fiduciary relationship lies in control by a person over the property of another. It is evident that while these two relationships may exist simultaneously, they do not necessarily do so.[258]

It is difficult to understand why a "species of common ownership" of

255. *See, e.g.*, Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n, 364 P.2d 247, 253 (Cal. 1961) for an excellent statement of this proposition. A divorce, of course, will automatically terminate a tenancy by the entirety and create a tenancy in common in its place. *See* Lanier v. Dawes, 255 N.C. 458, 462, 121 S.E.2d 857, 860 (1961). North Carolina courts have held, however, that once an action for equitable distribution has been filed, the usual rights of tenants in common—to an accounting or a partition, for example—are within the jurisdiction of the district court distribution claim, so that none of the remedies otherwise available to tenants in common are available. Although these cases are (barely) defensible analytically, they lack any redeeming value as a matter of equity and public policy. *See* Beam v. Beam, 92 N.C. App. 509, 512, 374 S.E.2d 636, 638 (1988) (Greene, J., dissenting) ("[O]ur Supreme Court has clearly held that the court's equitable distribution of the parties' property under the Act terminates the parties' previous *common law* right to *divide* their property based on those common law forms of ownership."), *rev'd per curiam*, 325 N.C. 428, 383 S.E.2d 656 (1989) (reversing based on Judge Greene's dissent below). In *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987), the supreme court concluded that because the wife had not made an equitable distribution claim she still had the common law remedies of tenants in common. *See id.* at 292, 354 S.E.2d at 233.

256. *See* Sharp, *supra* note 30, at 1414-24.

257. *See id.* at 1415-16.

258. *Vai*, 364 P.2d at 252; *see also* Compton v. Compton, 612 P.2d 1175, 1182 (Idaho 1980) (holding that a confidential relationship "continues until the moment of the marriage's termination"). Of particular importance in this context is *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), in which the supreme court imposed an independent duty of disclosure on a husband by virtue of his position as manager of a corporation, part of the stock of which he had forced his wife to sign over to him. *See id.* at 193, 179 S.E.2d at 704.

property that "vests" at the date of separation has failed thus far to yield grounds for any fiduciary responsibilities in North Carolina.[259]

In addition, of course, such a duty of fairness and full disclosure arises from the existence of a confidential relationship between husband and wife.[260] One North Carolina case contains what may be the strongest possible language regarding a confidential relationship: speaking in the context of an attempt to void a separation agreement, the supreme court held that any such agreement between husband and wife must be " 'untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.' "[261] Such a laudable statement of purpose, however, has been severely undermined by later cases.[262]

The real issue regarding confidential relationships in North Carolina is not how strong they are when they exist, but rather when such a relationship ceases to exist. In common with a growing number of states,[263] North Carolina at long last has discarded its adherence to the principle that an occurrence of a particular event

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259. Indeed, just the opposite occurred under the previously applicable section of the Equitable Distribution Act. *See* Chandler v. Chandler, 108 N.C. App. 66, 69-70, 422 S.E.2d 587, 590 (1992). There the wife was unaware of large rental incomes (over $140,000) from properties held in tenancy by the entirety. *See id.* She had no right to share in that income, or even to an accounting, whereas her husband in effect "kept" all the income, under the *Truesdale* rule, that because the money was received after the date of separation, it was therefore neither marital nor separate property. *See id.* at 70, 422 S.E.2d at 590; *see also supra* notes 512-20 and accompanying text (discussing *Truesdale*).

260. *See generally* Sharp, *supra* note 217, at 832-38. On the other hand, the renowned scholar Homer Clark takes the strong position that the duty of disclosure should not rest on a finding of a confidential relationship which often in fact does not exist, but upon the public interest in having the wife and children provided for in a manner bearing some relation to the husband's true means. *See* CLARK, *supra* note 2, § 19.2, at 415.

261. Eubanks v. Eubanks, 273 N.C. 189, 196, 159 S.E.2d 562, 567 (1968) (quoting Taylor v. Taylor, 197 N.C. 197, 201, 148 S.E. 171, 173 (1929)).

262. *See infra* note 264.

263. *See* Sharp, *supra* note 217, at 837 (discussing North Carolina cases); *see also* Bates v. Bates, 400 P.2d 593, 596 (Ariz. Ct. App. 1965) ("Extrinsic fraud may also consist of deception practiced by the successful party in purposely keeping his opponent in ignorance."); Dendrinos v. Dendrinos, 374 N.E.2d 1016, 1018 (Ill. App. Ct. 1978) ("Fraud may consist in the concealment of what is true as in the assertion of what is false."); Daffin v. Daffin, 567 S.W.2d 672, 677 (Mo. Ct. App. 1978) ("Concealment of a material fact . . . which a party has the duty to disclose, constitutes fraud as actual as by affirmative misrepresentation."); Abbate v. Abbate, 441 N.Y.S.2d 506, 514 (App. Div. 1979) (" 'Concealment with intent to defraud of facts which one is duty-bound *in honesty* to disclose is of the same legal effect and significance as affirmative misrepresentations of fact.' " (quoting Nasaba Corp. v. Harfred Realty Corp., 39 N.E.2d 243, 245 (N.Y. 1942))) (emphasis in original).

terminates the confidential relationship between spouses.[264] Instead, as the court of appeals has aptly stated the matter: "[T]he involvement of an attorney does not automatically end the confidential relationship of husband and wife" because when a "spouse alleges and offers evidence that the confidential relationship still existed and that the attorney's role was merely to record the agreement the spouses negotiated, it is a question of fact as to whether the confidential relationship has been terminated."[265]

Even more significantly, the supreme court recently held in *Bromhal v. Stott*[266] that separation agreements—often entered into without extensive discovery and so more likely to create opportunities for nondisclosure or misrepresentation—are indeed quite different from any other kind of contract.[267] The supreme court observed that in general, a separation agreement "cannot be analyzed in terms of the marketplace."[268] This statement alone contradicts, and presumably overrules, considerable case law to the contrary.[269] The court continued to explain its rationale at length:

> Standard contract principles are designed to operate within the context of a rational, competitive market that assumes a relative parity of bargaining strength between the parties. To equate the "market" of settlement agreements, marriage dissolution—a situation virtually always accompanied by extraordinary stress and rarely accompanied by mutual desires to achieve fair results—with the paradigmatic

264. Previous cases had treated the husband-wife relationship quite harshly. *See* Avriett v. Avriett, 88 N.C. App. 506, 508, 363 S.E.2d 875, 877 (determining no confidential relationship merely because husband had obtained a lawyer), *aff'd per curiam*, 322 N.C. 468, 368 S.E.2d 377 (1988); Knight v. Knight, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) ("[A] separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing.").

265. Harroff v. Harroff, 100 N.C. App. 686, 691, 398 S.E.2d 340, 343-44 (1990); *see also Eubanks*, 273 N.C. at 195-96, 159 S.E.2d at 567 (recognizing a confidential relationship despite involvement of an attorney). When, however, both parties have engaged attorneys, the confidential relationship is almost always deemed to have been terminated. *See* 3 LINDSEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 3-22 (1985).

266. 341 N.C. 702, 462 S.E.2d 219 (1995).

267. *See Bromhal*, 341 N.C. at 706-07, 462 S.E.2d at 222. Although the case held that a liquidated damages clause in a separation agreement was enforceable, Justice Orr's rationale for the holding was that separation agreements are indeed different from other types of contracts. *See id.* This emphatic ruling effectively negates the logic of cases such as *Avriett*. *See supra* note 264 (discussing cases).

268. *Bromhal*, 341 N.C. at 706, 462 S.E.2d at 222.

269. *See, e.g.*, Pope v. Pope, 38 N.C. App. 328, 330, 248 S.E.2d 260, 261 (1978) (explaining that a separation agreement is "just like any other contract under North Carolina law"); *supra* note 264 (discussing cases).

> "marketplace" in which strangers bargain at arms' length, is simply to ignore the realities of human nature, the adversarial process, and the realities of most divorce bargaining.[270]

Given these refreshingly flexible (and realistic) principles that the appellate courts of North Carolina are beginning to develop,[271] and because the issue of deliberate concealment in this context has never been addressed by statute and only barely by case law,[272] an even more basic issue involves the meaning of concealment itself. In many states, a misrepresentation that virtually amounts to fraud is required.[273] If and when there is a duty to disclose, however, many states hold that a simple failure to disclose violates that duty.[274] When nondisclosure amounts to misrepresentation, most states will

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270. *Bromhal*, 341 N.C. at 706-07, 462 S.E.2d at 222 (citing Sharp, *supra* note 136, at 350).

271. It must be emphasized that the language in *Bromhal*, 341 N.C. at 704-06, 462 S.E.2d at 220-21, is extremely broad and holds significant potential for the development of some of the analyses and conclusions set forth in this Article.

272. *See* Sharp, *supra* note 213, at 832-40.

273. *See In re* Marriage of Broday, 628 N.E.2d 790, 795 (Ill. App. Ct. 1993) (requiring "clear and convincing evidence that [husband] intentionally misstated or concealed a material fact which he had a duty to disclose and that [wife] detrimentally relied upon his statement or conduct" as proof of fraud); Hewlett v. Hewlett, 845 S.W.2d 717, 719 (Mo. Ct. App. 1993) (noting that "a single finding of misrepresentation or concealment rising to the level of fraud is a sufficient basis upon which to set aside the judgment"); Shelton v. Shelton, 885 P.2d 807, 808 (Utah Ct. App. 1994) (explaining that material misrepresentation or concealment of assets or financial condition which affected an alimony or property award is proper ground for relief, provided that " 'the alleged misrepresentation or concealment constitutes conduct, such as fraud, as would basically afford the complaining party relief from the judgment' " (quoting Clissold v. Clissold, 519 P.2d 241, 242 (Utah 1974), *overruled on other grounds by* St. Pierre v. Edmunds, 645 P.2d 615 (Utah 1982))). In some jurisdictions, proof of fraud suffices to invalidate settlements, but other evidence may also suffice. *See, e.g.*, Casto v. Casto, 508 So. 2d 330, 334 (Fla. 1987) ("The critical test in determining the validity of marital agreements is whether there was fraud or overreaching on one side, or, assuming unreasonableness, whether the challenging spouse did not have adequate knowledge of the marital property and income of the parties at the time the agreement was reached.").

274. Apparently, however, unless actual misrepresentation of the value of property is involved, *see infra* note 278, there is no duty to disclose the value of marital property. As one court noted, "each spouse is free to adopt a position favorable to himself or herself regarding the property's valuation, its inclusion in the community, or other such issues." Compton v. Compton, 612 P.2d 1175, 1183 (Idaho 1980); *see also In re* Marriage of Connolly, 591 P.2d 911, 915 (Cal. 1979) (en banc) (holding that failure of husband to reveal that stock was about to go public was not a breach of fiduciary duty when even a "cursory examination" by wife's attorney would have revealed the pending sale); Boeseke v. Boeseke, 519 P.2d 161, 164-65 (Cal. 1974) (imposing no duty to value property); Garmisa v. Garmisa, 280 N.E.2d 444, 454 (Ill. App. Ct. 1972) (holding that failure of husband to reveal negotiations for sale of stock was insufficient to warrant setting aside decree).

grant a Rule 60(b) motion to set aside the judgment.[275] As noted earlier, the same treatment is often afforded a "mere"[276] failure to disclose when there is a duty to make full disclosure, derived either from a confidential relationship, fiduciary obligations, or contract,[277] at least as to the existence of an asset if not always as to its value.[278]

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275. Rule 60(b) states, in part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." N.C. R. CIV. P. 60(b)(3). Virtually all states have adopted this version of the federal rule. *See* Sharp, *supra* note 30, at 1411 & n.48.

276. *See, e.g.*, Ronnkvist v. Ronnkvist, 331 N.W.2d 764, 765-66 (Minn. 1983) (setting aside decree when husband failed to disclose assets he had purchased after an agreement was signed but prior to the divorce decree); Verschell v. Pike, 445 N.Y.S.2d 489, 491-92 (App. Div. 1981) (rescinding an agreement, although no actual duress or fraud was found, on grounds that wife had failed to reveal her knowledge of a zoning problem, which would have adversely affected the value of the settlement to which the husband had agreed).

277. Duties derived from a contract, usually a settlement agreement, are discussed *infra* notes 282-85 and accompanying text. In *Lee v. Lee*, 93 N.C. App. 584, 378 S.E.2d 554 (1989), however, a separation agreement was set aside on the grounds that husband had failed to disclose a $102,000 loan he had made to a third party, because the separation agreement itself warranted full disclosure and stated that failure to disclose would constitute a material breach of the agreement. *See id.* at 587-88, 378 S.E.2d at 556. For other examples of jurisdictions in which the duty to disclose is not governed solely by fraud principles, see *In re Marriage of Grissom*, 35 Cal. Rptr. 2d 530 (Ct. App. 1994) and *In re Marriage of Baltins*, 260 Cal. Rptr. 403 (Ct. App. 1989). In *Grissom*, the court noted that the spouse controlling a community asset " 'has a duty to disclose the existence of that asset. This fiduciary relationship does not terminate with the separation of the spouses or the commencement of a dissolution proceeding. The duty of disclosure continues until the marriage has been dissolved and the community property divided by the court.' " *Grissom*, 35 Cal. Rptr. at 536 (quoting *In re* Marriage of Modnick, 663 P.2d 187, 191 (Cal. 1983) (citations omitted)). In *Baltins*, the court explained the legislative mandate imposing a good faith duty in the confidential relationship between spouses in the management and control of community property until the property is divided by the court, which includes the obligation to make full disclosure to the other spouse of assets and debts of the community, upon request. *See Baltins*, 260 Cal. Rptr. at 418.

278. In cases involving the valuation of assets, as opposed to the concealment of assets, property settlement agreements have been set aside based on the misrepresentation of asset value. See, for example, *Shafmaster v. Shafmaster*, 642 A.2d 1361 (N.H. 1994), in which the court countered the defendant's contention that his estimates of value in his financial statements were opinions rather than facts, with the holding that "opinions" of value, if made to mislead, were indeed fraudulent misrepresentations. *See id.* at 1365. Similarly, in *Hager v. Hager*, 378 N.E.2d 459 (Mass. App. Ct. 1978), the court held that husband's representation that stock he owned was virtually without value, when in fact the value was over one million dollars, was sufficient to set aside the settlement agreement. *See id.* at 460; *see also* Adams v. Adams, 376 So. 2d 1204, 1204-05 (Fla. Dist. Ct. App. 1979) (vacating decree of a case in which the husband assigned value of $290,000 to Kentucky Fried Chicken holdings worth well over eight million dollars); Bellow v. Bellow, 352 N.E.2d 427, 430-31 (Ill. App. Ct. 1976) (determining that husband's actual income was five times greater than he represented); Alexander v. Sagehorn, 600 S.W.2d 198, 200-02 (Mo. Ct. App. 1980) (recognizing the gross undervaluation of farm acreage as sufficient fraud to warrant setting aside property division portion of decree).

Absent such a meaningful disclosure requirement, the burden may well shift to the other spouse to undertake extensive and expensive discovery—a result that can only create yet more animosity and distrust of the judicial system.[279] Thus, absent a duty to disclose, and to update disclosure as necessary,[280] (coupled with remedies and penalties for such behavior), spouses enter into "friendly" settlements at their peril—a result that blatantly contradicts public policy in favor of settlement agreements.[281] The only law or policy that can further this strong public interest in settlements is imposition of disclosure duties sufficient to reassure spouses that it is in fact *safe* to enter into such agreements.

A third basis upon which a duty to disclose may be supported is through the simple act of voluntarily undertaking the duty, as with a contract or settlement agreement—a strategy that in fact has led to success in at least one case in North Carolina.[282] Parties also often deal with these issues by what amounts to an in terrorem clause in a separation agreement,[283] that warrants full disclosure and provides for penalties if nondisclosure is later discovered. Often, however, there is no provision affirming the existence of any disclosure. In the absence of a statutory, confidential, fiduciary, or contract foundation

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279. This was, in fact, the effect of North Carolina cases that so narrowly defined the confidential relationship. *See supra* note 264 (discussing cases).

280. Ironically, this duty already exists in North Carolina under § 50-21(a). *See* N.C. GEN. STAT. § 50-21(a) (Supp. 1997). Thus far, however, neither the bar nor the bench have taken this mandate seriously.

281. In *Bromhal*, the court observed that "it is obvious that the General Assembly of North Carolina views the utilization of separation agreements as instruments of sound public policy in North Carolina in dealing with the growing number of divorces taking place in our society." Bromhal v. Stott, 341 N.C. 702, 704, 462 S.E.2d 219, 220-21 (1995). Alternatively, honest spouses might well be forced into unnecessary discovery.

282. *See* Lee v. Lee, 93 N.C. App. 584, 378 S.E.2d 554 (1989). The agreement in that case contained a provision that "the failure to disclose property shall constitute a material breach of this Agreement and give rise to whatever remedies at law or in equity may be available to either." *Id.* at 587, 378 S.E.2d at 556. On proof that husband had failed to disclose a $102,000 debt owed to his corporation, the court of appeals rescinded the agreement. *See id.* at 588, 378 S.E.2d at 556.

For excellent examples of other types of disclosure and penalty clauses commonly used in settlement agreements, see Carlyn G. Poole, *Deception, Disclosure and Confidentiality*, FAMILY LAW INTENSIVE SEMINAR (North Carolina Bar Foundation Continuing Legal Education, Cary, N.C.), Feb. 1998, at V-B-15 to -18.

283. Common provisions include an agreement that 75%—or even 100%—of such nondisclosed property discovered after a final equitable distribution will become the property of the aggrieved spouse. Another solution, eminently feasible in North Carolina given its year-plus waiting period for a divorce, is simply to set aside any agreement for a material failure to disclose. A material failure to disclose often amounts to fraud, of course, and many courts have set aside decrees on this basis. *See infra* note 273 (citing cases).

for the duty to disclose, there can be no "free-floating" obligations, and thus the burden "to find out" may rest entirely upon the other spouse—a result that has no discernible merit whatsoever. Imposition of a duty to discover not only exposes the financially weaker spouse to what may be immense discovery expenses, but it also creates additional acrimony towards the other spouse and to the ever-growing frustration with, or enmity towards, the judicial system itself. Whatever the parameters of this duty might be,[284] the clear opportunity, if not mandate, for the imposition of such duties at long last has presented itself to the courts of this state.[285]

In particular, the strong public policy of encouraging settlement agreements between spouses, including both alimony and division of property, can only be undermined by the continuation of "every man for himself,"—a policy, thus far largely allowed by our courts in the absence of a settlement agreement to the contrary.[286] It is of immense significance that North Carolina courts are presented at last with the opportunity, or perhaps with the necessity, to begin to undertake the task of defining true disclosure duties between the parties themselves.[287] Our domestic law, particularly in this context, is light years behind the law of other states[288] and even lags far behind

284. Any duty to disclose must, of course, include some duty to value in North Carolina, because § 50-21(b) of the North Carolina General Statutes requires that our courts determine the net value of a marital asset at the date of separation, although the same statutory section requires that divisible property be valued as of the date of distribution. *See* N.C. GEN. STAT. § 50-21(b) (Supp. 1997).

285. Two points regarding disclosure in other contexts do appear to be well-established. The first is that if a party chooses to make a representation, she must do so fully—half truths may give rise to fraud almost as easily as outright misrepresentations. *See* Ragsdale v. Kennedy, 286 N.C. 130, 134, 209 S.E.2d 494, 497 (1974) (involving the sale of a business). The second is that failure to speak fully when there is a duty to do so may also be fraud. As the Middle District of North Carolina has explained:

> "Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other . . . party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances. . . . [t]he silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not . . . ."

Breeden v. Richmond Community College, 171 F.R.D. 189, 194 (M.D.N.C. 1997) (omissions in original) (quoting Setzer v. Old Republic Life Ins. Co., 257 N.C. 396, 399, 126 S.E.135, 137 (1962)).

286. *See* Sharp, *supra* note 217, at 832-33.

287. *See supra* note 282 (discussing *Lee*)

288. *See* GREGORY ET AL., *supra* note 213, § 4.04[A], at 86-90. For example, New York, which has always maintained a firm adherence to its presumption of equal division of marital property, recently justified a 35%/65% division in favor of the wife, on proof that the husband had attempted to hide assets in a foreign bank, and had also squandered large sums of money on luxuries for himself and various mistresses. *See* Maharam v.

disclosure requirements in business or commercial contexts.[289] The absence of such duties and effective judicial measures to provide remedies (particularly after an agreement is signed but before the divorce decree) can operate only to encourage the dominant/supporting spouse to fail to disclose, to misrepresent, and to commit fraud.[290] As Justice Benjamin Cardozo once observed (in a joint venture case, not a matrimonial one), the morals of the marketplace are completely inappropriate for any enterprise that requires the "duty of finest loyalty."[291] Surely no less should be said of simple duties of honesty and disclosure owed to a spouse, to the institution of marriage, and to the more efficient operation of the judicial system of this state.

### *C. Alimony Factors*

#### 1. Introduction: Factors 1-3

Finally, this discussion of the new alimony laws is clearly incomplete without a rather extended discussion of the factors that a court, in its discretion, but with a strict mandate for findings of fact,[292] "shall consider"[293] in determining the "amount, duration, and manner of payment of alimony."[294] A cursory glance at the list of factors can

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Maharam, 666 N.Y.2d 129, 129-30 (App. Div. 1997).

289. *See supra* note 291 (citing cases). Imposition of higher standards with commercial sales than with marriage dissolutions has long been an anomaly in North Carolina. This probably derives from the repeal of the Privy Examination Statute in 1978. *See* N.C. GEN. STAT. § 52-6 (1966) (repealed 1977). The magistrate's exam, in effect, substituted for judicial review. The preferred solution, as suggested by Judge Greene in his dissent in *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875 (1988) (Greene, J., dissenting), would have been to ensure that both parties were guaranteed the protection against overreaching, nondisclosure, and unconscionability that the older statute provided for the wife. *See id.* at 510-11, 363 S.E.2d at 878-79 (Greene, J., dissenting).

290. The line between fraud and failure to disclose is often a thin one indeed. *See generally* Sharp, *supra* note 218 (discussing these issues).

291. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). It is sadly, but not infrequently, true that spouses often receive less protection than do business partners, for whom good faith and disclosure duties not only continue beyond formal dissolution, but throughout the "winding up" or liquidation phase as well. *See* Lavin v. Erlich, 363 N.Y.S.2d 50 (Sup. Ct. 1974); Johnson v. Peckham, 120 S.W.2d 786 (Tex. 1938); Karle v. Seder, 214 P.2d 684 (Wash. 1950).

292. *See* N.C. GEN. STAT. § 50-16.3A(c) (1995).

293. *Id.* § 50-16.3A(b).

294. *Id.* Pennsylvania, which lists 17 factors to be considered in alimony determination, 23 PA. CONS. STAT. ANN. § 3701(b) (1991), is apparently the only state which enumerates more factors than North Carolina. Other states also have a lengthy list of factors in their alimony statutes. *See* CAL. FAM. CODE § 4320 (West Supp. 1998) (12 factors); HAW. REV. STAT. § 580-47 (Supp. 1995) (13 factors); IOWA CODE ANN.

easily leave the impression that they are self-evident. But a more thorough analysis of the factors reveals that they may be the most exciting, innovative, and potentially most significant part of the new statutes. These factors are:

(1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;

(2) The relative earnings and earning capacities of the spouses;

(3) The ages and the physical, mental, and emotional conditions of the spouses;

(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;

(5) The duration of the marriage;

(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;

(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;

(8) The standard of living of the spouses established during the marriage;

(9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;

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§ 598.21(3) (West Supp. 1997) (10 factors); ME. REV. STAT. ANN. tit. 19-A, § 951(1) (West 1998) (15 factors); MD. CODE ANN., FAM. LAW § 11-106(b) (Supp. 1997) (12 factors); MO. ANN. STAT. § 452.335(2) (West 1997) (10 factors); N.J. STAT. ANN. § 2A:34-23(b) (West Supp. 1997) (10 factors); N.M. STAT. ANN. § 40-4-7(E) (Michie Supp. 1996) (10 factors); N.Y. DOM. REL. LAW § 236(6)(a) (McKinney 1986) (11 factors); OHIO REV. CODE ANN. § 3105.18(c)(1) (Anderson Supp. 1997) (14 factors); OR. REV. STAT. § 107.105(d) (1997) (13 factors); S.C. CODE ANN. § 20-3-130(C) (West Supp. 1997) (13 factors); TENN. CODE ANN. § 36-5-101(d)(1) (Supp. 1997) (12 factors); WIS. STAT. ANN. § 767.26 (West 1993) (10 factors); *see also* UNIF. MARRIAGE & DIVORCE ACT § 308(b), 9A-II U.L.A. 446 (1998) (listing six factors to be considered in determining maintenance, four of which, § 308(b)(2)-(5), are virtually identical to § 50-16.3A(b)(3), (5), (8), (9) of the North Carolina General Statutes).

(10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;

(11) The property brought to the marriage by either spouse;

(12) The contribution of a spouse as homemaker;

(13) The relative needs of the spouses;

(14) The federal, State, and local tax ramifications of the alimony award;

(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.[295]

The first factor, marital misconduct, including "illicit sexual behavior," has already been discussed in considerable detail.[296] The remaining fourteen factors are in part familiar, either through prior case law under the predecessor alimony statute[297] or because of their similarity to the thirteen statutory factors, many of which have received considerable appellate attention,[298] in the equitable distribution statute.[299] Some of these factors, however, introduce

295. N.C. GEN. STAT. § 50-16.3A(b)(1)-(15) (1995). The most obvious "any other factor" that comes to mind is a history of domestic violence inflicted upon a dependent spouse. It may well take years before a battered spouse, even with extensive psychological help, may be able even to begin to attempt to function in a self-sufficient manner. Limited term alimony awards would appear to be especially inappropriate in such situations. At a minimum, the court should retain jurisdiction to extend the award if necessary.

296. *See* discussion *supra* Part III.A.

297. The predecessor statute stated only that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C. GEN. STAT. § 50-16.5 (1987), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641.

298. This is particularly true with factor 12—"[a]ny other factor." N.C. GEN. STAT. § 50-20(c)(12) (Supp. 1997).

299. The factors that a court considered in dividing marital property equitably, as listed in the old § 50-20(c), were:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;
(2) Any obligation for support arising out of a prior marriage;
(3) The duration of the marriage and the age and physical and mental health of both parties;
(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
(5) The expectation of nonvested pension, retirement, or other deferred compensation rights, which is separate property;

considerations that are quite new and potentially of great significance, particularly with regard to North Carolina domestic law, which has been underdeveloped in many areas for so long.[300] In general, however, the expansion of alimony factors—always bearing in mind the dependency hurdle[301] and the possibility of adultery as an absolute bar for the dependent spouse[302]—appears to signal a considerably more generous approach to alimony awards than did its predecessor, particularly with regard to amounts.[303] In addition, the alimony factors evidence growing familiarity, increased sophistication with, and appreciation of the many facets of a marriage and the often gender specific roles undertaken therein—roles that now require prominent consideration.[304]

Factors number 2 and 3—"[t]he relative earnings and earning capacities of the spouses" and "[t]he ages and the physical, mental, and emotional conditions of the spouses"[305]—are basically quite familiar. Earnings and earning capacities track the old statute, and

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(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
(9) The liquid or nonliquid character of all marital property;
(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
(11) The tax consequences to each party;
(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and
(12) Any other factor which the court finds to be just and proper.

N.C. GEN. STAT. § 50-20(c) (1995) (amended 1997). It should be noted here that the equitable distribution factors include "11a," so that there are effectively thirteen factors.

300. *See supra* Part III.B.3 (discussing disclosure duties).

301. *See supra* note 1.

302. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995).

303. *See infra* Part III.C.2 and accompanying text (analyzing medical benefits in particular); s*ee also supra* note 180 (discussing the pitfalls in the underlying assumptions regarding alimony for a specified term).

304. Nothing in the now repealed statutes forbade consideration of many of these new factors, of course, but the statutory mandate now raises these factors to an entirely different plane. *See supra* note 297 (setting forth the previous standards). Although many gender-based roles reflect social mores and choice of the parties, others, such as child-bearing, are biologically imposed.

305. N.C. GEN. STAT. § 50-16.3A(b)(2), (3).

nothing in that statute indicates that one might expect any change from prior case law,[306] with the exception of "earnings."[307] It should be noted that a supporting spouse's earnings and earning capacity should, as with dependency, be measured initially as of the date of separation, absent extraordinary involuntary declines in earnings or earning capacity.[308] Many factors, especially those related to the health of a supporting spouse, may affect earning capacity. Probably the best initial guides to determining income (particularly if one is self-employed) and the nature of under-employment may be found in the introductory text to the child support guidelines.[309]

### 2. Medical Insurance and Other Factors

Factor number 4—directing consideration of earned and unearned income, "including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others"[310]—appears to reinforce strongly the usage of the child support guidelines in calculating income.[311] Much more importantly, however, this factor not only specifically opens the door to include

306. *See, e.g.*, Bowes v. Bowes, 287 N.C. 163, 171-72, 214 S.E.2d 40, 45 (1975) (explaining that only when a court finds that a supporting spouse has deliberately reduced his earnings in order to avoid support obligations should his earning capacity be the basis for an award of alimony); Harris v. Harris, 258 N.C. 121, 128 S.E.2d 123 (1962) (same); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960) (same). A decrease in actual earnings between the date of separation and the date of an alimony hearing, however, should be viewed with more than mere suspicion.

307. *See infra* notes 310-36 (discussing employer-provided medical insurance).

308. *See supra* note 306; *see also* Laura W. Morgan, *Beyond the 1040: Finding Hidden Sources of Income for Support*, 10 DIVORCE LITIG. 83-87(discussing often overlooked sources of income, such as employer contributions to tax-deferred savings plans, reinvested dividends, retained earnings from a close corporation that could be distributed, and pre-payment of debts).

309. *See* N.C. GEN. STAT. § 50-13.4(c1) (Supp. 1997) (authorizing the Conference of Chief District Judges to set uniform presumptive guidelines for computing child support obligations). The actual Guidelines state that computation for self-employed persons "should be carefully reviewed to determine an appropriate level of gross income .... In most cases, this amount will differ from a determination of business income for tax purposes." N.C. ADMIN. OFFICE OF THE COURTS, N.C. CHILD SUPPORT GUIDELINES AOC-A-162, at 3 (1994) [hereinafter CHILD SUPPORT GUIDELINES].

310. N.C. GEN. STAT. § 50-16.3A(b)(4) (1995). *See* 42 U.S.C. § 1482(a)(2)(B) (1994) (defining unearned income, in part, as "any payments received as an annuity, pension, retirement, or disability benefit, including veterans' compensation and pensions, workmen's compensation payments, old-age, survivors, and disability insurance benefits, railroad retirement annuities and pensions, and unemployment insurance benefits"); *see also* I.R.C. § 32(c)(2)(B) (West Supp. 1998) (discussing income that the IRS has thus far chosen to disregard).

311. *See supra* note 309 (discussing guidelines).

more broadly defined sources of income,[312] but it also places medical benefits in that category.[313] Although it sounds almost clichéd today to repeat that health insurance is of almost inestimable value to all persons, it is particularly so for housewives who are divorced after a number of years of marriage[314] and who previously had medical coverage through their husbands' employers.

The significance of factoring in health insurance coverage in determining income, both for purposes of establishing dependency and for determining the duration and amount of alimony,[315] both during employment and after retirement, simply cannot be underestimated, particularly in marriages in which one spouse (usually the wife) has been out of the work force for a number of years.[316] Although continuation of medical insurance (at the expense of the non-employee spouse) is available for a maximum of thirty-six months[317] under COBRA provisions,[318] the value of which is certainly

312. The Child Support Guidelines, for example, offer a much more expansive definition of income:

> Gross income includes income from any source, except as excluded below, and includes but is not limited to income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. While includable as income, non-recurring, one-time payments should be distinguished from ongoing income.

CHILD SUPPORT GUIDELINES, *supra* note 309, at 2.

313. It has been suggested, quite appropriately, that the existence of health insurance should be considered as marital property for the spouse who is insured. *See, e.g.*, William R. Horbatt & Alan M. Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier*, 28 FAM. L.Q. 327, 328 (1994). Several states, moreover, require increased coverage beyond that which is mandated by COBRA to insure that coverage remain available until the non-participant reaches the age of 62. *See supra* note 316 (citing examples).

314. *See supra* note 4 (discussing *George v. George*, 115 N.C. App. 387, 444 S.E.2d 449 (1994)).

315. See *supra* notes 333-36 and accompanying text for a discussion of the possibility of the inclusion of medical benefits, particularly after one reaches the age of eligibility for Medicare, as property.

316. The question of how long is "long enough" is clearly a difficult one. Several states, however, have established alimony or maintenance guidelines. Section 60-1610(b)(2) of the Kansas Statutes, for example, creates rules for presumptive terms for alimony, with a presumed duration of 121 months, but allowing successive orders of 21 months. *See* KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1997). Delaware's formula sets a maximum duration of one-half of the years of the marriage, for marriages of under 20 years, but has no limit for marriages of over 20 years. *See* DEL. CODE ANN. tit. 13, § 1512(d) (1993).

317. This limit is probably reflective of the early years of experience with rehabilitative alimony, when three-year awards were common. *See supra* note 182 and accompanying text.

better than nothing, COBRA is nonetheless of limited worth. First, unlike its most recent counterpart, a federal law requiring health insurance for children when it is available to a parent[319] and mandated under state law,[320] the three-year maximum continuation of insurance[321] is woefully inadequate for virtually all "homemaking" spouses over forty years of age (and often younger spouses as well), who are unlikely, regardless of any retraining, to obtain any job which provides health benefits.[322]

Second, only forty-four percent of the United States population[323] is employed by firms that are covered by the Employee Retirement and Income Security Act ("ERISA") group health plans[324] that provide medical care[325] and that therefore must also provide continuation coverage under COBRA.[326] Third, no state, federal, local government, certain charitable organizations, or businesses with fewer than twenty employees[327] are subject to COBRA provisions regarding insurance continuation in the first instance.[328] Lamentably and needlessly, North Carolina grants absolutely no right to continuation of health insurance in the case of

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318. Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 1986 U.S.C.C.A.N. (100 Stat.) 82, 228-29, codified at I.R.C. § 4980B (1994)). This act is codified in the Internal Revenue Code, I.R.C. § 4980B (1994), and the Public Health Service Act, 29 U.S.C. §§ 1161-68 (1994).

319. COBRA has been amended to require and provide for Qualified Medical Child Support Orders ("QMCSOs"). For example, it requires employer-provided heath insurance plans to continue health insurance for dependent children, regardless of whether the child lives with the employee, resides in the group coverage geographical area, etc. *See* Consolidated Omnibus Budget Resolution Act of 1993, Pub. L. No. 103-66, § 1908, 1993 U.S.C.C.A.N. (107 Stat.) 312, 633-36 (codified as amended at 42 U.S.C. § 1396-g1(1994)).

320. *See* N.C. GEN. STAT. § 50-13.11 (1995).

321. *See* I.R.C. § 4980B(d)(1)-(3).

322. According to the United States Census Bureau, nearly 75% of the elderly four million poor in the United States are women. *See* LEATHA LAMISON-WHITE, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P60-198, POVERTY IN THE U.S.: 1996, tbl.2, at 2 (1997).

323. *See* GAO OFFICE LETTER REP., 07/25/95, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA (1995).

324. Section 58-53-3 provides only for twelve months of continued coverage under the group policy for an employee and his "eligible" dependents. *See* N.C. GEN. STAT. § 58-53-3 (1984).

325. Group health plans are defined in I.R.C. § 5000(b)(1) (1994).

326. For the definition of medical care, see I.R.C. § 213(d).

327. COBRA actually provides that businesses with 20 or fewer employees are excluded if that number is employed for less than one-half of the year. *See id.* § 4980B(d).

328. Employees and their dependents may be, and usually are, provided health insurance from such employers, but there is likely to be no continuation insurance for ex-spouses beyond the three-year limit imposed by COBRA. *See id.*

an ex-spouse.[329] Many states not only provide for the availability of such coverage, but have greatly expanded the continuation coverage beyond that required by COBRA.[330] Massachusetts has gone even so far as to require an employee (in conjunction with his or her health care plan) to provide continued insurance for a former spouse as if such spouse were still a dependent.[331] Other states have extended continuation coverage for older spouses until they reach the age of Medicare eligibility.[332]

Especially in view of both the absence of any such provision in North Carolina and the explicit statutory reference in the fourth factor to "medical" benefits,[333] statutory analysis, logic, and common sense suggest that medical benefits, both current and post-retirement, should be treated as either (1) earned or unearned income and therefore a critical component in determining income with a determination of dependency in the first instance, or (2) an asset or a form of deferred compensation under the equitable distribution factors.[334] At an absolute minimum, the cost of procuring post-COBRA medical coverage for a dependent former spouse should be one of the most significant factors in determining the amount and duration of any alimony award.[335] Equity, among the other concerns listed above, should surely require no less.[336]

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329. Section 58-53-3 provides for an employee and his or her dependents—clearly not including an ex-spouse—to maintain coverage under his or her group plan (and at his or her expense) for up to one year. *See* N.C. GEN. STAT. § 58-53-3.

330. Illinois, for example, mandates that all former spouses under the age of 55 must have the option of continuation of insurance for two years, but that a former spouse 55 or older may continue coverage until that spouse otherwise obtains health insurance or becomes eligible for Medicare. *See* 215 ILL. COMP. STAT. ANN. 5/367.2 (West 1994). Missouri has a similar provision for ex-spouses 55 years old or older. *See* MO. ANN. STAT. §§ 376.892-.894 (West Supp. 1998). California provides for a five-year COBRA extension of benefits. *See* CAL. INS. CODE § 10116.5 (West Supp. 1998).

331. *See* MASS. GEN. LAWS ANN. ch. 175, § 1101 (West 1987).

332. *See, e.g.*, 215 ILL. COMP. STAT. ANN. 5/367.2.

333. *See* N.C. GEN. STAT. § 50-16.3A(b)(4) (1995).

334. It is almost impossible to distinguish between retirement benefits and medical retirement benefits. If the former can be reduced to a discounted current value, the latter may clearly be as well. *See* Elizabeth L. Bennett & John W. Goldsborough, *Guaranteeing Medical Insurance Coverage After Separation or Divorce*, 28 FAM. L.Q. 305, 331-32 (1994) (demonstrating such valuations). Similarly, medical benefits until retirement may clearly be, in whole or in part, a "marital asset" and should thus be subject to the same rules governing valuation as are pension benefits. *See* Horbatt & Grosman, *supra* note 313, at 328.

335. Were the former spouse to procure employment that provided such benefits, modification of the alimony award might be appropriate.

336. Nearly $16,000,000 is paid by North Carolina counties each year in Medicaid benefits. *See* N.C. DEP'T OF HUMAN RESOURCES: STATISTICS FISCAL YEAR 1996, STAT. J. 3-4 (1996). The statistics are not broken down into age or gender categories.

Consideration of the ages and the physical, mental, and emotional states of the parties, of course, is virtually identical to the third factor of the equitable distribution statute,[337] as is the fifth factor, the duration of the marriage.[338] Indeed, duration of a marriage correlates not only with age and the need for continued medical coverage, but with earning capacity as well. It is likely to be—along with a dependent spouse's income—the most critical factor in determining the amount and duration of alimony in North Carolina and in the majority of states.[339] It is also likely to be closely related to the sixth factor—"[t]he contribution by one spouse to the education, training, or increased earning power of the other spouse,"[340] a factor that is similar to, but still significantly different from, its counterpart in equitable distribution.[341] Clearly, the alimony statutory directive to consider the "relative earnings and earning capacities"[342] is much more forceful and specific than the equitable distribution factor to consider "the career potential" of the other spouse.[343] Thus, assuming that one can "pass" the dependency test, the opportunity to maximize the effect of this alimony factor should never be overlooked. Employer-paid medical insurance, both before and after retirement, is no less income, or an asset, than pension benefits. The cost to a dependent spouse in obtaining similar coverage after three years should similarly be taken into account in determining whether an alimony award is appropriate in the first instance.[344]

The seventh factor, the "extent to which the earning power, expenses, or financial obligations of a spouse will be affected by

337. *See supra* note 299 (quoting N.C. GEN. STAT. § 50-20(c) (1995) (amended 1997)).

338. *See* N.C. GEN. STAT. §§ 50-16.3.A(b)(5), -20(c)(3) (1995 & Supp. 1997). This should, in fact, be the paramount consideration in determining when a periodic alimony award is appropriate. *See supra* notes 127-35 and accompanying text.

339. *See* ALI PRINCIPLES, *supra* note 6, § 5.02, at 268.

340. N.C. GEN. STAT. § 50-16.3A(b)(6) (1995).

341. *See id.* § 50-20(c)(7) (Supp. 1997) (referring to "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse").

342. *Id.* § 50-16.3A(b)(2) (1995). It is also the second time the alimony factors specifically refer to earning capacity. *See supra* text accompanying 295 (quoting N.C. GEN. STAT. § 50-16.3A(b)).

343. *Id.* § 50-20(c)(7) (Supp. 1997).

344. Even a modest alimony award leaves the door open for an increase once an ex-spouse's COBRA coverage expires. Alternatively, an order that a supporting spouse continue health insurance for the dependent spouse after COBRA coverage—assuming that the dependent spouse is unable to secure employment which provides coverage—could also be appropriate.

reason of serving as the custodian of a minor child,"[345] is the statutory embodiment of the eminently common-sense holding in *Fink v. Fink*,[346] a relatively new decision from the court of appeals. The relationship between caring for a minor child, or children, and earning capacity (or even the ability to secure a job in many instances) is almost too obvious to warrant discussion. A recent and quite extensive study found, however, that the custodial spouse was awarded alimony in only thirty percent of cases involving divorcing parents who had at least one child under the age of sixteen.[347] The significance of this custodial factor, moreover, correlates to a considerable degree with the twelfth factor, the "contribution of a spouse as homemaker,"[348] as well as to the "duration of the marriage."[349] In virtually all instances, homemaking and child care responsibilities will result not only in a significant decline of earnings, but in a decline in residual earnings and earning capacity as well.[350]

The custodial and/or homemaking responsibilities of a dependent spouse must play a large role in the ninth factor—the "relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs."[351] This factor rather clearly refers to situations in which alimony for a specified term is contemplated, and it has been discussed at length already.[352] Again, however, it must be

345. *Id.* § 50-16.3A(b)(7) (1995).

346. 120 N.C. App. 412, 462 S.E.2d 844 (1995).

347. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD 123-24 & n.4 (1992). This percentage is considerably higher than the average number of divorces that include alimony awards. *See* ALI PRINCIPLES, *supra* note 6, § 5.05, at 302.

348. N.C. GEN. STAT. § 50-16.3A(b)(12).

349. *Id.* § 50-16.3A(b)(5).

350. The significance of these declines has been the subject of many studies, with findings that an interruption in work for a *single year* may result in an income decline ranging from somewhere between 3.3% and 7.6% to 1.4%. This decline, moreover, is cumulative and lifetime. *See* ALI PRINCIPLES, *supra* note 6, § 507, at 346; *see also* Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993). Virtually the entirety of this excellent article is devoted to the inability, or unwillingness, of the domestic laws of the several states to truly take seriously, value, or recompense, the economic value of marriage to a caregiver—and the equally dismal failure to recognize the losses incurred by such a caregiver. At one point, Professor Estin asks what should be, but unfortunately is not, a rhetorical question: "We know empirically, however, that women continue to be responsible for most caregiving work in our society, and in the context of divorce, that difference generates substantial, unrecognized economic consequences. Can we not agree that this is an unfair approach to family life, or, at least, to divorce?" *Id.* at 781.

351. N.C. GEN. STAT. § 50-16.3A(b)(9).

352. *See supra* Part II.C.2.

emphasized that such awards are often totally inappropriate, may often underestimate greatly the actual opportunities available to a spouse, or may ignore eventualities that were completely outside the contemplation of either party at the time of the decree[353]—all of which point to the critical opportunity for a court to revisit the issue of any time limit imposed upon alimony.[354]

### 3. Standard of Living and Remaining Factors

The tenth and eleventh factors are somewhat unusual in that they contemplate a decision as to the amount and duration of alimony after an equitable distribution of property, whereas § 50-16.3A(a) allows for an alimony claim to be heard on the merits before property is actually divided.[355] The tenth factor directs consideration of the "relative assets and liabilities of the spouses and the relative debt service requirements . . . including legal obligations of support."[356] Clearly such assets and liabilities should be measured after the completion of an equitable distribution. Indeed, any well-advised supporting spouse, unless she has evidence, unavailable at the time of separation, of pre-date of separation adultery on the part of the dependent spouse, should attempt to avoid an alimony hearing in which these two factors are, almost by definition, unknown. Added expenses for both parties and a waste of judicial resources are likely to be the only results of an alimony hearing before a final equitable distribution. The eleventh factor, "property brought to the marriage by either spouse,"[357]—may or may not be known or agreed to by the spouses before equitable distribution is resolved, but the rationales for delaying any alimony hearing until after property division is complete still retain validity. Moreover, in the event of a settlement agreement prior to divorce, it strains credulity to postulate that parties could agree on a property division without also agreeing upon alimony. The two are in virtually every instance inextricably intertwined.[358] If there is no settlement, however, hearing the alimony claim first is likely to be a waste of judicial and other resources and will certainly bring added expenses to the parties. The

353. Countless examples illustrate this point: diagnosis of a serious health problem in the dependent spouse or in a child of the parties; disabling accidents to either; a job that did not materialize; loss of employment; diagnosis of a serious learning disorder in a child, etc.

354. *See supra* Part II.B.2.

355. *See* N.C. GEN. STAT. § 50-16.3A(a).

356. *Id.* § 50-16.3A(b)(10).

357. *Id.* § 50-16.3A(b)(11).

358. *See supra* notes 109, 187.

caveat to this statement would involve the unlikely event that the results of equitable distribution would not change the alimony duration or amount, or the dependency status—an eventuality that, given the potential of the expanded factors that can be used to increase the assets and income of the supporting spouse,[359] is so unlikely as to stretch the imagination.

Of the four remaining factors, the fourteenth factor—the "federal, State, and local tax ramifications of the alimony award"[360]—is similar to the same factor in equitable distribution,[361] albeit the alimony factor is more specific. The major point to recall regarding the fourteenth factor is that the court of appeals has held that consideration of the tax ramifications of any equitable distribution award is limited only to those that actually will ensue as a direct result of any court order. As the court made clear in the property context, "speculative" or hypothetical considerations of what tax consequences might ensue at a future point are impermissible.[362] It seems clear, however, that this thoroughly common-sense rule should

359. *See supra* notes 310-36 and accompanying text (discussing the value of medical insurance).

360. N.C. GEN. STAT. § 50-16.3A(b)(14).

361. *See id.* § 50-20(c)(11) (Supp. 1997) (stating only that the "tax consequences to each party" should be considered in determining if equal is equitable).

362. *See* Harvey v. Harvey, 112 N.C. App. 788, 793, 437 S.E.2d 397, 400 (1993) ("[I]t is improper to consider possible tax consequences as a distributive factor under G.S. § 50-20(c)(11) in the absence of evidence that some taxable event has already occurred or that the distribution ordered by the court will itself create some immediate tax consequence to either of the parties." (citing Smith v. Smith, 104 N.C. App. 788, 411 S.E.2d 197 (1991))); Wilkins v. Wilkins, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993) (rejecting consideration of hypothetical tax consequences on retirement plan value as a distributive factor because "predict[ing] variables (including, inter alia, the government's tax structure, plaintiff's financial condition, the date of plaintiff's early withdrawals, if any, and the date of plaintiff's eventual retirement) that far in the future requires the trial court to engage in impermissible speculation"); *Smith*, 104 N.C. App. at 790, 411 S.E.2d at 198 (rejecting plaintiff's argument that tax consequences of withdrawal from his retirement plan funds should be considered in equitable distribution, when plaintiff did not present evidence, nor even argue, that he would be forced to withdraw any part of these funds to comply with the distribution order, indicating that the fact of withdrawal and possible tax consequences were "purely speculative"). Several other states—as common sense would indicate—also have found no error in trial court failure to consider merely speculative tax considerations as a factor in property distribution. *See In re* Marriage of Bayer, 687 P.2d 537, 539 (Colo. Ct. App. 1984); *In re* Marriage of Kapusta, 491 N.E.2d 48, 53 (Ill. App. Ct. 1986); *In re* Marriage of Hayne, 334 N.W.2d 347, 353 (Iowa Ct. App. 1983); Catania v. Catania, 385 N.W.2d 28, 30-31 (Minn. Ct. App. 1986); Hardwick v. Hardwick, 399 S.E.2d 791, 793 (S.C. Ct. App. 1990). *See generally* Tracy A. Bateman, Annotation, *Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital Property*, 9 A.L.R.5TH 568 (1993) (listing both jurisdictions which have not found trial court error in failure to consider hypothetical tax consequences, and jurisdictions which have found such error).

not be applicable in instances in which, for example, one spouse receives the marital home or other real estate, the taxes on which become a necessary and legitimate living expense.[363]

The eighth factor—"[t]he standard of living of the spouses established during the marriage"—and the thirteenth factor—"[r]elative needs of the spouses"[364]—are of singular importance. Despite the paramount emphasis under the predecessor statute[365] and prior case law on the previous standard of living as both the *sine qua non* and a virtual "ceiling" on support amounts,[366] an almost irresistible argument can be made that under the new alimony and postseparation statutes, both of which merely list the previous standard of living as one of many factors,[367] the previous standard of

363. Although the last revision of the tax code eliminated capital gains taxes on transfers incident to divorce, either spouse will be responsible for such taxes if the property is sold. *See* I.R.C. § 1041 (1994). Therefore, it would appear that the relative bases in different pieces of property should at least warrant some consideration, particularly if the divorce itself will force one party to sell the marital home.

364. N.C. GEN. STAT. § 50-16.3A(8), (13) (1995).

365. Repealed § 50-16.5(a) stated only that alimony should be determined "having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties." *Id.* § 50-16.5(a) (1987) (repealed 1995). Earning capacity had specific restrictions, however, *see supra* note 306, and the previous standard of living was unquestionably the most critical factor in determining the amount of alimony, *see infra* note 366.

366. *See* Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980) (holding that legislative usage, in determination of spousal dependency, of the term "accustomed standard of living of the parties" in connection with "maintenance and support" means that "alimony, to the extent it can possibly do so, shall *sustain* that standard of living for the dependent spouse to which the parties together became accustomed" (emphasis added)), *quoted in* Quick v. Quick, 305 N.C. 446, 456, 290 S.E.2d 653, 660 (1982) (stressing the critical importance of this factor in determining not only dependency but also the amount of alimony)); Spillers v. Spillers, 25 N.C. App. 261, 264, 212 S.E.2d 676, 678 (1975) (upholding the trial court's consideration of plaintiff's earning capacity in determining that she could " '*substantially* continue to maintain the standard of living previously enjoyed during her marriage' " (quoting trial court) (emphasis added)).

367. Section 50-16.2A governs the determination of the amount of a postseparation support award. That section lists the following nine factors:

> In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

N.C. GEN. STAT. § 50-16.2A(b) (1995). The alimony statute lists 14 specific factors, and factor 15 mandates consideration of "[a]ny other factor relating to the economic circumstances of the parties that the court finds to be just and proper." *Id.* § 50-16.3A(b)(15). Thus the previous standard of living surely must be deemed to have lost its preeminent status under the old statute and case law.

living *does no longer*, and should no longer, create such a ceiling. It is emphatically not a "first among equals," and indeed may bear little relationship to the needs of a newly separated or divorced spouse. Use of this single factor in such an overwhelming manner as virtually to render the fourteen other factors nugatory would contradict the purposes of the new statutes, would be egregiously inconsistent not only with the respective needs of the parties but with many other factors as well and would drastically reduce if not eliminate one of the more critical goals of the new statutes—flexibility.[368] And in an area of law in which fairness and equity are inevitably defined on an almost case-by-case basis, flexibility is essential to the just interpretation and effective application of the new statutes.

Last, but hardly least, the final factor that a court "shall" consider in its determination of the amount, duration, and manner of payment of alimony is "[a]ny other factor relating to the economic circumstances of the parties."[369] If experience with equitable distribution furnishes any guide, this might well prove to be the most significant of all the factors.[370] This factor's application is limited only by circumstances, imagination, and more than a scintilla of common sense. The following examples, however, come to mind: the fact that one spouse has cared for the children from the other spouse's previous marriage; the fact that one spouse has an employment contract, beginning on a date certain to increase his income and benefits, or has received notice that he will be "downsized" at a date certain; the fact that one spouse has a preexisting medical condition;[371] and the fact that the parents or children of a spouse need regular and intensive attention. The possibilities would appear to be endless.

Finally—and probably most significantly—in view of the economic ramifications of the extensively broadened scope and list of factors—it is suggested that just as the definitions of assets and

368. *See supra* text accompanying note 15.

369. N.C. GEN. STAT. § 50-16.3A(b)(15).

370. Certainly the "any other factor" in the equitable distribution context has proven to be of greater significance than any of the listed factors in § 50-20(c). Collins v. Collins, 125 N.C. App. 113, 479 S.E.2d 240, *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997), furnishes the most recent example of the use of "any other factor" to serve the ends of justice. In that case, involving a short-term marriage and a home the husband had placed in tenancy by the entireties, the wife was awarded considerably less than 50% of the marital property. *See id.* at 115, 479 S.E.2d at 242.

371. Federal law now mandates that coverage be extended to such a spouse after, for example, COBRA coverage has terminated. But it places no limit on the additional cost that a group plan may—and certainly will—charge for such individual coverage. *See* 29 U.S.C.S. § 1181 (Law Co-op. 1997).

income have changed and the "previous standard of living" of the parties is now only one of fifteen factors, the manner of determining dependency status surely should follow suit. To limit a determination of dependency to the "incomes and expenses based upon the previous standard of living,"[372] as did previous law, and yet to determine the amount and duration of alimony under the new factors, is surely short-sighted. Factors determining the latter surely should be read *in pari materia* with any determination of dependency in the first instance.[373] Application of two different standards to accomplish the same statutory goal—expanding the manner in which both the eligibility for and the amount of support are determined—would undermine that very goal. If unearned income, increased income capacity, medical benefits, and the duration of the marriage (and all the disabilities that may well accompany one spouse in such a marriage) are critical factors in determining the amount of alimony, such factors should be just as critical in determining dependency in the first, or any other, instance.[374] It seems that the essence of judicial interpretation and common sense would dictate that these different sections of the same revision of the alimony statutes must inform, rather than do battle with, one another.

## IV. POSTSEPARATION SUPPORT

### *A. Introductory Issues*

Postseparation support awards, as one would expect, share much in common with the new alimony statutes, and many of the issues already discussed regarding alimony are quite relevant to, or identical with, issues that arise with postseparation support awards. Issues

372. *See* Talent v. Talent, 76 N.C. App. 545, 548, 334 S.E.2d 256, 258 (1985) ("To determine whether such actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit." (citing Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980))); *see also* Patterson v. Patterson, 81 N.C. App. 255, 257-58, 343 S.E.2d 595, 598 (1986) (explaining that "actually substantially dependent" has been interpreted "to mean that the spouse seeking alimony must be actually dependent upon the other 'in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation' " (quoting *Williams*, 299 N.C. at 180, 261 S.E.2d at 854)).

373. *See supra* notes 122-26 and accompanying text.

374. An almost precise parallel may be drawn between this conclusion and the treatment of the tax considerations that *will ensue* as a direct result of an alimony or equitable distribution award. *See supra* text accompanying notes 360-63. So long as the precipitating event of tax consequences that will flow directly from a maintenance or property order may be considered, so should the economic circumstances inevitably incident to a separation or divorce.

involving the latter awards are, on the other hand, quite different in many significant respects. Although reminiscent of alimony pendente lite awards,[375] postseparation support is by no means the same—in purpose, entitlement, prerequisites, or operation—and is to some degree an entirely new creature in what may aptly be called the thicket of North Carolina family law.

The first significant point, however, is that postseparation support is, much as was alimony pendente lite,[376] primarily designed to function as a means of securing temporary support for a dependent spouse in an expedited manner.[377] The new statute defines postseparation support as "spousal support to be paid until the earlier" of the date specified[378] in the "order of postseparation support, or an order awarding or denying alimony."[379] Previous warnings with regard to the significance of a specified date in any postseparation order (which, as noted previously, ought to be the date of final distribution) are not inconsistent when paired with the admonition that such orders ought to remain subject to continuing jurisdiction of the entering court. Even without undue delay by either party, the discovery process often may be a long and tortured one. Moreover, in the event of any intentional delay on the part of the spouse already receiving postseparation support,[380] the payor

375. Thus some, but by no means all, alimony pendente lite principles (often called temporary alimony) developed by case law may prove relevant in the interpretation and operation of the new statute.

376. *See infra* note 378 (discussing limitations on alimony pendente lite awards).

377. Section 50-16.2A(a) reads that the action for postseparation support may be brought by "verified pleading, verified motion, or affidavit of the moving party" which shall set forth the factual bases for the relief requested. N.C. GEN. STAT. § 50-16.2A(a) (1995). While several judges make use of the affidavit procedure, apparently most do not as yet.

378. As noted earlier, failure to obtain a date specified for a supporting spouse could well result in an almost limitless award. *See supra* notes 111-14 and accompanying text. The alimony pendente lite section limited the award to "the pendency of the suit in which the application is made." N.C. GEN. STAT. § 50-16.3(b) (1987), *repealed by* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641.

379. N.C. GEN. STAT. § 50-16.1A(4) (1995). The statutory section goes on to read that it "may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce." *Id.* For a discussion of the possible procedural inconsistencies between this and § 50-16.2A(a) (authorizing the action to be brought in "an action brought pursuant to Chapter 50"), see *supra* notes 122-26 and accompanying text.

380. A defense to resist extending such an award could also be made on a myriad of other bases as well, including the termination events included within the new act, *see* N.C. GEN. STAT. § 50-16.9, as well as any other change of circumstances. On the other hand, a motion to set alimony hearing *before* there has been reasonable time and opportunity for completion of discovery, should surely be subject to dismissal.

spouse is always free to resist continuation of the original award beyond its initial term. This adds even more support to the previous conclusion that a court must exercise its continuing jurisdiction and flexibility to deal with attempts by either spouse to delay or to move to set a permanent alimony hearing before the discovery process is complete. Again, following strict statutory definition,[381] postseparation support is designed to provide the necessary funds to a dependent spouse to bridge the period from separation until a final alimony hearing, which may not occur until after equitable distribution.[382] While the statute defines the award as one that terminates on the earlier of the date specified in the order or the award or denial of alimony,[383] there appears to be no non-punitive rationale that would justify terminating such an award merely because the "date certain" had occurred. In any event, judicial power to extend the date of a postseparation award certainly does not limit a court's willingness to refuse to do so.[384]

Although marital fault has not been banished from consideration in postseparation support awards,[385] in those instances in which marital fault is irrelevant the statute goes on to mandate that such an award be made, if "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay."[386] The latter findings, in turn, are based upon the consideration of several factors enumerated in § 50-16.2A(b)—to the effect that the court "shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities," plus debt services, other legal obligations, and "those expenses reasonably necessary to support each of the parties."[387]

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381. In fact, neither the definition of "alimony" nor postseparation support contains any reference to the dependency status. *See* N.C. GEN. STAT. § 50-16.1A(1), (4). Nonetheless, it is clear that one must be adjudicated dependent before either type of support may be granted.

382. Such hearings, in view of the complexity of the 15 factors discussed *supra* Part III.C, are likely to include much greater trial preparation time, in addition to longer trials.

383. *See* N.C. GEN. STAT. § 50-16.1A(4).

384. The most likely scenario when a court probably should refuse to extend an award is that in which the dependent spouse, for reasons of marital misconduct, might be ineligible for alimony. In such a situation, a delaying strategy might not be the better, but possibly the only, "course of valor" for such a spouse. *See supra* Part II.A.2.

385. *See* N.C. GEN. STAT. § 50-16.2A(e).

386. *Id.* § 50-16.2A(c).

387. *Id.* § 50-16.2A(b).

A more critical examination of these factors leads to several conclusions. The first is that given the relative brevity of these factors compared with those for alimony,[388] postseparation support contemplates a rather truncated examination of the parties' needs and assets.[389] Second, given the fact that this section clearly looks at short-term, rather easily calculable, economic characteristics of the individuals to a marriage, the statutory factors[390] coincide very neatly with the purposes of postseparation support—to function almost as a stop-gap measure to provide some support to a dependent spouse prior to the discovery of the data necessary for an alimony or equitable distribution hearing. Although it is significant that postseparation support factors do not include "any other factor,"[391] the "accustomed standard of living" of the parties is, as noted earlier, but one of nine factors that a court must consider in determining the amount of an award of postseparation support.[392]

Finally, it appears that the dependency gatekeeper with postseparation support is not so fully susceptible to the type of expansion already discussed with alimony.[393] Even this more limited eligibility for dependency status will be quite sufficient for those spouses who are "actually substantially dependent upon the other spouse for his or her maintenance and support,"[394] even if the amount of support is somewhat limited—again, as alimony is not, and postseparation support should not be[395]—by the parties' accustomed standard of living. A more meticulously calculated computation of income—which even at this early stage of the proceedings—should include unearned income, plus a realistic limit on the reasonable living expenses[396] of the supporting spouse—should create a less formidable dependency hurdle even with postseparation support

388. *See supra* text accompanying note 295 (quoting N.C. GEN. STAT. § 50-16.3A(b)).

389. Indeed, § 50-16.8, setting forth the procedures in an action for postseparation support, specifically states that a court may base its award "on a verified pleading, affidavit, or other competent evidence." N.C. GEN. STAT. § 50-16.8.

390. *See supra* note 367 (quoting N.C. GEN. STAT. § 50-16.2A(b)).

391. N.C. GEN. STAT. § 50-16.3A(b)(15); *see supra* note 307 (comparing postseparation support to alimony).

392. *See supra* text accompanying notes 364-68 (discussing the diminution in importance of the previous standard of living and other factors that should ease the burden of proof of dependency).

393. *See supra* notes 109-14, 381 accompanying text (discussing dependency determinations).

394. N.C. GEN. STAT. § 50-16.1A(2); *see also supra* note 67 (discussing the difference between the two definitions of dependency).

395. *See supra* notes 372-74 and accompanying text.

396. N.C. GEN. STAT. § 50-16.2A(b) (1995).

orders.

This observation leads to two conclusions that, certainly at first blush, may seem odd: (1) there may be different standards for dependency with postseparation support and alimony; and the correlative proposition that (2) the accustomed standard of living probably furnishes somewhat more of a ceiling with postseparation support than with alimony.[397] In light of the different functions of the two means of spousal support and the detailed discovery process necessary for alimony, however, these conclusions in fact should not occasion great surprise. Considering the often times urgent need for postseparation support, moreover, time is of the essence.

Given the greater limits on postseparation support, however, the question arises as to why a nonadulterous spouse would not skip this interim step altogether and proceed to an alimony hearing.[398] The start of the answer to this question is easy indeed: assuming proof of dependency, postseparation support should be a more expedited and less complicated process. Moreover, as noted previously, a pre-equitable distribution alimony hearing would probably result in the waste of the parties' and the courts' resources, and, at a minimum, will likely require extensive discovery in many cases. The remainder of the answer, however, takes us not only back into marital fault issues but adds a new twist as well.

### *B. Fault and the Fault Flaw*

Subsection (d) of the postseparation support statute is designed solely to deal with fault issues and also clearly contemplates, if not mandates, a hearing on the issues. It states in full:

> At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support

397. As previously discussed in Part III.C, the list of alimony factors is greatly expanded under the new statute and clearly contemplates much more elaborate discovery than do the factors determining postseparation support.

398. This may always be a viable option to some degree, unless the dependent spouse had committed adultery before or on the date of separation, in which case such adultery would prove to be a bar to alimony. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995). In comparison with postseparation support, the illicit marital misconduct would be a factor a judge would consider. *See id.* § 50-16.2A(d), (e) (1995).

and in deciding the amount of postseparation support.[399]

To point out the obvious, marital misconduct (including, of course, illicit marital sexual behavior)[400] may well be relevant in the determination of whether or how much postseparation support will be awarded. The statute at least limits such misconduct to that which occurred before or at the date of separation, however, and it does not create a statutory bar to or mandate for an award of such support.[401] It is in this narrow sense only that the statute creates at least the possibility of a "no-fault" support award.[402] But this is indeed likely to be the most narrow of possibilities, due largely to the fact that the supporting spouse alone appears to have the option of whether or not to introduce fault issues.[403] The manifestly unjust reading of the statute would relegate the dependent spouse to a purely reactive position. If, for example, a supporting spouse somehow had managed to commit all nine acts of marital misconduct,[404] and thus wisely decided not to present any evidence of the other spouse's marital misconduct, would the dependent spouse in effect be muzzled?

Granted that our legislature unfortunately has decided that fault may be a consideration even in a postseparation support hearing, it nonetheless strains the imagination to understand why the discretion to play the fault cards is left in the hands of the supporting spouse only. Not only does this policy contradict the "what's good for the goose is good for the gander" rationale for the treatment of postseparation adultery with alimony,[405] but if this portion of the

399. *Id.* § 50-16.2A(d).

400. *See supra* Part III.A (discussing illicit sexual behavior).

401. The alimony statutes, as discussed previously, do create statutory bars to or mandates for awards of alimony if there is proof of illicit marital behavior. *See* N.C. GEN. STAT. § 50-16.3A(b).

402. *Compare supra* text accompanying notes 67-74 (discussing alimony and the role of fault, *with supra* note 396 (discussing the greater ease with which dependency may now be proven).

403. *See supra* text accompanying note 399 (quoting N.C. GEN. STAT. § 50-16.2A(d)); *see also infra* notes 405-10 and accompanying text (discussing Equal Protection concerns).

404. *See* N.C. GEN. STAT. § 50-16.1A(3) (stating the nine factors).

405. Section 50-16.3A states in part:

> If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)(a), during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)(a), during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.

statute is interpreted to mean what it says, then one might well raise the question of whether it would pass constitutional muster even under a rational basis test.[406] Certainly such an anomalous, disparate treatment of spouses, whether labeled dependent or supporting, husband or wife, appears nowhere else in Chapter 50.[407] An award or denial of postseparation support based on marital misconduct, the introduction of evidence as to which lies within the control of only one spouse, not only magnifies the effect of such fault of the dependent spouse in a manner totally inconsistent with the intent of the statute, it also deals with a substantial right from which appeal may lie as a matter of right.[408]

Given the substantial nature of the right involved and the drastically unequal allotment of the privilege to introduce evidence that could be the determinative factor in denying or awarding that right, it appears that this issue is ripe for constitutional challenge.[409]

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N.C. GEN. STAT. § 50-16.3A(a).

406. The modern equal protection rational basis test requires that a statute be based on "a rational means to serve a legitimate end." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442 (1985). The Court in *Cleburne* held that the "legislation ... must be rationally related to a legitimate governmental purpose." *Id.* at 446. The legitimate governmental purpose for this statute is virtually impossible to discern, unless, of course, its purpose is to protect supporting spouses' marital misbehavior from coming before the court, which would seem ludicrous.

407. The father of a child is, for example, no longer presumed to be "primarily liable" for the support of a child and the mother only secondarily liable. *See* Act of June 18, 1981, ch. 613, § 1, 1981 N.C. Sess. Laws 892, 892 (codified at N.C. GEN. STAT. § 50-13.4(b) (Supp. 1997)). And in 1994 our legislature was so acutely attuned to such unequal treatment that it even amended § 50-12(a1) to allow a husband, incident to a divorce, to change his surname to his "premarital surname." Act of June 15, 1994, ch. 565, § 1, 1993 N.C. Sess. Laws 565, 565 (codified at N.C. GEN. STAT. § 50-12(a1) (1995)).

408. *See* N.C. GEN. STAT § 50-16.3. Although the alimony pendente lite statute has been repealed, the statutory annotations remain and provide the only guidance available for analysis of postseparation support. The right to appeal from such an order has long been recognized. *See, e.g.*, Rickert v. Rickert, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972).

409. *See* U.S. CONST. amend. XIV, § 1. Indeed, an argument can be made for subjecting this statute to a heightened level of constitutional scrutiny: the procedural advantage given to the supporting spouse—who happens to be male in almost all of the divorce actions in North Carolina—presents a possible violation of the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sex.

The United States Supreme Court has created a two part test to determine if a statute is gender based:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution."

Under any equal protection analysis, it is, to say the least, difficult to conceive of any *legitimate* state purpose that could be served by such a rule. Any provision in our laws serving, first and foremost, as a powerful evidentiary weapon placed only in the hands of supporting spouses hardly serves a legitimate state purpose.[410]

It appears that the only other option in interpreting this statute would be to postulate that it merely sets the order in which a judge "shall"[411] hear evidence of marital misconduct—first that committed by the dependent spouse, (presumably an offensive tactic by the other spouse)[412] and only then that committed by the supporting spouse. Moreover, it is worth noting that the statute is silent as to who may present such evidence. Following by analogy to the new alimony act, which allows either party to move for a hearing,[413] one could at least argue that the dependent spouse might move to introduce evidence of marital fault, but that evidence of his or her fault must not be heard first.[414] Absent such an admittedly rather strained interpretation, it would appear difficult to free the statute from the conclusion that it is otherwise constitutionally frail. This attempt to avoid a constitutional challenge to the statute carries with

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Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979) (citations omitted) (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) *and* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)). While disproportionate impact alone is typically insufficient to hold a statute unconstitutional, *see* Washington v. Davis, 426 U.S. 229, 242 (1976), an exception exists where the "statute could not be plausibly explained on a neutral ground." *Feeney*, 442 U.S. at 275. Absent this exception, "[p]roof of racially discriminatory intent or purpose ... may be used to show a violation of the Equal Protection Clause." *Village of Arlington Heights*, 429 U.S. at 265. However, note that discriminatory purpose does *not* have to be the primary purpose, merely a "motivating factor in the decision." *Id.* at 266. Multiple factors should be considered when searching for discriminatory intent, including the impact of the statute (especially, a "clear pattern, unexplainable on grounds other than race"), historical background of the decision, and legislative history. *Id.* at 266-68.

Any classification that is determined to be based on gender "must bear a close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273. For example, in *Reed v. Reed*, 404 U.S. 71 (1971), the goals of expediting the judicial process and avoiding additional conflict within families did not meet the test of important governmental objectives in the gender-based appointment of administrators for intestate decedents' estates. *See id.* at 76-77.

410. *See supra* note 406.

411. N.C. GEN. STAT. § 50-16.2A(d) (1995).

412. Presentation to the court of marital misconduct on the part of a dependent spouse might also be characterized as "defensive." In any event, the purpose of such evidence would clearly be to attempt to defeat or diminish any postseparation support award.

413. *See* N.C. GEN. STAT. § 50-16.3A(a) (1995) (stating that either party "may move for alimony").

414. The dependent spouse might also introduce his or her own fault, in order to open the door to presentation of fault of the supporting spouse.

it the danger that consideration of fault might be interjected into almost every postseparation support hearing—a result clearly not intended by the framers of this act or the legislature.[415] One might speculate, therefore, that this issue may well be one of the first to reach the Supreme Court of North Carolina.[416]

### *C. Termination Events*

The termination events portion of the statute, extensively amended in 1995,[417] brings something old, and some things quite new, to the discussion of alimony and postseparation support.[418] As a general proposition, either type of support may be "modified or vacated"[419] by proof of "changed circumstances"[420] on the part of "either party."[421] An "alimony" award, it should be noted, clearly applies only to "true" alimony, so that awards labeled "alimony" that are actually part of a property division will not be subject to this modification provision in the first instance.[422] "True" alimony, however, whether in a lump sum (or for a specified period) or periodic and so long as it is part of an order or judgment,[423] will be afforded the protection of the changed circumstances standard, as will an award of postseparation support.[424]

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415. It is true, of course, that "[w]here one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question." State v. T.D.R., 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998). On the other hand, the holding of the Supreme Court of the United States in *Orr v. Orr*, 440 U.S. 268 (1979), declaring unconstitutional an Alabama statute that allowed alimony only for wives, creates a parallel that is analytically hard to resist.

416. Apparently, no other state has imposed an almost wholly gender-based evidentiary standard. *See* CLARK, *supra* note 2, at §§ 16.2-.4, at 622-55; OLDHAM, *supra* note 198, § 13.04, at 13-39 to -46.

417. *See* Act of June 21, 1995, ch. 319, § 7, 1995 N.C. Sess. Laws 641, 647 (codified at N.C. GEN. STAT. § 50-16.9 (1995)).

418. *See* N.C. GEN. STAT. § 50-16.9. The section clearly applies equally to both types of awards.

419. *Id.* § 50-16.9(a).

420. *Id.* The standard has not been effected by other changes in the new alimony laws, but application of the standard must necessarily be modified by the repeal of § 50-16.5, *see* Act of June 21, 1995, ch. 319, § 1, 1995 N.C. Sess. Laws 641, 641 (repealing alimony pendente lite and accompanying factors), and by the recently adopted factors to be considered in awarding or denying alimony under § 50-16.9(a). *See* N.C. GEN. STAT. § 50-16.9.

421. N.C. GEN. STAT. § 50-16.3A (1995).

422. *See supra* text accompanying notes 173-78 (discussing integration),

423. *See* Marks v. Marks, 316 N.C. 447, 451, 342 S.E.2d 859, 862 (1986); *see also supra* Part II.C.1 (discussing integration and "true" alimony principles).

424. Section 50-16.9(a) states that "[a]n order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or

Because this standard of proof is already so well-established in the case law,[425] the types of changes in circumstances that will suffice are beyond the scope of this Article. It should be carefully noted, however, that use of the same standard does not imply that application of the changed circumstances standard will continue to be applied in the same manner. Indeed, quite the contrary is true, in view of the fact that both the amount and duration of alimony and postseparation support awards are now controlled by significantly different statutory factors.[426] Notably, the consideration of so many non-economic factors,[427] in addition to many more economic factors,[428] is likely to result in awards considerably less vulnerable to modification or termination under this changed circumstances standard.

In addition to the familiar changed circumstances standard, there are five other instances in which alimony or postseparation support may be terminated. The first two of these termination events, death of either the payor or the payee, are unchanged from previous law.[429] The third event, resumption of marital relations prior to a divorce,[430] is defined under § 52-10.2 as the "voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances."[431] The scant case law established under this still relatively new statute thus far indicates that courts are interpreting the totality of the circumstances standard, very sensibly, on a case-by-

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vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. GEN. STAT. § 50-16.9(a).

425. *But see supra* text accompanying note 402 (raising the caveat that the recent amendments have altered the standard).

426. *Compare* N.C. GEN. STAT. § 50-16.3A(b) (1995) (alimony), *with id.* § 50-16.2A(b) (postseparation support).

427. *See id.* § 50-16.3A(b). Prominent among the new factors are the duration of the marriage, the contribution of one spouse as a homemaker, and the existence of retirement, insurance, and medical benefits. *See supra* Part III.C.

428. For examples of the courts' previously rather narrow focus on largely economic factors, see *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985), and *Roberts v. Roberts*, 38 N.C. App. 295, 302-03, 248 S.E.2d 85, 89 (1978), determining changed circumstances existed when wife was no longer able to provide adequate standard of living for herself and child.

429. *See* N.C. GEN. STAT. § 50-16.9(b). Indeed, payment must cease upon the death of the payor in order for the amounts paid as alimony to qualify for the tax deduction from the payor's income. And payments that continue beyond the death of the payee are a classic indicator of an integrated agreement. *See supra* notes 148-49 and accompanying text.

430. *See* N.C. GEN. STAT. § 50-16.9(a).

431. N.C. GEN. STAT. § 52-10.2 (1991). The statute continues that "[i]solated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." *Id.*

case basis.[432] Remarriage of the dependent spouse is the fourth terminating event. Normally there are few disputes as to what constitutes a remarriage,[433] but cohabitation, the remaining termination event, warrants further consideration.

*D. Cohabitation*

The fifth terminating event introduces an entirely new concept and is likely to bring such complexity into North Carolina jurisprudence that it deserves separate treatment from the other termination events. Under the new statutes, spousal support will now terminate in the event that the receiving spouse "engages in cohabitation."[434] To suggest that the legislature has opened a Pandora's box of remarkable and unfortunate proportions is to state the matter mildly.[435] Even more unfortunately, the statute further

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432. In *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997), the court applied the "totality of circumstances" standard and explained that the standard " 'focuses on all the circumstances of a particular case, rather than any one factor.' " *Id.* at 750, 474 S.E.2d at 806 (quoting BLACK'S LAW DICTIONARY 1490 (6th ed. 1990)). The court held that no resumption of marital relations existed when plaintiff maintained her separate residence and never "moved" back into the home, the time period claimed by defendant to have established cohabitation was less than a week, there was no evidence that they resumed sharing of household responsibilities or that they held themselves out as husband and wife, both parties continued to abide by the separation agreement terms, and defendant stated that he wished plaintiff to leave because "he wanted to be with his girlfriend." *Id.* at 750-51, 474 S.E.2d at 806-07 (internal quotation marks omitted); *see also* Schultz v. Schultz, 107 N.C. App. 366, 373, 420 S.E.2d 186, 190 (1992) (holding marital relations were resumed, based on evidence that, among other things, defendant lived continuously at marital residence, moved his belongings, car, and animals there, paid joint bills, and mowed the lawn, while plaintiff did defendant's laundry, dined at restaurants and shopped with him, filed joint tax return with him, and engaged in sexual relations with him weekly for at least two to three months).

433. *But see* Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987) (holding that a bigamous "marriage," subsequently annulled, did amount to a remarriage for purposes of this statute and that the wife's previous alimony award should be terminated); Fungaroli v. Fungaroli, 53 N.C. App. 270, 280 S.E.2d 787 (1981) (same). Again, an "alimony" agreement that states that payment of alimony to the wife will continue even in the event of her remarriage is a hallmark of an integrated agreement.

434. N.C. GEN. STAT. § 50-16.9(b) (1995).

435. At least 12 other states deal with the cohabitation issue by statute. *See* ALA. CODE § 30-2-55 (1989); CAL. FAM. CODE § 4323(a)(1) (West 1994); CONN. GEN. STAT. ANN. § 46b-86(b) (West Supp. 1997); DEL. CODE ANN. tit. 13, § 1512(g) (1993); GA. CODE ANN. § 19-6-19(b) (Supp. 1994); 750 ILL. COMP. STAT. ANN. § 5/510(c) (Supp. 1998); LA. CIV. CODE ANN. Art. 115 (West 1998); N.Y. DOM. REL. LAW § 248 (McKinney 1986); OKLA. STAT. ANN. tit. 43, § 134(C) (West Supp. 1998); PA. CONS. STAT. ANN. § 3706 (West Supp. 1991); TENN. CODE ANN. § 36-5-101 (a)(3) (Supp. 1997); UTAH CODE ANN. § 30-3-5(a) (Supp. 1997). These statutes vary greatly in their content, standard of proof, and definition of cohabitation. North Carolina's statute, however, would appear to be the most complex, and confusing, of all.

provides that cohabitation, in the termination of support context, means "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship even if this relationship is not solemnized by marriage, or a private homosexual relationship," and evidence of cohabitation includes "the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations."[436]

Although legislative intent with regard to this cohabitation provision is clear, and certainly not to be regarded lightly,[437] one cannot help but wish that the rulemakers had not defined cohabitation with such pains, or indeed, had not defined it at all. Under previous case law, a dependent spouse's cohabitation with another was deemed simply to constitute a changed circumstance that might, or might not, be sufficient to modify or terminate alimony.[438] This position, adopted by a large majority of states, looks to any actual change of circumstances stemming from the cohabitation,[439]

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436. N.C. GEN. STAT. § 50-16.9(b).

437. Indeed, this section might be a reflection of the more generous standards for awarding alimony, in terms of both duration and amount, of the new acts and the concomitant intent that it be more easily terminable. It is more likely, however, that the new section partakes of a punitive quality, in view of how broadly it defines cohabitation.

438. *See* Britt v. Britt, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980); Stallings v. Stallings, 36 N.C. App. 643, 644, 244 S.E.2d 494, 495 (1978). Because such "cohabitation" clauses have long been a part of many settlements, or the subject of statutes in many states, courts in other states have frequently dealt with this issue, whether or not those states had a statutory termination, or definitional, section. Needless to say, the results in the majority of those cases are extremely fact-specific. *See* CLARK, *supra* note 2, § 16.5, at 666 n.9.

439. *See* CLARK, *supra* note 2, § 16.5, at 666 n.9. For an example of a state statute which specifies the necessity of a change in circumstances before living together can justify a modification of alimony, see § 46b-86(b) of the Connecticut Code, which allows the court to

> suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony *because the living arrangements cause such a change of circumstances* as to alter the financial needs of that party.

CONN. GEN. STAT. ANN. § 46b-86(b) (1995) (emphasis added). The case law in several other states supports this position. *See* Van Dyke v. Steinle, 902 P.2d 1372, 1378 (Ariz. Ct. App. 1995) (explaining that cohabitation is not, in itself, a sufficient basis for terminating or reducing maintenance, and that "only evidence relating to the economic nature of the cohabitation would be relevant to show that wife's support needs have changed since the decree"); *In re* Marriage of Dwyer, 825 P.2d 1018, 1019-20 (Colo. Ct. App. 1991) (stating that because unmarried cohabitants do not assume the reciprocal obligations of marriage, cohabitation in and of itself is not a sufficient ground to suspend, reduce, or terminate maintenance); Dibartolomeo v. Dibartolomeo, 679 So. 2d 72, 73 (Fla. Dist. Ct. App. 1996) ("Because it does not entail the same benefits, duties and rights

and thus largely avoids the issue of what does or does not constitute "cohabitation."[440] Under the new North Carolina statutes, the number of issues that are raised, simply by virtue of the definition of cohabitation, defy a truly thorough analysis.[441]

Other states have experienced less than satisfactory outcomes when dealing with this issue, whether or not the cohabitation/termination issue arose via statute or through a separation agreement between the parties.[442] Several states whose statutes failed[443]—as does ours—to exclude close blood relatives from the class of persons who may trigger cohabitation have found themselves in something of a quandary. If, for example, a dependent ex-spouse moved in with her brother and assumed the "normal" duties of a housekeeper, and he likewise assumed traditional "men's work," the lifestyle arrangement appears technically to be a true fit with the statute—a result that it is difficult to believe the legislature either intended or contemplated.[444]

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as a traditional marriage, cohabitation alone cannot precipitate a termination of alimony without the factual finding of a change in circumstances concerning the former spouse's needs and finances.").

440. *See supra* text accompanying notes 425-28.

441. *See* N.C. GEN. STAT. § 50-16.9(b) (1995) (defining cohabitation); *supra* text accompanying notes 434-35.

442. See *Gordon v. Gordon*, 675 A.2d 540 (Md. 1966), for a well-reasoned opinion in which the court dealt with a termination clause in a separation agreement, which was triggered in the event that the wife lived with an unrelated man for more than 60 days. *See id.* at 541. The court determined that the husband had failed to prove that cohabitation as intended by the parties did exist, but it enumerated certain factors that should be considered—among them, joint contribution to household expenses and community recognition of the relationship. *See id.* at 547-48. Such factors—unlike those that "evidence" cohabitation under § 50-16.9(b) of the North Carolina General Statutes—would have been immensely useful had they been included in this state's statute. Applying New York's statute, which requires a "holding out" as husband and wife in order to establish cohabitation, in *Bliss v. Bliss*, 487 N.Y.S.2d 26 (App. Div.), *rev'd*, 488 N.E.2d 90 (N.Y. 1985), the appellate division held that a husband was entitled to termination of his alimony payments when his former wife and her lover, each of whom kept separate homes, otherwise took on all the accouterments of marriage, and the wife lived with him the majority of the time and shared a family life with him, although she did not take on his last name. *See id.* at 28-29. But the New York Court of Appeals reversed, stating that there was no "holding out," and thus ruled that the support obligation could not be modified. *See Bliss*, 488 N.E.2d at 93; *see also* CLARK, *supra* note 2, § 17.6, at 287 n.4 (citing several Illinois cases for the statement that "cohabitation was held to have occurred 'on a conjugal basis' when the ex-wife lived with an impotent man, the court saying that the term 'conjugal' does not necessarily require evidence of sexual conduct").

443. Pennsylvania's cohabitation statute applies to persons of the opposite sex but excludes family members. *See* 23 PA. CONS. STAT. ANN. § 3706 (West 1991).

444. Most of the statutory provisions in other states refer to living with a party "of the opposite sex" in a "marriage-like" relationship—a redundancy of sorts, in view of the fact that homosexuals may not validly marry. *See* CLARK, *supra* note 2, § 16.5, at 667; *see also*

Nor is it facetious to question whether the statute might also give rise to a finding of cohabitation with mere roommates, a situation not at all uncommon for older dependent spouses and for those whose alimony awards were insufficient in the first instance. In particular, because our statute clearly is designed to include homosexual couples[445] via its reference to "two adults,"[446] it appears that it may be entirely overinclusive, not to mention punitive in intent.[447] Moreover, if alimony is intended to compensate a dependent spouse, after taking into consideration all fifteen of the listed factors, it is difficult to understand why such an award should be terminable without any proof of changed circumstances, which may or may not exist in a cohabitation context. Furthermore, to presuppose that two people of either sex live together without marriage, and possibly without sexual relations as well,[448] solely to avoid termination of alimony is patently ridiculous.

Similarly, one might ask if the termination provision is applicable only in situations in which there are only *two* roommates.

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N.Y. DOM. REL. LAW § 248 (McKinney 1986) ("proof that the wife is habitually living with another man and holding herself out as his wife"); OKLA. STAT. ANN. tit. 12 § 1289D (West 1988) ("voluntary cohabitation of a former spouse with a member of the opposite sex").

445. *See* N.C. GEN. STAT. § 50-16.9(b) (1995) (referring to a "private homosexual relationship").

446. *Id.* Whether or not these two adults might include siblings or a parent and an adult child depends on whether the statute is interpreted to require that the parties have sex.

447. Indeed, the entire termination provision, because it looks to post-divorce events without regard to whether or not any change in economic circumstances has occurred, appears to be quite punitive in intent and quite at odds with the more generous nature of the remainder of the new statutes. Tennessee has perhaps the best of both worlds, in that cohabitation raises a rebuttable presumption that cohabitation has affected the economic needs of a party. *See* TENN. CODE ANN. § 36-5-101(a)(3) (Supp. 1997).

448. Two people who live together in a "marriage-like" relationship are clearly included within the statute. Because cohabitation is "evidenced by" entry into a marriage-like relationship that "include[s] but [is] not necessarily dependent upon, sexual relations," it is somewhat difficult to determine if sexual relations are a necessary element in cohabitation. It would appear that the use of the word "include" would require an affirmative answer to this question. If this proves to be the case, then it is difficult to determine legislative intent with regard to the "not necessarily dependent upon" language. Indeed, unlike the quite specific definition of "illegal sexual conduct" in § 50-16.2A, what constitutes "sexual relations" is itself rather vague. *See* N.C. GEN. STAT. § 50-16.9(b). By far, the majority of states require that the recipient spouse cohabit with a person of the opposite sex. *See, e.g., supra* note 444 (citing examples); *see also* ALA. CODE § 30-2-55 (1984) (requiring the recipient spouse to be "living openly or cohabiting with a member of the opposite sex"). Alabama also requires proof of some permanency in the relationship, certainly an improvement over North Carolina's more vague "habitually and continually" standard. *See* Kennedy v. Kennedy, 598 So. 2d 985, 986 (Ala. Civ. App. 1992).

If two adults who are sexually involved with one another share a home with a third adult and are thereby excluded from the scope of the statute, then legislative intent is clearly being undermined.[449] To extend further this analysis from the sublime to the ridiculous: would a dependent spouse receiving alimony be forced to deny the request of an adult child to move back into the home, on peril of loss of spousal support?

There are, in addition, several other difficulties with this section of the statute, at both an analytical and often a practical level. One might well ponder, for example, how two adults living together, and falling within the other statutory requirements, could *have* a "private homosexual relationship" or a "private heterosexual relationship" and yet not have sexual relations with one another.[450] To characterize a relationship as either homosexual or heterosexual without regard to the existence of sexual relations rather strains the imagination and drastically limits the scope of the statutes.

Three other portions of this lamentable statute also deserve attention. How courts will define "dwelling together continuously and habitually"[451] is analogous to the question, "how long is a rope?"[452] A number of states that have statutory provisions on cohabitation at least include some kind of temporal requirement.[453]

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449. There are numerous reasons to avoid remarriage—paramount among them being the desire to protect one's estate for her children, loss of social security benefits, desire for companionship, etc.

450. Georgia requires the cohabitation of a "former spouse with a third party in a meretricious relationship," GA. CODE ANN. § 19-6-19(b) (Supp. 1997), as a ground for modification of alimony but does not require automatic termination of a spousal support award. Oklahoma makes cohabitation a grounds for a showing of changed circumstances and defines it as "the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship." OKLA. STAT. ANN. tit. 12, § 1289D (West 1988). Clearly, large portions of this definition were incorporated into the North Carolina statute. *See supra* text accompanying note 436 (quoting N.C. GEN. STAT. § 50-16.9(b) (1995)).

451. N.C. GEN. STAT. § 50-16.9(b).

452. The expression is indeed colloquial, but refers in general to issues that are not susceptible to a precise definition. By analogy, the "best interest of the child" is standard easy to state, but impossible to define in a manner that provides an "answer."

453. Virginia states its temporal requirement as follows:

> Upon order of the court based upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more commencing on or after July 1, 1997, the court may decrease or terminate spousal support and maintenance unless (i) otherwise provided by stipulation or contract or (ii) the spouse receiving support proves by a preponderance of the evidence that termination of such support would constitute a manifest injustice.

VA. CODE ANN. § 20-109(A) (Michie 1997). California formerly allowed revocation of a support order if the recipient spouse was "living with a person of the opposite sex and

In the absence of such a guideline, it possibly would behoove the courts of the state to proceed with great caution on this issue. Some type of common-sense requirement as to the length of cohabitation would also aid greatly in determining what is "continuously and habitually."[454] The use of these two terms conjunctively is otherwise the only statutory guide to what "dwelling together" may mean.[455] The often overlooked distinction between "continuously" and "continually" must be borne in mind as well.[456] The use of the former term would appear to strengthen greatly the proposition that a considerable period of time should be required before a finding that cohabitation has occurred.

Ambiguity follows upon ambiguity, moreover, when one turns from the definition of cohabitation to the evidence that is indicative of, and apparently required by the statute,[457] to show cohabitation—"the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people."[458] The

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holding himself or herself out as the spouse of the person for a total of 30 days or more, either consecutive or nonconsecutive, although not married to the person," CAL. CIV. CODE § 4801.5 (1974) (repealed 1992); *see also In re* Marriage of Ludwig, 130 Cal. Rptr. 234 (Ct. App. 1976) (applying 1974 version of the statute). It has been asserted that in order for the payor to rely on cases in which cohabitation was found to decrease or end the recipient's need for financial support, usually on the ground that the third-party cohabitant contributed to the recipient's support, "the payer should be required to show that the recipient occupied living quarters with the cohabitant *over a substantial period of time* up to the date of the petition for modification." CLARK, *supra* note 2, § 17.6, at 288 (emphasis added) (citing Brister v. Brister, 594 P.2d 1167, 1171 (N.M. 1979); *In re* Marriage of Vann, 544 P.2d 175, 176-77 (Or. Ct. App. 1976)).

454. N.C. GEN. STAT. § 50-16.9(b). A parallel might well be drawn from the cases dealing with reconciliation, *see supra* note 432, at least insofar as the behavior of the parties is concerned. Reconciliation, however, is a return to a former condition with which both parties are presumably quite familiar. Cohabitation, on the other hand, is entry into a new relationship with which both parties are relatively unfamiliar. It appears sensible, therefore, to find that a reconciliation has occurred after a considerably lesser period of time than should be required to find that cohabiting partners have in fact established the type of relationship usually manifested by married people.

455. Many states have terminated alimony even when the parties maintain separate residences. *See supra* note 442 (discussing cases).

456. One dictionary defines "continuous" as "1a: characterized by uninterrupted extension in space: stretching on without break or interruption ... b: characterized by uninterrupted extension in time or sequence: continuing without intermission or recurring regularly after minute interruptions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 493-94 (1993). "Continually," on the other hand, may be "in regular or repeated succession: very often." *Id.* at 493. "Habitually" is even more loosely defined as "1: by habit: customarily: unthinkingly. 2: consistently, persistently, repeatedly, usually." *Id.* at 1017.

457. *See* N.C. GEN. STAT. § 50-16.9(b).

458. *See* N.C. GEN. STAT. § 50-16.9(b). The language here is, in some respects, quite similar to that in Pennsylvania, 23 PA. CONS. STAT. ANN. § 3706 (1995), which has been

statutes of other states are replete with references to more definitive indicia of such a relationship.[459]

The first, and by any measure foremost, flaw in this portion of the statute is that there are *no rights or duties* whatsoever that flow between cohabitants. The parties may, by contract, attempt to settle their rights between themselves, but only so long as such a contract is not founded upon "illegal consideration."[460] Thus, cohabitants who are involved in a sexual relationship may be denied even the relief that contract law might afford. Parties may, of course, share a bank account, obtain credit cards in their joint names, sign or co-sign a lease, take out or guarantee loans together—but they certainly need not be cohabitants to do so. In short, any two persons may voluntarily undertake responsibilities vis-a-vis the other, but the law imposes utterly no other rights or duties between them, or between cohabitants. Equitable relief, such as a constructive or resulting trust, is equally available between two parties, regardless of their status as cohabitants.[461] The same is true with "obligations," whatever they may be. In brief, because cohabitants may easily refrain from creating any responsibilities or rights between themselves, and because neither statutory nor common law imposes any rights, duties, or obligations between them, this portion of the statute may, as a practical matter, be of little or no value in "evidencing" cohabitation sufficient to terminate support awards.

Finally, the last part of § 50-16.9—albeit unchanged from previous law[462]—warrants attention. In essence, it grants courts of this state, so long as personal jurisdiction over both parties exists, the power to modify a support decree from another state to the extent the issuing state could have done so.[463] In fact, this portion of the

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interpreted as follows: Cohabitation serves to bar alimony if "two persons of the opposite sex reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship," and a party may prove cohabitation by "evidence of financial, social, and sexual interdependence, by a sharing of the same residence, and by other means. An occasional sexual liaison does not constitute cohabitation." Miller v. Miller, 508 A.2d 550, 554 (Pa. Super. Ct. 1986).

459. *See* CLARK, *supra* note 2, § 16.5, at 665-67.

460. *See, e.g.*, Suggs v. Norris, 88 N.C. App. 539, 364 S.E.2d 159 (1988). The parties in this case were non-married cohabitants, but the court of appeals determined that the female partner who had been the sole worker in the business the two had shared, was entitled to a quantum meruit recovery, so long as none of her services could be characterized as "sexual" in nature. *See id.* at 542-42, 364 S.E.2d at 162. Otherwise, the implied-in-law contract would have been invalidated by "illegal consideration." *Id.* at 541, 364 S.E.2d at 161.

461. *See id.* at 543, 364 S.E.2d at 162.

462. *See* N.C. GEN. STAT. § 50-16.9 (1987) (amended 1995).

463. Section § 50-16.9 states:

statute is in direct conflict with the federally mandated Uniform Interstate Family Support Act,[464] effective in North Carolina since January 1, 1995.[465] Under that Act, the only state that may modify a spousal support award, regardless of where either or both parties live, is the rendering state.[466] Thus, any attempt by any court in North Carolina to modify a spousal support award from another state would thus be unenforceable in this, or any other, state.

In conclusion, the "termination upon cohabitation" provisions of § 50-16.9(b) are virtually without redeeming function. In an attempt to ensure that dependent ex-spouses, including homosexual ex-spouses, do not try to "have their cake and eat it too," the legislature has created a Hydra-like statute that is misguided, ambiguous, overinclusive, punitive, possibly void for vagueness, and that has effectively thrown out the baby—proof of changed economic circumstances—with the bathwater. The change of circumstances standard, focusing on the economic contributions of one cohabitant and the ensuing decreased need of the other, is a considerably more sensible and easy to follow standard.

## V. EQUITABLE DISTRIBUTION AMENDMENTS

### *A. Introduction*

The 1997 amendments to the Equitable Distribution Act are indisputably the most significant changes to that Act since it was first passed in 1981.[467] Despite this fact, the discussion of these changes in property division will be considerably more truncated than the above alimony and postseparation analyses. There are several factors that account for this difference, but above all the property division amendments are the direct and extremely well-analyzed product of almost two decades of extensive and often very frustrating experience

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> When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.

N.C. GEN. STAT. § 50-16.9(c).

464. 42 U.S.C.A. § 666(f) (1997) ("on or after January 1, 1998, each State must have in effect the Uniform Interstate Family Support Act").

465. *See* N.C. GEN. STAT. § 52C (1995).

466. *See id.* § 52C-2-205.

467. *See* Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Sess. Laws 1184, 1184-86 (codified as amended at N.C. GEN. STAT. §§ 50-20, -21 (Supp. 1997)).

with the Equitable Distribution Act.[468] The experiences, at both the trial and appellate levels, over this period of time made the more serious defects—of omission and commission—blatantly obvious. Knowledge of the flaws in the legislation carried with it, at least in this instance, considerable knowledge not only of how to "fix" the law, but many of the consequences of doing so as well. Thus, these amendments are more directed, corrective of well-known flaws,[469] and less experimental than most of the new alimony laws. They nonetheless pose analytical, practical, and mechanical new issues, and exciting new possibilities for the state.

In addition, the equitable distribution amendments were only signed into law in the summer of 1997 and did not become effective until October 1, 1997.[470] Given the novelty of the new amendments, and the slow pace at which cases move through the court system,[471] it has been both more difficult, and less pressing, to attempt to explore the full ramifications of the property division changes in the manner in which the new alimony statutes were analyzed. Moreover, as previously noted, knowledge of what the problems *were* goes far towards analysis of the corrections.[472] Finally, of course, the issues and implications of portions of the new alimony statutes on equitable distribution have already been discussed at length.[473]

### *B. The Amendments*

#### 1. Pension Benefits

One of the more obvious deficiencies in the previous equitable distribution law—and one that no degree of judicial or scholarly legerdemain could obviate or alleviate[474]—was the statutory mandate that only *vested* pensions were subject to distribution as marital property.[475] The rationale for this almost defiantly unfair exclusion of

468. *See supra* notes 3-4; *see also* Sharp, *supra* note 2 (providing an initial analysis of the act).

469. *But see infra* Part V.B.2 (discussing several lingering problems under the date of separation rule).

470. *See* Act of July 16, 1997, ch. 212, § 3, 1997 N.C. Adv. Legis. Serv. 206, 207-08 (codified at N.C. GEN. STAT. § 50-20 (Supp. 1997)); Act of June 19, 1997, ch. 212, § 6, 1997 N.C. Adv. Legis. Serv. 206, 210 (codified at N.C. GEN. STAT. §§ 50-20, -20.1 (Supp. 1997)).

471. *See supra* note 53 (citing examples).

472. A forthcoming article will attempt to provide such close analysis.

473. *See supra* Part III.B.3.

474. ERISA, 29 U.S.C. §§ 1001-1461 (1994), limits vesting in most instances to ten years or less. *See id.* § 1053; *see supra* note 4 (discussing vesting).

475. Section 50-20(b)(1) of the North Carolina General Statutes could not be clearer:

nonvested pensions rights accumulated during the marriage was never clear.[476] Employee contributions to any type of pension plan,[477] as virtually all commentators[478] and all states[479] have recognized, are no less a divisible product of the marital community than a savings account—or than vested pensions. In particular, however, the vesting requirement had a much greater potential for harm in North Carolina than in most other states, owing to the large number of members of the armed forces stationed in this state[480] and to the fact that military pensions were interpreted in North Carolina to mean that a serviceperson must complete twenty years of service for vesting to occur.[481]

In the summer of 1997, however, the legislature at long last took the necessary steps to correct the meaningless distinction (at least in this context) between vested and nonvested pensions as marital property—a position apparently already taken by all but three

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"The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property." N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1997). Under § 50-20(c)(5), such expectations of nonvested deferred compensation rights are merely one of 12 factors that a court could consider, after determining that an equal distribution would not be equitable, in determining what would constitute an "equitable" distribution. *See id.* § 50-20(c).

476. The original version of the statute, however, excluded all pension and other forms of deferred compensation benefits as well. *See* N.C. GEN. STAT. § 50-20(b)(1) (1981) (amended 1997). The inclusion of vested pensions and other such benefits was the first amendment to the statute—an indication of a recognition of the same kind of inequity that inclusion of unvested pensions only repeats. *See* Act of July 14, 1983, ch. 758, §§ 1, 2, 1983 N.C. Sess. Laws 787, 787 (codified as amended at N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1997)).

477. This includes both defined benefit and defined contribution plans.

478. *See, e.g.*, CLARK, *supra* note 2, § 15.6, at 613-14 (explaining that both contributory and non-contributory pensions "realistically represent deferred compensation to the earning spouse and therefore should be available for division on divorce," and that "the non-vested pension is an intangible asset of value, in some cases the only valuable asset of the marriage, which properly should be divisible on divorce"); Grace Ganz Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement Analysis*, 33 UCLA L. REV. 1250, 1290-94 (1986) (making the point that pension benefits are sui generis wage replacements); Sarah G. Ramsay, *1994-95 Survey of New York Law, Family Law*, 46 SYRACUSE L. REV. 661, 667 (1995) (noting that nonvested pensions are a form of deferred compensation, and uncertainties in value or vesting need not deter division as marital property).

479. *See infra* note 482 (citing examples).

480. All military personnel stationed in North Carolina for the requisite six month period are deemed to have met the residency requirement. *See* N.C. GEN. STAT. § 50-18 (1995); *see also* George v. George, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994) (holding that 17-year armed forces veteran had no "vested" pension benefits).

481. *See* 3 WILLIAM M. TROYAN ET AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 46.32 (1985).

states.[482] Not only have the definitions of separate[483] and marital[484] property been amended to deal with nonvested pensions, but the expectation of nonvested pension benefits has been eliminated as a factor in determining what is an "equitable" distribution.[485] Additionally, an entirely new section, § 50-20.1, has been added to the equitable distribution statute describing the manner in which payments reflecting the division of nonvested pensions may be made.[486] Section 50-20.1(b) reads:

> The award of nonvested pension, retirement, or other deferred compensation benefits may be made payable:
>
> (1) As a lump sum by agreement;

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482. Only Arkansas, Indiana, and Ohio still differentiate between vested and nonvested pensions in the division of marital property. *See* Burns v. Burns, 847 S.W.2d 23, 25-26 (Ark. 1993) (holding that nonvested military retirement benefits are not property to be divided at dissolution, and explaining that such benefits "lack the following characteristics of property: cash surrender value, loan value, redemption value, lump sum value, and a value realizable after death"); Kirkman v. Kirkman, 555 N.E.2d 1293, 1294 (Ind. 1990) (holding that because husband's "right to pension benefits was neither vested nor had it become 'not forfeited upon termination' prior to the entry of the dissolution decree," the pension was properly excluded from property division (quoting *In re* Marriage of Adams, 535 N.E.2d 124, 126 (Ind. 1989))); Skinner v. Skinner, 644 N.E.2d 141, 146 (Ind. Ct. App. 1994) (holding that when husband's pension was only 20% vested at the time of dissolution, and when, under § 31-1-11.5-2 of the Indiana Code, he had no present right to withdraw the unvested portion, no right to receive the unvested portion which was not forfeited upon employment termination, no present right to receive the unvested portion payable after dissolution, and the unvested portion was not disposable retired or retainer income, the unvested portion was not "property" to be included in the marital estate); King v. King, 605 N.E.2d 970, 974-75 (Ohio Ct. App. 1992) (classifying vested pension plans accumulated during marriage as marital assets that must be considered with other factors in dividing marital assets and liabilities, but concluding that it was trial court error to reserve jurisdiction to divide unvested pension benefits that may or may not be available in nine years). For a contrary classification of the status of nonvested pension rights, in accordance with the vast majority of states, see *Kendrick v. Kendrick*, 902 S.W.2d 918 (Tenn. Ct. App. 1994). In *Kendrick*, the court of appeals acknowledged the supreme court's recognition of "the trend in other jurisdictions toward treating nonvested pension rights as marital property," and concluded that although § 36-4-121(b)(1)(B) of the Tennessee Code specifically includes vested, but not nonvested, pension rights in the definition of marital property, the legislative intent was not to exclude nonvested pension rights. *Id.* at 923-24. The court thus held that nonvested pension rights accruing during marriage are marital property subject to equitable distribution. *See id.* at 924.

483. Section 50-20(b)(2) has been amended to omit any reference to nonvested pensions as separate property. *See* Act of June 19, 1997, ch. 212, § 3, 1997 N.C. Adv. Legis. Serv. 206, 207-08 (codified at N.C. GEN. STAT. § 50-20 (Supp. 1997)).

484. Similarly, § 50-20(b)(1) has been amended to include "vested and nonvested" pensions as part of marital property. *See* Act of June 19, 1997, ch. 212, § 2, 1997 N.C. Adv. Legis. Serv. 206, 207 (codified at N.C. GEN. STAT. § 50-20 (Supp. 1997)).

485. *See supra* note 295.

486. Section § 50-20.1 is now devoted solely to division of pension benefits. *See* N.C. GEN. STAT. § 50-20.1 (Supp. 1997).

(2) Over a period of time in fixed amounts by agreement; or

(3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.[487]

With one exception, the treatment of nonvested pensions is now identical to that of vested pensions. Vested pension benefits may be divided by a fourth option not available (except, presumably by agreement of the parties[488]) with nonvested pensions. Regarding only vested benefits, § 50-20.1(a)(4) provides, for the award of "a larger portion of other assets to the party not receiving the benefits and a smaller share of assets to the party entitled to receive the benefits."[489] The exclusion of this option with nonvested pension and other deferred benefits may reflect an assumption that parties who have been married for a time period insufficient for such benefits to vest may not have sufficient assets to offset a current payout—and the even more important contingency that vesting might not occur at all. Such a contingency, however, should have already been factored into the valuation process in the first instance.[490] It should be emphasized that it is the rendering court that loses this payout option, not the parties, who are at liberty to agree otherwise.[491] The remainder of § 50-20.1 is almost identical to the now-repealed provisions of § 50-20(b)(3),[492] which has been removed from the old statute and placed

487. N.C. GEN. STAT. § 50-20.1(b). Subsection (3) is an excellent example of the "share the risk" approach that may also be used with other deferred compensation benefits, *see infra* Part V.C.3 of this Article. The significance of the further applicability of this statutory authorization should not be overlooked.

488. It has long been recognized that parties may by settlement agreement bind themselves to obligations that a court could not order but could enforce. Provisions to provide for the college education of children are probably the classic example. *See, e.g.*, Sharpe v. Nobles, 127 N.C. App. 705, 710, 493 S.E.2d 288, 291 (1997) (upholding trial court's enforcement of provision in separation agreement, incorporated into divorce decree, requiring father to invest $50 per month for child's college education).

489. N.C. GEN. STAT. 50-20.1(a)(4).

490. *See* Seifert v. Seifert, 319 N.C. 367, 369-70, 354 S.E.2d 506, 508-09 (1987).

491. *See supra* note 488 and accompanying text. The two options specifically made available to the parties by agreement—payout as a lump sum or over a period of time in fixed amounts—do not appear to foreclose any other agreement between the parties.

492. The opening sentence in § 50-20(b)(3) has not been repealed. It reads: " 'Distributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code." N.C. GEN. STAT. § 50-20(b)(3) (Supp. 1997). The inclusion of this definition of distributive awards as the opening paragraph of

in the new one.

In conclusion, the categorization of unvested pension rights is a much welcomed, albeit somewhat overdue, development in the law of equitable distribution in North Carolina. It is a development, moreover, that should occasion few to no difficulties in analysis, implementation, or interpretation. Valuation problems should be, if anything, even less complicated than those which are already present with vested pensions, for which an abundance of case law guidance is already available.[493] In particular, the "share the risk" (of never vesting) coupled with the new presumption of in-kind awards, is a relatively small risk, and may prove to be the easiest and most attractive option for many couples.[494] The same, most emphatically, cannot be said with regard to the other, equally corrective, revisions to the law of equitable distribution.

### 2. Date of Separation and Its Progeny

The term "divisible property" may leave most experts in this field rather understandably bewildered, insofar as the concept appears to exist as a third category of property in no other state.[495] For years, moreover, it was clear that only property defined as "separate" or "marital" need be identified and thus valued by courts and parties, although only the latter was divisible.[496] Introduction or

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the long remainder of that section (dealing only with pension distribution laws), now repealed but also incorporated into the new § 50-20.1, had long seemed inappropriately placed. *See* N.C. GEN. STAT. § 50-20.1 (Supp. 1997).

493. *See* Sharp, *supra* note 2, at 210-17.

494. *See infra* notes 525-33 (discussing this option).

495. Equitable distribution states may occasionally invade separate property at the time of divorce, but only in extraordinary circumstances. *See* Sharp, *supra* note 10, at 249 nn.8-10. It should be pointed out, however, that the term "divisible property" is used in several states as synonymous with what North Carolina calls marital property. *See, e.g.*, Grigsby v. Grigsby, 620 So. 2d 35, 36 (Ala. Civ. App. 1993) (rejecting wife's claim that a retirement plan "should be divisible as marital property" by concluding that the trial court's failure to treat the plan "as divisible property" was not error); *In re* Marriage of Conger, 492 N.W.2d 715, 716 (Iowa Ct. App. 1992) (explaining that "pension benefits are treated as marital property in Iowa" and holding that the benefits at issue "are like a private pension plan and, as such, are divisible property"); *In re* Marriage of Murphy, 862 P.2d 1143, 1145 (Mont. 1993) (explaining that specific military disability and retirement pay "may be considered by state courts as community property, i.e. divisible property"); Spindler v. Spindler, 558 N.W.2d 645, 651 (Wis. Ct. App. 1996) (addressing the question of whether a spouse had shown that the character of certain property "had changed to *marital property*," and explaining that "[c]hanging the property's title, for example, can transmute it to *divisible property*") (emphasis added). The term "divisible" property, however, is virtually unknown in other states.

496. Because § 50-20(c)(1) requires that the "income, property, and liabilities of each party" be considered as a factor in determining if an equal division is equitable, *see* N.C.

recognition of the three new kinds of property now deemed to be distributable property is a step of immense significance.[497] In essence, § 50-20(4) recaptures from the black hole of established case law[498] passive increases or decreases in value of marital and divisible property from the date of separation to the date of distribution,[499] increases in marital debt,[500] and—most significantly—"[p]roperty, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage."[501]

These changes, however, were almost without doubt the only feasible options to correct the scores of "analytically challenged"

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GEN. STAT. § 50-20(c)(1) (Supp. 1997), separate property must be identified and valued, *see* McLeod v. McLeod, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916-17 (1985).

497. The North Carolina General Assembly defined "divisible property" to mean all real and personal property as set forth below:

> (a) All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
>
> (b) All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.
>
> (c) Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.
>
> (d) Increases in marital debt and financing charges and interest related to marital debt.

N.C. GEN. STAT. § 50-20(b)(4) (Supp. 1997).

498. *See supra* notes 512-20 and accompanying text (discussing the previous rule that required courts to ignore increases or decreases in value of, or income, or profits from marital property after the date of separation).

499. *See* N.C. GEN. STAT. § 50-20(b)(4)(c) (Supp. 1997); *see also infra* notes 517-20 (discussing the *Truesdale* case). It is well worth noting, however, that this section of the new amendments could potentially pose problems, in that it may conflict with § 50-21(b) regarding valuation of marital property on the date of separation. To paraphrase § 50-21(b), if marital property is diminished in value by one spouse after the date of separation, such diminution is clearly not to be treated as diminished value marital property. And if it is to be treated as depreciated marital property, could both spouses bear the cost of such decrease in value or would a court simply revert to value as of the date of separation? At a minimum, the issue further clouds the continued clarity of the rigid rule equating date of separation with valuation of marital property.

500. *See* N.C. GEN. STAT. § 50-20(b)(4)(d).

501. *Id.* § 50-20(4)(b). The statute also excludes from divisible property increases or decreases in value of marital or divisible property that are the result of the activities of either spouse after separation. *See id.* § 50-20(b)(4)(a). This provision in the new amendments is especially likely to cause difficulties for practitioners and the courts. It is closely akin to the already familiar concept of "mixed" property, discussed *infra* note 511 and accompanying text.

results and the irreconcilable conflicts within our own jurisprudence—all of which were set in motion by a seemingly innocuous amendment to the Equitable Distribution Act in 1983.[502] Because the original version of the Act had contained no clear indication as to when marital property was to be valued, the Act was amended in 1983 to include the now infamous requirement that marital property "shall be valued as of the date of the separation of the parties."[503] The fact that numerous types of assets or property that were clearly earned by a spouse during the marriage but that were technically, and often just barely,[504] acquired after the date of separation, was almost entirely unappreciated initially.[505] Very quickly, however, spouses realized how this "all or nothing" rule could be used to manipulate the receipt of income or property until after the date of separation and so exclude it from division by the court. Thus the simple and unilateral act of separation before the receipt of income or assets could markedly decrease the value of the marital estate.[506]

Nonetheless, it first appeared that the 1983 amendment, albeit somewhat miserly in its effect in further decreasing the marital proportion of property, would be susceptible to a sensible and flexible interpretation, as indeed it initially was by the court of appeals,[507] and by the supreme court as well.[508] In particular, the

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502. *See* N.C. GEN. STAT. § 50-21(b) (1984) (amended 1997) (affecting all cases pending as of August 1, 1983). One might only have wished that the somewhat retroactive reach of this amendment had been duplicated by its predecessor.

503. Act of July 1, 1983, ch. 671, § 1, 1983 N.C. Sess. Laws 640, 640 (codified as amended at N.C. GEN. STAT. § 50-21(b) (Supp. 1997)).

504. *See infra* note 521 (discussing cases). Remarkably, this oversight contradicted both the substance and the analysis underlying the source of funds theory, a position firmly embraced in existing case law, the function of which was to recognize and reward marital contributions to separate property and vice-versa. *See, e.g.*, McLeod v. McLeod, 74 N.C. App. 144, 377 S.E.2d 910 (1985); Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985). For a more painstaking, and possibly painful, discussion of the source of funds theory and examples of formulas other states have used, see Sharp, *supra* note 2, at 217-19. For an example of a trial court formulating its own formula to separate out marital and separate portions of mixed property, see Mishler v. Mishler, 90 N.C. App. 72, 75, 367 S.E.2d 385, 387-88 (1988). *See also infra* note 511 and accompanying text (discussing the dual classification of property).

505. See Sharp, *supra* note 2, at 236-37, for a critique, including comments from other state courts, on the use of such a unilaterally determined date of valuation. *See also* David L. Baumer & J.C. Poindexter, *Women and Divorce: The Perils of Pension Division*, 57 OHIO ST. L.J. 203, 208 (1996) (collecting data showing that North Carolina is the only state that unequivocally mandates the use of the date of separation for valuation and distribution of marital property).

506. *See, e.g., infra* notes 507-20 (discussing cases).

507. *See, e.g.*, Dewey v. Dewey, 77 N.C. App. 787, 790-91, 336 S.E.2d 451, 453 (1985)

supreme court decision in *Johnson v. Johnson*[509] suggested that the 1983 amendment as to valuation might be interpreted quite sensibly. The "analytical approach"[510] adopted in that case was used to separate out what in other contexts is known as "dual" or "mixed" property."[511]

That benign assessment of the probable and initial effect of the amendment,[512] however, was virtually eradicated by the court's opinion in *Truesdale v. Truesdale*,[513] which inexplicably ignored both the logic and analysis of *Johnson*,[514] rejected the rationale of *Dewey* and its kindred cases,[515] and ignored the source of funds rule as well.[516] Instead, the court of appeals held in contravention to § 50-

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(holding lower court's error in valuing the marital home sometime after the date of separation harmless because it had also ordered an equal division of the proceeds of the sale); Appelbe v. Appelbe, 76 N.C. App. 391, 392-93, 333 S.E.2d 312, 312-13 (1985) (allowing the proceeds from the sale of a marital home to be divided in kind, in order to assure that each spouse received his and her distributional shares). After *Truesdale*'s insistence on fixing the value on the date of separation was established, such in-kind divisions were no longer available to ameliorate the disparities in value that might occur after the date of separation and before equitable distribution.

508. Indeed, in *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), the supreme court sensibly held that proceeds received after the date of separation from a personal injury lawsuit for an injury received during the marriage would be divisible to the extent that such proceeds represented losses to the marriage. *See id.* at 450-53, 346 S.E.2d at 438-40. As the concurrence carefully explained, "The proceeds merely represent the value of the cause of action, which cause was acquired during the marriage and before separation." *Id.* at 456, 346 S.E.2d at 441 (Martin, J., concurring). This ruling, however, was utterly and inexplicably overlooked by the court of appeals with a series of cases that created one of the major problems the new legislation was intended to correct. *See infra* notes 512-20 and accompanying text.

509. 317 N.C. 437, 346 S.E.2d 430 (1986).

510. *See id.* at 446-51, 346 S.E.2d at 435-38 (discussing the "analytic" method).

511. *See* Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985). The court of appeals recognized that property might sometimes have a "dual classification . . . as part marital and part separate," but concluded that this was consistent with the partnership principle in that it ensured "that both the separate and marital estates receive a proportionate and fair return on its [sic] investment." *Id.* at 381-82, 325 S.E.2d at 269.

512. See Sharp, *supra* note 2, at 226-37, for one of this author's more notably incorrect prognostications.

513. 89 N.C. App. 445, 366 S.E.2d 512 (1988).

514. *See supra* note 508 (discussing *Johnson*).

515. *See supra* note 507 (citing cases). *Truesdale* basically overruled both *Dewey* and *Appelbe* without analysis, without appreciation of the practical effect, and in contravention of the supreme court's holding in *Johnson*.

516. The source of funds rule had its origin in the partnership theory of marriage, called the "very raison d'être of the Act" in *Mauser v. Mauser*, 75 N.C. App. 115, 119, 330 S.E.2d 63, 65 (1985). The North Carolina Supreme Court, in its first decision interpreting the Equitable Distribution Act, agreed: the Act "reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions." White v. White, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985).

21(b) that it was not mere "harmless error to distribute such appreciation [of marital property received after the date of separation] so long as it is distributed in the same ratio deemed equitable under Section 50-20(c)."[517] To compound its error and to confound rational analysis, the court went on to hold that any such appreciation of "marital property is itself neither marital nor separate property."[518] This rather incomprehensible and internally inconsistent[519] conclusion ignored the results it would inevitably produce: that even passive appreciation in the value of what was clearly marital property would inure solely to the benefit of the spouse in control of, or who was awarded, that property. It also flew directly in the face of what was then, and is now, one of the guiding principles of interpretation of the act—the source of funds doctrine, readily adopted by the supreme court in its early interpretations of the Act to ensure that both marital and separate estates would be justly recognized and rewarded commensurably with their contributions to the marriage, regardless of when such fruits of their contributions were actually received.[520]

As this interpretation of the valuation as of the date of separation rigidly progressed, moreover, it quickly became a remarkably voracious worm in the apple of equitable distribution. It invited extensive pre-divorce planning—manipulation of the receipt of income or assets, clearly earned during the marriage, until after date of separation[521]—and forced courts virtually to put on blinders

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517. *Truesdale*, 89 N.C. App. at 448, 366 S.E.2d at 515.

518. *Id.* at 448, 366 S.E.2d at 514. This statement has long struck this author as tantamount to saying that one is "neither pregnant nor non-pregnant." The court held that any such change in value should instead be considered as a distributional factor in determining if equal were equitable. *See id. Truesdale* nonetheless is the start of a long line of cases adopting this logic, thus creating a kind of "black hole" sucking into itself virtually all economic events after the date of separation. *But see* Nye v. Nye, 100 N.C. App. 326, 327, 346 S.E.2d 91, 91-92 (1990) ("awarding" over $500,000 in post date of separation increase in the value of the husband's corporation).

519. *See supra* notes 515, 518.

520. *See* Sharp, *supra* note 10, at 254-59; *see also* Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985) (creating the partnership concept); McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910 (1985) (formulating the active-passive distinction with increases in separate property); Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (same). It should also be recalled that even the most simple divorce requires a year's separation under § 50-6, plus an additional couple of months for serving the complaint, filing the answer, and obtaining a court date. *See* N.C. GEN. STAT. § 50-6 (1995).

521. *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992), discussed in a different context, *see supra* note 20, is again an excellent example of this. The husband there closed down his private gynecological practice shortly before separation and joined a professional clinic as a salaried employee—thereby nicely shedding himself of any goodwill he would otherwise have had. *See id.* at 248-49, 412 S.E.2d at 918. Not

with regard to increases or decreases in the value of assets after the date of separation and before the often long-delayed distribution of assets.[522] Although the new amendments to the Equitable Distribution Act do not deal directly with the valuation as of date of separation rule (except as to "divisible property" which is to be valued as of the date of distribution[523]), they nonetheless must create the critically needed flexibility in this heretofore unyielding rule in order to carry out the mandates of the new portions of the statute.[524]

### 3. In-Kind Awards and Valuation

Probably more critically, although perhaps less obviously, the dogmatic adherence to identification of value with the date of separation had also led to at least two other, equally misbegotten derivative rules. The first was that each and every asset must be assigned a value by the court in order for it to be distributed in the first instance[525]—a rule which unfolded, for example, as a total bar on a court's power to order that an asset be divided in kind,[526] regardless of the fact that there are indeed assets whose values, although not ascertainable, are nonetheless quite real,[527] and regardless of the fact that the ultimate division of an asset in kind would resolve many of the problems with post-separation increases in value.[528]

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surprisingly, he re-opened his private practice shortly after the divorce. *See id.*; *see also* Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (providing an example of the kind of manipulation of the receipt of income, clearly earned during the marriage, that could and should have been avoided altogether simply by following the guidelines laid down by the supreme court in *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986)); *infra* notes 602-04 and accompanying text (discussing *Godley v. Godley*).

522. *See supra* note 53 (citing examples).

523. *See* N.C. GEN. STAT. § 50-21(b) (Supp. 1997). *But see supra* note 499 (discussing a potential problem with diminution in value).

524. Again, the inclusion of unvested pension rights, which almost by definition cannot be valued as of the date of separation, is an excellent example of this statement.

525. *See* Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987); Grasty v. Grasty, 125 N.C. App. 736, 482 S.E.2d 752 (1997). The analytical foundation for this rule is not altogether lacking: it derived from the premise that a court cannot determine if equal actually is equitable, as required by § 50-20(c), unless it first has all the valuation evidence before it. The rule is nonetheless shortsighted, for reasons discussed above in part, and also has the ironic effect of transgressing the very principle and presumption that equal is equitable. *See also supra* note 511 and accompanying text (discussing valuation dual-nature property and the source of funds doctrine).

526. *See supra* notes 512-20 (discussing *Truesdale* and the sensible line of cases it disavowed).

527. Frequent flyer miles are an excellent example of this. Surely no one would assert that they are without value, but what that value is rests solely with how the individual owner of the miles decides to use them. *See supra* note 646 and accompanying text (discussing frequent flyer miles cases).

528. Ironically, the line of cases begotten by *Truesdale* became so deeply entrenched

One of the new amendments to the Equitable Distribution Act has at long last corrected the above rule, which had virtually nothing to recommend it in any event. Section 50-20(e) now states that "[s]ubject to the presumption . . . that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable."[529] The benefits likely to be derived from this amendment are difficult to overestimate. This is by no means to suggest that under the new amendment valuation is not still of great importance, because the statute still dictates that at least the "approximate"[530] net value of both marital and divisible property must be found by the court.[531] At a practical level, however, many asset valuations depend more on the skill of an expert witness than on actual net value, and case law has already created strong precedent for division of assets whose value is so difficult to determine that valuation need only "reasonably approximate" the

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that even the supreme court has cited *Truesdale* for support. *See* Smith v. Smith, 336 N.C. 575, 578, 444 S.E.2d 420, 422 (1994) (stating that the receipt of dividend income of over $240,000 after the date of separation must be considered as a distributional factor only).

529. N.C. GEN. STAT. § 50-20(e) (Supp. 1997). Section 50-20(e) continues as follows:

> This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property.

*Id.*

530. *See infra* note 532 (giving examples of approximations of value).

531. *See* N.C. GEN. STAT. § 50-20(c). Logically, and in order to conform to the new amendments, this section should be amended to read, "where feasible." Indeed, our courts already stray widely from the set "date of separation value" any time they allow a deferred distribution of a pension. Because the value of the pension once the employee begins to receive it is almost by definition unknown, our courts make full use of the "coverture fraction" which essentially does what our courts are now urged to do: divide property in-kind. The values of a book, invention, screenplay, patent, etc., are similarly unknown at the date of separation or distribution. Again, an in-kind distribution is particularly appropriate in such cases. Furthermore, as the Supreme Court of Minnesota has noted, with regard to assets that are susceptible to some form of valuation:

> Furthermore, valuation is necessarily an approximation in many cases, and it is only necessary that the value arrived at lies within a reasonable range of figures. Thus, the market valuation determined by the trier of fact should be sustained if it falls within the limits of credible estimates made by competent witnesses . . . .

Hertz v. Hertz, 229 N.W.2d 42, 44 (Minn. 1975). A Missouri court, moreover, held that the trial judge was not required to value a husband's military retirement pension before awarding the wife a coverture fraction of such retirement. *See In re* Marriage of Ward, 955 S.W.2d 17, 21-22 (Mo. Ct. App. 1997).

net value of an asset.[532] Furthermore, insistence on a precise value of every asset already contravenes most pension valuations because of contingencies necessarily involved but unknown at the time of valuation.[533]

The point is not a recommendation that courts ignore what our statutes dictate, but that increased flexibility, including toleration of some imprecision where necessary, should be accorded valuations of some types of assets that will or must be divided in-kind. Indeed, fluctuations in the value of assets after the date of separation, along with many other fact scenarios are particularly well suited to an in-kind division, and also justify a very disproportionate division as "any other factor."[534] Furthermore, our supreme court had already mandated that increases or decreases in marital property after the date of separation be classified as either active or passive.[535] Divisible property, which includes passive increases in value to the date of distribution,[536] is also an appropriate candidate for what is already a presumption in favor of such distributions.[537]

Secondly, the separation/valuation date also had led to the rule that an asset must either be in existence, or must be the subject of a near absolute right of ownership by the marital community, by or on the date of separation.[538] Otherwise, it could be excluded from consideration as marital property—regardless of whether or not the marital community had contributed all or ninety-nine percent of the effort that went into securing its acquisition.[539] In addition, the same

532. *See* Fox v. Fox, 103 N.C. App. 13, 18, 404 S.E.2d 354, 356 (1991); *see also* Carlson v. Carlson, 127 N.C. App. 87, 92, 487 S.E.2d 784, 788 (1997) (ruling that the trial court had "reasonably approximated" the goodwill value of husband's medical practice); Lawing v. Lawing, 81 N.C. App. 159, 169, 344 S.E.2d 100, 108 (1986) (allowing an offer to buy to serve as competent evidence of value); Poore v. Poore, 75 N.C. App. 414, 421, 331 S.E.2d 266, 271 (1985) ("There is no set rule for determining the value of the goodwill of a professional practice.").

533. See *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987), which held that that employment contingencies may result in a non-matured pension and must be factored into the valuation process. *See id.* at 369-70, 354 S.E.2d at 508-09. The existence of contingencies with nonvested pensions gives even greater weight to this observation.

534. N.C. GEN. STAT. § 50-16.3A(b)(15) (1995); *see also supra* note 370 (discussing *Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (1997)).

535. *See* Smith v. Smith, 336 N.C. 575, 579, 444 S.E.2d 420, 423 (1994).

536. *See* N.C. GEN. STAT. § 50-21(b) (Supp. 1997).

537. *See id.* § 50-20(e).

538. This rule rather blatantly contradicted the large group of cases in the 1980s, beginning with *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985), which held that "acquisition must be recognized as an on-going process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained." *Id.* at 380, 325 S.E.2d at 268-69.

539. In *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd on other*

valuation rule had been extended, not only to the draconian situations discussed above, but also to the passive earnings of or income from any marital property received after the date of separation, including rental income from marital property.[540] Never was a rule as illogical and unfair as the date-of-separation accumulation and valuation rule. When paired with the prohibition against in-kind distributions of property without absolute values or ownership at the date of separation, the result for many parties was an incarceration in rigid rules from which neither equity nor existing case law could free them.[541]

### *C. Divisible Property*

#### 1. Introductory Issues

Considerable public outrage[542] accompanied such decisions as those previously discussed. Additionally, such decisions violated both the spirit and the law[543] of equitable and partnership principles. The more indefensible argument that treatment of post-separation appreciation of, income from, or literal acquisition of property earned during the marriage but not received until after the date of

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*grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994), for example, the court of appeals held, inter alia, that a stock redemption of $900,000, of which $300,000 was still owed at the date of separation, and was paid to the marital corporation after that date, was nonetheless marital property, because even though it was not actually received until after the date of separation, the right to the funds was "vested" before the date of separation. *See id.* at 481-84, 433 S.E.2d at 209-11. Compare this holding with *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993), in which a marital corporation increased in value by more than one million dollars within three months after separation. It was not disputed that this increase resulted from husband's completion of a contract—on which he had been working for two years—with Saudi Arabia, but none of the increase in value was held to be marital property. *See id.* at 1, 6-7, 428 S.E.2d 834, 836 (1993).

540. *See, e.g.*, Chandler v. Chandler, 108 N.C. App. 66, 422 S.E.2d 587 (1992). In *Chandler*, the rent collected after separation by the husband (who presumably was the rental manager of the property) was held to be "neither marital nor separate property." *Id.* at 69, 422 S.E.2d at 590. In another case, a wife's attempts to demand an accounting for, or partition of, the property during the long process of equitable distribution were denied. *See* Beam v. Beam, 92 N.C. App. 509, 512, 374 S.E.2d 636, 638 (1988) (Greene, J., dissenting) (arguing that equitable distribution claim in district court deprived the superior court of jurisdiction and extinguished wife's common law right to the alternative accounting and division of property), *aff'd*, 325 N.C. 428, 383 S.E.2d 656 (1989); *see also* Hagler v. Hagler, 319 N.C. 287, 292, 354 S.E.2d 228, 233 (1987) (same).

541. *See infra* notes 504-05 and accompanying text (discussing ownership at separation requirement).

542. *See supra* note 31 (discussing the publicity garnered by such cases).

543. The major principles, which should infuse the law with their spirit are the marriage as partnership, source of funds, dual or mixed property, and the analytical approach, discussed in more detail *supra* notes 508-11.

separation was "neither marital nor separate property"[544] constituted a total derogation of the source of funds rule[545] and other cardinal rules of interpretation under the Act.[546] All these forces combined—at long last—to form the legislative creation of the most unique but creative concept: "divisible property."[547]

As noted above,[548] divisible property essentially pours back into the marital "pot" passive increases in the value of marital property, including any fruits of marital efforts, *or portions thereof*, that are received up until the time of distribution.[549] But this greatly simplified explanation grossly underestimates the complexities that await both the bench and the bar. Beyond the rather simple situation involving post date-of-separation rental income from marital property, such as that posed in *Chandler v. Chandler*,[550] extremely complex issues will arise at both practical and procedural levels. Fortunately, there is an abundance of case law from other states which offers considerable guidance as our courts wade into these often very muddy new waters.

Initially, however, there are two general issues that will undoubtedly be the subject of new or expanded litigation. The first of these issues is the much expanded opportunity for dissipation of assets that accompanies the introduction of divisible property.[551]

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544. Truesdale v. Truesdale, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988); *supra* notes 512-20 (discussing *Truesdale*).

545. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985), was the first case to address the source of funds principle, under which the separate and marital (and now divisible) portions of dual-natured property must be identified and proportionally recompensed. *See also* Sharp, *supra* note 2, at 210-20 (discussing the source of funds principle).

546. *See supra* notes 531, 535, 537 and accompanying text.

547. *See* N.C. GEN. STAT. § 50-20(b)(4) (Supp. 1997); *supra* note 497 (setting forth text of statute).

548. *See supra* note 497.

549. At a minimum these changes alone should operate to help deter the strategy of unduly prolonging an equitable distribution trial or settlement. Although active increases in value will not be treated as divisible property under § 50-20(b)(4)(a), and thus will presumably remain "neither separate nor marital" property and only a distributional factor under *Truesdale*, there is still considerable incentive on the part of the wealthier spouse to speed up the entire process.

550. 108 N.C. App. 66, 67-70, 422 S.E.2d 587, 589-90 (1992); *see supra* note 21 (discussing *Chandler*).

551. It is relatively safe to conclude that the single advantage of the absolute date of separation rule was that it created no incentive whatsoever to dissipate marital property after separation, because any increases or decreases in the value of marital property would be, at best, "any other factor" under § 50-20(c)(12). N.C. GEN. STAT. § 50-20(c)(12); *see, e.g.*, Nye v. Nye, 100 N.C. App. 326, 327, 396 S.E.2d 91, 92 (1990); *see also supra* note 19 (discussing *Nye*).

North Carolina case law, like that of most states, has long been clear that marital property that "disappears" or that is appropriated by one spouse for her separate use at or shortly before the date of separation will be reincluded in the marital estate as part of the guilty party's distribution.[552] In addition, of course, the behavior of either spouse that has resulted in "waste, neglect, devalu[ation] or conver[sion]" after separation and until the time of distribution is already a statutory factor to be considered in determining if an equitable distribution is equal.[553] Dissipation resulting in the reinclusion of the property so disposed of is obviously a much more effective deterrent than considering such conduct as a "factor."[554] The opportunity for such dissipation of divisible and even marital property, however, is greatly extended for at least two reasons. First, the extension of the reach of divisible property to the date of distribution may well prolong the period for acquisition of such assets for months, or even years,[555] after the date of separation. Second, the same extension of time may well increase the incentive to dissipate as well.[556] The phenomenon of cutting off one's nose to spite one's face is hardly unknown to family law practitioners.[557] Loss or destruction and non-marital gifts of divisible (or marital) property,[558] non-payment of a

552. *See, e.g.*, Talent v. Talent, 76 N.C. App. 545, 553, 334 S.E.2d 256, 261-62 (1985) (reincluding $68,000 which was appropriated by wife after date of separation in the marital estate); McManus v. McManus, 76 N.C. App. 588, 591-92, 334 S.E.2d 270, 272-73 (1985) (determining that the existence of approximately $10,000 in funds controlled by the husband one month before separation and unaccounted for at trial as sufficient to raise an inference that he had disposed of the fund for non-marital purposes).

553. N.C. GEN. STAT. § 50-20(c)(11a) (Supp. 1997). The statute also includes any acts to preserve, maintain, develop, or expand marital property. *See id.*

554. It may be worth suggesting that only deliberate actions aimed at waste, destruction, or other losses to marital or divisible property be considered as true dissipation and that the statutory factor be used to include both intentional and negligent losses.

555. *See supra* note 53 (citing examples).

556. Excessive spending, for living expenses or vacation trips that exceed the previous standard of living, is held to be dissipation by a majority of states, for example. *See, e.g.*, *In re* Marriage of Dunseth, 633 N.E.2d 82, 94 (Ill. App. Ct. 1994); Barringer v. Barringer, 514 S.W.2d 114 (Ky. Ct. App. 1974); Noll v. Noll, 375 S.E.2d 338, 341 (S.C. Ct. App. 1988); *see also supra* note 499 (discussing potential problems with valuation of marital property due to the acts of one party before the date of separation).

557. *See infra* notes 558-59 (discussing cases).

558. *See, e.g.*, *In re* Hebbring, 255 Cal. Rptr. 488, 497-98 (Ct. App. 1989) (husband threw his wife's expensive jewelry, most of which he had given her, into the sea); *In re* Marriage of Kaplan, 500 N.E.2d 612, 618 (Ill. App. Ct. 1986) (gift to friend of the opposite sex); Rosenberg v. Rosenberg, 497 A.2d 485, 492 (Md. 1985) (husband made substantial "loan" to his paramour). For a sample of cases involving gambling, see *Harrison v. Harrison*, 787 S.W.2d 738 (Mo. Ct. App. 1989); *Siegel v. Siegel*, 574 A.2d 54 (N.J. Super. Ct. Ch. Div. 1990), and *Wilner v. Wilner*, 595 N.Y.S.2d 978 (App. Div. 1993).

mortgage resulting in a foreclosure sale at far less than fair market value,[559] deliberate reduction in the fair market value of an asset,[560] excessive business expenses, especially for the self-employed,[561] and even failure to earn income after separation[562] have all been held to constitute dissipation of income.[563] Gambling losses or funds or assets given to a paramour are, not surprisingly, held to be dissipation in every state that has had occasion to address the issue.[564]

Yet another initial observation with regard to divisible assets is that, with one exception,[565] one would expect that the "vested but not yet received" rule in effect prior to the creation of the divisible property context[566] would continue to be fully applicable with

559. *See, e.g.*, Heins v. Heins, 783 S.W.2d 481, 484-85 (Mo. Ct. App. 1990) (husband deliberately refused to pay the marital home mortgage, and his parents subsequently bought the home at a foreclosure sale); DiLacqua v. DiLacqua, 623 N.E.2d 118, 127-28 (Ohio Ct. App. 1993) (husband intentionally failed to make mortgage payments).

560. *See, e.g.*, Berrios v. Berrios, 553 N.Y.S.2d 100, 100-01 (App. Div. 1990); Sharp v. Sharp, 473 A.2d 499 (Md. Ct. Spec. App. 1984) (asset unnecessarily encumbered with a lien).

561. *See* Nelson v. Nelson, 651 So. 2d 1252, 1253-54 (Fla. Dist. Ct. App. 1995); State *ex rel.* Nielsen v. Nielsen, 521 N.W.2d 735, 737 (Iowa 1994); McCarthy v. McCarthy, 480 N.W.2d 617, 619-20 (Mich. Ct. App. 1991).

562. *See* Gastineau v. Gastineau, 573 N.Y.S.2d 819, 820-21 (Sup. Ct. 1991). In this case, the husband left his professional football team during the middle of the season in order to be with his paramour, who had just been diagnosed with cancer. *See id.* at 821. The $500,000 salary loss thus incurred was held to be dissipation, because the loss was clearly not related to a marital purpose. *See id.*; *see also In re* Tietz, 605 N.E.2d 670, 676-77 (Ill. App. Ct. 1992) (involving a lawyer husband who intentionally lessened his billing in order to reduce the value of his law practice). Intentional depression of income in order to avoid support payments is a well-established area in the law of North Carolina and thus should provide considerable guidance in dealing with this issue. *See, e.g.*, Beall v. Beall, 290 N.C. 669, 672, 228 S.E.2d 407, 410 (1976) (observing that capacity to earn may serve as basis for award if husband is deliberately depressing income); Sharpe v. Nobles, 127 N.C. App. 705, 708, 493 S.E.2d 288, 291 (1997) ("Child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. A party's earning capacity may be used to calculate the award if he deliberately depressed his income . . . ." (citation omitted)); Broughton v. Broughton, 58 N.C. App. 778, 782, 294 S.E.2d 772, 776 (1984) (ruling that plaintiff had not deliberately depressed his income).

563. For a more comprehensive treatment of this subject, see Lewis Becker, *Conduct of a Spouse That Dissipates Property Available for Equitable Property Distribution*, 52 OHIO ST. L.J. 95 (1991), and Brett R. Turner, *Here Today, Gone Tomorrow: Identification and Division of Dissipated Marital Assets*, DIVORCE LITIG. 21 (Feb. 1996).

564. *See supra* note 558 (citing cases).

565. The amendment to the definition of marital property to include unvested pensions under § 50-20(b)(1) is obviously an exception. *See* N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1997). "[R]etirement or other deferred compensation benefits" that mature during this period surely should receive the same treatment as pension rights already do. *Id.* § 50-20.1(b).

566. *See* Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

divisible property and the date of distribution termination. There seems to be no principled analysis that would warrant application of this rule with date of separation but not with date of distribution. Thus, for example, employee stock options that are exercisable, but not yet exercised, at the date of distribution should be included as divisible property.[567] The basic point is that timing of the receipt of assets, including the right to receive them, although susceptible to manipulation and perhaps some contingent elements as well, should still be treated as are unvested pensions. Critical support for this suggestion derives from the inclusion of "property, property rights, *or any portion thereof*"[568] in the definition of divisible property. The last phrase can easily be interpreted in conformity with both the "vested" rulings and with the source of funds rule.[569] The critical difference with the addition of divisible property and in-kind divisions is that the *right* to receive property will not necessarily correlate with the value of the property at the date of distribution.[570] This will require that courts cease treating payments or assets earned in whole or part during the marriage and after the date of separation as a non-divisible whole. However, case law analysis, including vesting, source of funds, acquisition as a fluid process, and in-kind divisions all provide the necessary principles—if not the math—to determine what was actually earned during the marriage, rather than literally received.[571] The same definition of divisible property could, moreover, offer a powerful antidote to attempts to manipulate the accumulation of marital property until after the date of separation. And economists, of course, can value portions of marital property almost as easily as the property itself.

### 2. Contingent Fees

Of particular interest to readers of this Article is likely to be the issue of attorneys' contingent fees. Although some state courts have held that contingent fee contracts still pending at the time of

567. *See, e.g.*, *In re* Marriage of Harrington, 935 P.2d 1357, 1365 (Wash. Ct. App. 1997) (concluding that because the parties had both the right and the ability to exercise the stock purchase right at any time by payment of the option price, the purchase right was vested at time of trial and was community property).

568. N.C. GEN. STAT. § 50-20(b)(4)(b) (Supp. 1997) (emphasis added).

569. *See supra* note 539 (illustrating the "vested but not yet received rule"); *supra* note 545 (explaining the "source of funds" rule).

570. This difference is especially true with stock options, discussed more fully in the next section, *infra* notes 629-42 and accompanying text.

571. *See infra* text accompanying notes 587-91 (discussing various methods of calculating the marital portion of pension benefits).

dissolution or distribution are too "speculative" to be divided upon divorce,[572] a very clear majority of state courts have held that such contingency contracts are indeed divisible.[573] Contingent fee contracts that mature into a judgment or settlement prior to the date of dissolution will of course be at least partially divisible property—a result reached in virtually every other state through rules that establish valuation at the date of distribution in the first instance.[574]

It is precisely the above scenario about which there is still some disagreement.[575] The majority of states, however, follow the rationale

572. *See, e.g.*, Roberts v. Roberts, 689 So. 2d 378, 381-82 (Fla. Dist. Ct. App. 1997) ("The client owes the lawyer nothing until and unless the client recovers money.... The contingency lawyer may labor like Hercules for more years than it takes a pension to vest, reason like Cardozo, and orate like Webster but, in the end, recover nothing."); Goldstein v. Goldstein, 414 S.E.2d 474, 476 (Ga. 1992) (concluding that pending contingency fees are "too remote, speculative and uncertain to be considered marital assets in making an equitable division of property"); *In re* Marriage of Zells, 572 N.E.2d 944, 945 (Ill. 1991) (noting that the attorney lacks any assurance of ever receiving a fee, that " 'its ultimate value, if any, remains highly speculative during the pendency of the case,' " and that the " 'worth of a contingent fee to an attorney, if any, remains intangible until the firm receives [payment] for the services rendered' " (quoting *In re* Marriage of Zells, 554 N.E.2d 289, 292-93 (Ill. App. Ct. 1990))); Musser v. Musser, 909 P.2d 37, 40 (Okla. 1995) (explaining that the attorney "*is not assured of anything for his efforts nor does he acquire a vested interest in the income from those cases unless his client recovers*, an event impossible to accurately predict" (emphasis in original)).

573. *See, e.g.*, Garrett v. Garrett, 683 P.2d 1166, 1169 (Ariz. Ct. App. 1984) ("While it is true that an attorney is not entitled to the full benefit of his contract until the contingency upon which it is based is fulfilled, this does not mean that valid enforceable contract rights do not exist regardless of its fulfillment."); *In re* Marriage of Kilbourne, 284 Cal. Rptr. 201, 204 (Ct. App. 1991) (allowing trial court to reserve jurisdiction to make a property division in the future); *In re* Marriage of Vogt, 773 P.2d 631, 632 (Colo. Ct. App. 1989) (explaining that contingent fees are not mere expectancies but valuable contract rights acquired during the marriage); Due v. Due, 342 So. 2d 161, 163-64 (La. 1977) (concluding that contingent fee contracts constitute a patrimonial asset despite the theoretical nature of the right); Quinn v. Quinn, 575 A.2d 764, 770 (Md. Ct. Spec. App. 1990) (explaining that the court is "not prepared to say that the value of a contingent fee can *never* be determined or considered as an asset of a law firm"); Lyons v. Lyons, 526 N.E.2d 1063, 1063 (Mass. 1988) ("Like the interest of a litigant in a pending lawsuit, the interest of an attorney in a contingent fee arrangement constitutes property."); *In re* Marriage of Estes, 929 P.2d 500, 502 (Wash. Ct. App. 1997) ("The difficulty of valuation, without more, does not preclude the court from awarding contingent fees; the proceeds of a contract obtained during marriage in the conduct of the community's business may be awarded to both parties and divided between them when received."); Metzner v. Metzner, 446 S.E.2d 165, 173 (W.Va. 1994) (concluding that contingent fee contracts are marital property); Weiss v. Weiss, 365 N.W.2d 608, 613 (Wis. Ct. App. 1985) (concluding that the impossibility of valuing a contingent fee on the day of divorce is not a sufficient reason to ignore that asset when dividing marital property).

574. *See* Sharp, *supra* note 2, at 236-37; *see also* O'Neal v. O'Neal, 929 S.W.2d 725, 726 (Ark. Ct. App. 1996) ("It is true that assets acquired after separation and prior to divorce are marital property.").

575. *See supra* notes 572-74, and *infra* notes 576-82.

that a contingency fee contract is not a "mere expectancy" without value, contrary to the position taken by the minority of states.[576] Instead, such a contract is deemed to be a "valuable property right," and the fact that it may not be wholly fulfilled "does not mean that valid enforceable contract rights do not exist."[577] That property right—well recognized in North Carolina and most states—is to sue for a quantum meruit recovery of reasonable fees, even if the attorney is dismissed from the case before completion.[578] That right to sue, arising from the marital community efforts, may be contingent in amount, but it nonetheless has value that should not be ignored. In any event, it seems clear that even if the acquisition or increase in value of an asset cannot, for whatever reason, be classified as divisible or marital property, it might nonetheless suffice as a changed circumstance to review dependency status and the amount of alimony.[579] But the real point is that contingent fee contracts performed or partially performed during marriage are indeed an asset of value and should be—at least in part—treated as divisible property.[580] Additionally, professional licenses and degrees earned,

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576. *See supra* note 573 (discussing cases). In North Carolina, presumably any such contingent contract could be assigned a reasonable value, and under the also newly enacted § 50-20(e), an in-kind distribution of any recovery could be ordered, regardless of whether or not it met the "assigned" value, or indeed, regardless of whether or not there was any ultimate recovery or not.

577. *Garrett*, 683 P.2d at 1169.

578. *See, e.g.*, Mack v. Moore, 107 N.C. App. 87, 92, 418 S.E.2d 685, 688 (1992) (observing that an attorney who withdrew from contingent fee case was entitled only to action for quantum meruit recovery of any fees received by ex-client); Clerk of Superior Court v. General Builders Supply Co., 87 N.C. App. 386, 389-90, 361 S.E.2d 115, 118 (1987) (following termination of contingent fee, the contract lawyer retained right to reasonable value of work done up to the termination date); O'Brien v. Plumides, 79 N.C. App. 159, 162, 339 S.E.2d 54, 55 (1986) (stating the same).

579. *See* discussion *supra* Part III.C.2.

580. Many states have simply left the final judgment open to deal with such fees. *See, e.g.*, *Garrett*, 683 P.2d at 1171 (allowing the trial court to retain jurisdiction to monitor the value of the attorney's services as each contingent fee case is resolved, and to determine "the community interest in the contingent fee contracts based upon the percentage of the number of hours worked during the marriage bears to the total number of hours worked in earning the fee, the community being entitled to that percentage of the fee received"); *In re* Marriage of Kilbourne, 284 Cal. Rptr. 201, 204 (Ct. App. 1991) ("Civil Code section 4800 expressly empowers the trial court to reserve jurisdiction to make a property division at a later time."); *In re* Marriage of Vogt, 773 P.2d 631, 632 (Colo. Ct. App. 1989) (upholding division of fee under the " 'reserve jurisdiction method,' " which "allows the trial court to determine the division formula at the time of the decree but to retain jurisdiction to distribute payment when the contingent funds are received"); *In re* Marriage of Estes, 929 P.2d 500, 502 (Wash. Ct. App. 1997) (explaining that the proceeds of a contingent fee contract obtained during marriage "may be awarded to both parties and divided between them when received"); Metzner v. Metzner, 446 S.E.2d 165, 174 (W.Va. 1994) ("Because the ultimate value of a contingent fee case remains uncertain

or largely earned, during the marriage are by definition separate property.[581] Nonetheless, such a degree or license may be the object of an increase in value, partly passive—although largely active—yielding substantial funds between the date of separation and the date of distribution and could be extremely useful in the dependency/alimony/value of separate property context.[582]

### 3. Employment and Other Benefits

The same analysis also holds true with respect to "golden parachutes," voluntary separation incentive plans, other early retirement incentives and bonuses, and stock options.[583] Cases from other states addressing these types of assets are both fact-specific and in disagreement concerning these types of property,[584] with one exception: when a spouse receives a lump sum distribution of the other's pension, using the current net value discounted method of valuation,[585] there simply is no issue regarding early retirement incentives, or other benefits linked to the pension.[586] Unless such incentives were received before the date of distribution, the non-employee spouse has no further claim to any employment enhancements.

When the non-employee spouse receives a "deferred distribution" of the other's pension benefits, however, and there is some form of incentive for early retirement accepted by the

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until the case is resolved, a court must retain continuing jurisdiction over the matter in order to determine how to effectuate an equitable distribution of this property.").

581. *See* N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1997).

582. *See supra* note 25 (discussing this option). Such degrees are not, of course, marital property in North Carolina, as they may well be in a growing number of states. *See* N.C. GEN. STAT. § 50-20(b)(2) (classifying specifically all such licenses or degrees as the separate property of their owners). It is noteworthy, however, that North Carolina has declared that such degrees and licenses are in fact property. Judge Greene's concurrence in *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992), makes the excellent point that these forms of separate property, as is true with all others, should be subject to the active/passive analysis in determining the increased value of a degree, particularly within the first few years of its receipt. *See id.* at 256, 412 S.E.2d at 922-23 (Greene, J., concurring).

583. *See infra* notes 628-42 and accompanying text.

584. *See infra* notes 628-42; *see also* Baumer & Poindexter, *supra* note 505, at 214-15 (focusing on the manner in which deferred distributions from defined benefit retirement plans are grossly undervalued).

585. *See, e.g.*, Seifert v. Seifert, 319 N.C. 367, 369-70, 354 S.E.2d 506, 508-09 (1987).

586. *See id.* at 369-71, 354 S.E.2d at 508-09; *see also In re* Marriage of Kelm, 912 P.2d 545, 547 (Colo. 1996) (en banc) (explaining that under the net present value method, "the net present value of the pension is distributed immediately and offset against other property in the marital estate").

employee spouse before or just after the date of distribution,[587] decisions in other states tend to fall into two distinct categories. One approach, often called the "bright line" method, equates post dissolution or distribution pension benefit enhancements with earnings after the "cut-off" date or as replacement for future earnings, as opposed to compensation for past services.[588] As one court concluded, "in a deferred distribution of a defined benefit pension, the spouse not participating may not be awarded any portion of the participant-spouse's retirement benefits which are based on post-separation salary increases, incentive awards or years of service."[589] The other, and majority, approach uses what has been called the "time rule" formula or the "marital foundation" theory.[590] This theory, as its name might indicate, is considerably more harmonious with the major equitable principles already developed under North Carolina law.[591]

The marital foundation approach, recognized by that name in a substantial number of states and followed without the nomenclature in the majority,[592] holds that enhancements of retirement benefits are in fact to be treated as deferred compensation benefits, available, at least in large part, only because of the number of years of the marriage that created the foundation for such future enhancements.[593] As two commentators have noted, courts have had

587. Just as an aside, it would appear to be a logical syllogism that if assets dissipated in anticipation of divorce may be reincluded in the marital estate, then assets received as a result of the marital efforts just after the date of separation (for marital property) should be accorded the same analysis and possibly the same treatment.

588. Probably the leading case addressing this issue is *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995), which describes both the bright-line and time-rule formulas and upon which much of the analysis in this portion of the Article relies. *See id.* at 532-33.

589. Berrington v. Berrington, 633 A.2d 589, 594 (Pa. 1993). One might just as well ask, however, why the employee spouse should be entitled to the full value of an employment enhancement that was partly based on pre-separation years of service.

590. *See Hunt*, 909 P.2d at 533 (concluding that the time-rule formula constituted a "sensible and fair" approach). Both of these concepts are substantially similar to the coverture fraction approach already mandated by North Carolina statutes. *See* N.C. GEN. STAT. § 50-21 (Supp. 1997).

591. *See supra* text accompanying note 571.

592. *See* OLDHAM, *supra* note 198, § 7.10[4], at 7-67 to -68.

593. Even in these states, however, the fact that the enhancements are not "vested" or that the employee must continue to work for a number of years may defeat the inclusion of such benefits as marital property. Conversely, payments that have vested, or payments for which only minimal employment is necessary will result in inclusion of those enhancements. *See, e.g.*, *In re* Marriage of Hurd, 848 P.2d 185, 190-91 (Wash. Ct. App. 1993) (holding that accrued vacation pay and increases in retirement benefits should be included as community property because the community had laid the foundation for the benefits and the benefits were not subject to forfeiture in any event). In a New Jersey

an extremely difficult time with analysis and valuation of pension and related benefits, to the point that even some decisions from the early 1990s no longer reflect the realities of marital contributions.[594] The same authors conclude:

> Correct valuation of pensions requires recognition that pension benefits can grow following separation not only because of *active* efforts of the employee spouse; but also because of *passive* adjustments for inflation and other factors. The latter adjustments, more likely to occur than not, should be considered marital property. Courts need also to recognize explicitly that, with share-of-benefits deferred distribution, nonemployee spouses share in ... their marital share of the value of escalation of benefits. They also, of course, share in any plan risks.[595]

Section 50-20(a)(4)(b), defining one form of divisible property as "property, property rights, or any portion thereof, received after the date of separation but before the date of distribution that was acquired by the efforts of either spouse during the marriage ... including, but not limited to, commissions, bonuses, and contractual rights,"[596] would certainly indicate that the legislature has, in effect, adopted the marital foundation theory. And case law has already established that the right to receive an asset, presumably regardless of when it is received, is tantamount to "owning" the asset.[597] Although the results in *Smith* seem relatively simple, the implications of the case are not.[598] The fact that stock options are not exercised,

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case, *Ryan v. Ryan*, 619 A.2d 692 (N.J. Super. Ct. Ch. Div. 1992), the court held that husband's severance pay, accrued vacation pay, and commissions, all of which were received after separation but before divorce, were subject to equitable distribution because they were various forms of deferred compensation for 46 years of work for the company. *See id.* at 696. The same logic was used in *Brotman v. Brotman*, 528 So. 2d 550, 551-52 (Fla. Dist. Ct. App. 1988).

594. *See* Baumer & Poindexter, *supra* note 505, at 233-34. This excellent article reviews the law, and emerging law, of all fifty states.

595. *Id.* at 232-33.

596. N.C. GEN. STAT. § 50-20(a)(4)(b).

597. *See, e.g.*, Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). Two payments of $300,000 each were received (in return for a previous sale of stock) after separation, but were nonetheless included in marital property, because they were vested. *See id.* at 482-84, 433 S.E.2d at 209-11. The opinion predated the new amendments, and the case continued until well after the parties' divorce, so presumably the same logic would have prevailed had the last of the "vested" payments not been received for years.

598. Wrongful discharge, sex discrimination, and violations of the Americans with Disabilities Act all come readily to mind when the "vesting" event occurs during the marriage, but any recovery may well take years after a divorce and distribution occur. This would also present the ideal opportunity to "estimate" the value of the claim and

or not exercisable for a certain period of time, or that an employee must continue to work for a few years or months after the date of distribution in order to be eligible for a retirement bonus—or any number of contingencies—should not blind courts to the years of marital effort that laid the foundation for such employment benefits to be treated, at least in part, as marital or divisible property. North Carolina's statutes and most deeply embedded equitable principles would appear to dictate this result.[599] The approximate value of such future benefits, such as with retirement bonuses or enhancements, can be determined; the marital portion can be set by a judge, an in-kind order regarding that asset could be entered, and the parties can share the risk that the necessary contingent factors might not occur.[600]

The same result is more likely than not to attend commissions issues as well.[601] Among the worst of the commission cases in North Carolina is *Godley v Godley*.[602] In that case, the North Carolina court of appeals held that, despite the fact that the husband had virtually completed sales of real estate in a large coastal development

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divide it in-kind.

599. *See infra* notes 575-78 and accompanying text.

600. *See supra* notes 477-79 and accompanying text. This approach need not lead to leaving judgments open for years. As with any property division, the parties would always have the right to bring a motion in the cause to enforce a judgment calling for a percentage or in-kind payment of a portion of a divisible or marital asset when it is received. Indeed, § 50-20.1(c) restricts receipt of ordinary pension benefits until the participant spouse begins to receive the payments. *See* N.C. GEN. STAT. § 50-20.1(c).

601. In *In re Marriage of Wade*, 923 S.W.2d 735 (Tex. Ct. App. 1996, writ denied), the court held that the right to termination benefits vested upon husband's contract of employment made during the marriage, that the great majority of payments he would receive were earned during the marriage, and that the fact that he would not receive the enhancements until sometime during a 12 month period after dissolution was irrelevant because "the commissions [were] cumulative over an agent's entire career." *Id.* at 738; *see also* Pangburn v. Pangburn, 731 P.2d 122, 125 (Ariz. Ct. App. 1986) (holding that because the contractual right to commissions for future renewals was earned during marriage, the renewal value of those policies was community property); Niroo v. Niroo, 545 A.2d 35, 39-40 (Md. 1988) (clarifying that "an insurance agent has a vested right in commissions on renewal premiums when provided for by contract" and that "contractually vested rights in renewal commissions are a type of property interest encompassed within the definition of marital property," and noting that "the husband's right amounts to more than a 'mere expectancy,' or a 'mere historical possibility of gain' as he alternatively characterizes it" (quoting husband's statement)); Bigbie v. Bigbie, 898 P.2d 1271, 1273-74 (Okla. 1995) (upholding trial court's division of renewal premiums on insurance policies sold by husband during marriage, and joining "the court in *Niroo* in holding the issue of whether future commissions on renewal of insurance policies are marital assets is determined by the agent's rights to those commissions under his or her contract with the insurance company").

602. 110 N.C. App. 99, 429 S.E.2d 382 (1993). The inclusion of "commissions" as part of the definition of divisible property in § 50-20(b)(4)(b) is almost certainly a response to the *Godley* case. *See* N.C. GEN. STAT. § 50-20(b)(4).

during the marriage but had not yet received his "contractual right" to the commissions (well over two million dollars) by the date of separation,[603] the "mere contractual right to receive an uncertain amount ... at some indefinite time in the future" meant that the entirety of such income was not marital property.[604] Thankfully, there no longer exists the opportunity for such manipulation of benefits to total exclusion from marital property,[605] and the *Godley* case would surely have a different result under the new statutes. In view of the developing law here and in other states, moreover, the case stands as an egregious anomaly, in conflict with both the source of funds theory, the "vested right" theory, and the analytical approach.[606] In one of the earliest cases addressing a similar issue, a California court held that future insurance commissions and termination benefits should be divisible because the initial employment contract contained such a benefits-upon-termination clause, and that even though the right to such had vested, but had not been exercised, the additional benefits were nonetheless subject to division, if and when the employee exercised his right to termination.[607]

The approaches to commission cases are very similar to, and often draw analogies from, other forms of retirement enhancements.[608] Probably one of the best statements of this

603. *Id.* at 114, 429 S.E.2d at 391.

604. *Id.* at 115, 429 S.E.2d at 392. It might be noted that this case illustrates the significance of a good estimate of value coupled with an in-kind division under the new laws. Even under the old laws, however, the husband clearly had a "vested" right to such commissions.

605. *See supra* notes 498-501 and accompanying text (discussing this problem).

606. *See supra* note 601 (discussing cases). In *Ray v. Ray*, 916 S.W.2d 469 Tenn. App. 1995), for example, the husband was a State Farm insurance agent, and would be entitled to benefits based on his books at the time—five years later—of his retirement. Although he argued that the "asset" had no value because it was contingent, the court disagreed, based on his testimony from an accountant that, even at the time of trial, the husband's monthly benefit would have been $4,000 per month—a sum that translated into a present value of $185,000, using an interest rate of 9%. *See id.* at 470. For further discussion of this case, see JANET LEACH RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW § 11-6(b), at 249-50 (1997). The thoughtful and scholarly Professor Richards also notes that "[p]ension rights are part of the marital estate, to the extent that they were acquired during the marriage, without regard to whether pension rights are vested or nonvested, mature or unmature, or contributory or noncontributory." *Id.* § 11-5(a), at 240 n.20. The term "unmatured" refers to contracts, commissions, and stock options—virtually all employment or retirement benefits or enhancements that were at least partially earned during the marriage.

607. *See In re* Marriage of Skaden, 566 P.2d 249, 251-54 (Cal. 1977).

608. *See id.* at 251 (analogizing vesting of termination benefits to the vesting of pension rights).

approach is from a Colorado case:

> Specifically, we adopted the "marital foundation" theory and held that ... enhanced pension benefits ... are "acquired" during the marriage ..., if distribution is delayed. As a corollary, we held that if the pension is distributed upon dissolution under the net present value method, post-dissolution enhancements ... are treated as separate property.... Accordingly, we explicitly approved the use of the "time rule" formula which not only compensates the non-employee spouse for the delay but also internalizes the notion that post-dissolution pension enhancements due to employee advances are built upon efforts undertaken during the marriage years.[609]

While North Carolina case law has been somewhat at odds with itself with regard to incentive retirement packages,[610] the principles that underlie the majority position are already well established here. The "analytical approach," first used by the supreme court in 1986,[611] is in many ways almost identical to the "marital foundation" theory, in that each tries to compensate both the marital and separate estates for contributions or losses to the marital estate. The source of funds theory,[612] dealing solely with mixed, separate, and marital property, gives full recognition and credit to marital contributions to separate estates and to the clear proposition that "acquisition" is an on-going process, not a static one, and that even an active increase in value of separate property may result in the depletion of the marital estate.[613] Clearly, the appellate doors of justice should be open to any argument that "vesting" of a retirement enhancement, either through the initial employment contract or through a retirement offer made and accepted before or shortly after the date of distribution, should, at least to the extent of the normal coverture fraction, be considered as divisible property.

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609. *In re* Marriage of Kelm, 912 P.2d 545, 550 (Colo. 1996) (en banc).

610. *Compare* Johnson v. Johnson, 317 N.C. 437, 446-51, 346 S.E.2d 430, 435-38 (1986) (applying the "analytic approach" to proceeds from a personal injury settlement received after date of separation), *with* Boger v. Boger, 103 N.C. App. 340, 343-45, 405 S.E.2d 591, 593-94 (1991) (applying the analytic approach to proceeds of early retirement package which became available to husband due to tender offer following date of separation).

611. *See* Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

612. *See* discussion *supra* note 520.

613. *See* Sharp, *supra* note 2, at 225-26. Of particular interest is *McLeod v. McLeod*, 74 N.C. App. 144, 150-51, 327 S.E.2d 910, 910-12 (1985), in which the court of appeals emphasized use of a "functional analysis" which recognized that even what appears to be passive increases in value may in fact deplete the marital estate by protecting the separate fund and forcing the marital estate to bear the burden of everyday living expenses.

Moreover, even the concept of strict "vesting"[614] may require reexamination of existing case law in view of the new statutory amendments. The expansion of the definition of marital property to include "nonvested pension, retirement, and other deferred compensation rights"[615] is itself a clear refutation of the absolute vested requirement. More significantly, the statute recognizes that the "active" continued employment of a spouse until vesting occurs may never be fulfilled:

> (b) The award of nonvested pension, retirement, or other deferred compensation benefits may be made payable:
>
> . . .
>
> (3) By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.[616]

Thus, the statute itself clearly recognizes that contingencies, such as a requirement that one spouse continue employment for a certain number of years after separation or distribution, do not defeat the marital portion of such benefits. In essence, the statute places the risk upon both parties that "vesting" of retirement "or other deferred compensation"[617] may never occur. This is, of course, a risk worth taking, when the alternative is to receive nothing. Assuming, however, that the benefit does mature—that, for example, an early retirement option becomes available before the date of distribution—there would appear to be no principled reason not to extend the coverture fraction of the non-employee spouse to cover this contingency. This suggested conclusion is also supported by the statutory definition of divisible property to include "[a]ll property, property rights, or any portion thereof received after the date of

614. *See* Smith v. Smith, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). The court of appeals' opinion in *Smith* confirmed that "our appellate courts have recognized that funds received after the date of separation may appropriately be classified as marital property under certain circumstances." *Id.* at 483, 433 S.E.2d at 210; *see also Boger*, 317 N.C. at 343-45, 405 S.E.2d at 593-94 (purporting to use the "analytic" theory in its determination that husband's early retirement incentives should be his separate property).

615. Act of June 19, 1997, ch. 212, § 2, 1997 N.C. Adv. Legis. Serv. 206, 207 (codified at N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1997)).

616. N.C. GEN. STAT. § 50-20.1(b) (Supp. 1997). The same section of the statute also allows for payments to be made in a lump sum or over period of time in fixed amounts, but only by agreement between the parties. *See id.*

617. *Id.*

separation but before the date of distribution"[618] that resulted from the marital efforts of either spouse.

It would defy logic and fairness principles to contend that a right to a retirement incentive that is made available before the date of distribution, whether exercised or not, was not deserving of treatment as a distributive award (or a portion thereof). So long as an asset *has value*, be it a contingency fee case, unexercised stock options, annuity payments, nonvested pensions—none of which can be reduced to an absolute value but may be divided in-kind—and was the product of the marital community, such asset should clearly be included in the marital estate (or possibly as a marital asset). Such a rule would have the further advantage of deterring manipulation of the receipt of such benefits,[619] of removing incentives to delay by both parties, and, most critically, encouraging parties to settle these issues. On the other hand, appellate avoidance of this type of admittedly difficult analysis carries with it only the advantage of the kind of "foolish consistency" about which Ralph Waldo Emerson wrote.[620] If our court system can (as it has) adapt itself to the massive changes wrought by the introduction of equitable distribution fewer than twenty years ago,[621] it can certainly deal with retirement enhancements in a more thoughtful and analytical manner.[622] As a Missouri court succinctly put the matter:

> In this case the higher retirement benefits that may be realized by the husband by continued employment after the dissolution are made possible, in part, by his years of employment during the marriage. To preclude the wife from an opportunity to share in these increased benefits would be unjust and inequitable.... A present division of those rights which allows the wife her share of their value, when and if they mature, does not award her after-acquired separate property of her former spouse. Rather such a division [should require] that the parties' qualitative parity of interest will be maintained and that their respective interests in the rights that the court divided will remain of

618. *Id.* § 50-20(b)(4).

619. *See supra* notes 544-46 and accompanying text.

620. RALPH WALDO EMERSON, *Self-Reliance*, *in* RALPH WALDO EMERSON: COLLECTED ESSAYS 183 (Larzer Ziff ed., 1982).

621. *See supra* notes 467-68 and accompanying text.

622. For example, a qualified domestic relations order using a coverture fraction could easily be devised to include future (nonvested or vested but not exercised) retirement enhancements.

equal stature.[623]

Lack of familiarity with such language of the courts, or from the new amendments should not be equated, however, with lack of familiarity with the principles involved. Indeed, "reserved jurisdiction" is little more than deferred distribution, a concept, especially with regard to pension and employment benefits, long solidified by the supreme court in *Seifert v. Seifert*.[624] As one treatise has noted, under the deferred distribution method, " 'the "coverture" fraction is applied to the benefits when they enter pay status."[625] Our own statute has long prescribed the same approach to deferred distributions, albeit on a more limited basis than the current amendments require.[626] The basic point is simply that regardless of whether employment enhancements are nonvested, unmatured, or unexercised, such benefits—clearly resting in part on the marital efforts—do have value, and must be included, according to some proportion, in marital property.

This same type of analysis—which gives the marital unit credit for what it has produced and simultaneously divides the risk as to prospective enrichments, which might or might not occur, but which were built upon the foundation of the marriage—is equally applicable in many other contexts. With vacation pay, for example, which is vested but not "matured" or exercised at the time of dissolution or distribution, the great majority of courts have held that the value of such unused vacation pay is marital property, even if received after separation or distribution.[627] The same is true with regard to unused

623. Lynch v. Lynch, 665 S.W.2d 20, 24 (Mo. Ct. App. 1983). The Supreme Court of California has recently ruled, quite unequivocally, that a wife of 17 years had the right to share, proportional to the length of the marriage, in an early retirement benefit plan which her husband elected 16 years after their divorce. *See In re* Marriage of Lehman, 955 P.2d 451, 452-56 (Cal. 1998). The court emphasized that although various events and conditions after divorce may affect the amount of retirement enhancements received by the employee spouse, the character of the benefits, based upon the length of the marriage, is unchanged. *See id.* at 455-56. It cautioned, however, that the retirement enhancement issue was one of apportionment, not of characterization. *See id.* at 456. Clearly the benefits partook of both marital and separate property. *See id.* at 461-62.

624. 319 N.C. 367, 354 S.E.2d 506 (1987); *see supra* note 533 (discussing the discounted present value method and the deferred distribution approach); *see also* N.C. GEN. STAT. § 50-20.1(b)(3) (Supp. 1997) (allowing the same deferred distribution—or reserved jurisdiction—with nonvested pension rights); GREGORY ET AL., *supra* note 213, § 9.10[D], at 339-41.

625. GREGORY ET AL., *supra* note 213, § 9.10[D], at 340 (quoting Braderman v. Braderman, 488 A.2d 613, 619 (Pa. Super. 1985)).

626. *See* N.C. GEN. STAT. § 50-20.1.

627. *See, e.g.*, Brotman v. Brotman, 528 So. 2d 550, 551 (Fla. Dist. Ct. App. 1988) (holding that it was error not to value husband's accrued vacation and holiday time and

sick leave and vacation days.[628] The contingencies involved in all these cases, in other words, may make valuation somewhat uncertain or difficult, but should not determine the characterization of the assets as marital or divisible in whole or in part. Our courts have dealt successfully with valuation of such contingencies in the past, and mathematics should never stand in the way of equity.

Stock options also present courts with difficulties. In an older North Carolina case,[629] the court of appeals reasoned essentially that stock options that are "vested" or exercisable at the date of separation are marital property, but that the contingencies inherent in options not exercisable at that time warranted separate property treatment.[630] Nor is North Carolina the only state that has opted for this admittedly simple solution, despite the fact that the result lacks both fairness and principled analysis.[631] Illinois courts have been notable for their propensity to equate inability to value exercisable but unexercised stock options with a mandatory separate property classification.[632] North Carolina courts, however, should be extremely wary of adopting this approach, particularly in view of our current treatment of nonvested pensions[633] under the new laws.[634]

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consider it marital property, even though husband had not liquidated it at the time of divorce); Ryan v. Ryan, 619 A.2d 692 (N.J. Super. Ct. Ch. Div. 1992) (determining that a large portion of unused vacation of $20,000 paid to employee upon termination should have been characterized as marital property).

628. *See, e.g.*, Lyons v. Lyons, 526 N.E.2d 1063, 1063 (Mass. 1988) (analogizing wife's interest in pending contingent fee case of lawyer-husband to the interest a litigant has in a pending lawsuit, which is also subject to distribution); Grund v. Grund, 573 N.Y.S.2d 840, 844 (Sup. Ct. 1991) (noting that, when husband's unused sick leave and vacation pay was valued at $89,000, the fact that husband had chosen not to retire did not alter the fact that he had a contract right to the money upon retirement, but concluding that because of the contingency that he might develop a catastrophic illness and use up the vacation and sick leave before retirement, it was error to award wife a lump sum distributive award, although the funds were marital property); Nuss v. Nuss, 828 P.2d 627, 632 (Wash. Ct. App. 1992) (concluding that when value of unused sick leave could be received at death or retirement, this contractual provision was similar to deferred compensation and should have been an asset for distribution).

629. *See* Hall v. Hall, 88 N.C. App. 297, 363 S.E.2d 189 (1987).

630. *See id.* at 307, 363 S.E.2d at 195-96. These kinds of assets would almost certainly be classified as deferred employment compensation under § 50-20(b)(1). *See* N.C. GEN. STAT.§ 50-20(b)(1) (Supp. 1997).

631. *See, e.g.*, *In re* Marriage of Moody, 457 N.E.2d 1023, 1026-27 (Ill. App. Ct. 1983). As noted previously, *supra* text accompanying notes 572-83 (discussing contingent fees, golden parachutes, early retirement incentives, etc.), virtually anything can be assigned a value and then be divided in-kind and in proportion to the marital contribution thereto.

632. *See Moody*, 457 N.E.2d at 1026-27.

633. See *supra* Part V.B.1 for an expanded analysis of this issue. The analogy with unvested pensions, plus the inclusion of deferred compensation benefits "or any portion thereof" in § 50-20(b)(4) seems quite compelling.

Moreover, a large majority of courts have treated unexercised stock options quite to the contrary.[635] In a particularly well-analyzed case, a Washington appellate court reasoned that the husband's right to elect stock options from his employer Microsoft, which right occurred shortly before the marriage ended, was indeed marital property.[636] The husband's right to receive the options, along with the company's obligation to make them available at some point in the future, was not the equivalent of future earnings, said the court, but rather was a right, acquired and earned, during the marriage.[637] In part, this approach, increasingly considered the "better rule,"[638] is based on a sharing of the risk approach used with pension enhancements not yet exercised.[639] Although the shared risk or

634. *See In re* Marriage of Frederick, 578 N.E.2d 612, 619 (Ill. App. Ct. 1991) (applying Illinois law and allowing ex-husband to retain stock options).

635. *See, e.g.*, Pascale v. Pascale, 644 A.2d 638, 643 (N.J. Super. Ct. App. Div. 1994) (concluding that stock option, awarded after the date the divorce complaint was filed, given in recognition of past employment performance, should be included as marital property); *In re* Marriage of Powell, 934 P.2d 612, 614-15 (Or. Ct. App. 1997) (including husband's nonvested stock options as marital property because they were given to create future employment incentive, and approving of trial court's calculation which gave wife credit for time between husband's receiving of the options and the date of marital dissolution and gave husband credit for the time between dissolution and vesting); Bodin v. Bodin, 955 S.W.2d 380, 381 (Tex. Ct. App. 1997, no writ) (explaining that "the unvested stock options constitute a contingent interest in property and are a community asset"). The major exception to this statement covering the large majority of courts is South Carolina. *See* Winchell v. Winchell, 353 S.E.2d 309, 311 (S.C. Ct. App. 1987) (noting that stocks in retirement fund representing employer contributions are not subject to equitable distribution).

636. *See In re* Marriage of Short, 859 P.2d 636, 645 (Wash. Ct. App. 1993).

637. *Id.* at 643-44.

638. *See, e.g.*, Lewis v. Lewis, 785 P.2d 550, 556 (Alaska 1990) (treating husband's contingent stock interest like a nonvested pension and thus holding it to be marital property because it was earned in part during the marriage); Richardson v. Richardson, 659 S.W.2d 510 (Ark. 1983) (upholding award to wife of one-half of husband's unexercised employment stock options as marital property); *In re* Marriage of Renier, 854 P.2d 1382, 1385 (Colo. Ct. App. 1993) (concluding that husband's stock was marital property because even though he received the stock options before the marriage, he used marital funds to purchase the stock during the marriage); Salstrom v. Salstrom, 404 N.W.2d 848, 850-51 (Minn. Ct. App. 1987) (explaining that like vested pensions, stock options that are exercisable after the date of dissolution are marital property because they are an economic resource acquired during the marriage); Chen v. Chen, 416 N.W.2d 661, 662-63 (Wis. Ct. App. 1987) (including as marital property husband's stock options that were granted during marriage but were not exercisable until after dissolution).

639. *See* discussion *supra* text accompanying note 570. Indeed, the analogy is hard to resist. As the well-known scholar Thomas Oldham has observed:

> Under the majority approach, the marital claim to the pension rights is determined by multiplying the coverture fraction times the pension actually received.... If the employee is still working at divorce, this allows the non-employee spouse to share in post-divorce increases; however, the coverture

marital foundation approach will usually involve a coverture portion, most of these courts simply leave open the judgments until the stock options are vested or exercised.[640] Some make use of qualified domestic relations orders ("QDROs"),[641] and others have held that retirement plans or stock options may be discounted to reflect the possibility of nonvesting or death of the employee.[642]

The variety of what is or is not, in whole or in part, marital or distributable property received before or after any state's "cut-off" date, and regardless of any contingencies, is virtually limited only by one's imagination. The only real exception to this is the treatment of degrees, licenses, and other forms of what are called "human capital."[643] One author has aptly noted that "[t]he family law system has not begun to digest the dialogue among economists" dealing with this issue.[644] Nor will this Article attempt to do so.

There are, however, numerous other types of marital or divisible property, even though their value of eventual receipt may be subject to contingencies, that have been the subject of litigation. Examples include: patents and inventions,[645] frequent flyer miles,[646] copyrights

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fraction becomes smaller as the period of post-divorce employment continues. OLDHAM, *supra* note 198, § 7.10[5], at 7-75. The Oldham treatise is highly recommended and contains a much more intricate analysis of types of employment enhancements and stock options than has been undertaken here.

640. *See* OLDHAM, *supra* note 198, § 7.10[5], at 7-75.

641. Many employer retirement plans, however, allow for QDROs to include such contingencies just as regular retirement pay. If the order is drawn correctly, the non-participant's share will be directly forwarded to him. *See* 29 U.S.C. § 1056(d) (1994).

642. *See, e.g.*, Fisher v. Fisher, 33 Pa. D. & C.3d 69 (1984) (using this approach to arrive at a current discounted value). As two commentators have persuasively argued, however, the dependent spouse virtually always profits more from a deferred percentage award. *See* Baumer & Poindexter, *supra* note 504, at 220.

643. For a good general discussion of human capital, see GARY STANLEY BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1975)

644. OLDHAM, *supra* note 198, § 5.02[4], at 5-6.1.

645. *See In re* Marriage of Monslow, 900 P.2d 249, 253-54 (Kan. Ct. App. 1995) (rejecting argument that dividing future income from patents acquired during marriage violates "clean break" rationale, and upholding 60%-40% split of any potential future income from patent between husband and wife); Hazard v. Hazard, 833 S.W.2d 911, 916 (Tenn. Ct. App. 1991) (explaining that although medical device developed by husband had no present marketable value, it "has intrinsic value for its present stage of development . . . [and] is in the nature of an intangible asset which was properly valued at the time of trial as a contingent asset . . . [that] should be considered marital property subject to division"); Dunn v. Dunn, 802 P.2d 1314, 1319 (Utah Ct. App. 1990) (holding $243,750 that remained to be paid to husband at time of trial under a license agreement relating to artificial knee implantation instruments to be marital property, and opposing plaintiff's argument that the "instruments were invented during the marriage, . . . nothing in the royalty contract conditions the payment of royalties upon [husband's] personal services, and . . . [husband] himself characterized the income as 'installment payments

for books and motion pictures,[647] disability or workers' compensation payments,[648] pending litigation,[649] trust distributions and

from the sale of property' on the parties' joint 1987 income tax return"). *But see* Yannas v. Frondistou-Yannas, 481 N.E.2d 1153, 1160 (Mass. 1985) (upholding exclusion of husband's future income from patent on artificial skin which he co-invented, and noting that "[t]he judge could have concluded on the evidence that the present value of the husband's future income from this source was too speculative to consider" and that the "asset was not one which obviously has current value but is difficult to appraise (such as a close corporation)").

646. While these are obviously impossible to value with specificity, the "miles" may certainly be divided in kind. *See* Calarco v. Calarco, No. FA 950144817S, 1997 WL 607468, at *4 (Conn. Super. Ct. Sept. 23, 1997) (ordering husband to assign 200,000 frequent flyer points to wife); Duck v. Duck, 664 So. 2d 970, 972 (Fla. Dist. Ct. App. 1995) (per curiam) (directing trial court to divide equally husband's frequent flyer points earned during marriage as stipulated by the spouses in their joint pretrial statement); Hakkila v. Hakkila, 812 P.2d 1320, 1327 (N.M. Ct. App. 1991) (ordering that frequent flyer points "be divided and distributed to the parties in kind, thus rendering valuation unnecessary").

647. *See In re* Marriage of Worth, 195 Cal. App. 3d 768, 774 (1987) (concluding that wife was entitled to share in husband's post-divorce copyright infringement action because the parties had agreed to split equally the continuing royalties after their divorce, and clarifying that "[i]f the artistic work is community property, then it must follow that the copyright itself obtains the same status"); *In re* Marriage of Zaentz, 267 Cal. Rptr. 31, 37 (Ct. App. 1990) (upholding award to wife of half of the $600,000 that husband, producer of the movie "Amadeus," received after dissolution as compensation for his producing and financing efforts because "[w]hether or not the movie was completed and receiving income at the time of separation, the time and artistic energies expended occurred in some appreciable degree during the marriage").

648. There is a wealth of case law on these property rights. North Carolina is probably in the majority of states that hold that the portion of such benefits that truly compensate for a disability are largely separate property. *See* Johnson v. Johnson, 117 N.C. App. 410, 413, 450 S.E.2d 923, 926 (1994). Several states have held that benefits that represent lost earnings during marriage are marital property, even if they are received after divorce. *See, e.g., In re* Marriage of Smith, 817 P.2d 641, 644 (Colo. Ct. App. 1991); West v. Ortego, 325 So. 2d 242, 248-49 (La. 1975); Hicks v. Hicks, 546 S.W.2d 71, 73 (Tex. Ct. App. 1976, no writ). If the earnings being replaced by the benefits are post-divorce earnings, many states have held the benefits to be separate property. *See, e.g.*, Bandow v. Bandow, 794 P.2d 1346, 1348 (Alaska 1990); *In re* Marriage of Bugh, 608 P.2d 329, 331 (Ariz. Ct. App. 1980); Goode v. Goode, 692 S.W.2d 757, 758 (Ark. 1985); *In re* Marriage of Fisk, 4 Cal. Rptr. 2d. 95, 98 (Ct. App. 1992); *In re* Marriage of Smith, 817 P.2d 641, 644 (Colo. Ct. App. 1991); Cook v. Cook, 637 P.2d 799, 802 (Idaho 1981); Mosley v. Mosley, 682 S.W.2d 462, 463 (Ky. Ct. App. 1985); Fontenot v. Fontenot, 571 So. 2d 221, 223 (La. Ct. App. 1990); Kirk v. Kirk, 577 A.2d 976, 979 (R.I. 1990). Many states have included pending workers' compensation claims as marital property. *See, e.g.*, Tyc v. Tyc, 672 A.2d 526, 529 (Conn. App. Ct. 1996) (including future workers' compensation benefits in marital distribution because the benefits are not mere expectancies and are susceptible to valuation), *cert. denied*, 676 A.2d 398 (Conn. 1996); Dees v. Dees, 377 S.E.2d 845, 847 (Ga. 1989); *In re* Marriage of DeRosset, 671 N.E.2d 654, 656 (Ill. 1996); Cummings v. Cummings, 540 A.2d 778 (Me. 1988); Smith v. Smith, 317 N.W.2d 324, 326 (Mich. Ct. App. 1982) (per curiam); Hughes v. Hughes, 334 A.2d 379, 381 (N.J. Super. Ct. Ch. Div. 1975).

649. Most courts have held pending claims to be property acquired before divorce. *See In re* Marriage of Fields, 779 P.2d 1371, 1373 (Colo. Ct. App. 1989); Moulton v. Moulton, 485 A.2d 976, 978 (Me. 1984); Hanify v. Hanify, 526 N.E.2d 1056, 1059 (Mass.

remainderman interests,[650] lottery winnings,[651] celebrity status,[652] a

1988); Postill v. Postill, 323 N.W.2d 491, 492 (Mich. Ct. App. 1982) (per curiam); Nuhfer v. Nuhfer, 599 A.2d 1348, 1349 (Pa. Super. Ct. 1991); Mears v. Mears, 417 S.E.2d 574, 575 (S.C. 1992) (per curiam).

650. If a future interest is acquired during marriage, many courts hold that the remainder interest was acquired during marriage. *See, e.g.*, McCain v. McCain, 549 P.2d 896, 900 (Kan. 1976); Davidson v. Davidson, 474 N.E.2d 1137, 1144 (Mass. App. Ct. 1985); Buxbaum v. Buxbaum, 692 P.2d 411, 413-14 (Mont. 1984); *In re* Marriage of Bentson, 656 P.2d 395, 396 (Or. Ct. App. 1983); Chilkott v. Chilkott, 607 A.2d 883, 884 (Vt. 1992). However, most cases that have addressed whether income that accumulates in a trust during marriage, but is not distributed to a spouse before divorce, is acquired during marriage, and have answered the question in the negative. Many determine the income to be acquired during marriage only if the spouse has actually received the money. *See, e.g.*, Sayer v. Sayer, 492 A.2d 238, 240 (Del. 1985); Bacher v. Bacher, 520 So. 2d 299, 300 (Fla. Dist. Ct. App. 1988) (per curiam); *In re* Marriage of Muelhaupt, 439 N.W.2d 656, 661 (Iowa 1989); Reynolds v. Reynolds, 388 So. 2d 1135, 1139 (La. 1980); Mey v. Mey, 398 A.2d 88, 89-90 (N.J. 1979). Texas courts have required that the spouse have the right to demand the money before divorce. *See In re* Marriage of Burns, 573 S.W.2d 555, 557-58 (Tex. Civ. App. 1978, writ dism'd w.o.j.); *In re* Marriage of Long, 542 S.W.2d 712, 718 (Tex. Civ. App. 1976, no writ).

651. *See, e.g.*, *In re* Marriage of Mahaffey, 564 N.E.2d 1300, 1305-07 (Ill. App. Ct. 1990) (upholding equal division of winnings from ticket purchased during marriage because the right to receive payments was established during marriage, ticket was purchased with marital funds, and winnings resulted from fortuitous circumstances rather than either spouse's toil or labor); Alston v. Alston, 629 A.2d 70, 74-76 (Md. 1993) (holding that winnings from lottery ticket purchased by husband after separation but before divorce were marital property, but rejecting an equal division of the winnings between the spouses because when one party, wholly through her own efforts and without any contribution by the other, acquires marital property after separation and after the marital family has ceased to exist, an equal division of the property would generally not be equitable); Nuhfer v. Nuhfer, 599 A.2d 1348, 1350 (Pa. Super. Ct. 1991) (holding that when lottery ticket was purchased before separation, winnings from that ticket that were collected after divorce were marital property); Giha v. Giha, 609 A.2d 945, 948-49 (R.I. 1992) (ruling that when husband won lottery after an interlocutory order was entered in a divorce action, but before final judgment was rendered, the winnings were subject to equitable distribution, and explaining that despite separation and interlocutory order, the property rights of spouses remain unaffected until final divorce decree).

652. In *Elkus v. Elkus*, 572 N.Y.S.2d 901 (App. Div. 1991), the wife's opera singing career had increased in value during the marriage, due partly to husband's contributions and efforts as teacher and coach. *See id.* Holding that the increase in the wife's career value was the product of the marital partnership and thus subject to equitable distribution, the court explained that the nature and extent of the contribution by the husband, not the type of career, determine whether an asset is subject to equitable distribution. *See id.* at 904-05. For other decisions regarding celebrity status, see *Piscopo v. Piscopo*, 557 A.2d 1040, 1042-43 (N.J. Super. Ct. App. Div. 1989) (rejecting argument that future earnings resulting from celebrity status were so uncertain they were not quantifiable, and determining that because celebrity status was attained entirely during marriage, celebrity goodwill is a marital asset, and past earnings may be used to predict probable future earnings), and *Golub v. Golub*, 527 N.Y.S.2d 946, 949-50 (Sup. Ct. 1988) (holding increase in value of acting and modeling career to be marital property to the extent fame was attributable to the efforts of spouse, and stating that when traceable to marital efforts, "the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage

green card,[653] the expectation of an inheritance,[654] unharvested crops[655] or federal crop insurance,[656] unborn pedigree or farm animals,[657] syndication of stud fees for horses,[658] and military retirement fringe benefits.[659] This list is intended to be merely suggestive, and by no means exhaustive. At a minimum, it should excite or dismay both the bench and the bar with the possibilities opened by the simple, but highly inclusive, definition of distributable property to include "property, property rights, and other deferred compensation rights" earned even in part before the date of distribution.

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earner should be valued as marital property subject to equitable distribution").

653. In *Gubin v. Lodisev*, 494 N.W.2d 782 (Mich. Ct. App. 1992), the husband had fraudulently induced his wife to marry him so that he could immigrate to the United States. *See id.* at 784. When wife sought to have her husband's "green card" declared marital property, the court held that in light of national public policy to avoid sham marriages, a monetary value could not be assigned to a right to immigrate when marriage was eventually dissolved. *See id.* at 786-87. The court noted that it may encourage marriages for profit if it assigned a value to the green card, and that any award on that basis would be speculative and premature because the card may be revoked. *See id.* at 787.

654. *See* OLDHAM, *supra* note 198, § 6.03, at 6-14 to -16.

655. *See, e.g., In re* Marriage of Hawkins, 513 N.E.2d 143, 146-47 (Ill. App. Ct. 1987) (holding that when crops were produced from an orchard after marital dissolution but before property distribution, the crops are marital property and the orchard should be valued at time of dissolution, but income deriving from the orchard until time of property division is marital property); *In re* Marriage of Martin, 436 N.W.2d 374, 376 (Iowa Ct. App. 1988) (ruling that crops are marital property separate from the real estate on which they grow, and holding that their proper value is their probable value at the time of harvest, less labor and expenses, rather than their value at the time of the spouses' separation). *But see* Cobb v. Cobb, 107 N.C. App. 382, 420 S.E.2d 212 (1992) (declaring that the future value of timber growing on marital property that was not to be cut for 15 years did not become vested during marriage and was not subject to equitable distribution, and finding further that the future value was not a distributional factor to be considered in distribution, but that the actual value of the land in timber on date of spousal separation was proper for distribution purposes).

656. *See, e.g.*, Martin v. Martin, 307 N.W.2d 541, 543 (N.D. 1981) (upholding trial court award of two-thirds share of disaster and crop insurance payments to husband and one-third share to wife).

657. *See, e.g.*, Holznagel v. Holznagel, 369 N.W.2d 344, 346-47 (Minn. Ct. App. 1985) (noting that when a pregnant mare was valued for purposes of equitable distribution, the value of the unborn foal should be considered in determining the value of the mare).

658. *See, e.g.*, Hauge v. Hauge, 427 N.W.2d 154, 155-56 (Wisc. Ct. App. 1988) (rejecting trial court allocation to husband alone of debt arising from purchase of horses through a syndicated ownership and directing trial court to either establish the amount of the debt or order each party to pay an appropriate percentage, and noting that "had the investments continued to be profitable under the same circumstances, [the husband] would have had no right to claim the proceeds solely as his own").

659. *See, e.g.*, Rogers v. Sims, 671 So. 2d 714, 716 (Ala. Civ. App. 1995), *In re* Long, 921 P.2d 67 (Colo. Ct. App. 1996); Pegler v. Pegler, 895 S.W.2d 580, 582 (Ky. Ct. App. 1995).

## VI. CONCLUSION

The length, conclusions, suggestions and possibilities set forth in this Article have surprised no one more than its author. The more deeply one explores the scope and potential within both the new alimony laws (that do indeed create a labyrinth at times) and equitable distribution amendments (that are less of a maze but carry the same mandate for change and create the potential for even more change) however, the more evident become the analyses, complexities, and conclusions reached in this Article.

At a bare minimum, the new spousal support laws have greatly expanded the calculation of income, both for the purposes of determining dependency and particularly with regard to setting both the amount and duration of alimony. The fifteen new factors that courts shall henceforth consider, including in particular medical benefits supplied to an employee, is but one example of this expansion in the definition of income. Simultaneously, the new alimony act has laudably and realistically eliminated the previous standard of living as the unequivocal first among equals in determining the duration and amount of alimony and postseparation support, and has opened the door to imposition of a meaningful duty to disclose. For all these reasons, and more as pointed out in the text,[660] our new statute has greatly expanded the practical, if not the literal, definition of dependency, while simultaneously eliminating it as a permanent status.

The postseparation support portions of the new statute, while far from perfect, nonetheless share many of the virtues in the alimony sections of the new Act, and, just as critically, provide a crucial (and, it is to be hoped, expeditious) source of income for a dependent spouse when it is needed most. Finally, our courts, freed from the fairly severe shackles of the previous law, now possess the freedom and the flexibility to do justice, to inject the spirit inherent in the much more flexible letter of the new laws. One of the best examples of this is the ability our judiciary now has with regard to determining dependency, and the amount and duration of alimony awards, as it wades through the new fifteen factors that must be considered in determining such issues.

The new alimony act is hardly without blemish, of course. The persistent inability of North Carolina to divorce itself from the role of fault, the gender based inequality in the inability to present evidence

660. *See* discussion *supra* Part III.A-B.

of fault in the postseparation support hearings, the utter lack of clarity in determining when living with another party after divorce would be a termination event for alimony purposes, and the looming impact of the use and abuse (and even a precise definition) of condonation all bespeak a distinct unwillingness to throw off the barnacles of the past. Nonetheless, as the title of this Article indicates, domestic law in North Carolina—long the step-child of the legal profession, the legislature, and most law schools[661]—is moving, step by step, towards a more realistic and definitely fairer and more progressive approach to spousal support.

The same progressive and unequivocably more realistic accolades are at least as applicable, if not more so, with regard to the new equitable distribution amendments. In brief, the amendments in this area virtually erase most of the more glaring inequities in the Equitable Distribution Act and afford our courts the opportunities, and mandate changes in equitable distribution, that at long last breathe life into the very concepts that the supreme court initially stated as the goals of equitable distribution—the concept of a partnership marriage, a realistic treatment of the active/passive distinction, recognition of acquisition as an on-going process, and of the source of funds rule, in addition to a much more expanded opportunity to make use of the "analytical approach." In short, our judiciary has been freed to implement its own clearly stated purposes.

Moreover, the addition of a presumption in favor of in-kind property divisions has created what had been a sorely lacking opportunity not only to create considerably more just results in a property division trial, but almost by necessity, greatly to relax the previous inflexibility on valuation of property. Given the statutory mandate of the presumption, moreover, courts should be more than willing to accept virtually any semi-realistic stipulation of the parties as to valuation, particularly with an asset whose value may be somewhat contingent. While this may disappoint many expert witnesses, it would create an immense savings of judicial resources, not to mention resources of the parties. This conclusion as to the existence of infinitely greater flexibility with valuation of property is strengthened even further by the inclusion of nonvested pension benefits and employment enhancements, certainly until the date of distribution, and analytically and practically as well, even beyond the date of distribution. Thus, the combination of in kind distributions,

661. *See* Martha Minow, *"Forming Underneath Everything that Grows:" Towards a History of Family Law*, 1985 WIS. L. REV. 819, 819.

nonvested pensions and their analogue, post date of distribution with employment enhancements, all combine to create contingencies as to value that must create a much greater tolerance for approximate valuations. Indeed, the major change in the existing statute must focus upon the "bright line" insistence upon valuation of all assets and upon recognition of the analytically almost identical "marital foundation theory" with our own partnership marriage theory and the analytical approach. Legislative action to amend § 50-20(c) of the North Carolina General Statutes to read that the court shall, "where possible, arrive at an approximate value" of marital and separate property would be the preferred solution to this clear contradiction in the law.[662] Even absent such action from the legislature, however, courts will now be forced to accept contingency values as to some types of property, and presumably values that approximate net value of assets that are to be divided in kind.

Finally, the creation of "divisible" property—rewarding both marital and separate estates for increases or decreases in value between the date of separation and the date of distribution—not only corrects what was probably the most inequitable portion of the previous statutory and case law on equitable distribution it is also likely to have profound effects on the divorce process as well, in that it removes most of the previous incentives for obstruction and delay in equitable distribution. To a very large degree, moreover, it also eliminates the "*Truesdale* rule," which for so long had made a mockery of legal analysis, the very purposes of the statute itself, and common sense.[663]

The creation of divisible property does not, nor could it, remove all incentives for divorce planning, but it certainly eliminates the ease with which such planning behavior in which spouses previously engaged. Basically, it seems correct and appropriate to conclude that, unlike the unknown landscape into which the alimony act may lead us, the equitable distribution amendments, while not without new concepts with which courts will have to deal, have nonetheless taken straight and true aim at the most glaring deficiencies in our previous law.

The changes inherent in both the new alimony act and the amendments to the Equitable Distribution Act will clearly not be easy for either the bench or the bar to digest. But change is the very

662. N.C. GEN. STAT. § 50-20(c) (Supp. 1997).

663. For an analysis of the *Truesdale* rule and the havoc it caused, see *supra* notes 512-20 and accompanying text.

soul of the law. The indigestion may be particularly acute with deferred employment enhancements, although as previously noted, the "time line" or "marital foundation" approach used in most states is basically the same as our existing coveture fraction/deferred distribution combined with our "analytical approach." For somewhat different reasons, the new alimony laws may also be difficult to digest, in part because most of the previous law must be unlearned, but largely because the new provisions on spousal support contain so many more inconsistencies and complexities. But like the amendments to the Equitable Distribution Act, these provisions contain and create an enormous potential for equitable changes. Most importantly, when presented with the opportunity to do justice in the domestic relations area, our courts have consistently done so—when they have the necessary knowledge and background to do so. The opportunities to do justice abound with our new laws. It is profoundly to be hoped that this Article will provide the background and certainly some of the knowledge that will aid our judiciary in understanding and interpreting these new laws.[664]

664. If I may interject one personal note, the potential, complexities, and occasional outright inconsistencies, particularly with regard to the new alimony act, have proven to be extremely frustrating to this author. I naively undertook the Article in the summer of 1997, with the assumption—which I thought entirely reasonable at the time—that I could easily complete it within three months. As I complete the conclusion, it has now been thirteen months—all of which will be worthwhile if the Article is of not insignificant value to the bench and the bar.