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A SURVEY OF THE LAW OF PROPERTY DISPOSITION UPON DIVORCE IN THE TRISTATE AREA

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During the past 20 years, our society has witnessed profound changes in its most cherished values and institutions. Foremost among these changes is the recent explosion in the divorce rate. Once considered socially unacceptable, marital dissolution invariably has touched almost every American family. The legal system, however, has responded slowly to this emerging social reality.

Prior to the enactment of their respective equitable distribution laws,¹ New York, New Jersey, and Connecticut viewed divorce

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¹ Equitable distribution is the apportionment of marital assets between a divorcing husband and wife irrespective of individual ownership. *Painter v. Painter*, 65 N.J. 196, 209, 213, 320 A.2d 484, 490, 493 (1974); Comment, *Divorce Law—Equitable Distribution of Property in New Jersey*, 28 RUTGERS L. REV. 447, 447 (1974). The policy underlying equitable distribution is that "[t]he distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." UNIFORM MARRIAGE AND DIVORCE ACT § 307, Commissioner's Prefatory Note 93 (1973). Statutory embodiments of equitable distribution principles have withstood constitutional challenges premised on undue vagueness, *Painter v. Painter*, 65 N.J. at 211, 320 A.2d at 492, and the impairment of contractual rights. *Valladares v. Valladares*, 80 App. Div. 2d 244, 253, 438 N.Y.S.2d 810, 816 (2d Dep't 1981), *aff'd*, No. 134 (N.Y. Ct. App. April 6, 1982). Forty states, including the District of Columbia, have adopted some form of equitable distribution. See, e.g., ALASKA STAT. § 09.55.210(6) (1973); ARK. STAT. ANN. § 34-1214 (Supp. 1981); COLO. REV. STAT. § 14-10-113(1) (1973 & Supp. 1980); CONN. GEN. STAT. § 46b-81(a) (1981); DEL. CODE ANN. tit. 13, § 1513(a) (1981); D.C. CODE ENCYCL. § 16-910(b) (West Supp. 1978-1979); HAWAII REV. STAT. § 580-47(a) (Supp. 1980); ILL. ANN. STAT. ch. 40,

from the restrictive common-law perspective.² The financial contest usually was decided upon the merits of the divorce action. Alimony could not be awarded to a spouse who had been guilty of

§ 503(c) (Smith-Hurd 1980); IND. CODE § 31-1-11.5-11(b) (Supp. 1981); IOWA CODE ANN. § 598.21 (West 1981); KAN. STAT. ANN. § 60-1610(c) (Supp. 1980); KY. REV. STAT. § 403.190(1) (Supp. 1980); ME. REV. STAT. ANN. tit. 19, § 722A(1) (1981); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1981); MICH. COMP. LAWS ANN. § 552.23(1) (Supp. 1981-1982); MINN. STAT. ANN. § 518.58 (West Supp. 1981); MO. ANN. STAT. § 452-330.1 (Vernon Supp. 1982); MONT. REV. CODES ANN. § 48-321(1) (Supp. 1977); NEB. REV. STAT. § 42-365 (1978); N.H. REV. STAT. ANN. § 458.19 (1968); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982); N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982); N.D. CENT. CODE § 14-05-24 (1981); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1981-1982); OR. REV. STAT. § 107.105(1)(c) (1979); PA. CONS. STAT. ANN. § 23-401(d) (Purdon Supp. 1981-1982); R.I. GEN. LAWS § 15-5-16 (Supp. 1981) (reenactment); S.D. COMP. LAWS ANN. § 25-4-44 (1976); TENN. CODE ANN. § 36-825 (1977); UTAH CODE ANN. § 30-3-5(1) (Supp. 1981); VT. STAT. ANN. tit. 15, § 751 (1974); WIS. STAT. ANN. § 767.255 (West 1981); WYO. STAT. § 20-2-114 (1977); Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 249-50 (1981) [hereinafter cited as Freed & Foster, *Divorce in the Fifty States*]. Both equitable distribution and community property systems are premised upon the idea of collective ownership of marital property. This concept can be traced to the early Germanic tribes which established such a system in Spain. In turn, the Spanish implemented community property systems in their new world colonies. See Greene, *Comparison of the Property Aspects of the Community Property and Common Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 73-76 (1979). Eight states currently employ principles of community property which stem from their colonial heritages. See ARIZ. REV. STAT. ANN. § 25-211 (1976); CAL. CIV. CODE § 5104 (West 1970); IDAHO CODE § 32-906 (Supp. 1981); LA. CIV. CODE ANN. art. 2335 (West Supp. 1981); NEV. REV. STAT. § 123.220 (1979); N.M. STAT. ANN. § 40-3-8B (1978); TEX. FAM. CODE ANN. tit. 1, § 5.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1981). Mississippi, Virginia, and West Virginia, however, remain "title" jurisdictions. Freed & Foster, *Divorce in the Fifty States*, *supra*, at 249-50.

² Equitable distribution and the community property systems represent reactions against the common law under which the courts played a limited role in dividing marital property upon divorce. Under the common law, the only "divorce" available was the equivalent of a contemporary legal separation. Since the marriage remained legally intact, the spouses' respective property interests remained inviolate. See generally Comment, *supra* note 1, at 448-51. Thus, the title issue was dispositive. New York courts were powerless to transfer property to which one spouse held title unless the spouse seeking apportionment satisfied the requirements for the imposition of a constructive trust. *Fischer v. Wirth*, 38 App. Div. 2d 611, 611-12, 326 N.Y.S.2d 308, 309-10 (3d Dep't 1971) (absent fraud or concealment, wife denied share in husband's property purchased with their combined savings over 22 years); see note 6 *infra*. See generally Foster & Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L.Q. 55, 59-71 (1976) [hereinafter cited as Foster & Freed, *Marital Property*]. Connecticut also used the strained artifice of a constructive trust to distribute marital property. *E.g.*, *Pappas v. Pappas*, 164 Conn. 242, 320 A.2d 809, 810 (1973); *Manyak v. Manyak*, 29 Conn. Supp. 1, 268 A.2d 806, 808 (Super. Ct. 1970). Courts in New Jersey were inactive in distributing property because their jurisdiction was limited statutorily to periodic awards of alimony, modification of alimony awards, and the enforcement of private settlements which did not conflict with public policy. See, *e.g.*, *Polycronos v. Polycronos*, 17 N.J. Misc. 250, 256-59, 8 A.2d 265, 270-72 (Ch. 1939); *Calame v. Calame*, 25 N.J. Eq. 548, 549-51 (Ct. Err. & App. 1874).

marital fault and, if both parties were guilty of such fault, neither one would be eligible for an award of alimony.³ Additionally, because the authority of the judiciary was limited to the resolution of title disputes, courts could not invade the assets of either party or convey separate property.⁴

The resulting hardships led to a general consensus regarding the necessity for reform.⁵ Against this background, the states in the metropolitan area individually attempted to modernize their approach to divorce and the attendant disposition of marital property.⁶ Although the reformers spoke of marriage in terms of an eco-

³ See note 155 and accompanying text *infra*.

⁴ See note 2 *supra*.

⁵ *Fischer v. Wirth*, 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (3d Dep't 1971), vividly illustrates the harsh results engendered by the common-law rules. The wife in *Wirth* used her salary to pay the family expenses for 22 years while her husband enriched himself by investing his accumulated earnings in his own name. *Id.* at 612, 326 N.Y.S.2d at 310. Upon dissolution of the marriage, the wife petitioned the court for the imposition of a constructive trust. *Id.* at 611-12, 326 N.Y.S.2d at 309-10. Despite her husband's statement that he had started a savings program "for the two of us," the court held that he had not impliedly promised to reimburse his wife for the money she expended in fulfillment of his support obligation. *Id.* at 612, 326 N.Y.S.2d at 310. The court emphasized that:

A constructive trust is a vehicle for "fraud rectifying." There may be a moral judgment that can be made on the basis of respondent's conduct and the imperfectly expressed intention of some possible future benefit to appellant, but that is not enough to set the court in motion.

Id. at 612, 326 N.Y.S.2d at 311 (citations omitted).

⁶ The New York Joint Legislative Committee on Matrimonial and Family Laws issued a report in 1966 urging an extensive study of the state's alimony laws. This study was preempted by passage of the Divorce Reform Law of 1966, ch. 254, § 2, [1966] N.Y. Laws 834 (current version at N.Y. DOM. REL. LAW § 170 (McKinney 1977)), which established several novel grounds for divorce. Although the new law represented the first change in the New York divorce law since the abolition of legislative divorce in 1846, it did not alter the existing standards for distributing property or awarding alimony. See Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, 169-70 & nn.1-2 (1974) [hereinafter cited as Foster & Freed, *Marital Property Reform in New York*]. Professor Foster, an advisor to the committee which drafted the divorce reform legislation, produced an initial draft of the equitable distribution law during the early seventies. Ultimately, this draft received the approval of various New York bar groups. See generally Foster, *Legislative History*, in A PRACTICAL GUIDE TO THE NEW YORK EQUITABLE DISTRIBUTION DIVORCE LAW 41 (H. Foster ed. 1980) [hereinafter cited as GUIDE TO NEW YORK EQUITABLE DISTRIBUTION]; Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 1 n.1 (1981) [hereinafter cited as Foster, *Commentary on Equitable Distribution*]. Initially introduced in the Senate in 1976, the bill stalled in the Senate Judiciary Committee for 3 years because of fears that liberal reform would encourage divorces. The bill was reintroduced in 1980 by Senator Barclay and Assemblyman Burrows, N.Y.S. 6174, N.Y.A. 6200, 203 Sess. (1980). The legislation finally was enacted in June 1980. Ch. 281, § 9, [1980] N.Y. Laws 1227 (current version at N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982)).

New Jersey initiated reform in 1967 when its legislature appointed a commission to study the divorce law. Ch. 57, [1967] N.J. Laws. This commission proposed a bill which was

conomic partnership, the resulting laws implicitly rejected the notion that marriage inevitably is a partnership of economic equals in favor of an equitable distribution of marital property.⁷ Additionally, the new laws provide that, where appropriate, temporary or

introduced in the Assembly in 1970. N.J.A. 1100, 194th Sess. (1970). The bill was enacted in 1971, marking the first major substantive change in the New Jersey divorce law in nearly half a century. Ch. 212, § 8, [1971] N.J. LAWS 1025 (current version at N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982)).

Connecticut also moved toward divorce reform in 1967. In that year, the Family Law Committee of the Connecticut Bar Association began a study of Connecticut divorce law which culminated in a proposed bill which was submitted to the legislature in 1971. *Proposal for Revision of the Connecticut Statutes Relative to Divorce: Statute and Commentary*, 44 CONN. B.J. 411 (1970). The committee proposal formed the basis for the legislation that was enacted 2 years later. 1973 Conn. Pub. Acts 73-373 § 20 (current version at CONN. GEN. STAT. § 46b-81 (1981)). For a critique of the initial proposal, see Cohen, *Divorce Reform: Another Point of View*, 47 CONN. B.J. 88 (1973).

⁷ The New York Senate debated whether to adopt an amendment proposed by Senator Winikow. Supported by the National Organization of Women, the amendment contained a presumption that marital property should be divided equally upon divorce. The proposed amendment was grounded on the principle that "marriage is what most people were led to believe it to be, an equal partnership, and that equality is equity most of the time." Sassower, *Looking Anew for Fair Divorce Law*, N.Y. Times, May 11, 1980, § 22, at 18, col. 2. The debate was heated, with proponents of the amendment willing to postpone reform for yet another year rather than pass an equitable distribution bill. See Record, New York State Senate, at 3997 (June 3, 1980) (remarks of Sen. Winikow). Opponents of the amendment, however, maintained that the unique nature of each marital relationship necessitated flexibility in the disposition of property. *Id.* at 4061 (remarks of Sen. Goodhue). Indeed, one opponent remarked that "[i]f there was no difference in the various marriages around this state, then we should have equal distribution, but I suggest to you that there are no two marriages alike." *Id.* Critics of the equitable distribution bill countered that "flexibility" and its concomitant subjectivity would lead to unfair results with an overwhelmingly male judiciary undervaluing wives' roles as homemakers. Sassower, *supra*, at 18, col. 2. Eventually, the amendment was defeated by a vote of 30 to 21 in the New York Senate. See Record, New York State Senate (June 3, 1980).

New Jersey and Connecticut also have rejected the view that marriage always is an equal economic partnership. Any doubts concerning whether the 1971 revisions in the New Jersey divorce law incorporated the idea that marriage is an equal partnership were resolved by the first definitive judicial interpretation of the new law. In *Painter v. Painter*, 65 N.J. 196, 216-17, 320 A.2d 484, 495 (1974), the New Jersey Supreme Court noted:

[C]ommunity property law is very different from our law of property. . . . We have no reason to suppose that the lawmakers intended to adopt a rule the development and evolution of which would very likely come to be governed by rules of community property law, or that they were aware they might be doing so.

Id.; cf. *Rothman v. Rothman*, 65 N.J. 219, 232, 320 A.2d 496, 503 (1974) (each case should be examined individually).

By providing for judicial assignment "to either the husband or wife *all or any part* of the estate of the other," the Connecticut law emphasizes the potential for an *unequal* distribution of property. CONN. GEN. STAT. § 46b-81(a) (1981) (emphasis added). See also ARK. STAT. ANN. § 34-1214 (Supp. 1981); WIS. STAT. ANN. § 767.255 (West 1981).

permanent periodic payments may be awarded to either spouse.⁸

Of the three states, New Jersey was the first to adopt equitable distribution and was propelled into the forefront of subsequent developments.⁹ Connecticut followed suit in 1974.¹⁰ New York's statute became effective in July 1980, and consequently its parameters, to some degree, are undefined.¹¹ While there are significant

⁸ See notes 157-171 and accompanying text *infra*.

⁹ Ch. 212, § 8, 1971 N.J. Laws 1025 (currently codified at N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982)). The statute provides:

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.

Id.

¹⁰ 1973 Conn. Pub. Acts 73-373, § 20 (currently codified at CONN. GEN. STAT. § 46b-81 (1981)). The statute provides:

At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or wife all or part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.

Id. § 46b-81(a).

Section 46b-81, which appeared as section 46-51 until its transfer in 1979, has been amended twice. The language enabling the court to convey title to real property and specifying that the conveyance would function as a deed, binding life estates and remainders, was added in 1975. 1975 Conn. Pub. Acts 75-331. A 1978 amendment made nonsubstantive changes in phraseology and divided the section into subsections. 1978 Conn. Pub. Acts 78-230, § 36.

¹¹ Ch. 281, § 9, [1980] N.Y. Laws 1227 (currently codified at N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982)). Section 236 directs the court to distribute marital property equitably, considering both "the circumstances of the case and of the respective parties." *Id.* § 236(B)(5)(c). Subsection 236(B)(5)(d) outlines criteria to be considered in making the award:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any award of maintenance under subdivision six of this part;
- (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 as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (7) the liquid or non-liquid character of all marital property;

differences among these jurisdictions in the application of equitable distribution principles, the tristate practitioner now may expect a greater degree of uniformity in the division of marital assets upon divorce.¹² This Article will examine the similarities and dif-

(8) the probable future financial circumstances of each party;

(9) the impossibility or 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;

(10) any other factor which the court shall expressly find to be just and proper.

Id.

New York's equitable distribution statute became effective on July 19, 1980. The statute, by its own terms, does not apply to actions commenced prior to the effective date. N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982); *Goding v. Goding*, 106 Misc. 2d 423, 426, 431 N.Y.S.2d 797, 799 (Sup. Ct. Nassau County 1980). *But see* *Deschamps v. Deschamps*, 103 Misc. 2d 678, 684, 430 N.Y.S.2d 966, 969 (Sup. Ct. Nassau County 1980) (subdivision five of part B to be applied retroactively). Plaintiffs who had divorce actions pending on the effective date have sought to discontinue their actions with a view towards commencing a new action which would be subject to the equitable distribution law. When confronted with the issue, many courts have refused to grant leave to discontinue. *E.g.*, *Tucker v. Tucker*, No. 135 (N.Y. Ct. App. April 6, 1982); *Valladares v. Valladares*, 80 App. Div. 2d 244, 259, 438 N.Y.S.2d 810, 820 (2d Dep't 1981), *aff'd*, No. 134 (N.Y. Ct. App. April 6, 1982); *Gellman v. Gellman*, 80 App. Div. 2d 735, 735, 437 N.Y.S.2d 163, 164 (4th Dep't 1981); *Mazzei v. Mazzei*, N.Y.L.J., July 28, 1981, at 11, col. 1 (Sup. Ct. Nassau County); *Mercier v. Mercier*, 103 Misc. 2d 1029, 1035 (Sup. Ct. Monroe County 1980). Some courts have found that granting a discontinuance would be contrary to the legislative intent. *Moss v. Moss*, N.Y.L.J., Jan. 13, 1981, at 13, col. 1 (Sup. Ct. Queens County); *Goding v. Goding*, 106 Misc. 2d 423, 427, 431 N.Y.S.2d 797, 799 (Sup. Ct. Nassau County 1980).

Conversely, several courts have granted motions to discontinue, adopting the view that a discontinuance would not prejudice the defendant. *Cooper v. Cooper*, 103 Misc. 2d 689, 694-95, 430 N.Y.S.2d 998, 1001 (Sup. Ct. Westchester County 1980); *accord*, *Zervalis v. Zervalis*, N.Y.L.J., Jan. 7, 1981, at 14, col. 5 (Sup. Ct. Nassau County); *Pollack v. Pollack*, N.Y.L.J., Oct. 7, 1980, at 13, col. 4 (Sup. Ct. Westchester County). In granting a discontinuance, one court deemed it significant that the plaintiff was not seeking to harass the defendant or relitigate any issue. *Badeer v. Badeer*, N.Y.L.J., Sept. 10, 1980, at 15, col. 3 (Sup. Ct. Suffolk County).

For a discussion of the New York statute, see GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6; Foster & Freed, *Family Law, 1980 Survey of New York Law*, 32 SYRACUSE L. REV. 335 (1981) [hereinafter cited as Foster & Freed, *Family Law*]; Shainswit, *Some Thoughts From the Bench On Equitable Distribution*, N.Y.L.J., April 6, 1981, at 1, col. 2; Riebesehl, *Equitable-Distribution Law: Inequity in Dividing Property*, N.Y.L.J., March 23, 1981, at 1, col. 2; Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67 (1980); 45 ALB. L. REV. 483 (1981).

¹² Although the tristate practitioner now may anticipate a greater degree of uniformity, significant differences will continue to exist. For example, the statutory equitable distribution schemes diverge in their initial determinations of the property subject to distribution. See notes 13-32 and accompanying text *infra*. Furthermore, section 307 of the Uniform Marriage and Divorce Act originally required an assignment of each spouse's property to that spouse and a subsequent division of the marital property. Property acquired by gift, bequest, devise, or descent and any increase in value of property acquired before the mar-

ferences in the law of equitable distribution in the New York metropolitan area.

DETERMINING ASSETS SUBJECT TO EQUITABLE DISTRIBUTION

In arriving at an equitable distribution, a court initially must determine which assets are subject to distribution.¹³ New York and New Jersey distribute property acquired "during the marriage."¹⁴

riage was excepted from the marital property category. This approach was criticized by several commentators. See, e.g., *Proposed Revised Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 135, 151-52 (1973); Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 169, 175 (1973). Subsequently, in 1973, section 307 was amended to encompass two alternative approaches. Alternative A provided for the equitable apportionment of "property and estates belonging to either or both [spouse(s)], however and whenever acquired." Alternative B retained the distinction between community and separate property. Alternative A, however, was recommended for adoption. UNIFORM MARRIAGE AND DIVORCE ACT § 307, Commissioner's Comment (1973).

¹³ The process for determining which assets are subject to an equitable distribution was delineated in *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974). The *Rothman* court rejected any formalistic approach, declaring that the trial judge's determination should be based upon an examination of each case "as an individual and particular entity." *Id.* at 232-33 n.6, 320 A.2d at 503 n.6; Comment, *supra* note 1, at 461-62. Full cooperation is required from the litigants to assist the trial judge in his determination. Each spouse must review all of his eligible property beforehand and come into court fully prepared to testify accurately respecting these assets. *Rothman v. Rothman*, 65 N.J. at 233, 320 A.2d at 504. This preparation normally will involve an expenditure of time and money in addition to the use, when necessary, of appraisers and accountants. *Id.*

Compulsory financial disclosure is provided by statute in New York. N.Y. DOM. REL. LAW § 236(B)(4) (McKinney Supp. 1981-1982). Each party in litigation involving alimony, maintenance, or support is required to submit a sworn statement of individual net worth. *Id.* Failure to comply with subsection four of Part B is punishable by civil penalties. *Id.* Subsection four enumerates the minimum disclosure requirements. *Roussos v. Roussos*, 106 Misc. 2d 583, 584, 434 N.Y.S.2d 600, 602 (Sup. Ct. Queens County 1980). Additional disclosure may be mandated. *Id.*; see *McKenzie v. McKenzie*, 78 App. Div. 2d 585, 586, 432 N.Y.S.2d 424, 425 (4th Dep't 1980); *Stolowitz v. Stolowitz*, 106 Misc. 2d 853, 856, 435 N.Y.S.2d 882, 884-85 (Sup. Ct. Nassau County 1980) (broad disclosure imperative for proper equitable distribution trial). Notably, the only limitation which has been imposed upon this policy of complete disclosure has involved attempts to discover the identity and addresses of legal clients who are not parties to the matrimonial litigation. 106 Misc. 2d at 859, 435 N.Y.S.2d at 886-87. To facilitate the evaluation of pertinent financial information, several courts have made *pendente lite* awards of monies to enable an unemployed spouse to retain an accountant for the purpose of examining the financial condition of the supporting spouse. *Fay v. Fay*, 108 Misc. 2d 373, 375, 437 N.Y.S.2d 601, 603 (Sup. Ct. Suffolk County 1981); *Gueli v. Gueli*, 106 Misc. 2d 877, 878-79, 435 N.Y.S.2d 537, 538-39 (Sup. Ct. Nassau County 1981).

¹⁴ See N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982); N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney Supp. 1981-1982). As used in the New Jersey statute, the term "during the marriage" clearly refers to the period commencing with the marriage ceremony. See *Painter v. Painter*, 65 N.J. 196, 217, 320 A.2d 484, 495 (1974). Because of the difficulty inherent in determining precisely when a marriage dissolves, New Jersey courts have

The central inquiry under this standard is whether the assets involved may properly be regarded as "marital" or "separate" property.¹⁵ In making this determination, trial judges in the two states are aided by established definitions of the terms "marital" and "separate" property. These key terms are defined statutorily in New York.¹⁶ In New Jersey, however, the terms have been defined judicially.

*Painter v. Painter*¹⁷ is the seminal case defining marital property in New Jersey. In *Painter*, the New Jersey Supreme Court held that all property in which a spouse acquired an interest during the marriage is eligible for distribution upon divorce regardless of its original source.¹⁸ The court also enunciated what had been the established definition of separate property, holding that property owned by a spouse prior to the marriage—including any

adopted the date on which the divorce complaint is filed as the termination date. *Id.* at 218, 320 A.2d at 495. Although possibly inaccurate, this formulation was merely "an attempt to avoid promulgating an unworkable rule." *Smith v. Smith*, 72 N.J. 350, 360-61, 371 A.2d 1, 6-7 (1977). If parties enter into a formal separation contract which is accompanied by an actual separation, this date will serve as the termination date for equitable distribution purposes. *Id.* at 361-62, 371 A.2d at 7.

New York has statutorily adopted the test enunciated by New Jersey courts, treating the marriage as terminated once a separation agreement is executed or a matrimonial action is commenced. N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney Supp. 1981-1982); see Foster & Freed, *Family Law*, *supra* note 11, at 341.

¹⁵ See notes 18-28 and accompanying text *infra*.

¹⁶ N.Y. DOM. REL. LAW § 236(B)(1)(c)-(d) (McKinney Supp. 1981-1982).

¹⁷ 65 N.J. 196, 320 A.2d 484 (1974).

¹⁸ *Id.* at 217, 320 A.2d at 495. The *Painter* court gave comprehensive construction to the section allowing assets acquired by one spouse during the marriage to be distributed. *Id.* at 216-17, 320 A.2d at 494-95. In construing the statutory term "acquired" to include either spouse's receipt of title to property through "gift or inheritance or indeed any other way," the court expanded upon the trial court's construction, which limited marital property to assets obtained through individual effort. *Id.* at 215, 320 A.2d at 494; Note, *Painter v. Painter: Equitable Distribution of Marital Assets Upon Divorce*, 48 TEMP. L.Q. 397, 405 (1975). Moreover, the *Painter* court was motivated to adopt an inclusive definition of distributable assets in order to avoid following an established community property rule. 65 N.J. at 215-16, 320 A.2d at 494. In community property jurisdictions, assets received during the marriage by one spouse by gift, descent, or devise are considered separate property. *Id.* at 216, 320 A.2d at 494 (citing 4A R. POWELL, REAL PROPERTY § 626, at 717 (rev. ed. 1973)). See generally 1 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 69, at 171-74 (1943). Notwithstanding the differences between community property and equitable distribution principles, the court reasoned that the applicable community property rule probably would influence the subsequent development of the equitable distribution law. 65 N.J. at 216, 320 A.2d at 494; see Comment, *supra* note 1, at 458. The court believed that the adoption of community property law should not occur "unwittingly" and without legislative "study and deliberation." 65 N.J. at 216-17, 320 A.2d at 495; see 79 DICK. L. REV. 526, 530 (1975). For a critical analysis of the analogy to community gain principles, see Note, *supra*, at 411-12.

postmarital increase in value—is excluded from any subsequent equitable distribution.¹⁹ Recently, however, the New Jersey legislature redefined separate property to include assets acquired by bequest, devise, or descent, or by gift from someone other than the spouse.²⁰

Although the New York statute anticipated the change in the New Jersey definition of separate property, it was guided, to some extent, by the *Painter* definitions.²¹ The New York statute defines marital property as all property acquired by either spouse during the marriage, but before the execution of a separation agreement or the institution of a marital action.²² The New York County Su-

¹⁹ 65 N.J. at 214, 320 A.2d at 493. Any subsequent increase in the value of assets owned individually at the time of marriage was held to be separate property. Moreover, any income derived from such property, any property exchanged for the original asset, or any traceable proceeds from its sale also would be immune from distribution. *Id.* The *Painter* court, however, carefully noted that any increase attributable to the efforts of the other spouse or the efforts of both spouses would not necessarily be characterized as separate property. *Id.* at 214 n.4, 320 A.2d at 493 n.4. The spouse asserting that an asset is immune from distribution bears the burden of establishing its separate nature. *Id.* at 214, 320 A.2d at 493.

²⁰ Act of Dec. 31, 1980, ch. 181, § 1, 1980 N.J. Sess. Laws Serv. 609 (amending N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982)). This recent amendment contradicts the definition of distributable property established in *Painter*. See note 18 and accompanying text *supra*. The New Jersey Legislature contemplated that most gifts, devises, or bequests would be received from parents or relatives of the recipient spouse. To compel the division of these assets would be contrary to the expectations of both the recipients and the donors. Since neither spouse's efforts resulted in the obtaining of the asset, it should not be deemed a marital asset under the partnership concept. SEN. JUDICIARY COMM. STATEMENT NO. 1229, ch. 181, 1980 N.J. Sess. Law Serv. 610, reprinted in N.J. STAT. ANN. § 2A:34-23 (West 1981-1982). For a discussion of the legislative history and retroactive application of the 1980 amendment, see *Bellinger v. Bellinger*, 177 N.J. Super. 650, 652-53, 427 A.2d 620, 621-22 (Ch. Div. 1981).

²¹ See notes 18-19 and accompanying text *supra*. Compare N.Y. DOM. REL. LAW § 236(B)(1)(d) (McKinney Supp. 1981-1982) with *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). Although the *Painter* rule excluding property received during the marriage by gift, bequest, or devise from the definition of "separate property" was still effective when the New York statute was enacted in June 1980, the New Jersey State Assembly was considering an amendment which ultimately resulted in its abolition. See *Bellinger v. Bellinger*, 177 N.J. Super. 650, 652-53, 427 A.2d 620, 621-22 (Super. Ct. Ch. Div. 1981); note 20 *supra*. The New York definition of separate property surpasses the New Jersey definition in scope by encompassing compensation for personal injuries and property specifically allocated as separate by written agreement of the parties. N.Y. DOM. REL. LAW § 236(B)(1)(d)(2), (4) (McKinney Supp. 1981-1982).

²² N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney Supp. 1981-1982). The new definition of marital property marks a radical departure from prior New York law. Formerly, marital property consisted of jointly owned property such as a marital residence owned by both spouses as tenants in the entirety or a joint bank account. Foster & Freed, *Family Law*, *supra* note 11, at 341. In enacting the equitable distribution law, however, the New York legislature intended to recognize marriage as an economic partnership. *Id.* The statutory

preme Court, however, has concluded that the legislature intended to postpone the distribution of marital assets owned by separate spouses until the institution of an action to dissolve the marriage.²³ Thus, property obtained after the institution of a separation action may be subjected to distribution if the marriage is subsequently dissolved.²⁴ Separate property and property which the spouses have agreed to treat differently are excluded from the marital property category.²⁵ Separate property also encompasses property acquired by bequest, devise, or descent, or by gift from someone other than the spouse.²⁶

definition of marital property, therefore, was premised upon the theory that family assets acquired through individual or joint effort should be distributed equitably upon dissolution of the marriage. *Id.*; see *Kobylack v. Kobylack*, 110 Misc. 2d 402, 406, 442 N.Y.S.2d 392, 394 (Sup. Ct. Westchester County 1981). Recently, Justice Rigler examined the length of the marriage to determine to whom the funds deposited in joint bank accounts belonged. *Abbe v. Abbe*, N.Y.L.J., Feb. 26, 1981, at 12, col. 2 (Sup. Ct. Kings County 1981).

²³ *Jolis v. Jolis*, N.Y.L.J., Nov. 4, 1981, at 11, col. 1, col. 2 (Sup. Ct. N.Y. County). The husband in *Jolis* commenced a separation action on the ground of cruelty. *Id.* at 11, col. 1. Approximately 38 months later, he served a notice of intention to amend his complaint to state a cause of action for divorce. *Id.* Reasoning that the wife was not aware that the pending action might terminate the marriage until the service of this document, the court concluded that its service constituted the commencement of a marital action for equitable distribution purposes. *Id.* at 11, col. 2. Because matrimonial practice postpones the actual disposition of such motions until trial, the court believed it would be unjust to fix that date as the date of commencement of the matrimonial action. *Id.*

²⁴ *Id.*

²⁵ See N.Y. DOM. REL. LAW § 236(B)(1)(c), (d)(4) (McKinney Supp. 1981-1982); Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 9-10. Property may be designated as separate by a contractual agreement between the spouses. See N.Y. DOM. REL. LAW § 236(B)(d)(4) (McKinney Supp. 1981-1982). Critical to the enactment of this legislation was the offering of the opinion to spouses to divide their property in an agreed manner. Foster & Freed, *Family Law*, *supra* note 11, at 345. Section 5-311 of the General Obligations Law has been amended to prohibit, except as provided in N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982), any contract between husband and wife to relieve either of liability for the other's support which would result in the other becoming a public charge. Ch. 281, § 47, [1980] N.Y. Laws 387 (McKinney) (N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 1978)).

²⁶ N.Y. DOM. REL. LAW § 236(B)(1)(d)(1) (McKinney Supp. 1981-1982). In a memorandum accompanying his approval of the equitable distribution legislation, Governor Carey stated that its premise was the recognition that marriage is an economic partnership. The assets produced during the partnership should be distributed in a manner designed to meet the "individual needs and circumstances of the parties regardless of the name in which such property is held." Governor's Memorandum filed with Assembly Bill 6200-A, June 19, 1980, reprinted in GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 608-09; see *Jolis v. Jolis*, N.Y.L.J., Nov. 4, 1981, at 11, col. 1 (Sup. Ct. N.Y. County). In their zeal to facilitate this end, however, the legislators left several unanswered questions which will require judicial interpretation. For example, subsection 2 of the separate property definition includes "compensation for personal injuries." N.Y. DOM. REL. LAW § 236(B)(1)(d)(2) (McKinney Supp. 1981-1982). This rather expansive definition does not differentiate between awards received as compensation for medical expenses, lost earnings, and pain and suffering. See

Because these courts are required to distinguish between marital and separate property, they must be sensitive to a possible intermingling of the two types of property. Once joined with marital property, separate property presumptively becomes marital property.²⁷ This presumption, however, may be rebutted if the party

Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 85 n.67 (1980). Invariably, the amount expended for these services and the amount of lost earnings will come out of the marital assets. *Id.*

Subsection 3 provides that the appreciation in value of separate property caused by the "contributions or efforts" of the other spouse is marital property. N.Y. DOM. REL. LAW § 236 (B)(1)(d)(3) (McKinney Supp. 1981-1982); see *Jolis v. Jolis*, N.Y.L.J., Nov. 4, 1981, at 11, col. 6 (Sup. Ct. N.Y. County). It is conceivable that difficulties will arise regarding the interpretation of the phrase "contributions and efforts." See Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 10-11.

²⁷ *Husband T.N.S. v. Wife A.M.S.*, 407 A.2d 1045, 1047 (Del. 1979) (nonmarital property does not remain nonmarital property regardless of how it is held); *e.g.*, *Brunson v. Brunson*, 569 S.W.2d 173, 178 (Ky. App. 1978) (income derived from nonmarital property during the term of the marriage becomes marital property); *cf.* *Malone v. Malone*, 64 Idaho 252, 261, 130 P.2d 674, 678 (1942) (net rents and profits, but not gross income, from separate nonmarital property held to be community property); *Broussard v. Broussard*, 340 So. 2d 1309, 1314 (La. 1976) (interest accrued on premarital savings during the existence of the marriage held to be community property).

Several states which define marital property have incorporated into their equitable distribution statutes a rebuttable presumption that all property acquired by either party during the marriage is "marital property." *E.g.*, COLO. REV. STAT. § 14-10-113(3) (1973); ILL. ANN. STAT. ch. 40, § 503(b) (Smith-Hurd 1980); KY. REV. STAT. ANN. § 403.190(3) (Baldwin 1979). In Delaware, the rebuttable presumption may be overcome by proof that the property was acquired in exchange for property acquired prior to the marriage, that the property was excluded by valid agreement between the parties, or that the increase in value of the property occurred prior to the marriage. DEL. CODE ANN. tit. 13, § 1513(b)(1)-(3), (c) (Supp. 1981). The statute has been interpreted to place the burden of proof on the party asserting the exemption from equitable distribution. See *E.C.W. v. M.A.W.*, 419 A.2d 934, 935 (Del. Sup. Ct. 1980) (husband had burden of proving that stock dividends were "acquired in exchange for property acquired prior to the marriage"); *Halsey B.S. v. Charlotte S.S.*, 419 A.2d 962, 963 (Del. Fam. Ct. 1980) (husband has burden of proving that stock dividends represented an increase in value of premarital property); *Husband R.T.G. v. Wife G.K.G.*, 410 A.2d 155, 160 (Del. Sup. Ct. 1979) (burden on wife to prove existence of agreement that their residence was not to be categorized as marital property). The Illinois statute has been interpreted similarly. See *In re Marriage of Amato*, 80 Ill. App. 3d 395, 398-99, 399 N.E.2d 1018, 1020-21 (App. Ct. 1980) (husband had burden of proving that home constructed during the marriage was not marital property). Illinois courts also have found that a commingling of nonmarital property and marital property evidences an intent to treat the property as marital. See *id.*; *Smith v. Smith*, 77 Ill. App. 3d 858, 865, 396 N.E.2d 859, 864-65 (App. Ct. 1979); *Klingberg v. Klingberg*, 68 Ill. App. 3d 513, 517, 386 N.E.2d 517, 520 (App. Ct. 1979).

The burden of establishing that a particular asset is immune from equitable distribution also has been delegated judicially. In *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), the court interpreted the New Jersey statute to require that the burden of proof rests upon the party asserting the immunity. *Id.* at 214, 320 A.2d at 493; see *Canova v. Canova*, 146 N.J. Super. 58, 368 A.2d 971 (Super. Ct. Ch. Div. 1976). In *Canova*, the plaintiff

advocating the separate characterization can document the use of the asset from the date of its initial receipt.²⁸

While New York and New Jersey employ a separate property-marital property dichotomy in determining which assets may be distributed, Connecticut has adopted a broader approach. Under Connecticut law, all property owned by the spouse is eligible for equitable distribution notwithstanding its date of acquisition.²⁹ Indeed, in a recent case, the Connecticut Superior Court, New Haven District, held that the premarital stage of a relationship "should be considered [in a divorce action] in order to fairly determine the ultimate rights of the parties that may have accrued over their entire time together."³⁰ The inclusion of separate property, however, may be unfair to the owner when a just result could be obtained through the distribution of the available marital property.³¹ On the other hand, this method of property disposition allows the attainment of an equitable result when the marital property is insuffi-

sought to prove that his marital residence enjoyed an immunity from equitable distribution. The residence was purchased with proceeds from the sale of a house which the plaintiff had owned at the inception of the marriage. *Id.* at 60, 368 A.2d at 972. Subsequently, he transferred title of the original home to himself and his wife. *Id.* at 59, 368 A.2d at 971. Relying on *Painter's* consideration of interspousal gifts in distributing marital property, the court held that the second residence was a marital asset subject to equitable distribution, despite the fact that part of the funds used to buy it could be traced to property once separately held by the husband. *Id.* at 62, 368 A.2d at 973.

²⁸ See note 27 *supra*.

²⁹ CONN. GEN. STAT. § 46b-81(a) (1981). The Superior Court is empowered to assign to either spouse any part of the other's estate upon entry of the dissolution or separation decree. *Id.* This statute eliminates the need for a party to commence multiple suits in order to obtain an equitable property division. Schoonmaker & Balbirer, *Survey of 1976 Developments in Connecticut Family Law*, 51 CONN. B.J. 2, 5 (1977); see *Whitney v. Whitney*, 171 Conn. 23, 24-25, 368 A.2d 96, 98-99 (1976) (suit by wife for divorce, child support, and alimony followed by suit by husband seeking transfer of property held in wife's name). It is well settled in Connecticut that the assignment of property in a marital dissolution lies within the discretion of the court. See *Posada v. Posada*, 179 Conn. 568, 572, 427 A.2d 406, 408 (1980); *Ridolfi v. Ridolfi*, 178 Conn. 377, 379, 423 A.2d 85, 86 (1979); *Pasquariello v. Pasquariello*, 168 Conn. 579, 584, 362 A.2d 835, 837 (1975). The contribution of each party in the acquisition of their respective estates is merely one factor for the judge to consider in arriving at an equitable settlement. CONN. GEN. STAT. § 46b-81(c) (1981); see *Fucci v. Fucci*, 179 Conn. 174, 183, 425 A.2d 592, 597 (1979).

³⁰ *Vine v. Vine*, 7 Fam. L. Rep. 2765, 2766 (Conn. Super. Ct. 1981).

³¹ See Freed, *Equitable Distribution in the Common Law States: A Bird's View*, in *ECONOMICS OF DIVORCE* 22-23 (1978). New York's exclusion of separate property from equitable distribution has been lauded as preventing a windfall to any one party. In view of the increase in the divorce rate and the influx of women into the working world, it no longer is fair to subject separate property to disposition. See Foster, *Statutory Definitions*, in *GUIDE TO NEW YORK EQUITABLE DISTRIBUTION*, *supra* note 6, at 55.

cient or nonexistent.³²

These views are but the touchstones of the relevant inquiries. As a practical matter, many significant assets may not be categorized easily. Occasionally, the distinction between marital and separate property may be so subtle as to enable some assets to defy classification. The following section of this Article will summarize how each state has addressed certain recurring problems of classification. Due to recent modifications in New York law, the New York judiciary has not yet had occasion to consider many of these problem areas. Indeed, it may be several years before a body of governing case law develops. In the interim, and where applicable, New York may look to the experience of its neighboring states, New Jersey and Connecticut, for guidance.

Pension Plans

Vested pension plans and other deferred benefits are subject to equitable distribution.³³ New Jersey's statute, however, only permits the distribution of property which was "legally and beneficially acquired . . . during the marriage."³⁴ This statutory limita-

³² See Freed, *supra* note 31, at 22-23.

³³ Recently, in a case of first impression, the New York Supreme Court, Nassau County, held that an interest in a vested, though unmatured, noncontributory pension plan was marital property. *Martinez v. Martinez*, 7 Fam. L. Rep. 2781 (N.Y. Sup. Ct. Nassau County 1981). See generally *Fay v. Fay*, 108 Misc. 2d 373, 374-75, 437 N.Y.S.2d 601, 602-03 (Sup. Ct. Suffolk County 1981). The *Martinez* court noted that its holding was in accord with the great weight of authority in both community property and common-law jurisdictions. 7 Fam. L. Rep. at 2781; see, e.g., *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 215 (1977) (en banc); *In re Marriage of Brown*, 15 Cal. 3d 838, 841-42, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976); *In re Marriage of Pope*, 37 Colo. App. 237, 239-40, 544 P.2d 639, 640-41 (Ct. App. 1975); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 658-59, 397 N.E.2d 511, 516 (App. Ct. 1979); *Hiscox v. Hiscox*, 385 N.E.2d 1166, 1167 (Ind. Ct. App. 1979); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 476-77, 427 A.2d 76, 79 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981); *Leighton v. Leighton*, 81 Wis. 2d 620, 634-35, 261 N.W.2d 457, 463-64 (1978).

³⁴ N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982). The New Jersey statute views marriage as the functional equivalent of an economic partnership. See *Tucker v. Tucker*, 121 N.J. Super. 539, 545-46, 298 A.2d 91, 94-95 (Super. Ct. Ch. Div. 1972). Accordingly, the New Jersey Supreme Court stated that "[t]he concept of vesting should probably find no significant place in the developing law of equitable distribution." *Stern v. Stern*, 66 N.J. 339, 348, 331 A.2d 257, 262 (1975). Rather, noted the court, the proper inquiry should be whether the pension benefits were "acquired" during the marriage. *Id.* The term "acquired," however, has been given a "broad inclusive meaning." *Blitt v. Blitt*, 139 N.J. Super. 213, 216, 353 A.2d 144, 146 (Super. Ct. Ch. Div. 1976); see, e.g., *Painter v. Painter*, 65 N.J. 196, 215-17, 320 A.2d 484, 494-95 (1974); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 474-75, 427 A.2d 76, 78 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 516, 342 A.2d 226, 228 (Super. Ct. App. Div. 1975).

tion has been interpreted to permit the distribution of that portion of the pension which was acquired between the date of the marriage and the institution of the divorce action.³⁵ Pensions for which the employee-spouse has qualified during the marriage may be distributed, even though they may be receivable at the election of the employee or at some future date.³⁶

New Jersey case law, however, is unsettled respecting the inclusion of pensions which have not yet vested. One appellate court has held that when an employee-spouse would not be entitled to receive either a pension or a disbursement of funds paid into the pension at the time of the divorce, his pension would not be subject to equitable distribution.³⁷ Although subsequent cases have not expressly overruled this decision, they have employed an "ac-

³⁵ *Tucker v. Tucker*, 121 N.J. Super. 539, 548, 298 A.2d 91, 95-96 (Super. Ct. Ch. Div. 1972). Only those pension and profit-sharing rights which vested during the marital period are subject to equitable distribution. *Id.* at 550, 298 A.2d at 97. Benefits contingent upon continued employment or total disability were excluded from equitable distribution by the *Tucker* court. 121 N.J. Super. at 548-49, 298 A.2d at 96 (citing *Williamson v. Williamson*, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (Dist. Ct. App. 1962)). The rationale for the exclusion is that:

Pensions become community property, subject to division in a divorce, when and to the extent that the party is *certain* to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property.

121 N.J. Super. at 549, 298 A.2d at 96 (quoting *Williamson v. Williamson*, 203 Cal. App. 2d at 11, 21 Cal. Rptr. at 167). The filing of the divorce decree, rather than the date of the abandonment or other conduct giving rise to the divorce, is the point at which the marriage is deemed terminated. *See* 121 N.J. Super. at 544, 298 A.2d at 93.

³⁶ Pensions in which nonforfeitable interests are acquired during the marriage are subject to equitable distribution. *Kruger v. Kruger*, 73 N.J. 464, 469, 375 A.2d 659, 662 (1977); *see Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 515, 342 A.2d 226, 227-28 (Super. Ct. App. Div. 1975). The right to receive monies is an economic resource, *Kruger v. Kruger*, 73 N.J. at 468, 375 A.2d at 662, which is akin to deferred compensation—a substitution of wages earned during the course of a marriage. *Kikkert v. Kikkert*, 177 N.J. Super. 471, 475-76, 427 A.2d 76, 78-79 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981); *McGrew v. McGrew*, 151 N.J. Super. 515, 518, 377 A.2d 697, 699 (Super. Ct. App. Div. 1977); *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401-02, 346 A.2d 434, 436-37 (Super. Ct. App. Div. 1975); *Weir v. Weir*, 173 N.J. Super. 130, 134, 413 A.2d 638, 640 (Super. Ct. Ch. Div. 1980); *Blitt v. Blitt*, 139 N.J. Super. 213, 218, 353 A.2d 144, 147 (Super. Ct. Ch. Div. 1976).

³⁷ *White v. White*, 136 N.J. Super. 552, 553-54, 347 A.2d 360, 361 (Super. Ct. App. Div. 1975). The pension plan in *White* was funded solely by employer contributions. The pension holder did not have a right of withdrawal and his right to receive future benefits was contingent upon attaining the age of 40 and either completing 10 years of service or becoming totally disabled. *Id.* Since the defendant had not fully satisfied these eligibility requirements, the court held that the pension benefits were not subject to equitable distribution. *Id.* at 554, 347 A.2d at 361.

quired property" analysis.³⁸ Under this analysis, a pension for which an employee-spouse has not yet qualified arguably may have been earned partially during the marriage if the right to the pension is reasonably certain to become receivable or the amount paid is dispensable to the employee-spouse.³⁹

As if to preclude such an argument, the Chancery Division of the New Jersey Superior Court imposed an additional requirement on the pension plan analysis.⁴⁰ Noting that the statute required that marital property be legally and beneficially acquired, the court held that the employee-spouse must have had the power to "control, use or enjoy [the] asset" in order for it to be subject to equitable distribution.⁴¹ While relying on the statutory language to reach its result, this analysis will not allow a court to effectuate a completely equitable distribution in every situation. Where the employee-spouse has no present right to the pension, but is on the verge of qualifying for such a right, the beneficial acquisition test would nevertheless exclude the pension from equitable distribution.⁴²

³⁸ See note 34 and accompanying text *supra*.

³⁹ While there may be uncertainty as to whether the retirement benefits will come into the possession of the pension holder, the critical issue for the purposes of distributing future pension proceeds is the extent to which the anticipated benefits will be the product of marital efforts. *McGrew v. McGrew*, 151 N.J. Super. 515, 518, 377 A.2d 697, 699 (Super. Ct. App. Div. 1977); see *Kikkert v. Kikkert*, 177 N.J. Super. 471, 475, 427 A.2d 76, 78 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981). This inquiry requires comprehensive interpretation of the statutory phrase "acquired . . . during the marriage." N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981-1982); see notes 31 & 36 and accompanying text *supra*. In *In re Marriage of Brown*, 15 Cal. 3d 838, 845-47, 544 P.2d 561, 565-66, 126 Cal. Rptr. 633, 637-38 (1976), the California Supreme Court held that future pension rights, although wholly contingent, are deferred compensation subject to distribution upon the dissolution of the marriage.

⁴⁰ *Mueller v. Mueller*, 166 N.J. Super. 557, 561, 400 A.2d 136, 139 (Super. Ct. Ch. Div. 1979).

⁴¹ *Id.* at 560, 400 A.2d at 138. *Mueller* was premised upon the statutory construction which the New Jersey Supreme Court employed when addressing the distributability of an interest in a trust. *Id.* at 560-61, 400 A.2d at 137-38 (citing *Mey v. Mey*, 79 N.J. 121, 398 A.2d 88 (1979), *aff'g* 149 N.J. Super. 188, 373 A.2d 664 (Super. Ct. App. Div. 1977)). The *Mey* court had interpreted the statutory requirement that an asset be "legally and beneficially acquired" during the marriage to include "the effective power to control or use or enjoy" the asset. 79 N.J. at 124, 398 A.2d at 89. Applying this additional requirement, the *Mueller* court held that a fully vested pension plan contingent upon the attainment of a specified age was not subject to equitable distribution. 166 N.J. Super. at 561, 400 A.2d at 139.

⁴² Under the *Mey* court's construction of the New Jersey equitable distribution statute, see note 41 and accompanying text *supra*, an employee-spouse whose pension almost has vested at the time of divorce would have only a mere expectation of receiving pension bene-

Recognizing the inadequacy inherent in this approach, a subsequent case has held that the relevant inquiries must be whether a "property right has been acquired during the marriage and whether equity warrants its inclusion in the marital estate in light of its limitations."⁴³ This analysis may allow the equitable distribution of a nonvested pension plan. Where the pension has almost vested and was earned mostly during coverture, equity would favor its inclusion if the employee-spouse had no vested interest at the time of the divorce. It should be noted, however, that no subsequent New Jersey opinion has dealt with a pension plan in which the employee-spouse had not qualified for benefits or a refund of the monies contributed.

Finally, the New Jersey courts have minimized the distinction between contributory and noncontributory pensions.⁴⁴ Since a non-contributory pension plan is funded exclusively by the employer, it is deemed a benefit conferred upon the employee-spouse which otherwise would be manifested in the form of additional wages.

fits. Such an expectation would not be an asset subject to equitable distribution. See *Weir v. Weir*, 173 N.J. Super. 130, 134, 413 A.2d 638, 640 (Super. Ct. Ch. Div. 1980); *Blitt v. Blitt*, 139 N.J. Super. 213, 216-17, 353 A.2d 144, 146 (Super. Ct. Ch. Div. 1976).

⁴³ *Weir v. Weir*, 173 N.J. Super. 130, 133-34, 413 A.2d 638, 640 (Super. Ct. Ch. Div. 1980). In *Weir*, as in *Mueller*, see notes 40-41 *supra*, the pension holder had acquired a right to future retirement benefits, but not to their present enjoyment. Additionally, there was some uncertainty as to whether the employee-spouse would ever receive the pension benefits since they terminated upon his death. *Id.* at 133, 413 A.2d at 640. Nevertheless, the court refused to require that the employee have "effective power to control or use or enjoy" the proceeds. *Id.* at 134-35, 413 A.2d at 640-41. Accordingly, the pension plan was subjected to equitable distribution. *Id.* at 139, 413 A.2d at 642-43. Faced with the practical problem of assuring a fair distribution of the pension proceeds, the *Weir* court suggested a deferred distribution method whereby the interest in the fund would be calculated and distributed once the funds became available. *Id.* at 134-35, 413 A.2d at 640-41; see *Kikkert v. Kikkert*, 177 N.J. Super. 471, 478, 427 A.2d 76, 80 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981). Alternatively, the court could ascertain the present value of the proceeds and distribute them immediately. *Weir v. Weir*, 173 N.J. Super. at 135, 413 A.2d at 641. Although the present value may be inexact and calculation may be difficult, it avoids the continued hostility which accompanies the "long term and deferred sharing of financial interests." *Kikkert v. Kikkert*, 177 N.J. Super. at 478, 427 A.2d at 79.

Adopting the *Weir* rationale that a right to receive a future asset is a form of deferred compensation, the *Kikkert* court recently subjected to equitable distribution a pension interest contingent upon the holder reaching an unattained age. *Id.* at 476-77, 427 A.2d at 77-79; see *Weir v. Weir*, 173 N.J. Super. at 133-34, 400 A.2d at 640. The *Kikkert* court observed that "[e]ach spouse had the same expectation of future enjoyment with the knowledge that the pensioner need only survive to receive it." 177 N.J. Super. at 476-77, 427 A.2d at 79.

⁴⁴ See, e.g., *Kikkert v. Kikkert*, 177 N.J. Super. 471, 476-77, 427 A.2d 76, 79 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981); *McGrew v. McGrew*, 151 N.J. Super. 515, 517, 377 A.2d 697, 698 (Super. Ct. App. Div. 1977); *Blitt v. Blitt*, 139 N.J. Super. 213, 218-19, 353 A.2d 144, 147 (Super. Ct. Ch. Div. 1976).

Both spouses, therefore, are foregoing income which they would receive absent the pension. Consequently, an equitable distribution of the noncontributory pension is in order.⁴⁵

While New York's statute enumerates the loss of pension rights as a factor to be considered in determining the impact of the dissolution of the marriage,⁴⁶ it leaves the determination of when a pension becomes a right to judicial interpretation. By employing a broad range of permissible discretion, New York courts will be able to include nonvested pensions without resort to various formulae to obtain this result.⁴⁷ Such a step would go further than the present New Jersey law and would follow the rationale of several common-law property states which use the theory of equitable distribution upon divorce.⁴⁸ In view of the trend toward examining the equities of a particular case, it appears unlikely that New York will define pension rights merely as those which have vested.

The Connecticut statute, although not expressly including pensions, would allow the consideration of pensions in making an equitable distribution.⁴⁹ Nonetheless, the statute expressly requires

⁴⁵ In *Blitt v. Blitt*, 139 N.J. Super. 213, 218, 353 A.2d 144, 147 (Super. Ct. Ch. Div. 1976), the court took judicial notice of the fact that "lucrative profit sharing and pension plans are realistically wage substitutes." *Id.*; see note 36 and accompanying text *supra*.

⁴⁶ N.Y. DOM. REL. LAW § 236(B)(5)(d)(4) (McKinney Supp. 1980-1981). This section of the statute requires that "the loss of inheritance and pension rights upon dissolution of the marriage" be considered when marital assets are distributed upon divorce. As one of the 10 factors enumerated in subsection five, the loss of pension rights is a concrete guideline designed to assist the trial court in its exploration of the financial condition of the parties. See, e.g., *Martinez v. Martinez*, 7 Fam. Law Rep. 2781, 2782 (N.Y. Sup. Ct. Nassau County 1981); *Ettinger v. Ettinger*, 107 Misc. 2d 675, 676, 435 N.Y.S.2d 916, 917-18 (Sup. Ct. Nassau County 1981).

⁴⁷ Cf. *In re Marriage of Brown*, 15 Cal. 3d 838, 841-42, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976) (en banc) (pension rights derived from marital contributions represented deferred compensation regardless of whether the pensionholder's rights had "vested" during the marriage).

⁴⁸ Various common-law property jurisdictions have adopted the reasoning advanced in *In re Marriage of Brown*, 15 Cal. 3d 838, 841-42, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976) (en banc), see note 47 *supra*, in interpreting their equitable distribution statutes. See, e.g., *Linson v. Linson*, 618 P.2d 748, 749-51 (Hawaii App. Ct. 1980); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 660-64, 397 N.E.2d 511, 517-19 (App. Ct. 1979); *Leighton v. Leighton*, 81 Wis. 2d 620, 633-36, 261 N.W.2d 457, 463-64 (1978).

⁴⁹ The Connecticut equitable distribution statute grants the court broad discretion when distributing property upon divorce. Section 46b-81(c) provides in pertinent part: In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, *amount and sources of income*, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity

that a court consider the contribution of each party to the asset.⁵⁰ Operating on the theory that a wife's contribution to the marriage as a homemaker offsets a husband's earnings, a Connecticut court could render an opinion finding an equal contribution by each spouse toward the husband's pension benefits.⁵¹ At the present time, however, there is no Connecticut case law pertaining to the disposition of pensions in an equitable distribution.

Federal and quasi-federal pensions may present special problems. Under the New Jersey case of *Hipsley v. Hipsley*,⁵² a retirement pension under the Federal Railroad Retirement Pension Act is not subject to equitable distribution.⁵³ Comparing the development of coverage and rates in the Railroad Retirement Act and the Social Security Act, the court found striking parallels between them.⁵⁴ Noting that the railroad benefits replace rather than

of each for future acquisition of capital assets and income.

CONN. GEN. STAT. § 46b-81(c) (1981) (emphasis added); see *Krause v. Krause*, 174 Conn. 361, 363-64, 387 A.2d 548, 549 (1978). Under the Connecticut law, pensions may be categorized as an "amount and source of income" in determining the distribution of property. See generally Foster, *Commentary on Equitable Distribution*, supra note 6, at 36-41; Note, *New York's Equitable Distribution Law: A Sweeping Reform*, supra note 26, at 98-104.

⁵⁰ CONN. GEN. STAT. § 46b-81(c) (1981). The Connecticut statute directs the court to "consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." *Id.*

⁵¹ By statute or decision, 28 states currently include the services of the homemaker as a factor in determining an alimony award or the distribution of property. Freed & Foster, *Divorce in the Fifty States*, supra note 1, at 246. The contribution of the homemaker to the acquisition of income or property during the marriage has been viewed as an important consideration in the determination of any "equitable" arrangement. See, e.g., *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496, 501-02 (1974). See generally Burch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 110-14 (1976); Hauserman & Fethke, *Valuation of a Homemaker's Services*, 22 TRIAL LAW GUIDE 249, 258-62 (1978); Martin, *Social Security Benefits For Spouses*, 63 CORNELL L. REV. 789, 828-31 (1978); 45 ALB. L. REV., supra note 11, at 492.

⁵² 161 N.J. Super. 119, 390 A.2d 1220 (Super. Ct. Ch. Div. 1978).

⁵³ *Id.* at 127-28, 390 A.2d at 1223-24. The Railroad Retirement Act was enacted to provide a system of retirement and disability benefits for railroad employees. Railroad Retirement Act of 1934, Pub. L. No. 73-485, § 2, 48 Stat. 1283, 1284 (current version at 45 U.S.C. § 231 (1976), as amended by Pub. L. No. 93-445, § 101, 88 Stat. 1305 (1974)). The Act as restated was designated the Railroad Retirement Act of 1974. The original act was declared unconstitutional by the Supreme Court in *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 374 (1935), but was reenacted to resemble the Social Security Act in form. Railroad Retirement Act of 1937, Pub. L. No. 75-162, § 2, 50 Stat. 307, 309; see *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574 n.3 (1979).

⁵⁴ *Hipsley v. Hipsley*, 161 N.J. Super. 119, 126-27, 390 A.2d 1220, 1223-24 (Super. Ct. Ch. Div. 1978). The *Hipsley* court initially compared the Railroad Retirement Act pension and the military retirement pension subjected to equitable distribution in *Kruger v. Kruger*, 73 N.J. 464, 470-71, 375 A.2d 659, 663 (1977). 161 N.J. Super. at 125-26, 390 A.2d at 1223. Contrasting military retirement allowances with contributions made by railroad employees

supplement social security benefits, the court concluded that the "benefits under the railroad retirement plan should no more be subject to equitable distribution than a comparable employee's right to social security upon his retirement."⁵⁵ Because equitable distribution has not been extended to include the distribution of Social Security benefits, the *Hipsley* court likewise refused to subject the railroad pension to equitable distribution.⁵⁶

Hipsley anticipated the result in *Hisquierdo v. Hisquierdo*,⁵⁷ wherein the United States Supreme Court stated that the railroad pension "corresponds exactly to those [benefits] an employee would expect to receive were he covered by the Social Security Act."⁵⁸ Indeed, both social security payments and railroad pensions are protected from general creditors.⁵⁹ Since Congress had ex-

to a retirement fund, the *Hipsley* court found several distinguishing factors which prompted the conclusion that railroad pensions could not be distributed upon divorce. 161 N.J. Super. at 126-27, 390 A.2d at 1223-24. First, the court noted that contributions to a railroad retirement fund are taxed at special rates and are not taxable upon receipt. *Id.* at 126, 390 A.2d at 1223; see Railroad Retirement Act, 26 U.S.C. § 3201 (1976). Furthermore, the court stated that the benefits are statutory and not contractual in nature. 161 N.J. Super. at 126, 390 A.2d at 1223. The court found most significant, however, the fact that employees covered by the Railroad Retirement Act are not entitled to receive retirement benefits from the social security system. *Id.* at 126-27, 390 A.2d at 1224.

⁵⁵ *Hipsley v. Hipsley*, 161 N.J. Super. 119, 127, 390 A.2d 1220, 1224 (Super. Ct. Ch. Div. 1978).

⁵⁶ *Id.* at 128, 390 A.2d at 1224. The *Hipsley* court reasoned that social security benefits were not distributable because Congress intended that those benefits provide financial protection for the employee and his family. *Id.* at 127, 390 A.2d at 1224. To award a former spouse a portion of those benefits would be tantamount to supplementing her own social security payments at the expense of the employee in derogation of the congressional purpose. *Id.* Since railroad retirement benefits replace social security benefits, similar reasoning prohibits their distribution upon divorce. *Id.* at 127-28, 390 A.2d at 1224.

⁵⁷ 439 U.S. 572 (1979). For a discussion of *Hisquierdo*, see Reppy, *Learning to Live with Hisquierdo*, 6 COMM. PROP. J. 5 (1979).

⁵⁸ *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979); see *Allen v. Allen*, 363 S.W.2d 312, 315 (Tex. Civ. App. 1962) (wife may not be awarded a portion of anticipated railroad retirement benefits). See generally Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 257-60 (1977).

Although domestic relations traditionally has been a matter of local law, the *Hisquierdo* Court initially concluded that it had jurisdiction because of a conflict between state community property law and the Railroad Retirement Act. 439 U.S. at 581-83. Turning to the merits, Justice Blackmun observed that any anticipated diminution in pension benefits would discourage a divorced employee from retiring. *Id.* at 585. Since that would defeat the legislative intention to maintain an efficient workforce, a divided Court concluded that California must defer to the federal scheme embodied in the Railroad Retirement Act. *Id.*

⁵⁹ 439 U.S. at 586-87. Section 231m of the Railroad Retirement Act provides that "no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process." Railroad Retirement Act, 45 U.S.C. § 231m (1976).

pressly exempted spousal and child support claims from the statutory rule against garnishment, a specific exception also would be required to empower a state court to distribute either social security benefits or railroad pensions.⁶⁰ Finding no such exception, the Court held that a railroad pension, like social security benefits, is not subject to distribution as community property upon divorce.⁶¹

Whether the Supreme Court would extend *Hisquierdo's* rationale to encompass a military pension plan was the issue considered in *McCarty v. McCarty*.⁶² The *McCarty* Court initially reviewed its prior holding in *Hisquierdo*, stating:

Hisquierdo did not hold that only the particular statutory terms there considered would justify a finding of pre-emption; rather, it held that "[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."⁶³

⁶⁰ 439 U.S. at 583-85. An exception to the prohibition against garnishment enables federal benefits to be reached to satisfy child support or alimony obligations. 42 U.S.C. § 659(a) (1976 & Supp. III 1979). Alimony, however, does not include property subject to equitable distribution or division in accordance with community property principles. *Id.* § 662(c) (1976 & Supp. III 1979).

⁶¹ 439 U.S. at 589-90. The *Hisquierdo* Court noted that Congress had not abolished the distinction which it drew for garnishment purposes between alimony and community property. *Id.*; see notes 52-53 *supra*. Although the wife in *Hisquierdo* had been employed for 35 years and fully expected to receive social security benefits upon her retirement, those benefits were not claimed to be community property. 439 U.S. at 579. Nevertheless, the wife claimed to be entitled to part of her husband's pension benefits. *Id.* at 578. See also Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 U.C.L.A. L. REV. 417, 421-43 (1978) (discussing the extent to which private pension plans may be treated as community property under California law).

⁶² 101 S. Ct. 2728, 2735 (1981). *McCarty* reversed a line of state court decisions allowing the distribution of military retirement pay. See, e.g., *Kruger v. Kruger*, 73 N.J. 464, 471-72, 375 A.2d 659, 663 (1977); note 54 *supra*.

⁶³ 101 S. Ct. at 2735. Generally, courts have held that a pension is a valuable asset subject to distribution. See *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976). See generally Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*, 5 PEPPERDINE L. REV. 191, 205-20 (1978); Comment, *Toward A More Equitable Distribution of Pension Benefits*, 3 S.U.L. REV. 51, 53-55 (1976). Despite the Supreme Court decisions in *Hisquierdo* and *McCarty*, the view that all pensions are property in which the spouse has an interest has not yet diminished appreciably. In cases involving private pension plans, courts have continued to hold that "equitable considerations mandate their inclusion for distribution." *Kikkert v. Kikkert*, 177 N.J. Super. 471, 476, 427 A.2d 76, 79 (Super. Ct. App. Div.), *aff'd*, 88 N.J. 4, 438 A.2d 317 (1981); see *Russell v. Russell*, 436 A.2d 524, 525 (Md. Ct. Spec. App. 1981); *Ohm v. Ohm*, 49 Md. App. 392, 399, 431 A.2d 1371, 1375 (Ct. Spec. App. 1981); *Hughes v. Hughes*, 634 P.2d 1271 (N.M. Sup. Ct. 1981). Furthermore, state courts have limited the impact of *McCarty* by subjecting military pensions to equitable distribution if the judgment

Unlike the retirement plan considered in *Hisquierdo*, the military retirement plan in *McCarty* represented continuing compensation for services.⁶⁴ Reasoning that Congress intended a military pension to be a personal benefit with the retiree ultimately deciding "whether or not to leave part of that retirement pay as an annuity to his survivors," the Court concluded that Congress had not chosen to benefit an ex-spouse as it had a surviving spouse.⁶⁵ As it had

or agreement predated *McCarty*. *Sheldon v. Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380, 384 (Ct. App. 1981); *Mahone v. Mahone*, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274, 276 (Ct. App. 1981); *Braden v. Reno*, 8 FAM. L. REP. (BNA) 2041, 2041-42 (Idaho Dist. Ct. Nov. 3, 1981). See generally *Foster & Freed, Supreme Court Incursions Into State Family Law*, N.Y.L.J., Nov. 26, 1981, at 1, col. 1; see also *Ridgway v. Ridgway*, 102 S. Ct. 49, 57 (1981) (military service members' life insurance proceeds not divisible).

In *Ridgway v. Ridgway*, 102 S. Ct. 49 (1981), a retired army sergeant was required by a divorce decree to maintain his life insurance policy for the benefit of his children. *Id.* at 51. At the time of the divorce, Sergeant Ridgway was insured pursuant to the Serviceman's Group Life Insurance Act of 1965 (SGLIA), 38 U.S.C. §§ 765-779 (1976 & Supp. III 1979) and had named his first wife as beneficiary. 102 S. Ct. at 51; see 38 U.S.C. § 770(a) (1976). The Act gave the servicemen the right freely to designate the beneficiary. 102 S. Ct. at 53. When Ridgway remarried 4 months later he directed that the proceeds of the policy be paid as specified "by law." Under the SGLIA, payment was to be made to the insured's lawful spouse at the date of death. *Id.* at 51-52; see 38 U.S.C. §§ 765(7), 770(a) (1976). After he died, both his first and second wives sued in Maine state court for the proceeds, the former wife seeking the imposition of a constructive trust in favor of his children. 102 S. Ct. at 52. The Supreme Judicial Court of Maine imposed a constructive trust on the proceeds in favor of the Ridgway children. *Id.* The United States Supreme Court reversed, discerning an inconsistency between the state and federal law. *Id.* at 59. Since the SGLIA gives the insured the right to freely designate his beneficiary, the Maine divorce decree was invalid to the extent that it hampered the exercise of that federally created right. *Id.* at 57. By imposing a constructive trust upon the life insurance proceeds, Maine had run afoul of the broad anti-attachment provision of the SGLIA. *Id.* at 58.

⁶⁴ *McCarty v. McCarty*, 101 S. Ct. 2728, 2736 (1981). In reviewing its decision in *Hisquierdo*, the Court noted that, under the Railroad Retirement Act, a spouse was entitled to a separate annuity subject to termination upon divorce. Military retirement benefits, however, included no similar provision for payments to the spouse. *Id.* at 2737. Thus, the Court concluded, the military pension was not a limited community property, but rather a personal entitlement of the service member. *Id.*; see note 66 *infra*.

The Court noted that the retired officer remains a member of the service subject to recall to active duty "at any time." 101 S. Ct. at 2736. Moreover, the retiree may forfeit some or all of his benefits if he engages in certain prohibited activities. *Id.* Thus, military pensions differ from ordinary retirement pensions since military pensions can be viewed as reduced compensation for continuing services. See *United States v. Tyler*, 105 U.S. 244, 245 (1881). But see *Fithian v. Fithian*, 10 Cal. 3d 592, 604, 517 P.2d 449, 456-57, 111 Cal. Rptr. 369, 376-77, cert. denied, 419 U.S. 825 (1974) (military retirement pay is deferred compensation, not current compensation for reduced services); *Kruger v. Kruger*, 73 N.J. 464, 470, 375 A.2d 659, 662 (1977).

⁶⁵ 101 S. Ct. at 2737, 2738 (quoting H.R. REP. No. 481, 92d Cong., 1st Sess. 9 (1971)); see 10 U.S.C. § 1434 (1976 & Supp. IV 1980). As evidence of its finding that Congress intended military retirement benefits to be treated as a personal entitlement, the Court noted that an officer could designate a beneficiary to receive unpaid arrearages. Absent arrearages,

in *Hisquierdo*, the Court reviewed the legislative history of the retirement statute, noting that a proposed amendment to allow partial distribution of a military pension in favor of a spouse, former spouse, or child was not included in the Senate bill although it had been passed by the House.⁶⁶ The *McCarty* Court also found significance in two amendments to the Social Security Act.⁶⁷ One amendment made all federal benefits, including those payable to members of the armed forces, subject to child support or alimony orders.⁶⁸ A subsequent amendment excluded from the definition of alimony any "division of property between spouses or former spouses."⁶⁹ Discerning a conflict between the federal retirement law and the wife's claim for community property, the Court inquired whether permitting distribution would frustrate the federal objectives underlying the military pension program.⁷⁰ In enacting a military retirement system, Congress had a dual purpose.⁷¹ It intended to provide for the retired service member and to meet the personnel management needs of the military forces.⁷² Believing that both goals would be frustrated by the distribution of a military retirement fund, the Court held that any such distribution

however, payments would cease upon death. *Id.* at 2736-37; *cf.* *Wissner v. Wissner*, 338 U.S. 655, 658-59 (1950) (serviceman authorized to select beneficiaries under armed forces life insurance plan).

⁶⁶ 101 S. Ct. at 2739. The *McCarty* Court emphasized that Congress intended that the retiree receive his entire pension. The House of Representatives proposed a provision which would have permitted the attachment of half of an individual's military retirement pay to comply with a court order in favor of a spouse, former spouse, or child. *Id.* (citing H.R. REP. No. 481, 92d Cong., 1st Sess. 1 (1971)). The Senate bill did not include such a provision. 101 S. Ct. at 2739 (citing S. REP. No. 1089, 92d Cong., 2d Sess. 25 (1972)).

⁶⁷ 101 S. Ct. at 2740. The Court discussed the Social Security Act amendments permitting the garnishment of federal pension payments in the cases of alimony and child support, though not for the equitable distribution of marital property. *Id.*; *see* notes 59-60 *supra*.

⁶⁸ Social Security Act, Pub. L. No. 93-647, § 459, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659 (1976)).

⁶⁹ Social Security Act, Pub. L. No. 95-30, § 462, 91 Stat. 159 (1977) (codified at 42 U.S.C. § 662(c) (Supp. III 1979)).

⁷⁰ 101 S. Ct. at 2741. The Court stated the proper test to be whether the "application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." *Id.* The federal interest involved relates to the power and necessity of raising and supporting armed forces. *Id.*; *see* U.S. CONST. art. I, § 8, cls. 12-14.

⁷¹ 101 S. Ct. at 2741.

⁷² *Id.* Specifically, the *McCarty* Court noted that Congress had devised a scheme designed to encourage retirement so that a "youthful and vigorous" military could be maintained. *Id.* at 2742. The reduction in retirement pay which would result from a property award would discourage retirement and possibly provide an incentive to remain on active duty since current income earned after divorce would not be subject to equitable distribution. *Id.*

would be impermissible.⁷³

This holding represents an extension of the *Hisquierdo* rationale. In *Hisquierdo*, the Court interpreted a statute which included a limited amount of community property rights, holding that Congress had included only limited rights and consciously decided against enlarging them.⁷⁴ Because the Court in *McCarty* addressed a statute which included no distribution rights, the dissenters thought that the absence of the limited rights present in *Hisquierdo* would require a contrary conclusion.⁷⁵ The proposed amendment to the military retirement benefits legislation, however, indicated that the inference to be drawn was not merely a neutral omission of congressional action.⁷⁶ Rather, having failed to pass the amendment, the demonstrated intent of Congress was to prohibit the distribution of military pensions upon divorce.⁷⁷ Moreover, it should be noted that this rationale may be applicable to private pensions in commerce-related industries which are covered by the Employee Retirement Income Security Act of 1974 (ERISA).⁷⁸

⁷³ *Id.* Addressing the effect of distribution on the individual service member, the *McCarty* Court noted that an award to the former spouse would contravene the congressional intent that the benefits from the retirement fund should belong to the serviceman alone. Military personnel management would also be disrupted by the distribution of retirement benefits because it would diminish the pension's value as an inducement for enlistment or reenlistment.

⁷⁴ *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584-85 (1979). Recognizing that the statute in question embodied a form of community property, the *Hisquierdo* Court stated that Congress had "carefully targeted the benefits created by the Railroad Retirement Act." *Id.* at 584. Although the statutory balance is delicate, "[i]t is for Congress to decide how these finite funds are to be allocated." *Id.* at 585. Employing an analysis which foreshadowed that applied in *McCarty*, see note 66 *supra*, the Court stated that the reduction of benefits through equitable distribution discourages the divorced employee from retiring because the former spouse cannot claim a community property interest in salary earned after divorce. *Id.*

⁷⁵ *McCarty v. McCarty*, 101 S. Ct. 2728, 2747 (1981) (Rehnquist, J., dissenting). Noting that the statute at issue in *McCarty* did not contain any provision analogous to the annuity provision of the Railroad Retirement Act in *Hisquierdo*, the dissenting Justices suggested that there could be no preemption, since the argument could not be made, as it was in *Hisquierdo*, that Congress had confronted the issue and drawn the line. *Id.* (Rehnquist, J., dissenting). The dissent reasoned that the *Hisquierdo* Court had identified the Railroad Retirement Act's annuity provision as a limited community property concept and had deferred to Congress' explicit curtailment of that concept. *Id.* (Rehnquist, J., dissenting); see note 64 *supra*.

⁷⁶ 101 S. Ct. at 2739.

⁷⁷ *Id.*; see notes 58-59 *supra*.

⁷⁸ See 29 U.S.C. §§ 1001-1381 (1976 & Supp. III 1979). Prior cases which have upheld the equitable distribution of ERISA benefits, see, e.g., *Biles v. Biles*, 163 N.J. Super. 49, 55-

Professional Degrees

Frequently, one spouse finances the other spouse's professional education or simply supports the student spouse during the educational period. Thus, the issue arises whether a professional degree and/or the subsequent increase in earning capacity made available by the degree is an asset subject to equitable distribution. Recently, in *Lynn v. Lynn*,⁷⁹ a New Jersey Superior Court addressed this question, holding that a medical degree and license to practice medicine obtained during the marriage are marital assets subject to equitable distribution.⁸⁰ Emphasizing the fact that its

57, 394 A.2d 153, 156-57 (Super. Ct. Ch. Div. 1978), may have to be reevaluated after the *Hisquierdo* and *McCarty* decisions. See generally Doyle, *E.R.I.S.A. and the Non-Employee Spouse's Community Interest in Retirement Pay*, 4 COMM. PROP. J. 3 (1977).

⁷⁹ *Lynn v. Lynn*, 7 Fam. L. Rep. 3001 (N.J. Super. Ct. Ch. Div. December 5, 1980).

⁸⁰ *Id.* at 3007. Mr. Lynn was a first-year medical student while Mrs. Lynn held a lucrative laboratory position when they were married. *Id.* at 3001. The working spouse sublimated her aspiration to become a doctor to her husband's desire to achieve the identical goal. *Id.* The court found that Mrs. Lynn's contributions to her husband's education were critical and incontrovertible. *Id.* After obtaining his medical degree, Dr. Lynn's earnings still were roughly half those of his wife's. *Id.* Nevertheless, the court found that equity demanded that the medical school degree and license to practice medicine be subjected to equitable distribution. *Id.* at 3007.

Numerous other jurisdictions also have addressed this issue. In *Daniels v. Daniels*, 20 Ohio App. 2d 458, 461, 185 N.E.2d 773, 775 (Ct. App. 1961), an Ohio Court of Appeals concluded that a medical degree constituted property, which could be taken into account by the trial court in awarding alimony. The court, however, did not consider whether the degree was property subject to equitable distribution. See *id.* Similarly, in *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (Ct. App. 1978), the court awarded a wife \$15,000 in recognition of her contribution towards the acquisition of her husband's medical degree, *id.* at 694-95, 264 N.W.2d at 98, noting that it would be "impossible to award the wife a portion of the . . . degree," *id.* at 695, 264 N.W.2d at 98; accord, *Inman v. Inman*, 578 S.W.2d 266, 267-68 (Ky. Ct. App. 1979). Notwithstanding the theoretical and practical difficulties involved, a Kentucky appellate court remanded a case with instructions to ascertain a wife's proprietary interest in her husband's dental education based on her monetary contribution toward his enhanced earning capacity. 578 S.W.2d at 269. Because the educational costs precluded the acquisition of significant marital assets, the court stated that this was the only way to achieve an equitable result. *Id.* at 268. Generally, these decisions allowed recovery, apparently in restitution, although the proprietary nature of an educational degree has been recognized. See *In re Marriage of Cropp*, 5 Fam. L. Rep. 2957, 2958 (Minn. Dist. Ct. 1979); *Mahoney v. Mahoney*, 175 N.J. Super. 443, 447, 419 A.2d 1149, 1150-51 (Super. Ct. Ch. Div. 1980); cf. *Reen v. Reen*, 8 FAM. L. REP. (BNA) 2193 (Mass. Prob. & Fam. Ct. 1981) (wife who supported husband throughout dental school entitled to share value of license to practice orthodontia). But see *In re Graham*, 194 Colo. 429, 574 P.2d 75, 77 (1978) (advanced degree has "none of the attributes of property"); *Wilcox v. Wilcox*, 173 Ind. App. 652, 655-56, 365 N.E.2d 792, 795 (Ct. App. 1977) (future income construed not to include property); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) (degree is not a distributable asset although future earning capacity generated by the degree is distributable); *Hubbard v. Hubbard*, 603 P.2d 747, 750-52 (Okla. 1979) (allowing restitutionary recov-

sole concern was the professional license and degree, the *Lynn* court distinguished a prior case which refused to recognize an individual's enhanced earning capacity as a separate item of property.⁸¹ Indeed, noted the court, previous case law had recognized that the degree itself was a property right.⁸² The *Lynn* court, therefore, subjected the degree to equitable distribution, commenting that "[t]o do otherwise would render courts of equity impotent and unable to do more than recognize what *all* courts agree to be an 'obvious injustice.'" ⁸³ Although yet unpublished, it is likely that

ery though expressly rejecting contention that educational degree is distributable); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 60, 296 N.W.2d 761, 769 (Ct. App. 1980) (lower court erred in holding educational degree was marital property); *cf. Aufmuth v. Aufmuth*, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 678 (Ct. App. 1979) (husband's legal degree is not community property); *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131, 135 (Ct. App. 1969) (rejecting conceptualization of legal degree as community property). *See generally* Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517 (1981) [hereinafter cited as Note, *Professional Degree*]; Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979).

⁸¹ *Lynn v. Lynn*, 7 Fam. L. Rep. 3001, 3002 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980) (citing *Stern v. Stern*, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975)). In *Stern*, the husband's law firm kept an account for the payments that would be due to each partner upon his death. Although adopting that value and the value of his capital account as the presumptive value of his partnership interest, 66 N.J. at 346, 331 A.2d at 259-61, the court nevertheless held that the husband's earning capacity was not a separate asset subject to distribution, *id.* at 345, 331 A.2d at 260. The *Stern* court stated, however, that enhanced earning capacity is a permissible consideration when determining an equitable distribution or calculating alimony. *Id.*

⁸² 7 Fam. L. Rep. at 3005 (citing *Mahoney v. Mahoney*, 175 N.J. Super. 443, 447, 419 A.2d 1149, 1150-51 (Super. Ct. Ch. Div. 1980)). The wife in *Mahoney* was employed throughout the marriage and she supported the household during a 16-month period while her husband attended graduate school. 175 N.J. Super. at 444-45, 419 A.2d at 1149. During that period she also paid all of her husband's educational expenses. *Id.* at 445, 419 A.2d at 1149. The court reimbursed Mrs. Mahoney, observing that to do otherwise would unjustly enrich her husband. *Id.* at 446, 419 A.2d at 1150. It is suggested that the premise underlying the decision in *Mahoney* was that spousal contributions to the education of the other spouse constitute investments in the marital partnership. *See id.*

The *Mahoney* court noted that *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *see* note 81 *supra*, merely held that enhanced earning capacity was not a distinct asset. 175 N.J. Super. at 445, 419 A.2d at 1149-50. Consequently, the question of the intrinsic value of an educational degree was an issue of first impression in the jurisdiction. *Id.* Concluding that the educational degree was a property right, the court awarded the wife \$5,000 as an "equitable offset." *Id.* at 447, 419 A.2d at 1150-51.

It is important to note that, as this issue went to press, *Mahoney v. Mahoney* was reversed. No. A-491-80-T2 (N.J. Super. Ct. App. Div. Feb. 9, 1982).

⁸³ 7 Fam. L. Rep. at 3007 (emphasis in original). Before arriving at its conclusion, the court undertook a thorough examination of the precedent dealing with educational degrees as marital property. *Id.* at 3002-06. The court rejected cases which require the absence of traditional marital property as a prerequisite for the inclusion of a professional degree or

the *Lynn* rationale is the forerunner of similar New Jersey decisions.

New York also could include an educational degree within marital assets subject to equitable distribution since the statute requires the consideration of "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career potential of the other party."⁸⁴ Nonetheless, the Erie County Supreme Court recently refused to subject a medical degree to equitable distribution because the degree had no inherent monetary value.⁸⁵ Sub-

license since they produce divergent conceptual results. *Id.* at 3006. Cases providing implied loan or unjust enrichment remedies also were rejected because they failed to compensate adequately the working spouse. *Id.* Even the equitable offset cases did not satisfy the legitimate expectations of the working spouse. *Id.* at 3007. Accordingly, the court subjected the professional degree and license to distribution. *Id.*

If the value of a professional degree is held to be the increased earning potential, the award may be determined by subtracting the earning capacity without the degree from the earning capacity with the degree. Greene, *Dissolution of the "Educational Partnership" Marriage—Professional Degree as Divisible Marital Property*, 4 FLA. B.J. 292, 296 (1981). Due to such unforeseeable occurrences as premature death, disability, economic depression, or a change in professions, this award often will be speculative and conjectural. Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 611 (1974).

The recovery also may be measured by calculating the financial contribution that the working spouse made to obtain the educational degree. *See, e.g., Inman v. Inman*, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979); *Hubbard v. Hubbard*, 603 P.2d 747, 751 (Okla. 1979). No speculation is required under this approach since the calculation rests on known variables such as tuition costs, fees, and living expenses. *See Note, Professional Degree, supra*, note 80, at 551; Comment, *supra*, at 603. The primary pitfall of a cost valuation is its failure to recognize that the value of an education exceeds its cost. Thus, this valuation merely reimburses the working spouse for previous support without providing the expected economic benefit from the subsequent career professional. *See Comment, supra*, at 592. Historically, however, courts have considered the future earning capacity attributable to a degree when assessing damages in tort actions. *E.g., DeHass v. Pennsylvania R.R.*, 261 Pa. 499, 503, 104 A. 733, 734 (1918). Additionally, the same method may be applied in divorce actions. *See generally Denis, Sirman & Drinkwater, Wrongful Death Damages—Fair Compensation for Future Pecuniary Loss Requires Consideration of Economic Trends and Income Tax Consequences*, 47 MISS. L.J. 173 (1976); Peck & Hopkins, *Economics and Impaired Earning Capacity in Personal Injury Cases*, 44 WASH. L. REV. 351 (1969). This has prompted one commentator to note that "[t]he existence of valuable tools . . . demonstrates that future earning capacity may be characterized as marital property without unmanageable difficulty." 44 MO. L. REV. 329, 336 (1979).

⁸⁴ N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1981-1982) enables courts to consider, "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or career potential of the other party." *Id.*; *see id.* § 236(B)(6)(a)(8) (McKinney Supp. 1981-1982).

⁸⁵ *Lesman v. Lesman*, 110 Misc. 2d 815, 816, 442 N.Y.S.2d 955, 956 (Sup. Ct. Erie County 1981). The *Lesman* court expressly rejected *Lynn's* holding that a medical license is property subject to equitable distribution, stating that a medical license has no intrinsic monetary value. *Id.* at 816-17, 442 N.Y.S.2d at 956. The court opined that it would be pa-

sequent decisions which hold to the contrary will eventually confront the limited options available to the court when the degree-winning spouse does not obtain a subsequent position of increased income.⁸⁶

Distributive Award

Occasionally, the situation will arise in a matrimonial case where the traditional distribution of assets may be difficult. The framers of the New York statute, therefore, included a unique provision permitting a distributive award in lieu of an actual distribution of property.⁸⁷ Such a monetary award may be granted when a court decides that an ordinary distribution, though possible, would be burdensome or impractical, or where the distribution of a business, corporation, or professional interest would be illegal.⁸⁸ The court has discretion to make this award to facilitate, supplement, or effectuate an equitable distribution of marital property.⁸⁹ Moreover, such distributive award may be payable in a single sum or in fixed periodic amounts.⁹⁰ The statute stipulates that the payments are not to be treated as ordinary income under the Internal Revenue Code.⁹¹ Recently, the New York County Supreme Court employed this provision to distribute predominantly nonliquid assets which could not be converted readily into cash.⁹²

tently unreasonable to premise a financial obligation on a license which ultimately might not be used by the licensee. *Id.* at 817, 442 N.Y.S.2d at 957. Any increased earnings generated by the professional degree, the court reasoned, should be translated into increased support or maintenance payments. *Id.* Finally, Justice Sedita noted that the pursuit of an educational degree is an individual effort. *Id.*

⁸⁶ The courts apparently focus on the enhanced earning capacity resulting from the degree. *See, e.g., In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978). On this reasoning, the valuation and award should remain the same regardless of whether the anticipated increased income materializes. If the terms of a periodic payment agreement become unconscionable because of a failure to obtain profitable employment, courts should have the power to rescind provisions of the agreement. *Cf. Corcoran v. Corcoran*, 73 App. Div. 2d 1037, 1038, 425 N.Y.S.2d 402, 404 (4th Dep't 1980) (provision in support agreement which required a reduction in payments upon wife's employment found unconscionable and rescinded).

⁸⁷ *See* N.Y. DOM. REL. LAW § 236(B)(5)(e) (McKinney Supp. 1981-1982).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* § 236(B)(1)(b).

⁹¹ *Id.* Under the Internal Revenue Code, alimony payments are treated as gross income to the recipient, but are excluded from the payor's gross income. I.R.C. §§ 71(a)(1), 215(a). This includes all periodic payments made under a divorce decree or a written instrument pursuant to a divorce or separation. *Id.* § 71(a)(1).

⁹² *Jolis v. Jolis*, N.Y.L.J., Nov. 4, 1981, at 11, col. 1 & at 12, col. 3 (Sup. Ct. N.Y.).

Postmarital Increases in Value

New York specifically exempts from equitable distribution the appreciation in value of separate property unless the appreciation is due partially to the contributions of the other spouse.⁹³ The legislature apparently intended to exclude services as a wage earner, parent, spouse, homemaker, or any other career advancement factor from the category of spousal contributions toward the appreciation in value of separate property.⁹⁴ Accordingly, an appreciation in value of separate property will not be distributed to a spouse who cannot "correlate how and in what manner her indirect spousal efforts or services led to the appreciation in value" during the marriage.⁹⁵ By way of contrast, New Jersey exempts from equitable distribution any increase in value of separate property which is attributable to the efforts of either spouse.⁹⁶

County). The nonliquid assets in *Jolis* included an equity interest in a New York cooperative apartment, a French studio cooperative apartment used in the husband's European business, and farm acreage which had been appraised for a potential sale in 1983. *Id.* Justice Cohen ordered that all of the material property be distributed in equal portions over a 3-year period. *Id.* at 12, col. 4.

⁹³ N.Y. DOM. REL. LAW § 236(B)(1)(d)(3) (McKinney Supp. 1980-1981). Governor Carey recognized that upon dissolution of a marriage, "property accumulated during the marriage should be distributed in a manner which reflects the individual needs and circumstances of the parties regardless of the name in which such property is held." Memorandum of Gov. Carey (June 22, 1980), reprinted in GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 608. One of the considerations is "any . . . direct or indirect contribution made to the acquisition of such marital property by the party not having title, including . . . contributions . . . as a spouse." N.Y. DOM. REL. LAW § 236(B)(5)(d)(6). An appreciation in value of separately held property, when due in part to contributions from a spouse, apparently is considered as property acquired during the marriage. This view was adopted in response to a concern that the services of a homemaker might be undervalued. 45 ALB. L. REV., *supra* note 11, at 492. Because New York's statute was designed to eliminate previous injustices, it was necessary to recognize a spouse's contributions, as homemaker or wage earner, during the marriage. *Id.*

⁹⁴ *Jolis v. Jolis*, N.Y.L.J., Nov. 4, 1981, at 11, col. 1 (Sup. Ct. N.Y. County). The *Jolis* court observed that the legislature expressly omitted "spousal career advancement factors" from characterization as contributions toward the appreciation in value of separate property by including such factors exclusively in the provisions governing awards of maintenance and distributions of marital property. *Id.* at 11, col. 6 & at 12, col. 1.

⁹⁵ *Id.* at 12, col. 1. In *Jolis*, the wife claimed to have contributed to the appreciation in value of her husband's stock interest in a closely held family corporation. *Id.* at 11, col. 5. Her claim was premised on the social aid which she provided by serving as his homemaker and frequent companion on global business trips. *Id.* at 12, col. 1. Deeming these efforts speculative and indirect, the court concluded that the fluctuation in the value of the stock was attributable to market and management factors. *Id.* Significantly, Mrs. *Jolis* never participated directly in the business activities of the closely held corporation. *Id.*

⁹⁶ The increase in value of "separate" assets resulting after the marriage is eligible for equitable distribution to the extent that the increase is attributable to the efforts of the

Connecticut approaches this question from a different perspective. The statutory language directs the court to "consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."⁹⁷ There is no significant case law to aid in further interpretation. Although the statutory language allows the court broad discretion in determining which assets are subject to equitable distribution, it is silent as to the distributability of spousal contributions which increase the value of assets held by the other spouse.

VALUATION OF ASSETS

Assets subject to equitable distribution include interests in closely held corporations, stocks, bonds, real estate, and cash. Indeed, the parties have the obligation to supply sufficient information to aid the court in the valuation of these assets.⁹⁸ Conse-

other spouse subsequent to the marriage. *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401, 346 A.2d 434, 436 (Super. Ct. App. Div. 1975). In *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), the court held that property owned by either spouse at the time of marriage enjoys an immunity from equitable distribution and if such property increases in value, the increment also enjoys an immunity. *Id.* at 214, 320 A.2d at 493. The court cautioned, however, that the immunity does not include increments in value attributable to the other spouse. *Id.* at 214 n.4, 320 A.2d at 493 n.4. Increases in value of premarital assets due solely to inflation are not subject to equitable distribution. *Mol v. Mol*, 147 N.J. Super. 5, 9, 370 A.2d 509, 510 (Super. Ct. App. Div. 1977). For a concise list of premarital assets not eligible for equitable distribution under New Jersey law, see Skoloff, *The New Jersey Experience: Equitable Distribution from September 13, 1971 to June 1, 1980* in GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 496-97.

⁹⁷ CONN. GEN. STAT. § 46b-81(c) (1981).

⁹⁸ *Lavene v. Lavene*, 148 N.J. Super. 267, 276, 372 A.2d 629, 633 (Super. Ct. App. Div. 1977), *remanded*, 162 N.J. Super. 187, 392 A.2d 621 (Super. Ct. Ch. Div. 1978); *see Rothman v. Rothman*, 65 N.J. 219, 233, 320 A.2d 496, 504 (1974); *Franzese v. Franzese*, 108 Misc. 2d 154, 157, 436 N.Y.S.2d 979, 982 (Sup. Ct. Westchester County 1981). *See generally* Asnis, *Role of the Accountant in Matrimonial Cases*, in GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 366-68. When the parties do not provide the court with sufficient guidance to make the proper evaluation, the court has the authority to appoint its own expert to secure appraisals. *Lavene v. Lavene*, 148 N.J. Super. at 276, 372 A.2d at 633; *see Gueli v. Gueli*, 106 Misc. 2d 877, 878, 435 N.Y.S.2d 537, 538 (Sup. Ct. Nassau County 1981); N.J. STAT. ANN. § 14A:11-8(c) (West 1969) (in action to determine fair value of shares, court in its discretion may appoint an appraiser). Indeed, New York views the cooperation of the litigants essential to the disclosure process. *See Wells v. Wells*, 108 Misc. 2d 501, 502, 437 N.Y.S.2d 622, 623 (Sup. Ct. Nassau County 1981) (defendant's contention that broad discovery proceedings would be too costly rejected); *Gueli v. Gueli*, 106 Misc. 2d 877, 878, 435 N.Y.S.2d 537, 538 (Sup. Ct. Nassau County 1981) (plaintiff awarded \$500 to employ an accountant to evaluate defendant's business records); *Roussos v. Roussos*, 106 Misc. 2d 583, 587, 434 N.Y.S.2d 600, 603 (Sup. Ct. Queens County 1980) (wife entitled to disclosure of entire financial history of marriage); *Stolowitz v. Stolowitz*, 106 Misc. 2d 853, 859, 435 N.Y.S.2d 882, 886-87 (Sup. Ct. Nassau County 1980) (defendant's participation in discovery

quently, the equitable distribution award usually will be based upon what the court perceives to be the most realistic valuation.⁹⁹ Often, however, the valuation of assets is the most difficult question confronting a matrimonial court.

The New Jersey courts have held that the book value of a closely held corporation may not be its actual value.¹⁰⁰ Moreover, neither the assessed value nor the dividend income is considered an accurate measurement of the market value of a close corporation.¹⁰¹ Rather, New Jersey law has favored the use of the guide-

proceeding to value partnership interest made it unnecessary to require disclosure of law firm's clients).

⁹⁹ See *Lavene v. Lavene*, 162 N.J. Super. 187, 199, 392 A.2d 621, 627 (Super. Ct. App. Div. 1978); *Mandel v. Mandel*, 109 Misc. 2d 1, 3-4, 439 N.Y.S.2d 576, 578 (Sup. Ct. Queens County 1981); *Gramazio v. Gramazio*, 108 Misc. 2d 579, 580, 438 N.Y.S.2d 71, 72 (Sup. Ct. Rockland County 1981). In refusing to allow a jury trial on the issue of equitable distribution, the *Mandel* court stated that since a matrimonial action was an action in equity, the court must be permitted "to adapt the relief to the circumstances of the case." 109 Misc. 2d at 2, 439 N.Y.S.2d at 577 (citation omitted). Thus, the valuation of marital property is within the discretion of the trial judge. Similarly, the *Lavene* court noted that "[t]he weight to be accorded to the testimony of [expert] witnesses . . . depends upon the ability of the witness, his knowledge and his experience in the field." 162 N.J. Super. at 199, 392 A.2d at 627 (citation omitted).

¹⁰⁰ *Lavene v. Lavene*, 148 N.J. Super. 267, 275, 372 A.2d 629, 633 (Super. Ct. App. Div. 1977); see *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 444-45, 393 A.2d 583, 587-88 (Super. Ct. App. Div. 1978). *Contra*, *Esposito v. Esposito*, 158 N.J. Super. 285, 293, 385 A.2d 1266, 1270 (Super. Ct. App. Div. 1978). The book value of the corporation rarely is indicative of its true market value because the assets are recorded at cost and many assets are omitted for tax purposes. See *Fishman, Basic Principles of Closely-Held Stock Valuation*, in *GUIDE TO NEW YORK EQUITABLE DISTRIBUTION*, *supra* note 6, at 380. See also *ATTORNEY'S HANDBOOK OF ACCOUNTING* §§ 4.02[11]-4.02[12] (H. Sellin 3d ed. 1979); J. BONBRIGHT, *VALUATION OF PROPERTY* 265 (1937). Accordingly, a closely held corporation cannot be evaluated realistically under the simplistic book value approach since it fails to consider goodwill, "the investment value of a business in terms of actual profit," and the discounting of minority shareholders' interests. *Lavene v. Lavene*, 148 N.J. Super. at 275, 372 A.2d at 633. Nevertheless, in *Esposito v. Esposito*, 158 N.J. Super. 285, 385 A.2d 1266 (Super. Ct. App. Div. 1978), the court used the book value to determine valuation. *Id.* at 293, 385 A.2d at 1270. The court, however, noted that it was impelled to accept the book value as the fair valuation because of the circumstances of the cases and the absence of competent expert testimony. *Id.*

¹⁰¹ *Lavene v. Lavene*, 162 N.J. Super. 187, 196, 392 A.2d 621, 625 (Super. Ct. App. Div. 1978) (citing Rev. Rul. 59-60, 1959-1 C.B. 237, 241); *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 318, 437 N.Y.S.2d 584, 589 (Sup. Ct. Nassau County 1981); *cf. Gemignani v. Gemignani*, 146 N.J. Super. 278, 283, 369 A.2d 942, 944-45 (Super. Ct. App. Div. 1977) (trial court erred in accepting assessed valuation of two-family house as the fair market value and in failing to consider "the income-production aspect of the marital residence *vis-a-vis* asset value").

Dividends also do not provide a reliable indication of fair market value because past dividends may not bear any relation to present dividend-paying capacity. Rev. Rul. 59-60, 1959-1 C.B. 237, 241. This is especially true in the case of a closely held corporation when an individual or group might continue dividend payments to meet stockholder needs. 162 N.J.

lines enumerated in Revenue Ruling 59-60.¹⁰² Thus, an appraiser must consider carefully the corporation's nature and history, economic outlook, book value, financial condition, earning capacity, dividend paying capacity, past sales, blockage, goodwill, the market price of competitive stocks, and other intangible assets.¹⁰³ The weight accorded each of these factors will depend upon the facts of the particular case.¹⁰⁴

at 196, 392 A.2d at 625 (citing Rev. Rul. 59-60, 1959-1 C.B. 237, 241). For example, the controlling individual or group could substitute salaries and bonuses for dividends, thereby reducing net income and understating the dividend-paying capacity. Rev. Rul. 59-60, 1959-1 C.B. at 241; see *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 318, 437 N.Y.S.2d 584, 589 (Sup. Ct. Nassau County 1981). When dividends are employed in the valuation analysis, therefore, primary consideration should be given to the dividend-paying capacity of the firm, rather than to the historical record of payment. 162 N.J. at 196, 392 A.2d at 625 (citing Rev. Rul. 59-60, 1959-1 C.B. at 241); see GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 382.

¹⁰² See *Westfield Center Serv., Inc. v. Cities Serv. Oil Co.*, 86 N.J. 453, 466, 432 A.2d 48, 55 (1981); *Lavene v. Lavene*, 162 N.J. Super. 187, 193, 392 A.2d 621, 624 (Super. Ct. Ch. Div. 1978). New York also adopted the guidelines set forth in Rev. Rul. 59-60, 1959-1 C.B. 237 in "what appears to have been the first trial of a matrimonial action under . . . 'equitable distribution' law." *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 311, 316-17, 437 N.Y.S.2d 584, 586, 588-89 (Sup. Ct. Nassau County 1981).

¹⁰³ *Lavene v. Lavene*, 162 N.J. Super. 187, 193-94, 392 A.2d 621, 624 (Super. Ct. Ch. Div. 1978) (citing Rev. Rul. 59-60, 1959-1 C.B. 237, 238-39). Under the capitalization of earnings method, ownership of a closely held corporation is valued by capitalizing earnings at a reasonable return on investment which is based on relative risk and current interest rates. 162 N.J. at 197, 392 A.2d at 626 (citing *Lawinger, Appraising Closely-Held Stock—Valuation Methods and Concepts*, 110 *Trusts & Est.* 816, 817 (1971)). The capitalization rate will vary in each case depending on the nature of the business, the risk involved, and the stability or irregularity of the earnings. Rev. Rul. 59-60, 1959-1 C.B. at 243. In another method of valuation, price earnings ratios of the closely held corporation are compared to those of publicly traded companies in the same or comparable industries. 162 N.J. at 198, 392 A.2d at 626 (citing *Lawinger, supra*, at 818-19). Despite the difficulties posed by the degree of comparability between the companies and the weight to be accorded the evidence obtained, this method is preferable to selecting a pure earnings ratio based entirely on the assessment of risk and a judgment regarding the requirement for return on investment. *Id.* The final approach to valuation, an appraisal of all underlying assets with adjustments for existing liabilities, can serve as a check on the two previous methods. 162 N.J. at 198-99, 392 A.2d at 626-27 (citing *Lawinger, supra*, at 818-19). Basically this approach involves a summation of the assets.

¹⁰⁴ See *Treas. Reg. § 20.2031-2(f)* (1981). Courts have accorded various weights to the factors depending upon the property valued and circumstances involved. See, e.g., *Lavene v. Lavene*, 162 N.J. Super. 187, 201-02, 392 A.2d 621, 628 (Super. Ct. Ch. Div. 1978) (in evaluating electronics business court gave weight to expert testimony of recent decline in electronics industry); *Esposito v. Esposito*, 158 N.J. Super. 285, 292-93, 385 A.2d 1266, 1270 (Super. Ct. Ch. Div. 1978) (book value used because of absence of competent expert testimony as to value of auto dealership); *Franzese v. Franzese*, 108 Misc. 2d 154, 157, 436 N.Y.S.2d 979, 982 (Sup. Ct. Westchester County 1981) (court concluded that an adequate determination of business interests could be performed based on an examination of books and records); *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 321, 437 N.Y.S.2d 584, 591 (Sup.

An appraiser also must consider the methods of valuation which have been derived from the Revenue Ruling:

1. Capitalization of Earnings: The company's value as a going concern is measured by the capitalization of indicated earnings at a reasonable return on investment based on relative risk and current interest rates.
2. Comparison with P/E Ratios of Comparable Firms: The company's ratio of price earnings is compared to those of publicly-traded companies in the same or comparable industry. Adjustments are first made to compensate for differences between such companies and the company being appraised.
3. Value of Assets: All underlying assets, tangible and intangible, are appraised with existing liabilities subtracted.¹⁰⁵

When evaluating a service business, one must examine net earnings and compare them to the personal services which produced them.¹⁰⁶ The Revenue Ruling approach also is applicable to valuations of corporate stocks.¹⁰⁷ It may be used for valuation of any type of business interest, including partnerships, proprietorships, and intangible assets.¹⁰⁸ New Jersey employs the Revenue Ruling factors when valuating these assets for equitable distribution.¹⁰⁹

Ct. Nassau County 1981) (record of value acceptable for valuation purposes).

¹⁰⁵ See *Lavene v. Lavene*, 162 N.J. Super. 187, 197-98, 392 A.2d 621, 626 (Super. Ct. Ch. Div. 1978).

¹⁰⁶ *Levy v. Levy*, 164 N.J. Super. 542, 547, 397 A.2d 374, 376 (Super. Ct. Ch. Div. 1978); see, e.g., *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 318, 437 N.Y.S.2d 584, 589 (Sup. Ct. Nassau County 1981). Because of the service nature of one spouse's medical practice, there was little capital outlay involved in establishing it. 108 Misc. 2d at 320-21, 437 N.Y.S.2d at 590-91. Since the equipment used had little resale value, an evaluation based on return of capital or the value of net assets would be inappropriate. *Id.* at 318, 437 N.Y.S.2d at 589. The court determined that earnings could be calculated by subtracting the reasonable compensation for services from that which was actually paid. *Id.*

¹⁰⁷ Rev. Rul. 68-609, 1968-2 C.B. 327, 328. A number of courts have applied the standards set out in Revenue Ruling 59-60 to the question of corporate stock valuation. E.g., *Newcomer v. United States*, 447 F. Supp. 1368, 1368-70 (W.D. Pa. 1978) (valuation of stock for estate purposes); *Andrews v. Commissioner*, 35 T.C.M. (CCH) 459, 462 (1976) (valuation of stock for liquidation loss purposes). In *Righter v. United States*, 439 F.2d 1204 (Ct. Cl. 1971), the court listed as factors to be considered in valuing stock the corporate assets, earnings, dividend policy, earning power prospects, book value, management, competition, and other factors. *Id.* at 1218 (citing *Arc Realty Co. v. Commissioner*, 295 F.2d 98, 103 (8th Cir. 1961)).

¹⁰⁸ Rev. Rul. 68-609, 1968-2 C.B. 327, 328.

¹⁰⁹ *Stern v. Stern*, 66 N.J. 340, 345-47, 331 A.2d 257, 260-61 (1975) (value of the husband's partnership interest carried on the books of his law firm included in the distribution of assets); *Levy v. Levy*, 164 N.J. Super. 542, 554-55, 397 A.2d 374, 380-81 (Super. Ct. Ch. Div. 1978) (no good will in the law practice of the husband to be included in distribution where his net income for the past 6 years did not exceed the reasonable value of his ser-

In what has been characterized as a "maiden voyage," a New York court recently addressed the question of which factors may be considered in determining a spouse's interest in a closely held corporation. Relying on the Revenue Ruling factors for purposes of valuation, the Nassau County Supreme Court held that an ex-wife was entitled to one-fourth of her husband's interest in a closely held corporation.¹¹⁰

In addition to the Revenue Ruling factors, a bona fide buy-sell agreement which predates the marital discord also should prove acceptable in the valuation of the stock of a professional closely held corporation.¹¹¹ An agreement which places a value on the corporation in the event of the death of a stockholder is made by the stockholding spouse contemplating the disposition of his estate.¹¹² Since this valuation is set by the shareholder spouse at a time when he was endeavoring to protect his estate from those within

vices); *Lavene v. Lavene*, 148 N.J. Super. 267, 274, 372 A.2d 629, 632 (Super. Ct. App. Div. 1977) (subtraction of the value of good will from the computation of the husband's business interest held to be reversible error).

¹¹⁰ *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 322-23, 437 N.Y.S.2d 584, 592 (Sup. Ct. Nassau County 1981). The question of valuation has been addressed by other jurisdictions. *E.g.*, *Miranda v. Miranda*, 596 S.W.2d 61, 62-63 (Mo. Ct. App. 1980). In *Miranda*, for instance, a family-owned corporation was valued by computing the value of the corporation's good will and adding that to the book value. *Id.* at 63; *see Webb v. Webb*, 94 Cal. App. 3d 335, 344-45, 156 Cal. Rptr. 334, 339-40 (Ct. App. 1979) (valuation of a business which fell between the nominal market value testified to and the computation of the value of good will by a capitalization of excess earnings method held correct); *Lockwood v. Lockwood*, 205 Neb. 818, 821, 290 N.W.2d 636, 640 (1980) (valuation of good will of the husband's accounting practice at \$300,000 held to be correct); *Hinrichs v. Hinrichs*, 37 Or. App. 833, 834, 588 P.2d 130, 131 (Ct. App. 1978) (valuation of business that exceeded its book value held correct); *In re Marriage of Freedman*, 23 Wash. App. 27, 28, 592 P.2d 1124, 1126 (Ct. App. 1979) (factors to be included in valuing the good will of a law practice included the practitioner's health, age, reputation, earning power, and comparative success). The *Nehorayoff* court applied the capitalization of net earnings approach, determining the capitalization rate to be 25%, based on the nature, risks, past performances, and future prospects of the personal service corporation. *Id.* at 319-21, 437 N.Y.S.2d at 590-91; *see Foster v. Foster*, 42 Cal. App. 3d 577, 581-84, 117 Cal. Rptr. 49, 52-54 (Ct. App. 1974). *See generally* 1 A. DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 379-82 (5th ed. 1953).

¹¹¹ A restrictive agreement may serve to fix the value of corporate stock in a closely held business for estate tax purposes. *Weil v. Commissioner*, 22 T.C. 1267, 1273-74 (1954); *see Comment, Valuation of Shares in a Closely Held Corporation*, 47 Miss. L.J. 715, 716 n.4 (1976). By analogy, the value established by a buy-sell agreement may prove equally satisfactory for distribution purposes.

¹¹² In *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975), a law firm kept records of the value of partnership interests payable on any partner's death. *Id.* at 346, 331 A.2d at 260. The court upheld the trial court's use of that value along with the value of the husband's capital account as the presumptive value of the husband's partnership interest. *Id.* at 346, 331 A.2d at 261.

the corporation, it provides a reliable indication of the value of his interest, especially when the other stockholders have been reluctant to cooperate.

The valuation of a professional corporation involves unique considerations. Unlike other business entities, the professional corporation generally has few assets and high income.¹¹³ Generally, the assets to be valued include accounts receivable, goodwill, and tangible assets such as office equipment, furniture, and a building or lease. Liabilities such as accounts and notes payable must be subtracted from this valuation. Currently, the most widely accepted method of valuation for professional corporations is comparative sales for similar corporations.¹¹⁴

An independent valuation will be the most persuasive evidence of the value of a closely held corporation.¹¹⁵ Prudent estate planning is required to analyze the alternatives available to minimize potentially adverse tax consequences.¹¹⁶ To achieve this end, an increasing number of matrimonial practitioners are relying on professional expertise in the areas of accounting and estates.

DETERMINING AN EQUITABLE DISTRIBUTION

As previously noted, defining property as marital or separate is merely the initial consideration in arriving at an equitable distri-

¹¹³ Professional corporations provide services of a personal nature. As such, their incomes are guaranteed by the individuals in the corporation rather than by the tangible assets. See 3B J. MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 22.50, at 399-400 (1980).

¹¹⁴ See *Estate of Piper v. Commissioner*, 72 T.C. 1062, 1072-74, 1084-86 (1979); *Estate of Goodrich v. Commissioner*, 37 T.C.M. (CCH) 1062, 1071-79 (1978); *Estate of Hall v. Commissioner*, 34 T.C.M. (CCH) 648, 655-56 (1975). See also I.R.C. § 2031(b); Treas. Reg. § 20.2031-2(f)(2) (1981); Rev. Rul. 59-60, 1959-1 C.B., 237.

¹¹⁵ Welch, *Discovery and Valuation in a Divorce Division Involving a Closely-Held Business or Professional Practice*, 7 COMM. PROP. J. 103, 104-05 (1980); see G. DESMOND & R. KELLEY, *BUSINESS VALUATION HANDBOOK* § 1.05-3, at 12 (1977) (professional appraisal may be sole method of securing objective valuation). See generally Schreier & Joy, *Judicial Valuation of "Close" Corporation Stock: Alice in Wonderland Revisited*, 31 OKLA. L. REV. 853, 857 (1978); Comment, *supra* note 111, at 742.

¹¹⁶ Hardee, *The Valuation of a Closely-Held Business* (pt. 1), 5 ALI-ABA COURSE MATERIALS J. 35, 35-37 (1981). See generally Penner, *Lifetime Estate Planning for the Operation of a Closely Held Corporation*, 34 N.Y.U. INST. FED. TAX. 1538 (1976); Note, *Estate Planning for the Close Corporation*, 51 MINN. L. REV. 725, 725 (1967). Prudent estate planning is critical in certain instances. The stock value may require an increase to qualify as a redemption under I.R.C. § 303 or to reach the threshold for installment payment of death taxes under I.R.C. §§ 6166, 6166A. See Hardee, *supra*, at 36-37. For an analysis of the various alternatives available to the taxpayer in valuing a closely held corporation, see Lowell, Warren & Zabel, *Estate Planning for Owners of Closely-Held Businesses* (pts. 1 & 2); 3 ALI-ABA COURSE MATERIALS J., 19-20, 37, 37-62 (1978).

bution. Generally, a court is required to distribute property in a manner that is fair and just, considering all of the circumstances. In carrying forth this procedure, all three states are guided by specifically enumerated guidelines.

Trial Court Guidelines

These guidelines have been outlined by case law in New Jersey. In *Painter v. Painter*, the New Jersey Supreme Court approved a list of thirteen criteria.¹¹⁷ Additionally, the New Jersey courts have adopted section 37 of the Uniform Marriage and Divorce Act.¹¹⁸ Similar criteria are set forth by statute in New York and Connecticut.¹¹⁹ In the absence of an agreement, the New York statute directs a court to consider ten nonwaivable factors.¹²⁰ Connecticut's guidelines consist of sixteen interrelated factors.¹²¹

¹¹⁷ *Painter v. Painter*, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974). The *Painter* court noted that the 13 criteria were illustrative but not exhaustive of the permissible considerations. The matrimonial judge should consider the respective age, background and earning ability of the parties, the duration of the marriage, the standard of living during marriage, the money or property brought into the marriage by each spouse, the present income of the parties, the property acquired during the marriage by either or both of the parties, the source of the acquisition, the current value and income producing capacity of the property, the debts and liabilities of the parties, the present mental and physical health of the parties, the probability of continued employment at present or increased earnings, the effect of distribution on the ability to pay alimony and child support, and interspousal gifts during marriage. The *Painter* decision noted that the trial judge must consider all of the individual circumstances. *Id.* at 212, 320 A.2d at 492.

¹¹⁸ See *Chalmers v. Chalmers*, 65 N.J. 186, 194, 320 A.2d 478, 483 (1974). UNIFORM MARRIAGE AND DIVORCE ACT (UMDA) § 307. The UMDA recognizes that marriage is a partnership in which each spouse makes different albeit equally important contributions. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 164 (1969). The Act was recommended to the American Bar Association in 1970 and approved in 1974. See 60 A.B.A.J. 446, 451 (1974). A 1973 amendment to the original section 307 created two alternatives. Alternative A proceeds upon the principle that all property should be regarded as marital assets available for distribution. Alternative B was included at the insistence of several commissioners from community property states who preferred to adhere to the distinction between community property and separate property. See UMDA § 307 (commissioner's comment 1973).

New Jersey has adopted alternative B primarily because it specifies that equitable distribution should take place without regard to marital misconduct. See *Chalmers v. Chalmers*, 65 N.J. 186, 193-94, 320 A.2d 478, 482-83 (1974) ("[t]he concept of fault is not relevant to such distribution since all that is being affected is the allocation to each party of what really belongs to him or her").

¹¹⁹ See notes 124-127 *infra*.

¹²⁰ N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney Supp. 1981-1982); see note 11 *supra*.

¹²¹ Connecticut's guideline criteria, enumerated in CONN. GEN. STAT. § 46b-81(c) (1981), consist of 16 interrelated factors. The factors to be considered are: the length of the mar-

Upon a cursory examination, the reader may appreciate the basic similarities among the three sets of guidelines. Some differences, however, do exist. The *Painter* guidelines, for example, refer to the importance of interspousal gifts,¹²² whereas no such reference is found in the New York or Connecticut guidelines. Connecticut has distinguished itself by adding the contribution of each party in the acquisition, preservation, or appreciation in value of their respective estates as a consideration.¹²³

It is clear that New York studied the successes and failures of its neighbors in framing its guidelines. The New York statute includes three factors not mentioned in either Connecticut or New Jersey. One factor takes into account the loss of inheritance or pension rights upon dissolution of the marriage.¹²⁴ Another factor considers the impossibility or difficulty of evaluating any component asset or distributing any interest in a business, corporation, or profession.¹²⁵ It also considers the economic desirability of retain-

riage; the causes for annulment, dissolution of marriage or legal separation; the age, health, station, occupation, amount and sources of income; the vocational skills, employability, estate liabilities, and needs of each party; and the opportunity for future acquisition of capital assets and income. The court also must "consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." *Id.*

¹²² The *Painter* guidelines make reference to the importance of interspousal gifts, *Painter v. Painter*, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974), while no such reference is found in the comparable New York or Connecticut guidelines.

¹²³ CONN. GEN. STAT. § 46b-81(c) (1981).

¹²⁴ N.Y. DOM. REL. LAW § 236(B)(5)(d)(4) (McKinney Supp. 1981-1982). The loss of inheritance rights is related to N.Y. DOM. REL. LAW § 170-a (McKinney 1977), which was enacted in response to the Court of Appeals decision in *Gleason v. Gleason*, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970). *Gleason* held that the 1966 Divorce Reform Act should be applied retroactively, thus allowing a separation agreement executed in 1954 to be converted into a divorce in 1970 even though it meant that one spouse would be deprived of expected inheritance rights. *Id.* at 36, 256 N.E.2d at 516, 308 N.Y.S.2d at 352. The court of appeals stated that if the loss of a prospective right of inheritance was inequitable, then the situation should be remedied by the legislature. *Id.* at 43, 256 N.E.2d at 521, 308 N.Y.S.2d at 357. Five years later, the legislature enacted section 170-a which provided that a defendant in conversion divorce predicated on a separation decree or agreement obtained or executed before January 21, 1970, may recover a sum equivalent "to the value of any economic and property rights of which the spouse was deprived by virtue of [the conversion divorce], except where the grounds for the separation judgment would have excluded recovery of economic and property rights." N.Y. DOM. REL. LAW § 170-a (McKinney 1977).

¹²⁵ N.Y. DOM. REL. LAW § 236(B)(5)(d)(9) (McKinney Supp. 1981-1982). This factor must be read in conjunction with subsection 5(e) which states:

In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distributions shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may

ing such an asset or interest free from any claim or interference by the other party.¹²⁶ This factor is part of the aforementioned distributive award provision. Despite the specificity of the statute, New York leaves some discretion to the courts by the inclusion of a provision which allows the court to consider "any other factor which the court shall expressly find to be just and proper."¹²⁷

Role of Marital Fault

Under the common law, marital fault was an integral part of any proceeding to determine property rights upon divorce. While statutory reform has mitigated the harshness of the common law, the attitudes associated with the earlier law may be slow in changing. The resulting situation renders the role of marital fault unclear. What follows is a clarification of the current situation.

Marital fault is not expressly mentioned in New York's statute. It is possible, however, in a case where grievous marital mis-

make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

Id. § 236(B)(5)(e). Although the distributive award technique is useful in instances where it is more advantageous to keep an economic asset intact, it does not eliminate the need to make an evaluation of the worth of the interest in the business, corporation, or profession in question.

¹²⁶ See note 125 *supra*.

¹²⁷ N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1981-1982). The "wild card" provision was the result of compromises regarding the relevance of marital misconduct. See Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 49. Although marital fault expressly was excluded from the initial drafts of subdivisions five and six, regarding child support, the compromise resulted in the deletion of the express exclusion. *Id.*

One New York court asserted that the "wild card" provision authorized the equitable division of property between the spouses. *Kobylack v. Kobylack*, 110 Misc. 2d 402, 405, 442 N.Y.S.2d 392, 394 (Sup. Ct. Westchester County 1981). In *Kobylack*, the court determined that the husband and wife contributed to the marital expenses in a 2.5 to 1 ratio. *Id.* at 408, 442 N.Y.S.2d at 395. Consequently, the court declared that the property in question should be divided in accordance with that ratio. *Id.* The court also noted that although marital misconduct may be considered in the division of property, apparently pursuant to the "wild card" provision, that factor was inapplicable in the instant case. *Id.*

While the aforementioned criteria form the basic considerations given by the respective courts, they are not exclusive. The Connecticut statutory guidelines have been supplemented by subsequent case law. See, e.g., *Posada v. Jacobson*, 177 Conn. 259, 413 A.2d 854, 856 (1979); *Aguire v. Aguire*, 171 Conn. 312, 370 A.2d 948, 949 (1976); An analysis of the Connecticut courts' application of the statutory criteria may be found in Gordon, *Connecticut Alimony and Property Law*, in *GUIDE TO NEW YORK EQUITABLE DISTRIBUTION*, *supra* note 6, at 541.

New York may rely on case law and statutory guidelines developed in other jurisdictions for guidance in construing its statute. The difficulty, however, lies in predicting which precedents the New York courts will follow. 45 ALB. L. REV., *supra* note 11, at 507.

conduct is a material factor, fault may be considered as a "factor which the court shall expressly find just and proper."¹²⁸ As a leading commentator explained upon the unveiling of the New York statute, however, the purpose of the new law is to determine economic justice and not to punish marital fault.¹²⁹ Despite this admonition, the Suffolk County Supreme Court recently held that marital fault may be considered when distributing marital property, though it may not preclude such an award.¹³⁰ Additionally, the Nassau County Supreme Court has concluded that the axioms of equity have not been abrogated by the new equitable distribution law.¹³¹ Consequently, the court refused to award any share in the marital premises to a husband who had come into court with unclean hands.¹³² Unless its unusual nature requires that the assets be given to the innocent spouse, marital fault may not be considered in New Jersey.¹³³ Connecticut courts have held that fault may

¹²⁸ See note 127 *supra*.

¹²⁹ Since section 236 operates on the premise that marriage is an economic partnership, the distribution of marital property and the determination of maintenance should rest largely upon financial need and ability, irrespective of marital fault. Foster, *An Explanation of the New York 1980 Equitable Distribution Law*, 6 Fam. L. Rep. 2651, 2651 (1981). Unlike the predecessor section, which contained a provision that automatically barred alimony if the spouse was guilty of misconduct, N.Y. DOM. REL. LAW § 236 (McKinney 1977), the amended section does not include marital fault as a consideration when distributing property or awarding maintenance. N.Y. DOM. REL. LAW §§ 236(B)(5)(C)(1)-(10), 236(B)(6)(9)(1)-(10) (McKinney Supp. 1981-1982).

Nevertheless, marital fault may be considered when it is "heinous or grievous misconduct of a flagrant character." Foster, *supra*, at 2653; see N.Y. DOM. REL. LAW §§ 236(B)(5)(d)(10), 236(B)(6)(a)(10) (McKinney Supp. 1981-1982). Yet, in *Bofinger v. Bofinger*, 107 Misc. 2d 573, 435 N.Y.S.2d 652 (Sup. Ct. Suffolk County 1981), the court denied a spouse relief under the equitable doctrine of clean hands. *Id.* at 576, 435 N.Y.S.2d at 655.

¹³⁰ *Giannola v. Giannola*, 109 Misc. 2d 985, 987, 441 N.Y.S.2d 341, 343 (Sup. Ct. Suffolk County 1981); see *Kobylack v. Kobylack*, 110 Misc. 2d 402, 408, 442 N.Y.S. 2d 392, 395 (Sup. Ct. Westchester County 1981). The *Giannola* court premised its holding on the theory that each spouse was entitled to receive whatever he contributed to the marital partnership. 109 Misc. 2d at 987, 441 N.Y.S.2d at 343 (citing *Chalmers v. Chalmers*, 65 N.J. 186, 194, 320 A.2d 478, 483 (1974)).

¹³¹ *Whelan v. Whelan*, N.Y.L.J., Sept. 24, 1981, at 12, col. 5, 6 (Sup. Ct. Nassau County).

¹³² *Id.*

¹³³ *Chalmers v. Chalmers*, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974). The *Chalmers* court held that an adulterous relationship should not be considered when distributing marital property. *Id.* at 193-94, 320 A.2d at 482-83. The court reasoned that it may be impossible to ascertain who should bear the responsibility for the marital discord when the "fault" is merely a manifestation of an unhealthy relationship. *Id.* at 193, 320 A.2d at 482. Additionally, the court observed that equitable distribution is merely a reallocation of a spouse's contribution toward the acquisition of marital property and fault is irrelevant to such a distribution. *Id.* at 194, 320 A.2d at 482. Finally, the court noted that section 307 of the

be raised in marital dissolution actions for the purpose of establishing spousal obligations.¹³⁴

Economic fault often is a question before the court. Generally, economic fault will arise when one spouse has depleted the assets for purely personal acquisitions. A court which is presented with this problem may choose to place the depleted assets among that spouse's list of assets if the remaining assets are sufficient to compensate the innocent spouse. Typically, however, the guilty spouse has depleted most, if not all, of the assets subject to equitable distribution, thereby leaving nothing to be distributed to the other spouse. In this situation, a court may require the judicial sale of the asset which was acquired with the marital asset or its proceeds in order to compensate the other spouse.¹³⁵

Uniform Marriages and Divorce Act "provides for the distribution of marital property 'without regard to marital conduct.'" *Id.*

In *D'Arc v. D'Arc*, 164 N.J. Super. 226, 395 A.2d 1270 (Super. Ct. Ch. Div. 1978), *aff'd in part and rev'd in part*, 175 N.J. Super. 598, 421 A.2d 602 (Super. Ct. App. Div. 1980), a wealthy wife proved by a preponderance of the credible evidence that her husband had attempted to murder her. 164 N.J. Super. at 237, 395 A.2d at 1276. In holding that marital fault should be considered in distributing the marital property, the court indicated that the husband in *D'Arc* contributed only insignificantly to the marriage. Thus, there was no marital estate. *Id.* at 241, 395 A.2d at 1278. More importantly, however, the fault involved in *D'Arc* was "so evil and outrageous" as to "shock the conscience of everyone." *Id.* Concluding that there was no absolute statutory bar prohibiting the consideration of fault in the distribution of marital assets, the court held that equity dictated that the vast majority of the assets be distributed to the wife. *Id.* at 243, 395 A.2d at 1279.

¹³⁴ *E.g.*, *Edge v. Commissioner of Welfare*, 34 Conn. Supp. 284, 388 A.2d 1193, 1194-95 (C.P. 1978); *see Posada v. Posada*, 179 Conn. 568, 569, 427 A.2d 406, 408 (1980). Although marriage may terminate without regard to fault, 179 Conn. at 569, 427 A.2d at 408 (citing *Joy v. Joy*, 178 Conn. 254, 256, 423 A.2d 895, 896 (1979)), "no-fault divorce does not mean that the causes of a marital break-up are always irrelevant." 179 Conn. at 569, 427 A.2d at 408. CONN. GEN. STAT. § 46(b)-82 (1975), enables a trial court to consider "the causes for the annulment, dissolution of the marriage or legal separation" when deciding if alimony should be awarded. *Id.*

¹³⁵ Unlike marital fault, which involves misconduct of a spouse giving rise to a separation or divorce, economic fault concerns the attempt by one spouse to frustrate the other spouse's right to equitable distribution or maintenance. It is not the immorality of the spouse's act which warrants investigation, but the adverse economic impact on the family partnership which results from the squandering of marital assets. Because marriage is viewed as a partnership, unjust enrichment will result unless the wasteful dissipation of marital assets is considered when distributing the partnership assets. Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 58. Ensuring that the legal duty to support is fulfilled should be the objective. *Tobey v. Tobey*, 165 Conn. 742, 345 A.2d 21, 25 (1974); *cf. Hotkowsky v. Hotkowsky*, 165 Conn. 167, 170, 328 A.2d 674, 676 (1973) (primary basis for alimony award is continuing support of wife). Ten states presently include economic misconduct as a factor in determining an award of property, maintenance or alimony. Freed & Foster, *Divorce in the Fifty States*, *supra* note 1, at 248 (Table III — 3(c)). For statutory schemes which permit the court to consider the wasteful dissipation of the family assets in a

Role of the Homemaker

New York statutorily characterizes the role of the homemaker as a marital contribution.¹³⁶ Thus, it must be considered with the earning spouse's income contribution in making an equitable distribution award. The New Jersey Supreme Court adopted a similar rule when it approved section 37 of the Uniform Marriage and Divorce Act.¹³⁷ In Connecticut, however, statutory and case law are

divorce proceeding, see DEL. CODE ANN. tit. 13, § 1513(a)(6) (West Supp. 1980); N.Y. DOM. REL. LAW § 236(B)(6)(a)(9) (McKinney Supp. 1981-1982). Interestingly, New York allows consideration of economic fault when determining maintenance, see N.Y. DOM. REL. LAW § 236(B)(6)(a)(9) (McKinney Supp. 1981-1982), but omits it as an express factor to be considered when determining the distribution of marital assets. See N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney Supp. 1981-1982). One commentator has stated that economic fault may be considered when determining the equitable distribution under N.Y. DOM. REL. LAW § 256(B)(5)(d)(10) (McKinney Supp. 1981-1982) (any other factor the court deems just and proper). Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 49-51.

If a spouse attempts to frustrate the other spouse's equitable share of the marital assets through a fraudulent sale of the assets, the aggrieved spouse may obtain a temporary restraining order mandating that the marital assets not be significantly disturbed or reorganized. *Froelich-Switzer v. Switzer*, 107 Misc. 2d 814, 814-15, 436 N.Y.S.2d 123, 124 (Sup. Ct. N.Y. County 1981). Injunctive relief will be granted in special circumstances when the spouse seeking the injunctive relief shows the likelihood of ultimate victory and proves that the injunction is vital to prevent irreparable injury by the other spouse. See *deKwiatkowski v. deKwiatkowski*, N.Y.L.J., May 7, 1981, at 7, col. 2 (Sup. Ct. N. Y. County) (issuance of an injunction does not place any "unreasonable restraint or unduly heavy burden" on the parties as long as they are treated equally); *Bisca v. Bisca*, 108 Misc. 2d 227, 230, 437 N.Y.S.2d 258, 260 (Sup. Ct. Nassau County 1981) (injunctive relief is a drastic remedy that should be used sparingly and only to prevent threatened acts); *Annexstein v. Annexstein*, N.Y.L.J., Mar. 24, 1981, at 7, col. 2 (Sup. Ct. Kings County) (nothing in the equitable distribution statute deprives an equity court of traditional powers of injunctive relief); *Franzese v. Franzese*, 108 Misc. 2d 154, 157, 436 N.Y.S.2d 979, 981 (Sup. Ct. Westchester County 1981) (injunctive relief denied due to the absence of facts showing imminence of feared activity).

¹³⁶ N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1981-1982). Section 236(B)(5)(d)(6) provides that the court in distributing marital property may consider "[a]ny . . . contribution made to the acquisition of such marital property by the party not having title . . . including services as a spouse." *Id.* Additionally, the New York statute provides that the contribution for spouses as homemakers also must be considered when determining maintenance awards. *Id.* § 236(B)(6)(a)(8).

¹³⁷ *Painter v. Painter*, 65 N.J. 196, 211-12, 320 A.2d 484, 492 (1974). *Painter* included section 307 of the UMDA in its list of illustrative factors. See note 118 *supra*. Alternatives A and B of section 307 require the consideration of the contribution of a spouse as a homemaker in apportioning property. UMDA § 307, reprinted in 9A UNIFORM LAWS ANNOTATED (1979). Indeed, the equitable distribution statutes have at least one common purpose:

[They seek] to right what many have felt to be a grave wrong. [They give] recognition to the essential supportive role played by the wife in the home, acknowledging that as a homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage.

Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974); see *Brandenburg v. Brandenburg*, 83 N.J. 198, 210, 416 A.2d 327, 333 (1980); *Gibbons v. Gibbons*, 174 N.J. Super.

silent on this subject. The lack of commentary has led some authorities to conclude that no comparable recognition of the homemaker rule exists in Connecticut.¹³⁸

Judicial Discretion in Determining An Award

Indisputably, the most important factor in an equitable distribution is judicial discretion. All three states have recognized the prominence of judicial discretion in the implementation of what essentially is a doctrine of fairness.¹³⁹ They have, however, ap-

107, 113, 415 A.2d 1174, 1177-78 (Super. Ct. App. Div. 1980). In *Gibbons*, the court expanded on the partnership theory of marriage enunciated in *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496, 501-02 (1974). The court reasoned that the noneconomic duties that the homemaker contributes to the marital relationship are as imperative to the partnership as any economic factors. 174 N.J. Super. at 113, 415 A.2d at 1177-78. Recognizing that the equitable distribution award must be based on the totality of the contributions made to the marital partnership, the court concluded that equitable distribution "gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother, she should clearly be entitled to a share of family assets accumulated during the marriage." 174 N.J. at 113, 415 A.2d at 1175. See also *Burch*, *supra* note 51, at 110-14; *Hauserman & Fethke*, *supra* note 51, at 250-61. For cases regarding the evaluation of homemaker services in other jurisdictions, see *In re Marriage of Morrison*, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978); *Eschenburg v. Eschenburg*, 171 Mont. 247, 557 P.2d 1014, 1016 (1976).

¹³⁸ See generally *Freed & Foster, Divorce in the Fifty States*, *supra* note 1, at 246 (Table III); see CONN. GEN. STAT. ANN. 46b-81(c) (West Supp. 1981). See also UMDA § 307. For a detailed list of states containing "homemaker provisions," see D. FREE, *Factors For Equitable Distribution*, in GUIDE TO NEW YORK EQUITABLE DISTRIBUTION, *supra* note 6, at 201-03.

¹³⁹ See CONN. GEN. STAT. ANN. § 46b-81(c) (West Supp. 1981); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1981-1982). In the early case of *German v. German*, the Connecticut Supreme Court stated: In New York State as with us, divorce, with its incident of alimony, is a creature of statute. . . . It does not, however, follow that an action for divorce is one at law. The Legislature can create equitable rights and provide equitable remedies as well as it can those cognizable in the law courts. Obviously the relief given in a divorce action is not such as could be granted in a common-law court, but is essentially equitable in its nature.

122 Conn. 155, 160, 188 A. 429, 431 (1936) (citations omitted). This traditional view of equitable relief in matrimonial proceedings has been reaffirmed under the modern Connecticut statute. See, e.g., *Krause v. Krause*, 174 Conn. 361, 363, 387 A.2d 548, 550 (1978) (trial court did not abuse discretion in excluding evidence of possible future inheritance); *Rodearmel v. Rodearmel*, 173 Conn. 273, 274, 377 A.2d 260, 262 (1977) (per curiam) (no abuse of discretion in allowing husband to amend complaint to add new claim assigning the wife's interest in marital residence to him, awarding only one dollar a year as alimony). Similarly, New Jersey decisional law also recognizes the role of judicial discretion in implementing its equitable distribution law. See, e.g., *Smith v. Smith*, 72 N.J. 350, 360, 371 A.2d 1, 6 (1977); *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 443, 393 A.2d 583, 587 (Super. Ct. App. Div. 1978) (no restrictions on courts with regard to ordering distribution in kind of eligible assets or awarding monetary equivalent thereof).

proached the method of allocation in different ways.¹⁴⁰

Due to the general language of the Connecticut statute, trial judges are afforded broad discretion in the equitable distribution of marital assets.¹⁴¹ The Connecticut courts have supported this view, recognizing that trial courts "have a distinct advantage over an Appellate Court" when resolving property disputes.¹⁴² Notably, an abuse of discretion will not be found unless the conclusion of the trial court was not rationally based.¹⁴³ Moreover, a trial court need not recite the statutory language of the factors considered in reaching its conclusion provided that the decision as a whole clearly indicated that they were appropriately taken into account.¹⁴⁴ In addition, the trial court is not obligated to make conclusory findings regarding each of the statutory considerations.¹⁴⁵ Finally, a Connecticut court may order the transfer of an interest in a jointly held marital home as part of an alimony award even

In *Gibbons v. Gibbons*, 174 N.J. Super. 107, 415 A.2d 1174 (App. Div. 1980), both spouses were independently wealthy. Emphasizing that each spouse had been "supportive" of the other's needs during the marriage, the court stated that "neither need nor direct contribution to the acquisition of assets is in any measure a dispositive factor." *Id.* at 114, 415 A.2d at 1178. Marriage is a joint enterprise, the court reasoned, which depends on "the conjunction of multiple components, only one of which is financial." *Id.* at 113, 415 A.2d at 1177.

In a recent New York case, *Roussos v. Roussos*, 106 Misc. 2d 583, 434 N.Y.S.2d 600 (Sup. Ct. Queens County 1980), the husband complained that the wife's extensive request for production of documents was unduly burdensome. Upholding the wife's demands, the court noted that under the statute it had broad powers to delineate the extent of "marital property" to uncover hidden assets, to discover possible waste, and in general to gather information which may be pertinent to an equitable distribution. *Id.* at 585, 434 N.Y.S.2d at 602. *See also* *Nehorayoff v. Nehorayoff*, 108 Misc. 2d 311, 319, 437 N.Y.S.2d 584, 592 (Sup. Ct. Nassau County 1981) (wife who owned her own business entitled to only 25% of husband's one-half interest in a clinic where she expended minimal efforts in its founding).

¹⁴⁰ *See* notes 141-154 and accompanying text *infra*.

¹⁴¹ *See* note 49 *supra*.

¹⁴² *Jacobsen v. Jacobsen*, 177 Conn. 259, 262-63, 413 A.2d 854, 857 (1979); *see* *LaBella v. LaBella*, 134 Conn. 312, 318, 57 A.2d 627, 629 (1948). In *Jacobsen*, the court noted that when dealing with domestic relations "all of the surrounding circumstances and the appearance and attitude of the parties are . . . significant; the trial court, therefore, has broad discretion." 177 Conn. at 262-63, 413 A.2d at 857.

¹⁴³ *Pasquariello v. Pasquariello*, 168 Conn. 579, 584, 362 A.2d 835, 838 (1975); *DiPalma v. Wiesen*, 163 Conn. 293, 298, 303 A.2d 709, 712 (1972); *E. M. Loew's Enterprises, Inc. v. Surabian*, 146 Conn. 608, 611, 153 A.2d 463, 465 (1959).

¹⁴⁴ *See* *Krause v. Krause*, 174 Conn. 361, 364, 387 A.2d 548, 549 (1978). In *Krause*, the husband was appealing the trial court's dissolution of the marriage, contending that the trial court had erroneously failed to consider all of the factors outlined in the statute. The Supreme Court of Connecticut, however, affirmed, holding that the lower court's memorandum of decision clearly indicated a full consideration of all the statutory criteria. *Id.*

¹⁴⁵ *Id.*

though the wife's complaint did not include a claim for such a conveyance.¹⁴⁶

New Jersey has adopted a similar view. Again, trial judges have a considerable degree of discretion because of the absence of statutory guidelines.¹⁴⁷ Since New Jersey possesses a far more extensive body of case law, more definitive limitations have been placed on the exercise of judicial discretion.¹⁴⁸ The polarity of distributions which will inevitably result when allowance is made for judicial discretion may be illustrated by a comparison of two cases. One court ordered a wife to convey her half-interest in the marital residence, finding that it would be "inequitable, unjust and unconscionable to distribute or award any interest in the marital abode to the wife" under the circumstances.¹⁴⁹ Another court compensated a wife for contributions to the financial success of her husband, reasoning that "[e]ven a sparring partner can be said to contribute in some measure to the success of an adversary."¹⁵⁰

Desiring to avoid what they perceived to be unbridled judicial discretion elsewhere, the New York legislature granted more limited discretion to trial judges.¹⁵¹ New York's statute enumerates the criteria upon which a judicial decision must be based and re-

¹⁴⁶ See *McKay v. McKay*, 174 Conn. 1, 2, 381 A.2d 527, 528 (1977).

¹⁴⁷ The New Jersey statute provides in pertinent part:

[T]he court may make such award or awards to the parties . . . to effectuate an equitable distribution of the property, both real and personal, which was . . . acquired by them or either of them during the marriage. However, all such property . . . acquired during the marriage by either party by way of gift, devise or bequest shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution.

N.J. STAT. ANN. 2A:34-23 (West Supp. 1980).

¹⁴⁸ See notes 149-150 and accompanying text *infra*.

¹⁴⁹ *Sanders v. Sanders*, 118 N.J. Super. 327, 331, 287 A.2d 464, 466 (Super. Ct. Ch. Div. 1972). In divesting the wife of all right, title, and interest in the marital abode, the *Sanders* court considered the following facts: the residence was acquired and maintained solely by the husband, the disparate ages of the parties, the wife's upcoming remarriage, the husband's failing health, and the wife's refusal to have sexual relations with the husband or perform any of her wifely duties for the greater part of the marriage. Upholding the wife's claim to one-half of the residence, the court reasoned, would "violate the whole concept of tenancy by the entirety as a protection of the parties to a marriage." *Id.* at 330, 287 A.2d at 465-66.

¹⁵⁰ *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401, 346 A.2d 434, 436 (Super. Ct. App. Div. 1975). Although the marriage had been acrimonious from its inception, the *Scherzer* court found that the wife had made some effort to make the relationship viable. Moreover, the court stated that even if the wife were "responsible in considerable part for the antagonistic marital relationship, that factor alone should not bar her from sharing in the marital assets." *Id.*

¹⁵¹ See Foster & Freed, *Family Law*, *supra* note 11, at 357.

quires the court to make a written report outlining the factors which it considered in making its decision.¹⁵² Nevertheless, case law recognizes that discretion is to play a prominent role. In denying a jury trial for issues concerning the division of marital property, custody, maintenance and support, one court held that equitable distribution "is clear and unequivocal—the intent of the statute is to deal with the equitable rights of the parties."¹⁵³ Examining the legislative history of the statute, the court concluded that equity would allow the court the discretion to fashion a remedy to fit the particular circumstances of the case.¹⁵⁴

MAINTENANCE

The Diminished Role of Fault

Traditionally, alimony was awarded on a permanent basis to the wife, provided she was not guilty of misconduct entitling the husband to a judgment of divorce or separation.¹⁵⁵ New York's equitable distribution law, however, envisages alimony as "maintenance"—a flexible concept designed to meet the reasonable needs of the party requiring support regardless of that party's gender.¹⁵⁶

The New York statute permits the court to direct one spouse to pay maintenance to the other on a temporary or permanent basis "in such amount as justice requires, having regard for the circumstances of the case and of the respective parties."¹⁵⁷ The court is guided by nine specific criteria including, *inter alia*, the income

¹⁵² See N.Y. DOM. REL. LAW § 236(B)(5)(g) (McKinney Supp. 1981-1982); note 11 *supra*.

¹⁵³ *Mandel v. Mandel*, 109 Misc. 2d 1, 3, 439 N.Y.S.2d 576, 577 (Sup. Ct. Queens County 1981).

¹⁵⁴ *Id.* at 4, 439 N.Y.S.2d at 578.

¹⁵⁵ See, e.g., *Smith v. Smith*, 60 Misc. 2d 692, 693-94, 309 N.Y.S.2d 80, 81 (Fam. Ct. Ontario County 1969) (wife has no right to alimony where divorce granted to husband was premised on wife's misconduct); *Boate v. Boate*, 114 Misc. 321, 324, 187 N.Y.S. 321, 323 (N.Y.C. Mun. Ct. Kings County), *aff'd*, 115 Misc. 689, 190 N.Y.S. 914 (Sup. Ct. App. T. 2d Dep't 1921) (where husband procured divorce decree because of wife's adultery, his obligation to support her terminated); *Roth v. Roth*, 77 Misc. 673, 676, 138 N.Y.S. 573, 576 (Oneida County Ct. 1912) (adultery of wife is a defense to her action to recover payment due under separation agreement); cf. *Hessen v. Hessen*, 33 N.Y.2d 406, 412, 308 N.E.2d 891, 895, 353 N.Y.S.2d 421, 427 (1974) (recognizing that loss of right to alimony by wife because of misconduct should be a factor in determining her husband's action for divorce).

¹⁵⁶ The term "maintenance" replaced the term "alimony" in an effort to establish a new concept of support and distribution of property. See Memorandum of Assemblyman Burrows, reprinted in [1980] N.Y. LEGIS. ANN. 129.

¹⁵⁷ N.Y. DOM. REL. LAW § 236(B)(6)(a) (McKinney Supp. 1981-1982).

and property of both parties, the waste of family assets by a spouse, the tax consequences to each spouse, and a tenth provision which encompasses "any other factor which the court shall expressly find to be just and proper."¹⁵⁸ Thus, while economic fault is mentioned specifically, traditional fault, which precluded an award of alimony under prior law, apparently may now be considered in the discretion of the court under the catch-all provision.¹⁵⁹ Indeed, one New York court recently held that marital fault may even preclude an award of maintenance in an appropriate case.¹⁶⁰ Noting that the legislature did not accord any particular weight to the various statutory criteria used in determining maintenance, the court reasoned that a disallowance based upon marital fault would be permissible in certain situations.¹⁶¹ Hopefully, any abuse of discretion will be curbed by the statutory provision mandating that the

¹⁵⁸ *Id.* § 236(B)(6)(a)(10).

¹⁵⁹ The traditional role of fault was outlined in *Taylor v. Taylor*, 105 Misc. 2d 998, 430 N.Y.S.2d 29 (Sup. Ct. Orleans County 1980), wherein the court awarded maintenance to a wife although she committed adultery after being abandoned by her husband. *Id.* at 1000, 430 N.Y.S.2d at 31. Justice Mattina stated that "it is this court's opinion that the newly enacted matrimonial law amending section 236 of the Domestic Relations Law dispenses with misconduct as a bar to alimony relief." *Id.* at 999, 430 N.Y.S.2d at 31. The court noted that maintenance would be determined based on the statutory criteria and that while the wife's misconduct could conceivably be considered in the catch-all provision, it would be but one of the factors to be weighed. *Id.* at 1000, 430 N.Y.S.2d at 31. Similarly, in *Deschamps v. Deschamps*, 103 Misc. 2d 678, 430 N.Y.S.2d 966 (Sup. Ct. Nassau County 1980), the changed role of marital fault was recognized. *Id.* at 682, 430 N.Y.S.2d at 968. The *Deschamps* court thwarted a plaintiff-wife's attempt to avoid a defense of marital misconduct by denying her motion to recommence her action under the new statute. *Id.* The court noted that the new 236(B)(6) did not specifically mention fault "except to the extent that fault might be construed under certain circumstances as a factor under clauses (9) and (10) thereof." *Id.*

While fault will be considered in the "catch all provision," see Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 59; Note, *supra* note 49, at 93, its role may be minimal in view of the former law's express denial of alimony to the wife on grounds of marital misconduct and the new law's omission of fault.

¹⁶⁰ *Giannola v. Giannola*, 109 Misc. 2d 985, 986, 441 N.Y.S.2d 341, 343 (Sup. Ct. Suffolk County 1981). Although the court did not delineate what would constitute an "appropriate situation" justifying a denial of maintenance because of marital fault, it did note that the financial conditions of the parties must be examined and that the denial must not cause the spouse to become a public charge. *Id.* An equitable distribution of the marital property, however, may not be precluded because of marital fault. *Id.*

¹⁶¹ *Id.* It should be noted that the role of marital fault in determining maintenance was a major stumbling block in enacting the new section 236. Numerous legislators and committee members had demanded that marital fault be expressly included as a factor, but a compromise was reached whereby marital fault could be considered as a "factor which the court [may] expressly find to be just and proper." See Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 49.

court enumerate the factors considered and state its rationale for determining the award of maintenance.¹⁶²

In Connecticut, the statute also provides criteria for determining an alimony award.¹⁶³ Under case law, the award will be upheld unless an abuse of discretion can be shown.¹⁶⁴ In contrast to New York, however, the Connecticut statute specifically authorizes the court to consider the causes of the marital dissolution—a traditional fault concept.¹⁶⁵ Although case law dictates that alimony be viewed presumptively as support and not as punishment imposed upon a guilty spouse,¹⁶⁶ several cases have held that an unjustified

¹⁶² The New York statute directs the court to identify both the factors considered and the reasons underlying the decision. See N.Y. DOM. REL. LAW § 236(B)(6)(b) (McKinney Supp. 1981-1982). This requirement may not be waived by either party or counsel. *Id.* Also applicable to the equitable distribution of marital property, see N.Y. DOM. REL. LAW § 236(B)(5)(g) (McKinney Supp. 1981), this identification stipulation was the result of a compromise among members of the Matrimonial Law Committee of the New York County Lawyer's Association, other bar groups, and members of the legislature who disagreed over the degree of judicial discretion permissible in fashioning an equitable distribution of marital property and determining maintenance. See Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 51. The bill proposed by Senator Barclay and Assemblyman Furrows favored the "judicial discretion approach"—leaving it to the court to decide what percentage is equitable. The other bill, introduced by Senator Winikow and Assemblywoman Newburger, presumed that marriage is an equal partnership, mandating that the court utilize a 50-50 presumption. Sassower, *supra* note 7, § 11, at 18, col. 1 (Westchester opinion). The compromise resulted in a set of statutory guidelines and a requirement that the trial judge state the factors and reasons for his determination. See Foster, *Commentary on Equitable Distribution*, *supra* note 6, at 51.

¹⁶³ CONN. GEN. STAT. § 46b-81(c) (1981). The factors to be considered by the court include the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make as a property settlement. In the case of a parent to whom the custody of minor children has been awarded, the court also determines the desirability of the custodial parent securing employment. *Id.* § 46b-82.

¹⁶⁴ See *Corbin v. Corbin*, 179 Conn. 622, 626, 427 A.2d 432, 434 (1980) (denial of husband's motion for new trial on ground that denial of such a motion rests in discretion of the trial court, reviewable only in case of abuse); *Kriebel v. Kriebel*, 168 Conn. 7, 7, 357 A.2d 475, 476 (1975) (decisive issue on appeal of alimony award is whether trial court abused discretion); *Baker v. Baker*, 166 Conn. 476, 488, 352 A.2d 277, 284 (1974) (amount of alimony awarded is within sound discretion of trial court because of significant advantages that trial courts possess in cases dealing with domestic relations).

¹⁶⁵ CONN. GEN. STAT. § 46b-81(c) (1981).

¹⁶⁶ While the Connecticut statute specifically allows consideration of marital fault in determining an alimony award, the case law has assessed alimony primarily on the basis of the support needs of the spouse. See *Tobey v. Tobey*, 165 Conn. 742, 748, 345 A.2d 21, 25 (1974); *Hotkowsky v. Hotkowsky*, 165 Conn. 167, 170, 328 A.2d 674, 676 (1973); *Stoner v. Stoner*, 163 Conn. 345, 354, 307 A.2d 146, 152-53 (1972) (primary basis for alimony award is the continuing legal duty of a divorced husband to support his wife).

separation is a defense to the support obligation.¹⁶⁷

New Jersey's alimony statute is relatively brief and merely directs the court to consider the duration of the marriage and the need and ability of the parties to pay alimony.¹⁶⁸ Any award must be "fit, reasonable and just."¹⁶⁹ Additionally, New Jersey courts have been active in delineating the criteria to be considered in making an alimony award.¹⁷⁰ Although fault is a factor which may be considered in awarding alimony upon a divorce, the more recent trend has been to minimize its role.¹⁷¹

¹⁶⁷ In *Edge v. Commissioner of Welfare*, 34 Conn. Supp. 284, 388 A.2d 1193, 1194 (C.P. 1978), the court held that an otherwise legally liable husband was not required under section 17-82e of the General Statutes to reimburse the state for support payments made to his wife where she left the husband without any fault on his part and where she obviously engaged in adultery leading to the birth of another man's child. See *Cantiello v. Cantiello*, 136 Conn. 685, 690, 74 A.2d 199, 202 (1950); *Rucci v. Rucci*, 23 Conn. Supp. 221, 181 A.2d 125, 127 (Super. Ct. 1962).

¹⁶⁸ N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981).

¹⁶⁹ *Id.*

¹⁷⁰ *Greenberg v. Greenberg*, 126 N.J. Super. 96, 100, 312 A.2d 878, 880 (Super. Ct. App. Div. 1973), enunciates six factors to consider when making an award of alimony: the actual needs of the wife, the husband's actual means and his ability to pay support, the physical condition of the parties, their social position, the separate property and income of the wife and any other factors which bear on fair and reasonable support. *Id.*

The award of alimony is closely tied to the factors considered in making an equitable distribution of marital property. The New Jersey Supreme Court has stated that when a case is remanded for reconsideration of equitable distribution, the alimony judgment will be reopened for review. *Stern v. Stern*, 66 N.J. 340, 349, 331 A.2d 257, 262 (1975); *Rothman v. Rothman*, 65 N.J. 219, 233-34, 320 A.2d 496, 504 (Sup. Ct. 1974); *Painter v. Painter*, 65 N.J. 196, 217-18, 320 A.2d 484, 495-96 (1974).

Moreover, one of the factors in determining an equitable distribution of marital property is the "effect of distribution of assets on the ability to pay alimony." 65 N.J. at 211, 320 A.2d at 492. Any minor change in the value of the marital assets eligible for equitable distribution between the date of the separation agreement and the date of the divorce decree may be reflected in the amount of alimony awarded and not in the equitable distribution of the assets. *Smith v. Smith*, 72 N.J. 350, 362, 371 A.2d 1, 7 (1977); *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 447, 393 A.2d 583, 588-89 (Super. Ct. App. Div. 1978).

¹⁷¹ The New Jersey statute allows consideration of marital fault in determining an alimony award. The statute states that "[i]n all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just." N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981). New Jersey case law, however, has refined the effect of marital fault on alimony awards. Two years after the enactment of New Jersey's statute, the Superior Court of New Jersey held that the lower trial court could not increase an award of alimony based upon the marital fault of the husband. *Greenberg v. Greenberg*, 126 N.J. Super. 96, 99, 312 A.2d 878, 880 (Super. Ct. App. Div. 1973). The court stated that while marital wrongs were grounds for breaking the marital bond, the legislature did not intend that alimony be awarded as a punitive device. *Id.* at 100, 312 A.2d at 880. Justice Crahay stated that in enacting the statute, "the Legislature merely meant that trial courts might consider the proofs to support a

The Marital Standard of Living

While both New Jersey and Connecticut case law require a consideration of the marital standard of living in determining alimony,¹⁷² the New York statute qualifies the criterion by adding the

matrimonial cause of action when it turned to the issue of alimony and support assessment. Examples thereof would include the length of marriage, the mental and physical health of the aggrieved spouse, the mode of living which the parties enjoyed, and the like." *Id.*

In contrast, the Supreme Court of New Jersey has taken the position that marital fault would be a proper consideration in dealing with alimony although it was irrelevant for equitable distribution purposes. *Chalmers v. Chalmers*, 65 N.J. 186, 193, 194 n.4, 320 A.2d 478, 481, 482 n.4 (1974). Subsequently, the appellate division of the superior court startled the matrimonial bar with language intimating that a wife's adultery was always a bar to an award of alimony. *Mahne v. Mahne*, 147 N.J. Super. 326, 328-29, 371 A.2d 314, 315 (Super. Ct. App. Div. 1977); see *Lynn v. Lynn*, 165 N.J. Super. 328, 336, 398 A.2d 141, 144 (Super. Ct. App. Div. 1979). This broad statement was tempered, however, in *Nochenson v. Nochenson*, 148 N.J. Super. 448, 449-50, 372 A.2d 1139, 1140 (Super. Ct. App. Div. 1977), wherein the same court determined that marital fault would only be a permissible factor to consider in granting or denying alimony. See *Smith v. Smith*, 150 N.J. Super. 194, 196, 375 A.2d 290, 291 (Super. Ct. Ch. Div. 1977).

In *Lynn v. Lynn*, 165 N.J. Super. 328, 398 A.2d 141 (Super. Ct. App. Div. 1979), the court stated that " 'a paramount reason' for alimony is 'to permit a wife to share in the economic rewards occasioned by her husband's income level . . . reached as a result of their combined labors, inside and outside the home.'" *Id.* at 337, 398 A.2d at 145; see *Gugliotta v. Gugliotta*, 160 N.J. Super. 160, 164, 388 A.2d 1333, 1340 (Super. Ct. Ch. Div. 1978). While the *Lynn* court recognized that *outrageous* marital fault precipitating the dissolution of the marriage might justify barring alimony to the guilty spouse, the court held that an adulterous act committed after desertion by the husband did not constitute outrageous marital conduct. 165 N.J. Super. at 335, 398 A.2d at 144.

Fault as a consideration in an application for alimony upon the final judgment of divorce should be distinguished from the consideration of fault in an application for alimony *pendente lite*. Fault may not defeat *pendente lite* application for alimony. *Smith v. Smith*, 150 N.J. Super. 194, 196-97, 375 A.2d 290, 291 (Super. Ct. Ch. Div. 1977).

¹⁷² See *Ross v. Ross*, 172 Conn. 269, 273, 374 A.2d 185, 187 (1977); *Whitney v. Whitney*, 171 Conn. 23, 27-28, 368 A.2d 96, 100 (1976); *Lepis v. Lepis*, 83 N.J. 139, 150, 416 A.2d 45, 52 (1980); *Capodanno v. Capodanno*, 58 N.J. 113, 118, 275 A.2d 441, 443 (1971); *Gugliotta v. Gugliotta*, 164 N.J. Super. 139, 141, 395 A.2d 901, 902 (Super. Ct. App. Div. 1978); *Greenberg v. Greenberg*, 126 N.J. Super. 96, 100, 312 A.2d 878, 880 (Super. Ct. App. Div. 1973); *Weiner v. Weiner*, 120 N.J. Super. 36, 41, 293 A.2d 229, 232 (Super. Ct. Ch. Div. 1972). In determining alimony awards neither the New Jersey nor the Connecticut statute refer to the marital standard of living. Reference is made in the Connecticut statute, however, to "station, occupation, amount and sources of income." CONN. GEN. STAT. § 46b-82 (1981), and Connecticut case law indicate that both parties' standard of living during and after the marriage are factors in determining alimony. See *Whitney v. Whitney*, 171 Conn. 23, 27-28, 368 A.2d 96, 100 (1976). Under the New Jersey statute, courts are directed to award "an amount of alimony or maintenance that is fit, reasonable and just." N.J. STAT. ANN. § 2A:34-23 (West Supp. 1981). New Jersey case law continues to follow the traditional view that the standard of living to which a spouse has become accustomed should be the determinative criteria used in an alimony award. See, e.g., *Lepis v. Lepis*, 83 N.J. 139, 150, 416 A.2d 45, 52 (Sup. Ct. 1980); *Weiner v. Weiner*, 120 N.J. Super. 36, 41, 293 A.2d 229, 232 (Super. Ct. Ch. Div. 1972). This view was criticized, however, as being incongruous with contemporary soci-

phrase "where practical and relevant."¹⁷³ Although New York courts have not yet defined what circumstances warrant a consideration of the marital standard of living,¹⁷⁴ it may now be more difficult for a spouse to demand maintenance payments to support a luxurious lifestyle. Indeed, the burden of proving the relevance of the standard of living may be placed upon the party asserting it as a consideration.

Rehabilitative Alimony

When awarding alimony, New York courts must now consider any period of education or training which may be necessary to enable a party to become self-supporting.¹⁷⁵ This progressive concept of rehabilitative alimony has been recognized by an increasing number of jurisdictions.¹⁷⁶ It is predicated on the theory that maintenance should be a temporary measure except in cases where age, health, or other factors favor permanent support.¹⁷⁷

New Jersey has incorporated rehabilitative alimony into its decisional law. In *Turner v. Turner*, the court defined rehabilitative alimony as "alimony payable for a short, but specific and ter-

ety. *Turner v. Turner*, 158 N.J. Super. 313, 315-19, 385 A.2d 1280, 1281-83 (Super. Ct. Ch. Div. 1978).

¹⁷³ N.Y. DOM. REL. LAW § 236(B)(6)(a)(6) (McKinney Supp. 1981-1982).

¹⁷⁴ New York cases construing the former section 236 permitted a consideration of the marital standard of living in awarding alimony to a spouse. *See, e.g.*, *Hickland v. Hickland*, 39 N.Y.2d 1, 5, 346 N.E.2d 243, 245-46, 382 N.Y.S.2d 475, 477, *cert. denied*, 429 U.S. 941 (1976); *Kay v. Kay*, 37 N.Y.2d 632, 637, 399 N.E.2d 143, 147, 376 N.Y.S.2d 443, 447-48 (1975); *Shanahan v. Shanahan*, 80 App. Div. 2d 738, 739, 437 N.Y.S.2d 169, 170 (4th Dep't 1981); *Armiento v. Armiento*, 67 App. Div. 2d 661, 661, 412 N.Y.S.2d 38, 39 (2d Dep't 1979); *Fisher v. Fisher*, 56 App. Div. 2d 547, 547, 391 N.Y.S.2d 598, 598 (1st Dep't 1977).

¹⁷⁵ N.Y. DOM. REL. LAW § 236(B)(6)(a)(4) (McKinney Supp. 1981-1982).

¹⁷⁶ *See, e.g.*, *Porreca v. Porreca*, 8 Ariz. App. 394, 397, 446 P.2d 500, 503 (Ct. App. 1968); *Kirchman v. Kirchman*, 389 So. 2d 327, 329 (Fla. Dist. Ct. App. 1980); *Otis v. Otis*, 299 N.W.2d 114, 116-17 (Minn. 1980); *In re Grove*, 280 Or. 341, 358, 571 P.2d 477, 482, *modified on other grounds*, 280 Or. 369, 572 P.2d 1320 (1977); *Suther v. Suther*, 28 Wash. App. 838, 627 P.2d 110, 114 (Ct. App. 1981); CAL. CIV. CODE § 4801(a)(6) (West Supp. 1981); FLA. STAT. ANN. § 61.08(2)(e) (West Supp. 1981); MINN. STAT. ANN. § 518.552(2)(b) (West Supp. 1981); OR. REV. STAT. § 107.105(1)(c)(H) (1979); WASH. REV. CODE ANN. § 26.09.090(1)(b) (West Supp. 1981); WIS. STAT. ANN. § 767.26(5) (West 1981).

¹⁷⁷ *See McAnerney & Schoonmaker III, Connecticut's New Approach to Marriage Dissolution*, 47 CONN. B.J. 375, 393 (1973); Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493, 494-97, 517-18 (1978). Rehabilitative alimony is "designed to return the heretofore economically dependent spouse into the mainstream of society as a self-functioning, economically self-sufficient unit." Gillman, *Alimony/Spousal Support: From Punishment to Rehabilitation*, 7 COMM. PROP. J. 135, 138 (1980).

minable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support."¹⁷⁸ Reasoning that rehabilitative alimony was not prohibited by statute or case law,¹⁷⁹ the *Turner* court awarded the wife alimony for 18 months.¹⁸⁰ At the completion of that time, the court stated that the wife would be in a financial position to satisfy her needs adequately and maintain her accustomed standard of living.¹⁸¹

In contrast, the Connecticut Supreme Court rejected rehabilitative alimony in *Grinold v. Grinold*, characterizing it as a "novel and elusive concept."¹⁸² In *Grinold*, the lower court had granted the husband's motion to modify alimony since the wife was "substantially rehabilitated from any adverse socio-economic consequence of her marriage."¹⁸³ Arguably, however, the supreme court's reversal was grounded on the lower court's failure to make findings of any change in financial or other circumstances which would have supported a determination of rehabilitation.¹⁸⁴

¹⁷⁸ 158 N.J. Super. 313, 314, 385 A.2d 1280, 1280-81 (Super. Ct. Ch. Div. 1978).

¹⁷⁹ *Id.* at 323, 385 A.2d at 1285. *But see* *Arnold v. Arnold*, 167 N.J. Super. 478, 481-82, 401 A.2d 261, 263 (Super. Ct. App. Div. 1979). The *Arnold* court criticized an award of rehabilitative alimony, noting that an advanced determination that alimony shall cease because of the passage of an arbitrary period of time is an a fortiori frustration of established principles relating to alimony and its modification for change of circumstances. *Id.* at 480, 401 A.2d at 262.

¹⁸⁰ 158 N.J. Super. at 324, 385 A.2d at 1285-86.

¹⁸¹ *Id.* at 325, 385 A.2d at 1286. The concept of rehabilitative alimony has been endorsed by the New Jersey Supreme Court Committee on Matrimonial Litigation. *See* N.J.L.J., July 16, 1981, Supp. at 14, col. 1. The Committee stressed that such an award should be discretionary and subject to subsequent modification, if necessary. *Id.*

The final report of the New Jersey Supreme Court Committee on Matrimonial Litigation was released recently. *See Supreme Court Committee on Matrimonial Litigation: Phase Two, Final Report*, N.J.L.J., July 16, 1981, Supp. at 1, col. 1 [hereinafter cited as *Pashman Committee Report*]. The *Pashman Committee Report* addressed issues of matrimonial procedure, child custody, litigant representation, enforcement of matrimonial orders and judgments, rehabilitative alimony and the establishment of a family court. Although the Committee's primary concern was the reformation of matrimonial procedure to achieve a balance between judicial discretion, uniformity and predictability, *see id.* col. 2, its report also marks a new philosophy towards child custody proceedings by endorsing the concept of joint custody. *Id.* at 8, col. 2 & at 9, col. 1. Additionally, the noncustodial parent should be able to participate to a greater extent in decisions affecting the child. *Id.*

¹⁸² 172 Conn. 192, 195, 374 A.2d 172, 174 (1976). *See also* *Jacobsen v. Jacobsen*, 177 Conn. 259, 265 & n.2, 413 A.2d 854, 858 & n.2 (1979); *Friedly v. Friedly*, 174 Conn. 279, 282, 386 A.2d 236, 238 (1978).

¹⁸³ 172 Conn. at 193, 374 A.2d at 173.

¹⁸⁴ *See id.* at 196, 374 A.2d at 174. The *Grinold* court noted that "[a] change in financial circumstances was the sole basis of the defendant's motion to modify. The [lower] court found no showing of such a situation, nor is there a finding concerning any other substantially changed circumstance which would clarify and support the court's conclusions

Modification of Alimony Awards

New York courts may modify maintenance awards which were part of a separation agreement which merged into a divorce decree "upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance, including financial hardship."¹⁸⁵ Basically, the changed circumstances standard comports with prior law.¹⁸⁶ The alternative showing that a party is self-supporting may result in a more liberal allowance of alimony modification. Additionally, the New York courts now may modify a maintenance award even though it was made pursuant to a separation agreement which survived the divorce decree.¹⁸⁷ This provision

regarding 'rehabilitation' as a ground for modification." *Id.*

¹⁸⁵ N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982).

¹⁸⁶ See, e.g., *Kover v. Kover*, 29 N.Y.2d 408, 413-14, 418, 278 N.E.2d 886, 887-88, 890, 328 N.Y.S.2d 641, 643-45, 647 (1972); *Hickland v. Hickland*, 56 App. Div. 2d 978, 979, 393 N.Y.S.2d 192, 194 (3d Dep't 1977); *Canfield v. Canfield*, 55 App. Div. 2d 694, 694, 389 N.Y.S.2d 52, 53-54 (3d Dep't 1976); cf. *Wlodarek v. Wlodarek*, 78 App. Div. 2d 981, 981, 433 N.Y.S.2d 672, 673 (4th Dep't 1980) (oral stipulation of opposing counsel); *Adrien v. Adrien*, 65 App. Div. 2d 931, 932, 410 N.Y.S.2d 441, 443 (4th Dep't 1978) (enforcement of foreign judgment). Some of the changed circumstances which have resulted in the downward modification of alimony under the predecessor statute include the loss of overtime salary, *Toliver v. Toliver*, 67 App. Div. 2d 971, 972, 413 N.Y.S.2d 454, 455 (2d Dep't 1979), the loss of job and dependence on military pension and unemployment insurance, *Wlodarek v. Wlodarek*, 78 App. Div. 2d 981, 981, 433 N.Y.S.2d 672, 673 (4th Dep't 1980), and an illness causing gross change in the spouse's financial situation, *Klein v. Klein*, 55 App. Div. 2d 885, 886, 391 N.Y.S.2d 7, 7 (1st Dep't 1977). Upward modification has been permitted when illness prevented the spouse receiving alimony from working, *Wantuch v. Wantuch*, 56 App. Div. 2d 866, 867, 392 N.Y.S.2d 334, 335 (2d Dep't 1977). Modification was not allowed, however, when the husband's income remained unchanged. See *Adrien v. Adrien*, 65 App. Div. 2d 931, 932, 410 N.Y.S.2d 441, 443 (4th Dep't 1978); *Kurtz v. Kurtz*, 58 App. Div. 2d 1006, 1006, 396 N.Y.S.2d 952, 953 (2d Dep't 1977); *Hickland v. Hickland*, 56 App. Div. 2d 978, 979, 393 N.Y.S.2d 192, 194 (3d Dep't 1977).

While a decree of child support may be modified on the same grounds as maintenance, subdivision 9(b) of Part B of the new section 236 does apply to a distributive award. See N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982). This is logical in light of the purpose of distributive awards. Such awards are in the nature of property settlements based on the parties' holdings during the marriage. See N.Y. DOM. REL. LAW § 236 (B)(5)(e) (McKinney Supp. 1981-1982). See generally *Foster, Commentary on Equitable Distribution*, *supra* note 6, at 7-11. Additionally, modification will not be allowed for any sums due which have been reduced to final judgment. N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982).

¹⁸⁷ See N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982). New York now comports with the majority of states which allow modification of maintenance provided for by a separation agreement which survives or is incorporated into the divorce decree. See, e.g., *Hutton v. Hutton*, 284 Ala. 91, 95, 222 So. 2d 348, 351 (1969); *Lincoln v. Lincoln*, 24 Ariz. App. 447, 450, 539 P.2d 921, 924 (Ct. App. 1975); *Levitt v. Levitt*, 62 Cal. 2d 477, 481-82, 399 P.2d 33, 36, 42 Cal. Rptr. 577, 580 (1965); *Phillips v. Phillips*, 93 Idaho 384, 386-87, 462 P.2d 49, 51 (1969); *Smith v. Smith*, 358 Mass. 551, 553, 265 N.E.2d 858, 859 (1971);

radically changes prior law which had precluded the court from "rewriting" an agreement which survived divorce.¹⁸⁸ Furthermore, the statute requires a showing of "extreme hardship" but, if this burden is met, the modified decree will supersede the separation agreement.¹⁸⁹

To modify an alimony award, a "substantial change" in circumstances is mandated under the Connecticut statute.¹⁹⁰ Subsequent cases have expanded this concept and have required that the change be one that was not contemplated by the parties at the time the original decree was entered.¹⁹¹ When deciding whether to

Unander v. Unander, 265 Or. 102, 107-08, 506 P.2d 719, 721-22 (1973); Kinne v. Kinne, 82 Wash. 360, 362, 510 P.2d 814, 815-16 (1973). See generally H. CLARK, LAW OF DOMESTIC RELATIONS 452-53 (1968). Subsection 9(b), however, does not refer to modification of a separation agreement which provides for child support. See N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982). Thus, there is no change in prior New York case law dealing with modification of child support agreements. See Boden v. Boden, 42 N.Y.2d 210, 212-13, 366 N.E.2d 791, 794, 397 N.Y.S.2d 701, 703-04 (1977). In *Boden*, the court of appeals held that a fair and equitable separation agreement dealing with child support should not be disturbed absent "unanticipated and reasonable change in circumstances." *Id.* at 213, 366 N.E.2d at 794, 397 N.Y.S.2d at 703. It has been suggested that modification of child support provisions was omitted to avoid conflict with the *Boden* decision. Foster & Freed, *Family Law*, supra note 11, at 363 & n.71.

¹⁸⁸ See, e.g., McMains v. McMains, 15 N.Y.2d 283, 284-85, 206 N.E.2d 185, 186-87, 258 N.Y.S.2d 93, 94-95 (1965); Goldman v. Goldman, 282 N.Y. 296, 299-300, 26 N.E.2d 265, 266-67 (1940); Farber v. Farber, 25 App. Div. 2d 850, 850, 269 N.Y.S.2d 608, 610 (2d Dep't 1966); Adams v. Adams, 66 Misc. 2d 378, 380, 320 N.Y.S.2d 636, 638 (Sup. Ct. Nassau County 1971). By allowing a surviving separation agreement to be rewritten and superseded by a subsequent maintenance modification, the statute succeeds in correcting an inequitable and gender discriminatory situation which had been created by New York case law. Under prior New York law, if the separation agreement survived the divorce, the former wife could invoke the state's power to increase her alimony award as "justice requires," based on the concept that the former husband had an obligation to support his wife adequately. Moreover, any agreement relieving the former husband of his obligation was void. Yet, the separation agreement could not be modified based on a change in the husband's circumstances. See Goldman v. Goldman, 282 N.Y. 296, 300, 26 N.E.2d 265, 267 (1940); cf. McMains v. McMains, 15 N.Y.2d 283, 287, 206 N.E.2d 185, 186-87, 258 N.Y.S.2d 93, 98 (1965) (continuing duty of husband cannot be escaped by reliance on any contract).

¹⁸⁹ See N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney Supp. 1981-1982).

¹⁹⁰ CONN. GEN. STAT. § 46b-86(a) (1981); see McGuinness v. McGuinness, 43 CONN. L.J. 3 (Sup. Ct. July 21, 1981). The statute was amended in 1978 to allow the court to modify the payment of periodic alimony in actions for divorce, dissolution of marriage, legal separation, or annulment upon a showing that the party receiving the alimony is living with another person under circumstances which have altered the financial needs of the recipient. CONN. GEN. STAT. § 46b-86(b) (1981); see Kaplan v. Kaplan, 43 CONN. L.J. 3 (Sup. Ct. July 21, 1981).

¹⁹¹ See Swayze v. Swayze, 176 Conn. 323, 337, 408 A.2d 1, 8 (1978); Friedly v. Friedly, 174 Conn. 279, 280, 386 A.2d 236, 237 (1978); Sanchione v. Sanchione, 173 Conn. 397, 378 A.2d 522, 527 (1977). Connecticut's statute has been judicially construed to disallow a retroactive modification of alimony. *Id.* at 407, 378 A.2d at 526-27.

permit a modification, courts will consider the same type of circumstances that were relevant in making the original award of alimony.¹⁹²

By case law, New Jersey requires a showing of changed circumstances before a modification of alimony will be ordered.¹⁹³ In *Lepis v. Lepis*, the court listed factors constituting changed circumstances and held that the party seeking modification must demonstrate that the change has substantially impaired his ability to support himself.¹⁹⁴ Unlike Connecticut, however, the party requesting modification is not limited to demonstrating the occurrence of events which were unforeseeable at the time of the divorce.¹⁹⁵

PROPERTY SETTLEMENT AGREEMENTS

Property settlement agreements have become increasingly prevalent as a method of resolving disputes regarding marital property. Presently, the scope of permissible contractual arrangements is greater than that allowed by common law. Parties may "contract out" of equitable distribution and even establish the amount and duration of maintenance.

The New York statute specifies that an agreement must be fair and reasonable when made and not unconscionable when the

¹⁹² See CONN. GEN. STAT. § 46b-82 (1981). In ruling on a modification, the court should consider the needs and financial resources of the parties, including their income, age, health, earning capacity, and value of their estates. See *McGuinness v. McGuinness*, 43 CONN. L.J. 3 (Sup. Ct. July 21, 1981); *Jacobsen v. Jacobsen*, 177 Conn. 259, 264, 413 A.2d 854, 858 (1979); *Sanchione v. Sanchione*, 173 Conn. 397, 402, 378 A.2d 522, 525 (1977); *England v. England*, 138 Conn. 410, 414, 85 A.2d 483, 485 (1951).

¹⁹³ See, e.g., *Lepis v. Lepis*, 83 N.J. 139, 146, 416 A.2d 45, 48 (1980); *Berkowitz v. Berkowitz*, 55 N.J. 564, 569-70, 264 A.2d 49, 52 (1970); *Winter v. Winter*, 162 N.J. Super. 456, 461, 393 A.2d 593, 595 (Super. Ct. App. Div. 1978); *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 76, 328 A.2d 625, 627 (Super. Ct. App. Div. 1974); *McDermott v. McDermott*, 120 N.J. Super. 42, 44, 293 A.2d 232, 233 (Super. Ct. Ch. Div. 1972). See generally *Note, Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 728-40 (1979).

¹⁹⁴ 83 N.J. 139, 150-53, 416 A.2d 45, 51-52 (1980). The *Lepis* court enumerated several factual settings in which New Jersey courts have found changed circumstances warranting modification, including an increase in the cost of living, an increase or decrease in the supporting spouse's income, illness, disability or infirmity arising after the original judgment, the dependent spouse's loss of a house or apartment, the dependent spouse's cohabitation with another, subsequent employment by the dependent spouse, and changes in federal income tax law. *Id.* at 151, 416 A.2d at 51 (citations omitted).

¹⁹⁵ *Id.* at 152-53, 416 A.2d at 52. The *Lepis* court held that the dependent spouse had a continuing right to maintain the standard of living which was reflected in the separation agreement or decree, rather than on the foreseeability of any change in circumstances. *Id.*

judgment is entered.¹⁹⁶ A novel addition to New York's divorce law, this provision enables parties to enter into agreements both before and during the marriage¹⁹⁷ governing inheritance rights, the ownership or distribution of marital or separate property, the amount and duration of alimony, and the care, custody, and maintenance of children.¹⁹⁸

In Connecticut, pursuant to the statute, agreements concerning custody, support, alimony, or disposition of property will be examined by the court to determine whether the agreement is "fair and equitable."¹⁹⁹ Factors to be considered by the court include the financial resources and needs of the parties and, where applicable, their fitness to have custody or enjoy visitation rights with children.²⁰⁰ If the agreement is written and is "fair and equitable"

¹⁹⁶ N.Y. DOM. REL. LAW § 236(B)(3) (McKinney Supp. 1981-1982). Upon a strict reading of the statute, the requirement that an agreement be fair, reasonable, and not unconscionable applies only to agreements concerning spousal maintenance, and not those concerning child support, custody, division of property, and inheritance rights. *See id.* The legislature, however, could not have intended such an anomalous result. Foster & Freed, *Family Law*, *supra* note 11, at 347. Even if the statute is strictly construed, "the controversy at most is a tempest in a teapot" since general contractual and equitable principles would prevent a court from enforcing any agreement which was unfair and unreasonable when made or unconscionable at the entry of judgment. *Id.* *See generally* 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1628, at 6 (3d ed. 1972).

¹⁹⁷ N.Y. DOM. REL. LAW § 236(B)(3) (McKinney Supp. 1981-1982). A property settlement and support agreement is valid unless it attempts to alter or dissolve the marital relationship or relieves either spouse of his duty to support the other in instances where a spouse would require public assistance. N.Y. GEN. OBLIG. LAW § 5-311 (McKinney Supp. 1981-1982). Allowing agreements which alter the support duty between spouses marks a drastic departure from previous New York law. *Compare* General Obligations Law, ch. 254, § 12, [1966] N.Y. Laws 842 (repealed 1980) with N.Y. GEN. OBLIG. LAW § 5-311 (McKinney Supp. 1981-1982). Under prior law, agreements which relieved or altered the husband of his legal obligation to support his spouse were considered void. *See, e.g.,* McMains v. McMains, 15 N.Y.2d 283, 285, 206 N.E.2d 185, 187, 258 N.Y.S.2d 93, 95 (1965); Lacks v. Lacks, 12 N.Y.2d 268, 271, 189 N.E.2d 487, 488, 238 N.Y.S.2d 949, 950 (1963); Slocum v. Slocum, 42 App. Div. 2d 56, 57, 345 N.Y.S.2d 188, 190 (3d Dep't 1973); Pellman v. Pellman, 88 Misc. 2d 251, 253, 387 N.Y.S.2d 348, 350 (Sup. Ct. N.Y. County 1976); Colla-Negri v. Colla-Negri, 19 Misc. 2d 496, 497, 191 N.Y.S.2d 996, 997 (Sup. Ct. N.Y. County 1959). Nevertheless, courts were willing to recognize support agreements provided the "payments [were] regular, substantial and periodic, reflecting an understanding of a continuing obligation to support." *Marine Midland Bank v. Batson*, 70 Misc. 2d 8, 11, 332 N.Y.S.2d 714, 718 (Sup. Ct. Nassau County 1972); *accord*, *Belaustegui v. Belaustegui*, 85 Misc. 2d 1015, 1020, 380 N.Y.S.2d 950, 955 (Sup. Ct. Queens County 1976).

¹⁹⁸ N.Y. DOM. REL. LAW § 236(B)(3) (McKinney Supp. 1981-1982). The statute mandates that all agreements between spouses be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." *Id.*

¹⁹⁹ CONN. GEN. STAT. § 46b-66 (1981); *see* *Fitzgerald v. Fitzgerald*, 162 Conn. 147, 169, 362 A.2d 889, 892 (1975).

²⁰⁰ CONN. GEN. STAT. §§ 46b-66, 46b-82 (1981); *see* *Fricke v. Fricke*, 174 Conn. 602, 602,

under all the circumstances, the court will incorporate it into its decree.²⁰¹

New Jersey's statute is silent on agreements. Consequently, this area of the law has developed through case law. Despite their initial refusal to specifically enforce such agreements,²⁰² New Jersey courts subsequently recognized them to the extent that they were "just and equitable."²⁰³ This rule was refined further by the *Schiff* decision in the early seventies.²⁰⁴ *Schiff* held that "a far greater showing of changed circumstances must be made before the court can modify a separation agreement than need be shown to warrant the court amending an order for alimony or support."²⁰⁵ Employing principles of contract law, the court required changed circumstances sufficient "to convince the court that to enforce the agreement would be unconscionable."²⁰⁶ This contractual view of property settlement agreements, however, was abandoned in *Smith v. Smith*, wherein the court held that alimony and child support agreements should not be given greater deference than judicial decrees.²⁰⁷ By deciding that contract principles were inapposite because marital agreements were not contracts in the traditional

392 A.2d 473, 474 (1978).

²⁰¹ *Id.*; see *Monroe v. Monroe*, 177 Conn. 173, 183, 413 A.2d 819, 825, cert. denied, 444 U.S. 801 (1979). See generally Schoonmaker & Balbirer, *Survey of 1975 Developments in Connecticut Family Law*, 50 CONN. B.J. 67, 79 (1976); Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 134-37 (1976). The court has an affirmative obligation to determine whether a settlement agreement is fair and equitable. *Monroe v. Monroe*, 177 Conn. at 183, 413 A.2d at 825.

²⁰² *Apfelbaum v. Apfelbaum*, 111 N.J. Eq. 529, 531, 162 A. 543, 544 (1932) (per curiam). *Apfelbaum* was overruled in *Schlemm v. Schlemm*, 31 N.J. 557, 581, 158 A.2d 508, 522 (1960). See, e.g., *Aiosa v. Aiosa*, 119 N.J. Eq. 385, 386-87, 183 A. 219, 220 (1936); *Phillips v. Phillips*, 119 N.J. Eq. 462, 463, 183 A. 220, 221 (1936). In *Apfelbaum*, the court held that the power to enforce a just agreement "grow[s] out of the existing or preexisting marital status, and [is] not controlled by the rules of specific performance of contracts." *Apfelbaum v. Apfelbaum*, 111 N.J. Eq. at 531, 162 A. at 544.

²⁰³ See, e.g., *Carlesen v. Carlesen*, 72 N.J. 363, 370, 371 A.2d 8, 12 (1977); *Smith v. Smith*, 72 N.J. 350, 358, 371 A.2d 1, 5 (1977); *Hudson v. Hudson*, 36 N.J. 549, 555, 178 A.2d 202, 205 (1962); *Schlemm v. Schlemm*, 31 N.J. 557, 581-82, 158 A.2d 508, 522 (1960); *Wertlake v. Wertlake*, 137 N.J. Super. 476, 482, 349 A.2d 552, 555 (Super. Ct. App. Div. 1975).

²⁰⁴ *Schiff v. Schiff*, 116 N.J. Super. 546, 558-62, 283 A.2d 131, 137-39 (Super. Ct. App. Div. 1971).

²⁰⁵ *Id.* at 561, 283 A.2d at 139.

²⁰⁶ *Id.*

²⁰⁷ 72 N.J. 350, 360, 371 A.2d 1, 6 (1977). When presented with a request for modification of an agreement, the court should determine what is equitable under the circumstances. Nonetheless, due weight should be accorded to the "strong public policy favoring stability of arrangements." *Id.*

sense, *Lepis v. Lepis* affirmed the view expressed in *Smith*.²⁰⁸ Thus, the court should use general equitable principles²⁰⁹ and consider such agreements as hybrid documents evidencing a willingness on the part of the parties to resolve their differences.²¹⁰ Accordingly, the New Jersey Supreme Court recently held that although an escalator clause including a decree-incorporated agreement is not invalid *per se*,²¹¹ it will be modified or set aside if the challenging spouse can prove that the terms of the agreement are unfair and unjust under the circumstances.²¹² The court noted, however, that escalator clauses are geared to one of the *Lepis* factors—change in net income of the obligated spouse—which would ordinarily justify modification of child support and alimony.²¹³

CONCLUSION

With New York, New Jersey, and Connecticut now unified in their approaches toward equitable distribution, the metropolitan area practitioner may expect a greater degree of uniformity in the distribution of marital assets upon divorce. While there will be differences among the jurisdictions in their applications of equitable distribution principles, this theoretical unity hopefully will allow the development of an approach suited to the unique character of the tristate area.

Indeed, such a development would be most welcome. Since the three states have long shared a common history, geography, and socio-economic composition, it appears logical to extend these regional similarities to the equitable distribution of property. How to formulate such a regional outlook while acknowledging each state's individuality will be one of the major challenges confronting the tristate judiciary in the years ahead.

²⁰⁸ *Lepis v. Lepis*, 83 N.J. 139, 148-49, 416 A.2d 45, 49-50 (1980).

²⁰⁹ *Id.* at 148-49, 416 A.2d at 50.

²¹⁰ *Id.* at 153-54, 416 A.2d at 52-53. The *Lepis* opinion was authored by Justice Pashman, the chairman of the New Jersey Supreme Court Committee on Matrimonial Litigation. See note 181 *supra*. The decision acknowledges that spousal agreements may ensure the stability of support arrangements. 83 N.J. at 153-54, 416 A.2d at 52-53.

²¹¹ *Petersen v. Petersen*, 85 N.J. 638, 642, 428 A.2d 1301, 1303 (1981).

²¹² *Id.* at 644, 428 A.2d at 1304. The *Petersen* court stated that "to the extent that the parties have developed comprehensive and particularized agreements responsive to their peculiar circumstances, such arrangements will be entitled to judicial deference and greatly assist the judiciary in the discharge of its supervisory role in such matters." *Id.* at 646, 428 A.2d at 1305.

²¹³ *Id.* at 643, 428 A.2d at 1303.