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THE MARITAL/SEPARATE PROPERTY DISTINCTION IN THE DISTRICT OF COLUMBIA

Bernard Gordon and Mark London***

The District of Columbia's Marriage and Divorce Act of 1977¹ is almost three years old, yet there still is very little decisional law interpreting its disposition of property provisions.² That part of the Act most interests the parties and their attorneys and reputations in this area often are made on "how much he or she walked away with." The courts' silence in this area has created an innate reluctance by lawyers to risk a client's economic well-being in this terrain of "no impression." While a happy consequence of this may be that many cases are being settled out of court due to the natural fear of uncertain results, this "run to settlement" only forestalls the development of case law on this issue.

The forebearer of the District's Marriage and Divorce Act is the Uniform Marriage and Divorce Act (UMDA)³, and most of the statute's provisions are traceable to the UMDA.⁴ Under the UMDA, "[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."⁵

However, the origins of the property settlement provisions of the District's Act go beyond the plain language of the UMDA to its underlying socio-economic perspective of marriage. The Commissioners on Uniform State Laws have stated that "the original proposal [for property disposition

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1. D.C. CODE §§ 16-901 to 16-923 (Supp. V 1978).

2. *Id.* § 16-910(a)-(b). See notes 57-88 and accompanying text *infra*.

3. Uniform Marriage and Divorce Act, §§ 101-506, 9A U.L.A. 91-221 (West 1979).

4. See Green & Long, *The Real and Illusory Changes of the 1977 Marriage and Divorce Act*, 27 CATH. U.L. REV. 469 (1978).

5. Commissioners' Prefatory Note, Uniform Marriage and Divorce Act, 9A U.L.A. 93 (West 1979).

under the UMDA] was, in substance . . . *community property rules*."⁶ Such a philosophical perspective is contrary to the pre-1977 legal history of divorce in the District of Columbia. The District's Marriage and Divorce Act of 1977, therefore, represents a significant departure from the modified common law marital property system that existed under the previous statute and has created an "identity crisis" for the law of property distribution in the District of Columbia.⁷

I. PROPERTY DISTRIBUTION PRIOR TO THE MARRIAGE AND DIVORCE ACT OF 1977

Prior to the 1977 Act, the District of Columbia's rules for marital property distribution had remained virtually unaltered since the passage of the Divorce Act of 1935.⁸ The 1973 codification of this Act provided that:

Upon the entry of a final decree of annulment or absolute divorce, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and, in the same proceeding in which the decree is entered, the court may award the property to the one lawfully entitled thereto or apportion it in such manner as seems equitable, just and reasonable.⁹

The courts construed the statute as containing two basic elements. The first element, which was substantive, was interpreted to mean that once a final decree was entered the parties' rights in property, held either jointly or by the entirety, were dissolved.¹⁰ The second element, which was procedural, enabled the court to apportion that property in the same proceeding.¹¹ For the most part, the courts followed the plain language of the

6. FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (BNA 1974) (emphasis supplied).

7. For extensive analyses of the philosophical and practical differences among the various common-law and community property states, see W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES (1974); Bartke, *Marital Sharing — Why Not Do It By Contract?*, 67 GEO. L.J. 1131 (1979); 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 (1979).

8. Act of Aug. 7, 1935, ch. 453, § 3, 49 Stat. 540. Prior to this statute separate actions were required to adjudicate the parties' marital status and certain types of property. See *Richardson v. Richardson*, 112 F.2d 19, 20 (D.C. Cir. 1940).

9. D.C. CODE § 16-910 (1973).

10. See, e.g., *Heath v. Heath*, 189 F.2d 697, 698 (D.C. Cir. 1951); *Scholl v. Scholl*, 152 F.2d 672, 675 (D.C. Cir. 1945).

11. See, e.g., *Wheeler v. Wheeler*, 188 F.2d 31, 32 n.1 (D.C. Cir. 1951); *Richardson v. Richardson*, 112 F.2d 19, 20 (D.C. Cir. 1940).

statute and consistently held that only jointly-owned property could be judicially apportioned.¹² Individually owned property could not be distributed under the statute, although it was awarded to the non-titled spouse in cases where he or she could demonstrate a legal or equitable interest in such property.¹³

The statutory constraints in this area were evident in *Wheeler v. Wheeler*,¹⁴ where the trial court's award to the wife of a thirty-five percent interest in real property held solely in the husband's name was vacated by the United States Court of Appeals for the District of Columbia Circuit: "section [16-910] does not, contrary to appellee's contention, empower the court to award the wife an interest in the property which is owned by the husband alone, for by its terms it relates solely to property held in joint tenancy or tenancy by the entirety."¹⁵ The courts also had consistently rejected the contention that individually owned property could be awarded as alimony.¹⁶

In order for the non-titled spouse to receive an award of individually owned property, that spouse was required to show either a legal or equitable interest in the property¹⁷ or to prove facts that would serve as the basis for a finding of a constructive or resulting trust.¹⁸ Whether the court would find a legal or equitable interest in the non-titled spouse depended upon the facts particular to the case.

In *Hunt v. Hunt*,¹⁹ the husband was the title holder of record of certain real property when the divorce decree was entered. The trial court had awarded the wife a half-interest in the property and the husband appealed,

12. See, e.g., *Tendrich v. Tendrich*, 193 F.2d 368, 369 n.5 (D.C. Cir. 1951); *Reilly v. Reilly*, 182 F.2d 108, 108 (D.C. Cir.), cert. denied, 340 U.S. 865 (1950); *McGean v. McGean*, 339 A.2d 384, 387-88 (D.C. 1975); *Mumma v. Mumma*, 280 A.2d 73, 75 (D.C. 1971); *Jett v. Jett*, 221 A.2d 925, 927 (D.C. 1966).

13. See, e.g., *Mazique v. Mazique*, 356 F.2d 801, 804 (D.C. Cir.), cert. denied, 384 U.S. 981 (1966); *Lyons v. Lyons*, 295 A.2d 903, 905 (D.C. 1972); *Posnick v. Posnick*, 160 A.2d 804, 806-07 (D.C. 1960).

14. 188 F.2d 31 (D.C. Cir. 1951).

15. *Id.* at 32. The statute applied in *Wheeler*, D.C. CODE § 16-409 (1961), is virtually identical to D.C. CODE § 16-910 (1973).

16. See, e.g., *Keleher v. Keleher*, 192 F.2d 601, 602 (D.C. Cir. 1951), cert. denied, 343 U.S. 943 (1952); *Wheeler v. Wheeler*, 188 F.2d 31, 32-33 (D.C. Cir. 1951); *McGean v. McGean*, 339 A.2d 384, 387-88 (D.C. 1975). Cf. *Sirianni v. Sirianni*, 338 A.2d 101, 103 (D.C. 1975) (evidence of wife's financial contributions properly excluded where it was not sought to be introduced concerning alimony but on question of wife's entitlement to husband's property).

17. See, e.g., *Lyons v. Lyons*, 295 A.2d 903, 905 (D.C. 1972); *Mumma v. Mumma*, 280 A.2d 73, 75-76 (D.C. 1971); *Hunt v. Hunt*, 208 A.2d 731, 733 (D.C. 1965).

18. See *McGean v. McGean*, 339 A.2d 384, 388-89 (D.C. 1975).

19. 208 A.2d 731 (D.C. 1965).

contending that this allocation was precluded under section 16-910 of the D.C. Code.²⁰ In affirming the trial court's award, the District of Columbia Court of Appeals ruled that the stipulated record contained facts sufficient to establish the wife's equitable interest. The property at issue had been conveyed to the parties as tenants by the entirety during their marriage. When the husband was arrested on a felony charge, the property was conveyed to his mother. Because this transfer was made without consideration²¹, the court held that the parties remained equitable owners.²²

In contrast, the court in *Mumma v. Mumma*²³ reversed the trial court's award to the wife of a half-interest in real estate individually owned and paid for by the husband. Noting that "[t]he courts have been hesitant to find such an 'interest' or 'claim of right,'"²⁴ the court ruled that the wife's "sporadic clerical services for the husband for an undetermined period"²⁵ constituted an insufficient contribution to justify such an award. In *Lyons v. Lyons*,²⁶ however, the court distinguished *Mumma* and affirmed the trial court's award, ordering the husband to pay the wife \$7,500 out of a savings account maintained solely in his name. The trial court had found that the wife made "substantial monthly contributions" to the account "over a period of years."²⁷ The court of appeals held this finding sufficient to establish the wife's equitable interest in the account.²⁸

Subsequently, in *McGean v. McGean*,²⁹ the District of Columbia Court of Appeals reversed the trial court's finding of a resulting trust in favor of the wife concerning certain property located in Maryland.³⁰ The court applied Maryland law and noted that "[w]hen the parties are not strangers . . . the law will not necessarily presume that a trust arises."³¹ Although there was evidence tending to show that the wife contributed to a bank

20. The husband contended that the trial court was without jurisdiction to award the wife any interest in the property because he was the owner of record when the divorce action was commenced. *Id.* at 733.

21. The transfer was made to prevent creditors from reaching the property and to enable the husband to proceed *in forma pauperis* in a criminal matter. *Id.*

22. The court also rejected the husband's claim that the wife's financial contribution and assistance in managing the properties were insufficient to support the award. *Id.*

23. 280 A.2d 73 (D.C. 1971).

24. *Id.* at 76.

25. *Id.*

26. 295 A.2d 903 (D.C. 1972).

27. *Id.* at 905.

28. *Id.* at 906.

29. 339 A.2d 384 (D.C. 1975).

30. The deed was in the husband's name and he was solely responsible for the mortgage. *Id.* at 386.

31. *Id.* at 388.

account from which mortgage payments were made,³² and was therefore “presumptively entitled to a beneficial interest,”³³ the court held that the wife had failed to demonstrate an equitable interest sufficient to justify the award of a half-interest.³⁴

The statute thus limited the court’s awards, except in rare cases, to jointly-owned property. In distributing jointly-owned property, however, the statute was interpreted as vesting trial judges with broad discretion.³⁵ The parameters of this discretion were outlined in *Lundregan v. Lundregan*³⁶ in language that was later echoed in the 1977 Act:

The trial court must “exercise a sound judicial discretion in adjusting the property rights of the parties” No hard and fast rule can be laid down. Each case must be decided on its particular circumstances; and considering all those circumstances a trial judge in his sound discretion must rule in a manner that seems to him equitable, just, and reasonable.³⁷

To guide the trial judge, the appellate courts developed a list of factors to be considered in distributing jointly-held property. Most of these factors are found in Judge Bazelon’s opinion in *Quarles v. Quarles*.³⁸ Addressing the propriety of an alimony award, he stated:

[N]o fixed set of rules or formulae can be substituted for a careful study of the particular facts and circumstances in each case. Nevertheless, certain impelling factors of an equitable nature have always affected such awards. Among the factors have been: the duration of the marriage; the number and age of the children; the age and health of the parties; their respective economic conditions — both present and prospective; the wife’s contribution to the accumulation of the husband’s property; the circumstances under which the divorce was granted; the effect, if any, upon the family; and the interest of society generally to prevent a person, whenever possible, from becoming a public charge.³⁹

Although a direct financial contribution by the wife was not a condition precedent to an award of jointly-held property,⁴⁰ the trial court’s distribu-

32. *Id.* at 386.

33. *Id.* at 388.

34. *Id.* at 389.

35. *See, e.g.*, *Benvenuto v. Benvenuto*, 389 A.2d 795, 797 (D.C. 1978); *Finch v. Finch*, 378 A.2d 1092, 1093-94 (D.C. 1977); *Hales v. Hales*, 207 A.2d 657, 659 (D.C. 1965); *Leibel v. Leibel*, 190 A.2d 821, 821-22 (D.C. 1963).

36. 176 A.2d 790 (D.C. 1962).

37. *Id.* at 792.

38. 179 F.2d 57 (D.C. Cir. 1949).

39. *Id.* at 58.

40. *See Lundregan v. Lundregan*, 176 A.2d 790, 792 (D.C. 1962). *Cf. Johnson v. John-*

tion to her was generally upheld on appeal if she had contributed to the purchase or maintenance of that property. In *Lee v. Lee*,⁴¹ for example, the District of Columbia Court of Appeals affirmed an equal division of real property between a husband and wife who had contributed equally to its purchase and upkeep. In *Campbell v. Campbell*,⁴² the court affirmed the trial court's award of sole title of a jointly owned home to the wife, notwithstanding the husband's proof of their disproportionate financial contributions. A similar result was reached in *Grasty v. Grasty*,⁴³ where the court noted that such an award to the wife would provide a home for the children and a source of some income.⁴⁴ This case, along with *Campbell*, are examples of equities determining the substance of the law, and judicial recognition of fairness to the parties rather than rigid adherence to precedent.

Marital misconduct, when present, was a decisive factor in many property distributions, often overshadowing the more important factors of the parties' future needs and their roles in the accumulation of marital assets. For example, in *Pearsall v. Pearsall*,⁴⁵ the District of Columbia Court of Appeals found no abuse of discretion in the trial court's refusal to award the wife any interest in jointly-held property. The wife's adultery was held to be a sufficient basis for denying her an interest, despite her financial contribution to the purchase price.⁴⁶ In *Oxley v. Oxley*,⁴⁷ the trial court awarded the husband sole ownership of real property held by the entirety during the marriage. In affirming the award, the United States Circuit Court of Appeals held that the wife's "wrongful breach of the [marriage] vows . . . works a forfeiture of the property right conferred on her by the deed."⁴⁸ Similarly, in *Mazique v. Mazique*,⁴⁹ the wife was denied any share of the parties' jointly-held residence because she had deserted her husband "without just cause."⁵⁰ In *King v. King*,⁵¹ the District of Colum-

son, 257 A.2d 482, 483 (D.C. 1969) (husband awarded sole ownership of house held by the entirety when evidence established that he purchased house prior to the marriage and maintained it solely with his own funds).

41. 307 A.2d 757, 760 (D.C. 1973). In *Chamberlain v. Chamberlain*, 287 A.2d 530, 532 (D.C.), *cert. denied*, 409 U.S. 892 (1972), the court affirmed an award of a jointly owned home to the wife based on the trial court's finding that she had provided all of the consideration.

42. 353 A.2d 276, 279 (D.C. 1976). See *Slaughter v. Slaughter*, 171 F.2d 129, 130 (D.C. Cir. 1948).

43. 302 A.2d 218 (D.C. 1973).

44. *Id.* at 219.

45. 197 A.2d 269 (D.C. 1964).

46. *Id.* at 270.

47. 159 F.2d 10 (D.C. Cir. 1946).

48. *Id.* at 12.

49. 356 F.2d 801 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966).

50. *Id.* at 804.

51. 286 A.2d 234 (D.C. 1972).

bia Court of Appeals found no abuse of discretion in the trial court's award to the husband of the jointly-owned family home "after review of the findings respecting the attitudes and conduct of the wife."⁵²

The conduct of husband and wife was so influential on the courts that the absence of misconduct was a factor in cases where one spouse had not contributed financially to the purchase or improvement of jointly-held property. The rule in the District of Columbia, as stated in *Sebold v. Sebold*,⁵³ was that:

[E]ven if real property is purchased entirely by one spouse, and title is taken in the names of both as tenants by the entirety or joint tenants, the consideration to be implied for the share of the non-purchasing spouse is the faithful performance of his or her marriage vows.⁵⁴

In *Sebold*, the United States Court of Appeals held that the wife's faithful performance of her marriage vows was a sufficient basis for awarding her a half-interest in the parties' jointly-held home, even though she had not contributed financially to its purchase.⁵⁵

There was considerable tension inherent in the pre-1977 statutory scheme because of limits on the courts' ability to be just and reasonable. This jurisdiction recognized a spouse's faithful performance of marriage vows as a factor to be considered in allocating marital property. Yet, when all property was titled in the other spouse's name, this perspective on marriage was mere rhetoric to the untitled spouse.

II. THE 1977 ACT: MARRIAGE AS A PARTNERSHIP

The 1977 Act radically altered the above-described statutory scheme.⁵⁶

52. *Id.* at 237.

53. 444 F.2d 864 (D.C. Cir. 1971).

54. *Id.* at 872.

55. *Id.* at 873.

56. The property distribution provision of the Marriage and Divorce Act of 1977 provides as follows:

Upon the entry of a final decree of annulment or divorce in the absence of a valid ante-nuptial or post-nuptial agreement or a decree of legal separation disposing the property of the spouses, the court shall:

(a) assign to each party his or her sole and separate property acquired prior to the marriage, and his or her sole and separate property acquired during the marriage by gift, bequest, devise, or descent, and any increase thereof, or property acquired in exchange therefor; and

(b) distribute all other property accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties, in a manner that is equitable, just and reasonable, after considering all relevant factors including, but not limited to: the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount

Marriage in the District of Columbia is now considered to be a partnership. Upon "dissolution" of the marriage almost all property belonging to the parties, however titled, is partnership property. Legal title has become an artificial tag having little meaning under the new law.

The District of Columbia Court of Appeals first construed the property division aspects of the 1977 Act in *Hemily v. Hemily*.⁵⁷ In 1958, the parties had purchased two virtually identical houses as tenants by the entirety.⁵⁸ Title to one house was transferred to the wife in 1967 as sole owner.⁵⁹ Upon their divorce in 1978, the trial court awarded each party sole ownership of one of the houses pursuant to section 16-910(b).⁶⁰ On appeal, the wife contended that the trial court had improperly distributed both houses under section 16-910(b), claiming that the house transferred to her in 1967 was her "sole and separate property" under section 16-910(a).⁶¹ In rejecting the wife's contention, the court held that the exemption provided in section 16-910(a) for "sole and separate property acquired during the marriage" did not "exclude from apportionment [under section 16-910(b)] property which *initially* had come into the marriage other than by the means enumerated in [section 16-910(a)]."⁶² The court reasoned that section 16-910(a)'s exemptions⁶³ must be so limited because, "when property is acquired by one spouse in one of those ways, there normally would be little basis for an objectively reasonable expectation of an interest in that property on the part of the other spouse."⁶⁴ Thus, "marital property" —

and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income. The court shall also consider each party's contribution to the acquisition, preservation, appreciation, dissipation or depreciation in value of the assets subject to distribution under this subsection, and each party's contribution as a homemaker or to the family unit.

D.C. CODE § 16-910 (Supp. V 1978). The exception for property disposed of pursuant to a valid antenuptial or postnuptial agreement was carried over from the prior statute. See text accompanying note 9 *supra*.

57. 403 A.2d 1139 (D.C. 1979).

58. *Id.* at 1140. Although the "down payments" were made out of joint savings, the husband made all mortgage payments on both properties until 1967. *Id.*

59. *Id.* After transfer of title, the wife received all income from the property but also paid all taxes, mortgage payments, and the like. *Id.*

60. *Id.* at 1140-41.

61. *Id.* at 1141.

62. *Id.* at 1143 (emphasis added).

63. D.C. CODE § 16-910(a) (Supp. V 1978) exempts from distribution under § 16-910(b): (1) sole and separate property acquired prior to the marriage; (2) sole and separate property acquired during the marriage by gift, bequest, devise, or descent; (3) any increase in types (1) and (2); and any property acquired in exchange for types (1) and (2).

64. 403 A.2d at 1142-43.

property acquired initially so as to be distributable under section 16-910(b) — cannot be transformed into section 16-910(a) property by way of a purported interspousal gift during the marriage.⁶⁵ The *Hemily* court served notice that exclusions from “marital property” would result only from a narrow reading of section 16-910(a).

The court found support for its interpretation of the 1977 Act in section 307(c) of the 1973 version of the UMDA,⁶⁶ the statute upon which the District’s new Act was based.⁶⁷ Section 307(c) sets forth a “presumption” that property acquired during the marriage should be considered marital property subject to distribution, regardless of how title is held, unless the property can be shown to have been acquired by a method enumerated in section 307(b).⁶⁸ Additionally, the *Hemily* court relied on an analogous Maryland statute⁶⁹ that exempted gifts from marital property only when they were received from a third party.⁷⁰

In *Brice v. Brice*,⁷¹ the court again addressed the differences between “sole and separate” property under section 16-910(a) and “marital” property under section 16-910(b). The trial court had awarded the husband sole ownership of real property acquired by him *before* the marriage and held solely in his name.⁷² Thus, the property at issue in *Brice* had been acquired pursuant to a method specifically enumerated in section 16-910(a).⁷³ In affirming the award, the court distinguished *Hemily*; in that case neither party “reasonably would expect that [the husband’s] ‘purported gift of sole ownership’ to his wife during the marriage would cut off any claim [the husband] might have to the property upon dissolution of the

65. *Id.* at 1143.

66. See Uniform Marriage and Divorce Act, § 307(c), 9A U.L.A. 143-44 (West 1979).

67. 403 A.2d at 1143 n.3. See Green & Long, *supra* note 4, at 170.

68. Uniform Marriage and Divorce Act, § 307(c), 9A U.L.A. 144 (West 1979). Section 307(b) of the 1973 version of the UMDA exempted from distribution as marital property:

- (1) property acquired by gift, bequest, devise, or descent;
- (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (3) property acquired by a spouse after a decree of legal separation;
- (4) property excluded by valid agreement of the parties; and
- (5) the increase in value of property acquired before the marriage.

Id.

69. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(e) (Supp. 1979). See generally Note, *Property Disposition Upon Divorce in Maryland: An Analysis of the New Statute*, 8 U. BALT. L. REV. 377 (1979).

70. 403 A.2d at 1143 n.5.

71. 411 A.2d 340 (D.C. 1980).

72. *Id.* at 341-42.

73. See note 63 *supra*.

marriage.”⁷⁴ The issue in *Brice*, therefore, was the converse of that presented in *Hemily*: “whether property which originally was acquired by a spouse in one of the ways enumerated in § 16-910(a) could ever, under the particular circumstances of a given marriage, come to be considered property subject to distribution under § 16-910(b).”⁷⁵

The wife contended that her efforts in maintaining the property and her contributions to family expenses created an equitable interest in the husband’s “sole and separate” property.⁷⁶ Although noting that the new Act did not “indicate an intent to abolish or restrict”⁷⁷ the pre-1977 approach which awarded individually owned property to the non-titled spouse upon the showing of a legal or equitable interest,⁷⁸ the court held that the wife had failed to prove facts sufficient to remove the property from section 16-910(a) as a matter of law.⁷⁹

Hemily and *Brice* suggest that the court’s first and most delicate task will be to characterize the property at issue as either “marital” or “separate.” It is in this classification process that the new Act’s radical changes are most evident. The presumption in the District of Columbia now is that property is “marital” and thereby subject to distribution under section 16-910(b). Only property clearly falling within section 16-910(a) will be exempt from such distribution. And once the classification is made, the party attempting to alter it bears a heavy burden of proof.

A third case decided under the new Act, *Turpin v. Turpin*,⁸⁰ illustrates the expansive power of the trial judge to apportion “marital” property, once it is so characterized, under the broad definition and presumptions in its favor. In *Turpin*, the husband challenged the trial court’s award to the wife of a seventy-five percent interest in a jointly owned apartment and a fifty percent interest in a jointly titled bond.⁸¹ In upholding the award, the District of Columbia Court of Appeals noted that although the 1977 Act

74. 411 A.2d at 342-43.

75. *Id.* at 343.

76. *Id.* Although conceding that the husband made the “down payment” and paid the closing costs and the mortgage payments, the wife contended that her yardwork, painting, and household expenditures established her equitable interest in the property. The trial court found, however, that the wife made no major expenditures in connection with the property. *Id.* at 344.

77. *Id.* at 343.

78. See notes 17-34 and accompanying text *supra*.

79. 411 A.2d at 344. The court assumed without deciding that “disproportionately high payments for home maintenance and household expenses by one spouse may create an equitable interest in real property acquired prior to the marriage and held in the name of the other spouse,” but held that the wife had not established such an interest. *Id.* at 343.

80. 403 A.2d 1144 (D.C. 1979).

81. *Id.* at 1145.

changed the statutory scheme concerning the court's power to distribute both individually- and jointly-owned property, the Act did not alter the trial judge's discretion to apportion property that is subject to distribution.⁸² Moreover, the trial judge's discretion under the new Act is at least as broad as it was under the old statute because the "nonexclusive factors" listed in section 16-910(b) "are largely a codification of the guidelines enunciated in the cases which construed the bounds of the trial judge's authority under the old § 16-910."⁸³

In *Turpin*, the husband contended that because a certain percentage of the purchase price of both assets was traceable directly to funds he owned individually prior to the marriage, he should have been awarded, as "sole and separate" property under section 16-910(a), a percentage share equal to his original contribution.⁸⁴ In rejecting this argument, the court held that tracing is inappropriate under section 16-910(a).⁸⁵ That section applies only to "sole and separate" property and, under the Act, property either is or is not "sole and separate."⁸⁶ Since the property was jointly owned and not "sole and separate," it was distributable under section 16-910(b), and thus the amount of a party's contribution is not controlling for purposes of distribution.⁸⁷ With respect to the amount of the wife's award, the court found no abuse of discretion because the trial court's decision

82. *Id.* at 1146. The court noted, moreover, that under the new Act when property is placed in joint names it loses its § 16-910(a) exemption and becomes distributable under § 16-910(b). *Id.*

83. *Id.* at 1146. See notes 35-55 and accompanying text *supra*. D.C. CODE § 16-910(b) (Supp. V 1978) sets forth the factors to be considered by the court when dividing the parties' property. See note 56 *supra*. The list is straightforward, although this jurisdiction did not include the "without regard to marital misconduct" language from the UMDA. See Uniform Marriage and Divorce Act, § 307, 9A U.L.A. 142-43 (West 1979). A strong argument can be made that this omission indicates that "marital misconduct" is to be considered when apportioning property under the new law. This jurisdiction, therefore, can be considered to be only quasi-no-fault. See notes 136-51 and accompanying text *infra*.

84. For example, the husband asserted that 84.73% of the purchase price of the apartment was traceable directly to the proceeds derived from his sale prior to the marriage of individually owned property. 403 A.2d at 1147.

85. *Id.*

86. The court commented: "In this case there was nothing at all 'sole and separate' about the cooperative apartment. It was jointly funded, jointly owned, and jointly lived in by the parties. Therefore, it was distributable under § 16-910(b)." *Id.*

87. The court similarly rejected the husband's contentions respecting the bond. Although it was purchased with the husband's funds, the court held it was not his "sole and separate" property because it was bought during the marriage and held in joint names. In addition, both spouses exercised dominion and control over it, the interest from the bond was deposited monthly in the parties' joint checking account, and it was kept in a jointly controlled safe deposit box. *Id.*

was "based upon an assessment of the totality of the circumstances."⁸⁸

The origin of the 1977 Act's distinction between "marital" and "separate" property, as demonstrated by the decided cases and the statutory language, is the UMDA. The District's statute, however, differs from the UMDA in two respects *vis-a-vis* division of property.⁸⁹ First, the UMDA specifically exempts "increases in value" of separate property,⁹⁰ apparently referring to normal appreciation, while the District's statute refers to "any increase thereof"⁹¹ as being immune from distribution. Second, only increases in value of property acquired *before* the marriage are exempt under the UMDA,⁹² whereas the District's statute exempts certain property acquired after the marriage.⁹³ These differences, however, appear to be only semantical since both statutory sections address those types of property that were initially titled solely in one spouse's name. Thus, it is unlikely that the other spouse would have had any connection with the property or an opportunity to make any contribution. Additionally, both sections have a unified concept of separate property; that is, the *time* of its acquisition is not necessarily determinative of its character.⁹⁴

III. INCREASES IN VALUE OF MARITAL AND SEPARATE PROPERTY

The Marriage and Divorce Act of 1977 has simplified the trial court's task of making a just and reasonable distribution of the parties' property by removing distinctions based solely on title.⁹⁵ Once property is classified as either marital or separate, the trial court enjoys wide discretion under the new Act in fashioning a distribution scheme based on the equities and needs of the parties.⁹⁶ However, the initial step in this distribution process

88. *Id.*

89. With respect to "marital misconduct," see note 83 *supra* and notes 136-51 and accompanying text *infra*.

90. Uniform Marriage and Divorce Act, § 307(b)(5), 9A U.L.A. 144 (West 1979).

91. D.C. CODE § 16-910(a) (Supp. V 1978).

92. Uniform Marriage and Divorce Act, § 307(b)(5), 9A U.L.A. 144 (West 1979).

93. D.C. CODE § 16-910(a) (Supp. V 1978).

94. *Cf. Painter v. Painter*, 65 N.J. 196, 214-15, 320 A.2d 484, 494-95 (1974) (property acquired prior to marriage not subject to division, but all property acquired during marriage, including by gift or inheritance, is subject to division).

95. *See, e.g., Turpin v. Turpin*, 403 A.2d at 1146; *Hemily v. Hemily*, 403 A.2d at 1142. Other states with statutes modeled after the UMDA have similarly abandoned distinctions based solely on title. *See, e.g., In re Marriage of Howard*, 600 P.2d 93, 94 (Colo. App. 1979); *Morse v. Morse*, 571 P.2d 1147, 1149 (Mont. 1977).

96. *See Turpin v. Turpin*, 403 A.2d at 1146-47. Granting trial courts wide discretion in distributing marital property is also characteristic of states with statutes modeled after the UMDA. *See, e.g., Neal v. Neal*, 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977); *In re Marriage of Lodholm*, 35 Colo. App. 411, 413, 536 P.2d 842, 844 (1975); *In re Marriage of Thornquist*, 399 N.E.2d 176, 182 (Ill. App. 1979); *Bailey v. Bailey*, 603 P.2d 259, 260 (Mont. 1979).

— distinguishing between marital and separate property — presents the most complex problem of statutory interpretation of any of the new Act's provisions. Although there is some precedent on "how to allocate," there is very little precedent in this jurisdiction concerning "what may be allocated" under the new Act. In giving meaning to the Act's language, therefore, the District's courts should look to other state statutes based on the UMDA, and even to community property states. This borrowing is essential if marriage is to be treated like a partnership in the District of Columbia.⁹⁷

A preliminary issue that arises in making the marital/separate distinction concerns the allocation of the burden of proof. Since it now appears that the "presumption" in the District of Columbia is that property is marital,⁹⁸ this jurisdiction should adopt the rule established in other states that the burden of proving immunity from distribution (i.e., classifying property as separate) rests with the spouse asserting it.⁹⁹

Even where the burden is met and the property itself is deemed to be separate, the court still may distribute the fruits of that property to the other spouse. Many jurisdictions treat income from separate property as marital property. For example, if the husband inherits an office building prior to the marriage (which would be separate property), the rents from that office building accruing during the marriage probably are marital property. In *Brunson v. Brunson*,¹⁰⁰ the Court of Appeals of Kentucky rejected the husband's contention that all income produced by his inherited land, itself a non-marital asset, was his separate property for the purposes of distribution.¹⁰¹ Interpreting the Kentucky statute,¹⁰² which is virtually identical to section 307 of the UMDA, the court held that "any accumulation of income from the husband's nonmarital property constituted marital property to be divided by the court."¹⁰³ This rule should prevail in the District of Columbia, particularly in light of the fact that *income* is not within any of the exceptions to the definition of marital property set forth in section 16-910(a).¹⁰⁴

97. See note 5 and accompanying text *supra*.

98. See notes 66-68 and accompanying text *supra*.

99. See, e.g., *Adams v. Adams*, 565 S.W.2d 169, 171 (Ky. App. 1978); *Farmer v. Farmer*, 506 S.W.2d 109, 112 (Ky. 1974); *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). See also *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 571-72, 376 N.E.2d 1382, 1386 (1978); *Zillert v. Zillert*, 395 A.2d 1152, 1155 (Me. 1978).

100. 569 S.W.2d 173 (Ky. App. 1978).

101. *Id.* at 177.

102. KY. REV. STAT. § 403.190 (Cum. Supp. 1978).

103. 569 S.W.2d at 178.

104. D.C. CODE § 16-910(a) (Supp. V 1978). See note 63 *supra*.

This rule is consistent with the concept of community property and should appear more and more frequently in the decisional law of the District of Columbia.¹⁰⁵ Under a community property scheme, "marriage is a partnership in which the spouses devote their particular talents, energies and resources to the common good; and in which acquisitions and gains attributable, directly and indirectly, to such expenditures of labor and resources are shared by the partnership."¹⁰⁶ This is a classic statement of "what's-mine-is-ours;" to qualify for some of this income all that is needed are some credits on the "relevant factors" list set forth in section 16-910(b).¹⁰⁷ Moreover, since section 16-910(b) is "largely a codification of the guidelines enumerated"¹⁰⁸ in prior cases, a spouse may be entitled to share in marital property for no more than "faithful performance of his or her marriage vows."¹⁰⁹

As illustrated by *Brunson*, carrying land into a marriage and denying that income from it is marital property is tantamount to carrying any income producing business or capital asset into a marriage and claiming that the income is "sole and separate" property. Yet, this leads to a further problem in making property distinctions under the new Act. Suppose that the wife sold her law practice just prior to marriage and engaged in no further income producing activities. Upon divorce, the wife could argue that she had brought a lump sum of "sole and separate" property into the marriage. The plain language of section 16-910(a)¹¹⁰ would support the wife's claim that the property was exempt from distribution. This lump sum, however, actually represents a "capital" sum of income that was not earned during the marriage, and the court could extrapolate an income flow and declare the income marital property. A "substitution" analysis could be employed similar to that used in tax law in determining whether lump sum payments for damages¹¹¹ or sales of rights to future income¹¹²

105. See note 5 and accompanying text *supra*.

106. Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 SO. CAL. L. REV. 240, 241 (1966). See Greene, *supra* note 7, at 82-86. See generally *Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979) (en banc).

107. D.C. CODE § 16-910(b) (Supp. V 1978). See note 56 *supra*.

108. *Turpin v. Turpin*, 403 A.2d at 1146.

109. *Sebold v. Sebold*, 444 F.2d at 872. Other states with statutes modeled after the UMDA permit such a result. See, e.g., *Rieger v. Christensen*, 529 P.2d 1362, 1364-65 (Colo. App. 1974); *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978); *Biegalko v. Biegalko*, 564 P.2d 987, 989 (Mont. 1977).

110. D.C. CODE § 16-910(a) (Supp. V. 1978). See note 56 *supra*.

111. See, e.g., *Raytheon Prod. Corp. v. Commissioner*, 144 F.2d 110 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944).

112. See, e.g., *Commissioner v. Lake*, 356 U.S. 260 (1958); *Hort v. Commissioner*, 313 U.S. 28 (1941).

are excluded from ordinary income.

An understanding of the character of the base property is crucial in deciding whether the "increase in value" of that property is marital or separate. Suppose the husband inherits stock worth \$10,000 from his father and he continues in the employ of the family corporation. Ten years into the marriage, the husband has a falling out with his brother, who purchases the husband's stock for \$100,000.¹¹³ The "increase thereof,"¹¹⁴ — \$90,000 — is exempt from distribution under the new Act unless the "substitution" test is applied. In doing so, some of the husband's gain must be attributable to a capitalization of the salary the husband will no longer draw. This salary would certainly constitute marital property; thus, its substitute should be similarly treated. Moreover, some of the gain might be attributable to the husband's business efforts during the marriage and this, too, should be marital property. Quantifying the amount properly considered to be marital property, however, is more difficult than simply stating that marital property is the excess gain over the market value of the stock.¹¹⁵ A further complication is that the market value of stock of closely held corporations is not easily established.

Another example may help illustrate this problem. Suppose the wife brings ten shares of General Confusion (GC) into the marriage. The directors of GC decide that a stock dividend would be preferable to the issuance of cash dividends, so the wife receives five more shares of GC. Had the wife received ten dollars in cash dividends and then bought five more shares, there would be little doubt that the newly purchased shares are marital property under section 16-910(b), because the purchases were made *during* the marriage with income from separate property.¹¹⁶ In the cash dividend situation the wife realizes income for taxation purposes, and this might even be reported on a joint tax return. But when income is not realized, as in the case of a stock dividend, the wife appears to have a simple argument that the added shares are her separate property. Since she realized no income, she would argue that the community should receive no benefit. Nevertheless, for the courts to allow the form of accretion

113. This is similar to examining whether a spouse was paid a reasonable salary for her services to a corporation. If the spouse was not, then a portion of the increase in the stock's value, which was brought into the marriage, might be considered property acquired during the marriage. See generally King, *The Challenge of Apportionment*, 37 WASH. L. REV. 483 (1962).

114. D.C. CODE § 16-910(a) (Supp. V 1978).

115. See generally *Olsher v. Olsher*, 397 N.E.2d 488, 493-95 (Ill. App. 1979).

116. Since the cash dividend would be "property accumulated during the marriage" and since title is irrelevant under the new Act, it would be marital property distributable under D.C. CODE § 16-910(b) (Supp. V 1978).

selected by the board of directors to dictate when the added and subsequently exchanged property changes its character, and passes to or from the community, would be an abdication of the principles of the new Act to the strategy of a distant corporation.

In light of the difficulties under the new Act in distinguishing between marital and separate property, and increases thereof, the District's courts should seek guidance from rules developed in community property states.¹¹⁷ Two methods of classifying property are often employed in community property states to provide predictable standards respecting the marital/separate property distinction. The older, more traditional method is the inception of title rule.¹¹⁸ Under this rule:

the marital community is reimbursed for those marital funds expended to pay the acquisition cost of the property, but the remainder of its value, including any increase in value due to general economic conditions, would be the separate property of the spouse who had incepted title prior to marriage.¹¹⁹

The second method — the source of funds rule —¹²⁰ may be considered an equitable exception to the inception of title rule.

Under the source of funds rule the property is considered to be "acquired" as it is paid for; therefore, that portion of the ultimate value (increase or decrease by general economic conditions) which is the same as the portion of the purchase price paid with marital funds is marital property.¹²¹

The source of funds rule is more consistent with the principle of compensating a "housewife," since it brings more of the property into the marriage and is less concerned with the actual efforts of the parties toward that particular property.

An example may illustrate the difference between these methods. The husband inherits an office building worth \$1 million with a \$500,000 mort-

117. This approach was adopted by the Supreme Judicial Court of Maine in construing Maine's statute, which is modeled after the UMDA. See *Tibbets v. Tibbets*, 406 A.2d 70 (Me. 1979). See generally Note, *The Maine Marital Property Act: The Duties of Divorce Courts and the Right to An Equitable Share of Marital Assets*, 31 ME. L. REV. 333 (1980).

118. See, e.g., *Fisher v. Fisher*, 86 Idaho 131, 383 P.2d 840 (1963); *Cain v. Cain*, 536 S.W.2d 866 (Mo. Ct. App. 1976); *Colden v. Alexander* 141 Tex. 134, 171 S.W.2d 328 (1943). See generally Bartke, *Yours, Mine and Ours — Separate Title and Community Funds*, 44 WASH. L. REV. 379 (1969).

119. Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 180 (1978).

120. See, e.g., *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972); *Gapsch v. Gapsch*, 76 Idaho 44, 277 P.2d 278 (1954). See generally W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 133-34 (2d ed. 1971); *Baize v. Baize*, 460 S.W.2d 255 (Tex. Ct. Civ. App. 1970).

121. Krauskopf, *supra* note 119, at 180.

gage outstanding. The rents from the building are used to pay off the mortgage and the building is subsequently sold for \$2 million. Under the inception of title rule, the community is reimbursed for its investment, and \$500,000 (the mortgage indebtedness) is marital property. However, under the source of funds rule, which allows each party to share in market and inflationary appreciation, the community would be credited with at least \$1 million since it had paid for half of the building's cost. The source of funds rule would appear more equitable since the community had donated marital funds to maintain the separate property and carried the risk.

The traditional rule employed in community property states concerning increases in value during the marriage is as follows: "if the spouses' labor or industry has contributed to the increase in value then the community should share in the increase in proportion to the community's contribution to the increase."¹²² The labor and industry requirement should not be misconstrued as mandating that these efforts be directed to any particular enterprise;¹²³ it should be enough that the non-titled spouse directed his or her efforts to the marriage itself. In construing the new Act, this jurisdiction should recognize the non-financial contributions of a spouse when the "increased value" of separate property is distributed.

A contrary rule would be inconsistent with recognizing household and other non-remunerative contributions by a spouse¹²⁴ and would defeat the stated intent to treat marriage like a partnership. The services of a housewife, for example, often permit property appreciations to be available for heirs and heiresses. Indeed, without such contributions the property itself might have to be sold to maintain the household. Moreover, the housewife might have a paying job which would allow increases to accumulate rather than be spent. In essence, it would be inequitable to give all gain, even inflationary appreciation, to one party.

In addition to "increases" of sole and separate property, the new Act exempts exchanges of that property¹²⁵ from distribution under section 16-

122. Krauskopf, *supra* note 119, at 184 (citing W. DE FUNIAK & M. VAUGHN, *supra* note 120, at 169). See, e.g., *Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979) (en banc); *In re Neilson's Estate*, 57 Cal. 2d 733, 22 Cal. Rptr. 1, 371 P.2d 745 (1962); *Hiatt v. Hiatt*, 94 Idaho 367, 487 P.2d 1121 (1971); *Fontenot v. Fontenot*, 339 So. 2d 897 (La. App. 1976); *Wells v. Bank of Nevada*, 90 Nev. 192, 522 P.2d 1014 (1974); *Jones v. Jones*, 67 N.J. 415, 356 P.2d 231 (1960). See generally Note, *Dissolution of Marriage — Division of Property Which Has Increased in Value*, 42 MO. L. REV. 479 (1977).

123. See, e.g., *Schrader v. Schrader*, 156 Colo. 521, 400 P.2d 675 (1965); *Durfee v. Durfee*, 465 P.2d 161 (Okla. 1969).

124. See D.C. CODE § 16-910(b) (Supp. V 1978). Cf. *In re Marriage of Jorgensen*, 590 P.2d 606, 610 (Mont. 1979) (if court finds that non-monetary contributions of homemaker facilitated maintenance of separate property, it may include such marital assets for division).

125. D.C. CODE § 16-910(a) (Supp. V 1978).

910(b). This transmutation, too, will create complex legal questions because such transactions rarely occur without some gain involved. While it is apparent that the carry-over basis would be exempt under the new Act, the gain involved in an exchange may be subject to the claim of marital property. The gain is actually an "increase thereof" of the separate property which itself might have changed its identity. Tracing back to an original separate property source is by far the most common method of rebutting the presumption in favor of marital property.¹²⁶ Thus, while the source is separate property, the accretions which are increases in value may be marital property.¹²⁷

In a "partnership" jurisdiction, the party carrying separate property into the marriage can be assured of retaining that property upon divorce only by holding on to it throughout the marriage (although its added value might be divisible). Often, however, the separate property will be sold and the money deposited in an account containing marital funds. Once commingled, its "separate" character might be lost.¹²⁸ The spouse asserting that certain property is marital should retain an accountant to document any such commingling and thereby further cloud any contention that property is separate. The spouse claiming that property is separate should be aware that tracing becomes complex when sales, deposits, and exchanges occur frequently during a long marriage.¹²⁹ Moreover, since the "presumption" is that property is marital, the tracing must be precise.¹³⁰ Tracing is made even more difficult in this jurisdiction because lenders often require the personal guarantees of both spouses when either spouse applies for an investment loan.¹³¹ For example, if a "separate" building is

126. See W. REPPY & W. DE FUNIAK, *supra* note 7, at 140.

127. In *Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979) (en banc) the Supreme Court of Arizona held:

when the value of separate property is increased the burden is upon the spouse who contends that the increase is also separate property to prove that the increase is the result of the inherent value of the property itself and is not the product of the work of the effort of the community.

601 P.2d at 1336.

128. Cf. *Klingberg v. Klingberg*, 68 Ill. App. 3d 513, 516-17, 386 N.E.2d 517, 520-21 (1979) (commingling marital and non-marital property in joint bank account resulted in entire account becoming marital property). See also *Jaeger v. Jaeger*, 547 S.W.2d 207, 210-12 (Mo. Ct. App. 1977).

129. See, e.g., *Turley v. Turley*, 562 S.W.2d 665, 667-69 (Ky. App. 1978); *Angel v. Angel*, 562 S.W.2d 661, 663-65 (Ky. App. 1978).

130. See generally *Woosnam v. Woosnam*, 587 S.W.2d 262, 263-64 (Ky. App. 1979).

131. In *Tibbets v. Tibbets*, 406 A.2d 70 (Me. 1979), the Supreme Judicial Court of Maine, in construing Maine's statute based on the UMDA, commented:

Where the credit obligation is not shown to be the separate and sole obligation of one spouse, then the credit funds are presumed to be marital property and thus that

sold and a new one is bought with some of the proceeds, any financing of the acquisitions most likely will carry the personal guarantees of both spouses. This puts them both at risk and in possession of a valid claim to an interest in the property.

The evidentiary burden on the party asserting that property is separate is increased in certain loss situations. For example, suppose the husband brings stock worth \$1 million into the marriage. The stock's value increases to \$2 million and is sold during the marriage. Upon divorce, the husband contends that all of the gain should be assigned to him as an increase from "sole and separate" property acquired before marriage.¹³² But suppose that the husband also contributed \$150,000 of marital funds to a political candidate during the marriage. The husband used marital funds for this contribution rather than selling any of his rapidly appreciating stock. It seems unlikely that this jurisdiction would force the marital community to bear all of the loss from the contribution and assign to the husband all of the gain from the stock appreciation.¹³³ A more equitable result, however, could only be achieved by selecting a date at which the partnership was formed and stating that any gains and losses, even those that are unrealized, belong to the partnership.¹³⁴ Such a blanket rule would expand the boundaries of the partnership further than those in some community property states.¹³⁵

One additional issue must be examined in assessing the property disposition provisions of the new Act: marital misconduct. Although "fault" is no longer a ground for divorce in the District of Columbia,¹³⁶ it apparently

portion of the property acquired is marital property. The portion of the property acquired in exchange for marital credit and at the time of the divorce not yet fully paid with either marital or non-marital funds is, therefore, marital property.

Id. at 77 (footnote omitted).

132. D.C. CODE § 16-910(a) (Supp. V 1978).

133. *Cf.* *Barriger v. Barriger*, 514 S.W.2d 114, 115 (Ky. 1974) (husband's "profligate dissipation" of marital property was proper basis for including amount so spent in determining parties net worth); *Sanditen v. Sanditen*, 496 P.2d 365, 367 (Okla. 1972) (husband cannot make gifts of marital property without consent or knowledge of wife where such transfer is a fraud upon wife's marital rights). *See also* *Daniels v. Daniels*, 557 S.W.2d 702, 704-05 (Mo. Ct. App. 1977).

134. *Cf. In re Marriage of Wildin*, 563 P.2d 384, 386 (Colo. App. 1977) (spouses' conservation of the principal of an estate is a valuable contribution to be considered in distributing property).

135. *Cf. Lindsay v. Lindsay*, 115 Ariz. App. 322, 565 P.2d 199 (1977) (where husband's gambling resulted in loss of community asset, trial court's failure to award wife amount equal to her share was abuse of discretion); *Neely v. Neely*, 115 Ariz. App. 47, 563 P.2d 302 (1977) (under community property statute court may consider excessive or abnormal expenditures of community funds).

136. D.C. CODE § 16-904(a) (Supp. V. 1978). Adultery and cruelty, however, do remain

may be considered by the court in awarding marital property.¹³⁷ Marital misconduct is not specifically listed in section 16-901(b)¹³⁸ as a factor to be weighed by the court. This omission, however, should not be interpreted as a repudiation of the factor; rather, the omission, when viewed in the context of prior decisional law and the Act's legislative history, can be construed as permitting the court to consider this factor.

It should be noted initially that all versions of section 307 of the UMDA specifically state that marital property shall be distributed "without regard to marital misconduct."¹³⁹ Yet, although the District's Act is modeled after the UMDA,¹⁴⁰ this language was omitted from section 16-910(b). Additionally, several courts have held that absent an express legislative change corresponding to the enactment of "no-fault" grounds for divorce, fault should continue to be a factor in awarding property.¹⁴¹

In *Chapman v. Chapman*,¹⁴² the Court of Appeals of Kentucky was confronted with an analogous situation in construing Kentucky's maintenance statute,¹⁴³ which is modeled after section 308 of the UMDA.¹⁴⁴ Section 308(b) of the UMDA provided for the court to determine the amount of maintenance to be awarded "without regard to marital misconduct."¹⁴⁵ The Kentucky statute, however, did not include this language.¹⁴⁶ Noting that the original bill had contained the "no-fault" language and that it was

grounds for a legal separation. *Id.* § 16-904(b). *See generally* Greene & Long, *supra* note 4, at 475-82.

137. *See* note 83 *supra*. A distinction should be drawn between the factors to be considered for the disposition of property and those to be considered for awarding alimony. The court's powers respecting alimony are in a separate section of the D.C. Code and provide that when a divorce is granted, the court may require a spouse "to pay alimony to the other spouse, if it seems just and proper," D.C. CODE § 16-913 (Supp. V 1978). Although not stated in the statute, marital misconduct, specifically desertion, may be considered by a judge in determining whether to award a spouse alimony. *Kessler v. Kessler*, 397 A.2d 932, 935-36 (D.C. 1979) (citing *Quarles v. Quarles*, 179 F.2d 57 (D.C. Cir. 1947)).

138. D.C. CODE § 16-910(b) (Supp. V 1978). In adopting Maine's new property distribution statute modeled after § 307 of the UMDA, *see* ME. REV. STAT. ANN. tit. 19, § 722-A (Cum. Supp. 1979-1980), the Maine legislature also omitted the UMDA language "without regard to marital misconduct."

139. Uniform Marriage and Divorce Act, § 307, 9A U.L.A. 142-44 (West 1979). *See* *Morse v. Morse*, 571 P.2d 1147, 1149 (Mont. 1977); *Zillert v. Zillert*, 395 A.2d 1152, 1154-55 (Me. 1978).

140. *See* *Hemily v. Hemily*, 403 A.2d at 1143 n.3; Green & Long, *supra* note 4, at 470.

141. *See, e.g.,* *McClelland v. McClelland*, 318 So. 2d 160, 162 (Fla. App. 1975); *Kretzchmar v. Kretzchmar*, 48 Mich. App. 279, 286-89, 210 N.W.2d 352, 356-57 (1973); *In re Marriage of Clark*, 13 Wash. App. 805, 808, 538 P.2d 145, 147 (1975).

142. 498 S.W.2d 134 (Ky. 1973).

143. KY. REV. STAT. § 403.200 (Cum. Supp. 1978).

144. Uniform Marriage and Divorce Act, § 308, 9A U.L.A. 160-61 (West 1979).

145. *Id.*

146. KY. REV. STAT. § 403.200(2) (Cum. Supp. 1978).

deleted before final passage of the statute,¹⁴⁷ the court held that marital misconduct was a factor to be considered in determining the amount of a maintenance award.¹⁴⁸

The contention that marital misconduct should at least be considered by the trial court in awarding property under section 16-910(b) is supported by the Act's legislative history. The Committee on the Judiciary and Criminal Law reported the following to the District of Columbia City Council:

The factors enunciated in new subsection (b) of section 16-910 are not intended to be limitations upon the necessary, broad discretion entrusted to the court in adjusting the property rights of the parties; but rather, a public policy statement of the major factors to be considered. Your committee intends that property distribution decisions be made in the context of a variety of factors and without the existence of any one factor causing automatic forfeiture of property by a party.¹⁴⁹

This commentary demonstrates that the factors listed in section 16-910(b) are neither exclusive nor exhaustive. Moreover, in light of the fact that the committee's model, the UMDA, had expressly rejected any consideration of marital misconduct, the committee's apparently deliberate omission of this language indicates that marital misconduct is a factor the court may consider. Such an interpretation is also consistent with the discretion afforded trial judges in awarding property under the prior statute,¹⁵⁰ and "the judge's broad discretion in allocating this property is unaffected by subsection (b)"¹⁵¹ of the new Act.

IV. CONCLUSION

The Marriage and Divorce Act of 1977 represents an unshackling of the domestic relations law of the District of Columbia from its past view of individually-titled private property. Judges now have extraordinary power to allocate property based on the past efforts of the parties and their future needs. These judges have the ability to be as subjective and attentive to particular circumstances as was Judge Bazelon a generation ago.

With this grant of power comes a word of caution to each of the parties: upon marriage, a partnership is formed, and its interests supersede those of

147. 498 S.W.2d at 137.

148. *Id.* at 138.

149. See Report from Committee on Judiciary and Criminal Law: Bill No. 1-89, District of Columbia Marriage and Divorce Act (June 24, 1976).

150. See notes 45-56 and accompanying text *supra*.

151. *Turpin v. Turpin*, 403 A.2d at 1146.

the individuals. Although section 16-910(a) provides for the protection of certain individual property interests, these exceptions will not be broadened by judicial decision in this jurisdiction.

The 1977 Act reflects a changing societal view of marriage; it provides for the dignity of each party and carries with it no bias favoring the property owner or wage earner. Future decisions on increases and exchanges of separate property should recognize the windfalls of inflation and rapid appreciation of property in this jurisdiction, and examine what both partners were doing when the property was so enhanced. Increases that accrued because the partnership remained sound should belong, in part, to the partnership.

There is no precedent for many of the complex property issues that will arise under the 1977 Act. Yet, this aspect of family law really is not new at all, because this is the situation which Solomon faced. He had the parties' property before him: he had a sword, and all he had to guide him was his wisdom.