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THE ARKANSAS MARITAL PROPERTY STATUTE AND THE  
ARKANSAS APPELLATE COURTS: TIPTOEING TOGETHER  
THROUGH THE TULIPS

*Ora Fred Harris, Jr.\**

I. INTRODUCTION

Displaying an immense discernment of the trying nature of divorce litigation, one commentator astutely made this observation:

The dissolution of a marriage is always a difficult time at best. Perhaps the closest relationship known to man is in the process of being torn apart. Many times the parties are hurt and bitter. Quite often young children are involved. Divorce litigation is almost always a distasteful and painful experience.<sup>1</sup>

Generally, one of the most troublesome and indeed significant determinations made by courts during the course of the emotionally charged divorce process is dividing the property accumulated by the parties during the marriage. Through the years, courts have utilized a variety of approaches to accomplish this task.<sup>2</sup> Some of the methods for distribution of property have been excoriated as being unfair and ineq-

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1. Note, *Property, Maintenance and Child Support Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 559 (1973).

2. Note, *Divorce and the Division of Marital Property in Arkansas—Equal or Equitable?*, 35 ARK. L. REV. 671, 675-76 (1982).

uitable,<sup>3</sup> while others have been extolled.<sup>4</sup>

Similarly, Arkansas' property division laws have enjoyed mixed reviews over the years; the most recent development in this regard is the legislative adoption of the concept of "marital property."<sup>5</sup> Since its enactment in 1979, the Arkansas marital property statute has been the subject of a relatively sizable amount of litigation,<sup>6</sup> some of which has provided much-needed illumination. But some unanswered questions have been spawned as well.<sup>7</sup> And many thorny issues have not been addressed squarely by either the Arkansas Supreme Court or the Arkansas Court of Appeals.<sup>8</sup>

It is the purpose of this article to closely examine the concept of marital property in the context of the Arkansas marital property statute, to synthesize and analyze the interpretative decisions of the Arkansas appellate courts concerning the marital property statute, and to focus upon and provide some insight regarding those questions under the marital property law which remain unanswered. In the course of theorizing about the unresolved and unaddressed aspects of Arkansas marital property law, guidance will be drawn occasionally from the experiences of several sister states that have similarly entered the realm of either presumptive equal or equitable distribution of marital property.

## II. HISTORICAL BACKGROUND

One can reasonably conclude that both presumptive equal and equitable division of marital property statutes have stemmed from a pervasive discontent with common law-based property division statutes.<sup>9</sup> The principal flaw in common law concepts governing distribution of property upon divorce is that judicial inquiry generally focuses upon the situs of title to the marital assets to the exclusion of any consideration of the relative contributions of the marital partners to the acquisi-

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3. See e.g., Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C.L. REV. 761, 788 (1982) (the separate property approach and the equitable distribution system).

4. *Id.* at 788 (the system of fixed rules).

5. 1979 Ark. Acts 705 (subsequently amended by 1981 Ark. Acts 69, 714, 798, and 799 and 1983 Ark. Acts 369).

6. See, e.g., *Forrest v. Forrest*, 279 Ark. 115, 649 S.W.2d 173 (1983); *Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982); and *Belanger v. Belanger*, 276 Ark. 522, 637 S.W.2d 557 (1982).

7. For a discussion of these judicially spawned unanswered questions, see notes *infra* 394-477.

8. A discussion of the difficult, unaddressed questions appears at *infra* notes 275-393.

9. Krauskopf *A Theory For 'Just' Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 167 (1976).

tion of the respective properties.<sup>10</sup> The inequitable results of the common law system are no more painfully evident than when a "shrewd" partner (more frequently the husband) astutely places title to property acquired during the marriage in his name, excluding his homemaker wife.<sup>11</sup> Under the common law system, in view of its relentless search for "title," the property is considered to be separate property of the husband unless the court can impose a constructive trust upon the property or otherwise trace equitable title.<sup>12</sup>

The palpable defect in the common law system is that it fails to regard marriage as a joint undertaking or partnership.<sup>13</sup> Consequently, the system inevitably breeds unfairness and inequity.<sup>14</sup> Against this background, a number of individuals have strongly advocated the adoption of more equitable modes of dividing property incident to divorce.<sup>15</sup>

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10. Note, *Treating Professional Goodwill As Marital Property In Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 556 (1983). Only "[f]ive states - Florida, Mississippi, South Carolina, Virginia, and West Virginia - continue to abide by the common law division of property upon divorce with title usually controlling." *Id.* at 557, n. 21. See also Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089, 1092 (1983) ("Under the traditional common law system . . . , property follows title.") But there does seem to be some recent defections from the group of states subscribing to the common law-based "title" theory of property division. For instance, Virginia appears to have entered the realm of equitable distribution via Va. Code § 20-107.3 (1983). Moreover, Florida, Mississippi, South Carolina, and West Virginia may have done so by way of judicial decision. See, e.g., *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *Reeves v. Reeves*, 410 So. 2d 1300 (Miss. 1982); *Burgess v. Burgess*, 227 S.C. 283, 286 S.E. 2d 142 (1982); and *LaRue v. LaRue*, 304 S.E. 2d 312 (W. Va. 1983). See also Case Comment, *LaRue v. LaRue: Equitable Distribution of Marital Assets Finally Available in West Virginia*, 86 W. VA. L. REV. 251 (1983). These cases "utilize the concept of 'special equity doctrine' which recognizes a spouse's right to equitable considerations where the spouse has made significant contributions, whether as the result of rendering services as a homemaker or otherwise, to the acquisition of property during marriage." Hemingway and Daniel, *Legislative and Judicial Developments Under the Uniformed Services Former Spouses' Protection Act*, THE ARMY LAWYER 1, 8-9 (January 1984). Query: Are the commentators correct in concluding that "there is arguably no state which continues to follow the 'title' scheme of distribution of material assets"? *Id.* at 7.

11. Foster and Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L. Q. 169, 174 (1974).

12. Foster and Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L. Q. 55, 73 (1976).

13. Krauskopf, *supra* note 9, at 167. If one goes back to the earliest days of marital property law in England, it is obvious that the common law has made great strides since then notwithstanding its present shortcomings. As one commentator has observed about the feudal English marital laws: "[m]arriage converted the wife into a legal cipher, or a nonperson." Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equity*, 47 N.Y.U. L. REV. 1033, 1046 (1972).

14. Foster and Freed, *supra* note 11, at 175.

15. See e.g., Johnston, *supra* note 13, at 1057, where the commentator acknowledges the harshness of the common law system. And because of its draconian character, outstanding commentators like Krauskopf, Foster, and Freed have advocated its demise. See *supra* notes 11-13.

One of the most noteworthy efforts in this regard was undertaken by the commissioners who drafted the Uniform Marriage and Divorce Act (hereinafter UMDA).<sup>16</sup> Discussing the commissioners' intent with regard to the UMDA, one writer has aptly noted that "they did want to incorporate the shared enterprise or partnership theory of marriage . . . as a major guiding principle in dividing property at divorce."<sup>17</sup> Hence, they sought a major break from the common law method of distributing property.<sup>18</sup>

In a similar vein, there was also a ground swell of dissatisfaction with the concept of "fault" which frequently permeates the property division issue under common law statutes.<sup>19</sup> Thus, property divisions, based partially upon the misconduct of the marital partners, take on an aura of retribution against the "misbehaving" spouse and a semblance of reward for the "injured" spouse,<sup>20</sup> despite the inexactitude associated with singling out and assigning blame in a domestic relations dispute.<sup>21</sup> Hence, fault-conscious property division statutes tend to ignore a salient objective of a property division: to equitably divide the marital property between the parties.<sup>22</sup>

The UMDA<sup>23</sup> is significant primarily because it incorporates the shared enterprise or partnership theory of marriage into the distribution of property which is a "product" of the marriage.<sup>24</sup> Moreover, as a

*See also* Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROBS. 223, 235 (1939).

16. Note, *supra* note 3, at 761.

17. Krauskopf, *supra* note 9, at 166. The commissioners' ideas were not novel, however. A number of states wanted to infuse more equity into property distribution. *Id.* at 172. *See also* Comment, *supra* note 10, at 1092. ("The majority of states. . . have modified the commonlaw title-based system so as to allow courts to apportion all the property of the divorcing parties.")

18. The equitable distribution of marital property concept promulgated by the commissioners bears some similarity with the community property system. Namely, the partnership theory is fostered by both and hence, the veritable marital expectations of the parties are more likely to be vindicated. Daggett, *supra* note 15, at 234-35.

19. *See e.g.*, Newbern and Johnson, *The Uniform Marriage and Divorce Act: Analysis for Arkansas*, 28 ARK. L. REV. 175, 183-84 (1974), where the commentators criticize the utilization of the concept of fault in our divorce laws, specifically alluding to its prominence in the prior Arkansas property division statute. *See* ARK. STAT. ANN. § 34-1214 (1962) (amended 1981 and 1983).

20. *Id.* at 198.

21. *Id.* at 198, (removal of the fault concept should ameliorate the disharmony associated with property division).

22. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 14.8 (1968).

23. UMDA § 307 (1970), 9A U.L.A. 142 (1979).

24. Krauskopf, *supra* note 9, at 173. ("[T]he court's power to divide property was not extended to all property (including separate property) owned by the spouses because the shared enterprise or partnership theory is inherently applicable only to property acquired during the marriage through the efforts of the spouses.")

corollary, it eliminates marital fault or culpability as a factor in the property division question.<sup>25</sup> The net effect presumably is that property distributions incident to divorce will be more amicable and equitable.<sup>26</sup> More significantly, under the UMDA, a woman is placed on a higher plane, "capable of owning property and contributing her individual capital to the partnership,"<sup>27</sup> whether it is through the nonmonetary contributions of a homemaker or the monetary donations of a breadwinner. Both are of equal importance under the UMDA.<sup>28</sup>

This important departure from the common law by the UMDA signalled to the various common law states that a credible mechanism was indeed available to satisfy their cravings "for more equitable division of family assets."<sup>29</sup> Moreover, the dubious constitutionality of some of the common law-based property statutes in view of the U.S. Supreme Court decision of *Orr v. Orr*<sup>30</sup> was an additional impetus for some states to reform their laws with respect to property division incident to divorce.<sup>31</sup>

The equitable distribution model established by the UMDA has been the polestar for many states who initially subscribed to common law rules.<sup>32</sup> It calls for "marital property" to be equitably divided between the partners of the marriage on the basis of several equitable criteria, specifically excluding marital fault.<sup>33</sup> Note that the UMDA permits "only the division of 'marital property'."<sup>34</sup> The rationale for this limitation is simply that only property which is truly a "product" of the marriage should be subjected to the partnership theory. Stated differently, only that property which is actually a part of the marriage

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25. Note, *supra* note 1, at 560.

26. Newbern and Johnson, *supra* note 19, at 198.

27. Comment, *Division of Marital Property on Divorce: What Does the Court Deem 'Just and Right?'* 19 Hous. L. Rev. 503, 504 (1982). Actually, the commentator was alluding to the Texas system of marital property which has its genesis in the "Spanish ganancial system." The comparison is appropriate because its principle underpinning is the theory of "equality or partnership" between the spouses which underlies the UMDA and is at variance with the common law.

28. See, e.g., Note, *supra* note 2 at 688-89.

29. Krauskopf, *supra* note 9, at 172.

30. 440 U.S. 268 (1979).

31. Note, *supra* note 2, at 677, ("[B]y implication, the Court held other gender-based statutes unacceptable.")

32. New York, Delaware, Kentucky, Missouri, and Maine are examples of states which have adopted the concept of equitable distribution of marital property.

33. Actually, these equitable standards are to be applied by the court only in the specific instance when the parties are unable to arrive at property settlement or when an agreement is reached but is later found by the court to be unconscionable and hence totally unacceptable. O'Connell, *Marriage, Divorce, and the Uniform Marriage and Divorce Act*, 17 N.Y.L.F. 983, 1015 (1972).

34. Krauskopf, *supra* note 9, at 173.

partnership "pie" should be distributed in a manner akin to the dissolution of a business partnership.<sup>35</sup>

Some disagree as to whether the concept of equitable distribution of marital property better promotes the partnership theory of marriage. In fact, one commentator has assailed the equitable distribution approach to property division as being too costly, cumbersome, and non-productive, while placing his imprimatur upon a system grounded upon the fixed rule of a presumption of an equal division.<sup>36</sup> It is not known whether the commissioners seriously considered the presumptive equal division of marital property approach; it is fairly clear, however, that they found automatic equal distribution to be unpalatable.<sup>37</sup> To date, only three states seem to have embraced the presumption of equal distribution concept.<sup>38</sup> Even in these states, an equitable distribution is made on the basis of criteria strikingly similar to those enumerated in the UMDA when an equal distribution is deemed to be inequitable.<sup>39</sup>

Whether the distribution is characterized as equitable or equal, the policy underpinnings for eschewing the common law approach are present. That is, marriage is viewed as a partnership in which the contributions of each spouse, whether monetary or not, should be considered.<sup>40</sup> Moreover, the property disposition should be designed to make each party financially independent without punishing either.<sup>41</sup> These cornerstones of both the presumptive equal and equitable distribution of marital property statutes clearly distinguish them from their common-law-based counterparts and, in turn, make them more appealing to the states.<sup>42</sup> Those states adopting either the system of presumptive equal or equitable distribution of marital property are simply adhering to this clarion call: "At a minimum, a state retaining the common-law

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35. See Foster, *Commentary on Equitable Distribution*, 26 N.Y. L. SCH. L. REV. 1, 9-10 (1981); Note, *supra* note 2, at 689; Krauskopf, *supra* note 9, at 173.

36. Note, *supra* note 3, at 788.

37. It has been noted that "[t]he Commissioners deemed the most socially important consideration the economic dependency or self-sufficiency of the spouses. An automatic equal division of property would ignore that factor entirely." Krauskopf, *supra* note 9, at 175.

38. Arkansas (ARK. STAT. ANN. § 34-1214 (Supp. 1983)), Wisconsin (WIS. STAT. ANN. § 767.255 (West 1981)), and North Carolina, (N.C. GEN. STAT. § 50-20(c) (Supp. 1983)) have adopted the presumptive equal distribution of marital property system. Under this system, the marital property is divided equally unless said division would be inequitable. If so, then the court effectuates an equitable division in light of the enumerated equitable criteria.

39. See, e.g., ARK. STAT. ANN. § 34-1214(A)(1) (Supp. 1983).

40. Note, *supra* note 2, at 689.

41. *Id.* at 676.

42. Approximately "forty common-law states" have adopted either presumptive equal or equitable distribution of marital property statutes. Freed and Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L. Q. 229, 250 (1981).

system should grant equitable discretion to divorce courts to distribute and divide property, however title is held, as equity and justice require."<sup>43</sup>

### III. COMPARATIVE STUDY

The need to find an appropriate method for dividing the property of a marriage at divorce is perhaps more important today than at any other time in history in view of the current pervasiveness of divorce.<sup>44</sup> Yet, a totally palatable solution still seems to elude almost everyone involved with the problem.<sup>45</sup> To date, states are roughly divided along the lines of either the community property system, the separate common-law property system, equitable distribution, or the fixed rules system.<sup>46</sup>

The community property system has been commended as representing "the soundest and most equitable base of all systems."<sup>47</sup> Perhaps the most appealing feature of the community property theory is its perception of marital assets as an economic partnership.<sup>48</sup> Consequently, in a community property state, the community assets are commonly divided equally between the parties,<sup>49</sup> thereby producing some degree of certainty and equity in the divorce settlement.<sup>50</sup> This salient feature has evoked this comment: "The true community or partnership idea of the assets of the spouses accumulated by their joint efforts seems a practical and simple method of giving each a sense of security, reward, accomplishment, and justice."<sup>51</sup>

But the idea of marriage as a partnership or joint enterprise not only underlies the community property system, it is likewise, as previously noted, an underpinning of equitable, and necessarily equal, distribution of marital property as well.<sup>52</sup>

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43. Foster and Freed, *supra* note 12, at 59.

44. Note, *supra* note 3, at 761.

45. *Id.* at 761.

46. *Id.* at 788.

47. Daggett, *supra* note 15, at 230.

48. *Id.* at 234-35.

49. Foster and Freed, *supra* note 11, at 170. But in some community property states, an equitable distribution of the community assets is authorized. See Freed and Foster, *supra* note 42, at 249. (In Arizona, Idaho, Nevada, Puerto Rico, Texas, and Washington, "there is an equitable distribution.")

50. Daggett, *supra* note 15, at 230-31. The commentator perceives the element of certainty arising from a rule of equal division as a significant feature of the community property model which is worthy of emulation. *Id.* at 230-31.

51. *Id.* at 234-35.

52. Note, *supra* note 3, at 761-71.



With a growing number of common-law states now moving to the realm of either presumptive equal or equitable distribution of marital property, there has developed a corresponding sensitivity among the courts to enhance the status "of the propertyless housewife" and to "give recognition to the notion of marriage as a partnership."<sup>53</sup> A comparative study of these jurisdictions reveals some interesting similarities and distinctions. For example, a significant number of formerly common-law distribution states now consider a spouse's contributions as a homemaker in the acquisition of the marital assets to arrive at an appropriate property distribution.<sup>54</sup> Moreover, many of these states have marital property statutes which specifically list a number of equitable criteria for the courts to consider in fashioning an equitable distribution of the marital property.<sup>55</sup> And although there is some divergence of opinion, there seems to be movement in the direction where states are no longer considering the marital misconduct of the parties in connection with the property distribution determination.<sup>56</sup> It is evident that these actions are consistent with a growing "concern for more equitable division of family assets."<sup>57</sup>

### III. THE ARKANSAS MARITAL PROPERTY DIVISION STATUTE

#### A. *Historical Background*

In Arkansas, interest in a fairer and more equitable division of the property accumulated during the marriage at divorce mushroomed to a high level in the case of *McNew v. McNew*.<sup>58</sup> In *McNew*, Associate Justice Hickman, in a dissenting opinion, raised the conscience level of the populace when he stated: "Parties marry, share their love, lives, fortune and misfortunes. *In divorce they should share equally the*

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53. *Id.* at 769.

54. Freed and Foster, *supra* note 42, at 246. The commentators list a total of 28 states, including Arkansas, which elevate the homemaker's status.

55. *Id.* at 247. The commentators enumerate 31 states as having adopted some specific criteria which are balanced to make the property division.

56. *Id.* at 247-48. Views concerning the utility of marital fault in the context of property division are as diverse as (1) excluded, expressly or implicitly (Arkansas), (2) permitted as a discretionary factor, and (3) considered in regard to "economic misconduct" in the sense of squandering the marital assets, etc. *Id.* at 248.

Of course, in those states that subscribe to the community property method of distribution, variation in treatment likewise exists in regard to the consideration of marital fault—some say "yes" and some say "no". *Id.* at 249.

57. Krauskopf, *supra* note 9, at 172.

58. 262 Ark. 567, 559 S.W.2d 155 (1977).

*property they have accumulated during their marriage. Anything less is obviously unfair.*"<sup>59</sup>

Justice Hickman's comment was actually part of a broad, scathing indictment of the then Arkansas property division statute<sup>60</sup> because of its inherent tendency to spawn unfairness, inequity, and disharmony between the spouses of the marriage.<sup>61</sup>

To fully appreciate Justice Hickman's insightful criticism, one must understand the exact nature of the property division system which was embodied in the former statute. Of great importance in this regard is the fact that fault and gender were the two principal underpinnings of the statute.<sup>62</sup> Fault was a significant factor, for if the wife were awarded the divorce because she was the injured party, then the court was required to award her one-third of the husband's personal property absolutely and one-third of his realty for life.<sup>63</sup> And the statute was gender-based to the extent that it contained no reciprocal provision for an injured husband to take of his wife's property.<sup>64</sup> Commenting upon the absurdity of these deficiencies under the facts of *McNew*, Justice Hickman stated: "The chancellor could not have awarded the husband any of the wife's property, according to Arkansas law, and had to award the wife property simply because she was granted the divorce. Therein lies the obvious inequity and discrimination."<sup>65</sup>

Some have theorized that this patent gender-based disparity in treatment in regard to property division by the predecessor statute had its genesis in the "traditional common-law view of the husband's duty to support."<sup>66</sup> But this common-law-based disparate treatment has undergone some exacting scrutiny and questioning in view of current soci-

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59. 262 Ark. at 574, 559 S.W.2d at 159 (emphasis added). The majority opinion did not critically examine the propriety of the statute in view of its finding that the plaintiff was not entitled to a divorce because of inadequate corroboration.

60. ARK. STAT. ANN. § 34-1214 (1962) (amended 1981 and 1983).

61. The statute's appropriateness had been questioned earlier by commentators. See, e.g., Newbern and Johnson, *supra* note 19, at 198, and Mobley, *The Arkansas Divorce—Do We Have Problems?*, 23 ARK. L. REV. 601, 618 (1970).

62. Newbern and Johnson, *supra* note 19, at 183-84. Although the old general property statute mandated that the division of property be predicated upon fault and gender, tenancy by the entirety property was subject to equal division under ARK. STAT. ANN. 34-1215 (Supp. 1983). See *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813, 815 (1981).

63. Curiously, if both the husband and wife were at fault, then the court had the liberty to appropriately reduce the wife's statutory award. See *Narisi v. Narisi*, 233 Ark. 525, 345 S.W.2d 620 (1961) and *Alexander v. Alexander*, 227 Ark. 938, 302 S.W.2d 781 (1957).

64. ARK. STAT. ANN. § 34-1214 (1962) (amended 1981 and 1983).

65. *McNew v. McNew*, 262 Ark. at 573, 599 S.W.2d at 159.

66. Note, *Constitutionality of Arkansas Property Settlement and Alimony Statutes. McNew v. McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977), 2 UALR L.J. 123, 131-32 (1979).

etal conditions.<sup>67</sup>

For instance, in *Orr v. Orr*,<sup>68</sup> the United States Supreme Court expressed its dissatisfaction with a gender-based alimony statute which contained a provision for awarding alimony to the wife but had no reciprocal provision authorizing an award to the husband. The Court spurned Alabama's alimony statute as it was written and insisted that Alabama act in a gender-neutral fashion by either abolishing alimony completely or making it available equally to both men and women.<sup>69</sup> Although *Orr* was limited specifically to the question of gender-based alimony statutes, it can be read broadly to cast a shadow of doubt over the constitutionality of all gender-based statutes, including those regulating property division incident to divorce.<sup>70</sup>

Here again, much earlier in *McNew*, Justice Hickman had already concluded unequivocally that the predecessor Arkansas property division statute was constitutionally infirm<sup>71</sup> and had exhorted the Arkansas legislature to take necessary remedial action to rectify the situation.<sup>72</sup>

Later, the Arkansas General Assembly, clearly heeding Justice Hickman's charge, enacted Act 705 of 1979. Its avowed purpose was to eliminate all the apparent constitutional imperfections which plagued the predecessor legislation.<sup>73</sup>

67. Mobley, *supra* note 61, at 618. ("[d]o we need to revise our present laws as to . . . property division in view of the emancipation of women, the wage and hour law, federal and state income taxes and social security taxes?").

68. 440 U.S. 268 (1979).

69. Note, *supra* note 2, at 677.

70. *Id.*

71. *McNew v. McNew*, 262 Ark. at 573, 559 S.W.2d at 159. ("The Arkansas law regarding property was enacted before the turn of the century and can no longer be defended historically or legally with any confidence. *It clearly violates the Equal Protection Clauses of the Arkansas and U.S. Constitutions.* . . .") (emphasis added).

72. *Id.* at 574, 559 S.W.2d at 159. Justice Hickman expressed his views forthrightly by declaring that "[i]t would certainly be best if the legislature reviewed and revamped these laws so that they would not only meet constitutional tests but also be more suitable in assisting people to resolve their domestic disputes."

73. 1979 Ark. Acts 705. In its pertinent part, section 7 of the Act states:

It is hereby found and determined by the General Assembly that in a dissenting opinion in the recent case of *McNew v. McNew*, 262 Ark. 576 (1977), regarding Ark. Stat. Ann. Section 34-1214, a justice of the Arkansas Supreme Court said that 'The Arkansas law regarding property was enacted before the turn of the century and can no longer be defended historically or legally with any confidence' and that 'it clearly violates the Equal Protection Clauses of the Arkansas and United States Constitutions'; that in the majority opinion in that same case the Court did not decide this issue, stating 'We will not decide constitutional issues unless their determination is essential to the disposition of the case', and holding that this issue of property division at the time of a divorce action was not properly before it; that a decision holding that Ark.

**B. Act 705 of 1979: A Clear Expression of Legislative Reform**

The Arkansas legislature took one giant leap toward divorce reform when it enacted a new marital property statute for Arkansas in 1979.<sup>74</sup> Gone hopefully are the days of rank inequity and disparate treatment with respect to property distribution at divorce; Act 705's underlying thesis "is that 'marital property' belongs to the parties jointly."<sup>75</sup> In fact, the statute adopts essentially the partnership theory of marriage.<sup>76</sup> This is graphically illustrated by the fact that the apparent "starting point" of the statute is to equally divide the marital property.<sup>77</sup> More precisely, the Act seems to create a statutory presumption that there should be an equal division of the marital property unless such a division would be inequitable.<sup>78</sup> In that event, the court is then authorized to make an equitable distribution of the marital property in view of the equitable criteria enumerated in the Act.<sup>79</sup> Initially, the stated criteria were: "(1) the length of the marriage; (2) age, health and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation or appreciation of marital prop-

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Ann. Section 34-1214 is unconstitutional would create chaos in all divorce actions then pending in Arkansas courts until such time as the Arkansas General Assembly could enact legislation to cover this subject; and that this Act is designed to correct and clarify the law on this subject . . . .

The motivations underlying the legislative enactment of Act 705 have been recognized subsequently by the Arkansas Supreme Court in *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813, 815 (1981) ("The reasons for the amendment of § 34-1214 (Repl. 1962) by Act 705 of 1979 are obvious. Public caveats on the infirmities of the old statute were given.") and by commentators as well. See, e.g., Note, *supra* note 2, at 681.

74. 1979 Ark. Acts 705 (Now codified at ARK. STAT. ANN. § 34-1214 (Supp. 1983), as subsequently amended.

75. Note, *supra* note 2, at 688.

76. *Id.* at 689.

77. See Krauskopf, *supra* note 9, at 177, where Professor Krauskopf theorizes that an equal division threshold is an optimum method for augmenting the value and importance of the partnership theory.

78. 1979 Ark. Acts 705. Act 705's net effect has been aptly described by two commentators as follows: "In Arkansas, marital property is divided equally unless the court determines this inequitable, in which event the courts resort to equitable distribution under criteria specified in the statute." Freed and Foster, *supra* note 42, at 251.

79. 1979 Ark. Acts 705. One commentator has speculated that a departure from an equal division is countenanced only in the instance of "demonstrable special circumstances." Note, *supra* note 2, at 689. This supports clearly the view expressed several years ago that an equitable distribution is not always an equal one. See Daggett, *supra* note 15, at 228.

erty, including services as a homemaker."<sup>80</sup> The final equitable criterion in the 1979 version of the marital property statute—the contributions of a homemaker, both nonmonetary and monetary—is one of the most widely applauded features of the Arkansas law<sup>81</sup> and several other presumptive equal and equitable distribution of marital property statutes as well.<sup>82</sup>

Under the 1979 statute, if the court made an unequal distribution of the marital property between the parties, the reasons for this unequal division had to be explicated in writing by the court.<sup>83</sup> Failure to comply with this requirement has surfaced as an issue in several Arkansas cases,<sup>84</sup> suggesting the preeminent status of an equal division of marital property at divorce in Arkansas. But this presumption in favor of an equal division of marital property has not escaped criticism. For example, Professor Henry Foster perceives the presumption as providing a mechanism whereby judges can simply "cop out" by utilizing it "to avoid the difficult weighing and balancing process the case may deserve."<sup>85</sup> When one considers Professor Foster's misgivings in conjunction with Act 705's original requirement that the equitable basis for making an unequal division be reduced to writing by the chancellor, it is fairly obvious that the presumption might serve as a haven from an otherwise time-consuming, complex judicial task.<sup>86</sup>

Another prominent feature of Act 705 deals with the critical question of defining marital property for purposes of the Act. As a general rule, only property coming under the rubric of "marital property" is subject to division by the court at divorce under Act 705.<sup>87</sup> But, in a rather obscure provision, the statute does authorize courts, in special circumstances, to equitably divide property that the parties owned prior to the marriage.<sup>88</sup> Apart from this rather narrow exception, however,

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80. 1979 Ark. Acts 705. These equitable criteria bear a strong resemblance "to those employed by other equitable distribution states." Note, *supra* note 2, at 681.

81. Note, *supra* note 2, at 689.

82. For a listing of states recognizing the contributions of a homemaker see Freed and Foster, *supra* note 42, at 246.

83. 1979 Ark. Acts 705.

84. See, e.g., Noble v. Noble, 270 Ark. 602, 605-06, 605 S.W.2d 453, 455 (1980); Davis v. Davis, 270 Ark. 180, 183-84, 603 S.W.2d 900, 402-03 (Ark. App. 1980).

85. Foster, *supra* note 35, at 31-32.

86. For a discussion of the potential impact of the elimination of the "in writing" requirement as it relates to an unequal division of marital property, see *infra* notes 95-96 and accompanying text.

87. This rule is basically consistent with the underlying premise of the UMDA and statutes modeled after it. That is, only property in the "kitty" should be subject to equitable distribution. Address by DuCanto, Annual Arkansas Federal Tax Institute (Nov. 1981).

88. The "special circumstances" which must be demonstrated are the equitable distribution

only "marital property," defined as follows, is subject to the chancellor's discretion: "All property acquired subsequent to the marriage except (1) Property acquired by gift, bequest, devise or descent; (2) Property acquired in exchange for property acquired prior to 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;<sup>89</sup> (4) Property excluded by valid agreement of the parties; and (5) The increase in value of property acquired prior to marriage."<sup>90</sup>

However, the Arkansas General Assembly has not become complacent since enacting Act 705. When the legislature convened in 1981, some refinements, although not in wholesale amounts, were made to the statute. One amendment concerned the requirement that the court explain its basis for making an unequal division of the marital property. As observed earlier, Act 705 established a requirement that the court do this *in writing*.<sup>91</sup> However, in 1981, the legislature modified this requirement;<sup>92</sup> the 1981 amendment simply requires that "such basis and reasons should be recited in the order entered in said matter."<sup>93</sup> Moreover, a ninth equitable criterion—"the federal income tax consequences of the court's division of property"—was adopted for the court to consider in making an equitable, albeit unequal, division of the marital property.<sup>94</sup> Finally, the General Assembly passed an amendatory provi-

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criteria enumerated in the Act. Moreover, the statute exacts a requirement that the court "state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage." ARK. STAT. ANN. § 34-1214(A)(2) (Supp. 1983). See also Williford v. Williford, 280 Ark. 71, 655 S.W.2d 398, 401 (1983).

89. This exception to the marital property law has been subsequently amended to substitute "divorce from bed and board" in place of "legal separation." See 1981 Ark. Acts 799.

90. 1979 Ark. Acts 705. Generally, the exception to the marital law in Arkansas embrace property which cannot be characterized as a "product" of the marriage. A notable exception to this generalization is exception number 4 (property excluded by valid agreement of the parties); here again, the statute is consistent with the UMDA in allowing the parties to opt out of the realm of marital property if they so desire, provided their agreement is fair, reasonable, and conscionable. See UMDA §§ 306 and 307.

91. See *supra* notes 83-84.

92. 1981 Ark. Acts 69. A very recent case involving the statutory requirement of a court stating the reasons for making an unequal division of marital property is *Duncan v. Duncan*, 11 Ark. App. 25, 665 S.W.2d 893 (1984). In this case, a chancellor, who seems to have inadvertently departed from the equal division mandate, committed reversible error by failing to state "specific reasons for not equally dividing the parties' marital savings." 665 S.W.2d at 895.

93. 1981 Ark. Acts 69. The exigent circumstances that prompted the legislative amendment are graphically stated in the Act's emergency clause and reads as follows: "[t]he requirement that such basis and reasons be stated in writing in all such cases results in unreasonable delays in such proceedings and in inconvenience to the parties and to the courts; . . . this Act is designed to permit the court to orally state the basis and reasons for such division of property and should be given effect immediately."

94. 1981 Ark. Acts 798. The primary purposes of this amendment were to insure that the

sion which deleted the “[p]roperty acquired by a spouse after a decree of legal separation” exception to the marital property law and substituted “[p]roperty acquired by a spouse after a decree of divorce from bed and board” as the exception.<sup>95</sup>

An accurate assessment of the impact of the aforementioned changes in view of available data is difficult, if not impossible. Perhaps with the passage of time, definite effects, both positive and negative, will become evident. Dispensing with the “in writing” requirement, although a timesaving measure, may be improvident in that it relieves the chancellor from having to engage in a trenchant analysis, weighing and balancing the stated equitable criteria in the statute; this deficiency is not remedied by mandating that the basis and reasons for the unequal division be “recited in the order”, which is generally prepared by an attorney of record, simply trying to reduce to writing the reasons previously articulated orally by the chancellor. Regarding the insertion of the federal income tax consequences factor into the realm of consideration, this seems to be a significant improvement. It seems perfectly reasonable that the effect on the value of the settlement by the federal income tax consequences of the division should be considered.<sup>96</sup> And lastly, the substitution of “divorce from bed and board” for “legal separation” as an exception to the marital property law seems to be consistent with the current state of Arkansas law.

Following this well established pattern of fine-tuning periodically the marital property statute to augment the probability that the court will proceed in an equitable manner in regard to division of property, the General Assembly in the 1983 legislative session added a provision dealing with the distribution of marital property in the form of stocks, bonds, or other securities. The amendment provides:

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dramatic effect of the tax ramifications of divorce would be judicially considered and that the parties would be made aware “of the potential impact of federal income taxes upon property divisions.” (Emergency Clause).

95. 1981 Ark. Acts 799. The principal rationalization for this change is outlined in the emergency clause as being the nonexistence of a legal basis for a decree of legal separation in Arkansas, coupled with the current understanding that a divorce from bed and board is now recognized as a separate and distinct cause of action from absolute divorce, both of which are subject to the provisions of the general marital property division statute. *See, e.g.,* Forrest v. Forrest, 279 Ark. 115, 649 S.W.2d 173 (1983) and Spencer v. Spencer, 275 Ark. 112, 627 S.W.2d 550 (1982).

96. The perplexing question with regard to the federal income tax equitable criterion is what does it mean in view of the virtual total absence of cases on this issue. In *Stout v. Stout*, 4 Ark. App. 266, 273, 630 S.W.2d 53, 57 (1982), the Arkansas Court of Appeals merely tangentially addressed the question and decided that the “contribution” toward the “acquisition, preservation or appreciation of marital property” equitable distribution criterion justified the unequal distribution of the marital property.

When stocks, bonds or other securities issued by a corporation, association or government entity makes up part of the marital property, the court shall designate in its final order or judgment the specific property in securities to which each party is entitled, or after determining the fair market value of the securities may order and adjudge that the securities be distributed to one party on condition that one-half [½] the fair market value of the securities in money or other property be set aside and distributed to the other party in lieu of division and distribution of the securities.<sup>97</sup>

The apparent goal of this amendment is to clarify, facilitate, and, in turn, foster the fair and equitable distribution of "corporate stock and other securities in divorce proceedings."<sup>98</sup> Achieving these objectives is undoubtedly congruent with the underlying purposes of the seminal statute: Act 705 of 1979.

#### IV. SOME TROUBLESOME AREAS WITHIN THE REALM OF MARITAL PROPERTY DIVISION STATUTES

Total bliss has yet to be experienced in every facet of either presumptive equal or equitable distribution of marital property. In fact, it has been exceedingly difficult to apply these concepts in some distinct areas.

##### A. *Pension Rights*

Because "[f]or many families, the right to receive retirement benefits may constitute the principal, if not the only, substantial family asset,"<sup>99</sup> it is essential that these assets be properly classified, appraised, and allocated to insure their appropriate apportionment upon dissolution of the marriage.<sup>100</sup> As a practical matter, in view of the complexity

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97. 1983 Ark. Acts 369. [Codified currently at ARK. STAT. ANN. § 34-1214(A)(4) (Supp. 1983)].

98. *Id.* (Emergency Clause).

99. Bonavich, *Allocation of Private Pension Benefits As Property in Illinois Divorce Proceedings*, 29 DEPAUL L. REV. 1,4 (1979).

100. Basically, the normal mode of analysis for pension benefits divisibility issues in marital property distribution cases focuses upon these questions: (1) Are the pension or retirement rights "property" under the local marital property statute? (2) What value does one assign to these rights, if they are indeed capable of being characterized as "property?" and (3) How should these valuable property rights, if this should be the determination, be distributed to the parties to the marriage in a fair and equitable manner? *Id.* at 1-2.

With respect to federal governmental pension benefits payable under a federal statute which restricts—expressly or impliedly—the alienation or assignment of the pension, the additional consideration of the federal preemption of state family property law arises. Similarly, federal preemption questions concerning private pensions subject to the regulatory provisions of ERISA (Em-



involved with pension determinations, it is often advisable that an attorney who is inexperienced in the area seek the succor of "an actuary as well as an attorney knowledgeable in the pension field."<sup>101</sup>

Even with expert advice, however, questions concerning the treatment of pension rights under state marital property laws<sup>102</sup> are not generally susceptible to a facile solution. Judicial decisions vary as to whether a pension is "property" within the meaning of the marital property division statutes or is simply a mere expectancy. These diverse views seems to hinge upon whether the particular pension benefit is "vested and nonmatured", "nonvested and nonmatured", or "vested and matured."<sup>103</sup>

Quite often, if the pension benefit has "vested", then it is characterized as "property" subject to division under the relevant presumptive equal or equitable distribution of marital property statute.<sup>104</sup> In fact,

ployee Retirement Income Security Act), e.g., 29 U.S.C. § 1056(d)(1) (1976), can arise, at least theoretically because of the palpable restriction upon the alienation and assignment of pension plans subject to the Act. For an in-depth discussion of these preemption issues, see *infra* notes 129-142.

101. Bonovich, *supra* note 99, at 31. As one commentator has so aptly observed: Since pension plans are individualized, the terms vary greatly. A working knowledge of the terms of the pension plan as well as the applicable law is necessary in order to determine whether benefits are subject to equitable distribution. Note, *Pensions: After Mey v. Mey, When Are They Property Subject to Equitable Distribution Upon Divorce in New Jersey?*, 12 RUTGERS L. J. 261, 262 (1980).

A potentially negative consequence of the complexity associated with the issue of pensions as marital property is that expert testimony may not be affordable by parties of low or "modest" incomes. See Note, *Pension Rights As Marital Property: A Flexible Approach*, 48 MO. L. REV. 245, 254 n.60 (1983).

102. The situation in community property jurisdictions is generally much more congruent. The community property states are Arizona, California, Idaho, Louisiana, New Mexico, Texas, and Washington. Note, *Pension Rights As Marital Property: A Flexible Approach*, *supra* note 101, at 247 n.14, and Nevada, *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371, 1374 n.2. (1981). There seems to be a virtual consensus among these states that pension rights are divisible as community property upon the dissolution of the marital relationship. For some of the community property states, this reasoning has been applied uniformly to all pension plans, both vested and nonvested. See, e.g., *Van Loan v. Van Loan*, 116 Ariz. 272, —, 569 P.2d 214, 216 (1977) (a property right is acquired upon the performance of the contract, irrespective of whether the pension is vested or nonvested); *In re Marriage of Brown*, 15 Cal. 3d 838, —, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976) (pension rights which arise during marriage are property "whether or not vested.") *Sims v. Sims*, 358 So.2d 919, 921 (La. 1978); *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978) (vested, unmaturing pension rights); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976) (nonvested pension rights are more than mere expectancies; "such rights prior to accrual and maturity constitute a contingent interest in property and a community asset. . . ."); and *In re Marriage of Jacobs*, 20 Wash. App. 212, 579 P.2d 1023, 1024-25 (1978).

103. See Note, *Pension Rights As Marital Property: A Flexible Approach*, *supra* note 101, at 248, where the various forms of pension rights which may exist during the course of employment are discussed.

104. Note, *Pensions: After Mey v. Mey, When Are They Property Subject to Equitable*

this treatment has been consistently afforded to vested pension plans, whether matured or nonmatured.<sup>106</sup> But some apparent qualifications may exist in regard to the foregoing general principles. For instance, some presumptive equal and equitable distribution of marital property states have categorically refused to classify military pension benefits as "property" subject to division. However, upon close examination, it appears that the common denominator of these decisions has been that the military pensions were deemed not to have vested.<sup>106</sup> Even so, some presumptive equal and equitable distribution states have discounted the "vested" limitation as to divisible pension rights and have held that a pension benefit, whether vested or not, "constitutes marital property within the marital property statute."<sup>107</sup> Although this represents a distinctly minority view,<sup>108</sup> a cogent argument can be and has been made that the accrual of benefits, not vesting, is the critical point that a property interest comes into existence<sup>109</sup> and that the touchstone for ascertaining whether a pension right is marital property is "whether the [interest was] 'acquired' during the marriage."<sup>110</sup> Although there may be a few maverick jurisdictions, it appears that, in the vast majority of cases, only a vested pension benefit has qualified as divisible marital property upon divorce.

Quite frankly, the "property vs. mere expectancy" issue may not

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*Distribution Upon Divorce in New Jersey?*, *supra* note 101, at 261. The commentator notes that marital property states generally restrict marital property subject to equitable division treatment to those pensions that have vested.

105. See, e.g., *Kuchta v. Kuchta*, 636 S.W.2d 663, 666 (Mo. 1982) (vested, nonmatured pension rights may be considered as marital property). See also Note, *Vested But Unmatured Pensions As Marital Property: Inherent Valuation, Allocation and Distribution Problems in Equitable Distribution*, 14 RUTGERS L. J. 175 n.2 (1982) for a catalog of cases subscribing to the same views as *Kuchta*.

106. See, e.g., *Cochran v. Cochran*, 7 Ark. Ct. App. 146, 644 S.W.2d 635 (1983) (reaffirmed the previously established principle that military retirement pay is not marital property).

107. See, e.g., *Ohm v. Ohm*, 49 Md. App. 392, —, 431 A.2d 1371, 1375 (1981). See also *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235, 238 n.3 (1978), where the Wisconsin Supreme Court, in dictum, intimated that non-vested pension rights were cognizable property rights subject to division under the Wisconsin marital property statute; *Thompson v. Thompson*, 438 A.2d 839 (Conn. 1981); *In Re Marriage of Laster*, 643 P.2d 597 (Mont. 1982); *Linson v. Linson*, 618 P.2d 748 (Hawaii Ct. App. 1980); *In Re Marriage of Bevers*, 326 N.W.2d 896 (Iowa 1982); *Dewan v. Dewan*, 455 N.E.2d 1236 (Mass. App. 1983); *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983); *Damiano v. Damiano*, 463 N.Y.S.2d 477 (A.D. 1983) and *Leighton v. Leighton*, 261 N.W.2d 457 (Wisc. 1978).

108. See, e.g., *In Re Marriage of Camarata*, 602 P.2d 907 (Colo. App. 1979); *Walker v. Walker*, 631 S.W.2d 68 (Mo. App. 1981); *Irwin v. Irwin*, 406 N.E.2d 317 (Ind. App. 1980), and *Miller v. Miller*, 269 N.W.2d 264 (Mich. App. 1978), where the courts have refused to recognize that a nonvested pension is marital property.

109. *Bonavich*, *supra* note 99, at 26.

110. *Id.*

be as difficult conceptually as the tasks of ascertaining the value of the pension rights and then effectuating a fair and equitable allocation of them between the spouses to the marriage.<sup>111</sup> This responsibility is grounded upon the generally accepted principle that "a trial court must consider values in making property distributions."<sup>112</sup>

In determining the value of a pension right which comes under the rubric of "marital property," although the employee spouse may have no present right of access to the monetary benefits of the plan,<sup>113</sup> courts are assigned the extremely difficult and highly speculative responsibility of determining, with a reasonable degree of exactness,<sup>114</sup> the present value of a prospective interest which may never come into existence. This is undoubtedly the case in regard to vested or even nonvested plans, for that matter, which are nonmatured.<sup>115</sup>

A variety of valuation methods have been discussed and proposed in the cases.<sup>116</sup> One of the more penetrating analyses appears in *Bloomer v. Bloomer*,<sup>117</sup> where the Wisconsin Supreme Court discussed three alternative modes of valuation and distribution: (1) The court can award the nonemployee-spouse an "appropriate" portion of the employee-spouse's interest in the plan.<sup>118</sup> This simply means that in the case of a vested, but nonmatured, contributory plan the nonemployee-

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111. See, e.g., *Shill v. Shill*, 100 Idaho 433, \_\_\_, 599 P.2d 1004, 1008 (1979) ("The more difficult problem. . . is not deciding whether. . . the marital community has a property interest in the pension subject to division upon divorce, but in valuing and dividing that contingent interest.") Although *Shill* arose in a community property context, similar problems plague presumptive equal and equitable distribution of marital property states as well.

112. *Flach v. Flach*, 645 S.W.2d 718, 720 (Mo. App. 1982). However, the Missouri Court of Appeals placed a gloss upon the general rule by reasoning that a trial court was "not required to specifically enumerate the values, unless requested to do so by a party." *Id.* at 720.

In agreement with *Flach*, see *Dardick v. Dardick*, 10 Fam. L. Rep. 1435 (1984), a decision of the Missouri Supreme Court, where it was noted that this view was congruent "with the weight of authority from other jurisdictions which, like Missouri, have modeled their property distribution statutes on the Uniform Marriage and Divorce Act." *Id.* at 1436.

113. These benefits generally fall into the category of "vested, but nonmatured" pension rights. See Note, *supra* note 105, at 181.

114. Greater mathematical precision is generally required in community property jurisdictions that mandate an equal distribution and in marital property states which adhere to the concept of a presumption of an equal distribution. See Note, *supra* note 101, at 252. However, in equitable distribution of marital property states, the court's responsibility is to simply carve out a division that is fair and equitable, and not necessarily equal. *Id.* at 252.

115. See, e.g., *Bloomer v. Bloomer*, 84 Wis.2d at \_\_\_, 267 N.W.2d at 238 ("The problem of valuing prospective benefits under a pension plan is frequently exacerbated by the fact that unmatured rights may be terminated by death, discharge, or other contingencies.").

116. *Id.* at \_\_\_, 267 N.W.2d at 238-39.

117. 84 Wis.2d 124, 267 N.W.2d 235 (1978). See also *Ohm v. Ohm*, 49 Md. App. 392, \_\_\_, 431 A.2d 1371, 1377 (1981) for a good discussion of valuation and division.

118. *Bloomer v. Bloomer*, 84 Wis.2d at \_\_\_, 267 N.W.2d at 241.

spouse will be entitled to a portion of the amount which the employee-spouse has actually contributed to the plan, plus interest.<sup>119</sup> On the other hand, if the pension plan were noncontributory and had not matured, the employee-spouse would have no divisible interest in the plan; (2) The court can simply award the present value of the prospective pension benefits upon vesting.<sup>120</sup> Unquestionably, this is replete with speculation and conjecture and requires precise calculations as to the discount factor to be used to reduce this future benefit to its present value;<sup>121</sup> or (3) The court can simply award the nonemployee-spouse a fixed percentage of the future pension—whatever it may be—when it is actually paid to the employee-spouse.<sup>122</sup> This approach is often characterized as the fixed-percentage or “wait-and-see” method.<sup>123</sup> A determination of the value of pension benefits is not essential under this arrangement,<sup>124</sup> and this may be its redeeming feature when that determination would be too speculative.<sup>125</sup> Of course, difficulties associated with valuation should diminish if the pension rights have matured, thereby conferring upon the employee-spouse an unconditional right of immediate access to the monetary benefits.<sup>126</sup>

Taking the allocation question one step further, a court can avoid in some circumstances the complex task of dividing the pension rights and yet fashion an equitable division of the marital property. “Rather than divide prospective retirement benefits, a trial court may simply consider pension rights as part of the marital estate and award the non-employee-spouse an offsetting amount of other marital property.”<sup>127</sup> This has been considered appropriate in those cases “where the present value of the pension rights is not too speculative and there is sufficient other marital property to make an offsetting award.”<sup>128</sup>

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See, e.g.,* *Brown v. Brown*, 15 Cal.3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976), and *Ohm v. Ohm*, 49 Md. App. 392, 431 A.2d 1371, 1317-81 (1981). This approach has also been referred to as the “reserved jurisdiction method.” Note, *supra* note 105, at 189 n.87.

124. Note, *supra* note 105, at 193.

125. *Bloomer v. Bloomer*, 84 Wis.2d at \_\_\_, 267 N.W.2d at 241. Nevertheless, courts must “determine the appropriate percentage to which the non-employee spouse is entitled.” *Id.*

126. As noted in *Ohm*, the complexity attendant to valuing and distributing pension benefits is more acute when dealing with “benefits to be paid in the future.” 49 Md. App. at \_\_\_, 431 A.2d at 1379. *See also In re Marriage of Hunt*, 78 Ill. App.3d 653, 663, 397 N.E.2d 511, 519 (1979).

127. Note, *Pension Rights As Marital Property: A Flexible Approach*, 48 Mo. L. Rev. 245, 252 (1983). *See also* *Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982).

128. Note, *supra* note 127, at 252, citing *In re Marriage of Hunt*, 78 Ill. App.3d 653, 663, 397 N.E.2d 511, 519 (1979); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 477-78, 427 A.2d 76, 79

Overcoming the barriers of identifying, valuating, and allocating pension benefits does not necessarily assure victory in every factual circumstance. A potentially formidable obstacle in regard to federally-created pension rights is the federal preemption of state family property laws. In *Hisquierdo v. Hisquierdo*,<sup>129</sup> the United States Supreme Court breathed new life into the concept of federal preemption of state family property laws.<sup>130</sup> The Court held that a provision of the Railroad Retirement Act<sup>131</sup> which proscribed the attachment of railroad retirement benefits preempted the states from dividing these benefits upon divorce pursuant to their marital or community property laws.<sup>132</sup>

Although *Hisquierdo's* preclusion of railroad retirement benefits from the purview of state divorce law was significant, the more paramount concern focused upon the decision's possible effect on a state's power to allocate military pensions<sup>133</sup> and, more recently, ERISA-regulated private pensions<sup>134</sup> upon divorce.

Regarding the military retirement benefits preemption question, the United States Supreme Court in *McCarty v. McCarty*<sup>135</sup> addressed it rather definitively by holding that federal laws governing the military nondisability retirement benefits system preempted state courts from dividing military retirement pay upon divorce pursuant to a state's community property laws.<sup>136</sup> Later, the Court in *Ridgway v. Ridg-*

(1981); *Copeland v. Copeland*, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978).

129. 439 U.S. 572 (1979).

130. It was generally thought prior to *Hisquierdo* that family law matters were almost exclusively within the domain of the states. See, e.g., *Sosna v. Iowa*, 419 U.S. 393 (1975).

131. 45 U.S.C. §§ 231-231t (1976).

132. The court essentially established a two-pronged test for determining whether federal preemption applied in state family or family property cases: (1) There must be a conflict between the state law and the expressly declared intent of Congress and (2) The state law must be likely to cause substantial harm to the federal interest involved. Applying both elements of the test to the facts of *Hisquierdo*, the Court concluded it was a classic case for federal preemption. See *Hisquierdo v. Hisquierdo*, 439 U.S. at 592.

133. Some community property states—most notably California—had previously adopted the position that military pensions were divisible under their local law. See, e.g., *Milhan v. Milhan*, 27 Cal.3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980), *vacated*, 453 U.S. 918 (1981) and *In re Fithian v. Fithian*, 10 Cal.3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974).

134. There is a provision of ERISA which does restrict the assignment and alienation of pension benefits subject to the Act. 29 U.S.C. § 1056(d)(1) (1979).

135. 453 U.S. 210 (1981).

136. The *McCarty* decision has been roundly criticized by some commentators for its apparent disregard for the stringent preemption test enunciated in *Hisquierdo*. See Note, *The Federal Military Retirement System Preempts State Community Property Law at Divorce: McCarty v. McCarty*, 1982 B.Y.U. L. REV. 443, 463 (1982); Bierman and Hershberger, *Federal Preemption of State Family Property Law: The Marriage of McCarty and Ridgway*, 14 PAC. L.J. 27, 44 (1982), and Note, *Domestic Relations: Military Retirement Pay and Equitable Division in Di-*

way<sup>137</sup> held that the federal preemption doctrine foreclosed a state court from making a determination of the beneficiary of the proceeds of a Servicemen's Group Life Insurance policy which was inconsistent with the declaration of the deceased servicemember.

The limitations on state power imposed by *McCarty* have been subsequently removed by Congress in legislation basically declaring that states may indeed distribute military retirement pay upon divorce in accordance with their own laws.<sup>138</sup> But a potentially knotty question now in view of the explicit demise of the federal preemption doctrine with regard to military nondisability retirement benefits, concerns the residual effects, if any, of the doctrine on the countless private pensions which are regulated in a variety of ways by the federal Employee Retirement Income Security Act (hereinafter ERISA).<sup>139</sup> Notwithstanding "ERISA's restriction on the assignment and alienation of plan benefits covered by the Act," it seems to be generally accepted that there are no genuine federal preemption problems with respect to ERISA-regulated pension benefits, in contrast with "pension rights that originate directly from federal pension legislation."<sup>140</sup> This is highly significant, for a judicial determination that the anti-assignment provisions of ERISA preempted state family property laws would remove a major marital asset from the realm of marital and community property.<sup>141</sup> This, in turn, would undoubtedly hamper the states' efforts in tailoring

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orce Court Preemption, 34 U. FLA. L. REV. 280, 288 (1982). See also Note, *McCarty v. McCarty: The Battle Over Military Nondisability Retirement Benefits*, 34 BAYLOR L. REV. 335 (1982).

137. 454 U.S. 46 (1981). Two commentators have explained the Court's apparent departure from the test for preemption announced in *Hisquierdo* in both *McCarty* and *Ridgway* on the basis of judicial deference to Congress' constitutional power to regulate military affairs. See Bierman and Hershberger, *supra* note 136, at 54.

138. The anti-*McCarty* legislation is referred to as the Uniformed Services Former Spouses' Protection Act and is codified at 10 U.S.C. §§ 1401-1450 (1982). It was signed into law by President Reagan on September 8, 1982.

Congress' swift action in clearly making military retirement benefits subject to division by states pursuant to their marital or community property laws was consistent with earlier legislation concerning civil service retirement benefits. See 5 U.S.C. § 8345(j) (Supp. V 1981).

139. See 29 U.S.C. §§ 1001-1381 (1976).

140. Note, *Pension Rights As Marital Property: A Flexible Approach*, *supra* note 101, at 250. Various court decisions illustrate the apparent attitude on the part of the Court that this is not a legitimate federal question. See, e.g., *Campa v. Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980) and *Johns v. Retirement Fund Trust*, 85 Cal. App. 3d 511, 149 Cal. Rptr 551 (1978), *appeal dismissed and cert. denied* 444 U.S. 1028 (1980). But see *Francis v. United Technologies Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978). See also Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417, 519-22 (1978).

141. DuCanto, *supra* note 87.

a fair and equitable division of marital or community property at marital dissolution.<sup>142</sup>

### B. *Professional Degrees and Licenses*

“‘Putting hubby through’ college, law school, medical school or other educational program (‘getting a Ph.T.’ as it is sometimes called), appears to be a firmly entrenched American institution, despite the women’s liberation movement.”<sup>143</sup>

As an addendum, it might be underscored that the denouement to the above described scenario is frequently unpleasant: generally, the husband, shortly after obtaining the advanced academic degree, concludes that he has had enough of being married to the wife and consequently seeks a divorce.<sup>144</sup> The dissolution of a marriage between a husband who has received a professional degree and/or license and a wife,<sup>145</sup> who may have forsaken her own career goals and aspirations so

142. Adopting federal preemption principles with respect to private pension plans subject to ERISA would probably make it necessary for Congress to act in much the same fashion as it did when it overruled the preemption determination in *McCarty*.

In the totally unrelated area of fair employment practices legislation, the United States Supreme Court has held that a state (New York) human rights law was preempted by ERISA inasmuch as the New York law prohibited a certain aspect of an employee benefits plan that was permitted by federal law. *Shaw v. Delta Air Lines, Inc.*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 2890 (1983). Although this decision has no direct precedential value as far as the question of ERISA preemption of state family property law is concerned, it does indicate a willingness by the Supreme Court to deal with an ERISA preemption issue that clearly involves a federal question.

See also *Delta Air Lines, Inc. v. Kramarsky*, 725 F.2d 146 (2d Cir. 1983).

But see *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983), where the Court of Appeals for the Seventh Circuit ruled that ERISA’s proscription against the alienation or assignment of pension plan benefits did not preempt a Wisconsin court order concerning the division of the pension rights of a former spouse.

143. Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 948 n.4 (1978) quoted in Note, *Family Law: Ought A Professional Degree Be Divisible As Property Upon Divorce?*, 22 WM. & MARY L. REV. 517, 543 n.144 (1981).

144. This sequence of events has become so commonplace in our society that it has been occasionally referred to as the ‘putting the hubby through’ syndrome. See Raggio, *Professional Goodwill and Professional Licenses as Property Subject to Distribution Upon Dissolution of Marriage*, 16 FAM. L. Q. 147 (1982). A poignant description of the consequential effect of this pattern of conduct has been expressed as follows: “the student spouse will walk away with a degree and the supporting spouse will depart with little more than the knowledge that he or she has substantially contributed toward the attainment of that degree.” Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974).

145. Although it is quite conceivable that the supporting spouse may be the husband, research has actually reflected that it is more likely that the student spouse in this situation will be the husband, and the supporting spouse will be the wife. See Erickson, *supra* note 143, at 949, where the commentator reveals that no individual case involving a husband as the supporting

that the husband might pursue his education, "presents courts with difficult questions with regard to property division."<sup>146</sup>

Normally, the marital assets at the time of dissolution are miniscule because they generally have been depleted to finance the husband's educational pursuits.<sup>147</sup> Consequently, there are few conventional marital assets available for distribution between the spouses.<sup>148</sup> Moreover, in many jurisdictions, alimony is not readily available to a wife who is capable of supporting herself.<sup>149</sup> Hence, a wife who has been supporting a student spouse quite likely will experience some extreme difficulty in convincing a court of her need for alimony.<sup>150</sup> As a result, under traditional concepts of property division and alimony incident to divorce, the wife who supports her husband through school and who is suddenly faced with the specter of divorce may be in the unenviable position of getting no recompense for her investment in the husband's professional degree (education), license, or enhanced potential future earning capacity.<sup>151</sup> In other words, the husband walks away from the marriage with his professional degree in hand while the wife is left with a worthless "Ph.T." By permitting this result, do courts actually do violence to the letter and spirit of their respective marital or

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spouse was uncovered by her investigation. And, to date, this writer's research has not revealed a single case either. See also Mullinex, *The Value of An Educational Degree at Divorce*, 16 Loy. L.A.L. Rev. 227, 229 n.7 (1983) ("No reported case has involved a husband who asked the court for some recompense for his support or contributions to a wife's pursuit of an educational degree"). See also Mahoney v. Mahoney, 182 N.J. Super. 598, 442 A.2d 1062, 1067 n.4, *rev'd and remanded on other grounds*, 91 N.J. 488, 453 A.2d 527 (1982).

146. Annot., 4 A.L.R. 4th 1294, 1295 (1981).

147. Note, *Disposition of Professional Degree Upon Marriage Dissolution: DeLa Rosa v. DeLa Rosa*, 66 MINN. L. REV. 1205, 1208 (1982). Although the arguments that a professional degree, license, or increased earning capacity is divisible property upon divorce are more compelling when the student spouse is a recent graduate and there are no other tangible marital assets to speak of, these same contentions should probably be made "where the marriage has continued years after graduation and professional goodwill and tangible assets have accumulated." Raggio, *supra* note 144, at 148.

148. The potentially inequitable ramifications of the paucity of marital assets at dissolution will be addressed later in this Article. See *infra* notes 149-152.

149. In Arkansas, for example, a wife who is able-bodied and capable of working to support herself has a very slim—perhaps nil—chance of receiving an alimony award. See Mobley, *The Arkansas Divorce—Do We Have Problems?*, *supra* note 61, at 616.

150. See Mullinex, *supra* note 145, at 231, citing a number of cases and a study which reflects the niggardly attitude that some courts have adopted in terms of awarding alimony to able-bodied women. *Id.* at 231 n.9.

However, in McGowan v. McGowan, 663 S.W.2d 219, 225 (Ky. App. 1983) the Kentucky Court of Appeals affirmed a trial court's decision to award \$10,000 in lump sum maintenance to the non-professional wife without specifically making any allowance on the basis of the wife's contributions to the husband's professional degree.

151. Note, *supra* note 143, at 544.



community property laws and thus betray their inherent equitable powers?<sup>152</sup>

### 1. The Judicial Treatment of the Issue

Surprisingly, a relatively small number of courts have addressed the question of whether a professional degree, license, or the enhanced earning capacity arising from the possession of the education or license is property subject to apportionment upon divorce.<sup>153</sup> The resolution of the complicated issue engenders some important questions.

As a threshold matter, courts must ascertain whether a degree, license, or enhanced earning capacity is includible under the rubric of property within the meaning of a state's marital or community property law. In the majority of cases, the courts seem to resolve the issue in the negative<sup>154</sup> with the most commonly stated reasons being that: (1) they have no exchange or barter value; (2) they are personal to the possessor; (3) they are not susceptible to ownership; and (4) they do not survive the death of the holder.<sup>155</sup> Because these attributes of property are not present, neither the professional degree, license, nor enhanced earning capacity has been defined by the majority of courts as a marital asset subject to distribution upon divorce.<sup>156</sup>

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152. A writer has commented upon this legal dilemma as follows: "One such economic problem of divorce for which the law has failed to devise an equitable solution is the problem of the wife who supports her husband through school and then finds herself confronted with a divorce proceeding." Erickson, *supra* note 143, at 947.

153. Note, *supra* note 143, at 524.

154. See Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, 49 BROOKLYN L. REV. 301, 303 n.8 (1983), and Note, *The North Carolina Act For Equitable Distribution of Marital Property*, 18 WAKE FOREST L. REV. 735, 748 (1982). This unsettled area of the law can be a mixed blessing for an attorney. See Raggio, *supra* note 144, at 148-49.

155. Note, *Property Division—License to Practice Dentistry Is Marital Property Subject to Division. Inman v. Inman*, 578 S.W.2d 266, (Ky. App. 1979), 17 J. FAM. L. 826, 827-28 (1978). See also *Sullivan v. Sullivan*, 134 Cal. App. 3d 634, —, 184 Cal. Rptr. 796, 800 (1982) (medical degree was not property for purpose of divorce under community property laws because it was not susceptible to ownership in common, was not transferable, and was not capable of surviving the death of the holder); and *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

156. See Note, *supra* note 154, at 303 n.8. The failure by the majority of courts to broaden the definition of "property" to embrace a professional degree, license, or enhanced earning capacity is somewhat incongruous with their apparent willingness to bring economic concepts like goodwill and pension rights within the parameters of property. See Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 412 (1980). Professor Krauskopf refers to "[t]he development of earning capacity through the education of the spouse. . . [as] 'marriage specific capital.'" *Id.* at 387. Moreover, she postulates that this human capital can be as easily encompassed within the meaning of property as have goodwill and pension rights, its economic counterparts. *Id.* at 412.

A minority of courts has recognized that a professional degree, license, or increased earning capacity is property.<sup>157</sup> To do so has necessitated that the courts adopt an expansive definition of property congruent with "the special characteristics of both a divorce proceeding and a professional education."<sup>158</sup> Furthermore, these courts have been guided by the basic principles that (1) "property is that bundle of rights that the courts recognize as property;" and that (2) "[i]n order to make the determination that a thing is property, the court should ask whether as a matter of policy, the definition of property should include a particular concept."<sup>159</sup> In other words, to prevent a gross injustice in the typical "putting your hubby through" case, it may be quite appropriate and indeed essential "to find a property interest for the holder's spouse in a professional degree."<sup>160</sup>

## 2. So what if it is property?

Although a professional degree, license, or increased future earning capacity may get past the threshold hurdle of being classified as property, formidable obstacles may still foreclose a judicial determination that either is a marital asset capable of being separately divided between the parties upon marital dissolution. For example, it is generally vital that these marital assets have some non-speculative value which will allow the court to equitably distribute them between the husband and the wife.<sup>161</sup>

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157. See, e.g., *O'Brien v. O'Brien*, 114 Misc.2d 233, 452 N.Y.S.2d 801 (1982); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978).

158. Note, *supra* note 143, at 542.

159. *Id.*

160. *Inman v. Inman*, *supra* note 157, at 266. *But see* *Leveck v. Leveck*, 614 S.W.2d 710 (Ky. Ct. App. 1981), where *Inman* is factually distinguished by the court. *And see* *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1982) (*Inman II*) where the Kentucky Supreme Court stated emphatically that a professional degree was not a species of marital property. However, in a subsequent decision, *McGowan v. McGowan*, *supra* note 150, at 223-24, the Kentucky Court of Appeals concluded that a non-professional, contributing spouse could quite possibly be assisted in connection with the division of marital property pursuant to the Kentucky marital property statute by either (1) the contribution to the acquisition of marital property or (2) economic circumstances of each spouse equitable distribution criteria, or both. The court rebuffed, however, the suggestion that an automatic lump-sum monetary award based upon a prescribed formula was an appropriate remedy "in those dissolution cases where one of the spouses has worked so that the other can acquire a degree." *Id.* at 223. The prescribed formula alluded to was stated as dictum in *Inman v. Inman*, 648 S.W.2d at 852. (*Inman II*).

161. One court has observed that "includability, valuation, and the percentage of equitable distribution of assets are separate questions." *O'Brien v. O'Brien*, 114 Misc.2d 233, —, 452 N.Y.S.2d 801, 804 (1982). Putting this in proper perspective, a commentator has noted that "[i]f such partner (supporting spouse) is to receive fair compensation for her forced retirement, the

One view which is shared by some courts is that a professional degree, license, or enhanced earning capacity does not have any tangible value.<sup>162</sup> At most, the reasoning goes, these marital assets have "only an intangible or intellectual value" which cannot be converted into a specific monetary amount capable of being distributed between the parties at divorce.<sup>163</sup> Basically, what this amounts to is a determination that this species of property is not divisible because no reasonably certain value can be assigned to allow its apportionment between the parties.<sup>164</sup> Of course, the natural rejoinder is to point to those items which are just as speculative and intangible but which courts have, nevertheless, found to be valuable, divisible marital assets. Some classic examples are "professional goodwill, pension benefits, and tort actions for personal injury and wrongful death for loss of future earning capacity."<sup>165</sup> Moreover, it has been opined that the difficulty associated with quantifying the value of a professional degree, license, or enhanced earning capacity should not be used by courts to abdicate their responsibility to fashion an equitable distribution.<sup>166</sup> As a matter of fact, a court's refusal to countenance a professional degree, license, or enhanced earning capacity as a marital asset capable of having an assessed value which can be distributed between the parties upon divorce arguably undermines the partnership theory of equitable distribution—namely, that "each spouse is entitled to gain from his or her input."<sup>167</sup>

Even those jurisdictions which have held that a professional degree, license, or enhanced earning capacity is separately divisible property have devised methods of valuation and distribution which have generally simply furthered, but not fully advanced, the partnership theory.<sup>168</sup> The methodology has invariably failed to truly provide the

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value of that license to the community must be determined." Note, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DENVER L. J. 677, 685 (1979). For an in-depth discussion of the issues surrounding the valuation question, see Mullenix, *supra* note 145, at 227. ("Inevitably, in awarding compensation to the supporting spouse, courts have been confronted with the difficult task of quantifying either the worth of the education or the value of the spouse's support.") *Id.* at 236.

162. See, e.g., *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

163. Note, *supra* note 143, at 544.

164. See, e.g., *Todd v. Todd*, 272 Cal. App.2d at \_\_\_, 78 Cal. Rptr. at 135; and *In re Marriage of Aufmuth*, 89 Cal. App.3d 446, 461, 152 Cal. Rept. 668, 677 (1979).

165. Note, *supra* note 143, at 545.

166. Raggio, *supra* note 144, at 160.

167. Note, *The North Carolina Act For Equitable Distribution of Marital Property*, *supra* note 154, at 748.

168. See, e.g., *In re Marriage of Horstmann*, 263 N.W.2d at 885, where although the court ruled that the increased potential earning capacity derived from a professional degree or license

working marital partner with full compensation for the beneficial property expectations which have been dashed by the dissolution of the marriage and has consequently failed to achieve a fair and equitable property division.<sup>169</sup>

For example, a perusal of the court decisions that have considered the question of molding an appropriate remedy in the "putting the hubby through" cases reflects that virtually all the remedies are not based on property-division concepts but are simply grounded upon ad hoc considerations of what is deemed to be equitable.<sup>170</sup> Understandably, this analysis is adhered to by those courts which reject the idea that a professional degree, license, or enhanced earning capacity is a species of property.<sup>171</sup> But several jurisdictions which ostensibly recog-

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was marital property, it fashioned a remedy which in essence only allowed the recovery of those costs incurred by the working spouse in regard to the student spouse's education. This failed to fully compensate the working spouse for the gain derived by the family unit from her input, for she was not compensated for her unfulfilled expectations of a better standard of living as a result of the increased potential earning capacity of her husband.

169. In many cases, the courts have attempted to provide some form of equitable relief. It is this writer's opinion, however, that the various remedies have often not compensated the supporting spouse for his or her property expectations. *See, e.g., Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979). *But see Leveck v. Leveck*, 614 S.W.2d 710 (Ky. Ct. App. 1981).

170. *See, e.g., Mahoney v. Mahoney*, 175 N.J. Super. 447, 419 A.2d 1149 (1980) (property right subject to equitable offset), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *rev'd* 91 N.J. 488, 453 A.2d 527 (1982).

171. *See, e.g., Mahoney v. Mahoney*, 91 N.J. 488, —, 453 A.2d 527, 533 (1982), where the court enumerates several judicial decisions which have rebuffed the contention that a marital property interest was involved with respect to a professional degree, license, or increased earning capacity, but nevertheless reimbursed the supporting spouse "for her financial contributions used by the supported spouse in obtaining a degree." The basic reasoning of these determinations has been that it would be grossly unfair to allow the holder of the degree to escape without repaying the spouse who provided the financial resources which enabled him to obtain it. In *Mahoney*, however, the New Jersey Supreme Court did not endorse a cost reimbursement remedy in all cases. Rather, the court limited its holding in this manner:

Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license *with the understanding that future benefits will accrue and inure to both of them*, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy. (emphasis added).

*Id.* at 533.

The supreme court designated its remedy as reimbursement alimony indicating that it "should cover *all* financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license." *Id.* at 534. In a companion decision, *Hill v. Hill*, 91 N.J. 506, 453 A.2d 537, 538 (1982), the New Jersey Supreme Court added rehabilitative alimony to reimbursement alimony as alternative remedies in "putting your hubby through" situations. Rehabilitative alimony was defined by the court as "a short-term or lump-sum award from one party in a divorce [which] will enable his former spouse to complete the preparation necessary for economic self-sufficiency." *Id.* at 538. Additionally, in cases where there are other available

nize that these professional items are marital assets divisible under their respective property distribution laws have also generally fashioned remedies which actually subvert the traditional concepts of property.<sup>172</sup>

The most commonly utilized remedy or method of valuation is the restitution approach where the working spouse is basically awarded recompense for the funds which have been paid for the student spouse's professional education.<sup>173</sup> Courts have the discretion to make adjustments for inflation and to decree the payment of interest as well.<sup>174</sup> As noted earlier,<sup>175</sup> this remedy does not compensate the working spouse for the value of the degree, license, or enhanced earning capacity. It is simply a feeble attempt to prevent unjust enrichment.<sup>176</sup>

marital assets, the enhanced earning capacity of the student spouse and contributions made by the supporting spouse can be factors considered in connection with the traditional division of marital property. *See, e.g., Stern v. Stern*, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975). Of course, they may also be considered under the rubric of "a separate continuing alimony obligation." *See, e.g., Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539, 542 (1982) ("both an initial lump-sum award of reimbursement . . . and a separate continuing obligation would be appropriate.").

172. *See, e.g., In re Marriage of Horstmann*, 263 N.W.2d at 885, and *Inman v. Inman*, 578 S.W.2d at 269, where the courts assigned property status to the supported spouse's increased earning capacity and dental license, respectively; but they awarded relief—basically in the form of cost reimbursement or restitution—which was equitable, not legal, and which did not compensate the working spouse for the value of the "property" involved.

*But see O'Brien v. O'Brien* 114 Misc.2d 233, 452 N.Y.S.2d 801 (1982), where a New York Superior Court, in determining the value of a medical license which it had held to be distributable property, relied on the plaintiff's expert who concluded that the present value of the plaintiff's medical license was \$472,000. The expert "capitalized the earning differential between a college graduate, and the earnings of a general surgeon over the productive life expectancy of the plaintiff in arriving at the present value of the plaintiff's medical license of \$472,000." *Id.* at 806. Forsaking the contributions which the defendant spouse had made toward the plaintiff's medical education, the court apportioned the value of the medical license between the parties and awarded the defendant \$188,000 which was 40% of the license's present value. This appears to be compensation based on the value of the license and is thus property-based. *See Note, Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions, supra* note 154, at 308.

Illustrating the lack of consensus in this area, another New York decision, *Lesman v. Lesman*, 88 A.D.2d 153, —, 452 N.Y.S.2d 935, 937 (1982) reached the exact opposite conclusion as *O'Brien* and held that a professional degree or license was not property. The distinguishing feature of the two cases is that the supporting spouse in *O'Brien* had made a meaningful financial contribution to the student husband, while the wife in *Lesman* had not. *See O'Brien v. O'Brien*, 114 Misc.2d at 236, 452 N.Y.S.2d at 803.

173. *Note, Divorce After Professional School: Education and Future Earning Capacity May be Marital Property*, 44 Mo. L. REV. 329, 335 (1979). *See, e.g., In re Marriage of DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard v. Hubbard* 603 P.2d 747 (Okla. 1979).

174. *Inman v. Inman*, 578 S.W.2d at 269-70, cited in *Mullenix, supra* note 145, at 244.

175. *See supra* note 172.

176. *See Mullenix, supra* note 145, at 267 ("This calculation provides the supporting spouse with no return on his or her investment—an unfair result."). But one commentator has espoused the opposite view and has suggested that "[a] return of the contributions made to the attainment of the degree or license is preferable because it avoids the possibility of awarding a questionable

Another approach is the cost value method which takes into account not only the direct costs of the education but the "cost opportunity" of the education (the indirect costs) as well.<sup>177</sup> If expressed as a formula, this approach can be articulated in this manner: "Direct Purchase Cost + Cost Opportunity = 'Cost' Value of Education."<sup>178</sup>

A final method of valuation is the earning capacity value approach. Under this approach, expert testimony is "employed to determine the difference in earning potentials between a spouse with a professional education and the same spouse without that education."<sup>179</sup> A similar approach was adopted in *O'Brien v. O'Brien*,<sup>180</sup> the New York case discussed earlier. This approach, although not perfect, more clearly personifies a property remedy than any of the others.<sup>181</sup> Yet,

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percentage of unpredictable future earnings since evidence of the actual contributions made is more amendable to concrete proof." Note, *Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions*, *supra* note 154, at 317-18. In support of this position, the commentator proffers the "following formula":

$$\left[ \begin{array}{l} \text{non-student spouse's} \\ \text{financial contribution} \end{array} \right] - \left( \begin{array}{l} \text{student spouse's} \\ \text{financial contribution} \end{array} \right)$$

Cost of

$$- \left. \begin{array}{l} \text{Attaining Degree} \\ \text{or License} \end{array} \right) \quad \left. \begin{array}{l} \\ \\ \end{array} \right] \quad \times \frac{1}{2}$$

= Non-student

Spouse's Award of

Financial Contributions

*Id.* at 318.

177. Comment, *supra* note 144, at 603.

178. *Id.* at 604.

179. Note, *supra* note 173, at 335.

180. 114 Misc.2d 233, 452 N.Y.S.2d 801, 806 (1982). (The differential was "capitalized . . . over the productive life expectancy" of the student spouse.) See also *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (N.J. Super. Ct. 1982) ("The capitalized, discounted value of the differential in the earning capacity of a male with a four year college degree and a specialist in internal medicine that capitalized, discounted difference being the value of the medical education and license received.) This is referred to as the discount method and is criticized in *Mullenix*, *supra* note 145, at 267-68.

181. To be sure, some jurisdictions attempt to avoid the difficulties associated with the determinations of property, valuation, or distribution by dealing with these questions more traditionally in connection with alimony or general distribution of marital assets. See, e.g., *Scott v. Scott*, 645 S.W.2d 193 (Mo. Ct. App. 1982) (\$12,000 lump sum maintenance award in lieu of marital property division of professional degree) and *Conner v. Conner*, 10 FAM. L. RPTR. 1063 (1983), where the New York Supreme Court, Appellate Division, held that a husband's Master in Public Ad-

because of the difficulties attendant to placing a monetary value on this "new" property, it has been suggested that courts discontinue this effort and "assess the worth of education based on an older theory of value: the labor theory of value."<sup>182</sup>

### C. *The Goodwill of A Professional Practice*

The salient issues involved in the determination of whether professional goodwill is distributable property upon marital dissolution are strikingly similar—if not virtually identical—to those previously examined in connection with the divisibility at divorce of a professional degree, license, or increased earning capacity. They are: (1) Is professional goodwill a species of property capable of division upon marital dissolution? and (2) If professional goodwill is an item of property, how is its value to be determined so that it can be divided between the spouses upon divorce?<sup>183</sup>

In ascertaining whether professional goodwill<sup>184</sup> is property for the purpose of divorce litigation, courts have focused upon the rudimentary question of whether it is endowed with the attributes of property,<sup>185</sup> which have been primarily described as (1) transferability and (2) the

ministration and Master in Business Administration degrees were not marital property but were simply economic factors to determine the husband's ability to pay alimony. *See also* Krauskopf, *supra* note 156, at 415, where the writer opts for the remedy of in gross maintenance in lieu of a property classification theory. Moreover, the commentator amplifies her position by stating that "the court should consider not only restitution for the monetary contribution, but also fulfillment of the expectation of return in proportion to the amount of investment." *Id.* at 417.

182. Mullenix, *supra* note 145, at 275. Under this theory, "all the court need do is to look to the labor time of the student spouse in order to determine value. The supporting spouse, as marital partner, is then entitled to one half that value." *Id.* at 280. "In real terms, this would mean that the supporting spouse would receive one-half of the other spouse's income, for a number of years equivalent to those needed to acquire the degree or license." *Id.* at 283.

183. Raggio, *supra* note 144, at 147.

184. A classic definition of goodwill was articulated by Justice Story who defined it as "[t]he advantage or benefit, which is acquired by an establishment, beyond the mere value of capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement, which it received from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Note, *supra* note 143, at 545 n.155, quoting from J. Story, *Commentaries on the Law of Partnership* § 99 (1968).

A more concise, yet equally accurate, definition of goodwill is that it is an "expectation of future patronage." Note, *supra* note 173, at 334. *See also* *In re Marriage of Lukens*, 16 Wash. App. 481, 483, 558 P.2d 279, 280 (1976) and Scribner, *Professional Goodwill in Dissolution Proceedings: The Personification of Property*, 17 GONZ. L. REV. 303, 319 (1982).

185. *See, e.g., In re Marriage of Lopez* 38 Cal. App.3d 393, 113 Cal. Rptr. 58, 67 (1974) and *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972).

ability to be assigned a value.<sup>186</sup> In view of these criteria, some have fervently contended that professional “[g]oodwill is not property” because “[i]t lacks all indicia of property.”<sup>187</sup> For example, in *Nail v. Nail*,<sup>188</sup> the Texas Supreme Court held that the “accrued” goodwill of a spouse’s medical practice was not property for the purpose of division upon divorce, reasoning that it lacked the essential characteristics of property.<sup>189</sup>

However, *Nail* does not represent the mainstream of current legal thought. In the overwhelming majority of cases, professional goodwill, unlike a professional degree, license, or enhanced earning capacity,<sup>190</sup> is considered to be a distinct marital asset subject to division upon divorce.<sup>191</sup> And it has been labelled as being distributable property not-

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186. Krauskopf, *supra* note 156, at 410.

187. Scribner, *supra* note 184, at 327. The commentator attacks the treatment of professional goodwill as divisible property upon divorce not only on the basis that it is not property, but also with respect to the specter of double recovery, denial of equal protection and the presence of existing statutes which provide an adequate remedy without prostituting the concept of property. *Id.* at 326-27. *But see* Note, *supra* note 10, at 565, wherein the writer opines that “[p]rofessional goodwill, although derived from personal skills, often is as saleable and transferable as commercial goodwill.”

188. 486 S.W.2d 761, 764 (Tex. 1972).

189. In *Nail*, the cornerstone of the court’s reasoning is embodied in this description of medical professional goodwill:

It did not possess value or constitute an asset separate and apart from his person or from his individual ability to practice his profession. It would be extinguished in event of his death, or retirement, or disablement, as well as in the event of the sale of his practice or the loss of his patients, whatever the cause. . . . That is would have value in the future is no more than an expectancy wholly dependent upon the continuation of existing circumstances.

*Id.* at 764.

*But see* Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex. Civ. App. 1978) and Trick v. Trick, 587 S.W.2d 771 (Tex. Civ. App. 1979), where *Nail* is distinguished on the shadowy basis that it involved the goodwill of a sole practitioner rather than that of a professional corporation or association, the former being personal and the latter not being so. Thus, the professional goodwill of a medical corporation and a medical association was treated as marital assets upon divorce in *Geesbreght* and *Trick*, respectively. *See also* Austin v. Austin, 619 S.W.2d 290, (Tex. Civ. App. 1979) where another gloss is placed on *Nail* by the court’s holding that once a sole practitioner disposes of its goodwill it acquires value and qualifies as a marital asset.

190. Some commentators have seriously questioned this disparate treatment, arguing that a professional degree, license, or increased potential earning capacity is no more nebulous and amorphous with respect to transfer and valuation than is professional goodwill. *See, e.g.*, Krauskopf, *supra* note 156, at 411. These comparisons of speculativeness have also been made in regard to “pension and retirement benefits, and personal injury or wrongful death awards for lost future earning capacity.” Note, *supra* note 143, at 545.

191. *See, e.g.*, Stern v. Stern, 66 N.J. 257, 331 A.2d 257, 261 n.5 (1975) (a common-law jurisdiction recognizing that the goodwill of a law firm was a divisible marital asset upon dissolution). *See also* Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969); Mueller v. Mueller, 144 Cal. App. 2d 245, 301 P.2d 90 (1956); *In re* Marriage of Fleege, 91 Wash. 2d 324,



withstanding that it is admittedly "elusive, intangible, difficult to evaluate and will ordinarily require special disposition."<sup>192</sup>

To include professional goodwill under the caption of property is one thing; however, to assign a value to it is another. Here again, it is evident that "determining its value presents difficulties."<sup>193</sup> Yet, in the majority of cases, the courts have not considered this apparent difficulty to be a cogent basis for excluding professional goodwill as a divisible marital asset.<sup>194</sup> As one commentator has noted:

Methods of placing a value on professional goodwill vary according to the circumstances of each case. Factors considered by the courts when valuing the goodwill of a professional practice include the length of time that the professional spouse has practiced, the comparative success of the spouse's professional practice, the professional spouse's age and health, the past profits of the practice, the fixed resources of the practice, and the physical assets of the practice.<sup>195</sup>

That this approach may engender some uncertainty, unpredictability, and confusion with respect to valuing professional goodwill is evident. Commenting on the California experience, it has been observed that a court there is impelled to engage in pure "conjecture as to what would be the goodwill value of his (the professional's) practice, if he sold it and if someone bought it if there was a market therefore at the time of the dissolution."<sup>196</sup> But it appears that California courts have

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588 P.2d 1136 (1979); *In re Marriage of Kaplan*, 23 Wash. App. 503, 597 P.2d 439 (1979); *In re Marriage of Freedman*, 23 Wash. App. 27, 592 P.2d 1124 (1979); and *In re Marriage of Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976).

*But see*, *Holbrook v. Holbrook*, 103 Wis.2d 327, 350-51, 309 N.W.2d 343, 354-55 (Ct. App. 1981), and *Powell v. Powell*, 231 Kan. App.2d 456, 463, 648 P.2d 218, 223-24 (1982), where the view that professional goodwill is divisible property is soundly rejected.

192. *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58, 67 (1974). *See also* Mullinax, *supra* note 145, at 259, where, declaring that goodwill is actually "an intangible asset," the commentator still espoused the view that "goodwill and educational degrees should be recognized as intangible property assets, capable of valuation upon divorce." In a similar vein, in *Litman v. Litman*, 95 A.D.2d 695, 463 N.Y.S.2d 24 (App. Div. 1983), a New York court held that the husband's law practice was a marital asset capable of being equitably distributed at divorce. Eschewing contentions that proscriptions against the alienation of a law practice embodied in the Code of Professional Responsibility precluded subjecting a law practice to equitable distribution, the court concluded that the law practice could be equitably divided by way of awarding a distributive share—that is, the provision of "a sum of money in lieu of an actual distribution of property." 463 N.Y.S.2d at 25.

193. *Stern v. Stern*, 66 N.J. at 340, 331 A.2d at 261 n.5.

194. *See, e.g., In re Marriage of Lopez*, 38 Cal. App. 3d at —, 113 Cal. Rptr. at 67.

195. Note, *supra* note 143, at 546.

196. Lurvey, *Professional Goodwill on Marital Dissolution: Is It Property or Another Name for Alimony?*, 52 CAL. ST. B.J. 27 (1977). The writer does a good job of synthesizing the California cases and concludes that, if there were a rule of valuation in California with respect to profes-

been admonished to determine hypothetical market value in marital dissolution cases "with considerable care and caution."<sup>197</sup> Because professional goodwill is oftentimes a very significant marital asset,<sup>198</sup> courts should follow the lead of California and other states in exercising extreme caution in regard to valuation, while at the same time including the value of professional goodwill within the pale of divisible marital or community property upon divorce.<sup>199</sup>

#### D. *The Homemaker's Services*

A noteworthy feature of the UMDA is its recognition of the value—both monetary and nonmonetary—of the services of a homemaker in the acquisition of the marital estate and the concomitant consideration of this factor in making a fair and equitable allocation of the marital property between the spouses.<sup>200</sup> This is a significant development which has been widely accepted by a large number of states.<sup>201</sup> More importantly, the consideration of this criterion personifies "the concept of marriage as a partnership."<sup>202</sup> The court's responsiveness to this principle is evidenced by the following comment:

It 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. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint

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sional goodwill, it would be "that each case stands on its own." *Id.* at 83.

See also Norton, *Professional Goodwill—Its Value in California Marital Dissolution Cases*, 3 COMMUNITY PROP. J. 9 (1976), for a good discussion of the various methods of valuing professional goodwill.

197. *In re Marriage of Lopez*, 38 Cal. App.3d at 111, 113 Cal. Rptr. at 68.

198. Note, *supra* note 10, at 555. ("Excluding professional goodwill from marital assets can greatly affect the value of the distributable property.")

199. *Id.* at 574. ("The principles of marital partnership and fair division of property, which underlie the equitable distribution statutes, compel this result").

200. UMDA § 307(1) (1970), 9A U.L.A. 142 (1979). See also Note, *supra* note 2, at 679. Under the ancient common-law system, the contributions of a homemaker are not looked upon with as much regard as the financial provisions of the breadwinner. As one commentator has stated, expressing an almost apparent sigh of relief: "The venerable common law property system. . .survives in only a few states." Foster, *supra* note 35, at 9.

201. Some recent statistics reflect that as many as 28 states now weigh the homemaker's services in regard to division of property and/or alimony. See Freed and Foster, *supra* note 42, at 246. The contributions of a homemaker are now placed on the same plane as the financial contributions of a breadwinner. Note, *The Displaced Homemaker and the Divorce Process in Wisconsin*, 1982 WIS. L. REV. 941, 951 (1982).

202. Cohn, *New York's Equitable Distribution Law: A Year Later*, 27 N.Y. L. SCH. L. REV. 527, 541 (1981).

undertaking, that in many ways it is akin to a partnership.<sup>203</sup>

Because a sizable number of jurisdictions now consider the contributions and services of a homemaker in arriving at an equitable distribution,<sup>204</sup> a knotty problem exists in regard to valuing the nonmonetary portion of these services. In other words, how do you evaluate this worth in terms of dollars and cents?<sup>205</sup> There is no consensus apparently as to the proper mode of valuation, and this is somewhat to be expected in an area fraught with controversy. A methodology that has recently garnered a fair amount of notoriety is the "replacement cost" approach.<sup>206</sup> It operates primarily on the theory of identifying the jobs that the homemaker performs and then ascertaining how much it would cost to pay a third person to do them at a prescribed hourly rate for the number of hours that the homemaker spends doing the tasks.<sup>207</sup> The adept utilization of this approach by a homemaker's lawyer may result in some fantastic totals,<sup>208</sup> but a very real problem inherent in these astronomical figures is that the court may reject them as being too speculative or unrealistic.<sup>209</sup>

Another approach which has received some adherence<sup>210</sup> is referred to as the "opportunity lost" approach. Basically, this approach provides that where the spouse has been stymied—either economically or socially—by being a homemaker during the marriage, then the spouse is entitled to remuneration and perhaps additional education, if necessary, to eventually become financially independent.<sup>211</sup> Apparently,

203. *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496, 501 (1974). *See also* *Fuerst v. Fuerst*, 93 Wis.2d 121, 286 N.W.2d 861, 866 (1979) (considering "economic and equitable factors related to homemaking" . . . is congruent with Wisconsin law).

204. *See supra* note 201.

205. Foster, *supra* note 35, at 41. The commentator opines that, despite these valuation difficulties, the nonmonetary contributions and services of a homemaker should still be evaluated by courts because of their importance in vindicating the partnership theory of marriage. *Id.* at 41. *See also* Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L. Q. 41, 49-53 (1983) for a fairly good, cogent discussion of the principal method for valuing a homemaker's service.

206. This mode of evaluation has gained widespread attention largely due to the inventive efforts of Michael Minton, an attorney who has represented several female homemakers. *See* Ark. Gazette, Oct. 1, 1980, at 1B.

207. Foster, *supra* note 35, at 42.

208. In Mr. Minton's charts, for example, he arrives at an incredibly large dollar amount for the monetary worth of homemaker services and contributions. ("a weekly value of \$793.79 and a yearly value of \$41,277.08—which is a lot more than the average husband earns.") Ark. Gazette, Oct. 1, 1980, at 1B.

209. Foster, *supra* note 35, at 45.

210. Wisconsin has adopted statutorily the replacement cost approach. *See* WIS. STAT. ANN. § 767.255(3) (West 1981).

211. Foster, *supra* note 35, at 45-46.

this methodology is more appropriate for those situations involving a long-standing marriage where the homemaker spouse has no marketable skills and, moreover, no real prospect of acquiring them, making it well-nigh impossible for that spouse to acquire gainful employment.<sup>212</sup> Additionally, in those cases where a spouse has curtailed his or her educational pursuits to become a homemaker and now wants to continue the quest for further education, the "opportunity lost" approach seems to have some utility.<sup>213</sup> Here too, a significant degree of inherent speculation is a possible drawback to this approach.<sup>214</sup>

Finally, there are some proponents of an "eclectic" approach.<sup>215</sup> As reflected by its designation, this approach draws from several sources, including, under appropriate circumstances, "replacement cost" and "opportunity lost". But it dispenses with the "sugar-coating" and presents a straightforward, unpretentious account of the homemaker's daily routine, hoping to convince the court of her true value to the family unit.<sup>216</sup>

There will continue to be some disagreement as to whether homemaker contributions and services should be considered in making an equitable distribution. If the present trend continues, however, the number of states authorizing the consideration of this equitable criterion will steadily grow. A more difficult, and perhaps more debatable, question concerns the method of evaluating the homemaker services standard, especially in regard to nonmonetary contributions. Here again, the battle will undoubtedly persist. A victory by the pro-homemaker forces, however, will be a victory for the partnership theory of marriage and, in turn, another proper step toward progressiveness in marital property division.

#### E. *Classifying the Increase in Value of Separate Property*

Several presumptive equal and equitable distribution of marital property statutes contain provisions which address the question of how to treat the appreciation in value during the marriage of separate property.<sup>217</sup> And there is clearly no consensus among the states.<sup>218</sup> In fact, a

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212. *Id.* at 46.

213. *See, e.g., Morgan v. Morgan*, 81 Misc. 2d 616, \_\_\_, 366 N.Y.S.2d 977, 982 (1975) ("... she merely seeks for herself the same opportunity which she helped give to the defendant.")

214. Foster, *supra* note 35, at 46. The "opportunity lost" approach has been plagued by highly inflated dollar projections, too.

215. *Id.* at 47.

216. *Id.*

217. *See, e.g., COLO. REV. STAT. § 14-10-13(4)* (1973 & 1982) (the increase in value is marital property.) This apparently represents a departure from the prior law in Colorado. *See In*

surprisingly significant divergence of opinion exists in regard to this troublesome question.<sup>219</sup>

The various approaches adopted in one form or another by the states can be delineated as follows: (1) the increase in value of separate property is marital property;<sup>220</sup> (2) the increase is separate (nonmarital) property;<sup>221</sup> (3) the increase is marital property to the extent that it is an outgrowth of substantial contributions made by the spouse who is asserting a marital property interest therein;<sup>222</sup> (4) the

*re Wilden*, 39 Colo. App. 189, 563 P.2d 384, 386 (1977). See also *In re Marriage of Lester*, \_\_\_ Colo. App. \_\_\_, 647 P.2d 688, 691 (Colo. App. 1982) and *In re Marriage of Campbell*, 43 Colo. App. 72, \_\_\_, 599 P.2d 275, 276 (Colo. App. 1982).

*But see e.g.*, DEL. CODE ANN. tit. 13, § 1513(b)(3) (1974) (the increase in value of property acquired prior to marriage is considered to be separate property). While construing the Delaware statute in *Halsey B.S. v. Charlotte S.S.*, 419 A.2d 962, 964 (Del. Fam. Ct. 1980), the Delaware Family Court held that "[d]ividends received on stock during the course of the marriage are not an increase in value of the stock and thus excludable from marital property."

Typically, separate property means property acquired either before the marriage, or by gift, inheritance, devise, or descent, or in exchange for property that was acquired by gift, inheritance, devise or descent, or that was acquired in exchange for property acquired prior to the marriage.

218. Both the case law and statutory law reflect the diverse ways in which the "increase in value of separate property" factor has been handled. This may be some indication of how arduous the task is to classify the increase in value of separate property. See, *e.g.*, *supra* note 217.

219. See, *e.g.*, *supra* note 217. Although Colorado and Delaware are at opposite ends of the spectrum, a number of states are either aligned with one of them or somewhere in between.

220. See, *e.g.*, PA. STAT. ANN. tit. 23, § 401(3)(a)(1) and (e)(3) (Purdon Supp. 1983) (the "increase in value during the marriage" of "property acquired in exchange for property acquired prior to the marriage" or of "property acquired by gift, bequest, devise or descent" is marital property).

221. See, *e.g.*, ARK. STAT. ANN. § 34-1214 (B)(5) (Supp. 1983), MO. ANN. STAT. § 452.330(2)(5) (Vernon Supp. 1983); and ME. REV. STAT. ANN. tit. 19, § 722-A(2) (E) (1964).

222. *In re Marriage of Kennedy*, 94 Ill. App.3d 537, \_\_\_, 418 N.E.2d 947, 955 (1981). The enhancement in value which is attributable solely to inflation or natural external factors is nonmarital property. See *In re Marriage of Lee*, 87 Ill.2d 64, \_\_\_, 430 N.E.2d 1030, 1031 (1981) ("presumption of marital property was overcome when it was shown that the increase in value of property acquired before the marriage was substantially attributable to external economic factors and not any capital improvements made upon the land."); *In re Marriage of Komnick*, 84 Ill.2d 89, \_\_\_, 417 N.E.2d 1305, 1308 (1981). See also *In re Marriage of Reed*, 100 Ill. App. 3d 873, 427 N.E.2d 282 (1981) where an Illinois intermediate appellate court held that, while the increase in value of separate property was separate property, "any income derived from such property during marriage is deemed marital." Interestingly, the Illinois courts seem to have placed a judicial gloss upon the "increase in value of separate property" exception to marital property. The pertinent Illinois statutory provision seems to expressly characterize such property as nonmarital. ILL. ANN. STAT. ch. 40 § 503(a) (6) (Smith-Hurd Supp. 1983).

For other cases adopting the position that the increase in value of premarital property attributable to the nonowner spouse's contributions and efforts is marital property, see *In re Marriage of Brown*, 19 Mont. 481, \_\_\_, 587 P.2d 361, 365 (1978); *Von Newkirk v. Von Newkirk*, 212 Neb. 730, \_\_\_, 325 N.W.2d 825, 832 (1982); *Griffith v. Griffith*, 185 N.J. Super. 382, 448 A.2d 1035, 1036 (1982); *Mol v. Mol*, 147 N.J. Super. 5, 370 A.2d 509, 510 (1977); *Jolis v. Jolis*, N.Y.S.2d 138, 146 (Sup. Ct. 1981) (interpreting the New York statute to mean that a party was entitled to a share of the appreciation in value only to extent it was due to his "contributions or efforts");

increase is marital property if it is the product of the commingling of marital and nonmarital property;<sup>223</sup> and (5) those improvements which contribute to the enhancement of the value of separate property do not transform that property into marital property, but are equitable distribution factors to be considered in making a fair and equitable division of the marital property.<sup>224</sup>

These diverse perspectives—judicial and legislative—concerning the treatment that should be afforded to the increase in value of separate property graphically illustrate the complexity of the subject. But the view which seems most palatable is that which declares that the increase in value during the marriage of separate property is marital property.<sup>225</sup> Cogent reasons exist for placing this incremental value within the category of marital property. They are: (1) it advances the partnership theory of marriage by insuring that the enhancement of proprietary interests during the course of the marriage is treated as a

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Templeton v. Templeton, 565 P.2d 250, 252 (Okla. 1982); May v. May, 596 P.2d 536, 539 (Okla. 1979); and Bowman v. Bowman, 639 P.2d 1257, 1260 (Okla. App. 1981). Moreover, some state statutes have been judicially interpreted as not excluding from the realm of marital property those increases in value of premarital property which are attributable to the "efforts of the parties during the marriage." The courts have often described these efforts as either "joint" or "team." See, e.g., Woosman v. Woosman, 587 S.W.2d 262, 263 (Ky. Ct. App. 1979), construing KY. REV. STAT. 403.190(2)(E) (Supp. 1982). And in Allen v. Allen, 584 S.W.2d 599 (Ky. Ct. App. 1979), the Kentucky Court of Appeals applied this qualification to the "increase in value of premarital property" exception to marital property in a situation where there was barely any discernible increase in value of the premarital property. Nevertheless, the court discounted this and held that some value had to be assigned on the theory that the property would certainly have depreciated in value but for the improvements which were provided.

223. *In re Marriage of Smith*, 86 Ill.2d 518, 427 N.E.2d 1239, 1244 (1981); *Westphal v. Westphal*, 99 Ill. App.3d 1042, 426 N.E.2d 303, 305 (1981) (commingling resulted in a transmutation of property from nonmarital to marital).

224. *In re Marriage of Null*, 608 S.W.2d 568, 570 (Mo. Ct. App. 1980). The Missouri courts have consistently repudiated the suggestion that property acquired before marriage (separate property) can be transformed into marital property by virtue of the non-owner spouse's contribution of marital or nonmarital assets to the appreciation of the premarital property. See *Hull v. Hull*, 591 S.W.2d 376, 381 (Mo. Ct. App. 1979) and *In re Marriage of Morris*, 588 S.W.2d 39, 44 (Mo. Ct. App. 1979) ("assets which are separate property retain that identity and are not subject to division by the court regardless of changes in value by appreciation or depreciation.") Yet it does seem that a value-enhancing contribution to premarital property is a relevant equitable criterion in Missouri for determining a "just" distribution of the marital property. *Hull*, 591 S.W.2d at 381. See also *Lundgreen v. Lundgreen*, 112 Utah 31, —, 184 P.2d 670, 672 (1947), where this position was endorsed many years ago.

In addition, some state equitable distribution statutes authorize expressly the consideration of the contributions made by a spouse which appreciate the value of the other spouse's premarital property as an equitable factor relevant to the division of the marital property. See, e.g., N.C. GEN. STAT. § 50-20(c)(8) (Supp. 1983) and MONT. CODE ANN. § 40-4-202(1)(a)(b)(c) (1981) (factor for disposing of normally excluded property such as gift property, premarital property, etc.)

225. See COLO. REV. STAT. § 14-10-13(4) (1973 & Supp. 1982).

product of the marriage and (2) the other approaches either do not vindicate these primordial interests or they compel a court to make what seems to be an exceedingly complex and somewhat artificial determination of what increase in value of separate property is attributable to the efforts and contributions of the claimant spouse and what is not. Furthermore, to treat a spouse's contributions to the appreciation of the value of separate property as merely an equitable distribution factor in dividing the marital property fails to truly vindicate the marital property expectations of the contributing spouse.

#### F. *Ascertaining the Proper Treatment of the Marital Home*

Discovering an appropriate means of handling the marital home upon divorce in either a presumptive equal or equitable distribution of marital property jurisdiction can sometimes be vexing.<sup>226</sup> Consequently, to nobody's great surprise, the various states have espoused a number of approaches as to this question. A perusal of the pertinent statutory and decisional law reflects these disparate modes of treatment: (1) the marital home is marital property capable of being equitably divided as would any other species of marital property;<sup>227</sup> (2) the preference for awarding ownership or use of the marital home to the parent having child custody is an equitable criterion to be weighed in arriving at a fair and equitable distribution of the marital property, including the marital home;<sup>228</sup> (3) the marital home, when held in some form of co-

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226. The apparent difficulty in arriving at an appropriate method of treating the marital home stems partially from the failure of many of the marital property statutes to specifically address the question (*see, e.g.*, ALASKA STAT. § 09.55.210 (Supp. 1982); CONN. GEN. STAT. ANN. § 466-81 (West Supp. 1983); and D.C. Code Ann. § 16-910 (1981)), and from the inherent difficulty in ascertaining what disposition of the marital home is indeed fair and equitable to the parties even when a statute explicitly or implicitly alludes to it. Some examples of statutes which do address the issue of the treatment of the marital home are: (1) ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983) ("desirability of awarding family home or possession to custodial party" is an equitable criterion for making an equitable distribution of marital property) and (2) N.Y. DOM. REL. LAW § 236(f) (McKinney Supp. 1982) ("the court may make such order regarding the use and occupancy of the marital home and its household effects. . .without regard to the form of ownership of such property.")

227. *Turpin v. Turpin*, 403 A.2d 1144, 1147 (D.C. Cir. 1979) ("court could, nevertheless, consider equitable factors. . .in awarding wife a 75 percent interest in the apartment."); *Finch v. Finch*, 378 A.2d 1092 (D.C. Cir. 1977).

228. *See In re Marriage of Schulke*, 40 Colo. App. 473, \_\_\_, 579 P.2d 90, 93 (1978). (" . . .no abuse of discretion. . .particularly in awarding the family home to the wife because she had the responsibility of rearing the five children"); and *Collette v. Collette*, 177 Conn. 465, \_\_\_, 418 A.2d 891, 894 (1979) ("the underlying circumstances confronting the court was felt necessary to retain the stability of the home for the defendant [wife] and the minor children"). The Connecticut statute which seems to have been the underpinning for the *Collette* decision is CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1983). *See also R.E.T. v. A.L.T.*, 410 A.2d 166, 167

ownership with rights of survivorship, is not property subject to division under the general marital property statute;<sup>229</sup> and (4) the marital home is not apportioned on any consistent doctrinal basis other than perhaps the shibboleth "fair and equitable under the circumstances."<sup>230</sup>

Because of this divergence of opinion among the states on the marital home issue, the particular manner in which it will be treated upon marital dissolution may hinge upon the fortuitous circumstance of the situs of the court in which the action is brought.<sup>231</sup> Although the lack

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(Del. 1979), relying upon the pertinent equitable distribution factors outlined in DEL. CODE ANN. tit. 13, § 1514(a) (1-10) with special emphasis upon the factor in § 1513(a) (8) ("the desirability of awarding the family home or the right to live therein for reasonable periods to the party which with whom any children of the marriage will live"); *In re Marriage of Kush*, 106 Ill. App.3d 233, —, 435 N.E.2d 921, 923 (Ill. App. 1982); *Stribling v. Stribling*, 96 Ill. App.3d 317, 421 N.E.2d 403, (1981); *Swinney v. Swinney*, 419 N.E.2d 996, 999 (Ind. Ct. App. 1981) (child custody alone may support a possession award but not an award of ownership when the residence is the only "marital asset." (T)here must be "some offsetting factor;" otherwise, "such an award is not just and reasonable."); *In re Marriage of Florke*, 270 N.W.2d 643, 645 (Iowa 1978); *Downing v. Downing*, 428 N.E.2d 336 (Mass. App. Ct. 1981); *Hebron v. Hebron*, 566 S.W.2d 829, 831 (Mo. App. 1978); *Smith v. Smith*, 561 S.W.2d 714 (Mo. App. 1978); *McCurry v. McCurry*, 202 Neb. 235, —, 274 N.W.2d 865, 867 (1979); *Gemigani v. Gemignani*, 146 N.J. Super. 278, —, 369 A.2d 942, 945 (App. Div. 1977); *Arnold v. Arnold*, 30 N.C. App. 683, —, 228 S.E.2d 48, 50 (1976); *Martin v. Martin*, 35 N.C. App. 610, —, 242 S.E.2d 393, 396 (1978); *Rogers v. Rogers*, 39 N.C. App. 635, —, 251 S.E.2d 663, 665 (N.C. App. 1979); *Kostelecky v. Kostelecky*, 251 N.W.2d 400, 402 (N.D. 1977); *Stearns v. Stearns*, 80 S.D. 443, 126 N.W.2d 124 (1964); *Palmer v. Palmer*, 138 Vt. 412, —, 416 A.2d 143, 145 (1980); *Strawhorn v. Strawhorn*, 49 Md. App. 649, —, 435 A.2d 466, 470 (1981).

229. *See, e.g., Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981), where the Arkansas Supreme Court ruled that tenancy by the entirety property was not subject to division under the general marital property statute [ARK. STAT. ANN. § 34-1214 (Supp. 1983)]; rather, it was subject to equal division under the Arkansas entirety statute [ARK. STAT. ANN. § 34-1215 (Supp. 1983).] Language in the majority opinion also reflects that if there is a right of survivorship interest created even though no entirety estate actually exists, then the proprietary interest is not marital property under § 34-1214, but as a survivorship interest is still subject to the provisions of the entirety statute (§ 34-1215). *Warren*, at 535, 623 S.W.2d at 817. *But see, e.g., DEL. CODE ANN. tit. 13, § 1513(c)* (1974) ("All property acquired by either party subsequent to the marriage is presumed to be marital regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety."); *See also KY. REV. STAT. § 403.190(3)* (Supp. 1982), and *KAN. STAT. ANN. § 23-201(b)* (1975).

230. *See, e.g., In re Marriage of Tierney*, 263 N.W.2d 533, 535 (Iowa 1978), although the "[t]he desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children" is expressly listed as an equitable criterion in IOWA CODE ANN. § 598.21(1)(g) (West. 1981 and Supp. 1983). Other Iowa cases do reflect analyses grounded upon the statute, however. *See, e.g., In re Marriage of Florke*, 270 N.W.2d 643 (Iowa 1978).

231. A graphic illustration of the significance of the locus of the divorce action can be made by comparing the operative result that would ensue in one state as contrasted to another if the property to be divided is a marital home held as a tenancy by the entirety. For example, in Arkansas, a marital home owned as a tenancy by the entirety is not marital property subject to division under the Arkansas general marital property statute, *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981), while in Delaware the rule of law is quite the opposite. *See DEL. CODE ANN.*



of uniformity engendered by the administration of the diverse divorce laws of this country is not uncommon,<sup>232</sup> it is still unpalatable when uncertainty and inconsistency are spawned with respect to the handling of what is often regarded to be the most valuable marital asset: the marital home.<sup>233</sup> Perhaps serious thought should be given to promulgating a uniform law specifically delineating the preferred manner of treatment and status of the marital home under either a presumptive equal or equitable distribution of marital property law.<sup>234</sup> If adopted by the individual states, this would undoubtedly be a vast improvement over the current labyrinth of approaches.

### G. *Defining the Exceptions to General Marital Property*

Most, if not all, of the presumptive equal and equitable distribution of marital property statutes attempt to define "marital property";<sup>235</sup> a concomitant number of specific exceptions to the general rule of marital property are usually enumerated as well.<sup>236</sup> The nature

tit. 13, § 1513(c) (1974). And *see supra* note 229, where the pertinent parts of the Delaware statute are quoted. *See also* *Pascarella v. Pascarella*, 165 N.J. Super. 558 398 A.2d 921, 924 (1979) ("...the marital residence (held as tenants by the entirety) becomes property of the marriage subject to equitable distribution.")

232. Differences among the states in regard to the grounds for divorce, durational residency requirements and, at one time, child custody jurisdiction rules [the Uniform Child Custody Jurisdiction Act (in Arkansas, codified at ARK. STAT. ANN. §§ 34-2701-34-2725 (Supp. 1983) and the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A (Supp. V. 1981) have lessened the disparity] generally have wreaked havoc upon the lives of parties involved in divorce litigation. The principal basis for this diversity is the generally accepted view that domestic relations matters fall normally within the bailiwick of the individual states. *See, e.g.* *Sosna v. Iowa*, 419 U.S. 393 (1975) ("[R]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states.")

233. *See Torma v. Torma*, 645 P.2d 395, 399 (Mont. 1982).

234. Of course, any uniform legislation in this area can be no more effective in its overall impact than the number of states that eventually adopt it. This has certainly been true of the UMDA and its property division provisions.

235. *See, e.g.*, ARK. STAT. ANN. §34-1214(b) (Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(e) (1980); PA. STAT. ANN. TIT. 23, § 401(e) (Purdon Supp. 1983); N.Y. DOM. REL. LAW § 236 Part (B)(1)(c) (McKinney Supp. 1983); ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 722-A (2) (1964); MINN. STAT. ANN. § 518.54(5) (West. Supp. 1983); MO. ANN. STAT. § 452.330(2) (Vernon Supp. 1983); N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1983); KY. REV. STAT. § 403.190(2) (Supp. 1982); and DEL. CODE ANN. tit. 13, § 1513(B) (1974).

236. *See, e.g.*, COLO. REV. STAT. § 14-10-113(2)(a-c) (1982 Supp.); DEL. CODE ANN. tit. 13, § 1513(b)-(b) (3) (1974); D.C. CODE ANN. § 16-910(a)(1981); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983); IOWA CODE ANN. § 598.21 (West Supp. 1983); KAN. STAT. ANN. § 23-201 (1975); KY. REV. STAT. § 403.190(2)-(2)(3) (Supp. 1982); ME. REV. STAT. ANN. TIT. 19, §722-A(2)-2(e) (1964); MINN. STAT. ANN. § 518.54(5)(a)-(5)(e) (West Supp. 1983); MO. ANN. STAT. § 452.325(2)-(2)(5) (Vernon Supp. 1983); N.J. STAT. ANN. §2A:34-23 (West Supp. 1983); N.Y. DOM. REL. LAW § 234 Part B(1)(d)(1)-B(1)(d)(4) (McKinney 1977); N.C. GEN. STAT. §

and type of exclusions embodied in the numerous state statutes are varied.<sup>237</sup> Hence, only those exceptions which have been most commonly adopted will be discussed in this section of this article.

### 1. Gifts, Bequests, Inheritances, and Devises

The exception to the general marital property rule with respect to inherited, gift, bequeath, and devised property acquired during the marriage is perhaps the one most frequently mentioned in the state statutes.<sup>238</sup> Although the statutory provisions embodying this exception tend to be rather straightforward and, hence, have not engendered much controversy, courts situated in states which have not expressly adopted the exception, or any exception for that matter, have been occasionally constrained to fathom the treatment of a gift, bequest, inheritance, or devise under their equitable distribution of marital property laws.<sup>239</sup> And it seems to be the common theme in these cases that the disposition of this property—particularly gift or inherited—is determined by weighing the pertinent equitable distribution factors contained in the apposite state statute with the view of achieving a fair and

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50-20(b)(2) and (d) (Supp. 1983); PA. STAT. ANN. tit. 13, § 401(e)-(e) (7) (Purdon Supp. 1983); R.I. GEN. LAWS § 15-5-16.1 (Supp. 1982); WIS. STAT. ANN. § 767.255 (West 1981); and MD. CTS. & JUD. PROC. CODE ANN. §3-6A-01 (1980). *But see, e.g.*, CONN. GEN. STAT. ANN. § 466-81 (West Supp. 1983); HAWAII REV. STAT. § 580-47 (Supp. 1981); IND. CODE ANN. § 31-1-11.5-11 (Burns 1980); MASS. ANN. LAWS ch. 208, § 34 (Michie/Law. Co-op Supp. 1983); MONT. CODE ANN. § 40-4-202 (1981). N.D. CENT. CODE §14-05-24 (1981); OR. REV. STAT. § 107.105 (1979); S.D. CODIFIED LAWS ANN. § 25-4-44 (1976); UTAH CODE ANN. § 30-4-5 (Supp. 1981); WYO. STAT. § 20-2-114 (Supp. 1982), where no explicit allusion is made to an exception to the marital property rules.

237. A good example of the striking differences which exist among some of these statutory provisions is aptly illustrated by North Carolina's legislation (N.C. GEN. STAT. § 50-20 [Supp. 1981]) with its expansive, exclusionary provisions specifically encompassing peculiar items like "professional and business licenses" and "vested pension and retirement benefits and expectations of nonvested pensions or retirements" and Rhode Island's law (R.I. GEN. LAWS § 15-5-16.1 (Supp. 1982) with its pithy provision ("property acquired before marriage or by inheritance are not assignable by the court").

238. To this writer's knowledge, these states, in some form or another, have statutes which embody the "gifts, bequests, inheritances, and/or devises" exception: Arkansas, Colorado, District of Columbia, Illinois, Iowa, Kansas (*but see* Wachholz v. Wachholz, 603 P.2d 647 (Kan. App. 1970) gifts received during marriage are marital property despite KAN. STAT. ANN. § 23-201 in view of KAN. STAT. ANN. § 60-1610 [d]), Kentucky, Maine, Maryland, Minnesota, New York, North Carolina, Pennsylvania, Rhode Island, and Wisconsin. For a case narrowly construing the exception in regard to inherited property, *see* Sleeper v. Sleeper, 184 N.J. Super. 544, \_\_\_, 446 A.2d 1220, 1222 (1982).

239. *See, e.g.*, Cohm v. Cohm, 137 Vt. 487, 407 A.2d 184 (1979) (gift property: preference was simply not to disturb separate property) and Lord v. Lord, 443 N.E. 2d 847 (Ind. App. 1982) (exclusion of gift and inherited property from the marital kitty was equitable, although not required).

equitable division.<sup>240</sup> Thus, the mere fact that the property is either a gift or inheritance does not automatically warrant its exclusion from the realm of marital property; rather, its source is simply a factor to be considered with others in regard to dividing it.<sup>241</sup> In short, the courts in those states which have no explicit statutory provisions may, but are not required to, divide gift or inherited property;<sup>242</sup> the decision lies within their broad discretion.

## 2. Valid Agreements of the Parties

An interesting feature of many marital property statutes is a provision which allows the marital partners to enter into an agreement to exclude certain property acquired during the marriage from the realm of marital property.<sup>243</sup> As one commentator has observed, the parties to the marriage can effectively opt out of a presumptive equal or equitable distribution of marital property system by simply executing an agreement (antenuptial or postnuptial) to that effect which is fair and reasonable.<sup>244</sup> Given this, the focal point of judicial analysis has invariably been upon the validity of such agreements in screening out property which would otherwise be marital property and, consequently, subject to the distributive powers of the court. For instance, in *In re Marriage of Stokes*,<sup>245</sup> the parties to the marriage entered into an antenuptial agreement which provided that all property owned before marriage or acquired after marriage would be their respective separate property. The husband's property escalated substantially in value during the

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240. *Preston v. Preston*, 646 P.2d 705 (Utah 1982) (husband's contribution to farm inherited by the wife was too meager to transmute it to marital property). *But see Johnson v. Johnson*, 300 N.W.2d 865 (S.D. 1980) (husband's significant contributions to the acquisition of the marital home did not justify its characterization as a gift by the trial court; rather, home should have been sold and the proceeds from the sale should have been equitably divided between the parties).

241. *Cohm v. Cohm*, *supra* note 239, at 184. (gift property); *Andera v. Andera*, 277 N.W.2d 725 (S.D. 1979); *Torrey v. Torrey* 206 Neb. 485, 293 N.W.2d 402 (1980); *Craver v. Craver*, 601 P.2d 999 (Wyo. 1979); *Wachholz v. Wachholz*, 603 P.2d 647 (Kan. App. 1979) (gifts during marriage are marital property), subsequently followed by *Redmond v. Redmond*, 629 P.2d 142 (Kan. 1981); *Herlitzke v. Herlitzke*, 102 Wis.2d 490, 307 N.W. 2d 307 (Ct. App. 1981) (source of property is an equitable distribution factor).

242. *Lord v. Lord*, 443 N.E.2d 847 (Ind. App. 1983) (gift and inheritance property: separate division was equitable, but not required). *See also Wilson v. Wilson*, 409 N.E.2d 1169 (Ind. App. 1980).

243. Some states which have statutory provisions encompassing the valid agreements exception are: Arkansas, Colorado, Delaware, District of Columbia, Illinois, Iowa (agreements are to be considered, but are not binding), Kentucky, Maine, Maryland, Minnesota, Missouri, New York, North Carolina, Pennsylvania, and Wisconsin.

244. *DuCanto*, *supra* note 87.

245. 42 Colo. App. 245, 608 P.2d 824 (1980).

marriage; and the issue was whether this increase in value was excluded from the domain of marital property by the antenuptial agreement.<sup>246</sup> The Colorado Court of Appeals held that an antenuptial agreement which was valid according to ordinary contract principles<sup>247</sup> could negate the statutory mandate that the increase in value of separate property is marital property.<sup>248</sup>

Although validity, or lack thereof, has been a central issue in many of the cases, the basic question as to whether there is actually an agreement present has also surfaced in a few instances. In *Hofmann v. Hofmann*,<sup>249</sup> the Illinois Supreme Court wrestled with this very question. In *Hofmann*, the husband and wife purchased a farm from the husband's parents at reduced value. Although she was present at the sale, the wife did not object to her name not being placed on the deed. The issue broached by these facts was whether the wife had agreed that the farm was to be the separate property of the husband by her failure to object. The Supreme Court of Illinois reasoned that the wife's silence could not be construed as an agreement to surrender her marital property rights in the farm. Thus, she was presumed to have had a marital property interest in the farm since it was acquired during the marriage.<sup>250</sup>

In a similar vein, the Missouri Court of Appeals, in *Snider v. Snider*,<sup>251</sup> held that the exclusion for valid agreements did not pertain to a marital agreement to purchase stock because it was not grounded upon an intent to alter marital property rights.<sup>252</sup> Thus, the stock remained marital property, and the trial court did not err by ordering its

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246. Unlike most equitable distribution states, Colorado denominates the increase in value during the marriage of separate property as marital property. See COLO. REV. STAT. § 14-10-113(4) (1982 Supp.).

247. Quite interestingly, the court differentiated between separation agreements and antenuptial agreements in terms of the test for determining validity. According to the court, the unconscionability standard of review which governs separation agreements does not apply to antenuptial agreements. Instead, the validity of antenuptial agreements is ascertained in accordance with the normal contract laws extant at the time the contract is made. See *In re Marriage of Stokes*, 42 Colo. App. 245, 608 P.2d 824 (1980) and *Newman v. Newman*, \_\_\_ Colo. \_\_\_, 653 P.2d 728 (1982) (the common law subjects antenuptial agreements to fairness review for fraud, overreaching, and concealment at the time when made).

248. *In re Marriage of Stokes*, 42 Colo. App. at \_\_\_, 608 P.2d at 828. See also *In re Marriage of Ingels*, \_\_\_ Colo. App. \_\_\_, 596 P.2d 1211 (1979).

249. 94 Ill.2d 205, 446 N.E.2d 499 (1983).

250. *Id.* at \_\_\_, 446 N.E.2d at 502-03. The supreme court also distinguished *Hofmann* from a prior decision, *In re Marriage of Redden*, 89 Ill. App.3d 1073, 412 N.E.2d 219 (1980), on the basis that the farm property involved in *Redden* was the subject of an actual agreement between the parties.

251. 570 S.W.2d 770 (Mo. App. 1978).

252. *Id.* at 773.

equitable division between the parties.

In sum, the analytical framework for dealing with the "valid agreements" exception to the marital property principle seems to involve a two-pronged inquiry: (1) whether there is an agreement, and (2) whether it is valid. The resolution of these salient questions, as usual, depends upon the peculiar facts of each case. Moreover, a court's notion of fairness and equity in view of all the surrounding facts and circumstances will undoubtedly play a major role in the factual determination.

### 3. Property Acquired In Exchange for Property Acquired Prior to Marriage

The exception to general marital property which encompasses property obtained in exchange for property acquired prior to marriage can engender some very complex statutory construction problems.<sup>253</sup> As a result, some courts have been constrained to engage in some rather trenchant analysis to discern if the exception embraces the facts of a given case. For instance, in *Svetenko v. Svetenko*,<sup>254</sup> the husband brought farm machinery into the marriage. However, during the marriage, the parties obtained some newer farm machinery in exchange for the premarital equipment. Rejecting the trial court's award to the husband of all the farm machinery as his separate property, the Supreme Court of North Dakota held that the farm machinery was marital property, even though obtained in exchange for premarital property, to the extent its value exceeded that of the premarital farm equipment.<sup>255</sup>

In another interesting case, *Tibbetts v. Tibbetts*,<sup>256</sup> the Supreme Judicial Court of Maine provided some illumination concerning the precise contours of this exception by declaring that "it does not follow that where a part of the property exchanged was non-marital, the entire property acquired is, as a result, non-marital."<sup>257</sup> Elaborating fur-

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253. Among the states whose marital property statutes embrace this exception are: (1) Arkansas, (2) Delaware, (3) District of Columbia, (4) Illinois, (5) Kentucky, (6) Maine, (7) Minnesota, (8) Missouri, (9) New York, (10) North Carolina, (11) Pennsylvania, and (12) Wisconsin.

A number of these statutes also embody another distinct exception—property acquired in exchange for property acquired by gift, inheritance, devise, or descent. *See, e.g.*, ARK. STAT. ANN. § 34-1214(B)(2) (Supp. 1983); KY. REV. STAT. § 403.190(2)(a) (1982 Supp.); MO. ANN. STAT. § 452.325(2)(2) (Vernon Supp. 1983); MINN. STAT. ANN. § 518.54(5)(c) (West Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 722-A(2)(B) (1964); D.C. CODE ANN. § 16-910(a) (1981); N.Y. DOM. REL. LAW § 236, Part B(d)(3) (McKinney 1977).

254. 306 N.W.2d 607 (S.D. 1981).

255. *Id.* at 611.

256. 406 A.2d 70 (Me. 1979).

257. *Id.* at 74.

ther, the court reasoned:

Such property is non-marital to the extent that it was acquired in exchange for property acquired prior to marriage. Thus a single item of property may be to some extent non-marital and the remainder marital. Accordingly, where property is acquired in exchange for both marital property and non-marital property, the portion of the property acquired in exchange for non-marital property must then be "set apart" . . . .<sup>258</sup>

Upon achieving the appropriate separation of marital and non-marital property, "the divorce court must then set apart the non-marital property to each spouse and divide the marital property in an equitable manner between them."<sup>259</sup> Commenting later upon *Tibbetts*, in *Stevens v. Stevens*,<sup>260</sup> the Supreme Judicial Court of Maine provided further elucidation upon this exchange-set aside procedure by noting: "Under the tracing or source-of-funds theory recognized in *Tibbetts*, an exchange of a nonmarital interest for other property after marriage will yield only a nonmarital interest proportionate in value in the newly acquired property."<sup>261</sup>

To be sure, other factual issues may also arise concerning this exchange exception to the rule of marital property. In all likelihood, however, the questions should be no more difficult than those involved in the cases discussed above, for the process of tracing the non-marital interest in the exchanged property into the newly acquired property will generally be extremely troublesome.

#### 4. Miscellaneous Exceptions to General Marital Property

Even the process of defining some lesser-known exceptions to general marital property is a thorny undertaking. Specifically, this is the

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258. *Id.* at 75 (emphasis added by the court).

259. *Id.* at 77. The methodology that the court formulates to accomplish the task "of separating marital and non-marital property which has been conjoined in the acquisition of a single property during marriage" is eclectic in that it is drawn from the UMDA, community property court decisions, the ideas of legal commentators, and the Maine equitable distribution statute itself. *Id.* at 75-77.

260. 448 A.2d 1366 (Me. 1982).

261. *Id.* at 1371. In *Stevens*, the husband inherited property before marriage as a joint tenant with his mother and sister. After he married, title to the property was transferred to a strawman, who, in turn, conveyed the property to the husband and wife. The court held that the transfer of property to the husband and wife as joint tenants did not give the husband a larger share than his original one-third inherited interest as separate property. In other words, tracing the husband's separate property to ascertain what part of the newly acquired property was indeed separate led only to that percentage of the property which he had obtained by intestate succession.

case with respect to personal injury and workers' compensation awards and settlements. A graphic illustration of the disagreement that can arise in this regard is found in *Mack v. Mack*,<sup>262</sup> a decision of the Wisconsin Court of Appeals. In *Mack*, the husband was involved in a motorcycle accident during the marriage. A joint settlement was reached in the neighborhood of \$130,000.<sup>263</sup> The court of appeals ruled that the personal injury award was marital property, relying quite heavily on the fact that the Wisconsin marital property statute did not specifically exclude a personal injury settlement from the realm of marital property.<sup>264</sup> Although the settlement was held to be a marital asset, the court departed from "the presumed equal division" rule under Wisconsin marital property law and awarded the husband the larger share. In explicating its reasons for upholding the trial court in this regard, the court of appeals stated:

The court properly awarded a greater share of the settlement to James in view of its source. Because of the continuing effect of the injury to James, this is an appropriate case to alter the apportionment from the presumed equal division.

The effect of receiving the greater part of the settlement is to increase the amount of income that James will earn over his lifetime, an increase not unbalanced by the pain, suffering, humiliation, and loss of enjoyment of life suffered by James. It was also considered by the court insofar as it increases the income available to James for purposes of maintenance and support.<sup>265</sup>

Other courts have similarly held that a personal injury award was a marital asset.<sup>266</sup> But there is no consensus on the issue as evidenced by the South Dakota Supreme Court's decision in *Fink v. Fink*.<sup>267</sup> In a slightly unusual fact situation where the husband was injured in an explosion before the marriage and a settlement was reached after the complaint for divorce was filed but before a divorce decree was issued,

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262. 108 Wis.2d 604, 323 N.W.2d 153 (Ct. App. 1982).

263. *Id.* at \_\_\_, 323 N.W.2d at 154. The court seemed to attach some significance to the fact that the "lump sum settlement" was not only for the satisfaction of the husband's claim, but for the wife's claims, if any, as well.

264. *See* WIS. STAT. ANN. § 767.255 (West 1981). The terms of the statute exclude those assets which can be properly characterized as being a "gift, bequest, devise, or inheritance." *Mack v. Mack*, 108 Wis.2d at \_\_\_, 323 N.W.2d at 154-55.

265. *Id.* at \_\_\_, 323 N.W.2d at 155.

266. *See, e.g.*, *Harmon v. Harmon*, 391 A.2d 552, 553 (N.J. Sup. Ct. A.D. 1978) ("...the settlement monies from plaintiff's motor vehicle accident occurring during the marriage is marital property for distribution purposes. . ."); *Heilman v. Heilman*, 95 Mich. App. 728, 291 N.W.2d 183 (1980).

267. 296 N.W.2d 916 (S.D. 1980).

the court ruled "that the settlement proceeds were not marital assets subject to distribution."<sup>268</sup> Of especial significance is the fact that the court went to great lengths to distinguish *Fink* from other cases which had previously held that personal injury settlements were divisible marital assets.<sup>269</sup> The basic distinctions drawn by the court were that the cause of action in *Fink* "arose prior to the marriage" and that the settlement monies were received a considerable time after the divorce complaint was filed.<sup>270</sup> It seems, quite frankly, that these factual distinctions probably do reconcile *Fink* with those cases which have reached a contrary result.

In a similar vein, the Kentucky Supreme Court in *Johnson v. Johnson*,<sup>271</sup> held that "a lump-sum award of workers' compensation received by one of the spouses during the pendency of a divorce action between them is marital property."<sup>272</sup> The principal basis for the court's decision was its perusal of the Kentucky marital property statute<sup>273</sup> which reflected that a workers' compensation award was not enumerated as an exception to the general marital property rule.<sup>274</sup>

In summary, the miscellaneous exceptions to marital property like personal injury and workers' compensation awards and settlements once again highlight the ambiguities that are inherent in virtually all presumptive equal and equitable distribution of marital property statutes.

## V. THE ARKANSAS APPELLATE COURTS RESPOND TO SOME KNOTTY PROBLEMS

### A. Pensions

Surprisingly, neither the Arkansas Supreme Court nor the Arkansas Court of Appeals has been inundated by a plethora of marital property questions concerning pension benefits.<sup>275</sup> But a few noteworthy pension-related cases have been decided since the current marital property statute was enacted in 1979.

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268. *Id.* at 919.

269. *Id.* at 919.

270. *Id.* at 919.

271. 638 S.W.2d 703 (Ky. 1982).

272. *Id.* at 704.

273. KY. REV. STAT. § 403.190 (Supp. 1982).

274. *Johnson v. Johnson*, 638 S.W.2d at 704.

275. It is difficult to rationalize the paucity of Arkansas cases which have focused upon the pension benefits issue, although it is admittedly one of the most significant problems attendant to the dissolution of a marriage.



*Paulsen v. Paulsen*<sup>276</sup> was the first pension case to arise subsequent to the enactment of Act 705. It involved the issue of whether military retirement pay was marital property subject to division upon divorce.<sup>277</sup> Focusing upon the "attributes" of property, the supreme court concluded that military pensions do not vest, terminate upon the death of the retiree, or have cash, surrender, or redemption value; hence they cannot be logically described as "a fixed and tangible asset."<sup>278</sup> In essence, the court reasoned that military retirement pay was not property and thus could not be divided pursuant to the marital property statute at divorce.<sup>279</sup> Interestingly, and perhaps significantly, the supreme court did temper slightly the effect of excluding military retirement pay from the realm of marital property by holding that, while not marital property, military retirement pay was an economic factor with respect to alimony and child support determinations.<sup>280</sup>

Notwithstanding the federal preemption turmoil spawned by *McCarty v. McCarty*<sup>281</sup> and Congress' counteractive response via the Uniformed Services Former Spouses Protection Act,<sup>282</sup> *Paulsen* has weathered the storm unscathed. Indeed, it still appears to be an accurate statement of Arkansas law.<sup>283</sup>

276. 269 Ark. 523, 601 S.W. 2d 873 (1980).

277. Construing the predecessor legislation, ARK. STAT. ANN. § 34-1214 (Repl. 1962), in *Feeney v. Feeney*, 259 Ark. 858, 537 S.W.2d 367 (1976), the Arkansas Supreme Court held that military retirement pay was not personal property capable of being distributed upon divorce. A similar ruling was rendered later regarding railroad retirement benefits in *Knopf v. Knopf*, 264 Ark. 946, 576 S.W.2d 193 (1979).

278. *Paulsen v. Paulsen*, 269 Ark. 523, 526, 601 S.W. 2d 873, 875 (1980).

279. *Id.* at 256, 601 S.W.3d at 875.

280. *Id.*

A similar approach was urged upon the supreme court in *Day v. Day* by Justice Hickman as an alternative to the allocation between the parties to the marriage of the husband's pension rights as marital property. Justice Hickman, citing *Paulsen* and other cases, stated:

If the property can be divided at divorce, it should be done at that point. . . . If it appears inequities may result regarding either party, alimony is the answer. That has been the answer of our courts and a good many other courts. *Day v. Day*, 281 Ark. 261, 270, 663 S.W.2d 719, 723 (1984).

In *Day*, the majority of the court felt that this was not an appropriate method for disposing of the case because "an award of alimony and a division of marital property serve different purposes." *Id.* at 268, 663 S.W.2d at 722.

281. 453 U.S. 210 (1981).

282. 10 U.S.C. §§ 1401-1450 (1982).

283. See *Cochran v. Cochran*, 7 Ark. Ct. App. 146, 644 S.W.2d 635 (1983) where the Arkansas Court of Appeals reaffirmed the principles of *Paulsen*.

But a cloud of uncertainty may now hang over the status of military pensions in Arkansas in view of *Day v. Day*, 281 Ark. 261, 663 S.W.2d 719 (1984). For example, in a scathing dissent, Justice Hickman surmised that the extremely broad language appearing in the majority opinion might very well "be applied to military pensions" and possibly undo earlier precedent which ex-

Although the law in Arkansas concerning military retirement pay vis-à-vis marital property seems rather clear, a far different situation is extant with respect to civilian pension benefits. The first case in which the supreme court has squarely addressed the question of civilian pensions as a species of marital property is *Bachman v. Bachman*.<sup>284</sup> In *Bachman*, the plaintiff husband was a physician who practiced medicine in Russellville as a member of a professional medical association. As a result, he participated in the association's profit sharing trust and money-purchase pension plan. After the Bachmans failed to reach an agreement as to the allocation of Dr. Bachman's interests in the profit-sharing trust and pension plan, it was incumbent upon the Arkansas courts to determine if they were distributable marital assets upon marital dissolution.<sup>285</sup> Regarding the husband's interests in the pension plan and profit sharing trust, the Arkansas Supreme Court held that they were marital property, and the wife was, therefore, entitled to one-half of these interests.<sup>286</sup> Basically, the court reasoned that since the husband's interests in the pension plan and profit sharing trust had vested, had accumulated and were therefore ascertainable, and were distributable to Dr. Bachman at the time of the divorce if he had simply withdrawn from the professional association, they were indeed "a fixed and tangible asset" and thus property within the meaning of the marital property division statute.<sup>287</sup>

At this point in its analysis, however, the court failed to provide some much-needed direction concerning two other troublesome areas which generally surface in regard to pensions in the context of marital property: valuation and distribution.<sup>288</sup> Instead, the supreme court remanded the case to the trial court with directions that it address these

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cluded them from the rubric of marital property. *Id.* at 270, 663 S.W.2d at 723. But, until there is a definitive court ruling which explicitly overrules *Paulsen*, its rationale should still be accepted as good law.

For a more detailed discussion of *Day v. Day*, see notes *infra*, 286-322.

284. 274 Ark. 23, 621 S.W.2d 701 (1981).

285. The Yell County Chancery Court had previously held that the husband's interests in the trust and pension plan was not marital property and, alternatively, even if they did constitute a marital property interest, the wife was not entitled to share in the vested proceeds. *Id.* at 27, 621 S.W.2d at 703.

286. The supreme court rejected the wife's contention, however, that her one-half property interest should extend beyond the date of the divorce, expressing the view that this might be unfair and unduly disruptive of the professional association. Consequently, the wife's interest in the trust and pension plan was measured up to the date of the divorce. *Id.* at 28, 621 S.W.2d at 704.

287. *Id.* at 28, 621 S.W.2d at 703.

288. For instance, a complex question concerning the divisibility of non-contributing pension plans still awaits judicial determination.

questions without the benefit of any carefully articulated guidance from the state's highest court.<sup>289</sup> Consequently, these two vital issues are lacking any definitive guidelines from the supreme court; this is indubitably a major flaw in the *Bachman* analysis.

Besides unresolved questions in regard to methods of valuation and allocation of pension rights, it must be underscored that the pension plan in *Bachman* was vested and unmatured.<sup>290</sup> Thus, the case did not squarely address the status of nonvested pension benefits. Given the language embodied in *Bachman*, however, it is transparent that the vested nature of Dr. Bachman's pension<sup>291</sup> benefits was an integral factor in the supreme court's reasoning.

The most recent, epochal marital property development in connection with pension benefits in Arkansas occurred in the case of *Day v. Day*.<sup>292</sup> In *Day*, the issue was whether the husband's interest in an employer-sponsored pension plan was marital property subject to division at divorce.<sup>293</sup> Briefly, the undisputed facts in *Day* were that the parties had been married for a considerable period; during this time, six children had been born of the marriage, with all but one having reached majority at the time of the divorce.<sup>294</sup> The bone of contention at the trial level and ultimately on appeal before the Arkansas Supreme Court was the divisibility as marital property of the husband's interest in the University of Arkansas' retirement plan.<sup>295</sup> Of paramount interest was the fact that the plan was described by the supreme court as being "a combination of fixed and variable annuities, which cannot be

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289. *Id.* at 28, 621 S.W.2d at 704.

290. Although Dr. Bachman did not have immediate access to the pension, it was immediately distributable to him at the time of divorce by withdrawing from the professional association. But since this right of access was not unconditional, the pension interest must be classified as being unmatured. *See Note, supra* note 105, at 181-182.

291. The emphasis on being "vested" as a prerequisite for being classified as property has arisen more recently, albeit in slightly different contexts. In *McMurtray v. McMurtray*, 275 Ark. 303, 629 S.W.2d 285 (1982) the husband's interest in company stock was vested and fully distributable to him and was therefore marital property subject to equal division; however, in *Hackett v. Hackett*, 278 Ark. 82, 643 S.W. 2d 560 (1982), the husband's capital account with his employer's company was not shown to be vested nor fully distributable to him at the date of the divorce and consequently was not marital property.

This view gained significant support recently in *Potter v. Potter*, 280 Ark. 38, 655 S.W. 2d 382 (1983), where the Arkansas Supreme Court stated that "[p]roperty such as future retirement and pension benefits is not marital property because it has not yet been acquired." The court cites *Paulson* and *Bachman* in support of this proposition.

292. 281 Ark. 261; 663 S.W.2d 719 (1984).

293. *Id.* at 263, 663 S.W.2d at 719.

294. *Id.* at 263, 663 S.W.2d at 720.

295. *Id.* at 264, 663 S.W.2d at 720.

paid in a lump sum, have no loan value, and cannot be transferred."<sup>296</sup> Under the traditional analysis which the Arkansas Supreme Court had heretofore applied, the pension could have easily been characterized as not being "a fixed and tangible asset" and hence not property under the Arkansas marital property statute.<sup>297</sup>

But the Arkansas Supreme Court unexpectedly took a step in a different direction from its previous position by candidly conceding that it had "inadvertently failed to recognize the new concept of 'marital property' created by Act 705 of 1979, as amended."<sup>298</sup> In broad, sweeping language, the court affirmed the chancery court's determination that the husband's interest in his pension plan was marital property subject to division under the Arkansas marital property statute.<sup>299</sup>

The principal basis for this abrupt turnabout, if you will, was the court's unfettered acceptance of the reasoning of *In Re Marriage of Brown*,<sup>300</sup> where the California Supreme Court held that a "husband's pension rights, a contingent interest, whether vested or not vested, comprise a property interest of the community and that the wife may properly share in it."<sup>301</sup> Giving deference to *Brown*, the Arkansas Supreme Court construed Act 705 broadly and concluded that marital property means "all property acquired by either spouse subsequent to the marriage, with exceptions<sup>302</sup> not important" to the *Day* decision.<sup>303</sup>

Under this expansive analysis, the supreme court quoted extensively from that section of the *Brown* decision where the California Supreme Court rejected earlier precedent<sup>304</sup> and characterized a nonvested pension right as property and not a mere expectancy.<sup>305</sup> Ironically, the wholesale adoption of this language might have been gratuitous because the court seemed to conclude that the pension rights in *Day* were vested, in both the generally understood sense<sup>306</sup> and within

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296. *Id.*

297. *See, e.g., Paulsen v. Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980).

298. *Day v. Day*, *supra* note 292, at 265, 663 S.W.2d at 721.

299. *Id.* at 268, 663 S.W.2d at 722.

300. *Id.* at 266-67, 663 S.W.2d at 721-22.

301. *In Re Marriage of Brown*, 15 Cal.3d 838, —, 126 Cal. Rptr. 633, —, 544 P.2d 561, 570 (1976).

302. The exceptions to the marital property rule are found in ARK. STAT. ANN. § 34-1214(B) (1)-(5) (Supp. 1983).

303. *Day v. Day*, 281 Ark. 261, 265, 663 S.W.2d 719, 721 (1984).

304. *French v. French*, 17 Cal.2d 775, 112 P.2d 235 (1941).

305. *Day v. Day*, 281 Ark. 261, 266-67, 663 S.W.2d 719, 721-22 (1984).

306. "Dr. Day's interest is vested in the sense that it cannot be diminished by the University and is not dependent upon his continued employment there." *Id.* at 264, 663 S.W.2d at 720.

the meaning of *Brown*;<sup>307</sup> moreover, they appeared to be unmatured.<sup>308</sup> If this were indeed a vested, unmatured pension plan, then it could have been classified like the pension plans in *Bachman*, which were held to be marital property under preexistent analysis.<sup>309</sup>

But the Arkansas Supreme Court did not so limit its holding in *Day*. Instead, the court spurned any controlling distinction between vested pension plans, either matured or unmatured, in determining whether a pension plan is marital property subject to division upon divorce.<sup>310</sup>

Moreover, the court underscored the fact that the husband's pension right was vested, yet openly embraced that language in the *Brown* case which holds that it is inconsequential whether the pension benefit is vested or nonvested, so long as it is acquired during the marriage.<sup>311</sup> For example, the court, attempting to limit its holding, stated:

What we do hold is simply that earnings or other property acquired by each spouse must be treated as marital property, unless falling within one of the statutory exceptions, and neither one can deprive the other of any interest in such property by putting it temporarily beyond his or her own control, as by the purchase of annuities, participation in a retirement plan, or other device for postponing full enjoyment of the property.<sup>312</sup>

How does *Day* affect *Paulsen*, *Bachman*, and their progeny? In a dissenting opinion, Justice Hickman adopted the position that most, if not all, of the prior court decisions adhering to the "traditional approach to marital property" were ostensibly overruled by *Day*.<sup>313</sup> Is this pure hyperbole? Perhaps it is. But if one parses the majority opinion, its broad language is susceptible of an interpretation that answers some previously unanswered questions and quite possibly changes the answers to some questions which had previously been declared by the

307. "The court explained that it was construing a 'vested' pension right to be one that cannot be unilaterally terminated by the employer without also terminating the employment relationship. In that sense, Dr. Day's annuities are vested." *Id.* at 267, 663 S.W.2d at 722.

308. "Under the plan, Dr. Day cannot withdraw the funds standing to his credit, which have no loan or surrender value, and cannot transfer his interest. He can, however, stop making contributions at any time and began receiving his annuities." *Id.* at 264, 663 S.W.2d at 720.

309. *See supra* note 290.

310. One would think that these two types of pension plans were marital property under the prior traditional property analysis. That is, since a vested, unmatured plan was marital property under *Bachman*; surely, a vested matured plan would be marital property ("a fixed and tangible asset") as well.

311. *Day v. Day*, 281 Ark. 261, 267, 663 S.W.2d 719, 721 (1984).

312. *Id.* at 268, 663 S.W.2d at 722.

313. *Id.* at 269, 663 S.W.2d at 722-23.

court.

Regarding nonvested pension rights as marital property, the supreme court's unrestrained acceptance of the analysis in *Brown* engenders thoughts that such retirement rights may now be viewed as contingent interests in property and not mere expectancies. Clearly, this implication does violence to dictum previously appearing in *Potter v. Potter*<sup>314</sup> which was to the effect that a retirement plan vesting in the future could not be characterized as marital property for the purposes of division under the marital property statute.<sup>315</sup> And even though the pension plan in *Day* was vested, the ultimate holding of the case seems to transcend this limitation.<sup>316</sup> According to *Day*, the determinative factor was that the husband "used part of the family's money to buy the annuities he now seeks to exempt from their proper classification as marital property."<sup>317</sup> Apparently, this was sufficient to transform this retirement plan into marital property, absent some recognized statutory exception,<sup>318</sup> whether it was vested or not.

Perhaps as important as *Day's* potential effect on the treatment of nonvested pension benefits are the ramifications the decision may have upon other pension benefits and similar entitlements that are acquired during the marriage. The broad holding<sup>319</sup> invites a vast amount of speculation and conjecture as to its ultimate reach. As noted by Justice Hickman, "insurance benefits with no cash or loan value", "social security benefits received by a person that is self-employed", and possibly "military pensions" may now be marital property in view of the *Day* rationale.<sup>320</sup> As the majority conceded, and Justice Hickman pleaded, Dr. Day's pension benefit had none of the indicia of "a fixed and tangible asset": "no cash value"; "no loan value"; and "could not be assigned or transferred."<sup>321</sup> Yet, under the court's new "enlightened" definition of the concept of marital property, these standards are apparently no longer necessarily dispositive of the question.

In evaluating *Day*, one cannot ignore the court's blatant disregard

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314. 280 Ark. 38, 655 S.W.2d 382 (1983).

315. *Id.* at 46, 655 S.W.2d at 387.

316. Again, this is manifested in large measure by the deference accorded to *In Re Marriage of Brown*, *supra* note 300.

317. *Day v. Day*, *supra* note 292, at 266, 663 S.W.2d at 721. (Emphasis added.)

318. In his dissenting opinion, Justice Hickman emphasized that "[t]he mere fact that Mr. Day contributed a small percentage of his monthly check into the plan during their marriage should not convert it into marital property." *Id.* at 269, 663 S.W.2d at 723.

319. *Id.* at 268, 663 S.W.2d at 722.

320. *Id.* at 269-70, 663 S.W.2d at 723.

321. *Id.* at 264, 663 S.W.2d at 720 (majority opinion); *Id.* at 269, 663 S.W.2d at 723 (dissenting opinion).

of established precedent with respect to pensions as marital property. But it is totally refreshing and reassuring in a sense to see a court recognize that its prior analysis was flawed, thus necessitating a change in direction. To this extent, the *Day* decision should be applauded.<sup>322</sup> But the decision doesn't resolve all the unanswered questions. To be sure, it spawns uncertainty where there was none before—the military pension situation is just an example.<sup>323</sup> To the extent, however, that the decision eliminates narrow, sometimes illogical, distinctions as the basis for deciding whether a pension right is marital property, it is a progressive step which is congruent with the partnership theory of marriage and thus with the legislative intent underlying the Arkansas marital property statute.<sup>324</sup>

A glaring deficiency of *Day*, like *Bachman*, is the lack of guidance with respect to valuation.<sup>325</sup> Granted, valuation was not a troublesome determination in the case because TIAA-CREF information on this question was probably readily available.<sup>326</sup> But the court, in looking beyond *Day*, should have seized upon the opportunity to provide more illumination on an extremely vital issue which could have been utilized in more complex cases later on.

Although the *Day* decision is a highly significant addition to the evolving pension/marital property jurisprudence in Arkansas, it is probably not the ultimate judicial treatment of the issue. What it does provide is a new platform, modeled after California,<sup>327</sup> from which to address the unanswered and uncertain questions that remain.<sup>328</sup>

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322. Only with the passage of time will it be known whether it was impolitic for the supreme court to abandon precedent "in favor of a different approach used by California." Justice Hickman, in his dissenting opinion, viewed the court's action as being quite unreasonable. *Id.* at 270, 663 S.W.2d at 723.

323. Arkansas' stance on military pensions—they are nonmarital property—is perhaps contrary to the partnership theory of marriage. But a redeeming feature of the position is that it is unambiguous. *Day* tends to cloud the issue.

324. See *supra* notes 74-81.

325. Regarding distribution, the supreme court basically endorses the allocation scheme developed by the chancellor. After determining that Dr. Day's TIAA-CREF pension plan had an accumulated value of \$95,425.03, the chancellor awarded half of that amount to Mrs. Day. However, Mrs. Day will begin to receive her portion of the annuities only when Dr. Day decides to accept his pension benefits. As to any contributions to TIAA-CREF which Dr. Day may make subsequent to the divorce decree, they shall inure "only to his benefit." See *Day v. Day*, 281 Ark. 261, 264, 663 S.W.2d 719, 720 (1984).

326. TIAA-CREF periodically provides such information to the participants in its annuity programs to apprise them of the growth in value of their pension benefits. (See TIAA-CREF Report of Annuity Premiums and Benefits).

327. See *supra*, notes 300-303.

328. In this writer's opinion, the *Day* decision offers a better hope of addressing these vague and unanswered questions in a manner truly consistent with the concept of marital property as

B. *Treating the Marital Home Which is Owned as a Tenancy by the Entirety*

When the present Arkansas marital property law became effective,<sup>329</sup> the question was broached as to whether this novel approach to property division in Arkansas via the concept of presumptive equal division of marital property<sup>330</sup> encompassed property owned by the spouses as tenants by the entirety. It is conceivable that some chancellors may have thought that the new statute made them "horse traders" with respect to all marital property, including that held in tenancy by the entirety.<sup>331</sup> The legitimacy of this reasoning, however, was mildly suspect because there was a tenancy by the entirety statute already in place,<sup>332</sup> which called for the equal division of entirety property. To be precise, the statute provides that when the divorce decree is entered the tenancy by the entirety estate dissolves automatically (unless otherwise provided by the court) and becomes a tenancy in common, subject to apportionment between the spouses as such.<sup>333</sup>

The issue created by juxtaposing the present marital property statute and the preexisting tenancy by the entirety statute was whether the marital property statute superseded the older entirety statute, thereby making entirety property divisible marital property under the marital property statute. The issue reached eventually the Arkansas Supreme

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envisioned by the Arkansas General Assembly.

329. 1979 Ark. Acts 705.

330. On some occasions, Arkansas has been designated as an equitable distribution of marital property state. *See, e.g.*, 30 STAND. FED. TAX. REP. (CCH) ¶ 817 (1983). However, Arkansas' marital property statute appears to create a presumption of an equal division of marital property unless such a division would be inequitable. Then the court is empowered by the statute to equitably divide the marital property in light of the ten equitable criteria listed therein. In sum, it is slightly misleading to refer to Arkansas as an equitable distribution state per se; a preferable designation would be presumptive equal distribution unless special factors militate against it; then equitable distribution of the marital property becomes the rule.

331. *But see* the trial court's decision in *Warren v. Warren*, 273 Ark. 528, 529 623 S.W.2d 813, 814 (1981).

332. ARK. STAT. ANN. § 34-1215 (Supp. 1983).

333. Under the tenancy by the entirety statute, the court has only two options available with respect to the disposition of this property: (1) it can order the property sold and divide the proceeds equally between the parties, or (2) it can place one of the spouses in possession of the property until some future eventuality. However, the court cannot compel one spouse to convey his or her interest in the property to the other. *See Yancey v. Yancey*, 234 Ark. 1046, 356 S.W.2d 649 (1962). *See also Crabb v. Smith*, —, Ark. App. —, —, 664 S.W.2d 510, 511 (1984) ("The chancellor had the right to place the appellee in possession of the home, even for life."); *Cantrell v. Cantrell*, — Ark. App. —, —, 664 S.W.2d 493, 494 (1984) ("the trial court may award the possession of the homestead to either spouse, upon such terms as appear to be equitable and just"); and *Hada v. Hada*, 10 Ark. App. 281, 283, 663 S.W.2d 203 (1984).



Court<sup>334</sup> in *Warren v. Warren*,<sup>335</sup> and the court held that tenancy by entirety property was not marital property subject to division under the marital property statute but was property which could only be divided equally under the entirety statute.<sup>336</sup> This principle has been reaffirmed repeatedly in subsequent appellate court decisions.<sup>337</sup> Thus, the marital home which is owned as a tenancy by the entirety is not subject to the "horse trader" instincts of chancellors; rather, this property must be divided equally between the parties. As to those marital homes which the spouses do not own as tenants by the entirety, then the marital property provisions of the general marital property statute probably do apply.<sup>338</sup>

A potential problem may surface in connection with insuring that a marital home held as a tenancy by the entirety will actually be divided equally upon divorce. Perhaps the safest mechanism would be to order that the property be sold and the proceeds divided equally between the parties.<sup>339</sup> However, in some instances, especially in those cases where minor children are involved, the chancellor has the alternate prerogative of placing one of the spouses (generally the custodial parent) "in possession of the premises."<sup>340</sup> The exercise of this option may spur allegations by the spouse who is not awarded possession that this arrangement will inevitably lead to an unequal division of the marital home. In fact, this issue came before the Arkansas Court of Ap-

334. In *Ausburn v. Ausburn*, 271 Ark. 330, 609 S.W.2d 14 (1980), the issue was untimely raised for the first time on appeal; the supreme court rejected it and consequently upheld the chancellor's equal division pursuant to ARK. STAT. ANN. § 34-1214 (Supp. 1983).

335. 273 Ark. 528, 623 S.W.2d 813 (1981).

336. *Id.* at 816.

337. *Bratcher v. Bratcher*, 5 Ark. Ct. App. 250, 635 S.W.2d 278 (1982) (tenancy by the entirety property is not marital property under ARK. STAT. ANN. § 34-1214); *Wagh v. Wagh*, 7 Ark. App. 122, 644 S.W.2d 630 (1983); *Askins v. Askins*, 5 Ark. Ct. App. 64, 632 S.W.2d 249 (1982) [the general marital property statute does not affect ARK. STAT. ANN. § 34-1215's application to tenancy by the entirety property.]; and *Warren v. Warren*, 11 Ark. App. 58, 59, 665 S.W.2d 909, 910 (1984) ("[t]his statute is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault"). *But see* *Pinkston v. Pinkston*, 278 Ark. 233, 644 S.W.2d 930 (1983) where the Supreme Court seems to hold that a division of jointly held property was governed by ARK. STAT. ANN. § 34-1214 and was hence susceptible to an equal division unless demonstrable special circumstance justified "a departure from an equal division." This apparent inconsistency in the decisional law will be later discussed at notes *infra* 439-441.

338. *See, e.g., Pinkston v. Pinkston*, 278 Ark. 233, 644 S.W.2d 930 (1983) and *Hada v. Hada*, *supra* note 333 at 284, 663 S.W.2d at 205, where the court of appeals noted that the *Warren* holding pertains only to "entirety property."

339. This option's availability was recently reaffirmed by the court of appeals in *Wagh v. Wagh*, 7 Ark. Ct. App. 122, 644 S.W.2d 630, 631 (1983).

340. *Id.*

peals in *Bramlett v. Bramlett*.<sup>341</sup> In *Bramlett*, the wife was awarded possession of the marital home along with custody of the parties' minor children. Moreover, the husband was required to continue to make mortgage payments on the house, to pay taxes, and to make child support payments. The husband argued that it was necessary for the court to fix his equity in the house as of the date the divorce decree was entered and to give him credit for one-half of his mortgage payments in order that there would be an equal division of the house. Otherwise, he contended, the wife's interest in the house would steadily appreciate as he continued to make the mortgage payments, leading to the unpalatable situation of an unequal division of the property upon its ultimate sale.<sup>342</sup> The court of appeals listened to the husband's contentions with an unsympathetic ear, basically holding that with respect to tenancy by the entirety property (the marital home) the trial court was not required to fix the husband's equity upon divorce.<sup>343</sup> In addition, the court held that it was not erroneous to refuse to award "the husband credit for one-half of the mortgage payments where the court considered" them in formulating the child support obligations.<sup>344</sup> Under these circumstances, the trial court had not transgressed the statutory requirement that there be an equal division of property owned as a tenancy by the entirety.

Interestingly, the law in Arkansas in regard to distributing the marital home at divorce seems to be fairly settled. The incisive analysis of the Arkansas appellate courts is largely responsible.<sup>345</sup>

### C. *Defining the Exceptions to General Marital Property*

The Arkansas marital property statute encompasses several exceptions to the principle that "'marital property' means all property acquired by either spouse subsequent to the marriage."<sup>346</sup> A number of these exceptions have yet to be judicially interpreted by either the Ar-

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341. 5 Ark. Ct. App. 217, 636 S.W.2d 294 (1982).

342. *Id.* at 219, 636 S.W.2d at 295.

343. *Id.*

344. *Id.* at 220, 636 S.W.2d at 295.

345. *But see* Pinkston v. Pinkston, *infra* notes 446-448, for a discussion of a potential source of uncertainty that may have developed in this area.

346. ARK. STAT. ANN. § 34-1214(B) (Supp. 1983). The enumerated exceptions to the Arkansas marital property law are: "(1) [P]roperty acquired by gift, bequest, devise or descent; (2) [P]roperty acquired in exchange for property acquired prior to marriage or in exchange for property acquired by gift, bequest, devise or descent; (3) [P]roperty acquired by a spouse after a decree of divorce from bed and board; (4) [P]roperty excluded by valid agreement of the parties; and (5) [t]he increase in value of property acquired prior to the marriage."

kansas Supreme Court or the Arkansas Court of Appeals. For instance, there are no appellate decisions squarely construing the marital property exceptions regarding (1) property acquired in exchange for premarital property, (2) property acquired while a decree of divorce from bed and board is in effect, and (3) the increase in value of premarital property.<sup>347</sup>

There have been, however, some judicial rulings—some instructive and some not—where either the Arkansas Supreme Court or the Arkansas Court of Appeals has placed an interpretative gloss upon some of the enumerated exceptions to the law of marital property. An evaluation of these sparse, but rather significant, decisions is now in order.

### 1. The Gift, Bequest, Devise or Descent Exception

The marital property statute expressly excludes from the marital "kitty" that property which is obtained by virtue of either a gift, bequest, devise, or which has devolved to an individual by descent.<sup>348</sup> In reviewing the few Arkansas appellate decisions construing this exception, one discerns that the courts have interpreted it in a rather straightforward fashion. For example, in *Chrestman v. Chrestman*,<sup>349</sup> the Arkansas Court of Appeals reasoned that since the statute exempted property acquired by "bequest, devise or descent," then it was permissible for the lower court to conclude that the property whose status was being disputed was not marital property subject to division upon divorce.<sup>350</sup>

In another decision, *Hayse v. Hayse*,<sup>351</sup> the court of appeals faced a more complex set of facts. The wife had inherited \$20,000 in money market certificates; she later placed the money in a certificate of deposit in the names of both spouses.<sup>352</sup> Because the \$20,000 was inherited by the wife, according to the court, it would be treated as non-marital property and not be subject to equal division under the marital property statute unless the wife had somehow created a gift interest in

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347. Of those untouched areas, probably the most intricate and troublesome is evaluating "the increase in value of property acquired prior to the marriage." There has also been no judicial activity with respect to the two exceptions concerning property acquired in exchange for exempt property.

348. ARK. STAT. ANN. § 34-1214(B)(1) (Supp. 1983).

349. 4 Ark. Ct. App. 281, 630 S.W.2d 60 (1982).

350. *Id.* at 283, 630 S.W.2d at 62. The operative effect of the court of appeals' decision was that the appellant spouse was not entitled to any portion of the property because it was not a product of the marriage and thus could not be placed under the rubric of marital property.

351. 4 Ark. Ct. App. 160-B, 630 S.W.2d 48 (1982).

352. *Id.* at 160-D, 630 S.W.2d at 48.

her husband when she purchased the certificate of deposit.<sup>353</sup> The court concluded, however, that this act alone did not manifest the donative intent necessary to constitute a gift;<sup>354</sup> hence, the property maintained its non-marital quality and was not divisible.

In summary, it appears that the gift, bequest, devise or descent exception has been and will probably continue to be narrowly construed. The court of appeals has certainly demonstrated its predisposition to interpret this statutory exception in this manner, which will likely make it exceedingly difficult to show that it does not pertain to the facts of a particular case when the issue arises. Moreover, this mode of analysis seems to mirror the supreme court's position as well. In *Mitchell v. Mitchell*,<sup>355</sup> the court held that inherited property belonged to and had to be returned to the spouse who inherited it. Once again, the contention that a gift interest had been created in the other spouse which negated the non-marital character of the property was rejected.<sup>356</sup> And in *Potter v. Potter*,<sup>357</sup> the Arkansas Supreme Court held that a piano which the husband and children purchased for the wife was a gift, taking it outside the realm of marital property.

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353. *Id.* at 160-E, 630 S.W.2d at 49. The court of appeals was essentially looking for something which indicated that the wife had extinguished the "non-marital" status of the inherited property by creating a gift interest in favor of the husband.

354. *Id.* at 160-F, 630 S.W.2d at 49-50.

355. 278 Ark. 619, 648 S.W.2d 51 (1983).

356. *Id.* at 621, 648 S.W.2d at 52. *But see* Gorchik v. Gorchik, \_\_\_ Ark. App. \_\_\_, 663 S.W.2d 941 (1984), where the Arkansas Court of Appeals, applying the *Hayse* analysis, ruled that a husband's inheritance (\$5,000) was transformed to marital property status when he "placed the money voluntarily in a joint account which both parties utilized during the course of their marriage." *Id.* at \_\_\_, 663 S.W.2d at 943. In other words, the court of appeals concluded that the aforementioned facts evinced that the husband had created an interest in the inheritance in favor of the wife, thereby negating "its status as non-marital property."

However, in *Bell v. Bell*, \_\_\_ Ark. \_\_\_, 666 S.W.2d 708, 709 (1984), the Arkansas Supreme Court ruled that "the conveyance of the home from" the husband to the wife "did not constitute a gift" and that the home retained its marital property status, making it subject to equal division between the parties to the marriage at divorce. In explaining its unwillingness to be bound by the apparent conveyance of the home by quitclaim deed, the supreme court noted:

The quitclaim deed was not a gift from appellee to appellant but a device by both parties to ensure that appellee's former wife and children would have no claim on the property. Under the circumstances of this case, where during the marriage, both parties considered the home as joint property, we cannot say the chancellor's finding was clearly against the preponderance of the evidence.

Thus, according to the court, the facts did not reflect the requisite "intent to make a gift."

357. 280 Ark. 38, 44-45, 655 S.W.2d 382, 386 (1983). A dissimilar position was taken in *Richardson v. Richardson*, 280 Ark. 499, 500, 659 S.W.2d 510, 511 (1983) where the court held that the facts did not evidence that a transaction involving 30 acres of land was a gift. Thus, the acreage was deemed to be marital property.

## 2. Property Excluded by Valid Agreement of the Parties

An interesting feature of marital property division statutes is a provision that allows the spouses to opt out, totally or partially, from the realm of marital property by simply entering into a valid agreement to this effect.<sup>358</sup> In fact, one noted family law commentator has opined that the parties can by way of an antenuptial or postnuptial agreement, which is reasonable and fair, exclude any property from the ambit of marital property.<sup>359</sup>

The Arkansas Court of Appeals has considered the "valid agreement" exception twice in connection with reconciliation agreements. In *Schichtel v. Schichtel*,<sup>360</sup> the court initially recognized the validity of reconciliation agreements as an exception to the Arkansas marital property law.<sup>361</sup> Nevertheless, the court held that the provisions of the reconciliation agreement which was before it did not actually exclude the subject property from the realm of marital property.<sup>362</sup> The fatal deficiency of the agreement was that it reserved to the trial court the power to alter or modify its provisions, thus placing in serious question the parties' intent to irrevocably exclude that property from the marital property domain.<sup>363</sup>

In a later case, *Smith v. Smith*,<sup>364</sup> the court of appeals reaffirmed its earlier pronouncement in *Schichtel* as to the validity of reconciliation agreements as an exception to Arkansas' marital property law. However, *Smith* differed dramatically from *Schichtel* in that its facts did reflect a "valid agreement."<sup>365</sup>

Beyond reconciliation agreements, the Arkansas appellate courts have not been afforded an opportunity to decide what other compacts come within the pale of the "valid agreement" exception. There is no readily apparent reason why postnuptial agreements which avoid the fatal shortcomings of the reconciliation agreement in *Schichtel* cannot

358. See, e.g., ARK. STAT. ANN. § 34-1214(B)(4) (Supp. 1983). See also UMDA § 306.

359. DuCanto, *supra* note 87. In connection with the validity of antenuptial agreements in excluding property from the rubric of marital property, there is some ambiguity because ARK. STAT. ANN. § 55-309 (Cum. Supp. 1983), the relatively new antenuptial agreement statute, may be read to foreclose the utility of antenuptial agreements in this regard.

360. 3 Ark. Ct. App. 36, 621 S.W.2d 504 (1981).

361. *Id.* at 38, 621 S.W.2d at 506.

362. *Id.* at 41, 621 S.W.2d at 507-08.

363. *Id.* at 38, 621 S.W.2d at 506.

364. 6 Ark. Ct. App. 252, 640 S.W.2d 458 (1982).

365. *Id.* at 255, 640 S.W.2d at 460. The court of appeals noted the absence of any evidence "that the property was to belong to appellee if the reconciliation was successful or that there was an agreement that appellant would regain any interest in the property at any time."

effectively exclude property from marital property treatment. However, the chief uncertainty with respect to this exception is whether it encompasses antenuptial agreements in view of the equivocal language embodied in the Arkansas antenuptial agreement statute.<sup>366</sup> Further uncertainty and future litigation are probable consequences of this awkwardly drafted statute.

It is evident that both the Arkansas Supreme Court and the Arkansas Court of Appeals have not provided meaningful guidance in a number of the troublesome areas inherent in a presumptive equal/equitable distribution of marital property jurisdiction like Arkansas. In all fairness to both courts, however, many of these issues have not yet come before them;<sup>367</sup> this is probably due to the fact that the Arkansas marital property statute is still a relatively recent addition to Arkansas jurisprudence.<sup>368</sup> In future years, one can simply hope that more definitive answers will flow from the Arkansas appellate courts.

#### D. *The Homemaker's Services*

In what has to be recognized as an epochal development, the Arkansas marital property statute—like many of its counterparts in other states<sup>369</sup>—considers “homemaking as a contribution to the assets of marriage in determining property division.”<sup>370</sup> Under the presumptive equal division scheme embodied in the Arkansas statute, the homemaker services criterion can be a touchstone in fashioning an equitable distribution when the court concludes that an equal division will be inequitable.<sup>371</sup>

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366. See ARK. STAT. ANN. § 55-309 (Supp. 1983) and *supra* note 359.

367. See *supra* note 385.

368. ARK. STAT. ANN. § 34-1214 (Supp. 1983) was, as noted earlier, initially enacted in 1979.

369. See, Freed and Foster, *supra* note 42, at 246 for a listing of these states.

370. Note, *supra* note 2 at 679 n.46. See also ARK. STAT. ANN. § 34-1214(A)(1)(8) (Supp. 1983). [“contributions of each party in acquisition, preservation or appreciation of marital property including services as a homemaker” (emphasis added)]. This statutory provision has been applauded for placing the homemaker’s contribution on the same plane as the breadwinner’s financial contributions. See, Note, *supra* note 2 at 688.

371. See ARK. STAT. ANN. § 34-1214(A)(1)(8) (Supp. 1983). Although in the vast number of cases, the wife and the husband will be the homemaker and breadwinner, respectively, the roles may be reversed in some instances. See, e.g., *Stuart v. Stuart*, 280 Ark. 546, 660 S.W.2d 162 (1983). In *Stuart*, the supreme court spurned the wife’s contention that it was “inequitable to divide the property equally when her earnings formed the greater part of the purchase price.” *Id.* at 548, 660 S.W.2d at 163. And in *Day v. Day*, *supra* note 292 at 264, 663 S.W.2d at 721, the Arkansas Supreme Court once again acknowledged the importance of the services of a homemaker in making a division of marital property incident to divorce. Later in its opinion, the court specifically referred to the *Day* facts and stated:

To date, Arkansas' appellate courts have not been confronted with a deluge of cases broaching the homemaker services issue.<sup>373</sup> Yet, a couple of decisions do deserve some discussion because they provide some guidance as to how this equitable distribution factor will likely be weighed by the courts. In *Ford v. Ford*,<sup>373</sup> the Arkansas Supreme Court had to decide<sup>374</sup> whether a distribution of the marital personal property of the parties—other than property held in tenancy in common—in the amount of 90% to the husband and 10% to the wife squared with the Arkansas marital property division statute in view of the attendant facts and circumstances of the case.

In *Ford*, the determinative factor seemed to be that, for the last 5 ½ years of the marriage, Mrs. Ford had been virtually nonfunctional due to acute mental health problems; as a result, she had contributed very little to the marriage, including meager homemaker services.<sup>375</sup> In contrast, Mr. Ford was an industrious, resourceful farmer who made substantial monetary contributions toward the acquisition of \$300,000 in personal property for the family, the division of which was at issue in the case.

It seems indisputable that the 90/10 split of the personal property in favor of the husband in *Ford* was deemed to be equitable because of the vast disparity that existed in the respective contributions to the marriage of the husband and wife. The wife's miniscule contributions to the farming operations and as a homemaker were undoubtedly considered by the court in a negative vein and were largely the underlying reason why the 90/10 property split was upheld as a permissible equitable distribution of marital property.

A strikingly different result was in evidence later in *Bachman v.*

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[W]e must recognize that Mrs. Day also contributed to the acquisition of the annuities by service as a homemaker and by bearing the six children and bringing them up.

372. *Id.* One can only speculate why only a small number of cases embracing the homemaker's question have reached the Arkansas appellate courts. Here again, it is this writer's opinion that this is another classic example of what can happen during the early states of development of a statute which radically departs from the pre-existing law. Thus, the plenary resolution of each and every issue under the marital property statute may be gradual and could possibly take a long period of time.

373. 272 Ark. 506, 616 S.W.2d 3 (1981).

374. The supreme court also decided in *Ford* that, when a divorce decree is entered, the court must either allow or disallow alimony at that time. It is erroneous for a court to defer its ruling until some time in the future when there may be a change in circumstances. *Id.* at 517, 616 S.W.2d at 9.

375. *Id.* at 511, 616 S.W.2d at 6. The evidence reflected that Mrs. Ford spent much of the 5 ½-year period just sitting in a rocking chair while in a severe state of depression. As a result, the husband contended that she was not a "good homemaker." *Id.*

*Bachman*.<sup>376</sup> As previously noted,<sup>377</sup> the primary issue in *Bachman* was the divisibility as marital property of the husband's interests in a profit sharing trust and money purchase pension plan. Of course, the supreme court ruled that they were divisible marital assets.<sup>378</sup> But perhaps a more important aspect of the case is the weight that the court gave to the homemaker services equitable criterion in deciding the wife's percentage of the trust agreement and pension plan.

In *Bachman*, the court conceded that the property (trust and pension plan) was a product of the husband's labors.<sup>379</sup> Nevertheless, the court observed: "he wanted her to remain in the home. She turned down employment because of his desire that she be a homemaker and active in the community. *Her services as a homemaker are to be taken into consideration in determining the contribution of each party.*"<sup>380</sup>

Applying this reasoning, the supreme court held that the wife was entitled to a one-half interest in the trust agreement and pension plan,<sup>381</sup> indicating once again the willingness of the court to factor in the homemaker's services and contributions in reaching an equitable distribution of the marital property. There were significant homemaker and community contributions made by Mrs. Bachman and hence a more favorable result ensued from the wife's perspective than in *Ford*. Commenting upon the effect of the *Ford* and *Bachman* decisions, a writer has made this observation: "The decisions indicate that the Arkansas Supreme Court has recognized the statute's major innovation: in Arkansas marriages, the wife's homemaking contribution is now equal to the husband's financial contributions."<sup>382</sup>

Although the decisions undoubtedly demonstrate that a court can and sometimes will value the nonmonetary contributions of a homemaker on a par with the financial contributions of the breadwinner, it is

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376. 274 Ark., 23, 621 S.W.2d 701 (1981).

377. See *supra* notes 284-291.

378. 274 Ark. 23, 27, 621 S.W.2d 701, 703 (1981).

379. *Id.* at 28, 621 S.W.2d at 704.

380. *Id.* (emphasis added).

381. Here again, it deserves mention that the court cut off the wife's marital property interest as of the date of the divorce. *Id.*

382. Note, *supra* note 2, at 688. Perhaps the commentator's assessment of the supreme court is accurate. See, e.g., *Stuart v. Stuart*, 280 Ark. 546, 548, 660 S.W.2d 162, 163. *But see Forsgren v. Forsgren*, 4 Ark. Ct. App. 286, 288, 630 S.W.2d 64, 65 (1982) where the court of appeals upheld an unequal division of stock on the basis that it had been acquired solely by the efforts, contributions, and contacts of the husband; and the "wife contributed nothing to the acquisition of the stock, *except her efforts as a homemaker*," (emphasis added). Query: Is the court of appeals placing the financial contribution of a breadwinner on a higher level than the services of the homemaker in *Forsgren*.



unclear whether the court supplied any test or mechanism for valuing the homemaker's services for use in future cases. In neither decision is there a meaningful discussion of the calculus for determining how much the homemaker's services are worth in dollars and cents.<sup>383</sup> This is especially grating in *Ford* where Mrs. Ford's failure as a "contributing partner" caused her to not only lose an equal share, but to be relegated to a position where she was only awarded 10% of the personal marital assets other than tenancy in common property.<sup>384</sup> What valuation methodology concerning homemaker services did the court utilize to reduce her presumptive 50% share so drastically? It is not readily apparent from the decision.<sup>385</sup> And this is a major deficiency, for the reasonably precise valuation of the homemaker's services and contributions is a profoundly important judicial undertaking.

### E. *The Increase in Value of Separate Property*

One of the many exceptions to the Arkansas marital property law relates to the increase in value during the marriage of property acquired before marriage. Under the Arkansas statute, this increment is classified as separate property<sup>386</sup> and is normally not divisible between the spouses at divorce.<sup>387</sup>

To date, neither Arkansas appellate court has clearly defined the precise contours of this marital property exception. In fact, the closest issue yet to arise simply focused upon a spouse's right to recompense for improvements made upon the separate property of the other spouse. In *Callaway v. Callaway*,<sup>388</sup> the Arkansas Court of Appeals awarded the husband one-half of the value of improvements which he made on some real property which was acquired by the wife prior to the mar-

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383. In *Bachman*, for example, the supreme court basically concluded that the wife's contributions were equal to one-half the value of the profit sharing trust and money purchase pension plan which amount was not in the record. The court remanded the matter to the trial court for its determination of the monetary amount. *Bachman v. Bachman*, 274 Ark. 23, 28, 621 S.W.3d 701, 704. In a recent case addressing the homemaker services criterion, *Stuart v. Stuart*, 280 Ark. 546, 660 S.W.2d 162, the Arkansas Supreme Court once again failed to shed any light on the valuation question.

384. Note, *supra* note 2, at 688.

385. It appears that the supreme court relied heavily upon the reasoning and calculations of the chancellor. *Ford v. Ford*, 272 Ark. 506, 516-17, 616 S.W.2d 3, 8. But these computations seem to be a poor substitute for the precision necessitated by such an intricate, vital determination.

386. See ARK. STAT. ANN. § 34-1214(B)(5) (Supp. 1983).

387. But see ARK. STAT. ANN. § 34-1214(A)(2) (Supp. 1983) where the trial court is given discretionary authority to apportion separate property under special circumstances.

388. 8 Ark. Ct. App. 129, 648 S.W.2d 520 (1983).

riage.<sup>389</sup> In regard to the property, the court reasoned that "a spouse is entitled to improvements if the spouse claiming them can show he helped make them."<sup>390</sup> Furthermore, the court concluded that in *Callaway* "the improvements were made with marital property;"<sup>391</sup> this undoubtedly bolstered the husband's claim to a portion of them.<sup>392</sup>

Although the analysis of *Callaway* does not directly fall within the parameters of the increase in value of separate property exception, it may portend the approach that the court of appeals and perhaps the supreme court will employ in the future when they must actually decide whether the exception applies to the facts of a particular case. Because an "improvements" reimbursement case like *Callaway* is not dramatically different in its theoretical approach, the appellate courts may be loath not to equally apportion between the spouses those increases in value of property acquired before marriage which are undeniably attributable to some marital assets, provided the equal division is not deemed to be inequitable. The courts may very well decide that the exception does not apply in such a case, and thus, the increased value is in fact marital property; or they may hold that, although it is separate property, special circumstances nevertheless warrant the court's division of the property.<sup>393</sup> Here again, the definitive resolution of this question must await future litigation.

## VI. WHAT'S AHEAD FOR ARKANSAS IN REGARD TO MARITAL PROPERTY DIVISION?—A REPRISE OF SOME UNANSWERED AND PARTIALLY ANSWERED QUESTIONS AND A PROGNOSTICATION OF POSSIBLE THINGS TO COME.

### A. *Pensions*

Despite the Arkansas Supreme Court's pronouncements in *Bachman v. Bachman*<sup>394</sup> and, most recently, in *Day v. Day*,<sup>395</sup> the issue of

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389. *Id.* at 134, 648 S.W.2d at 523.

390. *Id.*

391. *Id.*

392. The court of appeals noted that the only circumstance which would preclude a spouse from recouping one-half of his improvements is one demonstrating that an equal division would be inequitable. *Id.*

393. See ARK. STAT. ANN. § 34-1214(A)(2) (Supp. 1983) which does seem to allow the court to affect property outside the marital property estate in view of the stated equitable criteria in the statute. See also *Williford v. Williford*, 280 Ark. 71, 76, 655 S.W.2d 398, 401 (1983) ("...the chancellor is given broad powers under § 34-1214 to distribute all property in divorce, nonmarital as well as marital, to achieve an equitable division").

394. *Supra* note 284.

pension benefits in the context of division of marital property upon divorce still remains somewhat unsettled.<sup>396</sup> In retrospect, *Bachman* may have left more questions unresolved than it actually answered. A valid criticism of *Bachman* is that it may have been too narrowly decided.<sup>397</sup> Only vested, unmatured pension rights are specifically encompassed by the court's holding.<sup>398</sup> To be sure, other pension rights quite conceivably may not have been affected.

Perhaps some of the shortcomings of *Bachman* have been assuaged by the *Day* decision. For instance, the court's unqualified endorsement of the reasoning of *In Re Marriage of Brown*, albeit ostensibly superfluous to the determination of the marital property question in *Day*,

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395. *Supra* note 292. The rationale in *Day* was recently adhered to in *Gentry v. Gentry*, — Ark. —, 668 S.W.2d 947 (1984), wherein the Arkansas Supreme Court held that a husband's civil service pension plan, which had vested and from which "the husband was actually receiving benefits at the time of the divorce," was marital property. The court emphasized that "all requirements for receiving benefits, required years of service and contributions, occurred during the marriage." Hence, in the opinion of the court, these retirement benefits had been acquired during the marriage. It deserves comment that the Arkansas Supreme Court in *Gentry*, as in *Day v. Day*, attempted to disavow any intention to establish any "rigid and inflexible rule for the future" by classifying *Gentry's* retirement benefits as marital property. Here again, the court reiterated that a vast amount of discretion lay in the hands of each chancellor to decide whether or not an equal division of retirement benefits was indeed equitable. *But see* *Bagwell v. Bagwell*, — Ark. —, 668 S.W.2d 949 (1984), where the supreme court again echoed the view that Section 34-1214, the Arkansas marital property division statute, "does not dictate an inflexible rule; rather it allows latitude for the exercise of the Chancellor's best judgment in complying with the statute." Nevertheless, the court decided in *Bagwell* that the chancellor had erred in dividing the property between the parties to the marriage. In a dissenting opinion, Justice Hays relied upon the earlier court decisions which had espoused the view that broad discretion is granted to the chancellor to equitably divide property incident to divorce; in view of this principle, Justice Hays could find no "compelling reason" for the Arkansas Supreme Court to modify the chancellor's division of the property. But the majority of the court did view the property division by the chancellor as being "clearly against the preponderance of the evidence" and thus reversible.

396. In stark contrast, the military pension benefits issue seems to have been definitively resolved in *Paulsen v. Paulsen*, *supra* note 267.

But some uncertainty may have crept into this area again with the advent of *Day v. Day*. See *supra* notes 292-328 for a discussion of the potential effects of *Day* on marital property distribution law in Arkansas.

397. Making narrow decisions has always been a palpable feature of the American judicial process. Even the United States Supreme Court has occasionally managed to avoid issues by fashioning a very limited holding. *See, e.g.*, *County of Washington v. Gunther*, 452 U.S. 161 (1981). The most commonly stated explication for this practice is that a court is only obligated to decide those issues which are before it; hence, collateral issues have to await resolution at some future time.

398. As noted earlier, the redeeming features of the pension plan in *Bachman* were that (1) it was vested; (2) it had accumulated and was, therefore, ascertainable; and (3) it was immediately distributable to the holder of the rights on the date of the divorce by his withdrawing from the professional association. Undoubtedly, vested, matured pension rights qualify as marital property interests under the *Bachman* analysis as well. *See* *Potter v. Potter*, 280 Ark. 38, 655 S.W.2d 382 (1984).

represents a powerful declaration in support of the notion that all pensions arising out of the marriage—vested and nonvested, matured and unmatured—are recognizable property rights subject to distribution, provided they do not fall within an enumerated exception to the Arkansas marital property statute.<sup>399</sup>

This holding is potentially far-reaching in terms of expanding the species of pension benefits that may be included with the pale of marital property.<sup>400</sup> But, as explicitly observed in *Day*, the Arkansas marital property statute still reposes a large amount of discretion in the chancellor because “it provides that all marital property shall be divided equally ‘unless the court finds a division to be inequitable.’”<sup>401</sup>

Again, a negative aspect of *Day* is its rather superficial treatment of the generally complex issue of the valuation of pension rights which are found to be divisible marital property.<sup>402</sup> Unlike *Bachman*, where the Arkansas Supreme Court chose apparently to shrug off the issue and delegated the responsibility of determining the value of Dr. Bachman’s pension benefits to the chancery court,<sup>403</sup> the court did ascertain the value of Dr. Day’s pension.<sup>404</sup> But, in *Day*, this determination probably did not require great insight.<sup>405</sup> More importantly, the court failed to articulate any standards that might serve as a polestar in future cases.<sup>406</sup> Thus, in both *Bachman* and *Day*, no significant light was shed on this vital subject.<sup>407</sup>

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399. See ARK. STAT. ANN. § 34-1214(B)(1)-(5) (Supp. 1983), for an enumeration of the exceptions to the law of marital property in Arkansas.

400. As noted earlier, social security benefits and military pensions, just to name a few, may be encompassed within the *Day* rationale. See *supra*, note 292.

401. *Day v. Day*, 281 Ark. at 268, 663 S.W.2d at 722.

402. The intricacy of the problem is graphically illustrated by commentators who suggest that it may be prudent to procure the services of an accountant or an actuary when trying to assign a present value to a pension right which will likely be realized some time in the future. See H. Clark, *Cases and Problems on Domestic Relations*, 908 (3d ed. 1980). See also *supra* note 101.

But see Troyan, *Pension Evaluation and Equitable Distribution*, 10 Fam. L. Rep. 3001, 3015 (1983), where the commentator concludes, after a fairly detailed discussion, that “[p]ension valuation can be simple, impartial and inexpensive.”

403. *Bachman v. Bachman*, 274 Ark. at 28, 625 S.W.2d at 705.

404. Apparently relying upon evidence emanating from the trial court, the court makes the conclusional statement that “[t]he accumulated value of his interest in the plan was \$95,425.03.” No further insight is provided.

405. As noted earlier, TIAA-CREF can easily provide this information. See *supra*, note 326.

406. This shortsightedness is a major deficiency of *Bachman* and *Day*.

407. One possible explanation for the supreme court’s apathetic treatment of the valuation question in *Bachman* is that it may not have been perceived as being an extremely complex issue under the facts of the case. The pension rights were vested, ascertainable, and distributable to the husband at the time of the divorce. Thus, the trial court could easily determine how much in

In a simple case, perhaps this lack of detailed guidance is not critical. But an entirely different matter is presented when, for example, there is a vested pension right which will not mature until several years in the future. The court is then generally placed into the unenviable position of having to determine, with some reasonable degree of precision, the present value of a future benefit.<sup>408</sup> As noted earlier,<sup>409</sup> the Wisconsin Supreme Court in *Bloomer v. Bloomer*<sup>410</sup> adopted an analytical approach that seems best suited for resolving the involved issues of valuation and distribution. *Bloomer's* three-option approach<sup>411</sup> provides some broad discernment for handling a variety of pension benefit valuation and allocation problems. The Arkansas Supreme Court should closely examine the *Bloomer* standards when the next marital property pension case is before it.<sup>412</sup>

On balance, *Day* is a very progressive decision in regard to the marital property treatment of civilian pensions. It is not the panacea, however; there are still some challenging questions which have not been satisfactorily addressed.<sup>413</sup> Yet, it is difficult to entirely comprehend the basis of Justice Hickman's statement in his dissenting opinion where he castigates the majority decision by declaring that it "can only lead to more confusion, uncertainty and perhaps, in many cases, less equitable decisions."<sup>414</sup> Undoubtedly, this may be correct in some instances.<sup>415</sup> But this is a small price to pay for a theory of marital property that truly vindicates the partnership theory of marriage in connection with pension benefits.

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pension benefits had accumulated at the time of divorce (the court explicitly refused to award the wife a greater interest) and then allocate equal shares to the parties. And in view of the fact that information concerning the accumulated value of Dr. Day's annuity was readily ascertainable from TIAA-CREF, the valuation question in *Day* may have been even simpler.

408. A number of courts have approached this task with apprehension. See, e.g., Note, *supra* note 105, at 175, for a detailed discussion of the valuation problem.

409. See *supra* notes 117-126.

410. *Bloomer v. Bloomer*, 84 Wis.2d 124, 267 N.W.2d 235 (1978).

411. See *supra* notes 117-126, for a discussion of these alternative methods of valuation and distribution.

412. See also Note, *supra* note 105, at 175, for some good guidance.

413. As noted previously, *Day* provides very little, if any, illumination on the generally sophisticated issues of valuation and distribution of pension benefits. Beyond interests in pension plans, it provides nothing but an opportunity to speculate as to the possible treatments of a professional degree, license, or enhanced future earning capacity and of professional goodwill in the context of the Arkansas marital property statute. Moreover, some credence must be given to Justice Hickman's contention that *Day* may obfuscate issues such as the marital property status of military pensions and other entitlements acquired with family funds during the marriage.

414. *Day v. Day*, 281 Ark. at 269, 663 S.W.2d at 723.

415. See *supra*, note 413.

### B. *Professional Degrees and Licenses*

To date, the issue of whether a professional degree, license, or increased earning capacity is divisible marital property under the Arkansas marital property statute has not been addressed by either the Arkansas Supreme Court or the Arkansas Court of Appeals.<sup>416</sup> One can, therefore, only surmise as to the eventual outcome once the issue is presented.

Undoubtedly, the central inquiry of the Arkansas appellate courts will be whether either a professional degree, license, or enhanced earning capacity is "property." Currently, the apparent benchmark in Arkansas for making this determination emanates from the previously decided military and civilian pension cases.<sup>417</sup> Given this, the focus will likely be on whether either of these professional items is "a fixed and tangible asset" or perhaps whether it was acquired with family assets during the marriage.<sup>418</sup>

If the analysis of *Paulsen v. Paulsen*<sup>419</sup> and *Bachman v. Bachman*<sup>420</sup> were literally applied to a case involving the distribution of a professional degree, license, or increased earning capacity incident to a divorce, there is a distinct possibility that a denial of property status would result. This assessment is grounded primarily upon those attributes that presently distinguish in Arkansas "a fixed and tangible asset" from something which is not "a fixed and tangible asset." Namely, it appears that an Arkansas appellate court might conclude that in no traditional sense of the word is a professional degree, license, or enhanced earning capacity a vested asset, for neither inures solely to the benefit of its holder and each discontinues upon the holder's death.

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416. The absence of any Arkansas court decision on the issue of classifying a professional degree, license or increased earning capacity is not altogether surprising given the relative dearth of decisions nationwide. See Annot., 4 A.L.R. 4th 1294, 1295 (1981).

417. The two principal cases, of course, were once *Paulsen v. Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980) (the military pension case) and *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.3d 701 (1981) (the first civilian pension benefits case). But the recent case of *Day v. Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), may now be the preeminent case in the pension area.

418. Although it was always possible to surmise that the Arkansas courts might use a mode of analysis analytically different from that found in *Paulsen* and *Bachman*, the seminal pension cases, some doubt as to the court's willingness to do so was questioned in view of subsequent cases like *Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982), and *McMurtray v. McMurtray*, 275 Ark. 303, 629 S.W.2d 285 (1982), where the supreme court, in non-pension cases, relentlessly searched for "a fixed and tangible asset" in reliance on existing precedent. But, because of the apparent directional change evident in *Day*, it is more likely that its new approach to marital property would be the template in a marital property issue involving a professional degree, license, or increased earning capacity.

419. *Paulsen v. Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980).

420. *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.2d 701 (1981).

Moreover, such a degree or license or increased earning capacity has purely an intangible value and does not accumulate in a traditional sense; any value which either might have, an Arkansas court might rule, is intrinsic and hinges upon the intangible qualities of the holder such as his or her initiative, drive, determination, resourcefulness, and industry. And finally, unlike the pension benefit in *Bachman*, a professional degree, license, or increased earning capacity is not a fixed asset in the sense of being distributable to the holder in a definitely ascertainable amount at the moment of divorce. To the contrary, the relative worth or value, present and future, of such items is so speculative and hinges on so many variables as to defy any characterization other than "an intangible and amorphous asset," which lacks the essential attributes of property.<sup>421</sup>

Although the aforementioned analysis will apparently lead to the ineluctable conclusion that a professional degree, license, or increased earning capacity is not property which is subject to division under the Arkansas marital property statute,<sup>422</sup> it is conceivable that an Arkansas appellate court might adopt the more recent reasoning of *Day v. Day*<sup>423</sup> as the basis for departure from the judicial analysis which abounds in *Paulsen*, *Bachman*, and their progeny concerning the definition of property. This is not improbable, although the earlier analysis has transcended decisions involving pension plans and has been applied to cases involving interests in company stock<sup>424</sup> and capital accounts<sup>425</sup> as well.<sup>426</sup> But the supreme court in *Day* does not clearly limit its "new concept of 'marital property'" to interests in pension plans, either.<sup>427</sup> In fact, one may reasonably conclude that "earnings or other property acquired by each spouse" during the marriage through the use of family assets embrace a professional degree, license, or increased earning ca-

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421. It is conceivable that these professional items might also be denominated as future benefits, the value of which "has not been acquired." *Potter v. Potter*, 280 Ark. 38, 47, 655 S.W.2d 382, 387 citing *Bachman* and *Paulsen*.

422. It is possible, however, that an Arkansas appellate court, congruent with the reasoning of *Paulsen*, might hold that a professional degree, license, or increased earning capacity is an economic factor which may be considered in connection with alimony and child support awards.

423. *Supra* note 292.

424. *McMurtray v. McMurtray*, *supra* note 291.

425. *Hackett v. Hackett*, *supra* note 291.

426. *Potter* seemed to solidify the pre-*Day* analysis as well, with its approving allusions to *Paulson* and *Bachman*. *But see* *Richardson v. Richardson*, 280 Ark. at 499, 569 S.W.2d at 511, where the supreme court made nothing more than a conclusional ruling that "an unexercised stock option is marital property." Actually, no doctrinal basis for the court's determination is evident.

Again, there is an affirmation of the calculus used by the chancellor to determine the value of the stock options and their allocation. *Id.* at 502-03, 659 S.W.2d at 513.

427. *See* the ultimate holding in *Day v. Day*, 281 Ark. at 268, 663 S.W.2d at 772.

capacity, thus making these items marital property.<sup>428</sup>

Of course, a just and equitable solution could be achieved if the Arkansas appellate courts would adopt a more expansive definition of property which does embrace professional degrees, licenses, or increased earning capacity.<sup>429</sup> The partnership theory would be vindicated by this more liberal approach because the parties to the marriage would actually be compensated for the benefits that flowed to the marriage as a consequence of their efforts, including those expended in assisting a spouse acquire a professional degree, license, or increased earning capacity.

Assuming *arguendo* that a property label will be affixed to these professional items, the Arkansas Supreme Court and Arkansas Court of Appeals should exercise extreme caution in fashioning an appropriate remedy. The remedy should be property-based and not merely provide a form of restitution which does not adequately compensate the working spouse for his or her veritable property expectations in the degree, license, or enhanced future earning capacity.

No one can prognosticate with absolute certainty the ultimate resolution of the professional degree, license, or increased earning capacity issue in Arkansas. At this point, a wager on nonrecognition may be provident.<sup>430</sup> And this will simply result in the inequitable perpetuation of the "putting the hubby through" syndrome.

### C. *Professional Goodwill*

As noted earlier,<sup>431</sup> the issues that surface in regard to the goodwill of a professional practice vis-à-vis equitable distribution of marital property bear a remarkable resemblance to those discussed previously in connection with the professional degree, license, or enhanced earning capacity. Here, too, there is no clear-cut precedent in Arkansas to follow.<sup>432</sup> Yet, one can reasonably divine that the primary issues for fu-

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428. *Id.* The broadly worded holding in *Day*, coupled with the court's concession that it was "not attempting to lay down inflexible rules for the future," creates a reasonable possibility that a professional degree, license, or increased earning capacity may be declared someday to be marital property. *Id.*

429. A broad construction of "property" would not be unprecedented because that is precisely what has been done in some other cases where there has been a property recognition. *See*, Note, *supra* note 143, at 542.

430. The *Day* analysis may create a closer question and conceivably a contrary result.

431. *See supra* notes 183-86.

432. In *Richardson v. Richardson*, 280 Ark. 499, 500, 659 S.W.2d 510, 512 (1983), the Arkansas Supreme Court may have obliquely shed some light on the issue of professional goodwill by holding that a spouse's interest in a commercial partnership (a beauty school), which included commercial goodwill, was marital property. Although this decision was limited ostensibly to com-



ture judicial determination in Arkansas will be: (1) Whether professional goodwill is "property" for the purposes of the Arkansas marital property statute, and, if so, (2) How do you value and then allocate it?

Regarding the property issue, a visceral response might be that professional goodwill is not divisible property in Arkansas simply because it is not "a fixed and tangible asset."<sup>433</sup> That is, this interest seems to be just as intangible and elusive as a professional degree, license, or increased earning capacity, if not more.<sup>434</sup> Thus, one might reasonably surmise that either the Arkansas Supreme Court or the Arkansas Court of Appeals, or both, will decide the divisible property question as regards professional goodwill in the negative.<sup>435</sup> But the Arkansas appellate courts do have a fair amount of precedent from other states which, if followed, would be a predicate for deciding that professional goodwill is indeed divisible property in spite of objective criteria seemingly to the contrary.<sup>436</sup> And, here again, the apparent change in direction with respect to the concept of marital property as manifested in *Day v. Day* may very well serve as the impetus for the adoption of an extensive definition of marital property that indeed envelops professional goodwill.

In short, it remains open to supposition as to which position the Arkansas appellate courts will adopt to decide the "property" question

mercial goodwill as a species of marital property, the court's mode of analysis might be susceptible to a much broader application. For example, in his dissenting opinion, Associate Justice Purtle stated: "Granting appellee an interest in the partnership is like granting the wife of a lawyer an interest in his law firm." *Id.* at 504, 659 S.W.2d at 513.

But the Arkansas Court of Appeals in *Gooch v. Gooch*, \_\_\_ Ark. Ct. App. \_\_\_, 664 S.W.2d 900, 903 (1984), faced squarely the issue of whether a husband's law practice was marital property under the facts of the case. The court resolved the issue as follows:

We find no error in the trial court's determination that appellant was not entitled to a portion of appellee's law practice as marital property because of her contributions as a party hostess. Appellee's practice had been established many years before his marriage to appellant. No showing was made that her serving as a party hostess in any way contributed to the growth of appellee's law practice.

The majority opinion in *Richardson* also provides some insight as to the method of valuing the partnership interest, basically the technique used by the chancellor. *Id.* at 500-01, 659 S.W.2d at 512.

433. Again, ascribing non-property status to professional goodwill would be predicated upon earlier Arkansas Supreme Court pronouncements of what is and what is not divisible property for the purposes of the general marital property statute. These cases are discussed at *supra* notes 284-291.

434. As noted earlier, a goodly number of courts have apparently discounted the elusiveness, nebulousness, and speculativeness of professional goodwill and have held that it is property. See *supra* notes 190-192.

435. This speculation presupposes that *Bachman, Paulsen*, and their progeny will be the controlling precedents.

436. See *supra* notes 190-194.

regarding professional goodwill. If traditional Arkansas judicial analysis is adhered to, there is a distinct possibility that the courts will rule that professional goodwill is not divisible property upon divorce.<sup>437</sup> However, if the courts deviate from this reasoning, as many other courts have inexplicably done, it is conceivable that an extremely intangible, amorphous asset will indeed enter the realm of marital property subject to division at divorce.<sup>438</sup> As noted earlier, *Day* may already represent such a deviation from the traditional norm.<sup>439</sup>

If the Arkansas courts should decide that professional goodwill is property, the monumental task of valuing this asset will arise. As previously noted,<sup>440</sup> the factors which underlie this determination paint a picture of uncertainty, volatility, and disorder with respect to placing a value on goodwill.

#### D. *Treating the Marital Home Held in Tenancy by the Entirety*

Unlike many vital issues which still require further clarification by the Arkansas courts,<sup>441</sup> the parameters for the treatment of the marital home owned as a tenancy by the entirety seem at first blush to have been fairly well-defined. The Arkansas courts have expressly held, as previously noted,<sup>442</sup> that property held as a tenancy by the entirety is not marital property subject to division under the Arkansas marital property statute.<sup>443</sup> Instead, it is property subject to equal division under the tenancy by the entirety statute.<sup>444</sup>

It would be quite palatable to conclude this discussion with the rulings of *Warren v. Warren* and its progeny.<sup>445</sup> But the Arkansas Supreme Court, in *Pinkston v. Pinkston*,<sup>446</sup> may have muddied the issue

437. By "traditional Arkansas judicial analysis" is meant the reasoning consistently used by the courts in their inexorable quest for "a fixed and tangible asset." See *Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982); *McMurtray v. McMurtray*, 275 Ark. 303, 629 S.W.2d 285 (1982); *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.2d 701 (1981); *Paulsen v. Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980).

438. Indeed, some commentators have expressed astonishment and consternation at those judicial decisions which have recognized professional goodwill as a divisible marital asset. See, e.g., *Scribner*, *supra* note 184 at 327.

439. *Supra*, notes 436-38.

440. See *supra* notes at 193-199.

441. See earlier discussion of unsettled questions at *supra* notes 394-440.

442. See *supra* notes 335-337.

443. ARK. STAT. ANN. § 34-1214 (Supp. 1983).

444. See, e.g., *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981).

445. See *Wagh v. Wagh*, 7 Ark. Ct. App. 122, 644 S.W.2d 278 (1982); *Bratcher v. Bratcher*, 5 Ark. Ct. App. 250, 635 S.W.2d 278 (1982); *Askins v. Askins*, 5 Ark. Ct. App. 64, 632 S.W.2d 249 (1982).

446. 278 Ark. 233, 644 S.W.2d 930 (1983).

by holding that the division of jointly held property (in *Pinkston*, a farm) was governed by the general marital property statute and could be divided unequally if equitable circumstances dictated it. What does this mean? Does *Pinkston* detract from the precedent previously established by *Warren*? Are the two cases reconcilable?

Although no absolutely certain response can be made to any of the aforementioned questions, it is highly probable that the supreme court's decision in *Warren* with respect to tenancy by the entirety property remains completely intact. At no point in *Pinkston* does the supreme court even cite *Warren*, much less explicitly modify or overrule it. But *Pinkston* did involve a farm which was "jointly held" by the parties to the marriage; property which is jointly held by the spouses is normally owned as tenants by the entirety.<sup>447</sup> And, as was stated in *Warren*, there must be an equal division of entirety property. To be sure, *Pinkston* casts some doubt over what was initially thought to be crystal clear in view of *Warren*. Unfortunately, it may require another court decision to efface the apparent ambiguity which may now exist.<sup>448</sup> Of course, reaffirming the rationale of *Warren* would be the prudent course of action for the Arkansas courts.

#### E. *Precisely Defining the Contours of the Statutory Exceptions of the Marital Property Law*

To delimit the precise boundaries of the various exceptions to the Arkansas marital property law<sup>449</sup> is, of course, extremely desirable. But it remains largely undone. The notable exceptions to marital property which have not been the subject of any judicial construction and which may be some of the most involved are those excluding (1) "[p]roperty acquired in exchange for property acquired prior to marriage"<sup>450</sup> and (2) property acquired "in exchange for property acquired by gift, inheritance or devise or descent."<sup>451</sup> As noted earlier,<sup>452</sup> these provisions

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447. Apparently, it does not always follow that property held jointly by the parties is owned in tenancy by the entirety. See *Warren v. Warren*, 273 Ark. 528, 534-35, 623 S.W.2d 813, 817 (1981). Yet, if a survivorship interest is created, such property is still subject to the entirety statute and not the general marital property division statute. *Id.*

448. On the other hand, the two decisions may be entirely compatible if, for example, the supreme court used the term "jointly held property" in *Pinkston* to simply mean property acquired during the marriage (marital property) but not as a tenancy by the entirety nor with right of survivorship.

449. The exceptions to Arkansas' marital property law are codified at ARK. STAT. ANN. § 34-1214(B)(1)-(5) (Supp. 1983).

450. ARK. STAT. ANN. § 34-1214(B)(2) (Supp. 1983).

451. ARK. STAT. ANN. § 34-1214(B)(2) (Supp. 1983).

452. See *supra* note 347.

of the Arkansas marital property law have unfortunately escaped judicial perusal.<sup>453</sup>

In both of these statutory exceptions, complex questions may invariably arise whenever the property acquired prior to marriage or that acquired by gift, inheritance, devise, or descent is exchanged for other property after having been the recipient of some improvements by the non-owner spouse<sup>454</sup> or having been commingled for some period of time with property of the non-owner spouse.

When improvements have been made by the non-owner spouse which actually preserve or enhance the value of the premarital, inherited, or gift property prior to its exchange, the Arkansas courts will probably defer to the *Callaway v. Callaway*<sup>455</sup> reasoning and hold that the non-owner spouse is simply entitled to compensation up to one-half of the value of the improvements actually made, if this is equitable, but that the property which is acquired in exchange for the premarital, inherited, or gift property is still not marital property under the Arkansas marital property statute.<sup>456</sup>

Whenever premarital, inherited, or gift property is commingled with property in which the other spouse has some interest, the Arkansas courts, congruent with other decisions,<sup>457</sup> will probably focus upon whether the combining of a spouse's exempt property with property (either marital or separate) of the other spouse manifests some kind of donative intent on the part of the spouse with respect to the exempt property. If a gift were found, then the premarital, inherited, or gift property would become the jointly held property of the spouses and property obtained subsequently in exchange for it should perforce be marital property, too.<sup>458</sup> Judging from past decisions, the Arkansas

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453. Perhaps this total lack of judicial scrutiny can be explained in terms of the relatively short period of time for these issues to work their way to the Arkansas appellate courts since the effective date of the marital property statute in 1979.

454. As previously noted, there has been an improvements case, *Callaway v. Callaway*, 8 Ark. Ct. App. 129, 134, 648 S.W.2d 520, 523 (1983), where the Arkansas Court of Appeals reasoned that in regard to real property acquired before marriage it was possible for a spouse who in fact made some improvements to the property to recover up to one-half of the value of those improvements, particularly if marital property were used in making them.

455. *Id.*

456. In other words, the newly acquired property should still fall within an exception to the marital property rule.

457. See *supra* notes 349-356.

458. There may be some question as to whether such property would be divisible under the general marital property statute (ARK. STAT. ANN. § 34-1214) or under the entirety statute (ARK. STAT. ANN. § 34-1215). See *Perrin v. Perrin*, 9 Ark. Ct. App. 170, 175-76, 656 S.W.2d 245, 248 (1983), where a gift created a tenancy by the entirety interest in shares of stock and a

courts are likely to be disinclined to find the existence of a gift unless extremely convincing evidence of donative intent is available.<sup>459</sup> And there is no apparent reason now to believe that any less rigid stance will be adopted in the future.

Another statutory exception to marital property which has ostensibly escaped judicial interpretation concerns "[t]he increase in value of property acquired prior to the marriage."<sup>460</sup> However, the Arkansas Supreme Court may have tangentially addressed this question while dealing with the issue of the provision of improvements in *Callaway v. Callaway*,<sup>461</sup> a case which was discussed earlier.<sup>462</sup> It is evident, however, that the "improvements" question is not completely coextensive with the "increase in value" exception to the marital property law. But to the extent that some improvements do actually enhance the value of property acquired prior to marriage, the "improvements" and the "increase in value" determinations may clash in terms of their operative effect.

For example, A and B are married. At the time of their marriage, A already owns a house. B, a crackerjack carpenter, later makes some substantial improvements to the house which significantly increase its value. Unfortunately, all is not perpetual bliss for this couple, and B eventually sues A for divorce. Query: how does the court allocate the improvements made to the house? If the issue is resolved pursuant to the *Callaway* rationale, there is a distinct possibility that the court will equally divide the value of the improvements between the parties. But if the improvements are examined from the standpoint of increasing the value of the property, then this may implicate the "increase in value" exception to the marital property law. And this increase in value would normally be outside the realm of marital property and thus would not be divisible between the parties. Of course, this may be one of those exceptional situations<sup>463</sup> where a court can affect a distribution of separate property in view of the enumerated equitable distribution criteria in the statute.<sup>464</sup>

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parcel of land, making the property divisible under the entirety statute.

459. See *supra* notes 349-356. See also *Perrin v. Perrin*, 9 Ark. Ct. App. 170, 656 S.W.2d 245 (1983).

460. ARK. STAT. ANN. § 34-1214(B)(5) (Supp. 1983).

461. 8 Ark. Ct. App. 129, 648 S.W.2d 520 (1983).

462. See *supra* notes 388-393.

463. To this writer's knowledge, such a situation has yet to arise before the Arkansas courts, although it has been alluded to in dicta. See, e.g., *Williford v. Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983) and *Potter v. Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983).

464. *Id.* See also ARK. STAT. ANN. § 34-1214(A)(2) (Supp. 1983).

Further judicial guidance is obviously desirable in this area. Moreover, there is an even greater need for court decisions which clearly define the exact parameters of the "increase in value" exception to marital property in a variety of disparate factual situations. Hopefully, an increased level of judicial activity in this regard is forthcoming.

Regarding the "[p]roperty excluded by valid agreement of the parties" exception under the Arkansas marital property law,<sup>465</sup> it is encouraging that the Arkansas Court of Appeals has rendered some instructive decisions with respect to the validity of reconciliation agreements as an exclusion to marital property.<sup>466</sup> Beyond this, however, there is an absolute void with respect to illumination concerning the potential validity of other agreements under this exception.

As noted earlier,<sup>467</sup> postnuptial agreements, which are fair and reasonable, should be an acceptable means of escaping the rubric of marital property.<sup>468</sup> Although some definitive guidance from the appellate courts would be helpful, there are no apparent exigent circumstances currently engulfing the postnuptial agreement question.<sup>469</sup> To the contrary, there is reason for consternation as regards the question of whether and under what circumstances antenuptial agreements are valid methods of excluding property acquired during marriage from the ambit of marital property. The Arkansas marital property statute does not explicitly define "valid agreement." Even in the absence of an expansive judicial definition of the term, it can be fairly assumed that reasonable, fair antenuptial agreements implicate the "valid agreement" exception under the statute. However, this reasoning may be fallacious in view of the Arkansas antenuptial agreement statute.<sup>470</sup> Because the antenuptial agreement statute is not a model of clarity as to this question,<sup>471</sup> it fosters some misgivings as to the efficacy of an antenuptial agreement in excluding what ordinarily would be a marital as-

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465. ARK. STAT. ANN. § 34-1214(B)(4) (Supp. 1983).

466. See *Smith v. Smith*, 6 Ark. Ct. App. 252, 640 S.W.2d 458 (1982) and *Schichtel v. Schichtel*, 3 Ark. Ct. App. 36, 38-39, 621 S.W.2d 504, 506 (1981).

467. See *supra* notes 358-366.

468. See *DuCanto*, *supra* note 87 and the UMDA § 306 (property agreements are valid and binding upon the court if not unconscionable).

469. Perhaps there is less concern with respect to post-nuptial agreements because there is a virtual consensus about the elements of such a valid agreement. See, e.g., *Id.* ("fair and reasonable").

470. ARK. STAT. ANN. §§ 55-309-314 (Supp. 1983).

471. Quite honestly, anyone who is skillful in legislative drafting might readily disavow any responsibility for the Arkansas antenuptial agreement statute. See, e.g., the remarks of Phillip E. Dixon, Esq., which were delivered at the Arkansas Bar Association Fall Legal Institute (1982).

set from the category of marital property.<sup>472</sup> But a cogent argument can probably be adduced to support the effectiveness of an antenuptial agreement in excluding property from the category of marital property if it simply meets the basic validity requirements outlined in the antenuptial agreement statute: (1) there must be "a full and fair disclosure" by the parties of their respective financial resources and (2) both parties must be afforded the "opportunity to consult" with a lawyer "of their own choice."<sup>473</sup> Nevertheless, some ambiguity, perhaps an intolerable amount, does exist; until the Arkansas courts act to rectify the problem, uncertainty will persist.<sup>474</sup>

The final exception to the Arkansas marital property law to be discussed—"[p]roperty acquired by a spouse after a decree of divorce from bed and board"<sup>475</sup>—suffers from the same defect as many others: there is scant judicial interpretation of it.<sup>476</sup> But one can reasonably assume that if there were a legitimate decree of divorce from bed and board already in existence at the time property is acquired by either party to the marriage, then this property would not be marital property.<sup>477</sup>

472. ARK. STAT. ANN. § 55-309 (Supp. 1983) engenders the greatest uncertainty. In its pertinent provisions, the statute provides:

. . .An antenuptial contract or settlement made in conformity with this section may determine what rights each party has in the non-marital property, being all property other than "marital property" as defined in Ark. Stat. 34-1214(B). . . This act [§§ 55-309-55-314] shall not be construed to make invalid or unenforceable any antenuptial agreement or settlement made and executed in conformity with this act because the agreement or settlement covers or includes marital property, if the agreement or settlement would be valid and enforceable without regard to this act.

473. *Id.*

Regarding an antenuptial agreement entered into prior to the effective date of the Arkansas antenuptial agreement statute, it "is valid if it was freely entered into, and is free from fraud and not inequitable." *Gooch v. Gooch*, \_\_\_ Ark. Ct. App. \_\_\_, 664 S.W.2d 900, 902 (1984).

474. Corrective measures also may fall within the bailiwick of the Arkansas Legislature.

475. ARK. STAT. ANN. § 34-1214(B)(3) (Supp. 1983).

476. The Arkansas Court of Appeals mentioned glancingly this exception in *Schichtel v. Schichtel*, 3 Ark. Ct. App. 36, 41, 621 S.W.2d 504, 508 (1981). The court rejected the contention that it applied to the facts of *Schichtel* by summarily stating "that Arkansas law authorizes divorce from bed and board but not legal separation." *Id.* At the time the complaint was apparently filed, the statute read "legal separation." Subsequently, the words "divorce from bed and board" were substituted by the legislature. *See* 1981 Ark. Acts 799.

477. Of course, the Arkansas marital property statute applies to a divorce from bed and board as well as an absolute divorce. *See* *Forrest v. Forrest*, 279 Ark. 115, 116, 649 S.W.2d 173, 174 (1983).

## VII. AD HOC JUDICIAL DECISION MAKING: CAN THE ARKANSAS LEGISLATURE FILL THE VOID?

At this point, it is painfully apparent that, after five years have passed since the seminal enactment of the Arkansas marital property law,<sup>478</sup> a number of significant questions concerning marital property division in Arkansas still remain unresolved.<sup>479</sup> In large measure, this inertia is probably attributable to the inherent nature of our judicial system which is often extremely cumbersome; this has been exacerbated by the apparent desire of the Arkansas appellate courts—particularly the Arkansas Supreme Court—to move very slowly and methodically in resolving marital property issues on a case-by-case basis.<sup>480</sup> The obvious drawback to such an approach is that a lawyer may be forestalled from giving complete and accurate advice to his or her clients concerning their marital property rights upon divorce.<sup>481</sup> Consequently, a client may be forced to pursue very costly litigation to get an ad hoc definitive ruling from the Arkansas appellate courts.<sup>482</sup>

In view of these inherent limitations in the judicial decision making process, attention must perforce be directed to the Arkansas legislative arena. Quite frankly, upon close examination, the Arkansas General Assembly has amassed a fairly admirable record in connection with marital property division. Beginning with the initial statutory enactment in 1979,<sup>483</sup> the General Assembly has made changes in the

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478. See *supra* notes 74-98 for an in-depth discussion of the Arkansas marital property statute.

479. For example, only some of the most elementary questions have been addressed regarding pensions. And no decisions, to date, have focused upon troublesome topics such as the treatment of a professional degree, license, increased future earning capacity, or goodwill. Moreover, the scope of many of the exceptions to marital property remain undefined.

480. A graphic illustration of the undesirability of this ad hoc approach is *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.2d 701 (1981), where the supreme court made a very narrow determination and, in the process, perhaps left a number of vital questions unanswered with respect to civilian pensions.

*Day v. Day*, 281 Ark. 261, 268, 633 S.W.2d 719, 722 (1984) is perhaps an exception to this discernible ad hoc approach because of its expansive language. Yet, even in this instance, there is an apparent attempt—perhaps in vain—to limit the scope of the court's holding.

481. Regarding the undecided questions, a lawyer's response will invariably be uncertain if the Arkansas appellate courts have yet to address the issue. There is not much solace in such a situation for either the attorney or the client.

482. The inclination of Arkansas appellate courts to decide only those questions essential to the resolution of the particular case before them is well established. (See, e.g., *McNew v. McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977).) Nevertheless, this practice may foster judicial inefficiency which frequently operates to the disadvantage of those parties not before the court with issues generically related to, but dissimilar from, the issue that the court is actually deciding.

483. As noted earlier, the Arkansas legislature enacted the first Arkansas marital property



marital property law at each ensuing regular legislative session.<sup>484</sup> And, most importantly, these modifications were made to rectify problems that had surfaced in the day-to-day application of the statute. For example, the legislature eliminated the requirement that the chancellor state his reasons in writing for making an unequal division of marital property;<sup>485</sup> it added a provision listing federal income tax consequences as an equitable distribution criterion;<sup>486</sup> it deleted the term "legal separation" and substituted in place the phrase "divorce from bed and board;"<sup>487</sup> and most recently, it added specific provisions governing the disposition of marital property which is in the form of stocks, bonds, and securities.<sup>488</sup> In seemingly every instance, the legislature has responded with a felicitous solution for the particular problem.

Query: Can the Arkansas legislature compensate for some of the sluggishness in the judicial process by providing a legislative answer to many of the questions still surrounding the Arkansas marital property statute? For example, it seems quite reasonable that the legislature could specifically address the intricate, unanswered questions surrounding pensions (*i.e.*, valuation and distribution, etc.). It could also specifically define the status of a professional degree, license, or increased earning capacity under the Arkansas marital property statute.<sup>489</sup> More-

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division statute in response to appeals for a new property division law because of suspected constitutional infirmities in the predecessor legislation. *See supra* notes 71-73.

484. Since 1979, there have been two regular sessions, one in 1981 and another in 1983. A special legislative session in 1983 did not produce any new marital property legislation.

485. The major impetus for this modification was that the "in writing" requirement had become so time-consuming for chancellors that it impeded their ability to expeditiously process the cases much to the dismay of the parties. *See* the emergency (statement of purpose) clause to 1981 Ark. Acts 69, and the legislative declaration contained therein.

486. The federal income tax consequences criterion was added in recognition of the fact that federal income tax obligations arising from a property division incident to divorce can genuinely affect the real value of what is received by either party upon the distribution of the marital property. *See* statement of purpose clause for 1981 Ark. Acts 798.

487. This change was necessitated by the discovery that there was no statutory authority for a legal separation in Arkansas; but there clearly is statutory authority for divorce from bed and board. *See* ARK. STAT. ANN. § 34-1202 (Supp. 1983); *Schichtel v. Schichtel*, 3 Ark. Ct. App. 36, 41, 621 S.W.2d 504, 508 (1981). (" . . . Arkansas law authorizes divorce from bed and board but not legal separation.")

488. 1983 Ark. Acts 369. Now codified at ARK. STAT. ANN. § 45-1214(A)(4) (Supp. 1983). This amendment was designed to rectify problems that had developed in regard to effecting a 50-50 division of marital property in the form of stocks, bonds, and securities.

489. For example, North Carolina has a statutory provision concerning "professional licenses and business licenses." Those that "terminate or transfer shall be considered separate property." N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1981). *But see* Comment, *The Career Asset as 'New Property' Subject to Distribution Upon Marriage Dissolution*, 6 HAMLINE L. REV. 489 (1983), (theorizes that the time has come for state legislatures to treat professional licenses, degrees, and increased earning capacity as divisible property). Moreover, the treatment of pension benefits has

over, the legislature might provide more insight as to its intent with regard to the federal income tax consequences of a marital property division in Arkansas.<sup>490</sup>

If both the Arkansas legislature and the Arkansas courts would assume a more activist role in filling the gaps that currently exist in Arkansas marital property law, then the unanswered and partially answered problems would probably be resolved through this miraculous process.

### VIII. CONCLUSION

It is quite evident that an unacceptably large number of vital issues concerning marital property division—both in the nation as a whole and particularly in Arkansas—remain shrouded in uncertainty. This is intolerable because the informed treatment of pension benefits, professional degrees and licenses, professional goodwill, and the like, under the Arkansas marital property statute is of paramount importance to those Arkansans whose marital property rights are subject to judicial determination in divorce proceedings.

The answer to this unpalatable situation lies in large measure with both the Arkansas Supreme Court and the Arkansas Court of Appeals.

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been legislatively addressed by some states. *See, e.g.*, VA. CODE § 20-107.3(E)(8)(1983), where “(t)he present value of pension or retirement benefits, whether vested or non-vested,” is listed as an equitable distribution criterion; N.C. GEN. STAT. § 50-20(b)(2) (Supp. 1981) (“Vested pension or retirement benefits and the expectation of nonvested pension or retirement rights shall be considered separate property”); and MINN. STAT. ANN. § 518.54(5) (West Supp. 1983) (“‘Marital property’ means property, real or personal, including vested pension benefits or rights, acquired by the parties or either of them. . .at any time during the existence of the marriage relation between. . .”)

490. In a similar vein, *see* Richardson v. Richardson, 280 Ark. 499, 501, 659 S.W.2d 510, 512, (1983) where a chancellor’s consideration of the income tax consequences of a property division to make an equitable apportionment of a party’s “interest in the Murphy Oil thrift plan” was affirmed by the supreme court.

But in Day v. Day, 281 Ark. 261, 268, 663 S.W.2d 719, 722, the Arkansas Supreme Court rejected the contention that it would be unfair to the husband, in view “of possible tax consequences,” to classify “his equity in the retirement plan as marital property.” Explaining the reasons underlying its position, the court stated:

This matter was not developed at the trial, nor could it have been, for the tax consequences depend upon what federal and state tax laws may be in force as much as ten or twenty years from now. The parties, however, should share the tax burden equitably. We therefore amend the decree to reserve jurisdiction in the trial court for the resolution of any tax problem that may arise.

*And in Bagwell v. Bagwell, supra* note 395, the supreme court, expressing some concern that tax consequences might make the particular property division inequitable at some future time, adopted the same course of action utilized in *Day*: it “modified the decree to reserve jurisdiction in the trial court to make such adjustments as the final tax consequences indicated.” *Id.*

An aggressive judicial decision making policy addressing marital property issues with a broad brush should be adopted to replace the restrained, piecemeal approach which has been so evident since the Arkansas marital property division statute was enacted in 1979.<sup>491</sup> Such an approach by the appellate courts would undoubtedly hasten the definitive resolution of most, if not all, of the unanswered and partially answered marital property questions which currently abound. And this would clearly be in the best interest of the thousands of divorce litigants in Arkansas.

Although one could legitimately look to the Arkansas General Assembly once again to respond to some or all of the knotty questions concerning marital property division in Arkansas, it is equally desirable, if not more so, that the Arkansas appellate courts begin to move more decisively and swiftly in this area and stop tiptoeing together through the tulips with the Arkansas marital property statute.

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491. *Day v. Day* represents Arkansas' boldest judicial initiative to date in the area of marital property rights. Yet, it quite possibly may be restricted to interests in pension plans. And this implicates only a small fraction of the questions surrounding the distribution of marital property upon divorce in Arkansas.