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Comments

The Pennsylvania Reformed Divorce Code: Equitable Distribution of Marital Property

I. INTRODUCTION

In 1980, the Pennsylvania state legislature adopted the reformed Divorce Code,¹ which encompassed sweeping changes in a body of law that had been substantially unchanged since 1785.² The enactment of these changes, occasioned by emphatic social and political debate in the legislature,³ caused Pennsylvania to join the overwhelming majority of states in providing for no-fault grounds for divorce,⁴ as well as allowing the award of alimony after divorce⁵ and the distribution of marital property.⁶

Prior to enactment of the 1980 Code, only fault grounds were available to sustain a cause of action in divorce,⁷ requiring that the

1. 23 PA. CONS. STAT. ANN. §§ 101-801 (Purdon Supp. 1983-1984).

2. H. TEITELBAUM, *The Pennsylvania Divorce Law*, PA. STAT. ANN. tit. 23, Commentary at 343-60 (Purdon 1955).

3. See J. FISHMAN, *THE LEGISLATIVE HISTORY OF THE 1980 PENNSYLVANIA DIVORCE LAW* (1981). The reformed code underwent seven revisions before acceptance; the legislature's debates comprise over one hundred pages in the legislative journals. *Id.* at iv.

4. The other states retaining only fault grounds are South Dakota and Illinois. S.D. CODIFIED LAWS ANN. § 25-4-2 (Smith 1976); ILL. ANN. STAT. ch. 40, § 301 (Smith-Hurd Supp. 1979).

5. At this time, every state permits an award of post-divorce alimony except Texas. See TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

Prior to 1980, the only circumstances permitting any award of alimony in Pennsylvania were the insanity of the divorced spouse, PA. STAT. ANN. tit. 23, § 45 (Purdon 1955) (repealed 1980); the pendency of the decree of divorce, allowing alimony pendente lite, *id.* § 46; and following a divorce from bed and board, a "quasi-divorce" wherein the parties live separately but the marriage continues. *Id.* § 47. The 1980 code permits a court to award alimony if it is determined that the spouse seeking alimony lacks both sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment. 23 PA. CONS. STAT. ANN. § 501(a) (Purdon Supp. 1983-1984).

6. 23 PA. CONS. STAT. ANN. §§ 401-04 (Purdon Supp. 1983-84).

7. Under the prior law, the available grounds were desertion for two years, adultery, bigamy, impotency, cruel and barbarous treatment, indignities, fraud, duress or coercion in the procurement of the marriage, and conviction of a felony resulting in a sentence of at least two years imprisonment. PA. STAT. ANN. tit. 23, § 10(1) (Purdon 1955)(repealed 1980).

plaintiff-spouse be "injured and innocent" and without marital fault.⁸ The practical effect of these limitations was to encourage perjury on the part of the "innocent" spouse in order to establish the existence of the grounds,⁹ and often, given the lack of alimony or distribution of marital property, virtually insured that even those "uncontested" divorces granted would be preceded by adversarial negotiation concerning property and support rights.¹⁰

Although the lack of no-fault grounds was a major contributing element in the status of Pennsylvania as a state with neither a modern nor a realistic view of marriage, it is possible that the primary impetus toward change in the law was Pennsylvania's adherence to the common law property theory in divorce.¹¹ Upon divorce, property was distributed between the spouses solely on the basis of in whose name the property was titled. Thus, the only property held by the parties capable of being affected by divorce was property held jointly or by the entireties.¹² The practical application of the title theory frequently resulted in depriving a dependent, non-working spouse of any interest in property held in the name of the working spouse. This, when combined with the prohibition against post-divorce alimony, effectively left the dependent spouse with no source of support, and unprepared for entry into the labor market. Consequently, that spouse was often forced into the public welfare system.¹³

This antiquated, often unjust, system of post-divorce property

Under the 1980 code, the above grounds are retained with the exception of impotency and fraud, and the desertion provision has been reduced to one year. 23 PA. CONS. STAT. ANN. § 201(a)(Purdon Supp. 1983-1984). In addition, the new code provides for the bilateral and unilateral no-fault grounds. Under bilateral no-fault grounds, a divorce may be granted where both parties consent to the divorce and where ninety days have passed from the filing of the complaint alleging that the marriage is irretrievably broken. *Id.* § 201(c). The unilateral ground permits a court to grant a divorce when it finds the marriage to be irretrievably broken, based on the complaint of one spouse alone, and when the parties have lived separate and apart for three years. *Id.* § 201(d)(1). In appropriate circumstances, the court may order counseling. *Id.* § 201(d)(2).

8. PA. STAT. ANN. tit. 23 § 10 (Purdon 1955)(repealed 1980).

9. Morrissey, *A Pennsylvania Primer for Alimony and Equitable Distribution*, 47 PA.B.A.Q. 503 (1976).

10. See Morrissey, *supra* note 9, at 505.

11. There are primarily three possible approaches to property distribution upon divorce: a common law approach, equitable distribution, and community property. For an overview of the operation of the common law approach in Pennsylvania, see Perlberger, *Marital Property Distribution: Legal and Emotional Considerations*, 25 VILL. L. REV. 662, 666-72 (1980).

12. See Perlberger, *supra* note 11, at 670.

13. See FISHMAN, *supra* note 3, at 1427.

distribution in effect virtually ignored the marital contributions of the non-working spouse, and hardly reflected the modern view of marriage as a partnership in a common endeavor in which both parties perform essential, if not remunerated, functions. However, with the enactment of the new code came the recognition that marital property would neither be acquired nor maintained without the efforts and cooperation of both spouses. The new code reflects this attitude, by granting a court a wide range of powers to protect the interests of both parties¹⁴ while it equitably divides the property accumulated during the marriage.

Specifically, it is section 401¹⁵ of the new code which effects the

14. A court is empowered to determine and dispose of property rights, child custody and visitation rights, child support and alimony, and to enforce voluntarily entered separation agreements. In addition, a court is given "all necessary powers, including but not limited to" the power of contempt and to attach wages, and may order the payment of costs and counsel fees. 23 PA. CONS. STAT. ANN. § 401(b)(Purdon Supp. 1983-1984). *See infra* note 15. Further, a court is given full equity power and jurisdiction and may issue injunctions or other orders to effectuate the provisions of the code. 23 PA. CONS. STAT. ANN. § 401(c)(Purdon Supp. 1983-1984). *See infra* note 15. *See, e.g.,* Baron v. Baron, 23 Pa. D. & C.3d 62 (C.P. Lawrence 1982) (court has power to stay the tax sale of marital home pending equitable distribution of marital property). A court may also issue an injunction to prevent a spouse from removing him or herself or property from the court's jurisdiction, and such property may be attached. 23 PA. CONS. STAT. ANN. § 403 (Purdon Supp. 1983-1984). *See, e.g.,* Jacono v. Jacono, 69 Delaware Co. Rep. 587 (C.P. 1982); Strouse v. Strouse, 77 Schuylkill L. Rec. 83 (C.P. 1981).

For further examples of the court's equity power, *see* Klinefelter v. Klinefelter, 18 Centre Co.L.J. 79 (C.P. 1983) (court may award interest charges to enforce a right to monies due under an equitable distribution award); Zeigler v. Zeigler, 24 Adams Co. L. J. 143 (C.P. 1982) (court may order the sale of marital property to third party when property cannot be otherwise equitably divided).

15. 23 PA. CONS. STAT. ANN. § 401 (Purdon Supp. 1983-1984) provides:

(a) In all matrimonial causes, the court having jurisdiction may either dismiss the complaint or enter a decree of divorce or annulment of the marriage.

(b) Any decree granting a divorce or an annulment, shall include after a full hearing, where these matters are raised in the complaint, the answer or other petition, an order or orders determining and disposing of existing property rights and interests between the parties, custody and visitation rights, child support, alimony and any other related matters including the enforcement of separation agreements voluntarily entered into between the parties. In the enforcement of the rights of any party to any such matters, the courts shall have all necessary powers, including but not limited to, the power of contempt and the power to attach wages. In the event that the court is unable for any reason to determine and dispose of the matters provided for in this subsection within 30 days after the master's report has been filed, it may enter a decree of divorce or annulment. The court may order alimony, reasonable counsel fees and expenses pending final disposition of the matters provided for in this subsection and upon final disposition, the court may award costs to the party in whose favor the order or decree shall be entered, or may order that each party shall pay his or her own costs, or may order that costs be divided equitably as it shall appear just and reasonable.

(c) In all matrimonial causes, the court shall have full equity power and jurisdiction

most significant change from prior law. This section empowers the

and may issue injunctions or other orders which are necessary to protect the interests of the parties or to effectuate the purposes of this act, and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

(d) In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:

(1) The length of the marriage.

(2) Any prior marriage of either party.

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(4) The contribution by one party to the education, training, or increased earning power of the other party.

(5) The opportunity of each party for future acquisitions of capital assets and income.

(6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party at the time the division of property is to become effective.

(e) For purposes of this chapter only, "marital property" means all property acquired by either party during the marriage except:

(1) Property acquired in exchange for property acquired prior to the marriage except for the increase in value during the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, bequest, devise or descent except for the increase in value during the marriage.

(4) Property acquired after separation until the date of divorce, provided however, if the parties separate and reconcile, all property acquired subsequent to the final separation until their divorce.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the time proceedings for the divorce are commenced.

(6) Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958, Public Law 85-857, 72 Statute 12291, as amended, except for those benefits received by a veteran where such veteran has waived a portion of his military retirement pay in order to receive Veteran's Compensation.

(7) Property to the extent to which such property has been mortgaged or otherwise encumbered in good faith for value, prior to the time proceedings for the divorce are commenced.

(f) All property, whether real or personal, acquired by either party during the marriage is presumed to be marital property 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. The presumption of marital property is overcome

court, upon the request of either party, to "equitably divide, distribute, or assign" marital property to either spouse,¹⁶ regardless of the fault of either party, and regardless of any form of co-ownership or in whose name the real or personal property is titled.¹⁷

In the three years since the enactment of this statute, the lower courts of Pennsylvania have construed and applied these provisions to a wide variety of specific questions which are not answered by the language of the statute: What types of property are capable of distribution? Will the increase in the value of any property owned separately before marriage be treated as marital property? As of what date will marital property be subject to valuation? What distribution between the parties is indeed equitable in a specific factual situation?

Few of the decisions of the county courts of common pleas applying the provisions of section 401 have yet been affirmed or overruled by the appellate courts of Pennsylvania. This comment will review a number of these decisions of the courts of common pleas in order to provide an overview of the construction and application of the reformed code.

II. DEFINITION OF MARITAL PROPERTY

"Marital property" is defined by the code as all property acquired by either party during the marriage,¹⁸ while property ac-

by showing that the property was acquired by a method listed in subsection (e).

(g) The court may impose a lien or charge upon the marital property assigned to a party as security for the payment of alimony or other award for the other party.

(h) The court may award to one, each, or both of the parties the right to live in the family home for reasonable periods of time.

(i) The court may also direct the continued maintenance and beneficiary designations of existing policies insuring the life of either party. The court's power under this subsection shall extend only to policies originally purchased during the marriage and owned by or within the effective control of either party.

(j) Whenever a decree or judgment is granted which nullifies or absolutely terminates the bonds of matrimony, any and all property rights which are dependent upon such marital relation, save those which are vested rights, are terminated unless the court otherwise expressly provides in its decree in accordance with subsection (b). All duties, rights, and claims accruing to either of said parties at any time heretofore in pursuance of the said marriage, shall cease and the parties shall, severally, be at liberty to marry again in like manner as if they had never been married, except where otherwise provided by law.

Id.

16. 23 PA. CONS. STAT. ANN. § 401(d) (Purdon Supp. 1983-1984). *See supra* note 15 for the text of the statute.

17. 23 PA. CONS. STAT. ANN. § 401(f) (Purdon Supp. 1983-1984). *See supra* note 15 for the text of the statute.

18. 23 PA. CONS. STAT. ANN. § 401(e) (Purdon Supp. 1983-1984). *See supra* note 15 for

quired prior to marriage remains the separate property of either spouse.¹⁹ The code provides that all real or personal property acquired during the marriage will be presumed to be marital property; this presumption may be overcome by a showing that the specific property falls within one of seven statutory exceptions: (1) property acquired in exchange for property acquired prior to the marriage except for the increase in value during the marriage; (2) property excluded by valid agreement of the parties entered into before, during or after marriage; (3) property acquired by gift, bequest, devise or descent except for the increase in value during the marriage; (4) property acquired after separation; (5) property which a party has sold, conveyed, or disposed of in good faith and for value prior to the commencement of the divorce action; (6) Veterans' benefits exempt from attachment pursuant to Public Law 85-857, 72 Statute 12291; (7) property to the extent to which it has been mortgaged or encumbered in good faith for value prior to the commencement of the divorce action.²⁰

A. *Retroactive Application*

An important issue, the resolution of which has and will have a significant effect in any equitable distribution proceeding, concerns property acquired by either party during the marriage but prior to the effective date of the code. The retroactive application of the equitable distribution provisions was held to be unconstitutional by at least two county courts,²¹ while other courts reached the opposite conclusion.²² The constitutionality of these provisions was upheld in *Bacchetta v. Bacchetta*,²³ the only case concerning the construction and constitutionality of the code to be decided by the Pennsylvania Supreme Court since its enactment. In reversing the lower court's holding that the retroactive application of section 401 was unconstitutional, the supreme court concluded that it is within the permissible exercise of the legislature's police power to provide

the text of the statute.

19. Each party has complete freedom to dispose of this separate property after divorce without the consent of the other unless otherwise provided by the court. 23 PA. CONS. STAT. ANN. § 402(e) (Purdon Supp. 1983-1984).

20. *Id.* § 401(e).

21. *Bacchetta v. Bacchetta*, 29 Chester Co. Rep. 167 (C.P. 1981); *Krenzelak v. Krenzelak*, 62 Washington Co. Rep. 53 (C.P. 1981).

22. *Brookens v. Brookens*, 5 Franklin Co. L. J. 146 (C.P. 1982); *Iannetta v. Iannetta*, 37 Bucks Co. L. Rep. 34 (C.P. 1981); *Kline v. Kline*, 67 Lancaster L. Rev. 319 (C.P. 1981).

23. 498 Pa. 227, 445 A.2d 1194 (1982). See 21 Duq. L. Rev. 1137 (1983).

for the distribution of property upon divorce,²⁴ and that due process considerations are not violated when this exercise is reasonable and has a substantial relationship to the objective sought to be obtained.²⁵ Hence, the legislature's aim of mitigating divorce's economic harm and effecting a fair and just determination of property rights, as well as equitable distribution as the means of achieving that aim, was held to withstand a constitutional attack.²⁶

B. Pension and Profit-Sharing Plans

An issue frequently occurring as the Pennsylvania courts find their way in applying the equitable distribution provisions is that of the classification of specific interests and properties: whether, and to what extent, these interests are marital property subject to distribution.

In many cases, the assets of the parties may consist primarily of the marital residence and pension, retirement or profit-sharing plans.²⁷ It is clear that a home acquired by the parties during the marriage is property subject to distribution.²⁸ However, the issue of pension and profit-sharing plans has been the subject of considerable discussion by the courts of all equitable distribution states, the majority of which hold that an interest in a pension plan is marital property.²⁹ Pennsylvania courts have followed this result.³⁰ However, some distinction has been made between vested and non-vested pensions,³¹ the latter being the source of some controversy. While vested pension interests, like those that have matured and

24. 498 Pa. at 233, 445 A.2d at 1197.

25. *Id.* at 234, 445 A.2d at 1197.

26. *Id.* at 235, 445 A.2d at 1198.

27. *Kalinoski v. Kalinoski*, 9 F.L.R. 3033 (C.P. Butler 1983).

28. Although the fair market value of the home will constitute marital property, the extent of any encumbrance or mortgage will be excepted. 23 PA. CONS. STAT. ANN. § 401(e)(7) (Purdon Supp. 1983-1984).

29. *See, e.g., Kikkert v. Kikkert*, 177 N.J. Super. 471, 427 A.2d 76 (1981); *Hiscox v. Hiscox*, 179 Ind. App. 378, 385 N.E.2d 1166 (1979).

30. *See, e.g., Miller v. Miller*, 131 P.L.J. 119 (C.P. Allegheny 1983)(pension benefits were considered marital property although no rationale was given); *King v. King*, 9 F.L.R. 2273 (C.P. Erie 1983)(adopting the law from other jurisdictions that unmatured pension rights are not free gifts from the employer, but rather, additional compensation earned by the employee and bargained for); *McCallum v. McCallum*, 130 P.L.J. 406 (C.P. Allegheny 1982) (pension benefits equitably distributed but no rationale was given); *Flowers v. Flowers*, 74 Berks County L.J. 168 (C.P. 1982); *Willikow v. Willikow*, 41 Somerset L.J. 227 (C.P. 1982). The conclusion in these cases is supported by the absence of pension benefits from the exceptions to marital property listed in 23 PA. CONS. STAT. ANN. § 401(e) (Purdon Supp. 1983-1984). *See supra* note 15 for the text of the statute.

31. *Kalinoski v. Kalinoski*, 9 F.L.R. 3033 (C.P. Butler 1983).

are being received, are in effect compensation earned by the employee,³² non-vested benefits require the satisfaction of certain threshold requirements, such as a minimum length of employment, and in reality are only a contingent future interest.³³

The Court of Common Pleas of Butler County, in *Kalinoski v. Kalinoski*³⁴ was recently confronted with this issue of whether the term "property" in the context of equitable distribution may include unvested pension benefits. Joining the courts of several other equitable distribution and community property states,³⁵ the court concluded that, under the theory that a pension is not an unrequited payment, but rather a contract for compensation for services already rendered and amounts to an inchoate debt, these benefits may be considered marital property.³⁶ This holding, however, is in conflict with those of other courts of common pleas.³⁷

In any discussion of the distribution of pension benefits, it is necessary to distinguish privately funded plans from public and civil service plans. Concerning military and federal railroad retirement benefits, the United States Supreme Court has ruled that these benefits are not capable of distribution as marital property under the federal pre-emption doctrine.³⁸ Although the Supreme

32. *King v. King*, 9 F.L.R. 2273 (C.P. Erie 1983).

33. *Kalinoski v. Kalinoski*, 9 F.L.R. at 3035.

34. 9 F.L.R. 3033 (C.P. Butler 1983).

35. See e.g., *Thompson v. Thompson*, 183 Conn. 96, 438 A.2d 839 (1981); *Robert C.S. v. Barbara J.S.*, 434 A.2d 383 (Del. 1981); *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978). In addition, Virginia has provided by statute for the equitable distribution of pension benefits. VA. CODE § 20-107.3(E)(8)(1983).

36. *Kalinoski v. Kalinoski*, 9 F.L.R. 3033 (C.P. Butler 1983). The court stated that those states which have held that nonvested pensions are not marital property have done so on the theory that the valuation of these benefits is too speculative. In refusing to adopt this result, the court noted that contingent interests are capable of valuation and that speculation does not prevent the valuation of an estate's fairmarket value or the value of goodwill in business. Therefore, speculating about value should not prevent nonvested pensions from being classified as marital property. *Id.* at 3035. Interestingly, a court of common pleas in the same county refused to order the equitable distribution of a spouse's pension rights which had not vested at the time of the divorce, but gave no rationale for its refusal. *McCandless v. McCandless*, 23 Pa. D. & C.3d 739 (C.P. Butler 1982). Other Pennsylvania courts have reached the same conclusion as the court in *Kalinoski*, but have not elaborated on their reasoning. *Paul W. v. Margaret W.*, 130 P.L.J. 6 (C.P. Allegheny 1981); *Reese v. Reese*, 109 Montgomery Co. L. Rep. 295 (C.P. 1981).

37. *Tonetti v. Tonetti*, 39 Lehigh Co.L.J. 535 (C.P. 1982); *Kutzer v. Kutzer*, 110 Montgomery Co. L. Rep. 226 (C.P. 1982). It was reasoned in these cases that a pension plan that was not vested at the time of separation did not constitute even contingent property rights acquired during marriage, and therefore, any rights in such a pension plan are separate property.

38. See, e.g., *McCarty v. McCarty*, 453 U.S. 210 (1981)(federal law precludes state

Court was not required to rule on the status of federal civil service retirement benefits or Social Security Act benefits as marital property, dicta in the *McCarty* decision suggests that the former may be subject to distribution,³⁹ while the latter may not.⁴⁰ While these issues remain to be settled, conflicting results have been reached.⁴¹

C. *Life Insurance and Property Acquired During the Marriage*

Another asset that may be significant in many proceedings, given the lack of other property, is life insurance. Courts have found that the cash value of a life insurance policy acquired and paid for during the marriage is marital property.⁴² The provision of section 401(i) would seem to provide additional authority for this result; this section empowers a court to direct "the continued maintenance and beneficiary designations of existing policies . . . originally purchased during the marriage and owned by or within the effective control of either party."⁴³

The all-inclusive nature of the equitable distribution statute has permitted the courts of Pennsylvania to reach a finding that certain property interests are marital property even where those rights arise from a personal injury. The phrase "all property . . .

court from dividing military non-disability retirement pay pursuant to state community property law); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)(railroad retirement benefits resulting from employment during marriage are not community property subject to division upon dissolution of marriage).

39. 453 U.S. at 230 (citing 5 U.S.C. § 8345(j)(1) (1976 & Supp. III)). This legislation requires that Civil Service retirement benefits be paid to an ex-spouse to the extent provided for by any court-approved property settlement incident to divorce. *Id.*

40. 453 U.S. at 230 (citing 42 U.S.C. § 462(c) (1976)). The Social Security Act provides that benefits payable under the act may be subject to legal process to enforce child support or alimony obligations; and provides that the term "alimony" does not include a transfer of property in compliance with a community property or equitable distribution settlement. *Id.*

41. The subject of federal civil service retirement benefits has been addressed by the courts of other states, which have held these benefits are not subject to equitable distribution. *See, e.g., Carter v. Carter*, 277 S.C. 277, 286 S.E.2d 139 (1982). In Pennsylvania there is only one decision dealing with Social Security benefits, which held that these benefits are not marital property. *Sorbello v. Sorbello*, 21 Pa. D. & C.3d 187 (C.P. Cumberland 1981). At least one court in another equitable distribution state has held that Social Security benefits acquired during marriage are marital property. *Evans v. Evans*, 98 Mich. App. 323, 296 N.W.2d 248 (1980).

42. *Krick v. Krick*, 74 Berks Co.L.J. 157 (C.P. 1982); *Clapper v. Clapper*, 41 Somerset L.J. 215 (C.P. 1982). Since life insurance policies acquired during marriage are not included in the exceptions to marital property listed in 23 PA. CONS. STAT. ANN. § 401(e) (Purdon Supp. 1983-1984), no other conclusion appears possible.

43. 23 PA. CONS. STAT. ANN. § 401(i) (Purdon Supp. 1983-1984). *See supra* note 15. This section has been construed to allow a court to direct the continuation of an existing beneficiary designation only, and not to direct that the beneficiary designation be changed. *Holben v. Holben*, 41 Beaver Co.L.J. 200 (C.P. 1983).

acquired during the marriage"⁴⁴ has been construed by one court to include settlement proceeds from personal injury claims when the cause of action arose during the marriage.⁴⁵ This result is in accord with the law of other equitable distribution states, which also include workers' compensation benefits as marital property subject to distribution.⁴⁶ However, this conclusion was not reached by the Court of Common Pleas of Lancaster County in *Snyder v. Snyder*,⁴⁷ which held that even though the husband was also named as plaintiff in an action brought by his injured wife, he was only a nominal plaintiff and had no right to the wife's personal injury settlement. Therefore, the settlement was considered her separate property.⁴⁸

D. Professional Degrees & Education

An interest in a business enterprise or a closely-held corporation that is acquired during marriage presents little controversy in being given the status of marital property.⁴⁹ However, a related issue which has produced differing results as the courts attempt to make decisions that are fair and equitable is that of the status of a professional degree or education. The difficulty in achieving the desired equitable result in these cases has been caused by factual circumstances in which the non-degreed spouse wholly or substantially supported the marriage, or at least made a significant contribution as a homemaker, while the other spouse obtained an education. The courts of Pennsylvania appear to agree in holding that a professional degree itself is not marital property subject to

44. 23 PA. CONS. STAT. ANN. § 401(f) (Purdon Supp. 1983-1984). See *supra* note 15.

45. *Platek v. Platek*, ____ Pa. Super. ____, 454 A.2d 1059 (1982). The court dismissed the appellant's contention that the proceeds were separate property by reason of their origin in her personal injury, supporting its conclusion by citing the legislative history of the code. The House version of § 401(e), excluding certain interests from marital property, also excluded payments received for the loss or impairment of parts or functions of the body; the Senate subsequently rejected the House version. 454 A.2d at 1061-62.

46. See, e.g., *In re Marriage of Dettore*, 46 Ill. App. 3d 540, 408 N.E.2d 429 (1980); *Evans v. Evans*, 98 Mich. App. 323, 296 N.W.2d 248 (1980); *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (1974).

47. 68 Lancaster L. Rev. 436 (C.P. 1982).

48. *Id.* at 439.

49. See, e.g., *Nassif v. Nassif*, 131 P.L.J. 122 (C.P. Allegheny 1983) (business real estate and share of oil well was held to be marital property); *Lagrotteria v. Lagrotteria*, 130 P.L.J. 459 (C.P. Allegheny 1982) (95% interest in real estate business was held to be marital property); *Russek v. Russek*, 20 Lebanon Co.L.J. 63 (C.P. 1982) (medical practice established during the marriage was held to be marital property).

distribution,⁵⁰ basing their holdings on traditional property concepts that a degree has no objective transferable value and is personal to the holder.⁵¹

Nevertheless, the goal of compensating a spouse for contributions and efforts made to further the other's education has necessitated the fashioning of some remedy. At least two courts have held that the contributing spouse is entitled to an interest in the value of the other's future earnings,⁵² while at least two other courts have adopted a method whereby the spouse will be awarded compensatory alimony.⁵³ Of the two approaches, the latter is obviously the more practical given the difficulties in valuating potential future earnings fairly and realistically.

III. EXCEPTIONS TO MARITAL PROPERTY AND PROBLEMS OF VALUATION

The construction and application of section 401(e), which lists

50. *Hodge v. Hodge*, 104 Dauphin Co. Rep. 14 (C.P. 1982); *Lehmicke v. Lehmicke*, 70 Delaware Co. Rep. 89 (C.P. 1982); *Pratt v. Pratt*, 23 Pa. D. & C.3d 673 (C.P. Lancaster 1982); *Millili v. Millili*, 111 Montgomery Co. L. Rep. 38 (C.P. 1982).

51. Most equitable distribution jurisdictions, employing similar rationales, have reached the same conclusion. *See, e.g., Mahoney v. Mahoney*, 182 N.J. Super. 598, 442 A.2d 1062 (1982); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982); *In re marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

52. *Lehmicke v. Lehmicke*, 70 Delaware Co. Rep. 89 (C.P. 1982); *Millili v. Millili*, 111 Montgomery Co. L. Rep. 38 (C.P. 1982). In both cases, the court found that the increased earning capacity of the degreed spouse was to a great extent the product of the other's labor, sacrifice, or financial support.

53. In *Pratt v. Pratt*, 23 D. & C.3d 673 (C.P. Lancaster 1982), the court refused to make an award based on future earnings because they were considered to be too speculative and presumptive. *Id.* at 681. Its rationale to instead make an award of alimony was grounded in § 501(b), which lists factors to be considered by a court in making such an award. Subsection (6) of § 501(b), *see infra* note 80, requires a court to consider the "contribution by one party to the education . . . or increased earning power of the other party." 23 Pa. D. & C.3d at 683.

The court in *Hodge v. Hodge*, 104 Dauphin Co. Rep. 14, (C.P. 1982), agreed that an award of a portion of future earnings was inappropriate, and concluded that § 501(b)(6) directed an award of alimony, on a theory of unjust enrichment or restitution for the spouse's contributions. 104 Dauphin Co. Rep. at 18.

Neither of these courts acknowledged that the contribution of a spouse to the education or increased earning power of the other is also a relevant factor to be considered in the distribution of marital property. *See* 23 PA. CONS. STAT. ANN. § 401(d)(4) (Purdon Supp. 1983-1984), *supra* note 15.

Russek v. Russek, 20 Lebanon Co.L.J. 63 (C.P. 1982), although dealing with an already established medical practice professional corporation held to be marital property, rejected the notion that future earnings are distributable, on the basis that an award of any future income, whatever the source, was inappropriate. 20 Lebanon Co. L.J. at 86.

seven exceptions to marital property,⁵⁴ has not been found to be particularly problematic, possibly because of the relatively plain language employed by most of the provisions. Nevertheless, several questions have arisen by way of the interplay between these exceptions and the implicit exception of property acquired before the marriage.

Subsection (1) excludes property "acquired in exchange for property acquired prior to marriage except for the increase in value during the marriage." In *Johnson v. Johnson*,⁵⁵ the Court of Common Pleas of Montgomery County was confronted with a distribution problem wherein a residence, the down payment for which was supplied from funds acquired from the sale of another home owned by one party prior to the marriage, was thereafter placed in joint names.⁵⁶ The court determined that the most equitable approach to the distribution problem was to consider the placement of the home in joint names as a gift to the marital entity, and that the entire value would be considered marital property.⁵⁷

The exceptions stated in subsection (3) include property acquired by gift, bequest, devise or descent; but, like subsection (1), they do not include increases in value during the marriage. Unfor-

54. See *supra* note 20 and accompanying text.

55. 109 Montgomery Co. L. Rep. 383 (C.P. 1981).

56. *Id.* at 384.

57. The court rejected two alternative approaches as inconsistent with the aims of the code. Under the "traceable assets" approach, any interest owned by one spouse prior to marriage would remain separate property, and only an increase in value would be distributable as marital property. 109 Montgomery Co. L. Rep. at 387-88 (citing *Sanger v. Sanger*, 49 Or. App. 215, 619 P.2d 660 (1980)). However, the non-contributing spouse, after a long marriage and slight increase in value, would be entitled to very little. 109 Montgomery Co. L. Rep. at 388. The other approach involved following traditional Pennsylvania gift law principles, which would hold the placement in joint names as a gift to the other spouse of a one-half interest. This approach would effectively prevent the spouse who originally owned the home from receiving proper credit for the original contribution. *Id.* To consider the placement in joint names as a gift to the marital entity effects the intent of the code, and allows the court to distribute the property according to the factors enumerated in 23 PA. CONS. STAT. ANN. § 401(d) (Purdon Supp. 1983-1984). See *supra* note 15 for the text of the statute. Specifically, subsection 7 directs the court to consider the contribution of each party in the acquisition of marital property, thereby permitting a spouse to receive credit for the pre-marital contribution. The court reasoned that this method protects both the party who purchases a marital home with separate funds and titles it jointly, as well as the party who, during a long marriage lives in a jointly-held home originally paid for by the other. 109 Montgomery Co. L. Rep. at 389. This approach was employed by the same court in two subsequent cases: *Maser v. Maser*, 112 Montgomery Co. L. Rep. 117 (C.P. 1983); and *Burry v. Burry*, 111 Montgomery Co. L. Rep. 330 (C.P. 1982); and by another court of common pleas in Somerset County: *Clapper v. Clapper*, 41 Somerset L. J. 215 (1982).

tunately, the question of how to treat an increase in the value of separate property that is neither acquired through an exchange nor through inheritance is not answered by the statute.

In confronting this problem, the Court of Common Pleas of Allegheny County, in *Birkel v. Birkel*⁵⁸ rejected a husband's argument that the legislature's failure to address this specific situation in section 401(e) revealed an intent to exclude the increase from equitable distribution.⁵⁹ Rather, the court reasoned that the legislature's treatment as marital property of an increase in exchanged property or gifts and inheritances created a presumption that an increase in value is due to joint efforts and contributions.⁶⁰ The court concluded that the overall goals of the statute, coupled with the added direction of subsections (1) and (3), necessitated a holding that any increase that can be attributed to the substantial contributions and efforts of both parties will be considered marital property subject to distribution.⁶¹

The same result was reached by a court in Crawford County. In *Starn v. Starn*,⁶² the court held that although stock acquired before marriage is not marital property, an increase in its value was attributable to the wife's contributions in her supporting role as a homemaker, and was therefore marital property.⁶³

These decisions are not inconsistent with that of the Court of Common Pleas of Erie County, where in *Rudd v. Rudd* it was held that an increase in value of a residence acquired by one spouse before the marriage, due solely to inflation, was not marital property.⁶⁴ This decision was grounded in the legislature's failure to include this type of increase in the "except for" language of section 401(e).⁶⁵

58. 131 P.L.J. 102 (C.P. 1983).

59. *Id.* at 104-05.

60. *Id.* at 105.

61. *Id.*

62. 48 Crawford Co.L.J. 42 (C.P. 1982).

63. *Id.* at 44. The court here was guided in its decision by the courts of New Jersey, also an equitable distribution jurisdiction. *See, e.g.,* Mol v. Mol, 147 N.J. Super. 5, 370 A.2d 509 (1977); Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434 (1975). These cases held that where an increase in the value of separate property is attributable to expenditures or efforts of the other spouse, such increase will be marital property.

64. 65 Erie Co.L.J. 58 (C.P. 1982). In an analogy to this rationale, one court has held that the increase in value stated in 23 PA. CONS. STAT. ANN. § 401(e)(3) (Purdon Supp. 1983-1984), *see supra* note 15, refers to the market value of property other than money and cannot include an interest award on money gifts. Clapper v. Clapper, 41 Somerset L.J. 215 (C.P. 1982).

65. 65 Erie Co.L.J. at 60.

Generally, the treatment of increases in value of separately owned property that is neither a gift nor an inheritance, nor property acquired by exchange, is a problem worthy of legislative attention. By addressing the issue directly, the statute could eliminate the dilemma of determining whether, and to what extent, an increase is due to the efforts and contributions of the other spouse or is merely the result of inflation.

For purposes of determining what is and is not marital property, it is clear that property acquired between the separation date and the date of divorce is the separate property of either spouse.⁶⁶ However, even though the statute is silent as to the date for *valuation* of marital property, the courts have established that marital property is to be valued as of the date on which the complaint in divorce is filed.⁶⁷ Of the possible dates for valuation, including the date of separation and that of distribution, this would seem to be the most reasonable point at which to fix the end of the marriage and, consequently, the value of the marital property to be distributed. Most decisions of the courts of common pleas in which the date of valuation has been an issue have reflected this conclusion.⁶⁸ This result is further supported by the code itself, which provides in pertinent part that "[b]oth parties shall submit . . . an inventory and appraisal of all property owned . . . at the time action was commenced."⁶⁹

Nevertheless, this appears to be another area in which the statute's lack of clarity has prompted an occasional divergent holding when a court reasons that the equities of a particular case require the use of a different date for valuation. For example, in *Drake v. Drake*⁷⁰ it was held that, in the case of assets which increase in value through economic forces rather than the contributions of the parties, equity demands the use of the latest available value rather than an arbitrarily determined value fixed at the date of the filing of the complaint.⁷¹

66. 23 PA. CONS. STAT. ANN. § 401(e)(4) (Purdon Supp. 1983-1984). See *supra* note 15.

67. See *infra* note 68.

68. See, e.g., *Graham v. Graham*, 66 Erie Co.L.J. 45 (C.P. 1983); *Mele v. Mele*, 66 Erie Co.L.J. 27 (C.P. 1983); *Treasure v. Treasure*, 130 P.L.J. 389 (C.P. Allegheny 1982); *Klug v. Klug*, 130 P.L.J. 73 (C.P. Allegheny 1982). The basis for this conclusion lies in the code, see *infra* note 69, as well as in the Pennsylvania Rules of Civil Procedure, which also provides that each party file an inventory and appraisal of all assets, with the value of each asset as of the date the action was commenced. PA. R. CIV. P. 1920.33(a).

69. 23 PA. CONS. STAT. ANN. § 403(b) (Purdon Supp. 1983-1984).

70. 111 Montgomery Co. L. Rep. 110 (C.P. 1982).

71. Another court, in determining the value of a closely held corporation, held that the

Another statutory ambiguity significant in both classification and valuation problems is illustrated by an attempt to reconcile section 401(e)(1) (an increase in value during the marriage of property acquired in exchange for pre-marital separate property will be marital property); section 401(e)(3) (an increase in value during the marriage of a gift or inheritance will be marital property); and section 401(e)(4) (property acquired after separation will be separate property). The statute does not make it clear whether the phrase "during the marriage" in sections 401(e)(1) and (3) means marriage up to the date of divorce, or only up to the date of separation. It is conceivable, in light of section 401(e)(4), that marriage, for the purpose of applying sections 401(e)(1) and (3), is ended as of the date of separation. At least one court has concluded that no other interpretation is possible.⁷³

This problem in construction of the statute gives rise to another issue with which it appears no court has yet been confronted. An increase during the marriage in the value of separate property *may* be determined to be marital property, and this increase, in turn, may itself increase in value between the date of separation and the date of the filing of the complaint. If value is determined as of the date of filing, a question arises as to whether this additional increase will be subject to distribution. The present state of the statute, enhanced by judicial interpretation, would seem to indicate that the increase would be subject to distribution.

IV. DISTRIBUTION OF MARITAL PROPERTY

After a court has determined what assets constitute marital property, and has fixed their value, it must then distribute the marital property between the parties. The statute directs that the court shall equitably divide the marital property "in such proportions as the court deems just"⁷³ after considering any relevant factors including the ten factors enumerated by the statute:

date of separation was the appropriate date to fix its fair market value. *Flojo v. Flojo*, 42 Bucks Co. L. Rep. 37 (C.P. 1983).

72. *Sorbello v. Sorbello*, 31 Cumberland L.J. 372, 21 Pa. D. & C.3d 187 (C.P. 1981). The court illustrated its reasoning by way of a hypothetical in which a spouse, separated but with no intention to reconcile, could refuse to consent to divorce for a possible three year period, and receive a share of an increase in the value of the other's inheritance during this period. *Id.* at 192-93. In instances similar to the hypothetical in *Sorbello*, the court has at its disposal broad equity powers. See 23 PA. CONS. STAT. ANN. § 401(c) (Purdon Supp. 1983-1984). See *supra* note 15.

73. 23 PA. CONS. STAT. ANN. §401(d) (Purdon Supp. 1983-1984). See *supra* note 15.

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties.
- (4) The contribution by one party to the education, training, or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.
- (10) The economic circumstances of each party at the time the division of property is to become effective.⁷⁴

The statute, however, does not indicate what weight is to be accorded each factor, nor the starting point at which to apply the factors. It can be seen, therefore, that almost unlimited discretion is granted a court to divide the marital property in what it views to be the most equitable proportions given the particular circumstances of the marriage and the parties.⁷⁵

While it appears then that an equitable distribution of marital property is not necessarily an equal distribution, it also seems generally accepted that the appropriate starting point for consideration of the above factors is an equal division.⁷⁶ This approach obviously best reflects the marriage-as-a-partnership concept. However, at least one court has refused to adopt an equal split of marital property as even a presumptive point at which to begin distribution.⁷⁷ Again, the lack of direction provided by the statute has

74. 23 PA. CONS. STAT. ANN. §401(d) (Purdon Supp. 1983-1984). See *supra* note 15.

75. The statute provides that in any order made for the distribution of marital property, the court must give its reason for the distribution. 23 PA. CONS. STAT. ANN. §404 (Purdon Supp. 1983-1984).

76. See, e.g., *Hanrahan v. Hanrahan*, 70 Delaware Co. Rep. 274 (C.P. 1983); *J.K. v. I.K.*, 73 Luzerne L. Reg. Rep. 64 (C.P. 1983); *Lawrence v. Lawrence*, 74 Berks Co.L.J. 298 (C.P.1982); *Tonetti v. Tonetti*, 39 Lehigh Co.L.J. 535 (C.P. 1982). For an extensive analysis of the rationale for this conclusion, see *Paul W. v. Margaret W.*, 130 P.L.J. 6 (C.P. Allegheny 1982).

77. *Ruth v. Ruth*, 67 Lancaster L. Rev. 461 (C.P. 1981). This court adopted the holding of the Supreme Court of New Jersey, an equitable distribution jurisdiction, upon whose statute Pennsylvania's was modeled. See *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974). The court in *Rothman* rejected a 50-50 starting point as having no basis in the New Jersey statute itself and believed that each case should be examined as an individual entity. 65 N.J. at 232-33 n.6, 320 A.2d at 503 n.6. This holding was specifically rejected by the court

prompted the courts of Pennsylvania to fashion guidelines most likely to effectuate the goals of the code.

Although a thorough discussion of the provisions of the statute permitting an award of alimony is beyond the scope of this comment, it should be pointed out that, in any proceeding in which applications for both equitable distribution and alimony are made, an award of a portion of the marital assets will be a factor in a court's decision whether to award alimony.

The code provides that a court may award alimony only if it finds that the party seeking the award "(1) lacks sufficient property . . . to provide for his or her reasonable needs; and (2) is unable to support himself or herself through appropriate employment."⁷⁸ The court, in concluding that a party lacks adequate property to provide support, is required to consider any property awarded to that spouse pursuant to section 401.⁷⁹ The court is then provided with a list of fourteen factors it must weigh in determining whether alimony is indeed necessary, and in determining the nature, amount, duration, and manner of payment.⁸⁰ Further, unless a spouse's ability to support himself or herself is significantly

in *Paul W. v. Margaret W.*, 130 P.L.J. 6, 10 (C.P. Allegheny 1982).

78. 23 PA. CONS. STAT. ANN. § 501(a) (Purdon Supp. 1983-1984).

79. *Id.* § 501(a)(1).

80. *Id.* § 501(b). These factors, not significantly different from those of § 401(d), include:

- (1) The relative earnings and earning capacities of the parties.
- (2) The ages, and the physical, mental and emotional conditions of the parties.
- (3) The sources of income of both parties including but not limited to medical, retirement, insurance or other benefits.
- (4) The expectancies and inheritances of the parties.
- (5) The duration of the marriage.
- (6) The contribution by one party to the education, training or increased earning power of the other party.
- (7) The extent to which it would be inappropriate for a party, because said party will be custodian of a minor child, to seek employment outside the home.
- (8) The standard of living of the parties established during the marriage.
- (9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.
- (10) The relative assets and liabilities of the parties.
- (11) The property brought to the marriage by either party.
- (12) The contribution of a spouse as homemaker.
- (13) The relative needs of the parties.
- (14) The marital misconduct of either of the parties during the marriage; however, the marital misconduct of either of the parties during separation subsequent to the filing of a divorce complaint shall not be considered by the court in its determinations relative to alimony.

Id.

reduced, the court is directed to limit the duration of the award to a reasonable time, sufficient to allow that spouse an opportunity to obtain appropriate employment or develop an employable skill.⁸¹ In any specific factual situation, the operation of these provisions in conjunction with those concerning equitable distribution will necessarily involve a delicate balancing of the factors enumerated by both provisions.⁸²

V. CONCLUSION

It is obvious, given the great discretion allowed the courts, that the answers to the questions of who gets what and in what amounts will be as varied as the factual contexts in which these decisions are made. The individual parties to a divorce will naturally be more concerned with the ultimate awards than with the judicial mechanics of the award process.

The parties may have already attempted to reach a mutually satisfactory agreement concerning both alimony and property distribution. However, if this is an impossible goal, it will be necessary for a court to fashion a settlement for them. A marriage that was begun in optimism and hope, likely with no thought of future conflicts which would require a court's intervention, might end with the recording of those conflicts in the county reports. And those conflicts may give rise to novel issues, the resolutions of which will contribute to the evolution of the law of equitable distribution in Pennsylvania.

The legislature has fashioned a framework in which the rights of each spouse may be justly determined, recognizing that neither spouse should be penalized for the failure of the marriage, and that both spouses should, in whatever manner appropriate to the circumstances of the marriage, be in some way compensated or re-

81. *Id.* § 501(c). Although this section indicates that in the usual case alimony will be primarily rehabilitative, the court is permitted in atypical situations to extend the duration of the award indefinitely, if warranted by the spouse's "age, physical, mental or emotional condition, custody of minor children, or other compelling impediment to gainful employment . . ." *Id.*

82. One court commented, in the context of a discussion of the modification of an alimony consent order, that "[w]e would be naive to think that trade-offs do not occur between equitable distribution and alimony." *Fleming v. Fleming*, 130 P.L.J. 68, 70 (C.P. Allegheny 1982).

warded for their contributions. Although questions remain to be answered by judicial interpretation or legislative amendment, Pennsylvania's law of divorce has entered the twentieth century.

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