

THE NEW JERSEY INFLUENCE ON NEW YORK'S EQUITABLE DISTRIBUTION LAW

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New Jersey's ten year experience¹ in the area of equitable distribution² is now providing guidance to its neighbor across the Hudson River. The 1980 New York Legislature approved a bill making significant changes in spousal property rights and obligations.³ The bill⁴ eliminated unconstitutional gender-based references⁵ throughout New York's domestic relations statutes,⁶ and added new sections on the disposition of marital property upon divorce.⁷ It also added new provisions in the area of spousal maintenance.⁸

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¹ New Jersey's equitable distribution statute was enacted on September 13, 1971. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980-1981).

² *Black's Law Dictionary* defines "equitable distribution" as follows: "No-fault divorce statutes in certain states (e.g. New Jersey) grant courts the power to distribute equitably upon divorce all property legally and beneficially acquired during marriage by husband and wife, or either of them, whether legal title lies in the joint or individual names." BLACK'S LAW DICTIONARY 483 (5th ed. 1979). This definition, which cites New Jersey as an example, is in accord with the basic concept of equitable distribution as adopted in New York. See N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980-1981); N.Y. DOM. REL. LAW § 236 (McKinney Cum. Supp. 1980-1981).

³ See Herman, *Major Changes in Divorce Law Voted in Albany*, N.Y. Times, June 4, 1981, § A, at 1, col. 1.

⁴ 1980 N.Y. Laws, ch. 281, § 9 (amending N.Y. DOM. REL. LAW § 236 (McKinney 1977)) (codified at N.Y. DOM. REL. LAW § 236 (McKinney Cum. Supp. 1980-1981)).

⁵ This modification was constitutionally mandated by several recent Supreme Court decisions. In *Orr v. Orr*, 440 U.S. 268 (1979), state laws requiring husbands, but not wives, to pay alimony were held unconstitutional. Later that same year, in *Childs v. Childs*, 440 U.S. 952 (1979), the Court imposed a rule requiring that awards of attorney's fees be made without regard to the recipient's sex. For an excellent review of the *Orr* decision, see *Orr v. Orr: The Decision That Takes Gender Out of Alimony*, FAM. ADVOCATE, Spring 1979, at 7.

⁶ E.g., N.Y. DOM. REL. LAW § 236(B)(1)(a) (word "maintenance" substituted for word "alimony"). See Herman, *supra* note 3.

⁷ N.Y. DOM. REL. LAW § 236(B)(5).

⁸ *Id.* § 236(B)(6)(a)(1)-(10).

The passage of the bill represented a major success for the proponents of equitable distribution. The prior statute granted the court no general power to distribute property of the parties.⁹ Its authority was generally limited to awards of alimony derived from the income of the husband. The old law also limited authority to settle disputes over title questions, and there was no authority to invade assets of the husband, or to convey property to the wife in lieu of periodic payments of alimony.¹⁰

The new law directs the courts to allow "equitable distribution"¹¹ of "marital property"¹² in any matrimonial cases after July 19, 1980. The current law provides certain guidelines for the court to consider in the division of property.¹³

Although the bill passed the legislature easily, there are now approximately one hundred different bills pending which would refine, reform, or repeal the new law. Of special note in this regard is the opposition to the law by some women's groups intent upon having the terminology "equitable distribution" changed to "equal distribution."¹⁴

New York is the most recent addition to the thirty-eight states which have now enacted statutes providing for the equitable distribution of property acquired during the marriage.¹⁵ Although general agreement exists as to basic equitable distribution principles, there are major differences as to which assets are to be included in the pool of assets subject to equitable distribution.¹⁶ Since New Jersey has been

⁹ *Id.* § 236.

¹⁰ Foster & Freed, *Explanation of the New York 1980 Equitable Distribution Law*, [1980] 6 FAM. L. REP. (BNA) 2651-52.

¹¹ N.Y. DOM. REL. LAW § 236(B)(5)(c). This section provides: "Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties." *Id.*

¹² *Id.* § 236(B)(1)(c). Marital property is defined as "[a]ll property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part." *Id.*

¹³ *Id.* § 236(B)(5)(d). See text accompanying note 37 *infra*.

¹⁴ The concept of equal distribution is based upon the philosophy of community property jurisdictions. In these states, which include Arizona, California, Idaho, Louisiana, Nevada, Texas, and Washington, all property earned during the marriage is considered to belong to the community of the marriage. See Greene, *Comparison of Property Aspects and Common Law Marital Property Systems and their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979); Foster & Freed, *Divorce Reform: Equitable Distribution of Property*, 183 N.Y.L.J. 103 (May 28, 1980); Sasser, *Looking Anew For Fair Divorce Law*, N.Y. Times, May 11, 1980, § 11, at 18, col. 1; Sasser, *Fairness in Divorce*, N.Y. Times, Feb. 8, 1980, § A, at 31.

¹⁵ See Foster & Freed, *Divorce in the Fifty States: An Overview as of August 1, 1980*, [1980] 6 FAM. L. REP. (BNA) 4043.

¹⁶ *Id.*

in the forefront of the development of guidelines for equitable distribution for ten years, New York will find a conveniently close basis for similar interpretations of their newly established law. New York is expected to rely on New Jersey's experience in defining the scope of marital property to be included in equitable distribution, separate property not subject to such distribution, and exceptions to both categories.

As an aid to the matrimonial practitioner, this article outlines the various provisions of equitable distribution in the recent New York enactments, and compares and contrasts features of their New Jersey counterparts.

I. PURPOSE OF EQUITABLE DISTRIBUTION

The fundamental principle of equitable distribution was declared by the New Jersey supreme court in the case of *Rothman v. Rothman*,¹⁷ where the court stated: "the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that is in many ways akin to a partnership."¹⁸

New York has adopted the *Rothman* view. In doing so, the statute acknowledges that while marriage is a partnership resulting in a single economic entity, its dissolution will not always result in an equal division of assets.¹⁹ This view differs from that of jurisdictions which view the marriage as the creation of an "equal" partnership, and which require an equal division of assets.²⁰ The new law permits the New York courts to direct one spouse to pay maintenance to the other on a temporary or a permanent basis "in such amount as justice requires, having regard for the circumstances of the case and of the respective parties."²¹

The courts in New York are directed to consider ten different factors in determining maintenance, the last of which, "any other

¹⁷ 65 N.J. 219, 320 A.2d 496 (1974).

¹⁸ *Id.* at 228-29, 320 A.2d at 501-02. It should be noted that the evaluation of a homemaker's service is of ongoing interest to courts. See Bruch, *Property Rights of Defacto Spouses Including Thoughts on the Value of Homemaker's Services*, 10 FAM. L.Q. 101 (1976); Hauserman & Fethke, *Valuation of a Homemaker's Services*, 22 TRIAL LAW GUIDE 249 (1978); Weitzman, *Legal Regulation of Marriage and Tradition and Change*, 62 CAL. L. REV. 1169 (1974).

¹⁹ N.Y. DOM. REL. LAW § 236(B)(1)(c). For the text of the statute see note 12 *supra*.

²⁰ See note 14 *supra*. Also note that beyond a mere division of property, courts have had to confront rapidly changing attitudes concerning the roles of respective spouses in the marriage. See Foster & Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L.Q. 55 (1976); Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1036 (1972).

²¹ N.Y. DOM. REL. LAW § 236(B)(6)(a).

factor which the court shall find to be just and proper,"²² is an all-encompassing criterion. These ten criteria for determining maintenance awards are analogous to those utilized by New Jersey courts.²³ The 1973 case of *Greenberg v. Greenberg*²⁴ set forth a list of six factors²⁵ to be considered in determining an award of maintenance. Other New Jersey courts over the years have added factors to the ones utilized by the *Greenberg* court.²⁶ Together with the basic principles of equity,²⁷ these criteria form the basis for both New Jersey law and the statute adopted in New York.²⁸

²² *Id.* The ten factors to be considered in an award of maintenance are:

- (1) the income and property of the respective parties in including marital property distributed pursuant to subdivision five of this part;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the present and future capacity of the person having need to be self-supporting;
- (4) the period of time and training necessary to enable the person having need to become self-supporting;
- (5) the presence of children of the marriage in the respective homes of the parties;
- (6) the standard of living established during the marriage where practical and relevant;
- (7) the tax consequences to each party;
- (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (9) the wasteful dissipation of family assets by either spouse; and
- (10) any other factor which the court shall expressly find to be just and proper.

Id.

²³ N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1981-1982) allows the court to make such orders as to alimony or maintenance "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just."

²⁴ 126 N.J. Super. 96, 312 A.2d 878 (App. Div. 1973).

²⁵ *Id.* at 100, 312 A.2d at 880. The six factors enumerated by the court were: "(1) the actual needs of the wife; (2) the husband's actual means and his ability to pay support; (3) the physical condition of the parties; (4) their social position; (5) the separate property and income of the wife, and (6) any other factors which bear upon the question of fair and reasonable support." *Id.*

²⁶ See, e.g., *Scalingi v. Scalingi*, 65 N.J. 180, 320 A.2d 475 (1974); *Khalaf v. Khalaf*, 58 N.J. 63, 275 A.2d 132 (1971); *Pascarella v. Pascarella*, 165 N.J. Super. 558, 398 A.2d 921 (App. Div. 1979); *Lynn v. Lynn*, 153 N.J. Super. 377, 379 A.2d 1046 (Ch. Div. 1977), *rev'd on other grounds*, 165 N.J. Super. 328, 298 A.2d 141 (App. Div. 1979).

²⁷ In New Jersey, matrimonial actions are adjudicated in the chancery division of the superior court according to the rules of equity. N.J. Cr. R. 4:75.

²⁸ There is an area in which the two states appear to differ. The tax consequences to the parties, criterion number 7 in the New York formulation, see note 22 *supra*, is only implicit among the broader factors to be considered by New Jersey courts when determining the income of the parties and arriving at a maintenance award. One New Jersey case, however, has explicitly included this as a factor to be considered. In *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), the Supreme Court of New Jersey specifically listed tax consequences as a consideration in arriving at any equitable property distribution or award of alimony or maintenance. *Id.* at 212-13, 320 A.2d at 492-93.

II. PROCEDURE

Generally, statutory law and court interpretations require equitable distribution of property to be fair and just, with consideration given to all circumstances in a specific case. The relevant procedure to be utilized by trial judges in New York²⁹ is similar to the standards set forth for New Jersey in the *Rothman* case.³⁰ The *Rothman* court stated:

In receiving and considering evidence designed to equip him to make an equitable distribution of marital assets, a trial judge enters upon a three-step proceeding. Assuming that some allocation is to be made, he must first decide what specific property of each spouse is eligible for distribution. Secondly, he must determine its value for purposes of such distribution. Thirdly, he must decide how such allocation can most equitably be made.³¹

Note that division and distribution of property represents only one of the economic incidents of divorce. Alimony ("maintenance" in New York) and child support may be of equal importance.³² Another consideration of significance may be the possession and occupancy of the marital residence for a limited, pre-set period of time, usually until emancipation of the parties' children.³³ When these items are considered in conjunction with the normal concept of division of property, the scope of equitable distribution is expanded, creating the opportunity for innovative interpretation at the trial level.³⁴

Since these diverse considerations are to be taken into account under the new law, there is likely to be a plethora of trial court interpretations.³⁵ For the erudite practitioner, the touchstone for interpretations will be the desire for more property and less alimony than under the prior New York law. Given the high rate of inflation, a spouse may be expected to choose a larger share of the assets, at their current value, rather than opt for alimony which will diminish in purchasing power as time progresses.

²⁹ N.Y. DOM. REL. LAW § 236(B)(3).

³⁰ See notes 17 & 18 *supra* and accompanying text.

³¹ 65 N.J. at 232, 320 A.2d at 503.

³² N.Y. DOM. REL. LAW § 236 (B)(6)-(7).

³³ *Id.* § 236(B)(5)(f).

³⁴ It should be noted that judges interpreting the New York Domestic Relations Act will have to account for changing spousal roles and the increasing number of working women who would prefer a division of the marital assets to traditional maintenance or alimony payments.

³⁵ Thus far, the results have been inconclusive. See notes 142-54 *infra* and accompanying text for a discussion of New York court opinions in this area.

III. GUIDELINES

After July, 1980, and in the absence of an agreement between the parties, a New York court arriving at an equitable distribution is directed to consider ten factors set forth by statute.³⁶ These ten non-discretionary factors are:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any award of maintenance under subdivision six of this part;
- (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (7) the liquid or non-liquid character of all marital property;
- (8) the probable future financial circumstances of each party;
- (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (10) any other factor which the Court shall expressly find to be just and proper.³⁷

Marital fault is not implied in the New York statute.³⁸ In a case involving grievous misconduct, it is possible that items of that nature might be considered within the tenth criterion listed above: "any other factor which the court shall expressly find just and proper."³⁹ The purpose of the statute, however, is to determine economic justice and not to punish marital fault.⁴⁰

³⁶ N.Y. DOM. REL. LAW § 236(B)(5)(d).

³⁷ *Id.* For a review of similar criteria employed by New Jersey tribunals, see note 43 *infra* and accompanying text. See also *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1978); *Woliner v. Woliner*, 132 N.J. Super. 216, 333 A.2d 283 (App. Div.), *aff'd*, 68 N.J. 234, 344 A.2d 781 (1975).

³⁸ See Foster, *Equitable Distribution: An Explanation of New York's New Statute*, 184 N.Y.L.J. 17 (July 24, 1980).

³⁹ N.Y. DOM. REL. LAW § 236(B)(5)(d)(10).

⁴⁰ See Foster, *supra* note 38.

In New Jersey, the guideline criteria to be utilized by a trial judge have been outlined by case law rather than by statute, as in New York.⁴¹ A list of such criteria were included in the seminal case of *Painter v. Painter*:⁴²

Guideline criteria over the broad spectrum of litigation in this area include: (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current value and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment at present earnings or better in the future; (12) effect of distribution of assets on the ability to pay alimony and support, and (13) gifts from one spouse to the other during marriage.⁴³

In addition to the aforementioned guidelines, the *Painter* court also reviewed section 307 of the Uniform Marriage and Divorce Act.⁴⁴ The provisions of that section of the Act contain the following criteria:

- (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as a homemaker;
- (2) value of the property set apart to each spouse;
- (3) duration of the marriage; and
- (4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.⁴⁵

Although the *Painter* court approved these criteria set out by the lower court, it was quick to add that these factors were to be considered only "illustrative and not exclusive."⁴⁶

⁴¹ See notes 23-28 *supra* and accompanying text.

⁴² 65 N.J. 196, 320 A.2d 484 (1974).

⁴³ *Id.* at 211, 320 A.2d at 492 (quoting *Painter*, 118 N.J. Super. at 335, 287 A.2d at 469).

⁴⁴ *Id.* at 211-12, 320 A.2d at 492.

⁴⁵ UNIFORM MARRIAGE AND DIVORCE ACT § 307 (Alternative B) (West 1970).

⁴⁶ 65 N.J. at 212, 320 A.2d at 492. A slightly different approach to this area is found in UNIFORM MARRIAGE AND DIVORCE ACT § 307 (Alternative A) (West 1970), which states:

The court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation,

In New Jersey, marital fault is also not an appropriate criterion for consideration in determining equitable distribution of marital assets.⁴⁷ Nevertheless, where the circumstances presented are of a highly unusual nature, New York,⁴⁸ like New Jersey,⁴⁹ seems to provide discretion to the trial court to consider marital fault.

IV. "MARITAL PROPERTY" AND "SEPARATE PROPERTY" DEFINED

In arriving at a decision for equitable distribution, New York courts must follow the statute, which defines the key terms "marital"⁵⁰ and "separate"⁵¹ property. The New York law follows the rationale of exempting separate property from consideration in equitable distribution.⁵² In New York, separate property will include assets acquired by gift or inheritance from someone other than a spouse, the increase in value of separate assets, except if such increase is attributable to the efforts of the other spouse,⁵³ compensation for personal injuries, and property described as such by agreement between the parties.⁵⁴ Marital property is defined as all property acquired by either spouse during the marriage and before execution of a separation agreement or the beginning of a matrimonial action, but excluding

amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

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

⁴⁷ See *Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478 (1974).

⁴⁸ See notes 38 & 39 *supra* and accompanying text.

⁴⁹ See *D'Arc v. D'Arc*, 164 N.J. Super. 226, 395 A.2d 1270 (Ch. Div. 1970) (husband contracted for murder of wife).

⁵⁰ N.Y. DOM. REL. LAW § 236(B)(1)(c). See note 12 *supra*.

⁵¹ N.Y. DOM. REL. LAW § 236(B)(1). Separate property is defined as:

- (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;
- (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
- (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

Id.

⁵² *Id.* § 236(B)(5)b-c. New Jersey defines separate property in a similar way. See 65 N.J. at 214, 320 A.2d at 493.

⁵³ See notes 57-63 *infra* and accompanying text.

⁵⁴ *Foster & Freed*, *supra* note 10, at 2650. See note 50 *supra*.

separate property and property which the parties have agreed to treat in other ways.⁵⁵

A subtle difference between the New York statute and the New Jersey case law did exist prior to the new bill in the treatment of property acquired by gift, devise, or bequest. New Jersey did include such assets as marital property. A recent New Jersey statute, however, has changed the definitions of separate and marital property. Property acquired by gift, devise, or bequest, with an exception for interspousal gifts, is now deemed separate property.⁵⁶ As a result, the two jurisdictions now have an aligned view of marital and separate property.

As a practical matter, there is still one remaining distinction between the definitions of marital and separate property which will create the most confusion in the forthcoming interpretations of the New York statute. The New York statute specifically exempts from equitable distribution the appreciation in value of separate property—except where the appreciation is due in part to the contributions or efforts of the other spouse.⁵⁷

In contrast, the New Jersey law exempts an increase in value of separate property unless the increase is attributable to the efforts of *either* spouse.⁵⁸ The import of the distinction between “other” and “either” spouse becomes apparent by the use of an example. The situation will often arise in matrimonial actions where one spouse, A, brings property into the marriage to B. Under the laws of both jurisdictions, the property belonging to A before the marriage is separate property, and therefore not subject to equitable distribution. The difference between the jurisdictions is in the classification of the increase in the value of that property in certain circumstances. If the increase in value is due to factors other than efforts of A or B, then under both interpretations the increase would be separate property, and not subject to equitable distribution. If, however, the increase is due only to A’s efforts, there is a difference in the treatment of that increase by the two jurisdictions. Since A brought the property into the marriage, he cannot be considered the “other” party under the New York statute, and so A’s efforts would not serve as a basis for a finding that the increase in value is marital property subject to equitable distribution. This increase in value in New York would be considered separate property. In New Jersey, however, it would not matter

⁵⁵ Foster & Freed, *supra* note 10, at 2650. See note 12 *supra*.

⁵⁶ N.J. STAT. ANN. § 2A:34-23, as amended by 1980 N.J. Laws, ch. 181.

⁵⁷ N.Y. DOM. REL. LAW § 236(B)(1)(d)(3).

⁵⁸ See *Painter*, 65 N.J. at 217, 320 A.2d at 495.

which spouse's efforts increased the value of the separate property. Since the New Jersey exemption allows for the inclusion of part of "either" spouse's effort, the increase would be marital property. Therefore, *B* would be entitled to equitable distribution of the increased value of the property in New Jersey, but not in New York.

It becomes apparent that the New York view of the exception of the increase in value of separate property created by the spouse who originally acquired the asset is incongruent with established New Jersey case law, and, most importantly, with other provisions of the New York statute. For example, the memorandum in support of the then-proposed statute stated that one of the purposes of the New York bill was to equitably distribute between the parties taking into consideration the circumstances of the parties. Included among these is a spouse's contribution as a homemaker.⁵⁹ It is this contribution of the homemaker-spouse who did not bring the separate property into the marriage that would not normally increase the value of the property, which the New York statute fails to consider.⁶⁰ This area is surely one marked for further interpretation by the New York judiciary. The interpretation should follow the New Jersey view, and consider the efforts of "either" spouse. The judiciary is likely to broadly interpret the meaning of the term "efforts" as used in the statute. This would allow an opinion in which the "efforts of the other spouse"⁶¹ is considered to include the contributions of a homemaker, regardless of how attenuated the relation between the two may be.

Distribution of separate property which is commingled with marital property, and vested interests, are two areas in which the drafters of the New York statute did anticipate special problems. The drafters sought guidance from several sources—again most notably from the New Jersey case law.

A. Commingling of Marital and Separate Property

The general rule is that by commingling the property, the separate property becomes subject to distribution along with the marital

⁵⁹ Memorandum in Support of Legislation, N.Y. DOM. REL. LAW § 236 (Assemblyman Burrows).

⁶⁰ N.Y. DOM. REL. LAW § 236(B)(1)(d)(3) makes no provision for a homemaker-spouse to share in the increased value of separate property unless the increase was due at least in part to the efforts of that homemaker. By contrast, a New Jersey homemaker shares in the increase in value of separate property if either spouse's efforts contributed to that gain. 65 N.J. at 217, 320 A.2d at 495.

⁶¹ N.Y. DOM. REL. LAW § 236(B)(1)(d)(3).

property.⁶² In New York, as in New Jersey,⁶³ the burden of tracing assets from the original source is placed upon the spouse claiming the property to be exempt from distribution as marital property.

A closely related question involves the situation where one party has used marital assets to acquire personal property. In equitable distribution, the court may choose to place such diminished assets among the assets purchased with the money derived from the sale of the marital property. If the acquiring spouse, however, has depleted all or most of the marital assets to obtain the subsequent acquisition, this would leave nothing to distribute to the other spouse. In such a situation, the court may require a judicial sale of the acquired asset to produce sufficient cash for the second spouse.⁶⁴

B. Vested Rights/Corporate Valuations

In general, only property acquired during the life of the marriage is to be considered distributable upon divorce. Additionally, only property possessed at the time of the matrimonial action is to be included.⁶⁵

Property in which any contingent interest is held is not subject to equitable distribution. The underlying reason is that to grant such a right would give the receiving spouse a right greater than that possessed by the owning spouse.

It is anticipated that the New York courts will follow a liberal approach in their interpretation of interests in professional partnerships, business entities, and closely held corporations. The form of entity will not determine whether equitable distribution is applicable. Interests in corporations, partnerships, and joint ventures have all been held subject to equitable distribution in New Jersey.⁶⁶ Although occasional questions arise in determining whether these interests are subject to distribution, the more frequent and troublesome question is that of valuation of a particular interest.⁶⁷

⁶² Riley, *Status of Property as Separate*, 20 AM. JUR. PROOF OF FACTS 321 (1979).

⁶³ See 65 N.J. at 214, 320 A.2d at 493; Scherzer v. Scherzer, 136 N.J. Super 397, 346 A.2d 434 (App. Div. 1975).

⁶⁴ 2 W. NELSON, DIVORCE AND ANNULMENT § 16.46 (2d ed. 1968); Note, *Equitable Distribution in New York*, 45 ALB. L. REV. 483 (1980).

⁶⁵ New Jersey follows this approach. See generally *Painter*, 65 N.J. 196, 320 A.2d 484; Scherzer v. Scherzer, 136 N.J. Super. 397, 346 A.2d 434 (App. Div. 1975).

⁶⁶ Stern v. Stern, 66 N.J. 340, 345-46, 331 A.2d 257, 260-61 (1978); Lavene v. Lavene, 162 N.J. Super. 187, 192-99, 392 A.2d 621, 623-27 (Ch. Div. 1978), on remand from 148 N.J. Super. 267, 372 A.2d 629 (App. Div. 1977).

⁶⁷ See Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution*, 56 N.D. L. REV. 201, 215 (1980).

New York should be expected to follow New Jersey in accepting established formulae in setting values of professional practices and closely held corporations. The accepted accounting methods for business valuation include capitalization of earnings using a reasonable rate of return on investment,⁶⁸ placing a market value on the stock through comparative analysis with companies in that given industry,⁶⁹ and ascertaining the value of the stock which appears in a publicly traded or an over-the-counter market.⁷⁰ Since dividend income does not reflect an accurate measurement, it is not used in establishing a business value.⁷¹ The goodwill of a business,⁷² however, is an asset generally subject to these considerations.⁷³

Other areas of concern facing the New York courts revolve around whether personal injury claims, social security, stock options, and pension plans are subject to equitable distribution. Once again, the New York courts should wisely base the development of their case law on New Jersey precedents.

The New Jersey judiciary held that a claim for personal injuries⁷⁴ was includable for purposes of equitable distribution. Additionally, a later New Jersey case included a workman's compensation claim⁷⁵ as an asset subject to equitable distribution. Nevertheless, social security benefits have been held not to be includable as an asset subject to equitable distribution by the New Jersey courts.⁷⁶ The exclusion of social security benefits from distribution is explained by the overriding federal policy considerations in favor of providing funds for assistance

⁶⁸ See *Lavene v. Lavene*, 162 N.J. Super. 187, 197, 392 A.2d 621, 626 (Ch. Div. 1978).

⁶⁹ *Id.*

⁷⁰ *Id.* at 198, 392 A.2d at 626.

⁷¹ *Id.*

⁷² See Grosman, *supra* note 67, at 215; Comment, *Valuation of Professional Goodwill Upon Marital Dissolution*, 7 Sw. L. Rev. 185 (1975).

⁷³ Special attention should be given by practitioners to the use of expert testimony in establishing the eight factors enumerated in Rev. Rul. 59-60, 1959-1 C.B. 237, utilized in ascertaining the value of a business's good will.

The eight factors are: the nature of the business and the history of the enterprise from its inception; the economic outlook in general and the condition and outlook of the specific industry in particular; the book value of the stock and the financial condition of the business; the earning capacity of the company; the dividend-paying capacity; whether or not the enterprise has goodwill or other intangible value; sales of the stock and the size of the block to be valued; and the market price of stocks of corporations engaged in the same or similar line of business having their stocks actively traded in a free and open market, either on exchange or over-the-counter. *Lavene v. Lavene*, 162 N.J. Super. 187, 194, 392 A.2d 621, 624 (Ch. Div. 1978).

⁷⁴ See *Harmon v. Harmon*, 161 N.J. Super. 206, 391 A.2d 553 (App. Div. 1978); *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974).

⁷⁵ See *Hughes v. Hughes*, 132 N.J. Super. 559, 334 A.2d 378 (Ch. Div. 1978).

⁷⁶ *Biles v. Biles*, 163 N.J. Super. 49, 394 A.2d 153 (Ch. Div. 1978).

in old age.⁷⁷ Stock option plans, however, held to be distributable by New Jersey courts,⁷⁸ are subject to an analysis similar to that used in pension plans.

C. Pension Plans

As a rule, courts will include employee benefits such as pension plans and other rights of deferred compensation within the scope of equitable distribution. New Jersey courts have consistently followed this rule.⁷⁹ In *Kruger v. Kruger*,⁸⁰ the court held that such benefits are normally included among plans for family maintenance.⁸¹ The New York statute has adopted this view and specifically enumerates the loss of pension rights as a factor in considering the future impact of the dissolution of the marriage.⁸²

In New Jersey, the issue of whether a right is vested is decided by examining whether the right has been acquired during the marriage, and whether it is equitable to include it in the marital estate.⁸³ Usually, if the rights of the spouse are vested during the marriage they will be included for equitable distribution, even though benefits would not be recovered until a future date.⁸⁴ It is reasoned that if a pension is subject to a contingency, it is a mere expectation and the proposed recipient has no fixed ascertainable interest in it. However, if the pension is non-forfeitable, then the proposed recipient has a fixed ascertainable interest in the pension, thus permitting it to be subject to equitable distribution.⁸⁵

The New York law appears to eliminate any distinction between vested and contingent pension rights. It requires all pensions to be considered, without the New Jersey distinctions as to when the rights are acquired.⁸⁶ Whether New York courts will include this distinction in future decisions remains to be seen.

⁷⁷ *Id.* See *Umber v. Umber*, 591 S.W.2d 299 (Okla. 1979) (provided rationale for *Biles v. Biles*, 163 N.J. Super. 49, 394 A.2d 153 (Ch. Div. 1978)).

⁷⁸ *Callahan v. Callahan*, 142 N.J. Super. 325, 361 A.2d 561 (Ch. Div. 1976).

⁷⁹ See *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 654 (1977); *McGraw v. McGraw*, 151 N.J. Super. 515, 377 A.2d 697 (App. Div. 1977); *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (Ch. Div. 1976); *White v. White*, 136 N.J. Super. 552, 347 A.2d 260 (App. Div. 1975); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (App. Div. 1975); *Tucker v. Tucker*, 121 N.J. Super. 539, 298 A.2d 91 (Ch. Div. 1972).

⁸⁰ 73 N.J. 464, 375 A.2d 659 (1977).

⁸¹ *Id.*

⁸² N.Y. DOM. REL. LAW § 236(B)(5)(d)(4).

⁸³ *Weir v. Weir*, 173 N.J. Super. 130, 138, 413 A.2d 638, 645 (Ch. Div. 1980).

⁸⁴ 73 N.J. at 471, 375 A.2d at 661-62.

⁸⁵ *Id.* at 469, 375 A.2d at 661.

⁸⁶ See N.Y. DOM. REL. LAW § 236(B)(5)(d)(4). For a comparable New Jersey discussion, see *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (Ch. Div. 1976).

Another issue is whether a pension plan may be distributed or compensated for at the time of equitable distribution. A recent United States Supreme Court decision controls where there is a federally funded pension.⁸⁷ In *Hisquierdo v. Hisquierdo*,⁸⁸ the Court reversed the California Supreme Court, which had held that federally funded railroad retirement benefits were subject to distribution as community property of the marriage.⁸⁹ In the majority opinion authored by Justice Blackmun, great weight was placed upon the sovereign immunity clause of the Railroad Retirement Act.⁹⁰ Noting that the Act had been amended,⁹¹ Justice Blackmun viewed the change as creating a definition of alimony which excluded any "payment or transfer of property or its value by any individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."⁹² Thus, the Court concluded that the legislature intended the amendment to cut off the right of a divorced spouse to a presently divisible interest in a pension plan.⁹³ The dissenting opinion, authored by Justice Stewart, noted that such an analysis places the spouse seeking distribution in a position comparable to that of a common creditor seeking a garnishment of the pension.⁹⁴ The two situations are readily distinguishable, according to Justice Stewart, in that the spouse seeking distribution of the pension has ownership rights and does not need to establish the right to a share as would a common creditor.⁹⁵

In another case addressing the applicability of property distribution law to a federal pension plan, the court in *Cose v. Cose*⁹⁶ applied this rationale to a military pension plan.⁹⁷ Relying on *Hisquierdo*, the *Cose* court held a military pension not divisible between spouses at the time of divorce.⁹⁸

Some commentators believe other federal legislation may cast doubt upon the availability of private pension plans for immediate

⁸⁷ *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

⁸⁸ 439 U.S. 572 (1979).

⁸⁹ *Id.* at 591.

⁹⁰ *Id.* at 573-77.

⁹¹ *Id.* at 576-77.

⁹² *Id.* at 577 (quoting Pub. L. No. 95-30, tit. V, § 501(d), 91 Stat. 160 (1977)).

⁹³ *Id.* at 584.

⁹⁴ *Id.* at 599 (Stewart, J., dissenting).

⁹⁵ *Id.*

⁹⁶ 592 P.2d 1230 (Alaska 1979), *appeal pending*, 104 S. Ct. 419 (1981).

⁹⁷ *Id.*

⁹⁸ *Id.*

distribution at divorce.⁹⁹ The Employee Retirement Income Security Act of 1974¹⁰⁰ (ERISA) outlines vesting requirements of certain private pension plans¹⁰¹ in trade related industries.¹⁰² One specific provision states that it "shall supersede . . . state laws."¹⁰³ Nonetheless, New Jersey and New York legislators have jointly introduced federal legislation designed to specifically exempt a state's alimony and property settlement laws from ERISA provisions.¹⁰⁴ Since this legislation is still pending, clarification as to current distributability of private pensions is still an open issue. In the meantime, the *Hisquierdo* analysis should still be controlling.

V. THE ROLE OF EDUCATIONAL DEGREES IN EQUITABLE DISTRIBUTION

A continually troublesome question to the courts has been the evaluation of an educational degree acquired through the financial sacrifice of the other spouse.¹⁰⁵ One view, followed by Colorado¹⁰⁶ and New Jersey courts,¹⁰⁷ holds that an educational degree resulting in an enhanced earning power is not an asset to be considered during an equitable distribution—regardless of whether the other spouse contributed financially to the degree's attainment.¹⁰⁸ This interpretation is based on the premise that an educational degree is not property, but rather is personal to its holder and not simply gained by expending money.¹⁰⁹ The Colorado court characterized a degree as "an intellectual achievement that may potentially assist in the future acquisition of property."¹¹⁰ In New Jersey, the leading case has been *Stern v. Stern*.¹¹¹ There the court held that "a person's earning capacity, even

⁹⁹ Note, *supra* note 64, at 503-04. See Doyle, *ERISA and the Non-Employee Spouse's Community Interest in Retirement Pay*, 4 COMM. PROP. J. 3 (1977); Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1977-78).

¹⁰⁰ 29 U.S.C. §§ 1001-1381 (1976).

¹⁰¹ *Id.* § 1053.

¹⁰² *Id.* §§ 1001-1003.

¹⁰³ *Id.* § 1144.

¹⁰⁴ See Note, *supra* note 64, at 503 & n.104, for a discussion of this legislation.

¹⁰⁵ The all too frequent scenario involves one spouse who supports the other during the latter's education only to find that once the costly education is completed, the marriage is over. For a discussion of the consequences of this situation, see Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 65 IOWA L. REV. 705 (1979); Recent Development, *Divorce—The Effect of a Spouse's Professional Degree on a Division of Marital Property and Award of Alimony*, 15 TULSA L. J. 378 (1979).

¹⁰⁶ See *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

¹⁰⁷ *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1978).

¹⁰⁸ See Note, *supra* note 64, at 495-96.

¹⁰⁹ *Id.*

¹¹⁰ *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978).

¹¹¹ 66 N.J. 340, 331 A.2d 257 (1978).

where development has been aided and enhanced by the other spouse . . . should not be recognized as a separable, particular item of property."¹¹² Thus, this rationale can be summed up by stating that potential earning capacity will not be considered an item subject to equitable distribution.

Another view, followed particularly by the judiciary in Iowa¹¹³ and Missouri,¹¹⁴ holds that contributions by one spouse to the education of another can be the basis of an award to the contributing spouse. The reasoning is that the husband and wife's present assets are directly related to the educational degree earned since the spouse earning the degree increased the earning capacity of the parties.¹¹⁵ For example, the Missouri Court of Appeals held that money contributed by the wife toward her husband's legal education was of ascertainable value with regard to acquired marital property.¹¹⁶

Recently, a superior court decision in New Jersey¹¹⁷ sided with this school of thought by distinguishing the *Stern* case discussed above.¹¹⁸ In *Lynn v. Lynn*,¹¹⁹ the court held that a medical degree and license to practice medicine obtained by a spouse during the marriage is to be included among assets subject to equitable distribution.¹²⁰ In reaching this result the court reviewed a litany of legal precedents on this topic.¹²¹ The court distinguished between states absolutely excluding educational degrees and/or licenses from equitable distribution or community property and those states which include such degrees—but with severe limitations.¹²² The court noted that valuation of an educational degree as an asset would be a most difficult process. Nonetheless, it held that such difficulties should not preclude some solution to the problem.¹²³ Judge Krafte, who authored the opinion, stated the following:

The syndrome is, unfortunately, becoming more a product of our times and must be dealt with by incursions into traditional thinking and the abandonment of all parochial notions of restric-

¹¹² *Id.* at 345, 331 A.2d at 260.

¹¹³ *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978).

¹¹⁴ *In re Marriage of Vanet*, 544 S.W.2d 236 (Mo. Ct. App. 1976).

¹¹⁵ See Note, *supra* note 64, at 496-97.

¹¹⁶ *In re Marriage of Vanet*, 544 S.W.2d 236 (Mo. Ct. App. 1976).

¹¹⁷ *Lynn v. Lynn*, [1981] FAM. L. REP. (BNA) 3001 (N.J. Ch. Div. 1981).

¹¹⁸ See notes 111-12 *supra* and accompanying text.

¹¹⁹ [1981] FAM. L. REP. (BNA) 3001 (N.J. Ch. Div. 1981).

¹²⁰ *Id.* at 3007.

¹²¹ *Id.* at 3002-07.

¹²² *Id.* at 3005.

¹²³ *Id.* at 3006-07.

tive boundaries. To do otherwise would render courts of equity impotent and unable to do more than recognize what *all* courts agree to be an 'obvious injustice.'¹²⁴

Since New Jersey has now arguably joined those jurisdictions which include a spouse's contribution to an educational degree of the other spouse, it is likely that New York will follow suit. The New York statute is in fact framed to allow, if needed, the inclusion of an educational degree as a consideration in the determination of equitable distribution. The New York statute explicitly states that "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or career potential of the other spouse," shall be included in equitable distribution.¹²⁵

If the New York courts follow the lead of New Jersey in its recent decision on educational degrees,¹²⁶ they are likely to encounter the same difficulties in assessing the value of the degree. Although the results will vary in assessing the value of the degree due to the particular facts of a case, the courts will still have to focus upon the duration of the marriage, the age of the parties, the amount of distributable assets, and the future earning capacity of the parties to reach an equitable result.

VII. AGREEMENTS

The recent New York statute broadened the permissible scope of contractual agreement between parties.¹²⁷ As presently written, the statute permits parties to enter agreements on or after its effective date, July 19, 1980. In essence, the parties may contract out of equitable distribution and, within certain limits, write their own agreement.¹²⁸ By contrast to previous New York law, the parties may now specify the duration and amount of maintenance.¹²⁹ Requirements for this freedom to contract are that an agreement must be written, subscribed to by the parties, and acknowledged or proven in the manner prescribed to record a deed. In addition, the provisions of any agreement must be fair and reasonable when made, and conscionable at the time of judgment.¹³⁰

¹²⁴ *Id.* at 3007.

¹²⁵ N.Y. DOM. REL. LAW § 236(B)(5)(d)(6). The framers of the statute had the foresight to anticipate the situation in which a supporting spouse has delayed or sacrificed an education until the other spouse's education is completed.

¹²⁶ See notes 117-24 *supra* and accompanying text.

¹²⁷ N.Y. DOM. REL. LAW § 236(B)(3).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

VIII. DISTRIBUTION AWARDS

It must be noted that the New York statute goes a step further than the New Jersey law by including a provision for a distributive award.¹³¹ These are monetary awards granted to a spouse in place of an actual distribution of property. Under the statute, a monetary award may be granted when a court "determine[s] that equitable distribution is appropriate, but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law."¹³² The court, in its discretion, also may make a distributive award to supplement, facilitate, or effectuate a distribution of marital property.¹³³ The distributive award may be made payable to either party in a lump sum, or over a period of time in fixed amounts. They are not to include payments which are treated as ordinary income to the recipient under the United States Internal Revenue Code.¹³⁴

IX. THE ROLE OF JUDICIAL DISCRETION

Although statutory definitions are an aid to the courts in determining assets available for distribution, the crucial factor in any award of equitable distribution will be that of judicial discretion.

The New York statute contains a provision which lists criteria on which the judge must implement any decision.¹³⁵ It also includes a provision which requires the court to file a written report outlining the precise factors used in its decision.¹³⁶ The purpose of these provisions is to minimize potential abuses of judicial discretion.¹³⁷

In creating these factors, the framers of the New York statute were guided by what they perceived to be flaws in New Jersey's system of property distribution. According to one commentator, it was unbalanced awards resulting in litigation and controverted property settlements which were creating the backlog in the New Jersey court calendar.¹³⁸ Other criticism is that the unbridled discretion

¹³¹ *Id.* § 236(B)(5)(e).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See notes 36-37 *supra* and accompanying text.

¹³⁶ N.Y. DOM. REL. LAW § 236(B)(5)(g) provides: "In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel."

¹³⁷ For a discussion of judicial discretion in property settlements, see Muookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

¹³⁸ Sassower, *Looking Anew For Fair Divorce Law*, N.Y. Times, May 11, 1980, § 11, at 18, col. 1.

afforded judges in the determination of equitable distribution is a primary cause of the court's backlog.¹³⁹ Whether these criticisms of the New Jersey system are justified is open to debate.¹⁴⁰ Nonetheless, there are still similar problems in these New York provisions overlooked by the drafters of the statute. For example, the requirement of a written report for each case of equitable distribution reduces the time a judge will spend on the bench, since time will have to be spent writing reports. The statute is also vague in its discussion of the proper factors required in the judicial report. As a result, judges may tend to stress whatever factors of the statute's guidelines they please, thus allowing for divergent decisionmaking.¹⁴¹

X. RECENT DEVELOPMENTS IN NEW YORK

The first months following the implementation of the New York statute have resulted in a climate of confusion. There has been little progress thus far by the New York courts toward any definitive and consistent trend in interpreting the statute. For instance, the rulings have varied from a holding that the statute is retroactive,¹⁴² to a holding that it is not retroactive.¹⁴³ Furthermore, one court has disallowed discovery of clients in a spouse's law firm,¹⁴⁴ while another has ruled that a comprehensive financial disclosure of a spouse's assets is required.¹⁴⁵ Other New York courts' interpretation of the statute have been clearer. A Nassau County supreme court held that a court may provide for equitable distribution of property of a defaulting party without any further hearing.¹⁴⁶ The court stated that to do otherwise "simply because one side defaults would give to the party choosing not to appear an advantage in defaulting and constitute a prejudice to the party seeking equitable distribution."¹⁴⁷

¹³⁹ One recent comment described the statute as the source of the problem in New Jersey, and suggested that New Jersey follow the New York example by adopting guidelines written into the statute in order to limit judicial discretion. See Note, *supra* note 64, at 504-05.

¹⁴⁰ The Supreme Court of New Jersey's Pashman Commission recently released its report on problems confronting the matrimonial court as well as possible solutions. See SUPREME COURT COMMITTEE ON MATRIMONIAL LITIGATION, PHASE-TWO, FINAL REPORT (June 10, 1981) (reprinted as a supplement to 108 N.J.L.J. 41 (July 16, 1981)).

¹⁴¹ *Contra*, Note, *supra* note 64, at 506.

¹⁴² *Deschamps v. Deschamps*, [1980] FAM. L. REP. (BNA) 2769 (N.Y. Sup. Ct. 1980).

¹⁴³ *Cooper v. Cooper*, [1980] FAM. L. REP. (BNA) 2770 (N.Y. Sup. Ct. 1980).

¹⁴⁴ *Stolowitz v. Stolowitz*, [1981] FAM. L. REP. (BNA) 2148 (N.Y. Sup. Ct. 1980).

¹⁴⁵ *Ruossos v. Ruossos*, [1981] FAM. L. REP. (BNA) 2157 (N.Y. Sup. Ct. Jan. 8, 1981).

¹⁴⁶ *Ettinger v. Ettinger*, [1981] FAM. L. REP. (BNA) 2277 (N.Y. Sup. Ct. Feb. 11, 1981).

¹⁴⁷ *Id.* at 2278.

Another New York supreme court in Erie County held that a 1979 separation agreement amounted to a complete property settlement agreement and thereby obviated the need for equitable distribution under the 1980 statute,¹⁴⁸ even though the action was filed after the new law became effective.¹⁴⁹ In arguing that only a partial distribution took place, the wife depended upon a 1977 New Jersey supreme court case, *Smith v. Smith*,¹⁵⁰ which mandated equitable distribution under the New Jersey law despite an agreement dating back to 1965. The New York court distinguished *Smith*, stating that the *Smith* agreement was one for mere support, whereas the case before the court was clear in providing that the parties intended a complete property division by use of expressions of finality.¹⁵¹

As a result of these rulings, attorneys practicing in New York are now proceeding with extreme caution in view of the more complex and time consuming issues they are confronted with in the new law.¹⁵² Counsel fees are also on the increase for matrimonial actions.¹⁵³ According to one recent article, attorney's fees may as much as double due to the increased expense and effort expended by attorneys adapting to the statute and the subsequent interpretive decisions.¹⁵⁴

CONCLUSION

The New York equitable distribution law's most significant change is that it allows the judiciary more flexibility and discretion. Although not allowing as much discretion as New Jersey law, the new law now frees the judiciary from the restraints of the fixed and narrow guidelines which existed prior to its enactment. In place of the former rigidity, the new law provides a more general criterion and methodology for the examination of the particular facts of each case.

The New York courts will seek guidance from other jurisdictions with more experience in implementing the principles of equitable

¹⁴⁸ *Gedratris v. Gedratris*, [1981] FAM. L. REP. (BNA) 1066 (N.Y. Sup. Ct. Feb. 6, 1981).

¹⁴⁹ *Id.*

¹⁵⁰ *Smith v. Smith*, 72 N.J. 350, 371 A.2d 1 (1977).

¹⁵¹ *Gedratris v. Gedratris*, [1981] FAM. L. REP. (BNA) 1066 (N.Y. Sup. Ct. Feb. 6, 1981).

¹⁵² *Castillo, Divorce Costs Rise Under New Law*, N.Y. Times, Feb. 2, 1981, at 1, col. 1.

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also Hinds, *Divorce Law and Women*, N.Y. Times, Apr. 4, 1981, at 21, col. 1. Hinds stated that a New York divorce will cost each spouse the following, depending upon the nature of the case: a simple settlement—\$1,500; an "average complex case"—\$10,000 to \$15,000; a case involving a custody fight—\$15,000 to \$20,000. *Id.*

distribution. This will necessarily include New Jersey, which has been in the forefront of developments in equitable distribution.¹⁵⁵

For both judge and attorney, the New York equitable distribution law opens a new phase of the law, with a perspective quite dissimilar to that of the past. It offers the challenge of imagination and creativity. At the same time, caution will be the watchword—especially in the early years as New York courts attempt to integrate tested principles, like those set by its neighbor,¹⁵⁶ into its own jurisprudence.¹⁵⁷

¹⁵⁵ For additional information on Equitable Distribution in New Jersey, see G. SKOLOFF, *NEW JERSEY FAMILY LAW PRACTICE* 220 (3d ed. 1976).

¹⁵⁶ See note 155 *supra*.

¹⁵⁷ For an excellent introduction to New York's recently enacted law, see Foster, *Equitable Distribution*, 184 N.Y.L.J., 17 (July 24, 1980). For a comprehensive discussion of the New York law, see *NEW YORK CIVIL PRACTICE—MATRIMONIAL ACTIONS AND FAMILY COURT PROCEEDINGS* (1980) (Special Supp. Sept. 1980) (covering equitable distribution and miscellaneous provisions under N.Y. Laws 1980, ch. 281, effective July 19, 1980).