

THE INEQUITY OF EQUITABLE DISTRIBUTION: AN EDITORIAL

by Elinor P. Mulligan*
and Amy C. D. O'Connor**

The equitable distribution statute directs that upon entry of a judgment for divorce, the court

may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.¹

In *Painter v. Painter*,² the Court likewise stated that “[t]he courts are now empowered to allocate marital assets between the spouses, regardless of ownership.”³ Eligibility of property for distribution merely requires that it was acquired during the marriage.⁴ In 1980, the New Jersey Legislature did exempt property acquired by gift, testamentary devise and bequest from distribution,⁵ but left all other property subject to distribution.

Case law has declared subject to distribution not only such obvious assets as cash savings and tangibles, but even claims against third parties for personal injuries suffered by one spouse,⁶ workers' compensation claims,⁷

* A.B., University of Michigan, 1950; J.D., Seton Hall University Law Center, 1970. The co-author is a member of the New Jersey Bar, a partner in the firm of Mulligan & Mulligan, Hackettstown, New Jersey and a member of the firm of Mulligan & Jacobson, New York City of which her husband is senior partner. Mrs. Mulligan has had an extensive practice in the field of matrimonial law since 1970.

** A.B., University of Michigan, 1975; J.D., Seton Hall University Law Center, 1981.

¹ N.J. STAT. ANN. § 2A:34-23 (West Supp. 1980-81).

² 65 N.J. 196, 320 A.2d 484 (1974).

³ *Id.* at 213, 320 A.2d at 493.

⁴ The period during which assets must be acquired in order to be subject to distribution is the period between the marriage ceremony and the filing of the complaint for divorce. *Id.* at 217-18, 320 A.2d at 495.

⁵ Ch. 181, 1980 N.J. Laws (amending N.J. Stat. Ann. § 2A:34-23). See *Bellinger v. Bellinger*, 177 N.J. Super. 650 (Ch. Div. 1981).

⁶ *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974); *Harmon v. Harmon*, 161 N.J. Super. 206, 391 A.2d 552 (App. Div. 1978).

⁷ *Hughes v. Hughes*, 132 N.J. Super. 559, 334 A.2d 378 (Ch. Div. 1975).

contributory or vested pension interests,⁸ partnership interests,⁹ stock options,¹⁰ and vested trust interests.¹¹ The proportions and modes of distribution are all at the discretion of the court.¹²

The legal systems of England, France, West Germany, Sweden, and all but a small minority of American states¹³ are committed by legislation to

⁸ *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977); *Kikkert v. Kikkert*, 177 N.J. Super. 471 (App. Div. 1981); *McGrew v. McGrew*, 151 N.J. Super. 515, 377 A.2d 697 (App. Div. 1977); *White v. White*, 136 N.J. Super. 552, 347 A.2d 260 (App. Div. 1975); *Pelligrino v. Pelligrino*, 135 N.J. Super. 512, 342 A.2d 226 (App. Div. 1975); *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (Ch. Div. 1976); *Tucker v. Tucker*, 121 N.J. Super. 539, 298 A.2d 91 (Ch. Div. 1972).

⁹ Even partnership interests in professional corporations are subject to equitable distribution. *See Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Grayer v. Grayer*, 147 N.J. Super. 513, 371 A.2d 753 (App. Div. 1977).

¹⁰ *Callahan v. Callahan*, 142 N.J. Super. 325, 361 A.2d 561 (Ch. Div. 1976).

¹¹ Trust interests which were created before marriage are not free from equitable distribution if vesting occurs during the marriage. *See Mey v. Mey*, 149 N.J. Super. 188 (App. Div. 1977), *aff'd* 79 N.J. 121, 398 A.2d 88 (1979). However, by reason of the amendment referred to in note 5, *supra*, trusts which are an outright bequest or gift will be exempt. *See Kikkert, supra* note 8, at 476.

¹² *See supra* note 1.

¹³ Only five states confer no statutory power on the courts to distribute separately titled property, but two of them have allowed "special equity" to effect distribution of property titled in one party alone. They are: Florida (special equity) (*see Johnson v. Johnson*, 367 So.2d 695, 5 Fam. L. Rep. 2452 (Dist. Ct. App. 1979)); Mississippi; South Carolina (special equity) (*see Wilson v. Wilson*, 270 S.C. 216, 241 S.E.2d 566, 4 Fam. L. Rep. 1978 (1978)); Virginia; and, West Virginia.

Thirty-seven common law property states and the District of Columbia have adopted equitable distribution property statutes: ALA. CODE § 30:2-31 (1975); ALASKA STAT. § 09.55.210 (Supp. 1980); ARK. STAT. ANN. § 34-1214 (1962); COLO. REV. STAT. § 14-10-113 (Cum. Supp. 1978); CONN. GEN. STAT. ANN. § 46-51 (West 1978); DEL. CODE tit. 13, § 1513 (Supp. 1978); D.C. CODE ENCYCL. § 16-910 (West Cum. Supp. 1980-81); GA. CODE ANN. § 30-203 to -205 (1980); HAW. REV. STAT. § 580-47 (1976); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980); IND. CODE ANN. § 31-1-11.5-11 (Burns Supp. 1978); IOWA CODE ANN. § 598.21 (West Cum. Supp. 1980-81); KAN. STAT. § 60-1610 (Supp. 1978); KY. REV. STAT. § 403.190 (Baldwin 1980); ME. REV. STAT. tit. 19, § 722-A (Supp. 1980-81); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-07 (1980); MASS. ANN. LAWS. ch. 208, § 34 (Michie/Law. Co-op. Supp. 1981); MICH. COMP. LAWS ANN. § 552.23 (West Supp. 1980-81); MINN. STAT. ANN. § 518.58 (West Supp. 1981); MO. ANN. STAT. § 452.330 (Vernon Supp. 1981); MONT. REV. CODE ANN. § 40-4-202 (1979); NEB. REV. STAT. § 42-366 (1974); N.H. REV. STAT. ANN. § 458.19 (1968); N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980-81); 1980 N.Y. Laws, ch. 281, § 9 (amending N.Y. DOM. REL. LAW. § 236 (1977)); N.C. GEN. STAT. § 50-16.5 (1976); N.D. CENT. CODE § 14-05-24 (1971); OHIO REV. CODE § 3105.18 (Page Supp. 1978); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1980-81); OR. REV. STAT. § 107.105(1)(e) (1977); PA. STAT. ANN. tit. 23, § 55 (Purdon Supp. 1980-81); R.I. GEN. LAWS § 15-5-16.1 (Cum. Supp. 1980); S.D. COMPILED LAWS ANN. § 25-4-44 (1976); TENN. CODE ANN. §§ 36-824 to -825 (Supp. 1981); UTAH CODE ANN. tit. 15, § 557 (1976); VT. STAT. ANN. § 15:557 (1974); WISC. STAT. ANN. § 767.255 (Special Pamphlet 1980); WYO. STAT. § 20-63 (1957).

Eight states distribute property pursuant to community property principles: ARIZ. REV. STAT. § 25-318 (1976); CAL. CIV. CODE § 4800 (West 1970); IDAHO CODE § 32-712 (1963); LA. CIV. CODE ANN. § 240:6 (West 1972); N.M. STAT. ANN. § 57-4A-4A (Supp. 1975); NEV. REV. STAT. § 123.050 (1973); TEX. FAM. CODE ANN. § 1:3.63 (Vernon 1975); and, WASH. REV. CODE ANN. § 26.08.110 (1961).

See generally Freed and Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229 (1981).

the view that the spouses' property ought to be shared upon divorce without regard to legal title.¹⁴ Advocates of this law, this extraordinary right of the court to take what legally belongs to one spouse and transfer it to the other, argue that equitable distribution corrects an inequity long visited upon the "homemaking" spouse, most often the wife. She is viewed to have been preoccupied with housekeeping and the rearing of children, and thus unable to have acquired property in her own name, although contributing to her husband's welfare and thus his ability to acquire property. Without equitable distribution she would be without any of the assets acquired by her husband except those he may have gratuitously placed in her name. Acknowledging the plight of the divorced homemaker and eager to recognize the value of homemaker services, the Appellate Division recently said in *Gibbons v. Gibbons*:¹⁵

The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition.¹⁶

To compensate the homemaker and to make up for an assumed inability to acquire her own property, New Jersey courts have condoned the use of equitable distribution to redistribute the husband's property to the wife. Finding the traditional remedy, alimony, insufficient in compensating the homemaker, the Supreme Court in *Rothman v. Rothman*¹⁷ noted:

The public policy sought to be served [by equitable distribution] is at least twofold. Hitherto future financial support for a divorced wife has been available only by grant of alimony. Such support has always been inherently precarious. It ceases upon the death of the former husband and will cease or falter upon his experiencing financial misfortune disabling him from continuing regular payments. This may result in serious misfortune to the wife and in some cases will compel her to become a public charge. An alloca-

¹⁴ See GLENDON, STATE, LAW, AND FAMILY—FAMILY LAW IN TRANSITION IN THE U.S. AND WESTERN EUROPE (1977).

¹⁵ 174 N.J. Super. 107, 113 A.2d 1174 (App. Div. 1980).

¹⁶ *Id.* at 113, 113 A.2d at 1177.

¹⁷ 65 N.J. 219, 320 A.2d 496 (1974).

tion of property to the wife at the time of the divorce is at least some protection against such an eventuality. In the second place the enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage.¹⁸

Although equitable distribution might indeed abolish inequities suffered by divorced homemakers, this anachronistic remedy no longer serves a useful function and may even become despised by many divorced women. Unlike alimony, where typically only a wife benefits, neither spouse can escape the operation of equitable distribution. Property owned by the wife can be transferred to her husband, if a judge in his discretion believes such result would be equitable. Such a result is unlikely to occur in those situations where the wife has been a homemaker for the duration of the marriage and consequently has not acquired substantial property. However, as increasing numbers of married women discard the role of full-time homemakers, become employed, and acquire property in their own names, not only will equitable distribution no longer be necessary to serve its intended purpose, but also many women will not wish to part with hard-earned possessions.

The fact that the percentage of married women entering the work force has been increasing at a substantial and steady rate indicates that the housewife marriage is on the road to extinction.¹⁹ In 1947, the percentage of married women, with spouses present, in the national labor force was 20.0%; in 1979 the percentage was 49.4%.²⁰ This thirty-three year trend bears out the fact that the marriage with only one spouse employed is becoming the exception and not the rule. Furthermore, the presence of children does not compel full time homemaking, and the use of modern day domestic appliances has reduced the demands of housekeeping to nearly the vanishing point.

While less frequently articulated, an additional justification for equitable distribution is the alleged inability of women to achieve success in commercial, business, and professional efforts. The obvious defect in this reasoning is that in this last quarter of the twentieth century, American

¹⁸ *Id.* at 228-29, 320 A.2d at 501.

¹⁹ The percentage of the labor force which is comprised of married women increases at the rate of about one percentage point per year. The following statistics represent the employment status of married men and women, with spouses present, from 1947 to 1979:

women have been steadfastly gaining access to every job and profession. Assisted by equal opportunity laws,²¹ civil rights legislation,²² and even the sincere and spontaneous encouragement of many males, American women are impeded only by the same factors which might limit men. Intelligence,

[Numbers in thousands]

| Marital status and year | Males | | | | | | Females | | | | | |
|----------------------------|-----------------|-------------|-------------------------------|---------------|------------|------------------------------|-----------------|-------------|-------------------------------|---------------|------------|------------------------------|
| | Popu- lation | Labor force | | | | | Popu- lation | Labor force | | | | |
| | | Total | | Em- ployed | Unemployed | | | Total | | Em- ployed | Unemployed | |
| | | Number | Percent of popu- lation | | Number | Percent of labor force | | Number | Percent of popu- lation | | Number | Percent of labor force |
| MARRIED, SPOUSE PRESENT | | | | | | | | | | | | |
| 1947 | 33,389 | 30,927 | 92.6 | 29,865 | 837 | 2.7 | 33,458 | 6,676 | 20.0 | 6,502 | 174 | 2.6 |
| 1948 | 34,289 | 31,713 | 92.5 | 30,563 | — | — | 34,289 | 7,553 | 22.0 | 7,369 | 184 | 2.4 |
| 1949 | 35,323 | 32,559 | 92.2 | 31,101 | 1,115 | 3.4 | 35,323 | 7,959 | 22.5 | 7,637 | 322 | 4.0 |
| 1950 | 35,925 | 32,912 | 91.6 | 30,938 | 1,503 | 4.6 | 35,925 | 8,550 | 23.8 | 8,038 | 512 | 6.0 |
| 1951 | 35,998 | 32,998 | 91.7 | 31,968 | 480 | 1.5 | 35,998 | 9,086 | 25.2 | 8,750 | 336 | 3.7 |
| 1952 | 36,510 | 33,482 | 91.7 | 32,222 | 464 | 1.4 | 36,510 | 9,222 | 25.3 | 8,946 | 266 | 2.9 |
| 1953 | 37,106 | 33,950 | 91.5 | 32,540 | 564 | 1.7 | 37,106 | 9,763 | 26.3 | 9,525 | 236 | 2.4 |
| 1954 | 37,346 | 34,153 | 91.5 | 32,139 | 1,328 | 3.9 | 37,346 | 9,923 | 26.6 | 9,388 | 535 | 5.4 |
| 1955 | 37,570 | 34,064 | 90.7 | 32,207 | 1,171 | 3.4 | 37,570 | 10,423 | 27.7 | 10,021 | 402 | 3.9 |
| 1956 | 38,306 | 34,855 | 91.0 | 33,046 | 1,016 | 2.9 | 38,306 | 11,126 | 29.0 | 10,676 | 450 | 4.0 |
| 1957 | 38,940 | 35,280 | 90.6 | 33,536 | 1,024 | 2.9 | 38,940 | 11,529 | 29.6 | 11,036 | 493 | 4.3 |
| 1958 | 39,182 | 35,327 | 90.2 | 32,283 | 2,267 | 6.4 | 39,182 | 11,826 | 30.2 | 10,993 | 833 | 7.0 |
| 1959 | 39,529 | 35,437 | 89.6 | 32,928 | 1,583 | 4.5 | 39,529 | 12,205 | 30.9 | 11,516 | 689 | 5.6 |
| 1960 | 40,205 | 35,757 | 88.9 | 33,179 | 1,564 | 4.4 | 40,205 | 12,253 | 30.5 | 11,587 | 666 | 5.4 |
| 1961 | 40,524 | 36,201 | 89.3 | 33,080 | 2,137 | 5.9 | 40,524 | 13,266 | 32.7 | 12,337 | 929 | 7.0 |
| 1962 | 41,218 | 36,396 | 88.3 | 33,883 | 1,605 | 4.4 | 41,218 | 13,485 | 32.7 | 12,716 | 769 | 5.7 |
| 1963 | 41,705 | 36,740 | 88.1 | 34,305 | 1,567 | 4.3 | 41,705 | 14,061 | 33.7 | 13,303 | 758 | 5.4 |
| 1964 | 42,045 | 36,898 | 87.8 | 34,667 | 1,310 | 3.6 | 42,045 | 14,461 | 34.4 | 13,626 | 835 | 5.8 |
| 1965 | 42,367 | 37,140 | 87.7 | 35,185 | 1,088 | 2.9 | 42,367 | 14,708 | 34.7 | 13,959 | 749 | 5.1 |
| 1966 | 42,826 | 37,346 | 87.2 | 35,685 | 888 | 2.4 | 42,826 | 15,178 | 35.4 | 14,623 | 555 | 3.7 |
| 1967 | 43,225 | 37,588 | 87.0 | 35,963 | 790 | 2.1 | 43,225 | 15,908 | 36.8 | 15,189 | 719 | 4.5 |
| 1968 | 43,947 | 38,225 | 87.0 | 36,552 | 787 | 2.1 | 43,947 | 16,821 | 38.3 | 16,199 | 622 | 3.7 |
| 1969 | 44,440 | 38,623 | 86.9 | 37,065 | 662 | 1.7 | 44,440 | 17,595 | 39.6 | 16,947 | 648 | 3.7 |
| 1970 | 45,055 | 39,138 | 86.9 | 37,103 | 1,020 | 2.6 | 45,055 | 18,377 | 40.8 | 17,497 | 880 | 4.8 |
| 1971 | 45,443 | 39,058 | 85.9 | 36,620 | 1,441 | 3.7 | 45,443 | 18,530 | 40.8 | 17,445 | 1,085 | 5.9 |
| 1972 | 46,400 | 39,654 | 85.5 | 37,311 | 1,326 | 3.3 | 46,400 | 19,249 | 41.5 | 18,217 | 1,032 | 5.4 |
| 1973 | 46,939 | 39,782 | 84.8 | 37,822 | 1,110 | 2.8 | 46,939 | 19,821 | 42.2 | 18,908 | 913 | 4.6 |
| 1974 | 47,324 | 39,718 | 83.9 | 37,681 | 1,125 | 2.8 | 47,324 | 20,367 | 43.0 | 19,406 | 961 | 4.7 |
| 1975 | 47,649 | 39,609 | 83.1 | 36,308 | 2,377 | 6.1 | 47,623 | 21,143 | 44.4 | 19,342 | 1,801 | 8.5 |
| 1976 | 47,865 | 39,444 | 82.4 | 36,735 | 1,940 | 5.0 | 47,852 | 21,554 | 45.0 | 20,023 | 1,530 | 7.1 |
| 1977 | 48,002 | 39,491 | 82.3 | 36,987 | 1,717 | 4.4 | 47,984 | 22,377 | 46.6 | 20,854 | 1,523 | 6.8 |
| 1978 | 47,920 | 39,237 | 81.9 | 37,118 | 1,389 | 3.6 | 47,906 | 22,789 | 47.6 | 21,614 | 1,175 | 5.2 |
| 1979 | 48,255 | 39,419 | 81.7 | 37,514 | 1,243 | 3.2 | 48,239 | 23,832 | 49.4 | 22,620 | 1,212 | 5.1 |

U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS, 106-107 (Dec. 1980).

²⁰ *Id.*

²¹ See, e.g., Equal Employment Opportunity Act of 1972, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e).

²² See, e.g., Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C.).

talent, ambition, health, and the advantages and disadvantages into which one is born, all affect prosperity, but both sexes are now on an equal par with these turns of Fortune's Wheel.

Recognition of the incongruity of a law which rewards the house spouse occasionally emerges from the courts. The judiciary has demonstrated expectations of performance from a wife, albeit a divorced wife, inconsistent with the thesis of equitable distribution.

In the recent case of *Lepis v. Lepis*,²³ the Supreme Court observed that

[i]t is no longer permissible to ground the law of domestic relations in the 'old notio[n]' that 'generally it is the man's primary responsibility to provide a home and its essentials.' [citations omitted]. 'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas [citations omitted]. The law must be concerned with the economic realities of contemporary married life, not a model of domestic relations that provided women with security in exchange for economic dependence and discrimination.'²⁴

In *Lepis*,²⁵ the court encouraged weighing the divorced wife's ability to contribute to her own support in determining the alimony award. The opinion is an implicit move away from viewing the divorced wife as financially displaced and hopelessly dependent upon her former spouse. There is a development toward limiting post-marital support for the wife in recognition of her ability to become independent,²⁶ and it is this realistic viewpoint which conflicts with the underlying theory of the equitable distribution statute.

The application of the "partnership" theory of marriage is also not without its troubling but revealing inconsistencies. Although it was said by the New Jersey Supreme Court in one of its first cases interpreting the new law that "marriage is a shared enterprise, a joint undertaking, that in many ways . . . is akin to a partnership,"²⁷ the same court has more recently defined "[a] modern marriage [as] a partnership, *with neither spouse necessarily*

²³ 83 N.J. 139, 416 A.2d 45 (1980).

²⁴ *Id.* at 156, 416 A.2d at 54.

²⁵ 83 N.J. 139, 416 A.2d 45 (1980).

²⁶ *Id.* at 156, 416 A.2d at 54.

²⁷ *Rothman, supra* note 17, at 229, 320 A.2d at 501.

dependent financially on the other."²⁸ Yet, still later in this same more recent pronouncement, the Supreme Court said that "[i]nterdependence is the hallmark of a modern marriage."²⁹

On a case by case basis, the parties in a modern marriage may commit themselves to each other and to mutual undertakings for significant periods of time. Nevertheless, it is a marvel of sophistry to declare that all modern marriages are a partnership. The autonomy which each party can and frequently does attain creates transient loyalties which axiomatically cause the modern marriage to be antithetical to an interdependent partnership. The high incidence of divorce and subsequent remarriage is further evidence that the marriage bonds are as facilely slipped on as off. Yet, to protect the myth of marriage as a partnership, the public supports the judicial expense of distributing the "partnership assets," where one party almost always comes away unjustly enriched.

As for the practical application of equitable distribution, the courts condone extensive discovery of both parties.³⁰ Discovery horrors not only involve the liberal examination of an adversary party's financial records and safety deposit boxes, and the appraisal of real estate and business interests, but also extend to the examination of the records of partnerships and closely held corporations.³¹ This latter practice does more than examine the records of the parties in interest; it seriously intrudes upon the rights and privacy of even those who are strangers to the marriage. Additionally, the often epic study of each marriage, which also includes ascertaining the pre-marital financial situation of the parties in order to identify and trace pre-marital assets,³² escalates the fees of the attorneys and other professionals required for this painful process. The Honorable Maxine K. Duberstein, Justice of the New York Supreme Court, has observed that the cost of marital litigation occasioned by the equitable distribution law puts it beyond the means of the lower and middle classes.³³

Once all the facts and figures concerning the parties' property holdings are before the court, the volume and complexity of data and the difficulty in

²⁸ *Jersey Shore Medical Center—Fitkin Hospital v. Estate of Baum*, 84 N.J. 137, 147, 417 A.2d 1003, 1008 (1980) (emphasis added).

²⁹ *Id.*

³⁰ *Gerson v. Gerson*, 148 N.J. Super. 194, 327 A.2d 374 (Ch. Div. 1977); see generally *Rothman*, *supra* note 17, at 232-33, 320 A.2d at 503-504.

³¹ *Gerson*, *supra* note 30; *Stern*, *supra* note 9.

³² Pre-marital assets are immune from equitable distribution. See *Painter*, *supra* note 2, at 214, 320 A.2d at 493.

³³ N.Y. Times, April 4, 1981, at 21.

determining the contributions each party made to the marriage have tempted the courts to resort to a fifty-fifty split of the marital assets. This is what occurred in *Gibbons*³⁴ where the court noted that "there are some marriages as to which an equal division is appropriate in view of its duration, the extent and nature of the spousal commitment, and the extent and nature of the marital assets."³⁵

A vigorous dissent in *Gibbons*³⁶ criticized this method of distribution: "While the approach has the virtue of simplicity, simplicity is not equity, especially where it is brought about by sacrificing the plasticity and attention to detail expected in a court of conscience."³⁷ Yet, because of the difficulty of digesting the results of often complex discovery and ascertaining such subjective factors as each party's contribution to the marriage, one court felt that it had no choice but to affirm the trial court's mechanistic formula of distribution. The court in *Perkins v. Perkins*³⁸ remarked despairingly:

[T]he result in this case, like many others, simply represents the best a fair-minded, conscientious judge can make of the law and the intangible equities on each side. How can one measure the benefits and losses of each party in a marriage that has consumed some seven years of cohabitation and two or three more of separation before divorce?³⁹

The equitable distribution statute is an unworkable law whose purpose is out-dated. It may ultimately be repealed by the Legislature in response, perhaps, to lobbying by women rebelling after suffering the loss of their acquisitions. Such countercurrents to the trend of legalized sharing have produced a proposal for reforming Swedish law so that property subject to sharing would be restricted to the marital home and its contents; extensive sharing of assets was seen as inconsistent with the independence of the spouses.⁴⁰ Indeed, the deeper criticism in both West Germany and Sweden of sharing all assets rests in the tendency of compulsory sharing to channel

³⁴ *Gibbons*, *supra* note 15.

³⁵ *Id.* at 114, 415 A.2d at 1178.

³⁶ *Gibbons*, *supra* note 15.

³⁷ *Id.* at 119, 415 A.2d at 1180.

³⁸ 159 N.J. Super. 243, 387 A.2d 1211 (App. Div. 1978).

³⁹ *Id.* at 248, 387 A.2d at 1214.

⁴⁰ See *Glendon*, *supra* note 14 at 260.

women into positions of economic dependence and to perpetuate their inferior economic status.⁴¹

For the present, persons about to marry can protect their after acquired property by an ante-nuptial agreement. Such agreements are enforceable by statute,⁴² and allow the parties to waive claims in later acquired assets or make such other commitment on property as the parties might wish and, incidentally, at a time when they are most inclined to be generous with each other. Correspondingly, the Legislature could remedy, short of repealing, the equitable distribution law by mandating that no license to marry may issue without the filing of an agreement between the prospective spouses which provides for the manner in which assets acquired during the marriage will be distributed in the event of a divorce. Then the involved parties themselves would properly replace the strangers who are now exercising over individually owned property a power which is inherently offensive to members of a free society.

⁴¹ *Id.* at 258-60.

⁴² N.J. STAT. ANN. § 37:2-4 (West Supp. 1980-81); *Chaudry v. Chaudry*, 159 N.J. Super. 566, 388 A.2d 1000 (App. Div. 1978).