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Property Distribution Upon Dissolution of Marriage: Florida's Need for an Equitable Distribution Statute

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Abstract

Equitable distribution is a method of dividing marital property according to the relative contributions of the partners upon dissolution of the marriage.

KEYWORDS: marriage, florida, distribution

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I. Introduction

Equitable distribution is a method of dividing marital property according to the relative contributions of the partners upon dissolution of the marriage. As the name of the doctrine implies, fairness and equity in the division of property are the primary objectives. In 1980 the Florida Supreme Court handed down the landmark decision of *Canakaris*

v. Canakaris[1] which formally introduced the equitable distribution doctrine to Florida. However, for the last three years the district courts have given such an array of interpretations to *Canakaris* that it would be inaccurate to say that Florida has definitely adopted the doctrine of equitable distribution as an independent vehicle for dividing marital property. Moreover, the courts making equitable distributions are producing such diverse results that the outcome of a dissolution proceeding is practically impossible to predict.

The objective of this note is twofold. First, an analysis of the present state of Florida law in the area of property distribution will be made. The reasons underlying the current state of confusion will be discussed by reviewing the most significant decisions in this area. Second, a proposal for statutory clarification of equitable distribution will be made. The type of statute, as well as the factors and guidelines that must be included, will be proposed.

II. Historical Perspective: Development of Traditional Vehicles for Property Distribution

Dissolution of marriage[2] has become an all too frequent occurrence in American society. There were one million dissolutions last year and more than one million are expected in the current year.[3] One of the most rapidly changing issues in the area of dissolution is property distribution. Currently the law on property distribution in Florida is in a state of confusion. The confusion is attributable to Florida's uncertain emergence from a common-law title state to an equitable distribution state.

In order to understand the development of equitable distribution in Florida, it is necessary to consider the evolution of the traditional vehicles used by the courts to distribute property and fashion dissolution decrees. The traditional vehicles are exclusive possession of property, special equities and alimony.[4] Far more than any other reason, the inconsistent use of these vehicles is causing confusion in the Florida

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1. 382 So. 2d 1197 (Fla. 1980).

2. In 1971 the Florida legislature changed the title of the divorce statute to "Dissolution of Marriage." FLA. STAT. ANN. § 61 (West Supp. 1983). Thus, in this note the term dissolution will be used instead of divorce in post-1971 references.

3. *Divorce American Style,* NEWSWEEK, January 10, 1983, at 42.

4. Child support is another vehicle the courts utilize to fashion divorce decrees, but consideration of it is beyond the scope of this article. Child support has the most indirect influence on the property distribution area.

courts.

A. Alimony

At common law, the English eccelesiastical courts did not readily authorize severance of the marital bond.[5] Rather, the courts authorized a type of separation by allowing the husband and wife to live apart, while remaining legally married.[6] Despite the judicially recognized separation, the husband was not released from his duty to support the wife. Thus, as a concomitant grant of the separation, the courts awarded alimony to the wife.[7]

American law incorporated the practice of granting alimony as an incident to dissolution. Traditionally alimony was an award for support and maintenance,[8] which the wife received with such unquestioned consistency that it practically arose to the level of an undeniable right.[9] The criteria for an award of alimony were the wife's need and the husband's ability to pay.[10]

Permanent alimony is the traditional vehicle of awarding support to the wife. Unlike temporary alimony which is, "an allowance made" to a spouse "for maintenance during the pendency" of the dissolution proceeding,[11] permanent alimony is awarded by the final decree of dissolution. The word permanent is used in contradistinction of the word temporary to designate the character of the alimony.[12] The word permanent does not indicate "the amount to be paid or time during which the payment should continue."[13]

Not only was permanent alimony the traditional type of alimony awarded, it was traditionally made in periodic payments. The Florida Supreme Court has stated that permanent periodic alimony is "not a

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5. FLORIDA DISSOLUTION OF MARRIAGE 187 (The Florida Bar Continuing Legal Education 1976).

6. *Id.* at 190.

7. H. CLARK JR., DOMESTIC RELATIONS CASES AND PROBLEMS 446 (1980).

8. Bredin v. Bredin, 89 So. 2d 353 (Fla. 1956); Jacobs v. Jacobs, 50 So. 2d 169, 173 (Fla. 1951) (alimony signifies nourishment or sustenance).

9. Brown v. Brown, 300 So. 2d 719, 722 (Fla. 1st Dist. Ct. App. 1974).

10. *Id.* at 722.

11. Floyd v. Floyd, 91 Fla. 910, 915, 108 So. 896, 898 (1926); *See also* Duss v. Duss, 92 Fla. 1081, 1087, 111 So. 382, 383 (1926) (temporary alimony is merely an interim allowance given until final decree).

12. Soule v. Soule, 4 Cal. App. 97, 105, 87 P. 205, 208 (Cal. Ct. App. 1906).

13. *Id.* at 105, 87 P. at 208.

sum of money or a specific proportion of the husband's estate given absolutely to the wife . . . [but] a continuous allotment of sums payable at regular periods for her support from year to year."[14] These periodic payments may be modified according to a significant change in circumstances[15] and generally terminate upon the death of either spouse or remarriage of the receiving spouse.[16]

In 1947 the use of lump sum payments of permanent alimony was statutorily authorized.[17] Lump sum payments can be in cash or property of a determined sum, on a single or multiple payment basis.[18] This method of payment, as distinguished from periodic payments, is final and non-modifiable.[19] According to the 1947 statute the court could not order both periodic and lump sum payments. A choice between the payment methods was required. This continued until 1963 when the statute was amended to allow the court to award permanent alimony in "periodic payments or payment in lump sum, or both, in its discretion."[20]

The Florida alimony statute remained relatively unchanged from 1963 to 1971. Then, in 1971, the Florida legislature significantly changed its divorce statute as a whole.[21] The new statute is titled "Dissolution of Marriage," instead of "Divorce." The prior grounds for divorce required a showing of fault, such as adultery, cruelty, impotency, or desertion.[22] The new statute abolishes these requirements and only requires the parties to declare that the marriage is irretrievably broken.[23] The no-fault concept is a recognition of the need to "preserve the

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14. Phelan v. Phelan, 12 Fla. 449, 456 (1868).

15. *See, e.g.*, Ruhnau v. Ruhnau, 299 So. 2d 61, 65 (Fla. 1st Dist. Ct. App. 1974).

16. *See, e.g.*, Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980).

17. Act of June 3, 1947, ch. 23894, 1947 Fla. Laws 539 (amended 1963).

18. *See, e.g.*, Mahaffey v. Mahaffey, 401 So. 2d 1372, 1374 (Fla. 5th Dist. Ct. App. 1981).

19. *See, e.g.*, Yandell v. Yandell, 39 So. 2d 554 (Fla. 1949).

20. Act of Sept. 1, 1963, ch. 63-145, 1963 Fla. Laws 306, *amended by* Act of June 27, 1967, ch. 67-254, § 16, 1967 Fla. Laws 560, 606-613, to delete the phrase "in its discretion." Also, the 1967 act renumbered the alimony statute from § 65.08 to § 61.08.

21. 1971 Fla. Laws 1319, ch. 71-241.

22. FLA. STAT. ANN. § 61.041 (West 1969).

23. FLA. STAT. ANN. § 61.052 (West Supp. 1983). Even though fault was removed from the statute as a ground for dissolution, fault remains a consideration in other aspects of the dissolution proceeding. *See infra* notes 180-84 and accompanying text.

integrity of the marriage"[24] while "promoting the amicable settlement of disputes that have arisen between the parties to a marriage. . . ."[25]

To be consistent with Florida's emergence as a no-fault state, the Florida legislature significantly changed its alimony statute. As changed, the statute specifically states that the court may grant alimony of a type that is either "rehabilitative or permanent in nature."[26] Further, the statute states that with either award of alimony, the court may order "periodic payments or payments in lump sum or both."[27] As evidenced by the language of this statute, the legislature recognized permanent and rehabilitative as two distinct types of alimony.[28] In addition the legislature specifically designated two methods of payment. Periodic and lump sum are not referred to as types or distinct categories of alimony in the statute, but rather as methods of making payments of the previously designated types of alimony, permanent or rehabilitative. However, Florida courts have not interpreted the statute precisely in this manner. In addition to designating lump sum as a pay-

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24. FLA. STAT. ANN. § 61.001(2)(a) (West Supp. 1983).

25. FLA. STAT. ANN. § 61.001(2)(b) (West Supp. 1983).

26. FLA. STAT. ANN. § 61.08(1) (West Supp. 1983) reads:

> (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded.

27. FLA. STAT. ANN. § 61.08(1) (West Supp. 1983).

28. Kahn v. Kahn, 78 So. 2d 367 (Fla. 1955), has been credited with the introduction, in this state, of the concept of rehabilitative alimony. Brown v. Brown, 300 So. 2d 719, 723-24 (Fla. 1st Dist. Ct. App. 1974). The following statement by the *Kahn* court illustrates the belief that women no longer are dependent upon men for support:

> Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus in an era where the opportunities for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has. We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.

Kahn, 78 So. 2d at 368.

ment method, the courts are characterizing it as a distinct type of alimony.

Although the concept of rehabilitative alimony was not new to the courts, it was not statutorily authorized until the 1971 amendment of the alimony statute. The theory underlying rehabilitative alimony is that if a means of extrinsic support is provided for a defined period of time, the receiving spouse, within that period, will develop skills which will provide the capacity for self-support.[29] The use of rehabilitative alimony "assumes necessarily either a previous potential or actual capacity for self-support" that has been dormant or lost during the marriage, "and should be limited in amount and duration to what is necessary to maintain that person through his training or education, or until he or she obtains employment or otherwise becomes self-supporting."[30]

Whether the type of alimony is permanent or rehabilitative and whether the method of payment is periodic or lump sum, the factors to be considered by the court for making a proper award are set out in the alimony statute.[31] These factors assist the court in determining whether the requisite need by the receiving spouse and concomitant ability by the paying spouse exist for an award of alimony.

B. Special Equities Doctrine

The introduction of the doctrine of special equity significantly

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29. *See, e.g.*, Reback v. Reback, 296 So. 2d 541, 543 (Fla. 3d Dist. Ct. App. 1974).

30. *Id.* at 543.

31. FLA. STAT. ANN. § 61.08(2) (West Supp. 1983) reads:

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of both parties.

(d) The financial resources of each party.

(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

changed the law affecting property distribution. Originally the Florida Supreme Court used the idea of special equities in order to avoid the statutory rule that an adulterous wife could not be awarded alimony.[32] As such the use of the doctrine was "to describe a *vested interest* in property brought into the marriage or acquired during the marriage because of a contribution of services or funds over and above the normal marital duties."[33] As a vested interest, a special equity was entirely separate from alimony.[34]

However, the courts have misapplied the doctrine of special equity to justify an award of alimony, usually in lump sum.[35] Generally the doctrine is used incorrectly when the courts are confronted with a case in which the marital property is titled in one party's name, yet the other spouse has made significant contributions to accumulating the property. The courts recognize that the parties deserve a fair distribution of the assets accumulated during the marriage. Thus, an award of property in the form of lump sum alimony is made to the non-titled spouse, based on a finding of a "special equity." When the courts refer to this type of "special equity" a vested interest is not involved. Rather reference is being made to the general equities of the situation that justify an award of the property to the non-titled spouse. This inconsistent use of the term special equity has led to confusion among the courts. Even though the Florida Supreme Court has unequivocally stated that, "[t]he term 'special equity' should not be used when considering lump sum alimony; rather, it should be used only when analyzing a vested property interest of a spouse,"[36] the confusion persists.

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32. *See* Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932) (award of alimony made to adulterous wife):

> The provisions of section 4987, Comp. Gen. Laws, section 3195, Rev. Gen. St., to the effect that no alimony shall be granted to an adulterous wife, do not preclude the ascertainment and allowance by the court of an amount to the wife for her special equity in property and business of the husband toward which she is shown to have contributed materially in funds and industry through a period of years while the marriage remained undissolved.

Id. at 1075, 138 So. at 797.

33. Canakaris v. Canakaris, 382 So. 2d 1197, 1200 (Fla. 1980) (emphasis added).

34. *Id.* at 1200.

35. *Id.*

36. *Id.* at 1201.

C. Exclusive Possession of Property

Another vehicle used by the courts in property distribution and fashioning dissolution decrees is an award of exclusive possession of property. Prior to the decision of *Duncan v. Duncan,*[37] the Florida Supreme Court held that an award of exclusive possession of the marital home must be for the benefit of the spouse with children and must terminate when those children reach the age of majority.[38] In *Duncan* the Florida Supreme Court expressly rejected this assertion because it is too inflexible. *Duncan* holds any exclusive possession award should be either directly connected to the obligation to pay support, or necessary to avoid a reduction in the property's value. An award of exclusive possession should be for a specified period of time and must serve a special purpose.[39] It is subject to modification upon a change in circumstances.[40] "The critical question is whether the award is equitable and just given the nature of the case."[41]

III. Emergence of the Equitable Distribution Doctrine in Florida

Historically a common-law property state,[42] Florida courts examined record title to determine who should be awarded the marital property upon divorce.[43] If there were no record title, the courts traced the acquisition of the property. Since the husband usually worked and acquired his personal estate, while the wife worked inside the home,[44]

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37. 379 So. 2d 949 (Fla. 1980).

38. *See* McDonald v. McDonald, 368 So. 2d 1283 (Fla. 1979).

39. *Duncan,* 379 So. 2d at 952. *See also* Richardson v. Richardson, 315 So. 2d 513 (Fla. 4th Dist. Ct. App. 1975) (husband with custody of minor children awarded exclusive possession over wife's petition to partition); Lange v. Lange, 357 So. 2d 1035 (Fla. 4th Dist. Ct. App. 1978) (wife's award of exclusive possession justified by her mental problems); George v. George, 360 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1978) (wife with custody of a child, not a minor, awarded exclusive possession because as a result of the child's handicap he would remain dependent on wife).

40. *Duncan,* 379 So. 2d at 952.

41. *Id.*

42. FLORIDA DISSOLUTION OF MARRIAGE, *supra* note 5, at 441.

43. *Id.*

44. If examined from a historical perspective, women have been at a great disadvantage relative to property distribution. At common law the husband was regarded as the guardian of his wife. The husband acquired seisen in any estate in which the wife was seised by his right of marriage, *jure uxoris.* Upon the birth of a live child, the

this method of analysis traditionally resulted in an award of the property to the husband. The wife was typically left with an award of alimony.

Slowly, Florida courts have acknowledged the inequities of this situation. There has been a progression from the common-law view that the husband is the sole contributor to the accumulation of the marital assets, to the more contemporary view that the marriage relationship is a partnership.[45] As a partnership, marriage is a voluntary contract "for the mutual participation in the profits which may accrue from the property, credit, skill or industry, furnished in determined proportions by the parties."[46] The view of marriage as a partnership has gained momentum since the new alimony statute was passed in 1971. The emergence of equitable distribution in Florida is a logical extension of this partnership view.

A. *Brown v. Brown*: The Partnership Concept

The foundation for equitable distribution in Florida was laid by the First District Court of Appeal in the 1974 case of *Brown v. Brown*,[47] where property accumulated during a 21-year marriage was at issue. In this marriage, one partner contributed time to the home and children, while the other pursued the accumulation of material wealth. The parties entered the marital venture with no estate of material value. Shortly thereafter, the wife exchanged her career as a registered nurse for the role of housewife and mother, while the husband successfully pursued a career as an accountant. The husband accumulated the material wealth in his name.

Had the *Brown* court analyzed this marriage from the common-

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husband could use, occupy and even sell the land, free from any claim of the wife. *See generally* C.J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962). The Married Women's Property Act finally created equality between spouses when property was held by the entireties. King v. Green, 30 N.J. 395, 153 A.2d 49 (1959). However, the concept of record title still remains. The inequities are apparent.

45. In Thigpen v. Thigpen, 277 So. 2d 583 (Fla. 1st Dist. Ct. App. 1973) the court stated, "[t]he new concept of the marriage relation implicit in the . . . 'no fault' divorce law . . . places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in event of dissolution . . . ." *Id.* at 585.

46. LA. CIV. CODE ANN. art. 2801 (West 1952) (current version at LA. CIV. CODE ANN. art. 2801) (West Supp. 1983).

47. 300 So. 2d 719 (Fla. 1st Dist. Ct. App. 1974).

law perspective, the wife would have surely been given a blind award of alimony, while the husband would have been given a blind award of all property titled in his name. However, recognizing that marriage is a partnership, the *Brown* court declared that "a new day has been created. . . ."[48] The court stated that periodic alimony should no longer be awarded in an automatic fashion, "in the nature of an obligation to a stranger."[49] Rather, it should be awarded only upon a showing of need and ability to pay. In addition, *Brown* emphasized that special attention should be given to the advisibility of an award of rehabilitative alimony, where, as here, the wife has the capacity for self-support.

Most significantly, the *Brown* court approved the use of lump sum alimony as a means of adjusting the material wealth of the parties at the time of dissolution of the marriage.[50] The court said, the salient factual concern is not the name in whom title is recorded, but "each spouse's contribution to the marital partnership."[51] Despite the fact that the property was titled in the husband's name, the court of appeal instructed the trial court to enter an award of lump sum alimony sufficient to compensate the wife for her contributions to the marriage.

Brown v. Brown represents a critical step toward recognizing the marriage partnership theory as it relates to distributing the material wealth of the parties in accord with equitable principles. However, by using lump sum alimony as the vehicle for distributing property, *Brown* significantly contributed to nearly a decade of confusion in the courts. The court used lump sum alimony, which had been a technical and traditional method of making alimony payments, and made it an independent vehicle for distributing property.

After *Brown,* Florida courts became more willing to take special recognition of the contributions of both parties to the marriage. The courts sometimes made awards of the marital property according to

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48. *Id.* at 725.

49. *Id.*

50. *Id.*

51. *Id.* at 726. *Contra* the dissenting opinion of Judge Boyer in *Brown.* He stated:

> Alimony came about during the era that women . . . were placed on a pedestal by male chauvinists. Women apparently found being worshiped on a pedestal to be distasteful and commenced a virtual worldwide drive to be removed from their place of superiority to a . . . lower postion of equality . . . "Success" has been marked by loss of many heretofore existing superior rights, among them being dower and alimony as a matter of right.

Brown, 300 So. 2d at 727.

these contributions, yet no vehicle was consistently employed to effectuate these distributions. Some courts used the lump sum alimony vehicle.[52] Some courts used the special equity doctrine.[53] Other courts used a combination of lump sum alimony and special equity;[54] while still others declined to use any or all of these for the purpose of property distribution.[55]

B. The Trilogy of Landmark Decisions: Introduction of Equitable Distribution

In 1980 the Florida Supreme Court handed down the landmark opinions of *Canakaris, Duncan,* and *Ingram.*[56] Examining this trilogy of cases, all of which concern the property distribution issue, the supreme court acknowledged the current state of confusion. The supreme court stated, "[t]he decisions in this subject area, both of this Court and of the district courts of appeal, are not reconcilable. It is our intent, . . . to the extent possible, [to] bring some stability to this area of the law."[57] The Florida Supreme Court perceptively attributed the confusion to the inconsistent uses of lump sum alimony, permanent periodic alimony, rehabilitative alimony, special equity and exclusive possession of property. In an effort to bring some stability to the area of

52. *See* Harrison v. Harrison, 314 So. 2d 812 (Fla. 3d Dist. Ct. App. 1975), *cert. denied,* 334 So. 2d 605 (Fla. 1976) (award of $100,000 lump sum alimony); Linares v. Linares, 292 So. 2d 63 (Fla. 3d Dist. Ct. App. 1974) (award of marital home as lump sum even though no special equities were shown); Goldman v. Goldman, 333 So. 2d 120 (Fla. 1st Dist. Ct. App. 1976) (case remanded for award of lump sum because wife shortchanged).

53. *See* Hendricks v. Hendricks, 312 So. 2d 792 (Fla. 3d Dist. Ct. App. 1975) (special equity in home due to contribution of funds by wife); Olson v. Olson, 321 So. 2d 462 (Fla. 3d Dist. Ct. App. 1975) (wife awarded home due to special equity based on loan made by wife to husband for pilot training, reversed and found to be within realm of ordinary duties).

54. *See* In re Marriage of Arnold, 335 So. 2d 13 (Fla. 4th Dist. Ct. App. 1976) (award of home as lump sum reversed because no special equity shown); Cann v. Cann, 334 So. 2d 325 (Fla. 1st Dist. Ct. App. 1976) (lump sum alimony should not be awarded unless there is a finding of special equity).

55. Niemann v. Niemann, 294 So. 2d 415 (Fla. 4th Dist. Ct. App. 1974), *cert. denied,* 312 So. 2d 733 (Fla. 1975) (holding courts are not allowed to simply divide assets equitably).

56. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) (the most noteworthy and frequently cited of the three cases); Duncan v. Duncan, 379 So. 2d 949 (Fla. 1980); Ingram v. Ingram, 379 So. 2d 955 (Fla. 1980).

57. *Canakaris,* 382 So. 2d at 1200.

property distribution, it set forth definitions and proper uses of each vehicle.

In *Canakaris,* the trial court had awarded the wife the husband's one-half interest in the marital home using the vehicle of lump sum alimony by finding she had a special equity due to her marital contributions. The court of appeal reversed, holding the lump sum award improper because the record revealed no special equity of the wife in the marital home. The supreme court upheld the award of lump sum alimony, but stated that the application of the special equity doctrine was improper. Therefore, *Canakaris* holds the use of lump sum alimony is not limited to "instances of support or vested property interests."[58]

Referring to Florida's alimony statute, the supreme court stated that in granting lump sum alimony, the trial court should be guided by all relevant circumstances to ensure equity and justice between the parties.[59] The court established new criteria for granting lump sum alimony. "A judge may award lump sum alimony to ensure an *equitable distribution* of property acquired during the marriage, provided the evidence reflects (1) a justification for such lump sum payment and (2) financial ability of the other spouse to make such payment without substantially endangering his or her economic status."[60] Prior to this decision, need was the element required for lump sum alimony. Now, when using lump sum alimony to ensure an equitable distribution, only justification is required.[61]

This statement by the Florida Supreme Court led the majority of courts to believe that the proper vehicle for making an equitable distribution was lump sum alimony.[62] The *Canakaris* court did not indicate, however, that the use of lump sum as a method of making permanent alimony payments should be terminated. To the contrary, the use of lump sum payments for spousal support was upheld. The *Canakaris* court stated, "[i]n our opinion, the award of the marital home as lump sum alimony may be coupled with other lump sum alimony or permanent periodic alimony awards if justified by the evidence."[63] In essence, the court established two distinct criteria for the award of lump sum

58. *Id.* at 1201.
59. FLA. STAT. ANN. § 61.08 (West Supp. 1983).
60. *Canakaris*, 382 So. 2d at 1201 (emphasis added).
61. Frumkes, *Florida's Flight to Fairness* (pt. 1), 56 FLA. B.J. 351 (1982).
62. *Id.* at 351.
63. *Canakaris*, 382 So. 2d at 1201.

alimony. One criterion permits an award of lump sum alimony on the basis of need plus ability to pay. Additionally, in the interests of equitable distribution, a further lump sum award might be made based on the criterion of justification plus ability to pay.

The newly endorsed use of lump sum alimony was to make an equitable distribution. However, permitting ability to pay to remain a criterion for making this type of lump sum award is contrary to the basic theories of the equitable distribution doctrine. The first criterion, justification, allows the court to make property distribution as justified by the relative contribution of the marital partners. In fact, justification provides for the use of guidelines to systematically determine what is equitable. On the other hand, the second criterion, ability to pay, indicates that the marital property actually belongs to one spouse who is required to give this property to the other spouse to discharge a duty of support. In the legal sense, payment is the performance of a duty or obligation by the delivery of money or other value by a debtor to a creditor.[64] By including the payment element the *Canakaris* court has interwoven the alimony theory into the equitable distribution doctrine. By implication, one spouse is still making a payment to the other. Arguably, this can only impede the proper use of the doctrine. Equitable distribution should be used to promote the partnership concept of marriage where property is acquired by the combined efforts of both parties and divided accordingly upon dissolution.[65]

C. *Canakaris:* Confusion in the District Courts of Appeal

When *Canakaris* was first published, it was pronounced that equitable distribution had been adopted in Florida.[66] However, within a year, the district courts of appeal had given such an array of interpretations to *Canakaris* that there remained as much, if not more, confusion than in the pre-*Canakaris* days. In most cases, regardless of the district, it is difficult to determine whether an award of lump sum was used as alimony or in an equitable distribution of property. Also, it is difficult to determine how the courts have applied the special equities doctrine.

The First District Court of Appeal seemingly approved the doc-

64. BLACK'S LAW DICTIONARY 1016 (rev. 5th ed. 1979).
65. Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).
66. Frumkes, *supra* note 61, at 351.

trine of equitable distribution in *Conner v. Conner*.[67] The court stated, "[a]fter *Canakaris,* trial courts now have the discretion to use lump sum alimony to ensure an equitable distribution of property acquired during the marriage."[68] Similarly, the Third District Court of Appeal approved the doctrine in *Roffe v. Roffe*[69] asserting "the trial court's power to fashion . . . an equitable distribution of the parties' property . . . which we think has been granted by *Canakaris*. . . ."[70]

Initially the Second District Court of Appeal gave approval to the use of the equitable distribution doctrine. In *Neff v. Neff*[71] the court stated, "*Canakaris* confirms the fact that marriage may indeed be a partnership. . . . If, as often happens, the harvest resulting from mutual efforts winds up in the hands of one partner, the equitable share of the other can be allocated by a award of lump sum alimony."[72] However, this district ultimately announced that the equitable distribution doctrine does not constitute "an independent vehicle for an award of property in a dissolution of marriage proceedings."[73] Similarly, the Fifth District Court of Appeal has given both approval[74] and disap-

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67. 411 So. 2d 899 (Fla. 1st Dist. Ct. App. 1982).

68. *Id.* at 901. *See also* Jacobs v. Jacobs, 400 So. 2d 141 (Fla. 1st Dist. Ct. App. 1981) (award of lump sum may be made to ensure equitable distribution if requested). *But cf.* Drozak v. Drozak, 424 So. 2d 120 (Fla. 1st Dist. Ct. App. 1982) (where the circuit court denied the wife's petition for either periodic or lump sum alimony. The district court reversed and remanded because "the requisite factors of the need for and ability to pay permanent alimony, either periodic or lump sum" were not respected. *Id.* at 121. The district court made no notice of the court's ability to use lump sum alimony to ensure an equitable distribution.).

69. 404 So. 2d 1095 (Fla. 3d Dist. Ct. App. 1981) (however, this court may have furthered confusion relative to the proper vehicle for making an equitable distribution by referring to the use of reciprocal lump sum awards).

70. *Id.* at 1096. *See also* Blum v. Blum, 382 So. 2d 52 (Fla. 3d Dist. Ct. App. 1980) (holding court can divide assets fairly between partners using alimony); Cuevas v. Cuevas, 381 So. 2d 731 (Fla. 3d Dist. Ct. App. 1980) (holding court can use lump sum alimony to ensure equitable distribution).

71. 386 So. 2d 318 (Fla. 2d Dist. Ct. App. 1980).

72. *Id.* at 319.

73. Powers v. Powers, 409 So. 2d 177, 178 (Fla. 2d Dist. Ct. App. 1982) (distribution should have been made by resort to alimony or special equities); *See also* Hu v. Hu, 432 So. 2d 1389 (Fla. 2d Dist. Ct. App. 1983).

74. *See, e.g.,* Mahaffey v. Mahaffey, 401 So. 2d 1372 (Fla. 5th Dist. Ct. App. 1981) (award of $200,000 lump sum awarded as an equitable distribution); Thompson v. Thompson, 402 So. 2d 1220 (Fla. 5th Dist. Ct. App. 1981) (award of lump sum upheld as valid equitable distribution of marital property). These cases are reported as being illustrative of the cases in this district.

proval to the doctrine.[75]

The Fourth District Court of Appeal approved the use of equitable distribution[76] but later rejected its use in *Sangas v. Sangas*.[77] In *Sangas* the court announced that the circuit court had erred in disposing of and transforming the marital property "by use of the theory of equitable distribution as an independent vehicle for an award."[78] To determine the final judgment the trial court had used the vehicles of child custody, child support, alimony, and equitable distribution. The district court of appeal pronounced that property should only be disposed of by resort to the vehicles of alimony and special equities, equitable distribution being an "end or purpose rather than a vehicle or remedy."[79] Thus, *Sangas* defined the equitable distribution doctrine as the outcome to be achieved by the use of the established vehicles of lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property and an award of exclusive possession of property. However, *Sangas* did not clarify whether alimony, when used as a vehicle to dispose of marital property, employed the traditional use of alimony based on need and ability or the more contemporary use based on justification and ability.

The Fourth District, after approving the doctrine and then disapproving it, has now re-adopted the doctrine, in *Tronconi v. Tronconi*.[80] The *Tronconi* court stated:

> [I]n *Sangas* we opined that *Canakaris* did not create a totally new vehicle for the division of property; however, we now think . . . that although the Supreme Court [sic] continues to quote traditional concepts in the vernacular of lump sum, periodic and rehabilitative alimony, we believe it has adopted the doctrine of equita-

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75. *See, e.g.*, Gorman v. Gorman, 400 So. 2d 75 (Fla. 5th Dist. Ct. App. 1981) (where home is only substantial asset, and there is no finding of need or special equity, property law concepts should be used for distribution rather than equitable distribution doctrine).

76. *See, e.g*, Bird v. Bird, 385 So. 2d 1090 (Fla. 4th Dist. Ct. App. 1980) (lump sum alimony award upheld as equitable distribution); Hurtado v. Hurtado, 407 So. 2d 627 (Fla. 4th Dist. Ct. App. 1981) (when considered together, award of lump sum alimony, permanent alimony and child support upheld as equitable distribution).

77. 407 So. 2d 630 (Fla. 4th Dist. Ct. App. 1981).

78. *Id.* at 633.

79. *Id.*

80. 425 So. 2d 547 (Fla. 4th Dist. Ct. App. 1982) (en banc). This case is now pending before the Florida Supreme Court on a petition for certiorari.

ble distribution de facto if not de jure.[81]

Although the *Tronconi* decision puts an end to the confusion over adoption of the doctrine, at least in the Fourth District,[82] the question remains whether equitable distribution is "a vehicle . . . to effect equity and justice between the parties or . . . [the] goal to be achieved by awards of lump sum alimony. . . ."[83] *Tronconi* quotes *Canakaris* that "a judge may award lump sum alimony to ensure an equitable distribution,"[84] but added that an equitable distribution may "take the place of lump sum alimony or any special equity."[85] These two statements appear to be directly in conflict and are difficult to resolve.

Although *Tronconi* and *Canakaris* agreed that an equitable distribution must be justified, they disagreed on what criteria should be used to establish the justification. As its criteria, the *Canakaris* court quoted the last paragraph of the alimony statute that says "[t]he court may consider any other factor necessary to do equity and justice between the parties."[86] The *Canakaris* court indicated the trial judge has broad scope in granting lump sum consistent with this statutory mandate.[87] On the other hand, when *Canakaris* discussed the criteria for establishing the need requirement for permanent periodic alimony, reference was made to the elements in subsection (2)(a) through (f) of the alimony statute.[88] It may be assumed from this distinction that the su-

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81. *Id.* at 548 (citations omitted).

82. *Contra* Hu v. Hu, 432 So. 2d 1389 (Fla. 2d Dist. Ct. App. 1983) (acknowledged the *Tronconi* decision but respectfully disagreed and held equitable distribution is not an independent vehicle for property distribution).

83. *Tronconi*, 425 So. 2d at 552 (Glickstein, J., concurring). Judge Glickstein, with whom Judge Hurley joined, suggested this precise question be certified to the Florida Supreme Court as one of great public importance: "Was the term Equitable Distribution as initially used in *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980), intended as a vehicle or device to effect equity and justice between the parties or as the concomitant goal to be achieved by awards of lump sum alimony, reciprocal and otherwise?" *Id.*

84. *Canakaris*, 382 So. 2d at 1201.

85. *Tronconi*, 425 So. 2d at 549.

86. FLA. STAT. ANN. § 61.08(2) (West Supp. 1983).

87. *Canakaris*, 382 So. 2d at 1201.

88. *Id.* FLA. STAT. ANN. § 61.08(2)(a) through (f) reads:

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and physical and emotional condition of both parties.

preme court did not find these elements to be appropriate guidelines for determining the justification requirement for an equitable distribution. Notwithstanding the fact that the *Canakaris* court used subsection (2)(a) through (f) only as criteria for an award of permanent alimony, the *Tronconi* court said, "[w]e see no reason why the provisions of subsection (2)(a) through (f) . . . should not also be applicable to an equitable distribution. . . ."[89]

The *Tronconi* opinion is clear on one important issue. It is not mandatory that an equitable distribution be carried out in every case.[90] To this end, it is necessary for the party seeking an equitable distribution to plead it.[91] The court gives no guidelines as to how property should be distributed when an equitable distribution is not made.[92]

IV. Considerations for Statutory Clarification

A. Statutory Treatment of Equitable Distribution in Other Jurisdictions

Based on the foregoing discussion of the state of the law in Florida, it is proposed that the supreme court in the *Canakaris* decision did intend to adopt the doctrine of equitable distribution. This would be a logical conclusion concerning the fact that, according to its proponents, " 'equitable distribution' is a term of art."[93] When " 'equitable' and 'distribution' [are] placed in juxtaposition" they have a distinct mean-

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(d) The financial resources of each party.
(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
(f) The contribution of each party to the marriage, including, but not limited to services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

89. *Tronconi*, 425 So. 2d at 550.
90. *Id.* at 549.
91. *Id.*
92. If an equitable distribution does not have to be carried out automatically in every case, does, then, the court have the authority to make an *inequitable* distribution?
93. Brief on Behalf of the Family Law Section of the Florida Bar as Amicus Curiae at 1, Tronconi v. Tronconi, 425 So. 2d 547 (Fla. 4th Dist. Ct. App. 1982).

ing, as do " 'special' and 'equity', 'community' and 'property', or 'contributory' and 'negligence'."[94] "To suggest that the Supreme Court of this state utilized a term employed by the courts and legislatures of . . . its sister states without realizing or recognizing that the term embodies a doctrine would be tantamount to suggesting that the Court suffers from myopia approaching total blindness."[95]

In order to make equitable distribution consistent throughout Florida, the state legislature should enact an equitable distribution statute. Presently, thirty-three states and the District of Columbia have provided by statute for equitable distribution of property upon dissolution.[96] Several of these states have enacted statutes which grant broad discretionary power to the courts.[97] The underlying principle for the discretionary type statute is that a statutorily prescribed set of criteria

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94. *Id.* at 1.

95. *Id.* at 2.

96. The states providing for equitable distribution by statute are: ALASKA STAT. § 09.55.210 (Supp. 1982); ARK STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); CONN. GEN. STAT. ANN. § 46-b-81 (West Supp. 1983-84); DEL. CODE ANN. tit. 13, § 1513 (1981); D.C. CODE ANN. § 16-910 (1981); HAWAII REV. STAT. § 580-47 (Supp. 1982); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 31-1-11.5-11 (West Supp. 1982-83); IOWA CODE ANN. § 598.21 (West 1981 and Supp. 1983-84); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1982); KY. REV. STAT. § 403.190 (Supp. 1982); ME. REV. STAT. ANN. tit. 19, § 722-A (1981); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-04,-05 (1980); MASS. GEN. LAWS ANN. ch. 208, § 33 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 552.23(1) (West Supp. 1983-84); MINN. STAT. ANN. § 518.58 (West Supp. 1983); MO. ANN. STAT. § 452.330 (Vernon Supp. 1983); MONT. REV. CODES ANN. § 40-4-202 (1981), amended by Act of October 1, 1983, ch. 613, 1983 LEG. REV. 121; NEB. REV. STAT. § 42-365 (Supp. 1982); N.H. REV. STAT. ANN. § 458:19 (1968) (titled alimony); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1983-84); N.Y. DOM. REL. LAW § 236(5) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20 (Supp. 1981); N.D. CENT. CODE § 14-05-24 (1981); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1982-83); OR. REV. STAT. § 107.105 (1981); PA. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1983-84); R.I. GEN. LAWS § 15-5-16.1 (Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-4-44 (1968); TENN. CODE ANN. § 36-825 (1977); UTAH CODE ANN. § 30-3-5 (Supp. 1981); VT. STAT. ANN. tit. 15, § 751 (Supp. 1983); WISC. STAT. ANN. § 767.255 (West 1981); WYO. STAT. § 20-2-114 (Supp. 1983).

97. *See, e.g,* ALASKA STAT. § 09.55.210 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 208, § 33 (West Supp. 1983-84); MICH COMP. LAWS ANN. § 552.23(1) (West Supp. 1983-84); N.H. REV. STAT. ANN. § 458:19 (1968); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1983-84); N.D. CENT. CODE § 14-05-24 (1981); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1982-83); OR. REV. STAT. § 107.105(c)(d)(e) (1981); S.D. CODIFIED LAWS ANN. § 25-4-44 (1968); TENN. CODE ANN. § 36-825 (1977); WYO. STAT. § 20-2-114 (Supp. 1983).

may prevent the courts from making a well-founded equitable distribution. The belief is the trial judge needs to be able to fashion each distribution individually as the facts of the particular case dictates.[98] However, this wide discretion causes judicial inconsistency in the states adopting these statutes.[99]

Other states have enacted statutes that more specifically set forth guidelines for an equitable distribution.[100] The Uniform Marriage and Divorce Act[101] served as a model for many of them. Statutes of this type assist the trial judges in narrowing the issues involved in distribut-

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98. *See* Note, *Is There a Need for Equitable Distribution of Property Upon Divorce in North Carolina?: Leatherman v. Leatherman,* 11 N.C. CENT. L.J. 156, 161-62 (1979-81).

99. *Id.* at 162.

100. *See, e.g.,* ARK. STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1983-84); DEL. CODE ANN. tit. 13, § 1513 (1981); D.C. CODE ANN. § 16-910 (1981); HAWAII REV. STAT. § 580-47 (Supp. 1982); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 31-1-11.5-11 (West Supp. 1982-83); IOWA CODE ANN. § 598.21 (West 1981 and Supp. 1983-84); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1982); MINN. STAT. ANN. § 518.58 (West Supp. 1983); N.Y. DOM. REL. LAW § 236(B)(5) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20 (Supp. 1981); PA. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1983-84); VT. STAT. ANN. tit. 15, § 751 (Supp. 1983); WISC. STAT. ANN. § 767.255 (West 1981).

101. UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1973). This section of the Act addresses disposition of property. The 1973 amendment to the Act divided this section into two alternatives: alternative A for common-law jusrisdictions and alternative B for community property jurisdictions. Alternative A provides:

> (a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree or dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment 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, 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 union.

ing property.[102] At the same time, the judge retains discretion to fashion the awards according to the facts.[103]

B. The Separation of Equitable Distribution and Lump Sum Alimony

Florida can benefit from the experience of her sister states which have chosen to adopt equitable distribution by statute. Florida's statute should establish guidelines for making an equitable distribution, yet allow judicial discretion to provide for the unique circumstances of each dissolution.[104] In the current state of Florida law the trial judge has various vehicles which he may use to achieve equity between the parties. These vehicles are lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property and an award of exclusive possession of property.[105] The court should consider these remedies interrelated when making an equitable distribution.[106] "[T]o the extent of their eventual use, the remedies are

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102. Note, *supra* note 98, at 162.
103. *Id.*
104. The Family Law Section of The Florida Bar suggests the following statute:

> (2) In a proceeding for dissolution of marriage, the court shall order such division of marital property as is equitable. The court shall set aside to each spouse his separate property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:
>
> (a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.
>
> (b) The economic circumstances of the parties.
>
> (c) The duration of the marriage.
>
> (d) Any interruption of personal careers or educational opportunities.
>
> (e) The contribution to the personal career or educational opportunity of the other spouse.
>
> (f) The contribution of each spouse to the acquisition, enhancement, or improvement of the marital property and the separate property of the other party.
>
> (g) The existing liabilities of the parties in the acquisition and maintenance of marital property.
>
> (h)The results of any alimony awarded.

Frumkes, *Florida's Firm Foundation in Formulating the Doctrine of Equitable Distribution,* 57 FLA. B.J. 327 n.7 (1983).
105. *Canakaris*, 382 So. 2d at 1202.
106. *Id.*

part of one overall scheme."[107] Statutorily adopting equitable distribution would generally leave these vehicles available to the courts. The proposed equitable distribution statute would clarify the proper use of these vehicles, and add the factors and guidelines to follow in effecting an equitable distribution.

Because of the current confusion in Florida courts regarding the use of lump sum alimony, the equitable distribution statute should explicate its appropriate use. Basically the statute would require a literal reading of Florida's alimony statute. Therefore, courts would categorize an award of alimony as permanent or rehabilitative. In either event, the alimony award should be based on need and ability to pay, not justification and ability to pay. Further qualification of this award would be with regard to the method of payment. The judge would designate the payments as either periodic or lump sum. In fact, characterizing an award of alimony as "lump sum alimony" would be erroneous. Technically there would be no such vehicle as lump sum alimony. Instead there would be lump sum payments of permanent or rehabilitative alimony.

Reading Florida's alimony statute in conjunction with the proposed equitable distribution statute would obligate the courts to recede from the present position that lump sum alimony may be used independently to effect an equitable distribution. Under the equitable distribution statute there would be no need for courts to employ lump sum alimony to effect an equitable distribution. An equitable distribution will be made in every case as a matter of procedure. The following discussion explicates the paramount factors and guidelines for inclusion in the proposed Florida equitable distribution statute. Because Florida's courts and practitioners are in immediate need of clarification in this area, the Florida legislature should formerly enact an equitable distribution statute without delay. In the interim, it is hoped that the factors and guidelines as hereinafter set forth will be of help to courts and attorneys involved in dissolution of marriage cases.[108]

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107. *Id.*

108. These factors are presented for the purpose of practicality. It is not asserted that this discussion is exhaustive. Each factor and guideline could be the topic of an entire note.

C. Factors to be Included in Florida's Equitable Distribution Statute

1. *Assets to Which Equitable Distribution Will Apply*

This factor provides the foundation for each subsequent factor in the equitable distribution process. Not all the assets owned by the parties, whether individually or jointly, will be subject to an equitable distribution. Thus, the first step the trial judge must take is to determine what property is subject to division. This has proven to be one of the most burdensome tasks for trial judges in effecting an equitable distribution.

As originally promulgated, Section 307 of the Uniform Marriage and Divorce Act[109] provided that "the court shall assign each spouse's property to him. It also shall divide the marital property. . . ."[110] Accordingly Section 307 provided:

> (b) For purposes of this Act, marital property means all property acquired by either spouse subsequent to the marriage except:
>
> (1) property acquired by gift, bequest, devise, or descent;
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
> (3) property acquired by a spouse after a decree or legal separation;
> (4) property excluded by valid agreement of the parties; and
> (5) The increase in value of property acquired before the marriage.
>
> (c) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in comon, tenancy by the entirety, and community property. The presumption of marital property is overcome by showing that the property was acquired by a method listed in subsection (b).[111]

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109. UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1970) (amended 1973).

110. UNIFORM MARRIAGE AND DIVORCE ACT, § 307.

111. UNIFORM MARRIAGE AND DIVORCE ACT, § 307(b) and (c) (1970). *See, e.g.* ARK. STAT. ANN. § 34-1214 (Supp. 1983); COLO. REV. STAT. § 14-10-113 (1974 and Supp. 1982); ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd Supp. 1983-84).

According to these provisions property must be designated as either marital or separate. The court determines what property is separate, which makes it immune from distribution, and proceeds to divide everything else equitably according to the set guidelines. States following this method of designating property are called deferred community property law systems.[112]

In the majority of the common-law equitable distribution states, the designation of property as marital or separate does not completely limit the court's ability to subject it to an equitable distribution.[113] However, property under the separate category is usually distributed to the other spouse only in very rare circumstances,[114] where that spouse has shown that hardship or inequities will otherwise result.[115] In comparison, trial judges in states following the deferred community property law system are faced with a smaller pool of assets to distribute than judges in the common-law equitable distribution states.[116] Consequently, judges in the common-law equitable distribution states are allowed greater judicial discretion in effectuating property distribution.[117]

In the current state of the law, Florida recognizes the concept of separate and marital property through the special equities doctrine. Florida cases, for example, have found a special equity where property was acquired with inherited funds of one spouse,[118] and where one spouse entered the marriage with possession of realty and personalty.[119] Further, Florida's case law appears more consistent with the common-law equitable distribution theory states than the deferred community property law states. Florida cases evidence the intent that the classification of separate property is not made for the purpose of making property immune to distribution. Florida, by use of special equities and

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112. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 3 (1978).

113. *See*, Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 6 N.C.L. REV. 247, 248-49 (1983).

114. *Id.* at 249.

115. *See, e.g.*, IOWA CODE ANN. § 598.21 (West 1981) (separate property not available for distribution unless refusal to divide would be inequitable). WISC. STAT. ANN. § 767.255 (West 1981) (gifts or property exchanged cannot be subject to division unless hardship would otherwise result).

116. Sharp, *supra* note 113, at 249.

117. *Id.*

118. *See, e.g.*, Ball v. Ball, 335 So. 2d 5 (Fla. 1976); Evans v. Evans, 398 So. 2d 943 (Fla. 3d Dist. Ct. App. 1981).

119. *See, e.g.*, Merrill v. Merrill, 357 So. 2d 792 (Fla. 1st Dist. Ct. App. 1978).

lump sum alimony, has allowed separate property which should be awarded to one spouse to be awarded to the other due to exceptional circumstances.

A case in point is *Schwartz v. Schwartz*.[120] In *Schwartz* an award was made to the wife of a thirty percent interest in a vacation home even though it "was supplied by the husband from sources unconnected with the marital relationship."[121] The award was justified by the court because the wife had contributed substantial labor to making the vacation home suitable for family life. On the other hand, in *Rosen v. Rosen*,[122] the trial court made an award of $125,000 in cash to the wife as lump sum alimony. Upon review, the court of appeal found no "relevant circumstances" to substantiate this award since the husband's assets "were indisputably willed or given to him"[123] and the wife had not made significant contributions to overcome the presumption that his assets were separate property. Therefore, where a party can show justification or exceptional circumstances, assets received by gift, inheritance, or a source unrelated to the labors of the marital party "should be a part of the pie, subject to the judicial slice."[124] This is similar to the more liberal view given separate property in the common-law equitable distribution states.

Thus, Florida can remain most consistent with judicial intentions evidenced by prior case law if it adopts a statute patterned after other common-law equitable distribution states. Subsections (b) and (c) from the original Uniform Marriage and Divorce Act appear appropriate for this purpose as long as one addition is made. In order to provide for the situations where designating property as separate would result in hardship, the following language should be added after the last sentence in subsection (c): unless the party against which such presumption is asserted shows by a preponderance of the evidence that by designating the property as separate, hardship or inequities will result.[125]

Because the concept of separate property is basically consistent

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120. 396 So. 2d 806 (Fla. 3d Dist. Ct. App. 1981).

121. *Id.* at 807.

122. 386 So. 2d 1268 (Fla. 3d Dist. Ct. App. 1980).

123. *Id.* at 1272.

124. Frumkes, *supra* note 61, at 354.

125. Thus the last sentence of the subsection would read: "The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (b)", unless the party against whom such presumption is asserted shows by a preponderance of the evidence that by designating the property as separate hardship or inequities will result.

with the theory of special equity, it is superfluous under this type of statute to retain the use of the special equity doctrine. However, the two ideas could be used interchangeably if the legislature perceives the abrogation of the special equity doctrine as inappropriate.

2. *Valuation of the Assets*

After the court designates the property as separate or marital, the separate property should be awarded to the appropriate spouse. All the other property will be subject to division between the parties.[126] Before distribution of the property can commence, the court must be presented with the net value of the marital assets.[127] The attorney is expected to value the assets acquired during the marriage. These assets include, but are not limited to, residential and commercial real estate, family and non-family businesses, stocks, bonds, personal property, pensions, retirement plans, professional degrees, bank accounts, and insurance policies.[128]

Property valuation is a highly sophisticated process. "It is necessary [for the attorney] to trace forward the assets which the parties owned before the marriage, and trace backward those assets which presently exist."[129] Counsel must "obtain full and complete discovery of all assets and uncover hidden sources."[130] The parties may stipulate to the value of all or part of the marital property.[131] When there is a dispute regarding value the assistance of experts becomes an integral part of the valuation process. The number and type of experts that are

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126. Of course, either spouse may invoke the proposed addition to subsection (c) of the statute which allows that party to show that a designation as separate property would result in hardship or inequities. This could be done at any point during the proceedings. Therefore, even if the judge excludes a certain property from distribution, the party may make a showing to later include it, if without it the distribution will not be equitable.

127. Note, *The North Carolina Act For Equitable Distribution of Marital Property,* 18 WAKE FOREST L. REV. 735, 750 (1982).

128. *Id. See generally* Donahue, *Trying Equitable Distribution Can Be Trying,* 5 AM. J. TRIAL ADVOC. 225 (1981-82); Mulligan, *Inside an Equitable Distribution Trial,* 8 LITIGATION 24 (1982); Grosman, *Identification and Valuation of Assets Subject to Equitable Distribution,* 56 N.D.L. REV. 201 (1980).

129. Donahue, *supra* at 228.

130. Knight and Elser, *Critical Factors Which Influence Equitable Distribution Awards,* 55 FLA. B.J. 581 (1981).

131. Note, *supra* note 127, at 750.

involved depend on the assets involved in the particular case.[132] An accountant is frequently used and is most valuable for purposes of tax analysis.[133] They are also used as appraisers for purposes of business valuation.[134] Nonetheless, since business valuations vary according to the nature of the business,[135] specialized appraisers or financial analysts are most suitable.[136] A real estate appraiser should be used to value real property.[137] "Additional methods of valuation include truly comparable market sales, reconstruction costs and 'face value of effective insurance.' The tax value of the property has been held not to be reflective of market value."[138]

3. *Distribution of Assets: Guidelines for Equitable Distribution*

Once the property has been classified and the marital assets valued, the court will proceed to distribute the marital property. It is compulsory that the division of property is equitable, based on the particular facts of the case. The Florida courts have distinguished equitable from equal.[139] "The two words are not synonymous."[140] Yet, as the court in *Mahaffey v. Mahaffey*[141] recognized "an equal division of the assets . . . is a good starting point in most cases."[142]

The suggestion that there be a presumption of an equal division is not a suggestion that Florida become a community property state. Unlike the community property states, there is "no mandate for making an equal division of the marital acquisitions in all cases."[143] The judge still has the discretion to do equity according to the circumstances of the particular case.[144] Beginning with the presumption that the marital

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132. Donahue, *supra* note 128, at 227.

133. *Id.* at 227. For cases involving intricate tax problems, the tax attorney may be the most appropriate expert. *Id.* at 228.

134. *Id.* at 227. However, the author cautions against use of accountants to value business. "Accountants should only be used to value business or professional practices in those instances where no other expert is available." *Id.*

135. Note, *supra* note 127, at 751.

136. Donahue, *supra* note 128, at 228.

137. Note, *supra* note 127, at 751.

138. *Id.*

139. *See, e.g.,* Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980).

140. Tronconi v. Tronconi, 425 So. 2d 547, 549 (Fla. 4th Dist. Ct. App. 1982).

141. 401 So. 2d 1372 (Fla. 5th Dist. Ct. App. 1981).

142. *Id.* at 1374.

143. Bullard v. Bullard, 385 So. 2d 1120, 1121 (Fla. 2d Dist. Ct. App. 1980).

144. *Id. See, e.g.,* ARK. STAT. ANN. § 34-1214 (Supp. 1983). This statute re-

property will be divided equally, the judge will consider each element in the proposed guidelines that follow. If the facts of the case require consideration of a given guideline, the judge will adjust the division accordingly. The equal starting point gives the judge a relative basis by which to weigh each guideline.[145]

The following proposed guidelines are not listed in order of importance. Some factors may weigh more than others depending on the circumstances of the particular case. This list of guidelines was compiled by reviewing Florida's alimony statute and case law, as well as the statutes from the other states that have adopted equitable distribution.[146]

(1) "*The duration of the marriage.*"[147] In a long marriage the court should give weight to one spouse's dependence, economically or emotionally, on the other spouse.[148] Also, with a long marriage the courts will have a stronger presumption that the marital assets were accumulated through the cooperative efforts of both parties.[149] If it is a short marriage the court will be less likely to find either party dependent on the other.[150]

(2) "*The age of the parties.*"[151]

(3) "*The physical and emotional health of the parties.*"[152]

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quires the court to make an equal division unless an equal division would be inequitable. When the court deems an equal division inequitable, the court is given guidelines to determine how the property will be distributed.

145. *See* Note, *supra* note 127, at 752-53.

146. A more specific focus was given to the statutes of North Carolina, New York, Maine, Illinois, Iowa and the UNIFORM MARRIAGE AND DIVORCE ACT § 307. Citations to states for certain guidelines are not exhaustive, but they are felt to be representative of the general inclusion in equitable distribution statutes.

147. *See, e.g.,* FLA. STAT. ANN. § 61.08(2)(b) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(5)(d)(2) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

148. *See* Note, *supra* note 127, at 755.

149. Knight and Elser, *supra* note 130, at 583.

150. *See* Note, *supra* note 127, at 755-56.

151. *See, e.g.,* FLA. STAT. ANN. § 61.08(2)(c) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(5)(d)(2) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(d) (West 1981 and Supp. 1983-84).

152. *See, e.g.,* FLA. STAT. ANN. § 61.08(2)(c) (West Supp. 1983); IOWA CODE ANN. § 598.21(1)(d) (West 1981 and West Supp. 1983-84). These statutes refer to the physical and emotional health of the parties, while others refer to the physical and mental health of the parties. *See, e.g.,* N.C. GEN. STAT. § 50-20(c)(3) (Supp. 1981). The court should ultimately consider all areas of health; physical, emotional and mental.

(4) "*Any obligation arising out of a prior marriage.*"[153] When a spouse is paying alimony or child support to a previous spouse, "the court should compensate the non-paying spouse for any reduction of marital assets due to this obligation."[154]

(5) "*Any antenuptial agreement or property settlement entered into by the parties.*"[155]

(6) "*The need of a parent with" primary parental responsibility of minor children born or adopted "of the marriage to occupy or own the marital residence and to use or own its household effects.*"[156] This quideline naturally overlaps the vehicle of exclusive possession of property. The judge should make an award of exclusive possession according to the established equities of the situation. Of course, the judge may order the non-custodial spouse to transfer his title to the home and contents rather than using the more temporary vehicle of exclusive possession.

(7) *The amount and sources of "income, property and liabilities of each party at the time the division of property is to become effective."*[157] The court should consider any loans or mortgages outstanding on marital property.

(8) "*The standard of living established during the marriage.*"[158]

(9) "*The vested pension or retirement rights and the expectations of non-vested pension or retirement rights.*"[159] As compared to other guidelines in the equitable distribution list, this one has received a great deal of judicial attention. The consensus appears to be that pension and retirement rights are "an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other de-

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153. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(2) (Supp. 1981); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

154. Note, *supra* note 127, at 755.

155. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(k)(1) (West 1981 and West Supp. 1983-84).

156. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(4) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(3) (McKinney Supp. 1982-83); IOWA CODE ANN. § 598.21(1)(g) (West 1981 and West Supp. 1983-84).

157. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(1) (Supp. 1981).

158. *See, e.g.*, FLA. STAT. ANN. § 61.08(2)(a) (West Supp. 1983); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

159. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(5) (Supp. 1981) (although considered this factor is designated as separate property under this statute); N.Y. DOM. REL. LAW § 236(B)(5)(d)(4) (McKinney Supp. 1982-83) (this statute also includes the loss of inheritance).

ferred income assets."[160] Unless some exceptional circumstances are shown, these assets should be included as marital property.

(10) "*Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.*"[161] Generally, courts do not designate a professional degree as marital property.[162] This is largely due to the fact that a professional degree is not a tangible asset which may be easily divided. Nonetheless, according to the partnership theory of marriage, when the marital partners work together toward a common goal they may both anticipate increased family income as the return on their efforts.[163] The court should consider the efforts of each party in relation to the probable future financial circumstances of each party.

(11) "*The difficulty of evaluating any component asset of 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.*"[164]

(12) "*The liquid or non-liquid character of all marital property.*"[165]

(13) *Any award of alimony to either spouse.*[166] The court should be guided by Florida's alimony statute when making an award of permanent or rehabilitative alimony. The needs of each of the parties should be provided for under this guideline. Included in this consideration are the occupation, vocational skills and employability of both spouses.[167] The time necessary for either party to acquire sufficient education or training to enable him or her to find employment should espe-

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160. Deering v. Deering, 292 Md. 115, 121, 437 A.2d 883, 888 (1981).

161. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(7) (Supp. 1981); FLA. STAT. ANN. § 61.08(2)(f) (West Supp. 1983); N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1982-83).

162. *See* In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978); In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1979); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

163. *See generally* Note, *The Supporting Spouse's Rights in the Other's Professional Degree Upon Divorce*, 35 U. FLA. L. REV. 130 (1983).

164. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(9) (McKinney Supp. 1982-83); N.C. GEN. STAT. § 50-20(c)(10) (Supp. 1981).

165. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(7) (McKinney Supp. 1982-83).

166. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(5)(d)(5) (McKinney Supp. 1982-83); UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979).

167. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979); IOWA CODE ANN. § 598.21(1)(f) (West 1981 and Supp. 1983-84).

cially be considered as it relates to rehabilitative alimony.

(14) "*Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property . . . including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.*"[168] The direct financial contributions of the parties are easiest to value and divide. The courts may experience much more difficulty when valuing and dividing the indirect contributions of the parties, especially as it relates to the services of a spouse as homemaker or parent. The courts use three methods to value the services of a homemaker. The most often used is the specific-task approach. It values each job performed by the homemaker according to the separate marketable value of that individual skill.[169] Basically "the hours per week devoted to each function is . . . multiplied by the hourly wage a person employed in that occupation would earn. . . ."[170] The replacement-cost approach is very similar to the specific-task method. The difference is that replacement cost is aggregated. "[T]he total hours an individual is likely to spend in home production is determined and then valued at the market wage for domestic help."[171] The third method is the opportunity-cost approach. It is based on computation of the wage rate multiplied by the number of hours of non-market production, resulting in the worth of the homemaker non-market services.[172] "This approach leads [to the conclusion] that the value of the time spent in menial chores, such as doing laundry, of an individual with high earnings is worth relatively more than the time devoted to these services by individuals who command less in the marketplace."[173] Whichever approach is used by the courts, there must be consideration given to the contribution made by the home-

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168. *See, e.g.*, N.C. GEN. STAT. § 50-20(c)(6) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(5) (McKinney Supp. 1982-83); IOWA CODE ANN. § 598.21(1)(e) (West 1981 and Supp. 1983-84). *See generally* Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. FLA. L.R. 1 (1975). According to the Commissioner's comment to the 1973 amendment of the UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 307 (1979), allowance for the contribution of homemaker services is a new concept in Anglo American law.

169. *See* Kiker, *Evaluating Household Services*, 16 TRIAL, February 1980, at 34.

170. Brandes, *Proving the Value of a Homemaker* (pt. 1), 2 FAIRSHARE, November 1982, at 5, 6.

171. Kiker, *supra* note 169, at 34. It should be noted, that the specific-task approach and the replacement-cost approach are used interchangeably by some authors.

172. *Id.*

173. *Id.* at 34.

maker. The idea that the homemaker's contributions are immune to monetary valuation is passé.

(15) "*The fringe benefits received by the homemaker/spouse.*"[174] The court should consider the benefits the homemaker spouse receives as a result of the marriage. Such considerations include room and board, health care, transportation, etc.[175]

(16) "*The tax consequences [of the property distribution or awards] made to each party.*"[176]

(17) *The cost of attorney's fees.* An award of attorney's fees may be made to avoid an inequitable diminution of the other awards made by the court.[177]

(18) *Any contribution by either spouse to the dissipation or depreciation of the marital assets.*[178] Any financial misconduct must be considered by the court to reduce the distribution to the spouse at fault. "Financial misconduct involves wasting or dissipating of marital assets."[179]

(19) *The value of property set apart to each spouse as separate property.* This guideline overlaps the vehicle of special equity. Usually separate property (or property awarded to a spouse as a special equity) is not subject to distribution under the guidelines. However, it may be considered when the party against which a special equity property award has been made, shows that hardship or inequities will result from the award. In this situation the court may consider the value of the separate property relative to distribution of the remaining marital

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174. Knight and Elser, *supra* note 130, at 584.

175. *Id.*

176. *See, e.g.,* N.C. GEN. STAT. § 50-20(c)(11) (Supp. 1981); IOWA CODE ANN. § 598.21(1)(j) (West 1981 and Supp. 1983-84). *See generally* Weissman, *Is Equitable Distribution Incident to Florida Divorce a Taxable Event Under Davis?,* FLA. B.J., Jan. 1983, at 42. *See also* U.S. v. Davis, 370 U.S. 65 (1964) (interpreting state law, the court ruled that a husband realized a taxable gain on the transfer of appreciated property to his wife pursuant to a negotiated property settlement). As a caveat, it should be noted that there is currently pending before the legislature a tax reform bill which, if passed, will cause significant changes in the tax ramifications of property distributions.

177. *See generally* Note, *supra* note 127, at 760. *Canakaris v. Canakaris,* 382 So. 2d 1205 (Fla. 1980), indicated the court should follow legislative intent and ensure that both parties have similar ability to be represented. Further, *Canakaris* held that attorney's fees may be awarded to avoid diminution of the wife's fiscal awards.

178. *See, e.g.,* UNIFORM MARRIAGE AND DIVORCE ACT, 9A U.L.A. § 306 (1979); ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd Supp. 1983-84).

179. Note, *supra* note 127, at 760.

property.

(20) *The effect of marital misconduct on the accumulation or depletion of marital assets.* A frequently asked question since the *Canakaris* decision is whether its use of the word "justification" relative to equitable distributions reintroduces fault into dissolution proceedings.[180]

Since the introduction of equitable distribution most cases have only referred to fault when it is relative to the financial condition of the parties. In *Mendel v. Mendel*[181] the trial court excluded evidence of the husband's marital misconduct. The district court reversed, stating that adultery must be considered as it "relates to the husband's expenditures of funds and the relationship of those expenditures to the economic situation in which the parties stand before the court."[182] In *Hurtado v. Hurtado*[183] the district court considered the husband's mar-

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180. When Florida became a no-fault state, it excluded the criterion that fault be shown before a dissolution would be granted. Yet, fault was not excluded in the context of monetary awards. Abrahams, *The Effect of Marital Misconduct on Monetary Awards,* 57 FLA. B.J., Feb. 1983, at 95. Under Florida's alimony statute adultery may still be considered in determining the amount of alimony, if any, that should be awarded to the spouse asking for alimony. FLA. STAT. ANN. § 61.08(2) (West Supp. 1979). Although the statute refers to adultery only in relation to the spouse seeking alimony, the courts have not retained this limited view. *See, e.g.,* McClelland v. McClelland, 318 So. 2d 160 (Fla. 1st. Dist. Ct. App. 1975) (persistent adultery of husband relevant even though he did not petition for alimony); Pro v. Pro, 300 So. 2d 288 (Fla. 4th Dist. Ct. App. 1974); Claughton v. Claughton, 344 So. 2d 944 (Fla. 3d Dist. Ct. App. 1977) (husband's marital misconduct was considered since he attempted to use wife's misconduct as defense to alimony). Generally, adultery has been considered whenever the court feels it is necessary to do justice between the parties. The latest Florida Supreme Court decision to consider this issue was Williamson v. Williamson, 367 So. 2d 1016 (Fla. 1979). The Williamson court denied a general consideration of marital misconduct in dissolution cases. The court said:

> Whether such an inquiry [into marital misconduct] is proper will depend upon the circumstances of each case. Today we hold only that where an analysis of the need of one spouse and the ability of the other to pay demonstrates that both parties will suffer economic hardship as a result of any division of available resources the court might make, the court may then consider, as an equitable circumstance under section 61.08(2), Florida Statutes (1975), any conduct of either party which may have caused the difficult economic situation in which they stand before the court.

Williamson, 367 So. 2d at 1019. This decision gave the trial judge broad discretion when considering adultery.

181. 386 So. 2d 627 (Fla. 4th Dist. Ct. App. 1980).

182. *Id.* at 628.

183. 407 So. 2d 627 (Fla. 4th Dist. Ct. App. 1981).

ital misconduct to the extent that he was paying rent on the apartment he shared with his mistress.

Under this equitable distribution statute marital misconduct should be considered only as it affects the spouse's financial contribution to the marital partnership. If the fault affects the accumulation or depletion of the marital assets, an appropriate adjustment should be made in the relativ, if any, that should be awarded to the spouse asking for alimony. FLA. STAT. ANN. § 61.08(2) (West Supp. 1979). n620] to the distribution of the marital assets.

(21) *Any other factor necessary to do equity and justice between the parties.*[185] The guidelines are not meant to be "inflexible rules of law which unduly restrict the trial judge in determining what is equitable and just."[186] This catch-all guideline allows the judge to fashion each judgment as the particular facts dictate, keeping in mind the previously prescribed guidelines and the ultimate goal of making an equitable distribution.

Finally, the court should state its basis and reasons for dividing the property as it has deemed equitable.[187]

V. Conclusion

For several years, Florida has recognized the partnership concept of marriage. Under this concept, the contributions of both parties in accumulating the marital assets are considered. Equitable distribution is a logical extension of the partnership view, as it requires a fair division of the marital assets according to the relative contributions of both partners.

Florida has taken definite, yet enigmatic, advancements in *Brown, Canakaris,* and *Tronconi,* towards judicially adopting the doctrine of equitable distribution. However, the courts have fallen far short of transforming Florida from a common-law title state to an equitable distribution state.

Working within the constraints of the existent legislative enactments relative to property distribution and alimony, the courts have

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184. Brief on Behalf of the Family Law Section of the Florida Bar as Amicus Curiae, *supra* note 93, at 6.

185. *See, e.g.,* FLA. STAT. ANN. § 61.08(2) (West Supp. 1983); N. C. GEN. STAT. § 50-20(c)(12) (Supp. 1981); N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1982-83).

186. Duncan v. Duncan, 379 So. 2d 949, 951 (Fla. 1980).

187. *Cf.,* ARK. STAT. ANN. § 34-1214(a)(1) (Supp. 1983).

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most frequently used the vehicle of lump sum alimony to effect an equitable distribution. At the same time, the courts continue to use lump sum as a payment method of permanent alimony. When making an award of permanent alimony in lump sum payments, the courts require a showing of need and ability to pay. When making an equitable distribution by using the vehicle of lump sum alimony, the courts require justification rather than need. To exasperate the confusion over lump sum alimony, the same criteria are being utilized to determine need and justification, which are two inherently opposed principles. In addition, the interrelation of the special equities doctrine in the process of equitable distribution is difficult to ascertain.

Accordingly, Florida is in immediate need of clarification on two issues. First, courts and counsel need a pronouncement as to whether Florida is truly an equitable distribution state. In December, 1983, the Florida Supreme Court will hear oral arguments on the *Tronconi* appeal.[188] The supreme court should accept the invitation this case offers to definitively adopt the doctrine of equitable distribution. Second, courts and counsel require clarification on the appropriate factors and guidelines to follow in effectuating an equitable distribution. The Florida legislature must prescribe these by statute, as have sixty-six percent of its sister states. Generally, the statute should provide that a trial judge do the following in a dissolution proceeding:

(1) The judge must provide for the needs of any minor children. The vehicles available and appropriate for this priority are child support and/or an award of exclusive possession of property to the parent with whom the children live.

(2) The judge may provide for the support of a needy spouse. The appropriate vehicles available are alimony and/or exclusive possession of property. An award of alimony should be made only if it is set out in the pleadings and only upon the required showings of need and ability. An alimony award should be made according to the types and payments set out in Florida's alimony statute. Thus the judge may award rehabilitative alimony in periodic or lump sum payments, or both; or the judge may award permanent alimony in periodic or lump sum payments, or both.

(3) The judge must distribute, as separate property, the property and material wealth in which one spouse possesses a vested interest.

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188. The Florida Supreme Court has scheduled oral arguments for December 6, 1983. Attorney for appellant is Ira Marcus, P.A., Fort Lauderdale. Attorney for Appellee is Philip Michael Cullen, III, Fort Lauderdale.

The appropriate vehicle for this is a special equity. A finding of a special equity requires that the property was acquired or brought into the marriage by a source independent of the efforts of the marital partnership, or that it was acquired by contributions of one marital partner which are considered to be clearly over and above the normal marital duties. Thus a special equity will not be found when the contributions are considered to be required in the normal course of a marital relationship.

(4) After the awards of child support, alimony, exclusive possession of property and special equities are made, the court must divide and distribute the property and wealth acquired in the course of the marriage. To do this, the court will use the factors and guidelines established for effectuating an equitable distribution.

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