EQUITABLE DISTRIBUTION VS. FIXED RULES: MARITAL PROPERTY REFORM AND THE UNIFORM MARITAL PROPERTY ACT

The problem of finding a proper method of dividing property upon ivorce has become increasingly important as the incidence of divorce rises, yet o satisfactory solution has been found. The National Conference of Commisoners on Uniform State Laws attempted to rectify this situation with the niform Marriage and Divorce Act of 1970 and 1973 (UMDA).[1] Among the rovisions of this Act was a codification of the system known as equitable distriution.[2] Under equitable distribution, the trial judge has wide discretion to ef-

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[1] UNIF. MARRIAGE AND DIVORCE ACT (1970) (amend. 1971, 1973) [hereinafter cited UMDA], 9 U.L.A. 9.1 (1979).

[2] UMDA § 307 as amended in 1973, now provides,

Alternative A.

(Disposition of Property)

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of 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 unit.

(b) In the proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Alternative B

(Disposition of Property)

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal dissolution by the court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to aquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and,

(4) economic circumstances of each spouse when the division of property is to become

fect a property division between the parties which he believes is just and fair.[3] Such discretion, however, is usually subject to statutory guidelines.[4] Equitable distribution has been widely adopted and now exists in the marital property law of forty-three states and the District of Columbia.[5] Despite its general acceptance, equitable distribution has received varied and widespread criticism.[6] In part because of this criticism, the Commissioners on Uniform State Laws attempted again to clarify this area of the law with the proposed Uniform Marital Property Act of 1981.[7] At a time when significant changes in the marital property law of the states are being suggested, it is appropriate to re-examine the various methods by which property can be divided upon divorce or dissolution of marriage. The result of such on examination will aid drafters of the proposed act to formulate the best possible system of property division.

Before the UMPA was drafted, three possible approaches to dividing property upon divorce or dissolution of the marriage had evolved: the separate property system, equitable distribution, and a system of fixed rules.[8] Under the

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effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.

9 U.L.A. at 142-143. Alternative A was recommended generally. Alternative B was included at the insistence of representatives of community property states. *Id.* at 144.

[3] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[4] For example, the Massachusetts equitable distribution law reads in relevant part:

> [T]he court may assign to either husband or wife all or any part of the estate of the other .... [I]n fixing the nature and value of property, if any to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, and the opportunity for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[5] The adoption of equitable distribution appears to have been a gradual phenomenon. An article published in 1934 lists only seventeen states as having equitable distribution. Daggett, *Division of Property Upon Dissolution of Marriage,* 6 LAW AND CONTEMP. PROB. 225, 227 (1939) [hereinafter cited as Daggett]. A 1976 article lists forty states as having equitable distribution. Foster & Freed, *From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution,* 3 COMM. PROP. J. 231, 232-34 (1976) [hereinafter cited as Foster & Freed, *Survey*]. A 1980 article lists forty-four states, Puerto Rico, and the District of Columbia as having equitable distribution. Foster & Freed, *Divorce in the Fifty States: An Overview as of August 1, 1980,* 6 FAM. L. REP. 4043, 4050-51 (1980) [hereinafter cited as Foster & Freed, *Divorce*].

[6] *E.g.*, M. GLENDON, STATE, LAW, AND FAMILY, 264 (1977); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 62-68 (1981) [hereinafter cited as GLENDON, NEW FAMILY]; Rheinstein, *Division of Marital Property,* 12 WILLAMETTE L. J. 413, 423-24 (1976) [hereinafter cited as Rheinstein].

[7] UNIFORM MARITAL PROPERTY ACT (Discussion Draft) (1981).

[8] These three systems are reflected in the law of American jurisdiction today. Foster & Freed, *Divorce, supra* note 5, at 4050-51. Five southern states maintain the separate property system (Fla., Miss., S.C., Va., W. Va.). *Id.* at 4051. Foster and Freed maintain, however, that case law developments have given Florida and South Carolina equitable distribution systems. *Id.* Of the community property jurisdictions, only three still retain a fixed rule for the division of

separate property system, the role of the court is limited to determining which spouse held title to the various assets during the marriage, and distributing such assets accordingly.[9] The essential feature of equitable distribution is the absence of fixed rules for the division of property, such division being within the discretion of the court. In most equitable distribution jurisdictions, however, courts are given some guidelines in the form of statutory criteria to help create a suitable property division.[10] The best example of a system of fixed rules for the division of property is the community of acquests which exist to some extent today in the eight American community property jurisdictions.[11] Community property, in its traditional form, effects on equal division of the property at issue.[12]

This note surveys the various methods of distribution of property upon divorce. The note begins by examining why the separate property system has been widely rejected in modern times. The note then compares the advantages and disadvantages of the equitable distribution and fixed rule distribution systems. The relative merits of each system as applied to the division of one important asset of the modern family — pension rights — will then be examined. It will be submitted that a fixed rule system is superior to a system of equitable distribution, since, as a practical matter, it achieves more desirable results in the vast majority of cases, while minimizing the expenses involved in dividing property. Against this framework, the note will then consider the scheme outlined by the proposed Uniform Marital Property Act (UMPA). It will be argued that the UMPA is an improvement upon equitable distribution, but that further reform, such as removing the property acquired by the spouses before marriage from consideration for division, is necessary to implement the purpose of the Act.

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property (N.M., Cal., La.): N.M. STAT. ANN. § 40-4-3 (1978); Sands v. Sands, 48 N.M. 458, 461, 152 P.2d 399, 400-01 (1944); LA. CIV. CODE ANN. art. 155, 159 (West 1952 & Supp. 1981); Rawlings v. Stokes, 194 La. 206, 214, 193 So. 589, 592 (1940), Phillips v. Phillips, 160 La. 814, 825-26, 107 So. 584, 588 (1926); CAL. CIV. CODE § 4800 (a) (West 1970 & Supp. 1981). The five other community property jurisdictions, although they inherited the equal division of the Spanish system, have since altered their system to allow equitable distribution. Foster & Freed, *Divorce, supra* note 5, at 4051.

[9] Division of property under the separate property system has been called "the mere unscrambling of title to assets." GLENDON, NEW FAMILY, *supra* note 6, at 57. N.Y. DOM. REL. § 236 (McKinney 1977), before it was amended in 1980 to allow for equitable distribution, allowed only alimony and made no provision for dividing property. The courts of New York, in accord with this notion did not allow assets to be transferred between spouses to satisfy alimony judgments. *See, e.g.*, Jury v. Jury, 242 App. Div. 476, 477, 275 N.Y.S. 586, 587 (1934). Similarly in Mississippi, a separate property state, where one spouse was divested of a one-half interest in real property, and such title was vested in the other spouse, the decree was overturned on appeal. Windham v. Windham, 218 Miss. 547, 554, 67 So.2d 467, 472 (1953). The court held that a chancery court did not have the power to transfer title in such a manner. *Id.*

[10] Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 31 (1981) [hereinafter cited as Foster].

[11] W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 93, 261-62 (1943) [hereinafter cited as DEFUNIAK].

[12] *Id.* "[T]he Spanish law of community very plainly provided that '[e]verything the husband and wife may earn during union, let them both have it by halves.' " *Id.* (quoting Novisima Recopilacion, Book 10 Title 4, Law 1).

I. INADEQUACY OF THE SEPARATE PROPERTY SYSTEM

The separate property system developed in response to the Married Women's Property Acts of the late ninteenth century.[13] Under this system, upon divorce, the court returns all assets to the spouse in whom title lies.[14] If after such a distribution one spouse is in need of support, a claim for alimony may be granted.[15] In order to determine which spouse possesses title to an asset, the court considers such factors as how the asset was acquired, and whose funds financed the purchase.[16] Since, in the traditional family the majority of the assets are purchased with the husband's salary, the separate property system is likely to leave the traditional housewife with nothing.[17] The divorced housewife is thus entirely dependent upon a precarious, and perhaps unenforceable, claim for alimony.[18]

The separate property system's emphasis on where title to property lies often results in unjust distributions. For example, in *Wirth v. Wirth*,[19] the parties pooled their resources for the first twenty-two years of marriage.[20] In later years, however, the husband began a "crash" savings program by investing a portion of his income, while the wife paid the family expenses with her earnings.[21] The assets generated by the investment program were in the husband's name alone.[22] Upon divorce, the court, in accord with separate property principles,[23] granted the entire amount of the accumulated assets to the husband.[24] Rejecting the wife's assertion that she was entitled to a share in the accumulated assets, the court noted that such a claim was actually a request for a community property division in the guise of equitable relief.[25] This result is in keeping with the principles of the separate property under which, if the wife was to have any claim, it was to be for alimony,[26] regardless of the contributions, both financial and non-financial, she made to the marriage.

A similar example of the inequities of the separate property system can be

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[13] *See* H. CLARK, DOMESTIC RELATIONS, § 7.2 at 219-26 [hereinafter cited as CLARK]; Rheinstein, *supra* note 6, at 423-24 (1976).

[14] Rheinstein, *supra* note 6, at 424.

[15] *Id.* Alimony itself arises from the common law duty of a husband to support his wife. CLARK, *supra* note 13, § 14.1 at 421.

[16] CLARK, *supra* note 13, § 14.2 at 450.

[17] Rheinstein, *supra* note 5, at 424. "But, as we have seen, the separate ownership of his or her separate assets meant that in divorce both spouses would walk away with whatever each happened to own. In the case of a housewife, this easily meant nothing." *Id.*

[18] *Id.*

[19] 39 A.D.2d 611, 326 N.Y.S.2d 308 (1971).

[20] *Id.* at 612, 326 N.Y.S.2d at 310.

[21] *Id.* at 611, 326 N.Y.S.2d at 309.

[22] *Id.* at 611, 326 N.Y.S.2d at 311.

[23] New York abandoned the separate property system with the adoption of an equitable distribution law in 1980. N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1981). *See* Foster, *supra* note 10, at 8-9.

[24] 38 A.D.2d at 613, 326 N.Y.S.2d at 311.

[25] *Id.* at 612, 326 N.Y.S.2d at 310.

[26] See text and note at note 14 *supra*.

found in *Pearson v. Pearson*.[27] In *Pearson*, the parties had been married for thirty-three years.[28] At the time of the divorce, the wife was in poor health, in debt, and without marketable skills.[29] The husband, however, held a substantial interest in a brokerage house, had an after tax income of $120,000, and a net worth of a million and a half dollars.[30] The wife's sole claim in this situation was for alimony,[31] being deprived of a share in any of the marital property.

Both *Wirth* and *Pearson* illustrate the inequity of the separate property system. *Wirth* seems particularly unjust since the wife had made financial contributions during the marriage and was still deprived of an interest in the acquired property.[32] The flaw of the separate property system, however, is not merely that it will occasionally ignore the financial contributions of the nontitleholding spouse. The system, as illustrated by *Pearson*, is also unable to take account of a spouse's nonfinancial contributions. In the case of many traditional housewifes such non-financial contributions are often considerable.[33] Thus, to allow a system of property division to ignore non-financial contributions is to create a likelihood of unjust division of property.

There are several ways to avoid the harsh results of the separate property system, but none of them are entirely satisfactory. The spouses may hold property jointly or transfer the title of certain assets to the homemaker spouse.[34] Alternatively, each spouse may enter the marriage with a substantial amount of separate property, and therefore retain such property after the divorce.[35] Both of these examples, however, assume that there exists adequate property to satisfy the needs of both spouses, and that such property has been fortuitously divided between them in a manner satisfactory to both. In effect, this is to assume away the major flaw in the separate property system. In most cases, distribution on the basis of legal title results in one spouse acquiring the bulk of the parties' property.

Another mechanism that might be used to avoid the injustices of the separate property system is the constructive trust.[36] A constructive trust,

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[27] 59 A.D.2d 775, 399 N.Y.S.2d 31 (1977).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 776, 399 N.Y.S.2d at 31.

[31] *Id.*

[32] *Wirth*, 39 A.D.2d at 613, 326 N.Y.S.2d at 311.

[33] The persistent attempts made to put a monetary value on a homemaker's contribution are likely to undervalue the magnitude of such contributions. *See* Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupations* (to be published in FAM. L.Q. (1982)). Nonetheless, estimates of replacement loss are made as high as $40,000 per year. Discussion with Sanford N. Katz, Professor of Law, Boston College Law School (March 25, 1982).

[34] CLARK, *supra* note 13, § 14-8 at 450.

[35] Since title in the property would remain with the spouse, so would the right to posession.

[36] RESTATEMENT OF RESTITUTION § 160 (1937) defines a constructive trust as follows: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." *Id.*

created by courts of equity, is a purely remedial device.[37] It can provide a means to prevent unjust enrichment,[38] but of its own accord creates no legal rights in the parties.[39] For instance, in *Wirth*, the wife claimed that since her income had been used to support the family, while her husband had accumulated earnings in his own name, he was unjustly enriched.[40] In addition, the husband allegedly had stated to the wife that his savings were "for the two of us."[41] As a result, the wife claimed the husband should be compelled to hold the property in a constructive trust for her benefit.[42] The court, however, held that there were no elements of fraud present,[43] and that the wife had accumulated no interest in the disputed assets.[44] Since constructive trusts were to be used only for "fraud-rectifying," they could not provide a remedy for the wife in *Wirth*.[45] Thus, unless the wife has a recognized legal interest in the property, her claim for equitable relief, based upon a constructive trust, will be precarious, if not unenforceable.

Alimony can also be used to mitigate the injustices of the separate property system. Alimony is derived from the common law duty of a husband to support his wife.[46] An alimony decree can be used not just to order support payments, but, in effect, to compel a division of property under the guise of alimony.[47] The court, in such situations, is forcing one spouse to make a private division of property in order to satisfy the alimony award.[48] In a sense, the court is asserting the right of one spouse to the separately held property of the other. Under the separate property system, however, such a right does not exist.[49] If the distinction between property division and alimony becomes meaningless,[50] then the separate property system ceases to exist. In effect, the

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[37] Pound, *Progress in the Law 1918-19, Equity,* 33 HARV. L. REV. 420, 421, 423 (1919).

[38] *Id.* at 421.

[39] *Id.* at 420-21.

[40] 38 A.D.2d 612, 326 N.Y.S.2d at 311.

[41] *Id.* at 612, 326 N.Y.S.2d at 312.

[42] *Id.*

[43] *Id.* at 612, 326 N.Y.S.2d at 311.

[44] *Id.*

[45] *Id. See also* In re Matter of Wells, 36 A.D.2d 471, 474, 321 N.Y.S.2d 200, 205 (1971).

[46] Kelso, *The Changing Social Setting of Alimony Law* 6 LAW AND CONTEMP. PROBS. 186, 188 (1939); *see also,* CLARK, *supra* note 13, § 14.1 at 421.

[47] This has been euphemistically called assimilating the property division to the alimony decree. CLARK, *supra* note 13, § 14.8 at 450. The necessity in separate property jurisdictions of keeping alimony analytically distinct from property division has been noted frequently. *See* Note, *Alimony and Property Settlement in Florida,* 11 FLA. L. REV. 312 (1958); Recent Cases, 47 KY. L. J. 556, 573 (1958); Comment, *Domestic Relations: Special Equity in Property as Prerequisite to Property Settlement,* 8 FLA. L. REV. 236 (1955). *See, e.g.,* Goode v. Goode, 76 So.2d 794, 795-96 (Fla. 1954).

[48] Alimony decrees often provide a greater award for the homemaker spouse. One of the factors leading to this result is a strong policy in favor of providing financially for the wife and children. CLARK, *supra* note 13, § 14.8 at 451.

[49] *See e.g.,* McGuigan v. McGuigan, 46 A.D.2d 665, 665, 359 N.Y.S.2d 974, 975 (1972).

[50] *See* Hopson, *The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level,* 11

system becomes one of judicial discretion to divide the property as the trial court best sees fit.[51] While a divorce is an equitable decree and therefore subject to certain flexibility,[52] it is, nonetheless, unacceptable that courts should achieve by indirect means that which they are not empowered to achieve directly.

The fundamental problem with the separate property system is its failure to protect interests, other than legal title, which a spouse may have in property to be divided upon divorce. Separate property allows a spouse to make a contribution to a marriage as a homemaker, then go largely uncompensated upon divorce. Where the court is limited to restoring to the party his or her own property, the system inherently favors the spouse whose skills were valued in the marketplace and compensated monetarily. Equitable results might be reached under the separate property system if, prior to divorce, each party held legal title to a significant amount of property. Such an occurrence, however, is unlikely. Remedial devices, such as the constructive trust, may provide relief in certain instances, but fail to solve the problems inherent in the system. Similarly, alimony decrees that require the transfer of title to property between spouses, in an attempt to alleviate the hardships of separate property divisions, run afoul of the very principles upon which the system is based. In short, the separate property system is a fundamentally flawed and ineffective method of dividing property upon divorce. The system's shortcomings no doubt account for its widespread rejection in the United States.[53]

II. EQUITABLE DISTRIBUTION VS. FIXED RULES

The most common method of property division is equitable distribution. The essential feature of equitable distribution is the absence of fixed rules for the division of property. The court is free to divide the property in the manner it views most equitable. Statutory criteria often provide guidelines to aid the court in dividing the property.[54] Equitable distribution does not totally abrogate the concept of separate property,[55] it merely empowers the courts to award the separate property of one spouse to another spouse.[56]

KAN. L. REV. 107, 146 (1962).

[51] CLARK, *supra* note 13, § 14.18 at 451. Clark notes that factors used by courts in determining awards when assimilating the property divisions to the alimony decree are: the extent of the husband's property; the wife's needs; the duration of the marriage; and the relative responsibility for the marital breakup. *Id.* These are essentially the same guidelines later adopted in the equitable distribution statutes. *E.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[52] Schwartz v. Durham, 52 Ariz. 256, 264, 80 P.2d 453, 456 (1938); Z. CHAFEE, SOME PROBLEMS OF EQUITY 73-84 (1950).

[53] See note 8 *supra*.

[54] *See* Inker, Walsh, Perocchi, *Alimony and Assignment of Property in Massachusetts,* 10 SUFFOLK U.L. REV. 1, 8 (1975) [hereinafter cited as Inker]; Foster, *supra* note 10, at 31. *See also* Lacey v. Lacey, 45 Wis. 2d 378, 383-84, 173 N.W.2d 142, 145 (1970).

[55] Inker, *supra* note 54, at 8.

[56] *E.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974): "The court may assign to either husband or wife all or any part of the estate of the other."

abrogate the concept of separate property,[55] it merely empowers the courts to award the separate property of one spouse to another spouse.[56]

There are several alternative forms of equitable distribution. The property subject to division may be limited to that acquired by the spouse during the marriage,[57] or, as is more often the case,[58] may include all of the property of both spouses.[59] The UMDA, as originally promulgated, favored limiting the property to be divided to that acquired during the marriage.[60] The Act, however, has been reformulated and now makes provisions for both alternatives.[61] Additionally, an important aspect of any equitable distribution scheme is whether the fault of the parties is to be considered in making the division. The UMDA in all versions recommended that fault not be considered.[62] This position, however, has not been adopted by all jurisdictions operating under equitable distribution.[63]

The mechanical aspects of equitable distribution are illustrated by the leading Massachusetts case of *Rice v. Rice*.[64] In *Rice* the parties had been married for twenty-seven years.[65] The wife was a fifty year old homemaker who had never been employed, had no vocational skills, had a negative net worth, and was entirely dependent upon her husband for support.[66] The husband was fifty-seven years old, had an annual income of $88,000 and a net worth of over one millions dollars.[67] In addition, the court noted that the husband had been "involved with another woman for several years."[68] The decree of the trial court, which was upheld on appeal, ordered the husband to transfer to the wife his interests in property worth $500,000, and pay $30,000 per year in support.[69] In effect, the court granted the wife approximately one-half of the husband's assets. Unlike a court operating under a separate property system, the court in *Rice* was not constrained by notions of who held legal title to the

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FOLK U.L. REV. 1, 8 (1975) [hereinafter cited as Inker]; Foster, *supra* note 10, at 31. *See also* Lacey v. Lacey, 45 Wis. 2d 378, 383-84, 173 N.W.2d 142, 145 (1970).

[55] Inker, *supra* note 54, at 8.

[56] *E.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974): "The court may assign to either husband or wife all or any part of the estate of the other."

[57] *E.g.*, N.Y. DOM. REL. LAWS ch. 281, § 236 (B) (5) (McKinney 1977 & Supp. 1981); N.J. STAT. ANN. § 2A: 34-23 (West 1952 & Supp. 1981).

[58] Foster and Freed list more than half of the equitable distribution states as subjecting all of the spouses' property to division. Foster & Freed, *supra* note 5, at 233.

[59] MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[60] UMDA (1970) § 307 (a), 9 U.L.A. at 143-44.

[61] UMDA (1973) § 307 Alternatives A and B, 9 U.L.A. at 142-43.

[62] UMDA (1970) § 307 (a): "[T]he court . . . shall divide the marital property without regard to the marital misconduct:" *See* 1973 Alternatives A and B amend. at note 2 *supra*.

[63] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[64] Rice v. Rice, 372 Mass. 398, 361 N.E.2d 1305 (1977).

[65] *Id.* at 398, 361 N.E.2d at 1306.

[66] *Id.*

[67] *Id.* at 399, 361 N.E.2d at 1306.

[68] *Id.*

[69] *Id.*

property. Rather, the property was distributed according to the court's view of what is just, given the plight of the propertyless housewife.

Equitable distribution is often viewed as an attempt to improve the position of the propertyless housewife.[70] Housewives may receive an award from the separate property of the husband, thus ameliorating the harsh consequences of the separate property system.[71] Equitable distribution can also be viewed as an attempt to give recognition to the notion of marriage as a partnership.[72] Proponents of the system argue that equitable distribution allows the court to take cognizance of the contributions of both parties, regardless of the extent to which they were measured in the marketplace.[73] Thus, equitable distribution gives recognition to the essential supportive role of the homemaker.[74] Besides recognizing the contribution of the homemaker in the marriage, the system also serves to protect the public fisc.[75] A housewife well cared for in the division of property is less likely to become a public charge.[76] Additionally, proponents assert, equitable distribution is flexible enough to take cognizance of the facts of each individual case, and tailor the property division accordingly.[77] All of these factors militated towards the abandonment of the separate property system, and the adoption of equitable distribution.

Besides the separate property system and equitable distribution, there exists a third method of dividing property upon divorce: the fixed rule system. The best example of a fixed rule is the community of acquests which exists to

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[70] Inker, *supra* note 54, at 8.

[71] *Id.*

[72] The notion that marriage should be viewed as a partnership has been voiced by legal commentators for quite some time and seems to be widely accepted. *See, e.g.*, Daggett, *supra* note 5, at 230; CLARK, *supra* note 13, § 14.8 at 449, Foster & Freed, *Marital Property Reform in New York: Partnership of Co-equals?*, 8 FAM. L.Q. 169, 176 (1974) [hereinafter cited as Foster & Freed *Marital Property*]. The division of the property of the divorced parties rests upon the concept of marriage as a shared enterprise or joint undertaking, literally a partnership. Lacey v. Lacey, 45 Wis. 2d at 382, 173 N.W.2d at 144 (1970).

[73] Foster & Freed, *Marital Property, supra* note 72, at 177.

[74] Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974).

[75] "Present in all property division systems, but more or less hidden below the surface, was the important issue of the extent of public responsibility for the casualties of broken families."
GLENDON, NEW FAMILY, *supra* note 6, at 58.

[76] Rothman v. Rothman, 65 N.J. at 229, 320 A.2d at 501:

> Hitherto future financial support for a divorced wife has been available only by a 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 his regular payments. This may result in serious misfortune to the wife, and in some cases will compel her to become a public charge. An allocation of property to the wife at the time of the divorce is at least some protection against this eventuality.

Id.

[77] Foster, *supra* note 10, at 31; Inker, *supra* note 53, at 18. *See* Lacey v. Lacey, 45 Wis. 2d at 382-83, 173 N.W.2d at 145.

some extent in the eight American community property jurisdictions.[78] This system in its traditional form creates two categories of property: separate property and community property.[79] Community property is that acquired during the marriage by the gainful activity of either spouse, and is held jointly irrespective of direct contributions to its acquisition.[80] Separate property is that acquired either before the marriage or by a gratuitous transfer during the marriage by either of the spouses.[81] Community property is owned by the spouses in vested and equal shares,[82] and is subject to an equal division upon the divorce of the spouses.[83] Separate property, however, is generally not subject to division, but remains with its original owner.[84]

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The application of community property principles can be illustrated by the California case of *In Re Marriage of Jafeman*.[85] In *Jafeman* the parties had been married for seventeen years.[86] At the time of the marriage the husband held, and had paid part of the purchase price for, the house which served as the marital home.[87] During the marriage, the parties continued to pay for, and develop equity in, the house.[88] The trial court in framing its decree included the residence in the community property, and consequently ordained that it should be divided equally between the parties.[89] The California Court of Appeals, however, held that to the extent the husband had developed equity in the

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[78] M. GLENDON, STATE, LAW, AND FAMILY 267 (1977).

[79] Prager, *The Persistence of Separate Property Concepts in California Community Property System*, 24 U.C.L.A. L. REV. 1, 6 (1976) [hereinafter cited as Prager].

[80] *Id. See also* W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, § 58 at 115 (1971) [hereinafter cited as DEFUNIAK & VAUGHN]. The civil codes of community property jurisdictions generally did not specifically define community property, taking the definition to be clearly established. *Id.*

[81] Prager, *supra* note 79, at 6. The California community property statute defines separate property as that owned before marriage and that acquired afterwards by gifts, devise, or descent, including the rents, issues, and profits thereof. CAL. CIV. CODE §§ 5107, 5108 (West 1970).

[82] DEFUNIAK, *supra* note 11, § 93 at 261; Prager *supra* note 79, at 6. The California statute describes the ownership of community property as "present, existing and equal interests." CAL. CIV. CODE § 5104 (West 1970 & Supp. 1981).

[83] M. GLENDON, STATE, LAW, AND FAMILY 267 (1977). *See* CAL. CIV. CODE § 4800 (a) (West 1970 & Supp. 1981).

[84] DEFUNIAK & VAUGHN, *supra* note 80, § 228 at 519-20.

[85] 29 Cal App.3d 244, 105 Cal. Rptr. 483 (1972).

[86] *Id.* at 251, 105 Cal. Rptr. at 487.

[87] *Id.*

[88] *Id.* at 252-54, 105 Cal. Rptr. at 488-89.

[89] *Id.* at 254, 105 Cal. Rptr. at 489.

house prior to the marriage, it was separate property and should not be divided.[90] Since payments on the mortgage made subsequent to the marriage were made with community funds, however, the equity developed was community property,[91] and therefore subject to equal division.[92] Thus, the system of fixed rules mandated that property acquired with community funds be divided equally, while property acquired separately was not subject to division.

This model of the fixed rules system has not survived intact in all community property jurisdictions.[93] Five of the jurisdictions have brought the division of property within the discretion of the judge, thus establishing a form of equitable distribution.[94] In fact, only Louisiana, New Mexico, and California still retain the traditional system.[95] California, for example, mandates the court make an equal distribution of the marital property[96] and does not allow the division of separate property.[97]

The community property system is based upon the premise that the spouses contribute equally to the marriage and, therefore, deserve to share equally in the resulting gains of the marriage.[98] Thus, the notion of marriage as a partnership seems to underly both equitable distribution and community property concepts.[99] Both systems are based on the belief that when one spouse

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[90] *Id.* at 257, 105 Cal. Rptr. at 491.

[91] *Id.*

[92] CAL. CIV. CODE § 4800 (a) (West Supp. 1981).

[93] GLENDON, NEW FAMILY, *supra* note 6, at 57. "In many community property systems . . . the traditional technique of mandatory equal division has been modified, eliminated, or supplemented by judicial discretion to award more than half of the community property to one spouse, and even to reallocate property that was not part of the community." *Id.*

[94] Foster & Freed, *Divorce, supra* note 5, at 4051. The conflict between the community property tradition and the modern trend toward the equitable distribution can best be seen in Arizona. The Arizona community property statute allows the court to divide the property in an equitable manner. ARIZ. REV. STAT. ANN. § 25-318 (1976 & Supp. 1981). This provision has understandably been interpreted as allowing the court to make an equitable distribution of the spouses' property, rather than an equal division. Cockrill v. Cockrill, 124 Ariz. 50, 54 601 P.2d 1334, 1343 (1979); Nace v. Nace, 104 Ariz. 20, 23, 448 P.2d 76, 79 (1968); Kosidlo v. Kosidlo, 125 Ariz. App. 32, 34, 607 P.2d 15, 17 (1979). To the contrary, however, the community interest of the spouses has been held to be immediate, present, vested, and equal. Hatch v. Hatch, 113 Ariz. 130, 131, 547 P.2d 1044, 1045 (1976); In re Marriage of Foster, 125 Ariz. App. 208, 210, 608 P.2d 785, 787 (1980). Similarly, there has been a requirement that the division be substantially equal. Britz v. Britz, 95 Ariz. 247, 249, 389 P.2d 123, 124 (1964). Perhaps the origin of the confusion is Schwartz v. Durham, 52 Ariz. 256, 80 P.2d 453 (1938), where the court held that the property is held equally by the husband and wife, and that the court has wide discretion in making the division. *Id.* at 265, 80 P.2d at 456. Thus, the law in Arizona seems to be a presumption of equal division that can easily be altered at the discretion of the judge.

[95] See note 6, *supra.*

[96] CAL. CIV. CODE § 4800 (a) (West 1970 & Supp. 1981).

[97] Mears v. Mears, 180 Cal. App. 2d 484, 500 4 Cal. Rptr. 618, 628 (1960).

[98] "The marriage is a community of which each spouse is a member equally contributing by his own industry to its prosperity and possessing an equal right to succeed to the property after its dissolution." DEFUNIAK & VAUGHN, *supra* note 80, § 1 at 2-3.

[99] The ability of the court to divide the property of the parties as it sees fit is "based on the joint contribution of the parties to the marital enterprise. Tied to, and justified by, the theory of marital partnership, it rests on the concept that non-economic contributions can enhance the partnership." Inker, *supra* note 54, at 11. See text and note at note 72 *supra.*

assets.[100] If the premise of marriage as a partnership is sound[101] then both equitable distribution and fixed rules are improvements upon the separate property system's myopic focus on legal title.

The question remains, however, whether subjecting the division of property to the court's discretion or following a system of fixed rules is a more effective way of implementing the concept of marriage as a partnership. Fixed rules have two advantages in this respect. A system of fixed rules establishes actual rights in the property on behalf of both parties rather than the mere expectation that the court may divide the property in an equitable manner. A system of

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[100] This is the definition of marital partnership used in this note. Other commentators have viewed the notion of marital partnership as a misleading ideology behind equitable distribution. *See* GLENDON, NEW FAMILY, *supra* note 6, at 65-68. To be sure, the term "partnership" has been used loosely, *Id.* at 66, *See* Foster & Freed, *Marital Property, supra* note 72, making it difficult to determine exactly what its definition is.

[101] There are substantial objections to effecting a change in the law based upon the widely perceived need to protect the propertyless housewife. It is argued that by the time the law has sufficiently taken account of the propertyless housewife, the changing economic status of women will ensure that the propertyless wife will no longer exist in substantial numbers. *See* Glendon, *Is There a Future for Separate Property?* 8 FAM. L.Q. 315, 318-19 (1974). Opponents of reform also argue that separate property concepts recognize the individual's right to control his or her own property. Therefore, when women acquire economic status equal to men, any rule limiting the right of an individual to control his or her own property will be an unnecessary impediment to individual freedom. Prager, *Sharing Principles and the Future of Marital Property Law,* 25 U.C.L.A. L. REV. 1,1 (1977). Furthermore, as a corollary, the critics suggest that the modern conception of marriage entails a diminished sense of economic responsibility with which sharing principles are incompatible. *E.g.,* M. GLENDON, STATE, LAW, AND FAMILY 271 (1977).

Finally, reforms based upon protecting the economically weaker spouse are said to be in some sense sexist, since they will tend to reward the purely domestic wife and give legal sanction to her role as homemaker. This approach, critics assert, will tend to preserve the present inequitable gender based division of labor in society. *See* Deech, *Book Review,* 94 LAW Q. REV. 474, 475 (1977).

While there have been dramatic changes in the economic position of women, it is not clear that these changes have been either so sweeping or so fundamental that economic equality of the sexes can be posited as a basis for legal reform. For instance, the number of married women in the labor force as a percentage of the female population has risen from 16.7% in 1940 to 48.1% in 1978. U.S. BUREAU OF THE CENSUS. STATISTICAL ABSTRACT OF THE UNITED STATES: 1979 400 (100th ed. 1979). The distribution of the female sector of the workforce has shifted from mostly unmarried to mostly married (48.5% unmarried, 36.4% married in 1940 to 24.9% unmarried, 60.0% married in 1978). *Id.* The number of women in the workforce has increased from 14 to 40 million. *Id.* Despite this increase in the activity of women in the workforce, the economic status of women appears largely unchanged. For example, among employed married women, the greatest concentration in employment in 1950 was of clerical and kindred workers with 32.4% (including sales workers). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1978 405 (99th ed. 1978). This was even more so in 1978 with clerical and sales workers accounting for 42% of the total. *Id.* Similarly, managers and administrators, which one would expect to include many relatively high paying jobs, accounted for 7% in 1950 and only 6% in 1978. *Id.*

The percentage of women workers in given occupations illustrates that significant gains have OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 1979 416, 417 (99th ed. 1979).

rights in the property on behalf of both parties rather than the mere expectation that the court may divide the property in an equitable manner. A system of fixed rules also diminishes the various costs incurred in matrimonial litigation, while providing outcomes that society and the vast majority of litigants will find acceptable.

The Chief Justice of the Massachesetts Supreme Judicial Court, commenting on a case interpreting Massachusetts's equitable distribution statute, spoke of the Court being guided by notions of marriage as a partnership, co-ownership of property brought to the marriage and respect for the wife's equal rights in the accumulated assets.[102] Equitable distribution, however, does not guarantee any such interest to the spouse. Rather, it gives her the possibility of acquiring an interest in the marital assets if the court views such a decision as equitable. The propertyless housewife is still dependent upon the court's perception of equity to provide her with a share of the assets acquired during the marriage.[103] The housewife may, of course, acquire an interest in property in any of the manners available under the separate property system, i.e., by acquiring title to an asset in her name, or by holding property jointly with her husband. The efficacy of such arrangements is uncertain in equitable distribution jurisdictions, however, since it is within the court's discretion to reallocate this property to the other spouse. In this sense, equitable distribution is the antithesis of marriage as a partnership.[104] If one

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OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 1979 416, 417 (99th ed. 1979). Despite these gains, women continued their domination of lower status and traditionally female jobs (secretaries, a gain from 99.1%, to 99.2%, typists, a gain from 96.1% to 96.6%, between 1972 and 1978). *Id.* at 417. Most importantly, while the gains in absolute numbers were relatively small in high status jobs, by comparison, the increase in numbers in lower status jobs was huge. *id.* at 416, 417. One cannot help but conclude that while significant numbers of women are entering the workforce, they are doing so largely within the traditional roles of women in the economy.

[102] Hon. Edward F. Hennessey. *Explosion in Family Law Litigation, Challenges and Opportunities for the Bar,* 14 FAMILY L.Q. 187, 189 (1980):

> In practical effect, the court in a liberal interpretation of the controlling statute, treated the marriage as an implied partnership for the purposes of division of property. As in the case law dealing with family oriented small businesses, the Rices' marriage should be viewed as a pooling of resources, a co-ownership of the property brought to the marriage, and acquired later. Although Massachusetts is not a community property state, the wife as homemaker could acquire equal rights in the accumulated assets as a service contributor and partner to the marriage.

[103] Kulzer, *Law and the Housewife: Property, Divorce and Death,* 28 U. FLA. L. REV. 1, 23 (1975).

[104] "Open ended discretion (even with guidelines) is really the antithesis of economic partnership." Baxter, *Family Law Reform in Ontario,* 25, U. TORONTO L. REV. 236, 260-61 (1975). This unpredictability of outcome, which may serve to deprive a spouse of an expectancy in property can be seen by looking at two recent trial court decisions in New York. In Kobylack v. Kobylack ____ Misc. 2d ____, 442 N.Y.S.2d 392 (1981), the court made its distribution of property in accord with the earnings ratio of the parties, granting two and a half times as much property to the husband as to the wife. *Id.*, 442 N.Y.S.2d at 394. The court saw its role as ensuring that "neither party secures an economic advantage merely by virtue of having been married to the other." *Id.* It is likely the court made its decision after considering the infidelity of the wife,

wishes to provide both spouses with an interest in the results of the gainful activity of the marriage, it is unproductive to subject those interests to a game of chance.

The system of fixed rules for property distribution eliminates this anomaly. Once the determination is made to abandon the separate property system and to recognize the interests of both spouses in the property at issue because of their contributions to the marriage, it follows that the respective interests of the spouses should be determined by fixed rules. Equitable distribution is really the separate property system with a gloss of judicial discretion. By leaving the division within the discretion of the court, the interests of the spouses remain illusory. For a system to prevent the harsh consequences of the separate property system, it must guarantee to each spouse a fixed interest in the property to be divided, regardless of measurable economic contribution.

Not only do fixed rules avoid subjecting the interests of a spouse to the subjective discretion of the court, they also accord with widely held presumptions about marriage itself.[105] Marital partners generally assume that worldly goods acquired during the marriage are to be shared.[106] The division of property upon divorce should, therefore, reflect this assumption, and apply what have been termed "sharing principles,"[107] or the enforced sharing of property.[108]

While generalization concerning contemporary couples' understanding of marriage is an uncertain undertaking, the notion that sharing behavior is inherent in marriage, and therefore, that sharing principles should be applied to the division of property, is sound.[109] For instance, one spouse may forego personal economic advancement in order to promote an economic opportunity for

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id. at 393, even though N.Y. DOM. REL. LAW § 236 B (McKinney 1977 & Supp. 1981) specifically excludes consideration of marital fault in dividing property. By contrast, in Majauskas v. Majauskas, _____ Misc. 2d _____, 441 N.Y.S.2d 900 (1981), the court saw the equitable distribution statute as allowing it to effect an equal division of the property. *Id.* at 903. According to *Majauskas,* if the court could not effect such a distribution, an inequity would result where one party kept the total benefits of an asset. *Id.* These differing views on the fundamental purpose of equitable distribution highlight the likelihood that similar claims will be viewed quite differently by different trial judges.

[105] This is the thesis of a 1974 article by two well known family law scholars:

> [M]arriage should be regarded as a partnership of co-equals with a division of labor that entitles each to a one-half interest in the family assets accumulated out of partnership activity while the marriage is functioning. We believe that such a system reflects the contemporary understanding of marriage, and the reasonable expectations of the parties.

Foster & Freed, *Marital Property, supra* note 72, at 176.

[106] Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 6 (1977).

[107] *Id.* at 1-2.

[108] M. GLENDON, STATE, LAW, AND FAMILY 265 (1977).

[109] The objection is tendered that even if couples commonly assume they are members of a community whose property is to be shared, the opposite assumption, that each should retain his or her own property, is found in couples contemplating divorce. Therefore, to divide the property as if the parties had assumed all assets acquired during the marriage were shared is unrealistic

the other spouse, or perhaps to manage the day-to-day affairs of the marriage. Although such an arrangement may increase the likelihood of economic success for the joint venture, in individual terms one spouse gains more than the other. Because of the decision to enter into the marriage, both spouses have a different economic future than they would have had as single persons. Marital partners make decisions in which one spouse receives an economic gain, and the other suffers a loss, regardless of whether the marriage is a traditional breadwinner-housewife couple, or two professionals each actively pursuing a career.[110]

Sharing, then, is an intrinsic characteristic of marriage, both in the assumptions of the spouses as to the ownership of property acquired during the marriage, and in the economic realities implicit in decisions affecting both spouses. Therefore, it is appropriate that "sharing principles" should govern the disposition of property upon divorce.

Although sharing activity is implicit in marriage, spouses may have specific notions concerning the extent to which they wish to share their economic fortunes, notions which run contrary to the fixed rules imposed by statute. Therefore, systems of fixed rules for the division of property generally allow the parties to contract out of the system.[111] This, in effect, allows the parties to separate their individual economic future from that of the marriage. The gains and losses between the spouses are allocated by the agreement. Absent such an arrangement the gains and losses between the individuals, both those economically measurable and those hidden in the decisions made during the marriage, should be divided equally between the spouses. A fixed rule of equal division of property acquired during the marriage gives both spouses a fixed interest in the property, providing the best alternative to a privately arranged distribution. Furthermore, fixed rules recognize the inherently entwined economic fates of both spouses and deal with them fairly.

Nevertheless, proponents of equitable distribution assert their system is superior to fixed rules since it allows for more finely tuned justice. The system purportedly is able to grant both spouses precisely the amount of property they deserve, by weighing the various equities in each case.[112] For instance, where the husband has been frugal and industrious, while the wife has contributed little to the marriage, an equal division is said to be unfair. Under equitable distribution, these considerations are weighed by the court, allowing such a ne'er-do-well wife to be deprived to some extent of her interest in the property.

The opportunity for individualized justice, however, is not itself sufficient justification for a system of equitable jurisdiction. A trade-off exists between the seemingly individualized justice that equitable distribution allows and the

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given the fact that modern couples routinely contemplate divorce. GLENDON, NEW FAMILY, *supra* note 6, at 65.

[110] *See* Prager, *supra* note 79, at 6-11.

[111] *E.g.*, UMPA prefatory note, p. vii, § 13; CAL. CIV. CODE § 4802 (West 1970). See note 171 *infra*.

[112] *See, e.g.*, Inker, *supra* note 54, at 8-11.

costs the system incurs.[113] In effect, the system cannot provide both individualized justice and fast, predictable, inexpensive division of property.[114]

Judicial discretion is always to some extent an exercise in uncertainty.[115] Consequently, the eventual division of property depends, in part, upon the predilictions of the presiding judge. This unpredictability of outcome serves to prevent the parties from negotiating a settlement, since it is not clear to a spouse exactly what he or she stands to gain by proceeding to court. In addition, a referral to judicial discretion is in a sense, a referral to litigation.[116] Any system that promotes litigation is inherently costly.

The costliness of equitable distribution is apparent in the appellate process. For example as of midsummer 1981, of the forty-nine cases involving equitable distribution which were appealed in Massachusetts, twenty-three were reversed or modified.[117] Such a high reversal encourages parties to suffer the additional costs and delays of the appellate process, since there is almost a fifty percent chance that an unsatisfactory result will be reversed.

Nor do statutory guidelines alleviate the problems inherent in equitable distribution. Indeed, the introduction of statutory guidelines, rather than simplifying the process as intended, may offer the opportunity for, and even encourage abuse of the litigation and negotiation processes.[118] Each guideline, in a sense, provides a different issue that must be litigated or negotiated before the division of property is complete. Any benefits equitable distribution brings in the form of individualized justice are thus gained at the expense of delay, litigation costs, and the animosity that is associated with much of domestic relations litigation.[119]

Equitable distribution, then, is a costly system. Each of these costs, it must be remembered, are incurred to gain that quantum of individualized justice that allegedly cannot be attained by a system of fixed rules. Whether this search for individualized justice is worth the costs involved seems doubtful especially since such individualized justice may be impossible to obtain.[120] As one commentator has noted, no human judge can ever ascertain or quantify the true contributions of each spouse.[121] Thus, a system which provides inexpensive and consistent results while achieving rougher justice, might be

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[113] Rheinstein, *supra* note 6, at 433.

[114] *Id.*

[115] *Id.* at 432.

[116] *Id.* at 433.

[117] *Id.* at 432-33; GLENDON, NEW FAMILY, *supra* note 6, at 63-64.

[118] M. Glendon, *Property Rights upon Dissolution of Marriages and Informal Unions*, Unpublished Speech Delivered at Cambridge University, England, July 31, 1981, at 9 (to be published in THE CAMBRIDGE LECTURES - 1981 (1982)).

[119] *Id.*

[120] *See* GLENDON, NEW FAMILY, *supra* note 6, at 63.

[121] "But given what is just as true — that no human judge can ever ascertain or quantify the true contributions of each spouse — the equal division of acquests commends itself as a rule of convenience without substantial demerit." *Id.*

preferable to one which spares no expense in an admirable, but perhaps unattainable search for individualized justice.[122]

Fixed rules are, therefore, superior to equitable distribution in several respects. They serve to eliminate the problem of illusory interests in property by giving each spouse a set interest in the property to be divided. Furthermore, a fixed rule of equal division as to the property acquired during the marriage is in accord with reasonable and widely held expectations about marriage. Final-

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[122] *See id.* at 63-64. A presumption of equal division has begun to work its way into jurisdictions ostensibly operating under equitable distribution. The leading equitable distribution case in Wisconsin noted that "in a long marriage, particularly as to property acquired by the parties during the marriage, a fifty-fifty division may well represent the mutuality of the enterprise." Lacey v. Lacey, 45 Wis.2d 378, 382-83, 173 N.W.2d 142, 145. Similarly, the Wisconsin equitable distribution statute reads in part, referring to property acquired during the marriage: "The court shall presume that all other property is to be divided equally between the parties." WIS. STAT. ANN. § 767.255 (West 1981). This equal division may be altered after the court considers the usual list of statutory factors. *Id.* The Arkansas property division statute also mandates a presumption of equal division. ARK. STAT. ANN. § 31-1214 (Supp. 1981). In Majauskes v. Majauskes, _____ Misc.2d _____, 441 N.Y.S.2d 900 (1981), the New York Supreme Court interpreted New York's new equitable distribution law as allowing the court to go " 'behind the scenes' of the marriage and hopefully give both spouses an equal division of the parties' marital property." _____ Misc.2d at _____, 441 N.Y.S.2d at 903.

This presumption of equal division can best be seen by looking at an interesting case decided by the New Jersey Superior Court, Gibbons v. Gibbons, 174 N.J. Super. 107, 415 A.2d 1174 (1980). In *Gibbons*, both husband and wife had come from wealthy and generous families. *Id.* at 109, 415 A.2d at 1176. During the marriage, the husband had received over two million dollars in gifts and inheritance, while the wife had received over one million dollars in a similar manner. *Id.* at 110, 415 A.2d at 1176. New Jersey is an equitable distribution state, N.J. STAT. ANN. 2A:34-23 (West 1952 & Supp. 1981), and at the time the case was heard, all property acquired during the marriage was available for distribution, including that acquired by gift or inheritance. *Id. See* 1980 N.J. Laws, c. 181, § 1. In making the division of property the court gave each spouse an equal amount of the property, thus granting the wife one-half million dollars of the husband's wealth. *Id.* at 110, 415 A.2d at 1176. The court noted the history of the family, that the wife had delayed her career, devoting herself to family concerns, while the husband had actively pursued his professional life. *Id.* at 111-12, 415 A.2d at 1176. The court noted that corollary to its understanding of equitable distribution was the concept that "marriage is a joint enterprise, whose vitality, success, and endurance is dependent upon the conjunction of multiple components, only one of which is financial. The non-remunerative efforts of raising children, making a home, performing a myriad of personal services, and providing physical and emotional support are, among other non-economic 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." *Id.* at 112-13, 415 A.2d at 1177. Although the court maintained it was fulfilling its duty under equitable distribution, and not using any mechanistic formula to divide the assets, it nonetheless decided on equal division. *Id.* at 114, 415 A.2d at 1178.

This decision was overruled by the New Jersey Supreme Court. 86 N.J. 515, 432 A.2d 80 (1981). Before the appeal, the New Jersey equitable distribution statute had been amended to exclude from division property received by gift or inheritance. N.J. STAT. ANN. 2A:34-23 (West 1952 & Supp. 1981). In reversing the decision the court relied on this amendment and applied it retroactively. *Id.* at 518, 432 A.2d at 81-82. Thus the holding did not alter the rule to be applied in making the decision. Rather, it simply removed from consideration a certain type of property. The notion that a wife's contribution to the marriage merits equal division of property acquired during the marriage by the efforts of the spouses remains intact. Had the Gibons' fortunes been acquired by their collective industriousness, the equal division would have been upheld.

ly, the system provides a manner of property division that is inexpensive, predictable, and able to minimize the need for litigation, while sacrificing only the uncertain benefits of individualized justice provided by equitable distribution. The effectiveness of a fixed rule system and the relative ineffectiveness of equitable distribution can be illustrated better by examining how each system has dealt with the important problem of dividing pension rights.

III. Equitable Distribution, Fixed Rules, and the Division of Pension Rights

Pension rights are an especially important asset in households where living expenses have absorbed the entire marital income of the spouses and, therefore, the partners have accumulated little joint property.[123] In this situation, pension rights, along with equity in the marital home, are likely to be the most important asset of the marriage.[124] Thus, to allow the entire pension to stay with the employee spouse is to penalize one spouse for adopting the non-economic role in the marriage, much in the manner of the separate property system.

Under no circumstances does equitable distribution guarantee an interest in the pension rights to both spouses. Some equitable distribution jurisdictions have held that pension rights, being an ephemeral expectancy, do not constitute property and thus, are not subject to division.[125] Even in jurisdictions that do hold that pension rights are to be considered property and thus made subject to equitable division,[126] it is within the court's discretion to award the entire value of the pension to one spouse alone.[127] To the extent equitable distribution jurisdictions have considered the divisibility of pension rights, there has been little agreement concerning the extent to which those rights may be awarded to the non-employee spouse.

In equitable distribution jurisdictions, pension right problems are analyzed in terms of whether the pension has vested and matured.[128] In New Jersey, for instance, courts have held that where an employee had an absolute right to the return of his contributions to a pension plan, the assets were subject to equitable distribution.[129] Where, however, such rights are dependent upon

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[123] Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. LAW 187, 189 (1978).

[124] *Id.*; Foster, *supra* note 10, at 37.

[125] This appears to be the position of Michigan. If the pension is subject to any contingency whatsoever, it is deemed an expectancy and is not subject to equitable distribution. Miller v. Miller, 83 Mich. App. 672, 675, 269 N.W.2d 264, 265 (1978).

[126] *E.g.*, Kruger v. Kruger, 73 N.J. 464, 470, 375 A.2d 659, 663 (1977).

[127] *E.g.*, MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974). "The court may assign to either husband or wife all . . . of the estate of the other." *Id.*

[128] A vested pension right has been defined as a right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement. In re Marriage of Brown, 15 Cal.3d 841, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976). A matured right exists when there is an unconditional right to immediate payment. *Id.*

[129] Pellegrino v. Pellegrino, 134 N.J. Super. 512, 516, 342 A.2d 226, 228 (1975).

the employee living to retirement age, the result has been less clear. In *Mueller v. Mueller*,[130] the husband had acquired the vested right to a pension.[131] If he left the company, he was entitled to a reduced pension.[132] The only contingency to full payment was attaining 65 years of age.[133] Although the employee spouse was sure to receive payment at some point, the court did not subject the rights to equitable distribution.[134] This amounts to requiring that a pension be presently payable before it can be made subject to equitable distribution. A contrary result was reached in *McGrew v. McGrew*.[135] In *McGrew* the husband had acquired rights in the pension plan which could be defeated if he died before retirement.[136] The court held that the pension rights were subject to division.[137] In doing so, however, it ordered the trial court to consider the possibility of the husband dying before the rights became presently payable in framing its decree.[138]

Subjecting the pension rights to division would seem to be the more desirable rule since the valuable asset is thus made available to both spouses. Under most equitable distribution schemes, however, whether the pension rights are supposed to be considered in making the distribution is irrelevant. Among the factors to be considered by a court in making an equitable distribution of property is the likely future income or earning capacity of the parties.[139] Thus, even if pension rights are excluded from the property subject to equitable distribution, they remain an element of the future economic status of the parties, a factor to be considered by the court in making the division, or in awarding alimony.[140] Under any equitable distribution system, then, non-economic spouses rest their claim to an interest in the pension rights on their ability to paint a grim enough picture of their financial situation, and a rosy enough one of their spouse's, to woo the court to rule in their favor.

Whether pension rights are considered property subject to division thus will not determine the nature of the division. In either instance the

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[130] Mueller v. Mueller, 166 N.J. Super. 557, 400 A.2d 136 (1979).

[131] *Id.* at 560, 400 A.2d at 137.

[132] *Id.* at 558, 400 A.2d at 136.

[133] *Id.* at 560, 400 A.2d at 137.

[134] *Id.* at 561, 400 A.2d at 138. This same result was reached in White v. White, 136 N.J. Super. 552, 347 A.2d 360 (1975). In *White*, however, it was not clear if the employee spouse would receive a pension if he were fired. *Id.* at 554, 347 A.2d at 361. This uncertainty may account for the court's decision not to subject the pension rights to distribution.

[135] 151 N.J. Super. 515, 377 A.2d 697 (1977).

[136] *Id.* at 517, 377 A.2d at 698.

[137] *Id.* at 519, 377 A.2d at 699.

[138] *Id.*

[139] The New Jersey Supreme Court, in Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1976), listed such criteria. *Id.* at 211, 320 A.2d at 492. *See also* N.Y. DOM. REL. LAW § 236(B)(5)(d)(8) (McKinney 1977 & Supp. 1981), which lists "the probable future financial circumstances of each party," as a factor to be considered in dividing the property. *Id.* The Massachusetts statute also mandates that "in fixing the nature and value of the property, if any, to be so assigned . . . the court . . . shall consider . . . the opportunity of each of each for future acquisition of capital assets and income." MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1974).

[140] The court in *Mueller* characterized the issue in *Kruger* as whether a pension was

nonproperty-holding spouse has no enforceable legal interest but must rely upon the discretion of the court to provide him or her with a share of the property. This is essentially the position the spouse would be in under the old separate property system.

Furthermore, the inclusion of pension rights demonstrates the inherent costliness of equitable distribution. In order to give effect to the notion of partnership underlying the system, courts have searched for more and more assets to divide.[141] The assumption is that in order to provide for the propertyless housewife the court needs to be able to reach the maximum amount of the spouse's property.[142] Among the additional forms of property sought out are pension rights.[143] The problem, however, is that as one increases the amount of property available for division, one increases the costs of disposing of the matter. To include pension rights for distribution introduces a host of additional questions that require litigation; for instance, how such rights are to be valued and what the appropriate interests for each party in the property are. Ironically, as equitable distribution struggles to attain individualized justice, its flaws become ever more apparent.

Equitable distribution of pension rights, then, is flawed in several respects. Where the pension rights are to be included in property to be distributed, no interest is guaranteed to either spouse. If, however, pension rights are not subject to division, courts making a distribution must consider the rights as likely future income of the parties. In either instance the nonpension-holding spouse can only receive an interest in the pension if it is deemed equitable by the court. This situation is not unlike that of the nontitleholding spouse under the separate property system; one can only receive a share in the resources at the court's discretion. Finally, equitable distribution of pension rights illustrates the inherent costliness of the system. A fixed rule of equal division as to the property acquired during the marriage would give both spouses a real interest in the pension rights, while minimizing litigation and expenses.

The community property system of California provides such a rule. Under the California system, the court is to divide the community and quasi-community property of the parties equally.[144] Thus, if a pension right is property, it is to be divided equally to the extent it was acquired during the marriage. Pension rights which were not subject to any future contingencies have been held to be property and thus subject to division.[145] Non-vested pension rights were at one time considered mere expectancies and, therefore, not sub-

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"property" within the meaning of the statute, *or a source of income to be considered on the question of alimony*. 166 N.J. Super. at 558-59, 400 A.2d at 136-37. *See* Foster, *supra* note 10, at 39.

[141] GLENDON, NEW FAMILY, *supra* note 6, at 67.

[142] *Id.*

[143] *Id.*

[144] CAL. CIV. CODE § 4800(a) (West 1970 & Supp. 1981).

[145] In re Marriage of Wilson, 10 Cal.2d 851, 854, 112 Cal. Rptr. 405, 407, 519 P.2d 165, 167 (1974).

ject to division.[146] This result was, understandably, heavily criticized.[147] In effect, an employee spouse could obtain a divorce shortly before acquiring vested pension rights, thereby retaining for himself the entire amount of perhaps the most valuable asset of the marriage. Such a result contradicts the fundamental principle of community property: that the contributions of both spouses regardless of whether they are economically measurable, are to be taken as equal.[148]

The Supreme Court of California reconsidered whether non-vested pension rights constitute a property interest in *In Re Marriage of Brown* in 1976.[149] In *Brown* the court held that non-vested pension rights are a form of property, not a mere expectancy, and therefore, are subject to division.[150] An expectancy, according to the court, described the interest of an heir apparent, in the sense that he has no enforceable right to his benificence.[151] Non-vested pension rights, however, are a form of deferred compensation which arises from the employment contract in the same sense as the right to the present payment of a salary.[152] While payment of the pension may depend upon future contingencies, the employer can no more unilaterally renounce the pension plan than he can refuse to pay salaries.[153] Non-vested pension rights, therefore, constitute a chose-in-action, which is a form a property.[154] To exclude non-vested pension rights would create what the court called a "potentially whimsical result."[155] For instance, in *Brown,* the husband had acquired his interest in the pension plan over twenty-four years of marriage.[156] During this time, he had acquired 72 of the 78 points necessary for a vested pension under the plan.[157] By obtaining a divorce before acquiring the last six points necessary for the pension to vest, Mr. Brown could insure that he would receive the entire amount of an asset which had been acquired over a number of years by community effort.

The husband in *Brown,* however, did not deny the inequity of a rule which allowed him to enjoy the complete benefits of a pension acquired by the joint efforts of the spouses.[158] Rather, he argued that such an inequity could be ade-

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[146] French v. French, 17 Cal.2d 775, 776, 112 P.2d 235, 236 (1941).

[147] *E.g.*, Thiede, *The Community Property Interest of the Non-employee Spouse in Private Employment Retirement Benefits*, 9 U.S.F. L. REV. 635 (1975); Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HAST. L.J. 347, 354-56 (1973).

[148] See text and notes at notes 80-84 *supra*.

[149] In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

[150] *Id.* at 841-42, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). This result has been reached in other community property jurisdictions. Van Loan v. Van Loan, 116 Ariz. 272, 273, 569 P.2d 214, 215 (1977); Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); DeRevere v. DeRevere, 5 Wash. App. 741, 746, 491 P.2d 249, 252 (1971).

[151] 15 Cal.3d at 844-45, 544 P.2d at 565, 126 Cal. Rptr. at 637.

[152] *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

[153] *Id.*; *see* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA*, 25 U.C.L.A. L. REV. 417, 420 (1978).

[154] 15 Cal.3d at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

[155] *Id.* at 847, 544 P.2d at 567, 126 Cal. Rptr. at 639.

[156] *Id.*, 544 P.2d at 566, 126 Cal. Rptr. at 638.

[157] *Id.* at 843, 544 P.2d at 563, 126 Cal. Rptr. at 635.

[158] *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

quately redressed by a grant of alimony. In effect, the argument was based upon the principles of the separate property system, maintaining that the court should give the husband that which he had earned, and, if the wife was destitute, grant her a claim for alimony. The court rejected this argument, noting that while alimony lay within the discretion of the court, the wife should not be dependent on the exercise of discretionary powers to provide what is hers as a matter of right.[159]

Under *Brown*, non-vested pension rights constitute property to be divided to the extent they are part of the community.[160] The *Brown* court suggested that the risk that some contingency may fail to be met, and consequently, that the pension would not vest, should be shared by both the parties. Thus, no shares should be awarded until the pension is payable.[161] This approach has been widely accepted.[162] Thus, if the parties had been married for fifteen of the twenty years necessary for the pension to vest, 75% of the pension would be community property. Since the pension has not yet vested, however, payment will not be made until the twenty years are completed and the employee retires. The court will retain jurisdiction to make a proper division when all contingencies have been met.

To be sure, a system of fixed rules does not guarantee perfect results in all instances.[163] Such a system, nonetheless, recommends itself as the best available alternative.[164] In the area of divorce and property division one should approach the search for fairness *per se* with skepticism, and search for a system that accords with public policy and efficiency. It may be good public policy to recognize that the additional cost of finding those few instances where fixed rules are unfair is simply not worth bearing, given the high cost, unpredictability, and potentially whimsical nature of the system which will purportedly remedy those few situations.

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[159] *Id.* (citing In re Marriage of Peterson, 41 Cal. App.3d 642, 651, 115 Cal. Rptr. 184, 191 (1974)).

[160] See text and note at note 125 *supra*.

[161] 15 Cal.3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

[162] *See* Survey, *The Supreme Court of California 1975-76: Dividing the Community Property Interest in Non-Vested Pension Plans*, 65 CALIF. L. REV. 231, 275 (1976).

[163] For example, under the law of California, if one spouse held a large estate received by bequest prior to the marriage, while the other spouse worked and acquired a pension, a potential inequity would result. If the couple used the income from the wife's estate to live at an inflated standard of living, upon divorce the husband's pension might be subject to division, while the wife's estate would not be divisible, as it was acquired prior to the marriage. Thus, the relatively impecunious husband is forced to share perhaps his most significant resource, while the wealthy wife receives a windfall. Such an unreported case was recorded in Bruch, *The Definition and Division of Marital Property in California: Toward Purity and Simplicity*, The California Law Revision Commission, at 19.

[164] "It would seem that under present social and economic conditions in the United States the rule of choice should be the old community property rule of equal division, limited to property acquired by gainful activity during the marriage, in the absence of an agreement to the contrary. It is difficult to defend this as a rule of fairness . . . but . . . the equal division of acquests commends itself as a rule of convenience without substantial demerit." GLENDON, NEW FAMILY, *supra* note 6, at 63.

A system of fixed rules, then, gives each spouse a present interest in the pension rights that is not subject to the court's discretion. In doing so, the system provides each spouse with a share of what is likely to be among the most valuable marital assets. If marriage is to be viewed as a partnership, it is fitting that each of the partners share in the assets equally, rather than subject their interests to the court's discretion. Additionally, dividing the pension rights equally, to the extent they were acquired during the marriage, helps to minimize the litigation and expense involved in distributing property upon divorce. Each party knows its rights before proceeding to court, thus promoting settlement.

Where the division of the pension rights is within the court's discretion, the parties have an incentive to litigate, since a talented advocate can convince the court to make a favorable distribution. Finally, to divide the pension rights acquired during marriage equally is in accord with reasonable and widely held notions about the parties' obligations toward each other. In effect, the interests of the parties will be best served if they are able to resolve their affairs with a minimal amount of expense and unpleasantness and to arrive at a settlement that accords with the expectations of society and the parties themselves. A system of fixed rules is, on balance, the best method of achieving this objective.[165]

It is with this evaluation of the relative merits of equitable distribution and a system of fixed rules in mind that the scheme for the division of property contained in the Uniform Marital Property Act of 1981 (UMPA) will now be examined.

IV. Division of Marital Property in the Scheme of the Uniform Marital Property Act

The discussion draft of the Uniform Marital Property Act was promulgated and discussed by the National Conference of Commissioners on Uniform State Laws in 1981.[166] The Act creates two categories of property: individual and marital property.[167] The UMPA defines marital property as all

[165] There exists some possibility that the applicability of California community property law to pension rights will be pre-empted by the Employment Retirement Income Security Act [ERISA]. The United States Supreme Court has held that military pensions and pensions earned under the Railroad Retirement Act were inalienable. Thus California community property law could not award these pensions to the non-employee spouse. McCarty v. McCarty, 101 S.Ct. 2728 (1981) (military pensions); Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979) (pensions under the Railroad Retirement Act). It appears, however, that the policy goal of ERISA, to prevent the failure of private pensions plans, may not require the pre-emption of state marital property law. A decision of the California Court of Appeals holding that ERISA does not have preemptive effect, In re Campar, 89 Cal. App.3d 113, 152 Cal. Rptr. 362 (1979), was dismissed on appeal to the Supreme Court for lack of a substantial federal question. Carpenters Pension Trust Fund for No. Cal. v. Campar, 414 U.S. 1028 (1980).

[166] See note 7 *supra*.

[167] UMPA, §§ (a), (b). The UMPA defines individual property as the property of unmarried persons. *Id.* § 3(b). Individual property is further defined as property acquired by one spouse:

property acquired by either of both spouses during the marriage which is not the individual property of either spouse.[168] Individual property, in turn, is defined in very specific, narrow terms.[169] In addition, the Act establishes a presumption that all property of the spouses is marital property.[170] Therefore, for any property of a married couple to be individual property it must fit clearly into the definition provided by section three of the UMPA.[171] Another important feature of the UMPA is that it allows the parties to establish their own division of marital property through the use of antenuptial contracts.[172]

Individual and marital property are treated differently for the purpose of property division under the UMPA. Each spouse has a present undivided one half interest in the marital property.[173] The property must, therefore, be divided in equal proportions between the spouses, unless the court finds there are unusual and extraordinary circumstances that make an equal division unjust.[174] The concept of equal division is derived from an underlying thesis of the UMPA, that property acquired during the marriage can be considered

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(1) before marriage or at, incident to, or after, a marital termination; or
(2) during marriage:
(i) by gift from the other spouse;
(ii) by gift or a disposition at death from a third party to that spouse alone;
(iii) by provisions in a marital property agreement designating the acquired property as individual property;
(iv) in exchange for or with the proceeds of other individual property of that spouse;
(v) from appreciation of that spouse's individual property;
(vi) which is designated by a decree as the individual property of that spouse;
(vii) as compensation for personal injury to that spouse by a third person, except to the extent that it is compensation for loss of earnings during marriage or for medical expenses incurred during marriage;
(viii) as compensation for interspousal personal injury or for injury caused wholly or in part by the other spouse;
(ix) as compensation to that spouse for a loss which accrues to that spouse for injury caused by a third party to the other spouse; or
(x) as compensation for personal injury to that spouse by a third person which occurred prior to marriage which is received during marriage.

[168] UMPA § 3(d).

[169] UMPA § 3(d), in listing forms of marital property, does so "without limitation." *Id.*

[170] *Id.* § 5(a)(1).

[171] *Id.* § 3(c).

[172] *Id.* § 13(a)(1). Antenuptial agreements that were to take effect upon divorce, setting the amount of alimony or maintenance to be paid, were generally held to be invalid. *See* Norris v. Norris, 174 N.W.2d 368, 369-72 (Iowa 1970); Finchum v. Finchum, 160 Kan. 683, 688, 165 P.2d 209, 213 (1946); Hilbert v. Hilbert, 168 Md. 364, 375, 177 A. 914, 919 (1935); French v. McAmery, 290 Mass. 544, 546, 195 N.E. 714, 715-16 (1935). A change in public policy, however, in the form of decreased opposition to divorce, and decreased emphasis on the preservation of marriage, has lead to a line of cases upholding such agreements. *See* Osborne v. Osborne, 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810 (1981); Parniawski v. Parniawski, 33 Conn. Supp. 44, 46, 359 A.2d 719, 720 (1976); Posner v. Posner, 257 So.2d 530, 534 (Fla. 1972); Volid v. Volid, 6 Ill. App.3d 386, 392-93, 286 N.E.2d 42, 47 (1972). The validity of such contracts, however, is subject to rather close scrutiny. *See* Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 147-54 (1978).

[173] UMPA § 3(e).

[174] *Id.* § 16(b).

"ours" by the parties, and that consequently, each spouse should possess a present vested interest in the marital property.[175]

Unlike marital property, individual property is to be divided between the spouses on the basis of an equitable apportionment.[176] An equal apportionment is presumed to be equitable.[177] This presumption is, however, less strong than the presumption as to marital property.[178] Consequently, the court is to consider a series of statutory factors in deciding exactly how to apportion the individual property of the spouses.[179] In the event the division of both marital and individual property has failed to take account of the respective interest of the spouses in an equitable manner, the court is given the additional power to award a money judgment to one spouse for contributions made to the increased earning power of the other spouse.[180] Finally, the UMPA allows the court wide discretion in the technical aspects of effecting a division.[181]

The UMPA treats marital property in a sound manner. By providing each spouse with a vested one-half interest in marital property, the UMPA is attempting to give substance to the legal conception of marriage as a partnership of equals. While under equitable distribution both parties have potential interests in the property acquired during the marriage, those interests are not vested in any meaningful sense, in as much as they are dependent upon the exercise of judicial discretion. This establishment of vested rights in marital property is the major reform proposed by the UMPA. The spouses' rights in the property are acquired and perfected during the marriage, and need not come into being as the result of a court ordered transfer.[182] The contributions of the parties to the marriage are taken to be equal, and consequently the gains and losses which result from the economic decisions made by the spouses are divided equally between them. The property acquired by the parties during the marriage can thus be divided without recourse to litigation, at a minimal amount of expense and a maximum amount of predictability.[183]

The UMPA's treatment of individual property, however, is subject to criticism. The Act, in effect, subjects individual property to equitable distribution. This has the apparent advantage of imparting flexibility to the legislative scheme. Flexibility is desirable, for instance, where one spouse has made a substantial expenditure of effort on individual property which resulted in the diminution of the marital property in such a situation the court may transfer

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[175] *Id.*, pref. note, at vi.

[176] *Id.* § 16(c).

[177] *Id.*

[178] *Id.*, pref. note, at vi.

[179] *Id.* § 16(c) 1-13. These factors are essentially the criteria for equitable distribution found in most statutes. See text and note at note 3 *supra*.

[180] *Id.* § 16(d).

[181] *Id.* § 16(e).

[182] *Id.*, pref. note, at iv.

[183] To this end, marital fault is excluded from consideration in the division of property. *Id.* § 16(b).

individual property from one spouse to another, in order to prevent waste.[184] However to offset property in an equitable apportionment undermines the advantages of a fixed rule of division for marital property. Equitable distribution as to part of the property to be divided amounts to equitable distribution of the entire amount. For instance, if after the marital property has been divided in half, the court feels one of the parties is overcompensated, it can make an award from the individual property of that spouse to eliminate the perceived unjust enrichment. Thus, the guarantee of one-half interest in the marital property depends, in a sense, upon a party having no individual property which can be offset against that amount. Where significant individual property exists in both spouses, the effect is to reinstate equitable distribution to the entire amount of property to be divided.

The ability of the court to respond so flexibly to the division of property might seem an advantage, since it arguably allows for individualized justice. As the discussion of equitable distribution indicated, however, the uncertain quest for individualized justice demands increased costs, spurs litigation and renders unpredictable results. It is more in keeping with the underlying principles of the UMPA for the separate property not be subject to division.[185] The property to be divided should be limited to marital property.

The appropriateness of excluding individual property from distribution upon divorce is especially clear in marriages of short duration. The separate property of each spouse would stay with that spouse, and the presumably limited amount of marital property would be divided equally. Given the growing conception that marriage does not involve a lifelong financial obligation,[186] it is wise to allow the parties to extricate themselves from a short-term marriage as painessly and inexpensively as possible. In fact, to allow the individual property of the spouses to be divided in short-term marriages is to encourage a windfall to one spouse. This result would obtain especially where one of the spouses has a significant amount of individual property. Although the spouses leave the marriage in greatly differing economic situations, to equalize these situations by dividing the individual property of the wealthier spouse would not be logical since the spouses presumably only made joint economic decisions and shared gains and losses for a short time. Thus, removing individual property from a division in short-term marriages is unlikely to work a hardship upon either party. Such a rule prevents windfalls in the form of transfers of individual property, comports with the reasonable expectations of the parties, and most importantly, avoids imposing the costs associated with equitable distribution.[187]

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[184] *Id.* § 16(c)(12). *See also* CAL. CIV. CODE § 4800(b)(2) (West 1970 & Supp. 1981).

[185] *See, e.g.*, CAL. CIV. CODE §§ 4805, 4806 (West 1970 & Supp. 1981).

[186] GLENDON, NEW FAMILY, *supra* note 6, at 54-55.

[187] The major possible problem in short term marriages where individual property is not subject to division, exists where one spouse foregoes economic opportunity so that the other may become qualified in a high paying profession. The UMPA makes a special provision for such a

As the length of the marriage increases, so presumably will the amount of marital property. Thus, the amount of property to be divided upon divorce will increase and the importance of separate property will diminish. It is in those marriages of longer duration where one spouse has considerable individual property, but little marital property exists, that one might expect removing the individual property from division to create a hardship. Such a rule seems to allow a wealthy spouse to live off the marital wealth for the duration of the marriage while preserving his or her own individually held assets. The scheme of the UMPA militates against this result, however, rendering the costs of dividing individual property greater than its benefits. Because the Act has an inclusive definition of marital property,[188] excluding the individual property of the parties is unlikely to foster harsh results. For instance, under the Act, the income from individual property is marital property.[189] Thus, in any longterm marriage where there is a large amount of individual property, one would expect there also to be a considerable amount of marital property. Rights acquired under pension plans are also considered marital property under the UMPA.[190] Thus, the Act creates the likelihood that no matter what level of income, or amount of assets possessed by the spouses, a significant part will be marital property. As such, the UMPA prevents unjust results without committing individual property to equitable distribution and its concomitant costs.

The UMPA is a valuable attempt at reform inasmuch as it creates a category of marital property and makes such property subject to a strong presumption of equal division. Such a presumption limits the discretion of the trial judge, and imposes a form of fixed rules for division of property. Thus the UMPA is a step toward the creation of enforceable legal interests in both spouses in the marital property. Similarly, the imposition of fixed rules may help create a system which accords with the reasonable expectation of the parties. Perhaps most importantly, this presumption of equal division of marital property enhances the predictability of the system, and diminishes the costs of property divisions to both litigants and society.

The UMPA's imposition of equitable distribution for individual property, however, serves to undermine the usefulness of the Act's reforms. The scheme imports to the UMPA the uncertainty and high costs inherent in equitable distribution. Given the trade-off between the speculative benefits afforded by equitable distribution in the form of flexibility and individualized justice, and the costs involved in the system, the UMPA should adopt a fixed rule of excluding the individual property of the spouses from division. Such a rule would

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situation, allowing for a money judgment to be given to adjust the interests of the spouses. UMPA § 16(d). While this provision would seem to be merited by the equities of the situation, it may amount to recognizing a property interest in graduate education. This approach poses complex problems of its own. *See* In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978).

[188] UMPA § 3(d). See text and notes at notes 168-69 *supra*.

[189] *Id.* § 3(d)(1).

[190] *Id.* § 3(d)(2).

serve the interests of the spouses in resolving the litigation without undue expense or delay, accord with the reasonable expectations of the parties, and avoid the costs inherent in equitable distribution.

CONCLUSION

Three distinct approaches have been applied to the division of property upon divorce: the separate property system, equitable distribution, and a system of fixed rules. The separate property system, with its myopic focus on legal title, proved inadequate, primarily because of its inability to take account of the non-economic contributions of spouses, especially traditional housewives. In an attempt to remedy the failures of the separate property system, equitable distribution has been widely adopted. This system, however, imposes high costs upon both litigants and society in what may be an unproductive search for individualized justice. A system of fixed rules with a presumption of equal division as to property acquired during the marriage is a preferable alternative. Such a system serves the interest of litigants since it reflects reasonable and widely held assumptions about the nature of marriage. Furthermore, a fixed rule system provides a property division method that is inexpensive, predictable, and able to minimize the need for litigation. Given the advantages of fixed rules for the division of property, the attempt by the Uniform Marital Property Act to impose such a rule as to property acquired during the marriage represents a valuable attempt at reform. The Act, however, undermines this reform by adopting equitable distribution as to the individual property of the spouses. Such a scheme needlessly reintroduces the considerable costs of equitable distribution to the system. It is suggested that the UMPA should remove individual property from division, thus further simplifying the process of dividing property upon divorce.

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