

THE INEQUITY OF EQUITABLE DISTRIBUTION: AN EDITORIAL

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

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

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

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

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

² 65 N.J. 196, 320 A.2d 484 (1974).

³ *Id.* at 213, 320 A.2d at 493.

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

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

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

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

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

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

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

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

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

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

¹² *See supra* note 1.

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

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

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

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

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

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

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

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

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

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

¹⁶ *Id.* at 113, 113 A.2d at 1177.

¹⁷ 65 N.J. 219, 320 A.2d 496 (1974).

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

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

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

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

¹⁸ *Id.* at 228-29, 320 A.2d at 501.

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

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

[Numbers in thousands]

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

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

²⁰ *Id.*

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

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

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

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

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

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

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

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

²³ 83 N.J. 139, 416 A.2d 45 (1980).

²⁴ *Id.* at 156, 416 A.2d at 54.

²⁵ 83 N.J. 139, 416 A.2d 45 (1980).

²⁶ *Id.* at 156, 416 A.2d at 54.

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

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

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

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

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

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

²⁹ *Id.*

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

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

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

³³ N.Y. Times, April 4, 1981, at 21.

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

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

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

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

³⁴ *Gibbons*, *supra* note 15.

³⁵ *Id.* at 114, 415 A.2d at 1178.

³⁶ *Gibbons*, *supra* note 15.

³⁷ *Id.* at 119, 415 A.2d at 1180.

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

³⁹ *Id.* at 248, 387 A.2d at 1214.

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

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

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

⁴¹ *Id.* at 258-60.

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