DIVORCE—NEW JERSEY COURTS MAKE FIRST EQUITABLE DISTRIBUTIONS OF PROPERTY UNDER NEW DIVORCE ACT—*Sanders v. Sanders*, 118 N.J. Super. 327, 287 A.2d 464 (Ch. 1972); *Painter v. Painter*, 118 N.J. Super. 332, 287 A.2d 467 (Ch. 1972).

After almost thirteen years of marriage, Nathan Sanders was granted an absolute divorce on his counterclaim against Helga Sanders on the grounds of her desertion.[1] In a supplementary hearing the principal marital property, a house purchased exclusively with Nathan Sanders' funds following the marriage, was awarded to him despite the fact that it was owned by him and his wife as tenants by the entirety. Title in fee simple was vested in him, and Helga Sanders was divested of all right, title and interest in the property.[2] The court refused to follow prior decisions which held that upon decree of divorce, a tenancy by the entirety became a tenancy in common, subject to partition,[3] with a one-half interest vested in the wife.[4] In determining what was an "equitable distribution" of the property, the *Sanders* court considered such factors as the health, age and disabilities of the parties, their respective contributions to acquisition, support and maintenance of the property during the marriage, and the fault of the parties leading to the dissolution of the marriage.[5]

When Stephen Painter divorced his wife, Joan, after nineteen years of marriage and three children, the court assigned to each of them one-half of the value of the house which they held as tenants by the

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1 Sanders v. Sanders, 118 N.J. Super. 327, 287 A.2d 464 (Ch. 1972).

2 *Id.* at 332, 287 A.2d at 467.

3 In New Jersey it has uniformly been held that a cotenant has an absolute right, absent an agreement to the contrary, to force a partition and sale of the real property so held. Drachenberg v. Drachenberg, 142 N.J. Eq. 127, 134, 58 A.2d 861, 865 (Ct. Err. & App. 1948); Wujciak v. Wujciak, 140 N.J. Eq. 487, 489, 55 A.2d 164, 165 (Ch. 1947).

4 *See* Ross v. Ross, 35 N.J. Super. 242, 113 A.2d 700 (Ch. 1955); Baker v. Kennerup, 102 N.J. Eq. 367, 140 A. 681 (Ch. 1928).

5 118 N.J. Super. at 329, 287 A.2d at 465-66:

> We find that taking into consideration all the facts and circumstances of this case—the equities of the parties, the course of conduct of the parties on acquisition, support and maintenance of the marital abode over the years, the age, health and infirmities of the parties, her abandonment of the marital abode and the marital status (and indeed the marriage, which was the only reason for her enjoying an interest in the title to the premises)—such rigorous relief as sought and provided under the old law of distribution of marital property upon divorce would, in this case, be inequitable, unjust and unconscionable.

At the time of the hearing Nathan Sanders was a sixty-seven year old retired merchant seaman living on Social Security. His ability to supplement his income was limited by failing eyesight and other disabilities of approaching old age. Helga Sanders, age 47, was planning remarriage and would need little outside financial support. *Id.*

entirety.[6] Certain assets were set aside as not available for distribution, such as property owned prior to the marriage or received by gift or inheritance. Joan Painter's jewelry was also not distributed, because it was of small value.[7] The furnishings and fixtures of the marital home were awarded to her because she was given custody of the children. The husband's separate assets available for distribution were valued at $82,571 and the wife's at $58,199. In the exercise of its equitable judgment, the *Painter* court awarded $4,874 (20% of the difference) to the wife.[8] This grant was the result of the consideration by the court of such factors as the length of the marriage, the amount of time the parties had lived together, the number of children, the party who was to receive their custody, and the relative health of the parties.[9] Most of these factors, because of the different fact situations, had not been considered by the *Sanders* court.

Sanders v. Sanders and *Painter v. Painter* are the first reported decisions concerning property distribution under the recently enacted New Jersey Divorce Act.[10] They are significant because New Jersey courts, prior to the Act, had not been empowered to transfer property in a divorce settlement without an agreement between the parties.[11] Since there was no precedent in this state to aid the courts in defining "equitable distribution," they exercised wide discretion, and looked to other jurisdictions with similar laws to determine the unique equities in each case and to distribute the property accordingly.

Prior to the adoption of the new Act, the law made provision for alimony and maintenance of the wife, and the care, custody, education and maintenance of the children.[12] It made no provision for distributing

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6 Painter v. Painter, 118 N.J. Super. 332, 337, 287 A.2d 467, 469 (Ch. 1972).

7 *Id.* N.J. STAT. ANN. § 37:2-14 (1968) provides:

> The paraphernalia of a married woman, being the suitable ornaments and wearing apparel of a married woman, which have come to her through her husband during coverture, shall be her separate property as if she were a feme sole.

8 118 N.J. Super. at 337, 287 A.2d at 469-70.

9 The defendant, Joan Painter, was recovering from a cancer operation and the likelihood of a complete recovery was still in question. *Id.* at 335, 287 A.2d at 468. The court cited Messer v. Messer, 289 Minn. 449, 184 N.W.2d 801 (1971) in determining the factors to be considered.

10 N.J. STAT. ANN. § 2A:34-23 (Supp. 1972-73) provides in part:

> In all actions where a judgment of divorce or divorce from bed and board is entered 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.

The statute went into effect September 13, 1972.

11 Calame v. Calame, 25 N.J. Eq. 548, 551-52 (Ct. Err. & App. 1874).

the marital assets. Since the century-old holding in *Calame v. Calame*[13] that a court of equity could not transfer property from one party to the other in a divorce proceeding without an agreement between the spouses, there have been no "lump sum" alimony awards in New Jersey without such an agreement.[14] However, the courts have rendered decisions concerning the ownership of the property of the marriage.[15]

An explanation of tenancy by the entirety and its development in New Jersey is necessary in order to understand the prior holdings of New Jersey courts with respect to the distribution of real property upon divorce.[16] At common law the husband and the wife were considered one, and that one was the husband, that is, the legal identity of the wife was totally merged into that of the husband.[17] When property was conveyed to husband and wife during coverture, a tenancy by the entirety was created[18] and each was seized *per tout et non per my*.[19] This means that each one owned the whole rather than an undivided part. Upon the death of one spouse, the surviving spouse still owned the entire estate.[20] The husband had complete control of the property of the marriage, including any property brought by the wife to the marriage,[21] and his rights of possession and survivorship were subject to execution for his debts, but not for those of his wife.[22] Since the estate by the entirety existed only between husband and wife, a similar conveyance to two unmarried persons would result in a tenancy in common.[23] Therefore, upon dissolution of the marriage, the tenancy by

12 N.J. STAT. ANN. § 2A:34-23 (1952), *as amended*, N.J. STAT. ANN. § 2A:34-23 (Supp. 1972-73) (emphasis added), provided in pertinent part:

> Pending any matrimonial action brought in this state or elsewhere, or after judgment of divorce or maintenance, whether obtained in this state or elsewhere, the court may make such order as to the alimony or maintenance of the *wife*, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders.

13 25 N.J. Eq. 548, 551-52 (Ct. Err. & App. 1874).

14 Tischler, *Distribution Of Property Upon Divorce*, 94 N.J.L.J. 1109 (1971) (citing Parmly v. Parmly, 125 N.J. Eq. 545, 5 A.2d 789 (Ct. Err. & App. 1939)).

15 *Id.*; *see, e.g.*, Buttlar v. Rosenblath, 42 N.J. Eq. 651, 9 A. 695 (Ct. Err. & App. 1887).

16 In New Jersey personal property may not be owned as tenants by the entirety. *In re* Estate of Hamilton, 108 N.J. Super. 106, 110, 260 A.2d 232, 234 (App. Div. 1969).

17 4 G. THOMPSON, REAL PROPERTY § 1784, at 47 (repl. 1961).

18 J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 92 (1962).

19 Kip v. Kip, 33 N.J. Eq. 213, 215 (Ch. 1880); BLACK'S LAW DICTIONARY 1294 (4th ed. 1951).

20 Phipps, *Tenancy by Entireties*, 25 TEMPLE L.Q. 24, 25 (1951).

21 Comment, *Weeding Out the Troublesome Plant of Tenancy by the Entirety*, 2 SETON HALL L. REV. 415, 416 (1971).

22 *See* J. CRIBBET, *supra* note 18, at 93-94; Phipps, *supra* note 20, at 25.

23 A joint tenancy and a tenancy in common are distinguished from each other by

the entirety would also be dissolved and become either a joint tenancy or a tenancy in common, depending upon the policy of the particular jurisdiction.[24] In addition to absolute divorce, a tenancy by the entirety could be terminated by death or joint conveyance.[25] The purpose of the estate was to preserve the marital property in the hands of the decedent's family[26] and to protect it from attachment by creditors to satisfy the improvident debts of one spouse.[27]

In the middle of the nineteenth century almost all state legislatures enacted Married Women's Property Acts.[28] These Acts abolished the common law rule that the husband was entitled to exclusive use and possession of property held in tenancy by the entirety during the joint lives of husband and wife, and gave wives control over their separate property.[29] Some state courts held that the Acts destroyed tenancy by the entirety. They reasoned that since the estate was dependent upon the dominion of the husband over the wife, her emancipation, which gave her the right to own and control a separate estate, necessarily eliminated the husband's control.[30] Therefore, the basis for the estate was also necessarily eliminated. In New Jersey it was held that the estate still existed, the effect of the Act being merely to place the wife on an equal footing with the husband.[31] Subsequently, in *Zanzonico v.*

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the right of survivorship which was, at common law, inherent in a joint tenancy but not in a tenancy in common. In a joint tenancy, when one tenant dies, the surviving tenant is presumed to own the whole "freed from the former's rights in the property," thus excluding any heirs of the deceased from receiving an interest in the property. For this reason some states do not allow joint tenancies at all and many have passed statutes which require that if the right of survivorship is to attach, then the intent of the parties to that effect must be expressly stated in the instrument or deed. J. CRIBBET, *supra* note 18, at 94-97.

24 Sbarbaro v. Sbarbaro, 88 N.J. Eq. 101, 102 A. 256 (Ch. 1917). *But see* Killgo v. James, 236 Ark. 537, 367 S.W.2d 228 (1963) (In this case the husband died following the final decree of divorce but prior to the sale of the house owned as tenants by the entirety. The court held that the tenancy by the entirety was not terminated by the divorce, but continued in existence so that the wife became the owner of the estate upon the death of the husband.); Benson v. United States, 442 F.2d 1221 (D.C. Cir. 1971) (The District of Columbia statute, D.C. CODE ANN. § 16-910 (1967), allows a tenancy by the entirety to continue after final decree of divorce.)

25 Thomas v. De Baum, 14 N.J. Eq. 37 (Ch. 1861); Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951); 4 G. THOMPSON, REAL PROPERTY § 1792, at 101 (repl. 1961).

26 Comment, *supra* note 21, at 423.

27 J. CRIBBET, *supra* note 18, at 93.

28 Comment, *supra* note 21, at 418.

29 Kip v. Kip, 33 N.J. Eq. 213, 215 (Ch. 1880).

30 Phipps, *supra* note 20, at 28-29 (listing Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina and Wisconsin as states which held that the Married Women's Property Acts destroyed the tenancy by the entirety).

31 Buttlar v. Rosenblath, 42 N.J. Eq. 651, 653, 9 A. 695, 696 (Ct. Err. & App. 1887). There is nothing in the married women's act which indicates an intention

Zanzonico, it was decided that the right of survivorship of the wife was not subject to attachment by her creditors during the joint lives of husband and wife.[32] In overruling this decision the New Jersey Supreme Court, in *King v. Greene*,[33] stated:

> [I]f the wife takes equal rights with the husband in the estate, she must take equal disabilities. Such are the dictates of complete equality. Thus, the judgment creditors of either spouse may levy and execute upon their separate rights of survivorship.[34]

This decision has had the effect of modifying the definition of a tenancy by the entirety in New Jersey so that it is now interpreted "as a tenancy in common between the spouses for their joint lives with remainder in fee to the survivor."[35]

Twenty-nine states do not have tenancy by the entirety,[36] and its abolition in New Jersey in favor of a joint tenancy has been strongly urged.[37] Those jurisdictions which retain tenancy by the entirety, New Jersey among them, generally have held that upon divorce the estate

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> to exclude this estate wholly from its operation. I think, therefore, that the just construction of this legislation, and the one in harmony with its spirit and general purpose, is that the wife is endowed with the capacity, during the joint lives, to hold in her possession, as a single female, one-half the estate, in common with her husband, and that the right of survivorship still exists as at common law.

Id. at 657, 9 A. at 698.

32 24 N.J. Misc. 153, 157, 46 A.2d 565, 568 (Sup. Ct. 1946).

33 30 N.J. 395, 153 A.2d 49 (1959).

34 *Id.* at 412, 46 A.2d at 60. *See also* Dvorken v. Barrett, 100 N.J. Super. 306, 241 A.2d 841 (App. Div. 1968).

35 Comment, *supra* note 21, at 419 (citing King v. Greene, 30 N.J. 395, 412, 153 A.2d 49, 59 (1959) and Zubler v. Porter, 98 N.J.L. 444, 446, 120 A. 194, 195-96 (Ct. Err. & App. 1923)).

36 Phipps, *supra* note 20, at 32.

37 The major objections to the estate by the entirety were set forth by Justice Hall and Chief Justice Weintraub in their dissenting opinions in King v. Greene, 30 N.J. 395, 153 A.2d 49 (1959), where Justice Hall stated:

> During coverture neither spouse "owns a separate, distinct interest in the fee; rather each and both as an entity own the entire interest. Neither takes anything by survivorship; there is nothing to pass because the survivor always has the entirety." . . . Thus the unity cannot be broken and the right of survivorship destroyed at law, presently or contingently, by unilateral action.

Id. at 420, 153 A.2d at 64 (Hall, J., dissenting) (quoting in part from Weintraub, C.J., dissenting).

> [J]oint tenancy today is almost exclusively a husband and wife holding. Joint tenancies between related persons other than husbands and wives are rare, survivorship arrangements between unrelated persons virtually nonexistent. Further, husband and wife joint tenancies dominate the whole area of cotenancy. If a cotenancy is created today, the chances are 9 out of 10 that it will be a marital joint tenancy.

Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582, 623 (1966).

becomes a tenancy in common.[38] In New Jersey this has been interpreted to mean that each spouse is entitled to receive an undivided one-half interest in the real property so held.[39]

In other jurisdictions where tenancy by the entirety still exists, the courts have usually found that upon divorce each spouse was entitled to an undivided one-half interest in the property held as tenants by the entirety[40] unless there was a direct showing to the contrary.[41] For instance, in the tax court case of *David R. Pulliam*,[42] the husband had transferred title to certain farmlands to his wife for the purpose of increasing his grain allotment. The tax court found that he was the equitable owner of the property since his intention had been merely to place title to the land in his wife's name and not to give her ownership thereof.[43] Fraud or undue influence has also been held to constitute a showing to the contrary.[44]

Since the enactment of the Married Women's Property Acts,[45] it has generally been held that the separate property of the wife is not part of the property which may be divided by the court in a divorce proceeding.[46] While the *Painter* court adhered to this general rule, the

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38 *See, e.g.*, Latta v. Latta, 121 So. 2d 42 (Fla. App. 1960); Madden v. Madden, 44 Hawaii 442, 355 P.2d 33 (1960); Eberle v. Somonek, 24 N.J. Super. 366, 94 A.2d 535 (Ch. 1953); Buttlar v. Buttlar, 67 N.J. Eq. 136, 56 A. 722 (Ch. 1904).

39 *See* Ross v. Ross, 35 N.J. Super. 242, 113 A.2d 700 (Ch. 1955); Baker v. Kennerup, 102 N.J. Eq. 367, 140 A. 681 (Ch. 1928).

40 Valentine v. Valentine, 45 So. 2d 885, 886 (Fla. 1950) ("The chancellor, by his decree, severed the marriage relationship and decided that the parties owned equal interests in the estate." But the court refused to partition, saying: "[I]t was for them to determine whether the property should be partitioned or whether one should purchase the interest of the other."); Walborsky v. Walborsky, 258 So. 2d 304 (Fla. App. 1972) (Upon divorce the court vested title held as tenants by the entirety in both parties as tenants in common with right to occupy the house in the wife, but was unable subsequently to require the husband to convey his undivided one-half interest to the wife.).

41 Latta v. Latta, 121 So. 2d 42 (Fla. App. 1960) (Upon a decree of divorce, unless there is a direct showing to the contrary, the wife will be the owner of a one-half interest in a tenancy by the entirety.).

42 39 T.C. 883 (1963), *aff'd*, 329 F.2d 97 (10th Cir. 1964).

43 39 T.C. at 884.

44 LeGendre v. Goodridge, 46 N.J. Eq. 419, 19 A. 543 (Ch. 1890).

45 New Jersey adopted a Married Women's Property Act in 1852. Law of March 25, 1852, ch. 171, [1852] N.J. Laws 407. The current statute provides:

> The real and personal property of a woman which she owns at the time of her marriage, and the real and personal property, and the rents, issues and profits thereof, of a married woman, which she receives or obtains in any manner whatever after her marriage, shall be her separate property as if she were a feme sole.

N.J. STAT. ANN. § 37:2-12 (1968).

46 *See, e.g.*, Ruppert v. Ruppert, 247 Wis. 528, 19 N.W.2d 874 (1945); Brenger v. Brenger, 142 Wis. 26, 125 N.W. 109 (1910).

Sanders court did not.[47] In order to distribute Helga Sanders' one-half interest in the marital property, the court relied on a series of cases decided under an old Wisconsin law[48] which allowed division and distribution of the separate property of the wife provided it had been derived from the husband.[49] It is not clear from the *Sanders* decision why this reliance was necessary. The New Jersey statute provides for distribution "of the property . . . legally and beneficially acquired by them or either of them during marriage."[50] The *Painter* court defined "acquired" to mean "attained by the individual by his own efforts." It went on to interpret the word as excluding any property received by gift, bequest, devise or descent. Property received in exchange for such property, acquired after decree of legal separation, excluded by valid agreement, acquired as a result of an increase on property held before the marriage, or received by gift, bequest, devise or descent was also excluded.[51] This view is substantiated by decisions under the old Wisconsin law,[52] but exclusion does not seem to be required by the New Jersey statute.

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47 Helga Sanders argued that she was entitled to her one-half interest in the tenancy by the entirety, but the court rejected this contention:

> [S]uch rigorous relief as sought and provided under the old law of distribution of marital property upon divorce would, in this case, be inequitable, unjust and unconscionable.

118 N.J. Super. at 329, 237 A.2d at 465-66.

48 WIS. STAT. ANN. § 247.26 (1957) provided in part:

> [A]nd the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband . . . .

This statute was recently amended to eliminate the bar to distribution of the wife's separate property, and has gone further than the New Jersey law in specifically providing for distribution of the property of either party acquired other than during the marriage. The Wisconsin statute now reads in pertinent part:

> The court may also finally divide and distribute the estate, both real and personal, of . . . *either party* between the parties and divest and transfer the title of any thereof accordingly, after having given due regard to the legal and equitable rights of each party . . . .

Ch. 220, § 12, [1972] Wis. Laws 203 (emphasis added).

49 Hartman v. Hartman, 253 Wis. 389, 34 N.W.2d 137 (1948) ("The estate which may be derived from the husband clearly includes property to which the wife holds title."). It seems unnecessary for the New Jersey court to cite authority for distribution of the property of the wife whether derived from the husband or acquired separately, since the new law specifically gives the court the right to distribute the property "both real and personal, which was legally and beneficially acquired by them or either of them during marriage." N.J. STAT. ANN. § 2A:34-23 (Supp. 1972-73).

50 N.J. STAT. ANN. § 2A:34-23 (Supp. 1972-73).

51 118 N.J. Super. at 336, 287 A.2d at 469 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1965)).

52 *See, e.g.*, Ruppert v. Ruppert, 247 Wis. 528, 19 N.W.2d 874 (1945); Brenger v. Brenger, 142 Wis. 26, 125 N.W. 109 (1910).

An equitable distribution of property need not necessarily be an equal distribution.[53] The determination of what is equitable is left to the discretion of the court based on the merits of each individual case.[54] The *Sanders* court looked to a Minnesota decision to find precedent for distributing *all* of the marital property to one party. In *Swanson v. Swanson*,[55] the defendant husband had contributed the entire amount toward the purchase of the marital home, but the plaintiff wife's earning capacity was limited by her physical condition. The court there held:

> In view of plaintiff's physical condition and limited earning capacity and all the other facts and circumstances presented in this case we can find no abuse of discretion in the trial court's award of the homestead to plaintiff free and clear of all claims of defendant.[56]

Both Minnesota, by statute,[57] and Wisconsin, by case law,[58] have rejected the application of minimum-maximum division formulas in favor of the more flexible standards of fairness and equity.

The *Sanders* decision is more similar in spirit to that of a federal district court in the District of Columbia than to earlier New Jersey decisions. In *Hipp v. Hipp*,[59] where there was a limited divorce decree, that court held that property owned by husband and wife as tenants by the entirety could be ordered sold or partitioned and awarded in part or in whole to one tenant.[60] The *Sanders* court

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53 Nace v. Nace, 104 Ariz. 20, 448 P.2d 76 (1968); Singer v. Singer, 489 P.2d 1053 (Colo. App. 1971); *see* Needel v. Needel, 15 Ariz. App. 471, 489 P.2d 729 (1971); Hyde v. Hyde, 169 Colo. 403, 457 P.2d 393 (1969); Tischler, *supra* note 14.

54 Hyde v. Hyde, 169 Colo. 403, 457 P.2d 393 (1969); Krohn v. Krohn, 284 Minn. 95, 98, 169 N.W.2d 389, 391 (1969); Husting v. Husting, 54 Wis. 2d 87, 194 N.W.2d 801 (1972); Leeder v. Leeder, 46 Wis. 2d 464, 175 N.W.2d 262 (1970); Lacey v. Lacey, 45 Wis. 2d 378, 173 N.W.2d 142 (1970).

55 243 Minn. 516, 68 N.W.2d 418 (1955). The decision in the case was based upon MINN. STAT. ANN. § 518.58 (1969) which provides:

> Upon a divorce for any cause, or upon an annulment, the court may make such disposition of the property of the parties acquired during coverture as shall appear just and equitable, having regard to the nature and determination of the issues in the case, the amount of alimony or support money, if any, awarded in the judgment, the manner by which said property was acquired and the persons paying or supplying the consideration therefor, the charges or liens imposed thereon to secure payment of alimony or support money, and all the facts and circumstances of the case.

56 243 Minn. at 518, 68 N.W.2d at 419 (1955).

57 The Minnesota statute imposing a limitation on the award to the wife of one-third of the value of the husband's real and personal estate was repealed in 1951. Law of April 6, 1901, ch. 144, § 4807, [1901] Minn. Laws 189 (repealed 1951).

58 Lacey v. Lacey, 45 Wis. 2d 378, 381-82, 173 N.W.2d 142, 144 (1970).

59 191 F. Supp. 299 (D.D.C. 1960).

60 *Id.* at 301.

awarded all the property of the marriage to one party, rejecting as too rigid the equal distribution required prior to the new statute.[61]

Of all the factors affecting an equitable distribution of property, economic contribution has been one of the most litigated and discussed.[62] Where the marriage follows the traditional pattern, husband and wife will be lifetime partners engaged in the business of caring for and raising a family. They will each contribute their equal shares to this endeavor, the wife as homemaker and the husband as wage earner supporting the family unit economically.[63] Ordinarily, the only money being contributed to the purchase of marital property will be money earned by the husband through his employment outside the home. The wife's compensation for her work will be the personal satisfaction of responding to the needs of husband and children and participating in their growth to success, none of which is readily translatable into economic value.[64] Herein lies the central problem of property distribution. If ownership of property is based entirely upon who actually earned the money for its purchase, then the wife, who has not been economically compensated for her labor inside the home, owns none of the property acquired during the marriage.[65] The point is most clearly drawn where property is in the name of one party as in the District of Columbia case of *Mazique v. Mazique*.[66] That court ignored the monetary value of the wife's homemaking duties and held:

> Where property is held solely in the name of one spouse, the other spouse must make a showing of a legal or equitable interest therein. Mere contribution to the maintenance of the household does not create an equitable interest.[67]

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61 118 N.J. Super. at 330, 287 A.2d at 466. The court was referring to the line of cases beginning with Calame v. Calame, 25 N.J. Eq. 548 (Ct. Err. & App. 1874), discussed *supra* p. 313.

62 *See, e.g.*, Johnson v. Johnson, 250 Minn. 282, 84 N.W.2d 249 (1957); Knutson v. Knutson, 15 Wis. 2d 115, 111 N.W.2d 905 (1961).

63 Tischler, *supra* note 14, at 1109.

64 *Cf.* Scott, *The Value of Housework—For Love or Money?*, Ms. [Magazine], July, 1972, at 56; *How Much is a Good Wife Worth?*, 14 AM. TRIAL LAWYERS ASS'N NEWS LETTER 147 (1971).

65 The inequities of such a situation may be ameliorated by recently suggested legislation. *See, e.g.*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Uniform Marriage and Divorce Act § 307, at 202-03 (1970) [hereinafter cited as Uniform Marriage and Divorce Act], which lists contribution "including the contribution of a spouse as homemaker," among the relevant factors to be considered in distribution of property. From an economic point of view, a woman would be much more secure financially if she worked outside the home and hired someone to take care of her house and children, since this would be an expense for the husband as well as the wife.

66 356 F.2d 801 (D.C. Cir. 1966).

67 *Id.* at 804.

Such decisions will hopefully be relegated to the status of anachronism as more jurisdictions recognize the insight recently expressed by the Wisconsin Supreme Court:

> The contribution of a full-time homemaker-housewife to the marriage may well be greater or at least as great as those of the wife required by circumstances or electing by preference to seek and secure outside employment.[68]

Contribution is only one of the factors considered by the courts and is rarely conclusive in itself.[69] Even where it is a major factor, the distribution need not be made in exact proportion to the economic contribution.[70] Except in community property states,[71] the wife's right to a portion of the marital property rests on the husband's duty of support rather than on any interest in the property acquired by virtue of her contributions as a housewife.[72] Furthermore, she may have no vested interest in the marital property at all.[73] An acquired interest in

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68 Lacey v. Lacey, 45 Wis. 2d 378, 383, 173 N.W.2d 142, 145 (1970).

69 Ruprecht v. Ruprecht, 255 Minn. 80, 96 N.W.2d 14 (1959); Swanson v. Swanson, 243 Minn. 516, 68 N.W.2d 418 (1955). On the other hand, an Oklahoma court has carried the weight assigned to contribution to the extreme in suggesting that contribution should be the sole factor considered in determining the equitable distribution of property. Bouma v. Bouma, 439 P.2d 198 (Okla. 1968).

70 Thompson v. Thompson, — Colo. App. —, —, 489 P.2d 1062, 1064 (1971) (It isn't "objectionable that an exact dollar amount of the husband's contribution cannot be determined from the testimony, as it is not a prerequisite to a fair and equitable division of property that such distribution be made in exact proportion to contribution of funds.").

71 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington are community property states. They all differ slightly in their application of the general rule.

> The term "community" implies an association of persons. The marital community is a group of persons consisting of husband and wife. . . . The community estate, like the tenancy by the entireties, prevails only between husband and wife, and is a legal consequence of a valid marriage.
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> . . . .
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> It is said that the community is a partnership in which the husband and wife own equal shares.

4 G. THOMPSON, REAL PROPERTY § 1951, at 318-19 (repl. 1961) (footnotes omitted).

72 United States v. Davis, 370 U.S. 65, 70 (1962):

> [T]he inchoate rights granted a wife in her husband's property . . . do not even remotely reach the dignity of co-ownership.
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> . . . Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof.

Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964) ("[T]he wife's rights during marriage do not vest in her an ownership of any part of the husband's property."); Thomas v. Thomas, 159 Conn. 477, 487, 271 A.2d 62, 66-67 (1970):

> [U]nder both our common law and by statute, a wife's share in her husband's estate pursuant to an award in the case of a divorce or legal separation is based upon a liability of the husband and not upon any property right of the wife such as coownership.

73 United States v. Davis, 370 U.S. 65, 70 (1962).

such property may be found if the wife has actually contributed skills and effort to a business enterprise.[74] While some courts have held that a transfer based solely on love and affection is not a sufficient consideration, a court in New Jersey has reached the opposite conclusion.[75] In the District of Columbia, the wife's interest in jointly held property "is deemed to be conditioned on her faithful performance of the marriage vows,"[76] while in Kentucky, a restoration statute simply provides that property obtained without valuable consideration by one party from the other through marriage shall be restored to the original owner upon dissolution of the marriage by divorce.[77] It has also been suggested that circumstances other than contribution, such as need, should only be considered with respect to alimony.[78]

Now that the New Jersey law allows transfers of property by the court upon decree of divorce, decisions in the state courts delineating the wife's interest in the marital property will be very important for federal income tax purposes. In common law jurisdictions, where the wife's interest in property acquired during the marriage is inchoate rather than vested, there has been a great deal of dispute as to whether property transferred as the result of a property settlement agreement in a divorce is a gift[79] or an exchange[80] for tax purposes. If the transfer is held to be a gift, the donor will have to pay a federal gift tax if the fair market value of the gift is more than $3,000 at the time of transfer.[81] The basis for the property in the hands of the donee will be that of the donor.[82] When the property is sold the donee will have

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74 Mills v. Commissioner, 442 F.2d 1149, 1151 (10th Cir. 1971).

75 LeGendre v. Goodridge, 46 N.J. Eq. 419, 426, 19 A. 543, 546 (Ch. 1890):

> [W]ithout such evidence [of incapacity, fraud or coercive influence], a deed which appears to have been executed under all the safeguards provided by law for the protection of the grantor against coercion and imposition, though voluntary, and supported by no consideration but love and affection, is entitled to stand on its own inherent strength. The grantee is not required to prove that it was fairly obtained.

76 Mazique v. Mazique, 356 F.2d 801, 804 (D.C. Cir. 1966).

77 KY. REV. STAT. § 403.060 (1962). *See* Swaim v. Commissioner, 417 F.2d 353 (6th Cir. 1969); Kivett v. Kivett, 312 S.W.2d 884 (Ky. 1958).

78 Note, *Domestic Relations: Relevant Factors in the Division of Jointly Acquired Property*, 23 OKLA. L. REV. 288, 292 (1970). *See* Durfee v. Durfee, 465 P.2d 161 (Okla. 1969) (The conditions of maintenance and financial support should not have been considered by the trial court, since the only relevant consideration is the effort of the parties in acquiring the property.); Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968) (needs of the parties should no longer be considered in effecting an equitable division of jointly acquired property); Bouma v. Bouma, 439 P.2d 198 (Okla. 1968).

79 *See* Heard v. Commissioner, 326 F.2d 962 (8th Cir. 1964).

80 *See* Badgett v. United States, 175 F. Supp. 120 (W.D. Ky. 1959).

81 INT. REV. CODE OF 1954, §§ 2501, 2503(b).

82 INT. REV. CODE OF 1954, §§ 1012, 1015.

to pay a capital gains tax based on the value of the property when originally purchased by the donor.[83] An exchange of property for release of marital rights will be treated as a sale and the basis to the wife will be the fair market value at the time of transfer. Consequently, when she sells the property, her taxable gain will be based on the value of the property at the time of the transfer. On the other hand, the husband will realize a taxable gain at the time of transfer if the property has appreciated in value.[84]

If the distribution is a division or partition between co-owners of property, there will be no taxable gain to either party.[85] This is the case in community property states or where property is jointly acquired.[86] However, if there has been a transfer of property from one party to the other, there may be a taxable gain to the transferor if the property has appreciated in value since its original purchase.[87] Conversely, if the property transferred has depreciated in value the transferor may not be allowed to claim a deduction for the loss. No deduction is allowed for loss as the result of a sale between related persons.[88] However, if the transfer of property occurs after entry of the final decree of divorce, the parties are no longer related and the prohibition may not apply.[89] Another method of avoiding this prohibition might be to sell the depreciated property on the open market and transfer the proceeds of the sale to the spouse.[90] This method is, of course, vulnerable to attack on the basis that it was done fraudulently, specifically to avoid the payment of tax.

In *Merrill v. Fahs*[91] and *Commissioner v. Wemyss*,[92] the tax court held that the release of dower or other marital rights in a property agreement does not constitute adequate consideration for gift tax

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83 INT. REV. CODE OF 1954, §§ 1051, 1201(b), 1221.

84 INT. REV. CODE OF 1954, §§ 1012, 2516.

85 Collins v. Oklahoma Tax Comm'n, 446 P.2d 290, 297 (Okla. 1968) (property settlement was a partition of jointly acquired property and not a taxable event).

86 Jointly acquired property is defined as "property accumulated by the joint industry, efforts, management, judgment, capacities, and earnings of both husband and wife during the marriage." 2 W. NELSON, DIVORCE AND ANNULMENT § 14.120, at 161 (2d ed. 1961) (footnote omitted).

87 Wallace v. United States, 439 F.2d 757 (8th Cir. 1971) (The absence of any co-ownership interest by the wife in the transferred stock prior to the divorce action required that the transaction be treated as a taxable event.).

88 INT. REV. CODE OF 1954, § 267(b)(1).

89 Schwartz, *Divorce and Taxes: New Aspects of the Davis Denouement*, 15 U.C.L.A. L. REV. 176, 180 n.25 (1967).

90 *Id.* at 193 n.99.

91 51 F. Supp. 120 (S.D. Fla. 1943), *rev'd*, 324 U.S. 308 (1945).

92 2 T.C. 876 (1943), *rev'd*, 144 F.2d 78 (6th Cir. 1944), *rev'd*, 324 U.S. 303 (1945).

purposes, so that transfers were subject to a federal gift tax.[93] In *Harris v. Commissioner*,[94] where the property was transferred by court decree rather than by agreement of the parties, the Court held that no gift tax could be imposed absent a promise or agreement. Finally, in *United States v. Davis*,[95] the United States Supreme Court stated:

> Any suggestion that the transaction in question was a gift is completely unrealistic. Property transferred pursuant to a negotiated settlement in return for the release of admittedly valuable rights is not a gift in any sense of the term.[96]

The Tax Court, in *Mesta v. Commissioner*[97] and *Halliwell v. Commissioner*,[98] decided that where property is transferred in a divorce property settlement, there could be no taxable gain to the husband because there was no way to measure the value of the marital rights released by the wife.[99] These two cases were reversed by the second and third circuits, on the theory that the value of the rights released was equal to the value of the property transferred.[100] In *Commissioner v. Marshman*,[101] the decisions in *Mesta* and *Halliwell* were rejected by the sixth circuit, again raising the question of the value of the release of the wife's marital rights. The question was finally settled by the

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93 Commissioner v. Wemyss, 324 U.S. 303 (1945); Merrill v. Fahs, 324 U.S. 308 (1945).

94 340 U.S. 106 (1950).

95 370 U.S. 65 (1962).

96 *Id.* at 69 n.6. INT. REV. CODE OF 1954, § 2516 provides:

> Where husband and wife enter into a written agreement relative to their marital and property rights and divorce occurs within 2 years thereafter (whether or not such agreement is approved by the divorce decree), any transfers of property or interests in property made pursuant to such agreement—
>
> (1) to either spouse in settlement of his or her marital or property rights, or
>
> (2) to provide a reasonable allowance for the support of issue of the marriage during minority,
>
> shall be deemed to be transfers made for a full and adequate consideration in money or money's worth.

But see Int. Rev. Reg. § 1.102-1 (1969), which states that an amount of principal paid under a marriage settlement is a gift. These two statements are apparently contradictory. *Quaere:* If by operation of a divorce decree, a spouse's inchoate interest in the property of the other is cut off, then just what are the marital rights released in exchange for the property? *Cf.* Draime v. Draime, 132 Ind. App. 99, 173 N.E.2d 70 (1961); Novak v. Novak, 126 Ind. App. 428, 133 N.E.2d 578 (1956); American Legion v. Smith, 45 N.J. Eq. 466, 17 A. 770 (Ch. 1889).

97 42 B.T.A. 933 (1940), *rev'd*, 123 F.2d 986 (3d Cir. 1941).

98 44 B.T.A. 740 (1941), *rev'd*, 131 F.2d 642 (2d Cir. 1942).

99 *Id.* at 748-49; *Mesta*, 42 B.T.A. at 940.

100 Commissioner v. Halliwell, 131 F.2d 642 (2d Cir. 1942); Commissioner v. Mesta, 123 F.2d 986 (3d Cir. 1941).

101 279 F.2d 27 (6th Cir. 1960).

holding in *United States v. Davis*,[102] that the exchange of property for the release of the wife's marital rights in an arm's length proceeding was an exchange of equal values.[103] The Court went on to hold:

> [T]he same calculation that determines the amount received by the husband fixes the amount given up by the wife, and this figure, *i.e.*, the market value of the property transferred by the husband, will be taken by her as her tax basis for the property received.[104]

In *Davis* there was a negotiated settlement. *Pulliam v. Commissioner*[105] has extended that holding to include property transferred by the court without an agreement between the spouses. Following the *Davis* rule, if property transferred pursuant to a divorce has increased in value, the husband will realize a gain subject to the federal capital gains tax.[106] The tax consequences to the husband will be the same as though a sale had occurred.[107] The receipt of the property by the wife, however, is not considered a taxable event.[108]

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102 370 U.S. 65, 72 (1962). The Court stated:

> It must be assumed, we think, that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged. . . . Absent a readily ascertainable value it is accepted practice where property is exchanged to hold . . . that the values "of the two properties exchanged in an arms-length transaction are either equal in fact, or are presumed to be equal."

See also Matthews v. United States, 425 F.2d 738, 749 (Ct. Cl. 1970). For a further discussion of Davis, see Schwartz, *supra* note 89; Recent Decision, *Marital Property Settlement Agreements—Wife's Marital Rights Presumed to Equal Fair Market Value of Property Exchanged Therefor*, 17 RUTGERS L. REV. 462 (1963).

103 370 U.S. at 72.

104 *Id.* at 73. Rev. Rul. 67-221, 1967-2 CUM. BULL. 63 states:

> Under the terms of a divorce decree and in accordance with a property settlement agreement, which was incorporated in the divorce decree, the husband transferred his interest in an apartment building to his former wife in consideration for and in discharge of her dower rights. The marital rights the former wife relinquished are equal in value to the value of the property she agreed to accept in exchange for those rights. *Held*, there is no gain or loss to the wife on the transfer and the basis of the property to the wife is its fair market value on the date of the transfer.

See also INT. REV. CODE OF 1954, § 1201(b).

105 39 T.C. 883 (1963), *aff'd*, 329 F.2d 97 (10th Cir. 1964).

106 Thomas v. Thomas, 159 Conn. 477, 271 A.2d 62 (1970).

107 Schwartz, *supra* note 89, at 180.

108 *But see* Mullock, *Divorce and Taxes*, 23 U. MIAMI L. REV. 736 (1969). Mullock's premise is that the wife obviously realizes a gain when property is transferred to her in a divorce settlement. Because there is no economic value placed on the services she performs, she cannot be said to be building up a basis for her marital rights equal to the value of the services performed. If that were so, then she should be taxed on the value of the rights acquired. This, however, is not done, and Mullock sees no reason, beyond public policy, for not taxing the wife upon distribution of property in a divorce settlement, and further suggests that the taxation of the husband in the same situation is inequitable.

In *Collins v. Oklahoma Tax Commissioner*,[109] the Supreme Court of Oklahoma held that the field of domestic relations "belongs exclusively to the state."[110] Therefore, the federal courts were bound to apply state property law in deciding the taxability of gain incident to a property settlement upon divorce.[111] As a result of the decision of the Oklahoma Supreme Court, the United States Supreme Court in *Collins v. Commissioner of Internal Revenue*,[112] vacated an earlier circuit court ruling which found a taxable gain to the husband,[113] and remanded the case for decision based on the finding of the Oklahoma Supreme Court.[114]

In a tenancy by the entirety situation such as existed in *Sanders* and *Painter*, the New Jersey courts have held that the wife had a vested interest in one-half of the marital property so held.[115] Since the holding in *Collins*, that the federal courts are bound to apply state law in the field of domestic relations,[116] if the wife's interest in the marital property is held by the New Jersey courts to be vested rather than inchoate, then the tax court should be precluded from finding a taxable transfer. But it has been suggested that in a similar situation, the Internal Revenue Service would probably trace the funds for acquisition of the property.[117] If the *Sanders* court had awarded the marital home to the wife, divesting the husband of his interest therein, the tax court would probably find a taxable gain to him if the value of his one-half of that property exceeded his original basis. The logical extension of this reasoning is that the transfer of property from Helga Sanders to her husband results in a taxable gain to her. Of course, if the wife has no vested interest in property transferred there will almost certainly be a finding of a taxable gain to the husband. The *Painter* court set aside property received by the wife by gift or in-

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109 446 P.2d 290 (Okla. 1968).

110 *Id.* at 294.

111 Huddleston v. Dwyer, 322 U.S. 232 (1944); Meredith v. Winter Haven, 320 U.S. 228 (1943).

112 393 U.S. 215 (1968). On remand, the court of appeals reversed the decision of the tax court. 412 F.2d 211 (10th Cir. 1969). Plaintiff had argued that the division of marital property in his divorce action was a division of property between co-owners. The tax court held that the division here was in satisfaction of a marital obligation and therefore the transfer of property was a taxable event. 46 T.C. 461 (1967).

113 Collins v. Commissioner, 388 F.2d 353 (10th Cir. 1968).

114 393 U.S. at 215.

115 Ross v. Ross, 35 N.J. Super. 242, 113 A.2d 700 (Ch. 1955); Baker v. Kennerup, 102 N.J. Eq. 367, 140 A. 681 (Ch. 1928).

116 446 P.2d at 294 (Okla. 1968).

117 Beck, *Tax Consequences Of Property Settlements Under The New Divorce Act*, 95 N.J.L.J. 605 (1972).

heritance as not available for distribution.[118] If New Jersey courts do not follow this general rule, they should be aware that the Internal Revenue Service will treat the distribution as a taxable transfer.[119]

By way of conclusion, one of the criteria considered by the *Sanders* court deserves mention here, particularly in light of the recent decision in *Chalmers v. Chalmers*.[120] The fact that Helga Sanders had deserted her husband weighed against her, but only as one of many other important factors.[121] In *Chalmers* the sole consideration in division of the marital property was the fault of the wife.[122] Mrs. Chalmers was awarded only twenty per cent of the assets of the marriage acquired prior to her adultery.[123] The court based its decision on a provision in the new law relating to the award of alimony, rather than on any provisions of the section on distribution of property. The alimony provision is as follows:

> In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.[124]

Other jurisdictions have held that fault should not be a consideration in the division of the property of the marriage. In *Yasulis v. Yasulis*,[125] the Wisconsin Supreme Court said that the division of an estate should not be used as a "means of punishment to the 'guilty party'."[126] The Iowa Supreme Court has gone even further, holding that the policy of their no-fault divorce law does not allow marital fault to be a consideration in either property division or alimony awards.[127] These two decisions are in accord with the proposed Uniform Marriage and Divorce Act, which states that:

> The court is directed not to consider marital misconduct, such as adultery or other non-financial misdeeds, committed during the marriage, in making its division.[128]

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118 118 N.J. Super. at 334, 287 A.2d at 468.

119 Collins v. Commissioner, 393 U.S. 215 (1968).

120 117 N.J. Super. 474, 285 A.2d 77 (Ch. 1971).

121 Sanders v. Sanders, 118 N.J. Super. 327, 328, 287 A.2d 464, 465 (Ch. 1972).

122 Chalmers v. Chalmers, 117 N.J. Super. 474, 285 A.2d 77 (Ch. 1972).

123 *Id.* at 478-79, 285 A.2d at 79.

124 N.J. STAT. ANN. § 2A:34-23 (Supp. 1972-73).

125 6 Wis. 2d 249, 94 N.W.2d 649 (1959).

126 *Id.* at 253, 94 N.W.2d at 651. *See also* Uniform Marriage and Divorce Act, *supra* note 65, § 307, at 178. In the preface to this section it is stated that, where possible, the marital property should be divided in the same manner as the assets of a partnership upon dissolution.

127 *In re* Marriage of Williams, — Iowa —, 199 N.W.2d 339 (1972).

128 UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 65, § 307, Comment, at 203-04.

It is a rare occurrence when a marriage breaks down based solely on the fault of one party. Moreover, the allotment of fault to one party or the other in a divorce is not a matter which easily falls within the judicial process, except on the most superficial levels of the controversy. The trend toward more flexible and humane divorce laws is an admirable one and the intention of the legislature should not be ignored nor taken lightly by the courts. There are no longer any rigid rules to be followed in New Jersey as to division of marital property in a divorce settlement. The courts are free to make whatever distribution they choose, based on the merits of each individual case, so long as that distribution is "equitable." Both the *Sanders* court and the *Painter* court have rendered decisions consistent with the intent and purpose of the new law. There is, however, a danger inherent in the exercise of such wide discretion by the court, and that is that the intention of the legislature may be controverted by an application contrary to their apparent efforts at liberalization. This was the situation in the *Chalmers* case. In order to avoid such decisions in the future, it is suggested that the present law be amended to include the directive in the comments following the Uniform Marriage and Divorce Act that the court is "not to consider marital misconduct" in dividing the marital property.

Decisions as to ownership of property such as *Davis*,[129] *Swaim v. Commissioner*,[130] and *Mazique*[131] have sociological ramifications not readily apparent. One of the principal tenets of the women's rights movement is that women should be compensated for their work in the home, receiving all the attendant benefits accruing therefrom. At the very least, the economic value of such work should be recognized upon dissolution of the marriage, so that the wife's interest in the marital property is treated as an earned interest rather than as a gift of duty of support. To remove the wife's dependency status and the husband's duty of support is to eliminate a basic inequity in the field of domestic relations. A marriage is a partnership. Must a woman be forced to work outside the home to gain recognition of her contribution to the acquisition of the marital property? Even so, the wife with education beyond high school will not be afforded this distinction. The value of her work will be based upon the value in the marketplace of the various jobs she performs, not a value commensurate with her ability and level of education.[132] It cannot be denied that in the United States, the worth

129 370 U.S. 65 (1962).
130 417 F.2d 353 (6th Cir. 1969).
131 356 F.2d 801 (D.C. Cir. 1966).
132 Scott, *supra* note 64.

of the work a person does is most often measured by the economic value placed on that work.

Ideally, it should be possible to substitute the word "spouse" for "husband" or "wife." But the dichotomy is too clearly drawn. The husband has a duty to support his spouse; except in cases of disability, the wife has no similar duty. Where one spouse does the work of maintaining the home and raising the children, it is almost always the husband who works outside the home and is paid for his labor. Therefore, because the laws and the courts treat husbands and wives differently, this distinction has necessarily been made.

The legislature has not chosen to provide guidelines for determining distribution of property upon divorce. The Uniform Marriage and Divorce Act[133] includes "contribution of a spouse as homemaker"[134] as one of the relevant factors to be considered by the courts when the property of a dissolved marriage is divided. Because the idea that the wife's services in the home are not economically valuable is so ingrained in the intellectual and emotional attitudes of the courts, the incorporation in the new law of a similar provision appears desirable.

Teel Oliver Rhett

133 UNIFORM MARRIAGE AND DIVORCE ACT, *supra* note 65, § 307, at 202.

134 *Id.* at 203.