Community Property in California

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Community Property in California

Eighth Edition

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For Donald, Rachel, Sarah, and Sean

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PREFACE

Now in its eighth edition, this book is intended to work on several levels. Most basically, it provides comprehensive coverage of California community property law, with a view toward preparation for the California bar examination and California practice, particularly in the areas of divorce, decedents' estates, and creditors' rights. Additionally, the scope and usefulness of the book extend beyond the borders of California. Every state now has some form of marital property system. California community property law, once viewed as an exotic and obscure area of local law, is currently considered one of the leading systems of marital property law. The book uses California law to examine the issues that face every marital property system. Because California community property law is more extensively developed than the marital property law of many other jurisdictions, it is a valuable aid for attorneys and legislators in sister states and other countries. Moreover, choice-of-law principles often require that sister-state probate and divorce practitioners have some familiarity with California community property law in order to serve clients formerly domiciled in California. Finally, because a law school course should focus on skills development as well as substantive law, the notes, questions, and problems that accompany the cases and text are intended to enable students to fully engage the material and to foster their professional development as attorneys, judges, and lawmakers.

The introductory chapter locates California community property law in the international and national landscape of marital property law. Throughout the book, the notes make comparative reference to the law of other jurisdictions, the Uniform Marital Property Act, and the American Law Institute's Principles of the Law of Family Dissolution. The introductory chapter also locates marital property law within the larger domain of family law. It explores the relationship between marital property law and support law, and surveys different approaches to family wealth allocation at the dissolution of a marriage, whether by divorce or death.

The development of California community property law provides abundant illustration of the interplay of social and legal change. Although the 1849 California Constitutional Convention adopted Spanish community property law principles in order to protect the interests of married women, the California legislature and courts initially constructed a marital property system as oppressive as the common law regime explicitly rejected by the constitutional convention. Women's progress toward formal, or de jure, sexual equality is reflected in a series of amendments from 1872 to

1975. Later, attention shifted from de jure equality to de facto equality, and the legislature sought to remedy de facto spousal inequality in a series of community property enactments that define the fiduciary responsibilities of a managing spouse and allow a non-managing spouse access to the community property.

Some of the most difficult marital property issues concern the classification of human capital and career assets. When community property law initially developed, personal wealth consisted largely of physical capital, usually agricultural land, which was made productive by relatively unskilled labor. Under such circumstances, a system that differentiated between earnings during marriage (community property) and earnings after dissolution (an earner's separate property) was conceptually sound and easy to administer. In more recent times, however, we tend increasingly to invest in ourselves and to rely on our human capital, usually in the form of education and vocational experience, to produce an ever-growing stream of income. To the extent that earnings after dissolution represent, in part, a return on human capital acquired during marriage (as contrasted with a return on postdissolution labor), the traditional classification rubric may seem inadequate. The issue is presented when, for example, a person acquires a professional education or business goodwill during marriage, but reaps the rewards of that acquisition after divorce. Closely related are the deferred compensation issues raised by pensions, disability benefits, severance pay, employee stock options, bonuses, and merit-based salary increases. The book closely and comprehensively examines the classification of career-related assets because they are the primary source of wealth for many persons and they pose a significant conceptual challenge for marital property law.

The study of community property law affords us an extended view of the most intimate relationship in American culture, the conjugal relationship. It is a subject to which we all bring personal experience, whether our own or that of our relatives and friends. Community property may cause us to reflect on how we might structure or restructure our present or future relationships. It also invites us to consider how we can best serve clients when their intimate relationships are terminated by separation, divorce, or death.

Readers familiar with the seventh edition will find that, in addition to updating all topics, the eighth edition adds a second prefatory note on the retroactive application of current community property legislation to events occurring before the effective date of that legislation. Wishing to make the text as readable as possible, I have re-edited cases to delete inessential material, multiple citations, and ellipsis marks that denote inconsequential omissions. In the light of electronic resources enjoyed by current law students, namely Westlaw and Lexis-Nexis, the rare student who wishes to read the entire case can readily do so.

Unlike prior revisions of the case book, preparation of the eighth edition has been difficult and vexing. The stumbling block has been a 2020 California Supreme Court decision, *In re Brace*, which upended more than half a century of community property law and left it in a state of disarray. The holding of *Brace* has created significant legal problems that require legislative repair. Besides the reparative issues, *Brace* destroys a premise of widely applicable current legislation, rendering it incoherent. From a pedagogical perspective, there are cautionary lessons to be drawn from the state in which *Brace* has left community property and real property law: namely, the value of adherence to stare decisis and the truth of the observation that the law is a seamless web.

Grace Ganz Blumberg

February 2021

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I. NOTE ON THE CALIFORNIA JUDICIARY AND CALIFORNIA APPELLATE STANDARDS OF REVIEW

This introductory note describes the structure of the California judiciary, the relationship among the three tiers of the judiciary, the reporting of cases, and the standards of appellate review exercised by California courts. The note is intended to enhance your understanding of the cases and the constraints that courts, particularly the California Courts of Appeal, experience when deciding a case.

The California judicial system is comprised of three tiers. Family law cases originate in Superior Court, a trial court. After the Superior Court issues a final judgment, an aggrieved party has an absolute right of appeal to the Court of Appeal, the intermediate appellate court. After the Court of Appeal issues its decision, an aggrieved party may petition the California Supreme Court for review. Whether to grant review is a matter of Supreme Court discretion, and the court rarely grants review in family law cases. When it does grant review, the decision of the Court of Appeal is said to be *superseded*.[1] Thus, the case comes to the Supreme Court directly from the trial court. The question before the Supreme Court is whether the trial court correctly decided the case.

In California, trial court decisions are not reported. Court of Appeal decisions are reported only in limited circumstances.[2] Thus, most Court of Appeal decisions are *unpublished*, although they may be read on Westlaw or Lexis. Even when a portion of a Court of Appeal opinion is published, the rest of the opinion may remain unpublished. The Supreme Court may subsequently *depublish* a published Court of Appeal opinion.[3] Unpublished, superseded, and depublished decisions of the Court of Appeal may not be cited as authority.[4] A published decision of the Court of Appeal appears in two reporters: California Appellate Reports, the official reporter, and California Reporter. The following citation indicates that the case was decided in the Court of Appeal: 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972). When the Supreme Court grants review of a published decision or depublishes a published decision, the opinion of the Court of Appeal is removed from the official California Appellate Reports; it remains only in California Reporter. Supreme Court decisions are reported in California Reports, the official reporter, Pacific Reports, and California Reporter. The following citation indicates that the case was

1. California Rules of Court, Rule 8.1105(e)(1).
2. California Rules of Court, Rule 8.1105(b), (c).
3. California Rules of Court, Rule 8.1105(e)(2).
4. California Rules of Court, Rule 8.1115.

decided by the California Supreme Court: 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

All lower courts are bound by decisions of the California Supreme Court. Decisions in one Court of Appeal do not bind other Courts of Appeal. When the Supreme Court does grant review, it is often to resolve conflicting decisions in the Courts of Appeal.

On appeal from the trial court, the California appellate courts exercise limited review of the trial court's findings of fact. If the findings are supported by *sufficient*, or *substantial*, evidence, they will be sustained on appeal. An appellate court will not reweigh the facts. It need only conclude that a reasonable trial court could have found as it did on the facts before it.[5] By contrast, if the issue presented is a matter of law, whether case law or statutory interpretation, the appellate court reviews the issue de novo. The distinction between deference to the trial court on findings of fact and de novo review on matters of law arises frequently in the casebook.

5. Other states permit their intermediate appellate courts to exercise de novo review of the facts as well as the law. See, for example, New York CPLR § 5501 and West's Oregon Revised Statutes Ann. § 19.415.

II. NOTE ON THE RETROACTIVE APPLICATION OF COMMUNITY PROPERTY LEGISLATION

The 1849 California Constitution directed the new California legislature to enact community property law.[6] Thus, community property law is largely a matter of statutory family law, as interpreted by the California judiciary. In the early 1990s the California Law Revision Commission recodified all community property statutes in the 1994 California Family Code, which is now governing law. Although the Family Code has been described as simply a recodification of existing law, it contained an important novation.

As a general rule, legislative *changes* in statutory law, as opposed to mere *clarification* of existing law, apply only prospectively unless the new legislation explicitly provides otherwise *and* retroactive application to events occurring earlier is constitutionally permissible.[7] For much of the history of California community property, the California judiciary routinely applied this principle to conclude that amendments to community property law affecting property and contract rights applied prospectively only. To hold otherwise, courts thought, would impair constitutionally protected property and contract rights.[8] Later, courts relaxed the application of the principle by allowing retroactive application of new law only when the legislation provided for retroactive application and retroactivity was supported by a compelling state interest.[9] Section 3 of the 1991 Probate Code and Section 4 of the 1994 California Family Code reversed the case law rule by providing that all amendments to the Probate Code and Family Code, including new legislation, apply retroactively *unless* the legislation specifically provides otherwise, subject to narrow exceptions and some degree of judicial discretion. *Velez v. Smith* contrasts the general rule and the 1994 Family Code rule:

> [T]he general directive in section 4 favors retroactive application of changes in the Family Code, despite the general rule that favors prospective application of changes in the law. Subdivision (c) of section 4 reads: "Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action." *The unambiguous intent of the Legislature gleaned from subdivision*

6. See Chapter II.

7. McClung v. Employment Development Dept., 34 Cal.4th 467, 475-477, 99 P.3d 1015, 20 Cal.Rptr.3d 428 (2004).

8. See, for example, Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934).

9. Marriage of Bouquet, 16 Cal.3d 583, 546 P.2d 1371, 128 Cal.Rptr. 427 (1976).

(c) is that amendments to the Family Code are intended to apply to past events unless, as specified in subdivision (b), the new law expressly provides otherwise, or the case fits into one of the particular exceptions enumerated in the remainder of section 4. (emphasis added).

48 Cal. App. 4th 1154, 1169-1171, 48 Cal. Rptr. 3d 642 (2008).

Section 4 provides:

(a) As used in this section:

(1) "New law" means either of the following, as the case may be:

(A) The act that enacted this code. [In other words, the entire 1994 Family Code. Ed.][10]

(B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date" means the operative date [January 1, 1994] of the new law.

(b) This section governs the application of the new law except to the extent otherwise expressly provided in the new law.

(c) Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.

(d) If a document or paper is filed before the operative date, the contents, execution, and notice thereof are governed by the old law and not by the new law; but subsequent proceedings taken after the operative date concerning the document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law. [Note that this section refers only to documents or papers filed in a legal action.]

(e) If an order is made before the operative date, or an action on an order is taken before the operative date, the validity of the order or action is governed by the old law and not by the new law. Nothing in this subdivision precludes proceedings after the operative date to modify an order made, or alter a course of action commenced, before the operative date to the extent proceedings for modification of an order or alteration of a course of action of that type are otherwise provided in the new law.

(f) No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.

10. The bracketed comments are inserted to clarify the meaning of portions of this legislation.

(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its repeal or amendment by the new law.

(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

Stats. 1992, c. 162 (A.B. 2650), §10, operative Jan. 1, 1994.

The California Law Revision Commission, which drafted section 4, appended the following:

LAW REVISION COMMISSION COMMENTS

Enactment [Revised Comment]

Section 4 is comparable to Probate Code Section 3. This section provides general transitional rules applicable to the Family Code. This section applies both to the act that enacted the Family Code and to any later act that changes the code, whether the change is effectuated by amendment, addition, or repeal of a provision of the code.

The rules stated in this section are general provisions that apply absent a special rule stated in a new law. Special rules may defer or accelerate application of a new law despite the general rules stated in this section. See subdivision (b).

The general rule prescribed in subdivision (c) is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by the exceptions listed in subdivision (d) (contents, execution, and notice of papers and documents are governed by the law applicable when the paper or document was filed), subdivision (e) (orders are governed by the law applicable when the order was made, subject to any applicable modification procedures), and subdivision (f) (acts are governed by the law applicable when the act was done).

Where a new law fails to address a matter that occurred before its operative date, subdivision (g) makes clear that old law continues to govern the matter.

Because it is impractical to attempt to deal with all the possible transitional problems that may arise in the application of a new law to various circumstances, *subdivision (h)* provides a safety valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision *is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests.*

> In addition to governing other substantive provisions, Section 4 also governs itself. It therefore becomes operative on the date the Family Code becomes operative and applies to provisions enacted and operative before, on, or after that date. [23 Cal. L. Rev. Comm. Reports 1 (1993)].

Why reverse the general retroactivity rule for California family law and probate law?

Both bodies of law concern, inter alia, family dissolution, whether by divorce or death. The state has an important public welfare interest in family dissolution. It is, for example, an event that justifies state reallocation of otherwise constitutionally protected property interests and state impairment of otherwise constitutionally protected parental rights to control and custody of one's children. The state's interest in family dissolution is reflected in the frequency of legislation intended to improve the welfare of family members at dissolution. Recognizing the importance of the state's interest in family welfare, the California Supreme Court explained that the purpose of the retroactivity rule is to make legislative improvements applicable on their operative date whenever possible.[11]

Community property issues arising at divorce often involve events and agreements that arose under prior law, for example, premarital agreements and property purchases that may have been made decades before divorce. Before the 1994 adoption of the Family Law Code, the resolution of such issues was generally controlled by the legal rules existing at the time of the transaction rather than the law existing at the time of adjudication. Initially, the judiciary did not grasp the significance of the new rule of retroactive application of family law and probate legislation. Even now, some intermediate appellate decisions ignore or avoid the rule.[12] However, in a series of probate and family law cases, the California Supreme Court has grasped the purpose and import of the retroactivity rule.[13] Because subsection (h) of section 4 grants courts some discretion to decline to apply a code provision to events occurring before 1994, the community property practitioner must be familiar with past as well as current law. The issue of retroactive application of current statutes is most prominent today with respect to the

11. Guardianship of Ann S., 45 Cal.4th 1110, 1137-1138, 90 Cal.Rptr.3d 701, 202 P.3d 1089 (2009).

12. See, for example, Marriage of Howell, 195 Cal.App.4th 1062 (2001) (declining to apply subsection (c) of Family Code 1612, which was added in 2001, to a 1999 premarital agreement spousal support waiver).

13. California Supreme Court cases approving retroactive application of amendments to the Probate and Family Codes include: Rice v. Clark, 28 Cal.4th 89, 47 P.3d 300, 120 Cal. Rptr.2d 522 (2002) (sustaining retroactive application of an amendment reversing the burden of proof); Marriage of Fellows, 39 Cal.4th 179, 138 P.3d 200, 46 Cal.Rptr.3d 49 (2006); Guardianship of Ann S., 45 Cal.4th 1110, 90 Cal.Rptr.3d 701, 202 P.3d 1089 (2009) (retroactive application of amendment allowing termination of parental rights to allow adoption of a child).

enforceability of premarital agreements entered under more permissive prior law. It will be considered in more detail in Chapter V.

In summary, current law provides that the 1994 Family Code and any amendments to the Code generally apply retroactively to events occurring before enactment of the Code. By contrast, pre-1994 case law expressed a general rule that legislation applied prospectively only. As you consider the holdings of cases decided before 1994, consider whether the issue of retroactive application would have been decided differently under section 4 of the 1994 Code.

CHAPTER 1
INTRODUCTION

Some property interests arise by operation of law rather than by agreement of the parties. They include ownership by adverse possession, statutory tenancy, and dower. California community property also arises by operation of law. In California, unless the parties agree otherwise, marriage brings with it a complex system of marital property. This introduction places the California system in international and national context.

A. THE RELATIONSHIP BETWEEN THE FAMILY AND PROPERTY OWNERSHIP: A COMPARATIVE OVERVIEW

In many cultures, a family unit is designated the owner of property acquired by its individual members. In prerevolutionary China, for example, the household unit, or chia, generally consisting of some dozen or so adult members related by blood, marriage, or adoption, was the owner of all wealth acquired by each of its members.[1] In the Western world, the basic ownership unit has been the conjugal, or husband-wife, dyad. Rooted in Germanic and Visigothic law,[2] community property principles spread over Europe and many of the areas colonized by Europeans, such as South Africa and Latin America.

1. M.J. Meijer, Marriage Law and Policy in the Chinese People's Republic 5-22 (1971).

2. The Visigoths were romanized central Europeans who moved west from the Danube Valley and sacked Rome in 410 A.D. From the fifth to the eighth centuries, they established the Visigothic Kingdom in what is now southwestern France and Spain. The Visigothic Code (Forum Judicum) was compiled in the mid-seventh century (649-652 A.D.). Book IV of the Code defines property rights. Section XVI of Book IV sets out the principles of community property law.

> **XVI. Concerning such Property as the Husband and Wife together have Accumulated during their Married Life.**
>
> When persons of equal rank marry one another, and, while living together, either increase or waste their property, where one is more wealthy than the other; they shall share in the common gains and losses, in proportion to the amount which each one holds. If the value of

When the Normans invaded England in 1066, they had not yet adopted community property law. Instead, they brought to England what we now call the *common law* system of ownership. This system endured, essentially unchanged, for centuries and was exported by the English to their American colonies, where it experienced substantial alteration in the Married Women's Property Acts of the nineteenth century. Louisiana, settled by the French, adopted a community property system derived from Spanish law. Later, seven western states, all late admittees to the Union, declined for various reasons to adopt the common law ownership system and chose instead the Spanish community property law then prevailing in the western territories taken from Mexico.[3]

The Spanish community property system, because of its adoption by other countries and the Spanish colonization of Latin America, has become the dominant form of community property in the Western world. It is not, however, the exclusive form. The most salient characteristic of Spanish community property is its distinction between marital property — property earned during marriage by the labor of the parties — and separate property — property acquired before marriage by any means and property acquired during marriage by gift, bequest, devise, or descent. In contrast, the Roman-Dutch system creates a universal marital community of all property whenever and however acquired.[4] A second prominent characteristic of

> their possessions is the same, neither has a right to assume superiority over the other. For, it is not unusual, where such property is equal in amount, for one party, in some way, to take advantage of the other. . . . This provision shall apply to, and be observed in, all cases relating to the estates of both husbands and wives. The distribution and possession of other property concerning which an agreement in writing has been entered into by both parties, shall be held and enjoyed by them according to the terms of that written agreement. If the husband should acquire any property, either from strangers, . . . or by donation of the king, or of a patron, or of any of his friends, his children or his heirs shall have a right to claim it, and shall have absolute power to dispose of it as they wish. The same rule shall apply to women who have received gifts from any source.
>
> The Visigothic Code 126-127 (S. P. Scott ed. 1908).

3. For comparative and historical background, see Comparative Law of Matrimonial Property (A. Kiralfy ed. 1972); W. de Funiak and M. Vaughn, Principles of Community Property 1-91 (2d ed. 1971); G. McKay, A Treatise on the Law of Community Property 1-63 (2d ed. 1925); Vaughn, The Policy of Community Property and Inter-Spousal Transactions, 19 Baylor L. Rev. 20 (1967); Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States, 11 Wash. L. Rev. 1 (1936); McMurray, The Beginnings of the Community Property System in California and the Adoption of the Common Law, 3 Cal. L. Rev. 359 (1915); Loewy, The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California, 1 Cal. L. Rev. 32 (1912). See also Bibliography, 68 Marq. L. Rev. 519 (1985).

4. Rheinstein and Glendon, Interspousal Relations (ch. 4) at 49-77, 139 in 4 Int. Encyclopedia of Comp. L. (A. Chloros ed. 1980). In 1980, the Roman-Dutch System still prevailed in the Netherlands, South Africa, Brazil, Denmark, Norway, and Iceland. Id.

the Spanish community property system is its creation of present interests. Under modern law, a nonearning spouse's interest attaches as soon as the property is acquired by the other spouse. In contrast, a number of Northern European countries have adopted a system characterized as "deferred community property." In Germany, Sweden, Norway, and Denmark, property is owned individually during marriage but at divorce or death is essentially treated as community property.[5]

B. MARITAL PROPERTY IN THE UNITED STATES

The differences between modern common law and community property jurisdictions are sometimes overstated. This section explores the differences and demonstrates that the similarities are more numerous and important than the differences.

1. The Modern American Common Law Marital Property System: The Elective Share and Equitable Distribution

Understanding the modern common law marital property system requires some brief attention to its history. Before the nineteenth century, marriage brought about a single unified property interest, with most of the incidents of ownership and all control residing in the husband. Upon marriage, a woman's property became for most purposes her husband's, and he was entitled to her earnings during marriage. Blackstone's often-quoted description of the common law as merging all of the spouses' interests into one person, the husband,[6] was in most respects correct.

During the nineteenth century, the common law system was radically reformed. The major thrust of the reform was to treat married women, for purposes of property ownership, as though they were unmarried. Enacted in all American common law states by the end of the nineteenth century, the Married Women's Property Acts regard the married woman as the separate and individual owner of all property that would have been hers but

5. Id.

6. By marriage, the husband, and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything. . . . [E]ven the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex in the laws of England.

William Blackstone, 1 Commentaries on the Laws of England 455-457 (3d ed. 1862).

for the marriage. A married woman owns and controls all property that she brings to the marriage from whatever source and all property that she acquires or earns during marriage. Thus, in the modern common law system, property belongs either to the husband or to the wife. Property is held jointly only when one or both spouses elect to take title jointly. The modern common law separation of interests contrasts with the unity of interest implicit in both the community property and pre–nineteenth-century common law systems.

Yet the enactment of legal equality for married women did not establish their economic equality. Interspousal economic inequality does not generally present problems during marriage, when husband and wife substantially share their resources. However, when marriage is dissolved by death or divorce, the economically inferior spouse may experience material hardship. In the past hundred years or so, modern common law jurisdictions have developed two redistributional mechanisms that are applied at marital termination: the elective share and equitable distribution. The elective share takes effect at death, and equitable distribution operates at divorce.

The elective share, whose historical antecedent is the surviving spouse's dower or curtesy right in certain freehold interests, ensures that the surviving spouse receives a substantial portion of the decedent's entire estate, both real and personal. That portion is generally one-third. To guarantee the survivor's share, many states make it difficult to defeat the surviving spouse's share by predeath gift transfers.[7]

The elective share comes into play when a decedent has left a will or otherwise disposed of property in derogation of a surviving spouse's elective portion. When a decedent has failed to dispose of property by will or other testamentary instrument, it is distributed according to state intestacy law. In modern common law jurisdictions, a surviving spouse is an intestate heir and, depending on the existence of other heirs, generally takes one-third, one-half, or all of the decedent's intestate estate.

Equitable distribution law, which applies only at divorce, empowers a divorce court to distribute the spouses' property without regard to predivorce legal ownership. Although equitable distribution originated in the nineteenth century, it has experienced dramatic development in the last 50 years. This growth accompanied the widespread adoption of no-fault divorce, which was in turn spurred by rising divorce rates. Equitable distribution took hold of divorce law in several ways. As recently as 1975, many prominent states, including New York, Pennsylvania, Maryland, and Virginia, did not allow their courts to distribute the spouses' property at divorce. Such states were called *title* jurisdictions. For purposes of divorce,

7. See, e.g., N.Y. Est. Powers & Trusts Law §5-1.1 (b); Uniform Probate Code art. II, pt. II, 8 U.L.A. 73.

they had no marital property system. Yet by 1986, every common law state had adopted equitable distribution.[8] As equitable distribution was widely legislated, its content was transformed to more fully embrace the concept of marriage as a sharing partnership. Initially intended to enable divorce courts to respond to unusual situations, equitable distribution is now a routine economic reallocation between divorcing spouses.[9] Although the doctrine initially contained no proportional norms, presumptive norms of 50-50 contribution or distribution are becoming more frequent.[10] As the doctrine has progressed from occasional to routine application, case law has developed apace. What, exactly, is *property* for purposes of equitable distribution? A pension? An unvested pension? The goodwill from a professional practice? The increased earning potential due to a professional degree acquired during marriage? To answer these questions, common law courts have often looked to already-developed community property law.

With respect to the definition of property subject to a divorce court's equitable distribution, the common law possibilities parallel the community property choices. The Roman-Dutch universal community of all property whenever and however acquired has its analogue in the *hotchpot* approach of the substantial minority of American common law states that empower a divorce court to redistribute *all* property owned by either spouse. In contrast, the remaining common law jurisdictions, like the Spanish community property system, distinguish between property acquired before marriage

8. Mississippi was the last state to adopt equitable distribution. In a series of cases decided during 1985 and 1986, the Mississippi Supreme Court announced the principle that jointly accumulated property of both married and unmarried cohabitants should be equitably divided according to the market and nonmarket economic contributions of each partner. Pickens v. Pickens, 490 So. 2d 872 (1986); Maxcy v. Estate of Maxcy, 485 So. 2d 1077 (1986); Watts v. Watts, 466 So. 2d 889 (1985). See also Dudley v. Light, 586 So. 2d 155 (1991) and Jones v. Jones, 532 So. 2d 574 (1988).

9. Compare, e.g., Anderson v. Anderson, 68 N.W.2d 849 (N.D. 1955) ($2,000 equitable distribution award to *wife* reversed because she had contributed no extraordinary services, that is, no services beyond those of an ordinary housewife) with more recent case law and legislation requiring that homemaking services be taken into account in property distribution. See, e.g., Ark. Code Ann. 9-12-315; Ind. Code Ann. §31-15-7-5; Neb. Rev. Stat. §42-365; Wis. Stat. Ann. §767.255.

10. See, e.g., Ark. Code Ann. §9-12-315 ("All marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. . . . [T]he court must state its basis and reasons for not dividing the marital property equally. . . ."). See cases and statutes collected in Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation and Other Wage Substitutes: An Insurance, or Replacement, Analysis, 34 UCLA L. Rev. 1250, 1251, n.7 (1986). For discussion of the distinction between equal contribution and equal distribution, see pages 29-30 infra.

and property acquired during marriage. In some of those states, however, a portion of property acquired before marriage may also be subject to equitable distribution.[11]

2. Community Property

Community property has traditionally been associated with eight contiguous American states. Moving geographically from northwest to southeast, they are Washington, Idaho, Nevada, California, Arizona, New Mexico, Texas, and Louisiana. American community property law, patterned on the Spanish system, establishes two categories of marital property: community property and separate property. Community property is all property acquired by the labor of either spouse during marriage. Community property is owned equally by the spouses from the moment of acquisition. Absent an agreement of the spouses, there is ordinarily no right to partition community property during marriage. On termination of the marriage by death, the surviving spouse and the decedent's estate each own one-half of the community property. Although 50-50 distribution at divorce is the rule in California, New Mexico, and Louisiana, the other five community property states empower their courts to make, incident to divorce, an equitable distribution of the community property.[12] Community property jurisdictions in the United States have typically defined *separate* property as all property owned before marriage and all property acquired by a spouse during marriage by gift, bequest, devise, or descent.

3. Contrast Between Modern Common Law and Community Property Systems

With respect to the ongoing marriage, modern common law and community property regimes take different positions on the desirability of unifying the property interests of husband and wife. In a common law

11. See, e.g., Minn. Stat. Ann. §518.58:

> [T]he court shall make a just and equitable disposition of the marital property of the parties without regard to marital misconduct. . . . The court may also award to either spouse the household goods and furniture of the parties, whether or not acquired during marriage. . . .
>
> If the court finds that either spouse's resources or property, including the spouse's portion of the marital property . . . are so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half [of the other spouse's separate property] . . . to prevent the unfair hardship.

12. Cal. Fam. Code §2550; Bustos v. Bustos, 100 N.M. 556, 558, 673 P.2d 1289 (1983); La. Civ. Code art. 2336; Ariz. Rev. Stat. Ann. §25-318; Idaho Code §32-712; Nev. Rev. Stat. §125.150; Tex. Fam. Code Ann. §7.001; Wash. Rev. Code Ann. §26.09.080. The Washington statute allows the divorce court to equitably distribute the parties' separate property as well.

jurisdiction, joint ownership is possible only by explicit choice. The spouses are regarded, for property ownership purposes, as though they were two unmarried persons. In contrast, community property law assumes joint ownership unless a spouse demonstrates otherwise, either by showing that the property is by definition separate or that the spouses explicitly agreed to a separate classification. Thus, insofar as the two systems characterize property during the ongoing marriage, they manifest different judgments about the nature of the marital relationship and the assumptions and expectations of the individuals who enter it.

Issues of property ownership rarely arise, however, during an ongoing marriage; instead, they become prominent at dissolution. Here the lines between modern common law and community property jurisdictions blur. In community property states, a divorced spouse is entitled to a portion of the community property; in five of the eight states, this portion is variable and subject to the divorce court's power of equitable distribution. In modern common law states, a divorced spouse is entitled to a portion of the marital property and perhaps to a portion of the other spouse's separate property as well. In modern common law states, variable distribution is the norm, although there is significant movement toward 50-50 distribution. At death, community property distribution has its counterpart for the surviving spouse in the common law elective share of the decedent's estate.[13]

Nevertheless, the notion of a spouse's present equal interest in marital property has considerable symbolic force. It clearly announces that spouses are understood to contribute equally to the family without regard to actual division of labor. It dignifies the work of the homemaker, tends to rectify sex-related inequality of employment opportunity, and recognizes that the couple may make unequal human capital investment in the spouses.[14] Community property ownership may also affect the manner in which courts equitably distribute property at divorce; that is, the way that courts allocate property at divorce may be influenced by predivorce legal ownership of the property.

In 1979 the National Conference of Commissioners on Uniform State Laws set out to promulgate a uniform marital property act. After considering the possibility of deferred community property derived from Northern European models, the drafters selected a full-blown community property

13. There is, however, a significant distinction from the perspective of the spouse who dies first. The common law elective share operates only in favor of the surviving spouse. Thus, the first spouse to die has no power to will away any interest in the survivor's property. In contrast, each spouse has testamentary power over one-half of the community property. Under what circumstances might this difference matter to the spouse who dies first?

14. See page 51 infra.

regime, largely for its symbolic and normative value: "Such a law translates the emotional and perceived concept of 'ours' into a verified legal reality."[15] The Uniform Marital Property Act was approved by the National Conference of Commissioners in 1983. It has been enacted only by Wisconsin.

In 1989 the American Law Institute undertook a project titled Principles of the Law of Family Dissolution: Analysis and Recommendations, which covers all aspects of divorce and the termination of nonmarital cohabitation. The project was ambitiously entitled Principles rather than Restatement because its purpose was to rethink and, where desirable, recast the law of family dissolution. The final version of the Principles was published in 2002. Its chapter on property division adopts many of the basic principles of California community property law.

California community property law, once perceived as a local and exotic subject, now occupies a central position in American marital property law. California cases are frequently considered by sister-state courts when they add content to their own less-developed law. Similarly, the Uniform Marital Property Act (UMPA) and the American Law Institute's Principles of the Law of Family Dissolution (ALI Principles) provide critical mirrors for California law. They adopt many California rules but reject others as unwieldy, unworkable, or unwise. This book comparatively notes sister-state, UMPA, and ALI treatment of particular marital property issues.

C. MARITAL PROPERTY AS A FORM OF DIVORCE-RELATED WEALTH DISTRIBUTION: THE RELATIONSHIP BETWEEN PROPERTY DISTRIBUTION AND CHILD AND SPOUSAL SUPPORT

Marital property law may be studied as a discrete subject, as is customary in some California law schools. Yet at divorce, community property law may also be understood, in theory and in practice, as simply one component of a more comprehensive treatment of the spouses' economic relationship and their continuing economic claims against each other on behalf of themselves and the children of their marriage. The other two components are child support and spousal support.

Although support and property distribution may be economically interchangeable for the divorcing litigants, they have different legal attributes. Unless the parties agree otherwise, spousal support is judicially modifiable and generally terminates at the death of either the support obligor

15. Prefatory Note, Uniform Marital Property Act (1983), 9A Uniform Laws Annotated 109 (1998).

or the support obligee, at the obligee's remarriage, and, in many jurisdictions, upon the obligee's marriage-like cohabitation with a third party. See, for example, California Family Code §§3591, 3651, 4323, and 4337, at pages 708-725 infra. Property distribution is unaffected by these events and is nonmodifiable. Property distribution obligations may be dischargeable in bankruptcy, but support obligations are not.[16] Federal income tax law makes certain divorce-related periodic payments taxable to the payee and deductible by the payor;[17] no such consequences attach to an immediate property distribution.

1. Child Support

In the past half century child support has been regularized and rationalized in the United States. As required by federal welfare law, all states have now formulated mathematical guidelines generally based on the percentage of income that parents at various income levels spend on children in intact families.[18] In the United States, child support is generally intended to support only children; it is not designed to provide for their custodial caretaker. The current California child support guideline is codified at Family Code §§4050-4073, reprinted at pages 712-720 infra.

*2. Spousal Support (also known as alimony or maintenance)**

At traditional common law, the quid pro quo for the husband's control of the wife's property was his duty to support her. This duty persisted even when the parties were legally separated (divorce *a mensa et thoro*, that is, from bed and board). Although absolute divorce provisions were not legislated until the mid-nineteenth century in England, some American colonies enacted absolute divorce statutes earlier. These enactments maintained the

16. In Chapter 7 bankruptcy proceedings, both property distribution and support obligations are non-dischargeable. 11 U.S.C. §523(a)(5) and (15). However, property distribution obligations may be dischargeable in Chapter 13 reorganization. The court's entry of a Chapter 13 bankruptcy discharge after the petitioner has successfully completed a confirmed Chapter 13 plan has the effect of discharging any debts relating to property division. 11 U.S.C. §1328(a)(2) (by omission).

17. 26 U.S.C. §§71, 215, and 1041.

18. See generally Garfinkel and Melli, The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support, 24 Fam. L.Q. 157 (1990).

possibility of a support duty that survived not only a decree of legal separation but a decree of divorce as well.

In its doctrinally most expansive formulation, alimony was conceived as permanent, that is, as payable until death or remarriage eliminated the recipient's need for support. The traditional measure of alimony was the marital standard of living insofar as it was maintainable in two postdivorce households. Yet alimony, even in its doctrinal heyday, was neither generously nor frequently awarded.[19] Moreover, alimony has always been difficult to collect.[20]

Beginning in the 1970s, coextensive with rising divorce rates, the nominal liberalization of divorce, and the expansion of marital property law, a number of American states experienced doctrinal constriction of alimony. In some jurisdictions statutes were rewritten to promote short-term, or rehabilitative, alimony.[21] In other jurisdictions appellate case law promoted the same result.[22] In still other jurisdictions trial court judges, acting on their own and purporting to apply "new principles of sexual equality," declined to order long-term alimony where existing state legal norms seemed to require it.[23]

The most principled and influential expression of this position appeared in the Uniform Marriage and Divorce Act (UMDA), promulgated in 1974.[24] The UMDA vigorously promoted property division as an alternative to spousal support.[25] It proposed that all assets, whenever and however acquired by the parties, be distributed according to principles of need and contribution, with homemaking contributions explicitly taken into account.[26] The economic quid pro quo for this expansive property division was abandonment of the traditional alimony formulation, which had nominally contemplated maintenance of the wife's marital standard of living, subject to the husband's ability to pay. Instead the UMDA established a threshold requirement: A spouse is eligible for support only if she is unable to meet her *reasonable needs* from

19. H. Clark, The Law of Domestic Relations in the United States §16.4 and sources cited therein (2d ed. 1988).

20. Id.

21. See, e.g., The Uniform Marriage and Divorce Act, §308, 9A U.L.A. 446 (1998).

22. See, e.g., Contogeorgos v. Contogeorgos, 482 So. 2d 590 (Fla. App. 1986); Herring v. Herring, 335 S.E.2d 366 (S.C. 1985).

23. For California experience, see Kay, An Appraisal of California's No-Fault Divorce Law, 75 Cal. L. Rev. 291, 300-302 (1987).

24. 9A U.L.A. 159 (1998). The UMDA has been enacted in eight states: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.

25. Prefatory Note, Uniform Marriage and Divorce Act, 9A U.L.A. 161 (1998) and Comment to §308, id. at 447.

26. §307, UMDA, 9A U.L.A. 288 (1998).

property, including that distributed to her at divorce, and earnings from her own gainful employment, unless the presence of young children or her own incapacity makes such employment infeasible.[27] The Act also contemplates that spousal support may be time-limited. In setting the duration of the award, it instructs the court to consider "the time necessary to acquire sufficient education or training to enable the party seeking maintenance [support] to find appropriate employment."[28] Although only eight states adopted the Act,[29] the content of the UMDA support provision was judicially and legislatively expressed in other jurisdictions as well.[30] In some jurisdictions, "reasonable needs" replaced "marital standard of living" as a measure both of threshold eligibility and level of support,[31] and short-term awards supplanted alimony of indefinite duration. In practice, this often meant a bare-bones, time-limited payment until the divorced spouse could find employment to provide for her basic needs. Although often optimistically labeled "rehabilitative" alimony, such awards rarely included funds for education or training. In many cases "minimal and short-term" would have been a more accurate descriptive label.[32] In 1988 Professor Krauskopf conducted a national survey from which she concluded that legislatures and courts were expressing increasing disenchantment with this constricted notion of spousal support.[33]

The legislatures of several states, including New York and California, amended their divorce statutes to revive traditional concepts of spousal support. In 1986 the New York legislature amended its support law to emphasize that courts "may award permanent maintenance." Deleting "reasonable needs," the legislature substituted "standard of living of the parties established during the marriage" as the benchmark for a spousal support award.[34]

27. §308(a), UMDA, 9A U.L.A. 446 (1998). If a spouse is able to satisfy the threshold eligibility requirement, that is, if her resources are inadequate to meet her reasonable needs, then the traditional criteria are used to establish the support payment. The traditional criteria include the parties' needs, the marital standard of living, and the duration of the marriage. §308(b), UMDA, 9A U.L.A, 348 (1998). Note the disjunctive nature of the level of support criteria. The spouse seeking support must be unable to satisfy her *reasonable needs* in order to cross the eligibility threshold, but once she does, support may be calculated in terms of the *marital standard of living*.

28. Id. §308(b)(2).

29. See jurisdictions listed in note 24 supra.

30. See Clark, supra note 19.

31. Contrast UMDA §308, discussed in note 27 supra. Inability to meet reasonable needs is a threshold requirement; if it is met, marital standard of living is a benchmark for support.

32. Krauskopf, Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, 21 Fam. L.Q. 573, 581 (1988).

33. Id.

34. 1986 N.Y. Laws, ch. 884, §4, amending N.Y. Dom. Rel. Law §236, Part B(6)(a), (c).

In 1988 California amended its spousal support law to require that the divorce court make specific findings about the parties' standard of living during their marriage and, in making the award, consider the parties' marital standard of living and the extent to which the earning capacity of each spouse is sufficient to maintain that standard of living. The court is further instructed to assess the *needs* of each party "based on the standard of living established during the marriage."[35] The current California spousal support provisions, Family Code §§4300-4360, are reprinted at pages 723-725 infra. Less dramatically, but significantly in California, where the divorce court must generally retain jurisdiction in order to award spousal support at some future date, in 1987 the legislature required that the divorce court retain jurisdiction indefinitely when the marriage has been of long duration. A marriage of more than 10 years is presumptively of long duration, but a marriage of less than 10 years may also be considered of long duration.[36]

The ALI Principles of the Law of Family Dissolution abandons spousal support (alimony or maintenance) in favor of *compensatory spousal payments*, which are intended to distribute fairly between the spouses the economic losses caused by the dissolution of a marriage. The degree and duration of redistribution from a higher-income spouse to a lower-income spouse is determined by uniform rules that take into account the length of the marriage and the amount of time a spouse assumed primary responsibility for care of the parties' children. Although the decision-maker is given some bounded discretion, the ALI formulation would produce awards that are both more predictable and more consistent than those currently generated under the rubric of spousal support.[37]

Canada and a few American jurisdictions have adopted formulaic spousal support formulas, often called guidelines, which may be used to determine both the amount and the duration of support.[38] Some of the guidelines are used only for temporary, or pendent lite, spousal support, which is intended to preserve the economic marital status quo until the

35. 1988 Cal. Stat., ch. 407, amending Cal. Civ. Code §4801 (West 1992), now codified at Cal. Fam. Code §4320(d).

36. 1987 Cal. Stat., ch. 1086, §2, amending Cal. Civ. Code §4801, now codified at Cal. Fam. Code §4336.

37. The American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations §§5.01-5.14 (2002).

38. See generally The Canadian Experiment with Spousal Support Guidelines , 45 Fam. L. Q. 241 (2011); Mary Kay Kisthardt, Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 Journal of the American Academy of Matrimonial Lawyers 61 (2008); and Guidelines for Alimony: The New Mexico Experiment, 38 Fam. L. Q. 29 (2004).

entry of final judgment. The Santa Clara County guideline[39] is widely used in California to determine temporary spousal support. It compares the parties' net incomes reduced by expenditure for children and adjusted to take into account the tax consequences of spousal support payments.[40] To determine the payor's obligation, the formula subtracts 50 percent of the adjusted net income of the payee from 40 percent of the adjusted net income of the payor. Assume, for example, that the adjusted net income of the payee is $50,000 and the adjusted net income of the payor is $100,000. The formula would subtract $25,000 from $40,000 to yield an annual support obligation of $15,000.[41]

During the last several decades many academic commentators, including economists and feminist legal scholars, have addressed the theoretical dimensions of spousal support and, more broadly, wealth distribution at divorce. Some of their work is surveyed at pages 31-52 infra.

D. THE COMMON LAW TITLE SYSTEM

Wirth v. Wirth was decided before New York's 1980 adoption of equitable distribution,[42] that is, before New York granted its courts the power to distribute the parties' property at divorce.

Wirth v. Wirth

38 A.D.2d 611, 326 N.Y.S.2d 308 (1971)

Appeal from an order . . . which granted defendant's motion to dismiss the complaint, and from the judgment entered thereon.

In 1970, the appellant obtained a foreign divorce. Thereafter, the parties stipulated that her pending New York divorce action would abate insofar as the divorce was concerned but continue with respect to the property claims. This appeal results from the trial court's decision on the property claims.

39. The Superior Court of California, County of Santa Clara, Local Family Rule 3(C).

40. Id. For purposes of the income tax, spousal support is deductible by the payor and taxable to the payee. 26 U.S.C. §§ 71, 215.

41. In California, child support and temporary spousal support are generally determined by one of seven computer programs certified by the California Judicial Council. They include DissoMaster and Xspouse.

42. 1980 N.Y. Laws, chs. 281, 645, eff. July 19, 1980, now codified at N.Y. Dom. Rel. Law §236.

In her complaint, appellant seeks judgment declaring that she is half owner of real and personal property held by her former husband in his own name and purchased with his own earnings. She claims that he was able to acquire these assets because his legal obligation to support her and their two children was fulfilled out of her earnings, not his.

Appellant's theory is constructive trust. A constructive trust may be found by a court when a party, because of a confidential relationship, relies upon a promise of another which is later breached resulting in unjust enrichment to the other. . . . The essential ingredients to support the action are that the person damaged must be induced to act to his detriment and the other's unjust benefit because of an abuse of the relationship of trust existing between the two. The language customarily used is that there is "actual or constructive fraud" in the transaction. . . .

For 22 years of marriage, the respondent delivered all his earnings to appellant, who handled the finances, to be pooled with her earnings to support the family. She paid the bills and made the investments. In 1956, he started a "crash" savings program telling appellant it was "for our latter days." She says he told her it was "for the two of us." From then on, appellant's earnings, supplemented by rental from an upstairs apartment and part of respondent's income, were used for family expenses and respondent's remaining salary was invested. This invested money has always been respondent's. It is not property appellant transferred to him. His enrichment, it is claimed, arose because she spent her salary to meet the costs of maintaining the family, while the respondent accumulated his earnings in his own name. Appellant's argument is that she parted with her property just as surely as if she delivered her check to her husband because her earnings fulfilled his support obligations.

A legal cause of action cannot be spelled out of her assumption of the family expenses after 1956. There is no doubt that a husband has the duty to support his wife and children within the limit of his means. . . . But a wife who uses her own money to pay household expenses may obtain reimbursement from her husband only when her husband either impliedly or expressly has promised he would repay her. . . . That promise does not appear in the evidence.

What appellant really seeks is a community property division under the guise of equitable relief. She premises her claimed right to equitable relief on the brief discussions between the parties in 1956 when respondent said he intended to save money for "the two of them." There was no promise or "arrangement" born either from that incident or the parties' course of conduct thereafter. Respondent did not agree that the property would be held in joint names. . . .

The elements of concealment or misrepresentation usually found in fraudulent transactions are missing. The facts are that appellant acquiesced in the original suggestion and she has known for many years that the property was in her husband's name alone.

Respondent's statement that he intended to save for later years may well have expressed an intent that there be a joint future benefit, but it did not give appellant a vested interest in any specific portion of his assets, come what might. Indeed, although appellant complained of lack of funds from time to time, she apparently evidenced no interest in the title to the investments or savings funds until 1967.

With respect to their home, the title to it was acquired in respondent's name alone in 1949 with the down payment of $6,500 being supplied by his mother. It clearly was not subject to any supposed agreement or "arrangement." Similarly, his life insurance and retirement antedated the discussions in 1956 and the only arguable issue concerns the investments and savings.

A constructive trust is a vehicle for "fraud rectifying." . . . There may be a moral judgment that can be made on the basis of respondent's conduct and the imperfectly expressed intention of some possible future benefit to appellant, but that is not enough to set the court in motion. . . .

Order and judgment affirmed, without costs.

NOTES AND QUESTIONS

1. What, exactly, is the defect in Mrs. Wirth's constructive trust theory?

2. Is there ever likely to be actual fraud, or misrepresentation, in the happier days of a marriage when the relied-upon promise or statement was made? Surely Mr. Wirth meant what he said when he said it; he simply changed his mind later.

3. *Wirth* shows that even a spouse employed outside the home might be unfairly treated under the common law *title* approach to property acquired by married persons. Yet Mrs. Wirth, with her employment history, did generate market earnings. Her problem was that she relinquished control of them. The homemaker's plight could not be cured by her own behavior. Even if she carefully managed the household allowance her husband provided in order to put aside savings for her old age, at divorce her husband could impose a constructive trust on these savings titled in her name. He, after all, had intended to provide her only with household expense money; any remaining funds were his. Marks v. Marks, 250 A.D. 289, 294 N.Y.S. 70 (1937) (dictum).

4. For further illustration of the difficulty of using constructive trust theory as a substitute for marital property law, see Saff v. Saff, 61 A.D.2d 452, 402 N.Y.S.2d 690 (1978), *appeal dismissed*, 46 N.Y.2d 969, 389 N.E.2d 142, 415 N.Y.S.2d 829 (1979). At the dissolution of their 30-year marriage, Mrs. Saff unsuccessfully sought to impose a constructive trust on a business established and developed with the funds and labor of both spouses but "owned" by her husband.

E. COMMON LAW EQUITABLE DISTRIBUTION AT DIVORCE

In some common law states, equitable property distribution at divorce is of relatively recent origin. Equitable distribution often accompanied other divorce reform measures, such as liberalized divorce rules and the introduction of no-fault grounds. Painter v. Painter, immediately below, is illustrative. From the content of the 1971 New Jersey reform provisions, you can infer the substance of pre-1971 law. Can you reconstruct the content of divorce negotiation under pre-1971 law? How would you explain the linkage of equitable distribution and other divorce reforms? What social factors have contributed to this recent rapid spread of equitable distribution?

Painter v. Painter

65 N.J. 196, 320 A.2d 484 (1974)

MOUNTAIN, J. The parties to this suit were divorced by judgment entered March 14, 1972 upon the ground, urged in defendant's counterclaim, that they had lived separate and apart for at least 18 or more consecutive months and that there was no reasonable prospect of reconciliation. N.J.S.A. 2A:34-2(d).[1] Thereafter, in accordance with the authority contained in N.J.S.A. 2A:34-23—as amended by the 1971 enactment—the trial court made an equitable distribution of the marital property. 118 N.J. Super. 332, 287 A.2d 467 (Ch. Div. 1972). We granted certification, . . . as we did simultaneously in several companion cases, in order to consider the questions these cases raise and that are generally presented by this important legislation.

Stephen and Joan Painter were married October 17, 1953, and lived together as husband and wife until January 23, 1967. Three children were born of the marriage and at the time of the institution of this suit, in October, 1970, they were 15, 12 and 7 years of age. They have always been, and remain, in the custody of the mother.

At the trial it was determined that the total assets of plaintiff, Stephen Painter, had a value of $230,309 and those of defendant, Joan Painter, a value of $99,709. However, in determining the value of property subject to equitable distribution pursuant to N.J.S.A. 2A:34-23, the court excluded assets which were acquired by gift or inheritance during marriage as well as property owned prior to marriage. Pursuant to this formula, the court determined the plaintiff's and defendant's assets available for distribution,

1. This is the so-called "no fault" ground for divorce, introduced for the first time into our law by L.1971, c.212, which became effective September 13, 1971.

as being $82,571 and $58,199, respectively. In addition, plaintiff's income in 1971 was found to have been $32,218.

The court then entered an order directing plaintiff to pay (a) alimony and support in the sum of $12,000 per year, allocated $500 per month as alimony and $166.66 per month as support for each of the three children; (b) all reasonable medical and dental care for the three children and all medical care for the defendant; (c) "twenty per cent (20%) of the difference between plaintiff's and defendant's *available assets*—$4,874" (emphasis added).

The issues presented to the Court on this appeal concern both the constitutionality and the interpretation of L.1971, c.212. . . .

Pursuant to L.1967, c.57 . . . the Legislature created a Divorce Law Study Commission ". . . to study and review the statutes and court decisions concerning divorce and nullity of marriage and related matters. . . ." L.1967, c.57, 144-145. In the preamble to this enactment it was noted that not since 1907 had there been any general revision of the statutes of the State relating to divorce, nullity of marriage or other phases of the law of domestic relations. Consequently, it went on to point out, except for the Blackwell Act (L.1923, c.187), which added extreme cruelty as a ground for divorce, there had been no significant legislation during this period pertaining to this general subject matter, although during the same interval concepts of marriage and divorce had been drastically altered. Legislative investigation and study were deemed essential as a necessary prerequisite to the drafting of a law that would adequately respond to the felt needs of our present day society in this area. On May 11, 1970 the Final Report of the Commission was submitted to the Governor and the Legislature. In very large part, but not entirely, the resulting statute, L.1971, c.212, was based upon the proposed Divorce Reform Bill which accompanied and was made part of this Report.

The most significant changes in our matrimonial law that have resulted from the adoption of this act are the following:

1. In addition to the pre-existing statutory causes for divorce, i.e., (1) adultery, (2) desertion and (3) extreme cruelty, the act includes as additional grounds: (4) separation for at least 18 months where there is no reasonable prospect of reconciliation; (5) voluntarily induced addiction to a narcotic drug, or habitual drunkenness, for a period of 12 months; (6) institutionalization because of mental illness for a period of 24 months; (7) imprisonment of the defendant for 18 months; and (8) deviant sexual conduct voluntarily performed by the defendant without the consent of the plaintiff. N.J.S.A. 2A:34-2.

2. Obstinacy need no longer be proven in order to establish a cause of action for desertion, which now accrues after twelve months willful and continued desertion rather than after two years as had previously been the case. Id.

3. Extreme cruelty, as a ground for divorce, is now defined by statute to include "any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant. . . ." Id.

4. A plaintiff seeking a divorce on the ground of extreme cruelty may now file a complaint three months after the date of the last act of cruelty complained of, instead of being required to wait six months as was formerly the case. Id.

5. Divorce from bed and board [judicial separation], which may be adjudged for the same causes as divorce from the bonds of matrimony, may now be had only upon the consent of both parties. Either party may thereafter at any time apply to have such divorce converted to a divorce from the bonds of matrimony, which application shall be granted as a matter of right. N.J.S.A. 2A:34-3.

6. Recrimination, condonation, and the clean hands doctrine are no longer available as defenses. N.J.S.A. 8A:34-7.

7. If both parties make out grounds for divorce, judgment may run in favor of each. Id.

8. The durational residence requirement to initiate an action for divorce, except for adultery as to which there is no such requirement, has been shortened from two years to one year. N.J.S.A. 2A:34-10.

9. Issue of an annulled marriage shall be deemed legitimate even if—as was not heretofore the case—the annulled marriage was a nonceremonial, bigamous union. N.J.S.A. 2A:34-20.

10. Alimony may be awarded to either spouse. Except where the judgment for divorce is granted on the no-fault ground of separation, the court may, in awarding alimony, consider the proofs submitted in support of the ground upon which the judgment of divorce is made to rest. N.J.S.A. 2A:34-23.

11. Incident to the grant of divorce ". . . the court may make . . . [an] 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." Id.

An effort has been made, as is apparent from the Commission Report, to move away from the concept of fault on the part of one spouse as having been solely responsible for the marital breakdown, toward a recognition that in all probability each party has in some way and to some extent been to blame. One objective of the Commission was to make it possible to terminate dead marriages regardless of where the responsibility for the failure lay. Final Report, Divorce Law Study Commission 6. The Legislature accepted this recommendation and provided, as we have noted above, that separation for at least 18 months where there is no reasonable prospect of

reconciliation shall be a ground for divorce. At the same time the Legislature concurred in the Commission's recommendation that fault grounds for divorce be retained, although somewhat liberalizing the requisites for their availability.

We turn then to the constitutional contentions which have been advanced. . . .

The second basis of constitutional challenge is that the section of the act providing for equitable distribution is impermissibly vague and uncertain. The argument here is two-pronged. It is first urged that the term "equitable" is insufficiently precise as a guide to a matrimonial judge in effecting distribution of marital property; secondly, it is contended that there is lacking any sufficient legislative statement as to what property shall be eligible for apportionment between the spouses.

. . . [T]here are two important statutory functions which may be significantly affected by indefiniteness. "One of these functions is to guide the adjudication of rights and duties; the other is to guide the individual in planning his own future conduct." Note, Due Process Requirements of Definiteness in Statutes, 62 Harv. L. Rev. 77 (1948). In other words due process requires that the adjudication of a litigant's rights and duties be governed by rules sufficiently clear and objective to guard against an arbitrary result, and that such rules be sufficiently precise to enable a lawyer to advise a client intelligently as to the probable results of a proposed course of conduct.

Judged by these criteria the words, "equitable distribution" set forth a standard which is not unduly vague. This phrase simply directs and requires that the matrimonial judge apportion the marital assets in such manner as will be just to the parties concerned, under all of the circumstances of the particular case. That a judge shall do equity is a notion understood by lawyer and litigant alike. It was the realization that certain matters must be disposed of "equitably" that led to the creation and rapid rise in influence of the Court of Chancery in the fifteenth and sixteenth centuries. Maitland, Equity (Chaytor & Whittaker ed. 1920) 3-10. The great body of equity jurisprudence that has since developed is a response to the continuing insistence that this need be met. . . .

Today in the laws of many other states, in words very similar to those found in our statute, provision is made for the fair and equitable distribution of marital assets in the event of divorce. . . . Counsel have cited no case, nor have we found any, in which legislation of this sort has been successfully attacked as affording insufficient guidelines to the judge charged with the responsibility of allocating marital assets upon the dissolution of a marriage. As Justice Peters observed in Addison v. Addison, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965),

> . . . many common-law jurisdictions have provided for the division of the separate property of the respective spouses in a manner which is "just and reasonable" and none of these statutes have been overturned on a constitutional basis.