

Update to Equitable Distribution in Large Marital Estate Cases

by

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I. Introduction

“As a marital estate increases in size, should the percentage distribution in favor of the dependent spouse decrease?” Should the producers of extraordinary wealth receive the majority of the marital estate? Does a marital “partnership” require an equal division of the marital estate regardless of the party’s individual economic and non-economic contributions? These were some of the questions posed, but not resolved, in this journal’s 2001 article, “Equitable Distribution in Large Marital Estate Cases.”¹

This article continues the examination of how larger estate cases have been handled, focusing on cases decided between 2001 and late 2007. Our focus also remains on states that utilize equitable distribution but do not presume equal division.² Recognizing that while some estates apply a presumption that marital estates should be divided equally, either through statute or case law, many states decline to impose a presumption in equitable distribution cases. These states may be signaling their belief that unequal contributions may require unequal results and that not all spouses are equally situated. These “non-presumption” states instead require that courts consider certain factors in de-

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¹ David N. Hofstein, Ellen Goldberg Weiner and Christian Marrone, *Equitable Distribution in Large Marital Estate Cases*, 17 J. AM. ACAD. MATRIM. LAW. 307 (2001).

² For purposes of this article, a larger estate will be defined as marital estates in excess of two million dollars.

termining what share of the estate and/or which assets should be allocated to each spouse.³ Factors considered generally include the economic and non-economic contributions each spouse had made to a marriage as well as how each spouse's lifestyle may change following the divorce as a result of the spouses' respective earning capacities and assets not subject to the distribution.

Assessing the spouses' relative contributions can be difficult, particularly where one spouse creates the economic wealth while the other provides intangible contributions such as maintaining the household or family. No appellate case to date has successfully and persuasively quantified the value of a homemaker's contributions. A mere dollars and cents approach to calculating a person's worth appears clearly inadequate, if not offensive. Given the inability to make precise measurements, the equitable distribution approach attempts to equitably recognize the spouses' relative contributions and weigh the effectiveness of each party's arguments regarding their own and their spouse's contributions.

At one end of the spectrum is the argument that marriage is an economic partnership in which each party contributes certain economic and non-economic benefits which together generate success for the partnership. This argument is often asserted by the economically dependent spouse and seeks an equal division of the estate upon the dissolution of the partnership. At the other end is the argument, often made by the party who provided the primary economic benefits to the estate, that his or her own work efforts generated the financial wealth of the estate and, therefore, reflect the greater contribution to the marriage. Based upon this greater contribution, that party seeks the greater share of the marital estate upon dissolution. In the middle lay the argument of those parties who contributed both economically and non-economically, but perhaps in differing proportions.

In weighing the statutorily designated factors, the cases discussed here, like those in the 2001 article, involve fact specific inquiries regarding the way the marriages functioned and how the assets were accumulated. As the phrase "equitable distribution" indicates, the role of the court in a "non-presumption"

³ In many jurisdictions, each individual asset need not be divided based on the same percentage of division. *See, e.g., Drake v. Drake*, 725 A. 2d 717 (Pa. 1999).

state is not to automatically divide the estate in half,⁴ but to instead weigh each factor with the aim of arriving at the most equitable or just division of property, considering the parties' relative contributions and their individual needs. The fact patterns in the cases range from one spouse creating the entire marital estate with the other neither contributing financially nor as a homemaker, to what is viewed by some courts as a "traditional marriage" where one spouse worked while the other spouse was responsible for taking care of the marital home and the children. Gaining in frequency are those instances where neither spouse is economically dependent or the primary force in the home, such as where both parties shared all duties, including employment or as co-owners of a business and as parents and caregivers.

The cases discussed in this article are, generally, appellate decisions. Appellate courts are limited in their scope of review, usually prohibited from substituting their own judgment for the judgment of the trial court and often limited to the determination of whether the lower court committed an error of law or "abuse of discretion," which is a high threshold for overturning a lower court's decision. Appellate decisions, therefore, often do not contain a thorough analysis of the factors for equitable distribution discussed below. Although appellate decisions often do not provide extensive insight into the trial courts' rationale, they can be helpful in guiding litigants because they provide binding precedent.⁵

II. Statutory Factors Considered By Equitable Distribution States

Most states that have promulgated an equitable distribution statute provide a list of factors which, in every case, *must* be considered, and failure to consider each and every factor may be grounds for reversal by an appellate court. The list of factors

⁴ In fact, in states in which no statutory presumption exists, it is often seen as reversible error for a court to suggest that its analysis used a 50/50 split as a starting point. *See, e.g., Fratangelo v. Fratangelo*, 520 A.2d 1195, 1199 (Pa. Super. Ct. 1987).

⁵ The attached chart of cases includes cases referred to in this article as well as additional cases for which only the size of the estate and distribution were given. It is not exhaustive, but is instead intended to be illustrative.

442 *Journal of the American Academy of Matrimonial Lawyers*

considered often includes a variation on the following factors taken from the 1974 Uniform Marriage and Divorce Act⁶ and equitable distribution statutes of various states:

The length of the marriage;

The age, health, station, amount of sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;

The contribution by one party to the education, training or increased earning power of the other party;

The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time;

The opportunity of each party for future acquisitions of capital assets and income;

The reduced or lost lifetime earning capacity of the party seeking maintenances as a result of having foregone or delayed education, training or career employment during marriage;

The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits;

The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker;

The value of the property set apart to each party, including any increases or decreases in the value of the separate property of the spouse during marriage or the depletion of the separate property for marital purposes;

The standard of living of the parties established during the marriage;

⁶ Unif. Marriage and Divorce Act § 307 (amended 1973), 9 U.L.A. 288 (1987)

The federal, state and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain;

The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain;

and

The role of a party as the custodian of any dependent minor children.

A. *Marital Misconduct*

Notably absent from the above set of factors is “marital misconduct of the parties,” including fault. While considerations of fault have been gradually disappearing from divorce statutes, including in many states’ requirements for obtaining a divorce (e.g., in Oklahoma, California, and Massachusetts),⁷ marital misconduct often remains an available consideration for courts in reaching their economic decisions. First, in some states, such as Pennsylvania, even if it is not a factor in property distribution, marital misconduct may be a factor considered in determining alimony.⁸ Second, many states include in their lists of equitable distribution factors a catch-all factor that provides the courts with leeway to consider the parties’ conduct. New York law, for example, allows the court to consider “any other factor which the court shall expressly find to be just and proper.”⁹ The New York case of *Havell v. Islam*¹⁰ applied that factor to Mr. Islam who engaged in marital misconduct both by “declin(ing) to seek any business opportunities [] instead garden(ing), read(ing) and attempt(ing) several writing projects”¹¹ and being verbally and physically abusive to both his wife and children.

The court, primarily motivated by the husband’s attempted murder of the wife, which was described in great detail, “held that [husband’s] vicious assault on plaintiff was so egregious as to

⁷ OKLA. STAT. ANN. TIT. 43, §101 (West 2008), CAL. FAMILY CODE §2310 (West 2008), MASS. GEN. LAW. ANN. CH. 208, §1 (West 2008).

⁸ 23 PA. CONS. STAT. ANN. § 3701(b) (14—) (West 1998).

⁹ N.Y. DOM. REL. LAW T.I 222 § 236(B)(6)(11—) (McKinney 2003).

¹⁰ 751 N.Y.S. 2d 449 (N.Y. App. Div. 2002).

¹¹ *Id.* at 450.

444 *Journal of the American Academy of Matrimonial Lawyers*

‘shock the conscience’ and relied on its equitable powers to render justice between the parties.”¹²

The husband in *Havell* argued on appeal that the court erred by considering his misconduct since it is not a statutorily enumerated factor. Noting that New York law allows “any other factor” to be considered, the court recognized that:

marital fault [may] only be taken into consideration where, the marital misconduct is so egregious or uncivilized as to speak of a blatant disregard of the marital relationship-misconduct that “shocks the conscience” of the court thereby compelling it to invoke its equitable power to do justice between the parties.¹³

The court, thus, rejected the husband’s argument that marital misconduct may not be considered, or that it must have an economic effect on the marriage to be considered, and awarded the wife a highly disproportionate 95% of the \$13 million marital estate.

Furthermore, courts have noted that marital misconduct, in forms less drastic than the domestic violence in *Havell*, can come into play when analyzing the parties’ contributions to the acquisition of assets. In *Miller v. Xiao Mei*,¹⁴ involving a nearly \$7 million estate, the New York court found that “the marriage was viable for only 2 ½ years, after which there was a pattern of bizarre behavior by defendant [wife] that caused plaintiff [husband] to fear for his safety and affected his mental and physical health, and warranted a divorce on the ground of cruel and inhuman treatment.”¹⁵ The court awarded wife only 25% of the marital estate.

Courts can also examine misconduct in more subtle ways. Under factors such as “the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker” spelled out in Pennsylvania’s equitable distribution statute,¹⁶ courts can evaluate the way the marriage functioned by considering one or both spouse’s role as provider and/

¹² *Id.* at 452.

¹³ *Id.* at 344 (quoting *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 133) (N.Y. App. Div. 1984).

¹⁴ 743 N.Y.S.2d 103 (N.Y. App. Div. 2002).

¹⁵ *Id.* at 104.

¹⁶ 23 PA. CONS. STAT. ANN. §3502(a)(7) (West 2005).

or homemaker in assessing whether each spouse fulfilled his or her respective obligations. Similarly, in *In re the Marriage of O'Rourke*¹⁷ the Washington court in awarding the husband 38% of the marital estate considered the fact that Mr. O'Rourke "breached his fiduciary [duty] to the marital community"¹⁸ by failing to insure certain marital property, selling certain items below their value and generally wasting marital assets.

With regard to a spouse who is not employed outside of the home during the marriage, courts may look to see that the spouse was not only a homemaker but that his or her role as homemaker also related to the other spouse's ability to acquire assets. If so, the homemaker spouse may be viewed as having contributed to the financial success of the marriage.

B. *Non-economic Contributions*

Recent cases struggle with the need to recognize the value of a spouse's non-economic contribution as mandated by statutes that specifically enumerate a homemaker's contribution as an important factor¹⁹ and the need to balance those contribution with the more easily recognizable economic contributions of the breadwinner spouse. Non-economic activities that a party may have engaged in might include raising the children, being involved in activities related to the community, such as sports leagues, scouting and the school, hosting large or frequent family dinners, caring for one or both spouse's elderly relatives, selecting and decorating the home, and the intangible creation of a warm and inviting family environment.

The pattern of recent cases shows that merely demonstrating that the dependent spouse took care of the home and perhaps assumed primary responsibility for raising the children may not be enough to award that spouse an equal share of the estate; courts frequently look for something more. That additional consideration may be a marriage as a partnership as in *In re Mar-*

¹⁷ No. 58096-5-I, 2007 WL 2985095 (Wash. Ct. App. Oct. 15, 2007).

¹⁸ *Id.* at 2.

¹⁹ See, e.g., Colorado – COLO. REV. STAT. §14-10-133(1)(a) (2005). Illinois – 750 III. COMP. STAT. 5/503(d)(1) (2008). New York – N.Y. Dom. Rel. Law. §23(B)6(5)(d)(6) (McKinney 2003). Pennsylvania – 23 Pa. Cons. Stat. Ann. § 3502(a)(7) (West 2005).

riage of Grim,²⁰ where the parties were married for 36 years and the trial court noted that “[t]he couple accumulated their assets as a unit.”²¹ Furthermore, where the marital estate is in the multiple millions, courts may conclude that it is not necessarily equitable to award a homemaker spouse an equal share of the estate absent an extraordinary non-monetary contribution.

C. *Non-Marital Property of Each Spouse*

As evident from the plethora of case law on the subject, one of the most frequently litigated topics in equitable distribution is the characterization and treatment of marital and non-marital property. An asset’s classification as marital or non-marital affects the overall size of the marital estate being divided. Traditionally, non-marital assets are not divided in equitable distribution.²² This could lead to one party having a large non-marital estate, which remains intact, while the marital estate (the portion being equitably divided) may be significantly smaller in comparison. For example, an equal division of a \$4 million marital estate appears quantitatively different if one party also has \$10 million in separate property on the side while the other has no separate estate.

This disparity in size between the non-marital portion and the marital portion available for equitable distribution also might affect the ultimate equitable distribution award. Noting the existence of a large separate estate, a trial court may award the dependent party a greater percentage of the divisible marital estate. In *In re Marriage of Corliss*,²³ for example, the dependent spouse was awarded 61% of the parties’ \$18 million marital estate because the independent spouse had a separate estate of \$72 million.

Another consideration involving non-marital property is that the increase in value of non-marital property from the date of marriage to the date of separation, is, in many states, marital property.²⁴ However, in the majority of those states, such as Florida and New York, the increase in value of non-marital prop-

²⁰ No. 25343-7-II, 2001 WL 959923 (Was. Ct. App. Aug. 24, 2001).

²¹ *Id.* at 6.

²² *See, e.g., Flannery v. Flannery*, 121 S.W.3d 647, 650 (Tenn. 2003).

²³ No. 56792-6-I, 2007 WL 442207 (Wash. Ct. App. Feb. 12, 2007).

²⁴ *See, e.g., Illinois – 750 III. COMP. STAT. 5/503(a)(7)(2008).*

erty becomes marital only if the increase was a result of active contribution by either the spouse who owned the asset or by the spouse who is arguing for the characterization. In other words, the critical factor is whether the asset increased in value due to the parties' active participation as opposed to being a passive increase perhaps due to market conditions.²⁵ Those arguments become more critical as the size of the marital estate increases.

In Tennessee, for example, marital property includes the increase in values of separate property if each party substantially contributed to the separate property's preservation or appreciation. In *Clement v. Clement*²⁶ the Tennessee appellate court determined that the increase in value by several hundred thousand dollars of several properties separately owned by the husband was marital property because of the wife's activities in the home. It found that because of her actions at home, the husband was able to increase the value of his separate assets. As such, the increase was active from both parties and, thus, marital. However, regarding a tract of land to which "the value of the improvements. . .[was] clearly a negligible component of the property's overall value,"²⁷ the court found that any increase in value was not due to some active contribution.

Other states merely require that one spouse actively contribute to the increase in value of a non-marital asset to make the increase in value marital. In *Courembis v. Courembis*,²⁸ the court implemented the Virginia Statute which allows for the increase in value of non-marital property to become marital by virtue of "significant personal contributions of either party."²⁹ Therefore, in assessing the increase in value of a parcel of property owned in part by Mr. Courembis prior to marriage but rezoned during marriage, the court found that the increase in value was marital property due to Mr. Courembis' efforts during the marriage and the fact that the statute allowed for the increase in value of non-marital property to be marital where either spouse

²⁵ See, e.g., *Allen v. Allen*, 693 N.Y.S.2d 708 (N.Y. App. Div. 1999); *Pagano v. Pagano*, 655 So. 2d 370 (Fla. Dist. Ct. App. 1996).

²⁶ No. W2003-02388-COA-R3-CV, 2004 WL 3396472 (Tenn. Ct. App. Dec. 30, 2004).

²⁷ *Id.* at 15.

²⁸ 595 S.E.2d 505 (Va. Ct. App. 2004).

²⁹ *Id.* at 512. (emphasis in original).

contributes to the increase. Interestingly, this means that a party who holds separate property may end up creating an unintended benefit for the other party by his or her exclusive actions in creating the increase in value.

One of the areas where increase in value is often discussed is in the context of a business interest. Again, the emphasis is often on what “active” role a party played in creating that increase. Some courts have found that the “active” role may be minimal. For example, in *Uygur v. Uygur*,³⁰ Mrs. Uygur argued to the Michigan court that the increase in value of her husband’s stock in the company for which he worked was marital property. The court noted that:

(t)he value of [the husband’s] stock rose and fell based on the net worth of [the husband’s company]. The success of the company, and thus its stock value rested on all of the company’s employees, of which defendant was only one. Because defendant worked for the company, his performance necessarily affected the company’s success to some degree. However, we cannot conclude that defendant’s employment cause the stock values to appreciate. Because [the husband’s] ability to affect the company’s stock values was limited, the nexus between the defendant’s employment and the company’s success was necessarily attenuated.”³¹

Therefore, because Michigan law required active contribution to the increase in value of non-marital property to make the increase marital property as well as a direct nexus between the activity and the increase, the court found the increase in value was non-marital property.

D. *Length of Marriage*

A frequently mentioned consideration in equitable distribution is the length of the parties’ marriage prior to separation or divorce. Where considered, it is frequently viewed in terms of how it enabled the parties to become accustomed to the lifestyle enjoyed during marriage and how the parties viewed their acquisition of wealth and how it might be shared after retirement. As the court noted in the New York case of *Mahoney-Buntzman v. Buntzman*,³² “the duration of a marriage is not a factor which

³⁰ No. 258207, 2006 WL 1568845 (Mich. Ct. App. June 8, 2006).

³¹ *Id.* at 2.

³² No. 8098/03, 2006 WL 2818786 (N.Y. Sup. Ct. Oct. 3, 2006).

should be considered in isolation; more important than the temporal duration of a marriage is the extent to which that marriage caused either party to sacrifice his or her own economic independence in favor of marital interdependence.”³³

Where the marriage is of relatively short duration, frequently considered to be less than ten years, there appears to be a significantly disproportionate division in favor of the independent spouse. In cases such as *Ranney v. Ranney*,³⁴ and *Miller v. Xiao Mei*,³⁵ the latter of which involved a marriage viable for only two and one-half years, the independent spouse received anywhere from two-thirds to ninety-six percent of the multi-million dollar estates. Often, the explanation for the uneven distribution in shorter marriages is that the independent spouse came into the marriage with the earning power that enabled him or her to accumulate the marital estate and there was little opportunity for the dependent spouse to contribute in any meaningful way toward the other spouse’s acquisitions in such a short amount of time.

In contrast, where the parties were married for a more significant period of time, it is more likely that each of the parties entered into the marriage with few assets and that the wealth was accumulated during the marriage. In some circumstances, the court may, therefore, view the marriage’s longevity as a justification for a closer to equal division. Longevity alone, however, does not generally convince a court to award a dependent spouse a comparable award to the independent spouse; rather courts engage in a careful analysis of the factors, looking at how the marriage functioned and how the parties’ respective activities, including non-economic, contributed either directly or indirectly to the acquisition of assets.

By way of example, in the Connecticut case of *Young v. Young*,³⁶ where the parties were married for over 24 years, the dependent spouse was awarded only 35% of the \$4 million plus marital estate and alimony of approximately \$100,000 per year because the court found little correlation between the dependent

³³ *Id.* at 24 (quoting *McCarthy v. McCarthy* 156 A.D. 2d 346, 347) (N.Y. App. Div. 1989).

³⁴ No. 177999, 2004 WL 603376 (Va. Cir. Ct. Mar. 4, 2004).

³⁵ 743 N.Y. S.2d 103 (N.Y. App. Div. 2002).

³⁶ No. FA054012391S, 2006 WL 3758126 (Conn. Super. Ct. Dec. 6, 2006).

spouse's actions and her husband's ability to build the marital estate. The wife's testimony reflected that she "did not see herself as having to join in her husband's endeavors and rarely entertained his business clients or shared much with his work colleagues."³⁷

III. Independent Spouse Arguments in High Asset Divorce Cases

A. Dependent Spouse Was Not a "Corporate Spouse"

In the context of larger estate cases where one spouse may be a successful entrepreneur or businessperson, courts often note whether the other spouse assumed the role of a "corporate spouse," a term utilized in *Arneault v. Arneault*.³⁸ In considering the equitable distribution factor of contributing to the acquisition of assets, the courts may view the dependent spouse's actions as a corporate spouse as the spouse's "contribution" to the acquisition of assets. This may allow for a direct correlation between that spouse's activities and the marital unit's acquisition of assets. Independent or breadwinner spouses often argue successfully that, where his or her spouse failed to fulfill that role, the spouse did not make a significant contribution to the acquisition of assets and, therefore, the "contribution" factor weighs heavily in favor of the breadwinner spouse.

In *Young*, although the Connecticut Superior Court recognized that "Ms. Young's homemaking services obviously aided Mr. Young's ability to work and acquire his estate", it also found credible the husband's testimony that his wife did not entertain clients often, refused to attend social gatherings and other gatherings of his work colleagues, and generally did not take part in his work. Under these circumstances, the court found that Ms. Young did not regard herself or act like she was in an equal partnership with her husband in the acquisition of their estate. That was a role she left exclusively to him. Thus, unlike some

³⁷ *Id.* at 2.

³⁸ 639 S.E.2d 720 (W. Va. 2006).

cases where the non-working spouse may play an equal, albeit non-monetary, role in parties' ability to acquire assets; the court did not find such here."³⁹

In light of this, the court concluded that the equitable distribution award should reflect the parties' unequal contributions. The court awarded the wife less than fifty percent of the more than \$4 million marital estate.

Similarly, where the dependent spouse did not contribute as a corporate spouse but instead only enjoyed the privileges that the independent spouse's success afforded the marriage, the independent spouse may be able to successfully argue for a disproportionate share. In *Uygur*, the court found that the "contribution" factor weighed in favor of the independent spouse, not because he contributed a significant asset but because he built the marital estate while the dependent spouse traveled, golfed and skied and because the dependent spouse made only minimal contributions to the running of the household.⁴⁰

Finding that the dependent spouse's "contributions as a 'corporate wife' were minimal" the court awarded the independent spouse 55% of the \$5 million marital estate.⁴¹ Interestingly, the dependent spouse still received a significant portion of the estate.

Where, however, the independent spouse's career does not require the dependent spouse to serve as a typical corporate spouse, that spouse may not be faulted for failing to contribute to the independent spouse's business. In *Sosin v. Sosin*,⁴² the Connecticut Superior Court noted that "plaintiff never needed the defendant to fulfill the role of a corporate wife."⁴³ The court, therefore, indicated it would not fault the wife for her lack of involvement in the plaintiff's business development.

Similar to the argument that the dependent spouse was not a "corporate spouse" is the broader argument that the dependent spouse simply did not make adequate contributions to the marriage which could either be regarded as comparable to the bread-

³⁹ *Id.* at 3.

⁴⁰ *Uygur*, 2006 WL 1568845 at 7.

⁴¹ *Id.* at 3.

⁴² No. FA030401416, 2005 WL 10230163 (Conn. Super. Ct. Mar. 22, 2005). *Sosin* is discussed more fully *infra* in text accompanying notes 59, 75.

⁴³ *Id.* at 3.

452 *Journal of the American Academy of Matrimonial Lawyers*

winner's economic contributions or contributions from which a nexus could be drawn to the breadwinner's acquisition or production of assets. In *Miller v. Xiao Mei*, the record established a "relatively short marriage in which [th[e] dependent spouse's] contributions as a spouse, mother and homemaker were minimal."⁴⁴ Substantially because of this, the court awarded the dependent spouse only 25% of the marital estate of \$6.8 million. A similar approach in a smaller asset case led to similar results. In the Virginia case of *Ranney v. Ranney*,⁴⁵ which involved an estate of slightly less than \$2 million and only a four year marriage, the court found that:

Carol Ranney made scant non-monetary contributions to the marriage apart from occasional shirt ironings and traveling with her husband in the early stages of the marriage. Mr. Ranney similarly made some, but few non-monetary contributions. However, his employment with Network Solutions enabled the couple to live very comfortably and to finance. . . property acquisitions. . .⁴⁶

Based upon this lack of contribution (with an added factor, perhaps, being the brevity of the marriage), Mrs. Ranney received approximately 35% of the marital estate while Mr. Ranney received the bulk of the estate.

In *Arneault v. Arneault*,⁴⁷ Mr. Arneault argued convincingly to the lower court in West Virginia that his wife was not a corporate spouse and that she presented no evidence regarding her contributions to his success in the business world. While the West Virginia Supreme Court reversed the lower court's determination, upholding the presumption of a fifty-fifty split,⁴⁸ the dissenting opinions noted that Mrs. Arneault had the opportunity, but failed to present evidence, regarding her contributions, such as demonstrating that she was a sounding board to her husband, that she suffered an increased workload in the home due to her husband's business activities or that she traveled extensively as a result of the business. The dissent, therefore, found that she had

⁴⁴ *Miller*, 743 N.Y.S.2d at 104.

⁴⁵ *Ranney*, 2004 WL 603376.

⁴⁶ *Id.* at 3.

⁴⁷ *Arneault*, 639 S.E.2d 720. *Arneault* is discussed more fully *supra* in text accompanying notes 65-73.

⁴⁸ *Id.* at 730. Although West Virginia employs a 50/50 presumption, the analysis in this case is relevant to this article's discussion of spouses' relative contributions.

not met her burden of showing that she had made a comparable contribution to the marriage as a corporate spouse. The dissent noted that, with respect to the stock in her husband's business "(h)ad Mrs. Arneault, in reality, served the role of 'corporate spouse' that she alleges, she might be entitled to half of the value of MTR stock."⁴⁹ Believing she had not fulfilled her duty, the dissent maintained she should only have received thirty-five percent of the stock.

B. The Spouse Who Earns the Money Deserves to Receive More

In dealing with estates in the million of dollars, the courts' concern may shift from merely providing each spouse with sufficient assets to live separately to enabling them to maintain the luxurious lifestyles they enjoyed during marriage. The question for the trial court often becomes how much to provide to each spouse that is above and beyond what the party actually needs to live comfortably. A common argument made by the independent breadwinner spouse is that he or she deserves more, if not significantly more, of the marital estate than the dependent spouse based on the simple proposition that he or she earned the money that built the estate. The breadwinner spouse will often argue that it was his or her "creative genius" that enabled the parties to amass the marital estate and as a result, he or she should retain the majority of the estate, or that the dependent spouse made no significant contribution in his or her own domain that could equate to the breadwinner's contributions. (Of course, this argument can be countered by the strong argument that, because the independent spouse has demonstrated such a significant ability to accumulate wealth, that spouse will continue to have a higher earning capacity and the dependent spouse should, therefore, receive a greater share of the marital estate.) These arguments all fall under the equitable distribution factor that requires the court to analyze the spouses' relative contributions to the acquisitions or dissipation of assets.

Frequently, in cases involving large estates, the independent spouse argues that the homemaker spouse employed a domestic staff such that the homemaker's duties were limited to delegating

⁴⁹ *Id.* at 742.

household responsibilities and enjoying a luxurious lifestyle and, therefore, are not comparable to the independent party's active economic duties or contributions.

In *In re the Marriage of O'Rourke*,⁵⁰ Mr. O'Rourke articulated this argument simply when he argued that he should receive a greater share of the estate due to "the fact that his family's wealth was the result of his hard work during the marriage."⁵¹ The appellate court rejected that argument, citing Washington case law that held that "(t)he fact that one spouse, be it husband or wife, may be the major income producer will not justify giving him a share of the community property"⁵² when it awarded Mrs. O'Rourke 62% of the over \$3 million marital estate.

In *Sosin v. Sosin*,⁵³ a recent case involving an estate of \$168 million, the husband unquestionably created the financial success that led to the substantial marital estate. Although the "[wife] was engaged in the care-taking of the children and the home"⁵⁴ and the husband was absent from certain family activities, the court awarded him 86% of the marital estate because his exceptional business efforts created the estate. While the court noted that Mrs. Sosin took care of the children and the home for years, it also strongly considered her eventual departure from homemaking duties and pursuit of a separate life filled with outdoor activities and international travel, which ultimately led to an extramarital affair. (The affair in particular, perhaps, played a substantial role in the court's ultimate decision.) The court, therefore, did not equate her contributions with Mr. Sosin's. (It should be noted that 14% of \$168 million is still over \$23 million, not an insubstantial amount.)

In the New York case of *Mahoney-Buntzman v. Buntzman*,⁵⁵ the husband argued that he should retain the majority of the stock in the company where he worked, which comprised a significant portion of the parties' more than \$6 million marital es-

⁵⁰ No. 58096-5-I, 2007 WL 2985095 (Wash. Ct. App. Oct. 15, 2007).

⁵¹ *Id.* at 5.

⁵² *Id.* at 5 (quoting *In re Marriage of DeHollander*, 770 P.2d 638, 642 (Wash. Ct. App. 1989))

⁵³ *Sosin*, 2005 WL 1023016.

⁵⁴ *Id.* at 2.

⁵⁵ No. 8098/03, 2006 WL 2818786 (N.Y. Sup. Ct. Oct. 3, 2006).

tate. The court went into an in depth analysis of the husband's contributions to the success of the business, both of the husband's overall efforts and specifically of his efforts between the date of separation and date of trial, finding that:

The defendant [husband] played a significant role in the creation of EVCI and its continued, and highly successful, ongoing operation. He was also the central figure in its change of direction to a company owning and operating for-profit colleges, and for its survival through its IPO and struggle to avoid 'de-listing' by NASDAQ. By virtue of defendant's efforts, EVCI has substantial increases in its revenue and earnings, and its stock value increased markedly, during the period from its creation through the time of trial.⁵⁶

The court also considered the wife's homemaking contributions as enabling the husband to acquire the EVCI assets, but found no credible proof that the wife played any direct role in the husband's business. "Reject[ing] plaintiff's contention that she played a direct role in the creation of EVCI, through participation in meetings or otherwise. . . Consequently, notwithstanding the length of the parties' marriage and her non-economic contributions, plaintiff is not entitled to an equal share of the value of the EVCI stock and options."⁵⁷ The plaintiff wife, therefore, received only 35% of the EVCI stock and options.

In *TenEyck v. TenEyck*,⁵⁸ the husband argued successfully to the Alabama court that he should be awarded a disproportionate share of the parties' most substantial asset, a truck driving school, the "Academy." The husband, who established the business "characterized the wife's contributions to the Academy as 'slim to none.'⁵⁹ Although the court found that "the wife did assist the husband in the start-up of the business by typing school catalogs, researching financial issues, and preparing a building for use as a truck-driving school and as a dormitory for students,"⁶⁰ the court ultimately awarded her only 16% of the value of the \$3 million business.

Similarly, in the *Uygun* case in Michigan, where the wife "spent a great deal of her time volunteering, golfing, skiing, and traveling, while defendant worked to sustain the parties' life-

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 46.

⁵⁸ 885 So.2d 146 (Ala. Civ. App. 2003).

⁵⁹ *Id.* at 149.

⁶⁰ *Id.*

style,”⁶¹ the appellate court agreed with the trial court’s finding that the husband “had made all significant financial contributions to the marriage”⁶² and therefore, awarded husband 55% of the \$5 million marital estate.

The independent spouses’ arguments in this context generally focus on the “equitable” aspect of “equitable distribution.” The independent spouse often argues that equity dictates that he or she be awarded a greater share of the estate based on the simple proposition that he or she contributed the greater share. In the West Virginia case of *Arneault*, Mr. Arneault argued “that his contribution to the marital estate has been so substantial that it would be inequitable to require him to divide the marital estate equally.”⁶³ The trial court accepted that argument, awarding him 65% of the over \$28 million marital estate. The West Virginia Supreme Court, however, reversed the 65/35 allocation, citing the state’s equitable distribution statute which has a presumption of 50/50. While this article focuses on states that do not have such a presumption, the discussions by the majority and dissenting opinions in this case provide insight into how courts view spouses’ relative contributions, and, given the extent of the dissenting opinions and the fact that the state supreme court felt constrained by the presumption of equality, the case demonstrates that, but for the presumption, the husband’s contributions may have merited a 65/35 split.

The West Virginia Supreme Court based its reliance on the presumption of an equal division on its view that this marriage was a partnership in which each spouse made important contributions to the marriage, the husband through his employment and the wife through her homemaking, which enabled the husband to work. The court noted that:

[e]ven though Mrs. Arneault also had an advanced degree, she abandoned her own career to stay home with the couple’s children. She also was responsible for the majority of the housework and the maintenance of the marital residence. Her responsibilities were manifestly increased by the fact that Mr. Arneault was completely absent from the marital home during the work week, leaving Mrs. Arneault with even greater responsibilities and household duties than is normally encountered in like circumstances. Rather than the conclusion made by

⁶¹ *Uygur*, 2006 WL 1568845 at * 3.

⁶² *Id.* at 7.

⁶³ *Arneault*, 639 S.E.2d at 725.

Vol. 21, 2008 Distribution in Large Marital Estate Cases 457

the family court, the facts of this case show it is more likely that Mrs. Arneault's contributions to the marriage are precisely the reason that Mr. Arneault was able to succeed in his work.⁶⁴

The majority, therefore, found that the Arneault's were in a position no different from the typical 50/50 case involving a traditional marriage. The dissenting opinion, however, agreed with the trial court that Mr. Arneault's contributions were extraordinary, both in the workplace and in the home, and that Mrs. Arneault's contributions were not comparable. The trial court's opinion, discussed by the majority and the dissent, sets out the quintessential argument of why an independent spouse who provides an extraordinary contribution to the marital estate by amassing an unusually large estate through his or her own work efforts should receive the majority of the estate, while the dependent spouse who provided relatively minimal contributions deserves a disproportionately smaller share of the estate.

The petitioner's intelligence and ability are unique to him and the development of these attributes can not [sic] be attributed equally to the [husband] and [wife], regardless of the environment which the [wife] created in order to allow the petitioner to achieve the estate that has been amassed. He must be given some additional weight and credit in equitable distribution for existence of those attributes, intelligence, and abilities, which helped him achieve the marital estate currently in question. This Court looks at these personal attributes as substantial service contributions to the marital estate. There are many persons who have obtained an MBA and become a CPA during their marriage, but they have not accomplished nearly the achievements of the petitioner. These achievements go beyond the acquisition of degrees of experience, and must be given additional consideration in equitable distribution.⁶⁵

The dissenting opinion by Justice Starcher, while not precedential, found that the independent spouse deserved a disproportionate share, not only because he was such an extraordinary businessman but because "Mr. Arneault was a devoted, involved father [who] coached his son's athletic teams, and, despite necessary business travel, made it home frequently and nearly every weekend while either child was living at the family home."⁶⁶ Justice Starcher suggested that Mr. Arneault assumed over fifty per-

⁶⁴ *Id.* at 729.

⁶⁵ *Id.* at 727-28.

⁶⁶ *Id.* at 740

cent of the responsibilities to the marriage and home, and, therefore, deserved over fifty percent of the marital estate.

In addressing the fifty-fifty percent presumption, Justice Starcher's dissenting opinion cites language of the West Virginia equitable-distribution statute which lists factors for straying from the presumption, including "*The extent to which each party has contributed* to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions.⁶⁷ Justice Starcher, therefore, indicated that Mr. Arneault's contributions epitomized the instance in which the presumption should be overturned and the breadwinner spouse awarded a greater share of the estate.

The contribution of the independent spouse may not just be through earned income but may also be in the contribution of greater separate funds to a marital asset. In the New York case of *Kaye v. Kaye*,⁶⁸ the parties disputed the appropriate distribution of their \$5,750,000 marital residence. The wife argued that she should receive a greater share of the value of the residence because she contributed more to the down payment. The husband argued that the equity in the home should be split equally. Finding that the residence was entirely marital, but recognizing that "[defendant's] contributions to the purchase, maintenance and operation of the premises was slightly less than plaintiff's contributions,"⁶⁹ the appellate court affirmed the special referee's award of 60% of the residence to the plaintiff wife.

The argument of the independent spouse that he or she deserves the bulk of the estate because he or she generated it is often difficult for a court to accept if the court accepts the idea that marriage is a partnership with each spouse making his or her relative contributions for the overall benefit of the marriage. This argument appears to best succeed where the independent spouse both makes an unusual financial contribution to the marriage and also assumes responsibilities traditionally borne by the homemaker spouse or is able to show that the dependent spouse simply did not shoulder his or her burden by assuming primary responsibility for the homemaking duties. On balance, the inde-

⁶⁷ *Id.* at 743 (quoting W. VA. CODE §48-7-104(1)(2001)).

⁶⁸ No. 350312/01, 2005 WL 41558 (N.Y. Sup. Ct. Jan. 5, 2005).

⁶⁹ *Id.* at 3.

pendent spouse develops a theory in which he or she was the far greater contributing “partner” than the other spouse.

C. Marriage Was Not a Partnership/The Parties Lived Separate Live

As with the argument that the dependent spouse did not function as a “corporate spouse,” independent spouses, anticipating the dependent spouse’s argument that the marriage functioned as a partnership, frequently assert that, where the spouses led relatively independent lives, the spouses should not share equally in the marital estate.

In the New York case of *Hearst v. Hearst*,⁷⁰ which revolved around John Randolph Hearst, Jr., a beneficiary of the Hearst Family Trust started by Mr. Hearst’s grandfather, publishing mogul William Randolph Hearst, the court recognized that “it cannot be said that the luxurious lifestyle the wife enjoyed was in any significant way shared with her husband, especially in the past few years.”⁷¹

In *Hearst*, Mr. Hearst was the beneficiary of the multimillion dollar trust producing an income of \$5 to \$6 million per year. Although the husband received such a significant income stream, he did not fully enjoy it since he was ill and confined to a wheel chair. The wife, however, fully reaped the benefits of the income stream by amassing a significant estate titled in her name alone. The court found that “despite the wife’s characterization of a rich and opulent marital standard of living, the evidence at trial showed that for much of the marriage, the wife enjoyed that lifestyle alone.”⁷² The husband was sick and confined to a wheel chair for the last ten years of the marriage. During his trial testimony, the husband described his decorating style as “wall to wall carpet made of socks. He essentially stayed in two rooms of his house during most of the latter part of the marriage, while his wife traveled, dined at expensive restaurants, spent time at numerous other residences and spent million of dollars from the husband’s trust distributions.”⁷³

In discussing the parties’ marital life, the court noted that:

⁷⁰ No. 350444-2004, 2007 WL 813852 (N.Y. Sup. Ct. Feb. 23, 2007).

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ *Id.*

460 *Journal of the American Academy of Matrimonial Lawyers*

[s]tarting in 1997 and continuing through today, the husband began receiving round-the-clock nursing care and so the wife's role in this area effectively ended. By that time, the wife was no longer sharing the marital bedroom, having left in 1995. Thereafter, the couple stopped almost all travel and dining out together. Indeed, the wife admitted that in 2003, the year before separation, she did not go out to dinner with her husband even once. And, . . . his nurse, testified that starting in about 2001, the wife said she was not going out to lunch with him."⁷⁴

In this particular decision, equitable distribution was not a consideration because the case had not progressed to the divorce and property issues and there was no guarantee that it would progress that far. However, the court's discussion of the parties' marriage remained relevant since it served as the court's basis for awarding Mrs. Hearst a significantly lower monthly maintenance award, \$20,000, than what she requested, finding that she had taken enough from her husband without living in a supportive interdependent marital relationship.

In *Sosin*, the Connecticut court discussed at length the wife's eventual absence from the marital relationship, suggesting that this (and the ensuing extra-marital relationship) played a key part in its decision to award her only 14% of the marital estate. While noticing that early on in the marriage, Mrs. Sosin served as homemaker and primary parent, the court found that:

[a]s the family was able to afford household help, [Mrs. Sosin] became thoroughly involved with skiing, rock climbing and dance activities. At times, [Mr. Sosin] and the children found themselves having meals without her while she was engaged in the spiral of her outdoor activities. Furthermore, she traveled extensively throughout the world, many times without [Mr. Sosin], keeping her away and detached from her husband and family for multiple days at a time.⁷⁵

As Mr. Sosin earned the assets comprising the marital estate without the company of his wife during the later years of the marriage, he therefore, received the overwhelming majority of the estate. Like Mr. Sosin, Mr. Ranney in the *Ranney* case discussed above, amassed the marital estate largely without the assistance of his wife. In *Ranney*, the Virginia Court found that "[t]he evidence persuasively demonstrate[d] that while Carol Ranney was solicitous of Timothy Ranney's affections before the

⁷⁴ *Id.* at 7.

⁷⁵ *Sosin*, 2005 WL 1023016 at 9.

marriage, once married her conduct changed. She became largely self-absorbed, dominating, and often threatened divorce”.⁷⁶ The court found that while both parties were engaged in the pursuit of financial gain during the marriage, it was not done as a partnership. Mrs. Ranney was, therefore, awarded only one-third of the \$2 million marital estate.

A reasonable interpretation of the cases in which the parties led primarily separate lives suggests that a disproportionate split in favor of the independent spouse may be found appropriate since any argument that the dependent spouse’s efforts enabled the independent spouse to build the marital estate becomes inapplicable. The case law suggests that merely taking care of oneself is not sufficient to gain the dependent spouse an equal or comparable share of the marital estate.

IV. Dependent Spouse Arguments in Large Estate Cases

A. Marriage as a Partnership/Role of a Homemaker

One of the difficulties in equitable distribution cases in which one spouse earned the majority or entirety of the marital estate while the other labored as a homemaker is quantifying the homemaker’s contribution. Dependent spouses in traditional marriages often argue in equitable distribution cases of any size that their marriage functioned as an equal partnership; one spouse worked out of the home while the other worked in the home and, since the marriage was a “partnership,” at dissolution, the parties should be treated as equal partners. Although there may be anecdotal evidence, cases generally have not quantified that role (e.g., teacher, nanny, babysitter, driver, housekeeper, confidante, concubine).

This “partnership” argument maintains that because the dependent spouse assumed homemaking and/or parenting responsibilities, the independent spouse was able to focus on her or his career, thereby creating the marital estate on behalf of the joint partners. In some states, the argument that non-economic contributions can be equated to economic contributions has resulted in a near presumption of a fifty-fifty division in a long term mar-

⁷⁶ 2004 WL 60337 at *3.

462 *Journal of the American Academy of Matrimonial Lawyers*

riage. As noted in the New York case of *Sieger v. Sieger*,⁷⁷ where both parties have made significant contributions to the marriage, a division of marital assets should be made as equal as possible.⁷⁸

This argument is strengthened where the dependent spouse can present evidence regarding the independent spouse's suggestion or insistence that the dependent spouse remain in the home and/or forgo an employment opportunity. In *Clement*, Mrs. Clement, who received forty-five percent of the over \$3 million marital estate,

devoted herself to the responsibilities of a homemaker with Mr. Clement's blessing; indeed, it is conceded by both parties that Mr. Clement did not want her to be employed outside the home. By taking care of these duties, Ms. Clement enabled Mr. Clement to spend much of his time outside the home pursuing business interests, community involvement, and recreational activities.⁷⁹

In the New Jersey case of *Dubois v. Brodeur*,⁸⁰ which involved the marriage of a professional hockey player earning millions of dollars per year and an estate of over \$13 million, the court divided the estate evenly, finding that Mr. Brodeur

wanted [Ms. Dubois] to at first be his companion and later his wife and the mother of their children. Hence, the parties' relationship was a shared enterprise and they could not go back in time and fault [Ms. Dubois] for neglecting to receive an education, not finding employment, or not developing a career.⁸¹

Similarly, in the Connecticut case of *Layman v. Layman*,⁸² the court awarded Mrs. Layman alimony in the amount of \$25,000 per month as well, as half of the marital assets including the husband's stock options, noting that the wife "was active with the children's school and extracurricular activities. The [husband] was traveling about 40% of the time⁸³" and the wife "has

⁷⁷ No. 6975/98, 2005 WL 2031746 (N.Y. Sup. Ct. June 29, 2005).

⁷⁸ *Id.* at 3 (quoting *Chalif v. Chalif*, 751 N.Y. S. 2d 197, 197) (N.Y. App. Div. 2002).

⁷⁹ *Clement*, 2004 WL 3396472 at 11.

⁸⁰ No. FM-07-2617-03, 2007 WL 2012387 (N.J. Super. Ct. App. Div. July 23, 2007).

⁸¹ *Id.* at 11.

⁸² No. FA010186011, 2003 WL 21675904 (Conn. Super. Ct. June 26, 2003).

⁸³ *Id.* at 1.

been homemaker for defendant and their four children. [The husband] has provided well for the family.”⁸⁴

Similarly, in *Condon v. Condon*,⁸⁵ the trial court ordered an equal division of the \$3 million plus marital estate, finding that “the wife has been a homemaker and the primary caretaker for the parties’ children” and the “wife also ‘played the role’ of ‘corporate spouse’ during the marriage, attending business, charitable and civic activities with the husband, although her participation in such activities decreased after the birth of the parties’ child.”⁸⁶ The appellate court ultimately remanded the case to the trial court, not disagreeing with the division, but merely requesting that the lower court provide some further rationale for its precise division of the assets.

This view of the homemaker spouse as being part of a “partnership” or “marital unit” which together accumulates the marital estate was similarly applied in *In re Marriage of Grim*:⁸⁷

During 36 years of marriage, Donald and Catherine Grim amassed community and separate property worth over \$4.7 million. During the marriage, Donald attended dental school and built a very successful orthodontic practice. Catherine worked sporadically over the years and raised their two sons. Both Grims were 58 years old at the time of their divorce. Other than assisting Donald with his practice, Catherine has not had any significant employment outside the home since 1982.”⁸⁸

The appellate court, referring to the court’s opinion, therefore found that “(t)he couple accumulated their assets as a unit”⁸⁹ and determined that this warranted an equal division of the assets. Similarly, in *In re the Marriage of Becker*,⁹⁰ the court awarded each spouse half of the over \$3.2 million marital estate considering the twenty year length of the parties’ marriage and the fact that “[Mrs. Becker] contributed to the marriage by sacri-

⁸⁴ *Id.* at 4.

⁸⁵ No. 03-P-78, 2005 WL 331738 (Mass. App. Ct. Feb. 11, 2005).

⁸⁶ *Id.* at 1.

⁸⁷ No. 25343-7-II, 2001 WL 959923 (Wash. Ct. App. Aug. 24, 2001).

⁸⁸ *Id.* at 1.

⁸⁹ *Id.* at 6.

⁹⁰ No. 06-0319, slip.op., 2008 WL 4307969 (Iowa, Sep. 12, 2008).

ficing a career to stay home and raise the parties' children which enabled [Mr. Becker] to focus on business activities."⁹¹

In the 2007 case of *In Re Marriage of Polsky*,⁹² a particularly notable decision (it was one of the largest marital estates subject to equitable distribution reported in a case in recent history), the Illinois court equally divided the couple's \$368 million estate, although the bulk of the estate was earned entirely by Mr. Polsky during the marriage. Unfortunately, the available trial court opinions do not provide the court's rationale for the split, rather the Amended Judgment for Dissolution merely states that:

The Court has listened to the arguments of counsel regarding the distribution of this marital estate, both sides agree that it is extraordinary in its size. [Mrs. Polsky] argues that she is entitled as a matter of right to an equal portion of the estate due to her contribution as a wife, homemaker for [Mr. Polsky] and their children, and confidant for [Mr. Polsky]. [Mr. Polsky] argues that it was through his ingenuity, skill and drive that the marital estate has grown to the size that it has.⁹³

Articles referring to the *Polsky* case cite Mrs. Polsky's argument in her brief that the couple were partners in all areas of life and that the couple "would walk together after dinners, and [Mr. Polsky] would share details of his work, looking for empathy, advice or merely an open ear. For many years, their marital partnership flourished. [Mr. Polsky] provided sustenance and security, and [Mrs. Polsky] provided love, support, advice and counsel."⁹⁴ (The articles also indicate that Mr. Polsky intended to file an appeal. Therefore, it is unknown whether this division will be altered if an appeal is taken).

In some states, the concept of the homemaker spouse contributing as a partner is relevant in two ways; first, as to the overall percentage distribution of the estate; and second, in states that consider the active/passive distinction in increase in value of non-

⁹¹ *Id.* at 4 Opinion vacated and superseded on rehearing by No. 06-0319, 2007 WL 4191936 (Iowa App. Nov. 29, 2007). This later rehearing modified the original calculations of the value of the estate but still awarded each spouse half of the estate.

⁹² No. 03 D 2662, Cook County, Illinois Domestic Relations Division (2007).

⁹³ *Id.*

⁹⁴ Carolyn E. Price, 'Homemaker' Gets \$184 Million in Divorce Settlement, DIGITAL JOURNAL, June 5, 2007, <http://www.digitaljournal.com/article/191900>.

marital property, whether the increase in value should be considered marital property. For example, as the court in *Clement* noted, “(w)hile it may be true that many of the day-to-day responsibilities of managing the properties were delegated to other individuals, the record shows that Mrs. Clement’s contributions as a homemaker freed Mr. Clement up to oversee his wide range of properties and investments unburdened by the day-to-day management of the home or many of the responsibilities involved in parenting their son.”⁹⁵ Given her role, Mrs. Clement received, as discussed above, 30% of the millions of dollars of increase in value of Mr. Clement’s separate property.

In *Sosin*, discussed above, while it is not explicitly clear how the court regarded the dependent spouse’s non-monetary contributions, the court did take note that the wife assumed the homemaking and child rearing duties while Mr. Sosin was frequently absent:

“While [Mr. Sosin] was working outside the home and earning the family income, [Mrs. Sosin] was engaged in the care taking of the children and the home. When she was pregnant with each of the three children, [Mrs. Sosin] attended the prenatal appointments alone. . . . The plaintiff played a minimal role in these activities, primarily because of his unabiding commitment to his business ventures.”⁹⁶

In the New York case of *K.J. v. M.J.*,⁹⁷ the court addressed the issue, relevant in only some states, of the value of the husband’s enhanced earning capacity, or “EEC,” which was the result of the MBA he acquired during the marriage. The wife argued that she was entitled to thirty-five percent of the EEC based upon her contributions to the marriage that enabled the husband to obtain the MBA which enhanced his earning capacity. In analyzing the wife’s contributions, the court considered “all forms of contribution to the economic partnership that characterizes a marriage,”⁹⁸ and particularly looked to see that the wife “made a substantial contribution to [the husband’s] acquisi-

⁹⁵ *Clement*, 2004 WL 3396472 at *11.

⁹⁶ *Sosin*, 2005 WL 1023016 at *2.

⁹⁷ No. 19759/03, 2007 WL 602225 (N.Y. Sup. Ct. Feb. 9, 2007).

⁹⁸ *Id.* at 28 (quoting *Brough v. Brough*, 727 N.Y.S.2d 555,555 (N.Y. App. Div. 2001)).

tion of that marital asset that has resulted in the enhanced earnings.”⁹⁹

The court found that:

While defendant pursued his MBA, beginning at the time plaintiff had just given birth to their first child, he insisted that plaintiff prepare elaborate Indian style meals, ensure that the children were quiet so that his studies and his sleep were not interrupted, address the children’s emotional and health problems and be the primary keeper of their home. [The wife], who fully supported [the husband’s] plan to obtain his MBA, continued that role throughout their marriage, enabling him to attain that degree with honors, which resulted in his obtaining his position at FinSrv and succeeding in his career change while she remained in her position, with a substantially lower salary and potential for income growth that his. Those same significant contributions on her part allowed defendant to put in the necessary effort to study for, and pass, the examinations for each of the . . . licenses.”¹⁰⁰

The wife, therefore, received 35% of the value of the EEC, which was all that she requested. Valuing the EEC at \$3,010,000, the court awarded her \$1,053,500.

This concept of a marriage as a partnership can extend beyond the homemaker/breadwinner spouse approach to instances in which a married couple actually works together in business. In those situations, it may not be as important to determine what precise role each played in the business itself as it might be in the creation or dissolution of a business partnership; rather it may be sufficient to demonstrate that the dependent spouse worked with the independent spouse in any capacity to convince a court to award the independent spouse a comparable or equal share of the marital estate. In *Sieger v. Sieger*,¹⁰¹ both parties worked together in an enterprise of nursing homes initiated by the wife and her family, which was worth in the tens of millions. The court noted that “both parties testified that he or she contributed to the marital assets and to the career of the other”¹⁰² with the plaintiff working at nursing homes owned by the defendant’s father early on in the marriage and the defendant helping the plaintiff to prepare for his license exams and assisting in staffing the facilities. Finding that the marriage was of long duration with

⁹⁹ *Id.* at 28.

¹⁰⁰ *Id.* at 29.

¹⁰¹ *Sieger*, 2005 WL 2031746

¹⁰² *Id.* at 45.

both spouses contributing to the partnership, the court divided the more than \$20 million estate equally.

Similarly, in the Iowa case of *In re Marriage of Keener*,¹⁰³ where the parties incorporated a business the day before their marriage, the court divided the estate equally as:

the business was their joint venture from the beginning [in which] [the husband] was responsible for purchasing merchandise, sales, marketing, contract negotiations, and arranging toy manufacturing. [The wife] was involved in the financial aspects of the business-invoicing, writing checks, keeping the books and tracking finances. The company started in the couple's garage but grew rapidly and became very successful.¹⁰⁴

The concept of marriage as a partnership focuses on the idea that parties to a marriage each assume specific responsibilities during the marriage and, regardless of which spouse earns the money, it is implicit in the marital relationship that the money was brought in on behalf of both parties. The argument succeeds best when there is a direct correlation between the efforts of the dependent spouse and the ability of the independent spouse to acquire assets on behalf of the marital unit.

A different situation arises where neither party actually 'labored' to create the significant marital estate, for example, where the estate was derived from lottery winnings. In those cases, the spouse who purchased the ticket often argues that either the winnings should be considered his or her separate property or that he or she should receive the majority of the winnings. Some cases, however, show that the way the couple functioned before they won the lottery is relevant to how the winnings should be divided. In the South Carolina case of *Thomas v. Thomas*,¹⁰⁵ the court saw that "Husband and Wife both: have a high school education, provided income to the marriage as well as other non-economic contributions, and are the same age."¹⁰⁶ Because of those facts and because the parties shared with winnings jointly prior to separation, treating their marriage as a partnership, the court divided the \$9 million of lottery winnings in half.

¹⁰³ 728 N.W.2d 188 (Iowa 2007).

¹⁰⁴ *Id.* at 191-92.

¹⁰⁵ 579 S.E.2d 310 (S.C. 2003).

¹⁰⁶ *Id.* at 314 n.5.

B. *Dependent Spouse Sacrificed for the Marriage/Has Diminished Earning Capacity*

Most equitable distribution statutes require that courts examining the parties' earning capacities determine the ability each party has to acquire future assets. Dependent spouses often assert that they should receive more than fifty percent of the marital estate because the independent spouse has the greater ability to acquire and produce future wealth based upon his or her earning capacity and earning's history. The issue of earning capacity also relates to the dependent spouse's argument articulated in *In re Marriage of Becker* discussed above, that he or she gave up a potentially successful career for the sake of the marriage and now, is face with a diminished earning capacity due to his or her significant absence from the workplace. Both of these issues (that the independent party can reproduce the wealth and the dependent spouse sacrificed a career) relate not only to equitable distribution but also to awards of maintenance and various types of alimony.

In *Condon v. Condon*, the court recognized that Mrs. Condon would be at a severe disadvantage should she attempt to re-enter the workforce due to her approximately twenty year absence from the workplace in which she served as homemaker and primary caretaker for the parties' children. Noting this, the court divided the more than \$3 million marital estate equally.¹⁰⁷

Similarly, in *Clement v. Clement*, the court paid special attention to the:

Dramatic disparity in the respective vocational skills, employability, and earning capacity of Mr. and Ms. Clement—Mr. Clement's yearly salary [of \$645,471] was approximately thirty-two times Mrs. Clement's yearly salary at the time of trial. It was undisputed that, once their son Bowes was born, Mr. Clement desired that Mrs. Clement not work outside the home, and that she spent approximately thirteen years as a full-time homemaker. . . . From the evidence adduced at trial, Mrs. Clement does not have comparable likelihood of obtaining capital assets and income in the future, due at least partly to her thirteen years working in the home."¹⁰⁸

¹⁰⁷ No. 03-P-78, 2005 WL 33178 (Mass. App. Ct. Feb. 11, 2005).

¹⁰⁸ *Clement v. Clement*, No. W2003-02388-COA-R3-CV, 2004 WL 3396472, at *6 (Tenn. Ct. App. Sep. 23, 2004).

The court, therefore, found Ms. Clement's decreased earning capacity to be a factor in her favor and awarded her a greater share of the \$3.5 million marital estate on appeal than was awarded at trial.

Often courts will award the dependent spouse more than half of the marital estate based largely on the fact that she or he has suffered a decreased earning capacity as a result of his or her contributions to the marriage and that the independent spouse experiences a greater earning capacity as a result of his or her contributions as well as the contributions of the dependent spouse. In *O'Rourke*, Mrs. O'Rourke was awarded 62% of the marital estate plus spousal maintenance recognizing Mr. O'Rourke's "tremendous ability to acquire and sell property"¹⁰⁹ which will enable him to "go back to making money in no time flat."¹¹⁰ With regard to Mrs. O'Rourke, the court noted that she would need a degree to develop any earning capacity and that, in any case, she would never approximate Mr. O'Rourke's earnings.

This "earning capacity" argument appears to have less application in cases in which the parties are both approaching retirement age or where both parties have health problems. In *Young*, Mrs. Young argued that, among other reasons, she was entitled to a greater share of the marital estate because her earning capacity was more limited than her husband's. The court disagreed, noting that:

Mrs. Young is a high school graduate and has a limited work history. In neither of her marriages did she work outside the home, and, between her 1967 divorce and the parties' marriage in 1981, she had part-time jobs and partially depleted her savings. At age 36, she does not particularly want to start working now but despite her age and health she is capable of working at a full-time job. . . ."¹¹¹

The court did not appear to consider either her diminished earning capacity or Mr. Young's greater earning capacity as significant considerations since "the ages and health of the two parties ma[de] it impossible to predict how long either will be able to continue working."¹¹²

¹⁰⁹ *O'Rourke* at *2.

¹¹⁰ *Id.*

¹¹¹ *Young*, 2006 WL 3758126 at *3.

¹¹² *Id.*

470 *Journal of the American Academy of Matrimonial Lawyers*

Similarly, the dependent spouse's argument as to his or her diminished earning capacity when compared to the independent spouse's much higher earning capacity may not be given much weight where it is foreseeable that the independent spouse's high capacity or high income level is only temporary. Such is often the case with professional athletes. In *Dubois*, discussed above, while the court divided the assets evenly, it declined to grant the wife permanent alimony of \$500,000 per year finding that "a dependent spouse in a seven-year marriage will never be able to attain the luxurious lifestyle enjoyed for a brief-period of time when the couple were in their twenties and early thirties and the supporting spouse was at the height of his highly lucrative athletic career."¹¹³

In some instances, the independent spouses can receive a larger share of the marital estate despite their greater demonstrated earning capacity where it is foreseeable both that his or her earning capacity may not continue at that level and that the dependent spouse has a greater potential, although not yet demonstrated, earning capacity. In the Alaska case of *Fortson v. Fortson*,¹¹⁴ the independent spouse earned over \$500,000 per year while the dependent spouse had a significantly lower earning capacity. Despite its recognition that "when a couple has sufficient assets, the spouse with the smaller earning capacity can and should receive a larger share in property distribution,"¹¹⁵ the court awarded the dependent spouse only 40% of the \$2.8 million marital estate due to the foreseeable decrease in the independent spouse's earning capacity resulting from her serious health problems which cost her over one million dollars in medical fees.

The argument regarding earning capacity is also weaker where both parties are viewed as having diminished earning capacities. In the Connecticut case of *Hehman v. Hehman*,¹¹⁶ for example, both parties' earning capacities were at issue. The wife had a diminished earning capacity due to her brief absence from

¹¹³ *Dubois*, 2007 WL 2012387 at *20.

¹¹⁴ 131 P.3d 451 (Alaska 2006).

¹¹⁵ *Id.* at 457 (quoting *Dodson v. Dodson*, 995 P.2d 902, 914 n.19 (Alaska 1998)).

¹¹⁶ No. FSTFA054005191S, 2007 WL 1321686 (Conn. Super. Ct. Apr. 16, 2007).

the workplace and health problems that diminished her ability to work full time. Similarly, the husband, who devoted significant efforts to enhancing the value of a particular marital asset, suffered a decreased earning capacity due to his time commitment to that asset. The court noted that with regard to Mrs. Hehman, “she is capable of working yet her income potential is limited.”¹¹⁷ The court determined that Mr. Hehman was “vastly underemployed. However, given the length of time which he devoted solely to property development and sale, it is almost impossible to determine a reasonable earning capacity.”¹¹⁸ Because the court found that both parties had diminished earning capacities, the marital assets of more than \$5 million were evenly divided.

The diminished earning capacity argument is in many ways the counter-argument to the independent spouse’s argument that because he or she earned the money, he or she should be awarded a disproportionate share of the assets. While the independent spouse argues that he or she deserves the bulk of the estate because he or she served as primary breadwinner while the other spouse perhaps stayed at home and earned no income that he or she now requires a more significant share of the estate. The dependent spouse’s argument best succeeds when the dependent spouse can demonstrate that the independent spouse either agreed to or insisted upon the dependent spouse withdrawing from the workplace in order to assume primary responsibility for the homemaking duties and enable the independent spouse to primarily focus on his or her economic activities.

C. Dependent Spouse Made Active and Direct Contributions to the Independent Spouse’s Acquisition of Assets

The argument that a dependent spouse’s assumption of homemaking and/or parenting duties enabled the breadwinner spouse to acquire assets on behalf of the marital unit presumes that the dependent spouse’s efforts naturally benefited the independent spouse. Dependent spouses often argue, perhaps more effectively that their efforts played a more direct tangible role in the independent spouse’s success or ability to generate income or amass wealth where those efforts include assisting the indepen-

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.* at 3.

dent spouse in his or her place of business, managing the family's finances and—making active contributions towards the increase in value of the independent spouse's separate assets.

The distinction between managing the home, which enables the breadwinner spouse to focus on his or her employment, and making a more direct contribution was discussed in *Uygur*.¹¹⁹ The Michigan statute at issue in *Uygur* indicates that “[a] party's separate property can be subject to division in a divorce if the other party contributes to the acquisition, improvement, or accumulation of the property.”¹²⁰

The *Uygur* court found that the wife's contributions as a homemaker were insufficient to warrant invasion of Mr. Uygur's separate asset since she “unilaterally quit her job just before the marriage, raised no children during the marriage, enjoyed numerous leisure activities, employed a housekeeper, ate dinners out, spent considerable time in Florida while defendant worked in Michigan, and contributed little to the marital relationship or to the administration of the household.”¹²¹

In contrast, in *Courembis*, discussed above, Mrs. Courembis argued that her direct and substantial contributions to the increase in value of Mr. Courembis' pre-marital property which included managing and selling properties and managing proceeds from the sales gave either the property itself a marital component or, at least, made the increase in value marital. With regard to one specific property, the court recognized that “[a]lthough husband assumed the lead role in acquiring and assembling the lots, wife contributed to efforts to rezone the property. Wife completed the application for rezoning, contacted members of the board charged with making zoning decisions, and garnered support from members of the community for the rezoning effort.”¹²² The court, therefore, awarded her \$800,000 of the \$2.4 million in increase in value of the property.¹²³ With regard to the proceeds from other property that was sold, however, despite

¹¹⁹ 2006 WL 1568845

¹²⁰ *Id.* at 3 (citing MICH. COMP. LAWS §552.401).

¹²¹ *Uygur*, 2006 WL 1568845 at *3.

¹²² 595 S.E.2d 505, 507-08 (Va. Ct. App. 2004).

¹²³ As discussed above, Virginia requires active contribution by either of the spouses for the increase in value of non-marital property to be considered marital.

Mrs. Courembis' testimony that "she managed the subsequent investment of the funds and exercised some control over them . . . [and] bought and sold short-term Treasury bill, 'transferring money back and forth as they mature,'"¹²⁴ the court found there was no marital component.

Merely being associated with the independent spouse's business may not be enough to convince a court to treat the dependent spouse as a "partner" with the independent spouse either in the business itself or in the marriage. In *TenEyck v. TenEyck*, where the husband started a truck driver academy but made his wife a member of the LLC, the husband:

Testified that he assigned to the wife a 1% membership in the LLC because he thought that was equal to her contribution to the Academy. . . .The wife testified that she knew her husband had made her a member in the LLC, but she stated that she had not read the amended operating agreement and was not aware of the percentage of membership he had assigned her. She said she had trusted her husband and had been supportive of what she considered a joint enterprise, since they had discussed earlier in their relationship their dream of owning their own truck-driving school."¹²⁵

Finding that the wife's contributions to the Academy did not in fact make the Academy a joint enterprise, she was awarded only \$500,000 of its \$3,000,000 value.

V. Conclusion

As the size of the marital estate increases, courts are presented with unique issues since there are more assets involved and the courts' concerns shifts from merely fashioning an award that allows for the survival of each party and ensuring that neither party moves into poverty as a result of the divorce to how to enable each party to continue in the high level lifestyle enjoyed during the marriage. Equitable distribution statutes require that, at any level, the court weigh the parties' contributions and abilities to maintain their lifestyle after divorce. The facts in recent cases indicate that as the size of the estate increases, it is more likely that one spouse earned the bulk of the estate and the other served as homemaker or, in some instances, merely reaped the benefits of the estate. The difficult question is how to com-

¹²⁴ *Courembis*, 595 S.E.2d at 508.

¹²⁵ *TenEyck*, 885 So. 2d at 149.

474 *Journal of the American Academy of Matrimonial Lawyers*

pensate the dependent spouse where the law almost universally mandates that homemaking efforts be compensated but provides little guidance as to how to assign a monetary value to the contribution. No clear trend has emerged from the recent cases regarding how the courts divide marital estates of any size. No single factor seems to uniformly cause the courts to award a disproportionate share to either spouse. Instead, the courts continue to engage in a careful analysis of the statutorily enumerated factors. Given the lack of recognizable trend, there continues to be room for creative arguments on the side of both the independent spouse and the dependent spouse that he or she deserves the bulk of the marital estate given their individual contributions to and/or their sacrifices for sake of the marriage.

CASES CITED IN “UPDATE TO EQUITABLE DISTRIBUTION IN LARGE MARITAL ESTATE CASES”

NAME OF CASE	STATE	SIZE OF MARITAL ESTATE	Percentage Award Independent/Dependent	LENGTH OF MARRIAGE	COMMENTS AND DEPENDENT SPOUSE'S CONTRIBUTIONS
Ranney v. Ranney, No. 177999, 2004 WL 603376 (Va. Cir. Ct. Mar. 4, 2004).	Virginia	\$2 million +	66/33	4 years	Short term marriage in which Independent spouse brought much more of the earned income into the marriage
In re the Marriage of Becker No. 06-0319 Slip op, 2008 WL 4307969 (Iowa Sep. 12, 2008)	Iowa	2 million +	50/50	20 years	Mother sacrificed her career to stay at home and raise the children; marriage was a partnership.
Fortson v. Fortson, 131 P.3d 451 (Alaska 2006).	Alaska	\$2.8 million	60/40	16 years	Independent spouse had significant health problems which overcame the independent spouse=s higher earning capacity.
TenEyck v. TenEyck, 885 So.2d 146 (Ala. Civ. App. 2003).	Alabama	\$3 million	84/16	4 years	Dependent spouse's contributions to success of Independent spouse's business were characterized as Aslim to none.

476 *Journal of the American Academy of Matrimonial Lawyers*

Condon v. Condon, 330 No. 03-p-78 2005 WL 33178 (Mass. App. Ct. Feb. 11, 2005).	Massachusetts	\$3 million +	50/50	26 years	Dependent spouse was both homemaker and corporate spouse
Layman v. Layman, No. FA010186011, 2003 WL 21675904 (Conn. Super. Ct. June 26, 2003).	Connecticut	\$3 million +	50/50	25 years	Dependent spouse was homemaker and primary parent while Independent spouse traveled for business.
In re Marriage of O'Rourke No. 58096-5-I, 2007 WL 2985098 (Wash. Ct. App. Oct. 15, 2007).		\$3 million +	38/62	22 years	Independent spouse wasted marital assets, Dependent spouse had decreased earning capacity.
Clement v. Clement, No. W2003-02388-COA-R3-CV, 2004 WL 3396472 (Tenn. Ct. App. Dec. 30, 2004).	Tennessee	\$3.5 million	55/45	20 years	Court recognized marriage as being of long duration. Dependent spouse's contributions allowed Independent spouse's separate assets to increase in value.
Hurley v. Hurley, 2005 WL 3071548 (N.J. Super. Ct. App. Div. Nov. 17, 2005).	New Jersey	\$3.5 million	58/42	13 years	
In re Marriage of Grim, 2001 WL 959923 (Wash. Ct. App. Aug. 24, 2001). No. 25345-7-II.	Washington	\$4 million	50/50	36 years	Court found that the couple accumulated their assets Aas a unit.@

Vol. 21, 2008 *Distribution in Large Marital Estate Cases* 477

Young v. Young, No. FA054012391S, 2006 WL 3758126 (Conn. Super. Ct. Dec. 6, 2006).	Connecticut	\$4.4 million	64/36	24 years	Dependent spouse did not see herself as corporate spouse having to join in Independent spouse's endeavors. Dependent spouse seen as having limited earning capacity.
Uygur v. Uygur, No. 258207., , 2006 WL 1568845 (Mich. Ct. App. June 8, 2006).	Michigan	\$5 million	55/45	32 years	Independent spouse worked hard while the dependent spouse enjoyed the lifestyle the estate afforded. Independent spouse made all financial contributions to the marriage.
Helman v. Helman, No. FSTFA054005191S, 2007 WL 1321686 (Conn. Super. Ct. Apr. 16, 2007).	Connecticut	Over \$5 million	50/50	19 years	Both parties had diminished earning capacities.
Kaye v. Kaye, No. 350312/01, 2005 WL 41558 (N.Y. Sup. Ct. Jan. 5, 2005).	New York	Over \$5.6 million	60/40		Independent spouse made greater contributions to acquisition and preservation of the parties= largest asset.
Miller v. Xiao Mei, 743 N.Y.S.2d 103 (N.Y. App. Div. 2002).	New York	\$6.8 million	75/25	Brief	Marriage was viable for only 2.5 years after which time Dependent spouse exhibited bizarre behavior which caused the Independent spouse to fear for his safety.

478 *Journal of the American Academy of Matrimonial Lawyers*

K.J. v. M.J., No. 19759/03, 2007 WL 602225 (N.Y. Sup. Ct. Feb. 9, 2007).	New York	\$7 million	64/36	11 years	Dependent spouse's role as homemaker contributed to Independent spouse's enhanced earning capacity.
Mahoney-Buntzman v. Buntzman, No. 8098/03, 2006 WL 2818786 (N.Y. Sup. Ct. Oct. 3, 2006)	New York	Over \$7 million	Over 50% to Independent	10 years	Dependent spouse awarded 35% of stock in Independent spouse's business as she played no direct role in the business.
Thomas v. Thomas 579 S.E.2c 310 (S.C. 2003)	South Carolina	\$9 million	50/50	4 years	Lottery winnings evenly divided as both parties were similarly situated and functioned as a partnership prior to winning the lottery.
Havell v. Islam, 751 N.Y.S.2d 449 (N.Y. App. Div. 2002)	New York	\$13 million	95/5	21 years	Dependent spouse committed severe acts of domestic violence. Marital misconduct was considered under catchall factor.
Dubois v. Brodeur, No. FM-07-2617-03, 2007 WL 2012387 (N.J. Super. Ct. App. Div. July 13, 2007).	New Jersey	\$13 million +	50/50	7 years	Couple functioned as a partnership, Independent spouse wanted Dependent spouse to be his companion and mother to his children and not to work.

Vol. 21, 2008 *Distribution in Large Marital Estate Cases* 479

Courembis v. Courembis, , 595 S.E.2d 505 (Va. Ct. App. 2004).	Virginia	\$14 million	17% to Dependent plus \$64,000/year spousal support	16 years	Dependent spouse made direct and indirect contributions to the increase in value of Independent spouse=s non-marital assets.
In re Marriage of Corliss, No. 56792-6-I, 2007 WL 442207 (Wash. Ct. App. Feb. 12, 2007)	Washington	\$18 million	39/61	18 years	Independent spouse had a separate estate of \$72 million.
In re Marriage of Keener, 728 N.W.2d 188 (Iowa 2007).	Iowa	\$22 million +	10 years	50/50	Parties created and worked in business together.
Sieger v. Sieger, No. 6975/98, 2005 WL 2031746 (N.Y. Sup. Ct. June 29, 2005)	New York	\$30 million +	23 marriage	50/50	Both spouses worked in business together.
Sosin v. Sosin, No. FA030401416, 2005 WL 1023016 (Conn. Super. Ct. Mar. 22, 2005).	Connecticut	\$168 million	25 years	86/14	Independent spouse earned entire marital estate while Dependent spouse traveled and pursued separate lifestyle during later years of marriage.
Polsky v. Polsky No. 03 D 2662 Cook County, Illinois Domestic Relations Division (2007).	Illinois	\$368 million	31 years	50/50	Marriage was seen as a partnership in which Dependent spouse was a sounding board for Independent spouse.

480 *Journal of the American Academy of Matrimonial Lawyers*

Arneault v. Arneault, 639 S.E.2d 720 (W. Va. 2006).	West Virginia	Unknown, but in the millions.	33 years	50/50	Court employed 50/50 presumption finding parties were no different from typical 50/50 case. Dissent and lower court believed Independent spouse should have received disproportionate share due to his extraordinary contributions and her minimal contributions.
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