Division and Valuation of Speculative Assets: Reasoned Adjudication or Courthouse Confusion?

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This article surveys a sampling of court decisions relating to inclusion of assets for division, distribution, or valuation in divorce cases. Examination of such cases may ascertain whether states employ any consistent approach, or discernable pattern, in the treatment of the concept of speculation in the aforementioned context. More specifically, some decisions have deemed some assets "too speculative" for inclusion purposes; or deem some portions of certain assets "too speculative" for valuation purposes; or deem some methods of distribution based on "too much speculation."[1] Other decisions dealing with similar assets have arrived at contrary results. We endeavored to identify a common thread running through these decisions.

Instead of identifying a consistent approach, we found that not merely are there differences between various jurisdictions, but more importantly, differences exist *within* jurisdictions in their approaches. That is, even within a single jurisdiction, courts often treat the identification and delineation of speculative assets in inconsistent and, at times, contradictory ways. This article will explore selected decisions, and recommend that states apply a consistent approach by including within the concept of marital property all assets, whether or not they are speculative, discounting as necessary to account for uncertainty.

The article is divided into three parts: Part I, *THE DATA* examines court approaches to inclusion for equitable distribution purposes and valuation of various assets, including vested and

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1 Unfortunately, the confusion between these inherently similar concepts results in even more obfuscation of the concept of speculation in this context.

unvested pension rights, goodwill of professionals and their practices, nonprofessional businesses, trust interests, stock options, other miscellaneous assets, and hypothetical deductions from value. PART II, *THE ANALYSIS* evaluates, by jurisdiction, the cases discussed in Part I, to identify inconsistencies within jurisdictions in the ways they value speculative assets. PART III, *THE RECOMMENDATIONS* is the authors' philosophical discussion of how courts should approach valuation, using a uniform system of reducing asset values to the most common denominator.

I. *The Data*: Treatment of Speculative Assets

The concept of speculation, in the context of this article, can be articulated as whether a position advanced by a party is too uncertain for a court to sustain. Just as the emerging concept of inclusion of assets for division often is confused with the process of valuation of such assets, so, too, is the consideration by courts of whether a position advanced by a party is too speculative.

A. *Vested Pension Rights*

The view in a majority of states is that vested pension rights are subject to distribution, though jurisdictions differ in the preferred method of distribution. The Connecticut Supreme Court in *Krafick v. Krafick*[2] considered whether a vested defined benefit pension plan should be considered property available for equitable distribution in a dissolution action. The court noted that neither the language, nor the legislative history of Conn. Gen. Stat. § 46b-81 reflected an intent to narrow the otherwise comprehensive scope of the plain meaning of "property." Recognizing that pension benefits are among the most valuable of all marital assets, the *Krafick* court further held that to interpret the term property broadly is consistent with the purpose of equitable distribution statutes. The mere fact that this contractual right is *contingent* upon certain future events, such as living to the age of retirement, did not render such rights mere expectancies. Accordingly, the court determined that property as used in Conn. Gen. Stat. § 46b-81 includes the right, contractual in nature, to receive vested pension benefits in the future.

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[2] 663 A.2d 365 (Conn. 1995).

The Connecticut Supreme Court then considered how vested pension benefits should be valued and distributed, discussing three widely approved methods of valuing and distributing speculative assets: the "present value" or "off-set" method; the "present division" method; and the "reserve jurisdiction" method. The court ruled that treating pension benefits as "a mere expectancy," rather than property, because of the non-liquidity of the asset constituted an abuse of discretion.[3]

The court remanded for an award valuing and distributing the pension, but left open to the trial court's choice employment of one of the three valuation methods identified above.

In *Moore v. Moore*,[4] the New Jersey Supreme Court considered whether the right to receive future post-retirement cost-of-living increases, payable to pensioners under the New Jersey Police and Firemen's Retirement System, qualified as marital property subject to equitable distribution. The trial court had determined that it would be too *speculative* to consider post-retirement cost-of-living benefits, because they were not guaranteed by the retirement system, even though increases, granted in each of the prior ten years, were paid by the government, and were unrelated to either spouse's personal efforts. The appellate court disagreed, finding that the increases were attributable to the employee spouse's past contributions and service during the course of the marriage, and were, therefore, subject to equitable distribution.[5] The court reasoned that "the uncertainties and *contingencies* inherent in such future benefits are issues that go to *how* and *when* such benefits are to be equitably distributed, not to *whether* they should be distributed."[6]

The New Jersey Supreme Court then considered whether distribution should be by an "immediate offset or payment" method, a "deferred distribution" method, or a "partial deferred distribution" method. The court noted that the major advantage of the deferred and partial deferred distribution methods is that they eliminate or minimize any uncertainty about the value of the benefit, and avoid issues inherent in a present value determination of a future benefit. The court also recognized that "the

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3 *Id.* at 376.
4 553 A.2d 20 (1989).
5 *Id.* at 2.
6 *Id.* at 25 (*emphasis in original*).

goal of divorce proceedings is to eliminate possible contact and strife between parties. Thus, the major disadvantage of the 'deferred distribution' approach is that it does not result in a final resolution."[7] The court encouraged finality in divorce proceedings, preferring that trial courts employ the "present payout" method even though it requires the court to fix a present value for future benefits, and may financially burden one of the parties with a large lump-sum payment. Contrary to the decision in *Whitfield v.Whitfield*,[8] the court also held that a trial judge can impose the present payout method on the parties regardless of their preference for a deferred distribution, although that court also may order a deferred distribution or partial deferred distribution.[9]

Even though the cost of living increases at issue were contingent on future state appropriations, and were not in any way guaranteed by the retirement system, the court recognized that, historically, the state had appropriated cost-of-living increases. Accordingly, "the trial court here should have awarded Mrs. Moore a current valuation equitable award of these benefits discounted to compensate Mr. Moore for any uncertainty inherent in his receipt of these benefits."[10] The court applied a "coverture fraction" to determine the post-retirement benefits subject to distribution, whereby the total period of time that the employee-spouse participated in the plan during the marriage would be divided by the total period of time that the employee-spouse participated in the plan.[11]

Consistent with the New Jersey approach, the Kansas Court of Appeals in *In re Sedbrook*[12] determined that a municipal firefighter's vested pension was a marital asset subject to equitable distribution. The court noted that subjecting such benefits to distribution is just, since it is often the most valuable asset that the parties own. Deciding that a state's anti-assignment provisions do not apply to spouses the court held

[7] *Id.* at 26.
[8] 535 A.2d 986 (N.J. Super. Ct. 1987).
[9] 553 A.2d at 26-7.
[10] *Id.* at 28.
[11] *Id.* at 29. (citing Whitfield 535 A.2d 986).
[12] 827 P.2d 1222 (Kan. Ct. App. 1992).

> more important, in our typical case, the wife has a just claim to a share of the benefit derived from joint contributions, albeit her contributions were of a different order. She has already earned her right to a share and paid for it with her past services. Thus she has a present accrued interest, not a contingent claim such as is involved in alimony.[13]

The Supreme Court of Colorado also rejected the argument that contingencies rendering actual receipt of pension benefits less than guaranteed preclude equitable distribution of the benefits. In *Grubb v. Grubb,*[14] the Supreme Court of Colorado considered whether a spouse's interest in a vested employer-supported pension plan constitutes marital property, subject to division upon dissolution of marriage, when the receipt of benefits under the plan is contingent upon the survival of the employed spouse until the actual commencement of retirement. Under the plan at issue, the employee spouse had a vested right to payment after completing ten years of service, but the right could be divested subject to the requirement that the employee survive until the actual commencement of retirement. The court noted that such property rights are not of a readily ascertainable value, and recognized the contingent nature of the receipt of pension payments under a vested but unmatured pension plan, but determined that the contingency did not "render the plan so speculative as to remove it from the category of marital property."[15] Thus, the court held that to the extent that "a spouse's interest in a vested but unmatured employer-supported pension plan has been funded by employee and/or employer contributions during the course of a marriage, it is marital property subject to equitable distribution in a dissolution proceeding.[16]

Although, the value of a vested but unmatured pension plan may change dramatically, this fact does not necessarily require a deferred distribution if it is possible to make necessary adjustments by way of modification. In *McGowan v. McGowan*,[17] the Minnesota Court of Appeals considered whether the trial court lacked jurisdiction to modify a divorce judgment by equitably distributing pension benefits accumulated at a later time. The

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13 *Id.* at 1234 (quoting Baxter, Marital Property §11.2, pp. 26-28).
14 745 P.2d 661 (Colo. 1987).
15 *Id.* at 665.
16 *Id.*
17 532 N.W.2d 258 (Minn. Ct. Appl. 1995).

court's analysis began with a comparison of the lump sum method of distribution - preferred when the present value of the pension is ascertainable at the time of the divorce, and the parties have sufficient assets to prevent payment without hardship - and the delayed distribution method - preferred when the parties have insufficient funds to enable a lump sum payment, or when evidence of the present value of the pension is too speculative. The trial judge ordered payment of a fixed amount equal to one-half of the marital share of the pension to the non-employee spouse with payments to begin when the employee spouse reached the age of sixty-five years. The trial court subsequently modified that original award from a fixed sum to a percentage amount.

In reaching its conclusion, the appellate court noted that when there has been a substantial change in the value of an asset prior to distribution, the court is permitted to adjust the value to insure equitable distribution. The court also observed that even though a property division is typically considered to be final, an equal division may be finalized at a later time when the original judgment has not made a lump sum award.[18] Finally, the court recognized that to disallow the modification would defy the spirit and intent of the original decree, which strove to equitably divide the marital assets.[19] The appellate court held that the trial court had properly exercised reserve jurisdiction to implement distribution of the employee spouse's pension, and properly modified the original judgment to reflect respondent's one-half interest in the marital pension.

Courts have drawn a distinction between assets of uncertain value and a mere expectancy. In *Hatcher v. Hatcher,*[20] the Michigan Court of Appeals considered whether the uncertainties attending the payment of the employee spouse's vested pension benefits render those benefits undistributable. The court first cited to state precedent for the proposition that "a non-contributory pension plan is distributable as a marital asset to the extent that it has a reasonably ascertainable present value, and the employee's interest in it is more than a mere *expectancy*."[21] The

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18 *Id.*

19 *Id.*

20 343 N.W.2d 498 (Mich. Ct. App. 1983).

21 *Id.* at 503.

party seeking to include the pension fund as a marital asset bears the burden of proving a reasonably ascertainable value. Once that party establishes the pension holder has such a valuable vested interest in the plan, it is presumptively considered a marital asset, and the employee must then show that, due to the speculative nature of the plan or problems with its solvency, a high probability exists that the employee-spouse will never receive the pension.[22] The rationale for including pension plans as subject to equitable distribution, according to the *Hatcher* court, is that such plans are bargained for consideration, in lieu of a higher present salary. The court concurred with the *Grubb* and *Sedbrook* courts that contingencies such as the insolvency of the plan, the fact that the employee may die before he completes his life expectancy, and the fact that the pension holder is still working render pension plans undistributable.[23]

The trial court found that the valuation of the employee spouse's pension plan did not "squarely meet the certainty test suggested in several appellant decisions," and, therefore, decided that "the most feasible way to award plaintiff her share of the pension was through a separate pension-related award of alimony."[24] Since defendant was not then receiving benefits however, the actual award of pension-related alimony would be deferred until he retired. At that time, a hearing would be held to determine what, if any, alimony should be granted to plaintiff, by virtue of defendant's receipt of pension income.[25] The appellate court approved, holding that "[d]eferring distribution of pension benefits until they are received by the pension holding spouse is an acceptable method of distributing that marital asset."[26] The court also noted several acceptable methods of distributing such benefits, including immediate distribution in the form of additional marital assets, or an immediate distribution of a portion of plaintiff's interest in the pension with delayed payment of the remainder.[27]

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22 *Id.*

23 *Id.*

24 *Id*.

25 343 N.W. .2d at 504.

26 *Id.*

27 *Id.*

B. *Unvested Pension Rights*

Courts employ a variety of approaches when dealing with unvested pension rights. In *Flynn v. Flynn*,[28] a spouse's unvested pension rights were held to constitute a type of marital property subject to consideration by the Pennsylvania Superior Court.

> Since a pension benefit is an economic resource acquired with funds that would have otherwise been utilized by the parties during their marriage to purchase other assets, it constitutes marital property. This determination is made without regard to the possibly contingent nature of the pension, whether or not it has vested or matured.[29]

The court then considered the proper allocation method for unvested pension rights. It noted that nonvested pension rights may be terminated upon a variety of contingencies, and that the immediate offset method of distribution places all of the risk of non-payment upon the employee spouse, whereas deferred distribution would allow the court to divide and distribute those pension benefits that are actually paid.[30] For these reasons, the court opted to implement a deferred distribution plan. The court left to the discretion of the trial court whether to retain jurisdiction and divide the benefits upon receipt or to assign a percentage to each party of any future payment. Given the speculative nature of a non-vested pension benefit, deferred distribution was the *Flynn* court's preferred method of effectuating economic justice between the parties, and insuring a just settlement of property rights.[31]

The dissent in *Flynn* argued in favor of the immediate offset method of unvested pension benefit allocation. Judge Beck noted three advantages of immediate offset distribution: the parties receive final resolution of their litigation, the immediate offset distribution method protects the non-employee spouse from attempts by the employee spouse to change pension plan beneficiaries, and the court is not required to retain jurisdiction. The disadvantages noted by Judge Beck are twofold: the non-employee spouse is afforded greater economic opportunities since the employee spouse's benefits are delayed, and the risk of non-

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[28] 491 A.2d 156 (Pa. Super. Ct. 1985).

[29] *Id.* at 160.

[30] *Id.* at 161.

[31] *Id.*

payment of a pension benefit falls chiefly upon the employee spouse.

Just because a pension is neither vested nor matured does not render it a mere expectancy incapable of distribution. This issue was addressed in *Whitfield v. Whitfield,*[32] in which the Appellate Division of the Superior Court of New Jersey indicated that the proper focus of inquiry is not whether the husband's military pension interest was vested at the time of the divorce, but whether that interest constituted property acquired during the marriage.[33] The court distinguished the interest from a mere expectancy because,

> [u]nlike an expectancy, accession to which comes entirely by chance, the employee has some control over receipt of a non-vested pension. To be sure, the control is not absolute because the employee may be terminated or the business may close. However, if the employee continues to work for the required number of years, he will be legally entitled to his pension. This [contract right] is what distinguishes a non-vested pension from a mere expectancy.[34]

The court then addressed the difficulty in valuing and dividing a nonvested pension. The *Whitfield* court favored a deferred distribution method, employing a coverture faction to determine the wife's interest in the pension. The numerator of the coverture fraction is the period of plan participation during the marriage, and the denominator is the total period of plan participation necessary to receive benefits.[35] By multiplying the coverture faction by a percentage representing the portion of the pension the wife should receive, the court determines the non-employed spouse's entitlement. The New Jersey Superior Court indicated on remand that the trial court should not impose the immediate offset method on unwilling litigants, but rather should employ this method of deferred distribution.[36]

Courts sometimes view the passage of time as the answer to the problem of valuing unvested unmatured retirement benefits. In *Poe v. Poe*,[37] the Kentucky Court of Appeals considered whether a non-vested military pension is marital property subject

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32 535 A.2d 986 (N.J. Super. Ct. 1987).
33 *Id.* at 991.
34 *Id.*
35 *Id.* at 993.
36 *Id.* at 994.
37 711 S.W.2d 849 (Ky. Ct. App. 1986).

to equitable distribution. The military spouse's pension in this case was entirely accumulated and vested during the marriage. The court turned to past state precedent dictating that excluding the employer's contribution to a pension plan was not an error when the employee-spouse's rights in the pension fund had not vested at the time of dissolution. At best, such a "speculative" value was held to be includible only if considered an "economic circumstance to be taken into account in the division of marital property."[38] The *Poe* court noted the "practical and conceptual inadequacies" of such treatment of non-vested military pensions, and took the opportunity to re-examine its philosophical underpinnings.[39] Surveying the law of other states, the court concluded that non-vested pensions were no more "speculative than the value of goodwill which has recently been considered an element in determining the value of marital property."[40] The court held that ". . . [a] non-vested pension is not overly speculative where courts. . .are willing to delay the actual division of those benefits until they are capable of distribution and have in every sense of the word 'vested.'"[41]

The length of time to vesting may be a factor in determining whether the retirement benefits are distributable. In *Lentz v. Lentz,*[42] the New York Supreme Court considered whether a nonvested Long Island Railroad pension was marital property subject to equitable distribution. In reaching its conclusion, the court heavily emphasized two points. First, the court noted that the employee spouse's pension would not vest for another seven years. "Accordingly, plaintiff's rights are speculative at best. Should defendant die or retire today, she would be entitled to none of the defendant's pension benefits at all."[43] Second, the Court noted that ". . . there is a danger in the form of adverse tax consequences should the Court award a portion of defendant's pension benefits if, as, and when received."[44] The court at-

[38] *Id.* at 853 (quoting Ratcliff v. Ratcliff, 586 S.W.2d 292 (Ky. Ct. App. 1979)).

[39] *Id.* at 853.

[40] *Id.* at 853.

[41] *Id.* at 856.

[42] 117 Misc.2d 78, 457 N.Y.S. 2d 401 (1982).

[43] *Id.* at 82.

[44] *Id.* at 82 (citing to I.R.C. §402, 71, 215 and the Supreme Court's decision in United States v. Davis, 370 U.S. 65).

tempted to pacify the plaintiff when it stated "Defendant's non-vested pension is not marital property subject to equitable distribution. Plaintiff may take solace in the fact that beginning in 1982, divorced wives of railroad retirees are eligible for the same spousal benefits as provided by the Social Security Act."[45]

Nonvesting is clearly viewed as a contingency rendering the value of the asset less certain, but most courts are unwilling to find that the fact that pension benefits have not yet vested is fatal to the characterization of the benefits as marital property subject to equitable distribution.

C. *Joint Tenancies With Right Of Survivorship*

In contrast to pensions that are traceable to spousal contributions during the marriage, courts are reluctant to include potential gifts from others in the distribution scheme. In *Hutnick v. Hutnick*,[46] the Pennsylvania Superior Court considered whether certificates of deposit held jointly by the husband with his mother should have been factored into the assessment of the husband's financial position. The court noted that the state's divorce code fails to exclude consideration of expectancies or inheritances for purposes of equitable distribution. In fact, the state statute specifically includes "future acquisitions of capital assets and income."[47] Against this legislation, the court weighed the fact that "expectancies are incapable of evaluation, and therefore speculative in the extreme; they are subject to dissipation by the prospective donor; the intended donee may predecease the donor; or some other event may intervene to prevent the putative recipient from enjoying actual receipt."[48] Finally, the court also noted that "even where a legislative right exists for attachment of a beneficial interest, such attachment can be made only after the interest is in fact realized."[49] The unequal distribution of the property favoring the wife was correct, but it should be attributed to the husband's superior personal resources such as educa-

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[45] *Id.* at 405. .

[46] 535 A.2d 151 (Pa. Super. Ct. 1987).

[47] *Id.* at 152, n. 1 (citing Penn. Stat. Ann. tit. 23, §401(d)(5)).

[48] *Id.* at 155.

[49] *Id.* at 156.

tion and earning potential, and not "because of appellant's theoretical expectancy."[50]

D. *Goodwill Of Professionals And Their Practices*

This section separates professional goodwill from practice goodwill and treats each independently. "Professional goodwill" is the goodwill associated with an individual practitioner, whereas "practice goodwill" is goodwill associated with an entity. Courts in the majority of states have ruled that practice goodwill is an asset of the marital estate of a professional practitioner in a divorce. A greater split exists among jurisdictions regarding whether professional goodwill is marital property subject to distribution.

A recent case briefly, and clearly highlights the difference between professional and practice goodwill. In *Williams v. Williams*,[51] the appellate court reversed the trial court decision attributing value to an accounting practice because the evidence failed to show practice goodwill. The Florida District Court of Appeals stated that goodwill of a professional practice can be a marital asset subject to division if it exists and is developed during the marriage. However, for goodwill to be a marital asset it must exist separate and apart from the professional. When attempting to determine whether goodwill exists, the evidence should show recent actual sales of a similarly situated practice, or expert testimony as to the existence of goodwill in a similar practice in the relevant market. Evidence that a practice would have no value in the absence of a noncompete clause would strongly support the contention that there merely is professional but no practice goodwill.[52]

1. *Professional Goodwill*

In the frequently cited case of *Lopez v. Lopez*,[53] the California Court of Appeals held that various factors should be considered in valuation, specifically: the age and health of the professional, the professional's demonstrated earning power, reputation in the community for judgment, skill and knowledge,

50 *Id.*
51 667 So.2d 915 (Fla. Dist. Ct. App. 1996).
52 *Id.*
53 38 Cal. App. 3d 1044 (1974).

comparative professional success, and the nature and duration of the professional practice.[54] The appellate court remanded to the trial court for a determination of the value of the husband's interest in the goodwill of the law partnership.

In *Conner v. Conner*,[55] the Supreme Court of New York, Appellate Division, in a fractured decision, found that a business degree is merely evidence of the level of education of one of the spouses. The degree, therefore, was not a factor to be taken into account as part of that spouse's "present and future financial circumstances relevant to his ability to pay maintenance and transfer marital property" to the other spouse.[56] One of the concurring opinions reached the issue of whether "the enhanced earning capacity derived from a professional degree is only an uncertain future expectancy, which is too speculative to be viewed as marital property."[57] The concurrence continued:

> This court nonetheless recently has held that a law practice is a proper subject of a distributive award . . . and further has concluded that non-vested pension benefits constitute 'marital property' subject to equitable distribution upon divorce. . . . If a professional practice or pension funds are to be viewed as 'marital property', law and logic dictate that a degree must be treated likewise, since all involve future expectancies to some extent. The increasing earning capacity received from a degree is, for example, no less certain than received of non-vested pension benefits which is contingent upon the employee-spouse remaining at his or her employment until the benefit matures. . . . While inclusion of these items as 'marital property' might present difficult problems of valuation, such difficulty cannot justify denial of the non-student spouse's equitable share of the increased earnings derived from a decree. In fact, such valuation is a routine element of proof in personal injury cases.[58]

New York courts addressed this issue again in *O'Brien*.[59] The issue in *O'Brien* was whether a professional license acquired by one spouse during a marriage, but attributable to the combined efforts of both spouses, constitutes marital property subject to equitable distribution. In this lengthy opinion the Supreme Court, Appellate Division reasoned

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54 *Id.* at 109-10.
55 468 N.Y.S.2d 482 (1983).
56 *Id.* at 493.
57 *Id.* at 496. (Bracken and Brown, J.J., concurring).
58 *Id.*
59 485 N.Y.S.2d 548 (N.Y. App. Div. 1985).

> that if it is sustained that a professional license is marital property - then we must declare, as a matter of law, that the future enhanced earning capacity of the holder thereof likewise is marital property! But clearly, enhanced earning capacity is not marital property. It is not vested; it has but, at best, a speculative and uncertain expectancy, dependent almost entirely upon the continued existence, good health, perseverance, diligence and intellectual capacity, not to mention intellectual integrity, of the holder of the license. . .[i]t may well be that the holder of a license has the potential, under favorable circumstances, to amass property *in futuro*, but that is a far cry from designating the license itself (or the highly speculative and uncertain future earning capacity of its holder) as property.[60]

The *O'Brien* court also cited to *Lesman v. Lesman*[61] for the proposition that

> gross inequities may result in predicating distribution awards upon the speculative expectation of enhanced future earnings, since distributive awards, unlike maintenance, once fixed may not be modified to meet future realities. It is almost impossible to predict what amount of enhanced earnings, if any, will result from professional education. The degree of financial success attained by those holding a professional degree varies greatly. Some even may earn less in their professional practices than they could have earned from non-professional work. Moreover, others, due to choice or factors beyond their control, may never practice their professions.[62]

Although the court refused to include a professional license as a marital asset subject to equitable distribution, it did suggest that the trial court fashion a maintenance award to the non-licensed spouse which would take into consideration the contributions she made to the licensed-spouse's acquisition of that license. Additionally, the court suggested a rehabilitative award, which would permit the non-licensed spouse to obtain a post-graduate degree of her own.

The dissenting opinion in *O'Brien* was similarly lengthy. Notably, however, the dissent would distinguish the court's previous opinion in *Conner v. Conner*,[63] by holding that the instant case "presents a scenario that educational background has been converted into a concrete privilege to practice the profession of medicine, that privilege being in the nature of a franchise was

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60 *Id.* at 550.

61 88 A.D.2d 153, *appeal dismissed*, 57 N.Y. 956 (1982).

62 485 N.Y.S.2d at 553 (citing Lesman, 88 A.D.2d at 157).

63 468 N.Y.S.2d 482 (N.Y. App. Div. 1983).

properly considered by the trial court as marital property for the purpose of equitable distribution."[64]

Other courts, equally unwilling to quantify professional degrees in order to distribute a portion of the value as an asset, have struggled to find a remedy to avoid what would otherwise be an inequitable result. In *Mahoney v. Mahoney*,[65] the New Jersey Supreme Court addressed whether an MBA degree constitutes property subject to equitable distribution. The decision opened with a broad survey of the various assets that the state's courts have subjected to equitable distribution, including vested but unmatured private pensions, military retirement pay and disability benefits, unliquidated claims for benefits under workers compensation, and personal injury claims. The court concluded this survey with the statement that it has "never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license."[66] In comparing the professional degree to a pension, the court concluded that "a professional license or degree represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. By contrast, the vested but unmatured pension entitled the owner to a definite amount of money at a certain future date."[67] Additionally, the court wrote:

> valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork. As the Appellate Division noted, courts would be required to determine far more than what the degree holder could earn in the new career. The admittedly speculative dollar amount of earnings in the "enhanced" career must be reduced by the. . .income the spouse should be assumed to have been able to earn if otherwise employed. In our view, this is ordinarily nothing but speculation, particularly when it is fair to assume that a person with the ability and motivation to complete professional training or higher education would probably utilize those attributes in concomitantly productive alternative endeavors.[68]

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64 485 N.Y.S.2d at 560.

65 453 A.2d 527 (N.J. 1982).

66 *Id.* at 531.

67 *Id.*

68 *Id.* at 532.

Finally, the court discussed at some length the unfairness to the non-recipient spouse if no distribution were available.

The court ultimately held that to provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living or been deprived of a better standard of living in the future, the court would introduce the concept of reimbursement alimony into divorce proceedings." [S]uch reimbursement alimony should cover all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license."[69]

Rejecting the New Jersey approach, the Utah Supreme Court in *Martinez v. Martinez*[70] reversed the trial court's creation of a new type of property interest, which it called "equitable restitution," awarded to compensate the non-student spouse for the contribution that spouse had made to the other spouse's degree. The Utah Supreme Court refused to equate a marriage to a commercial partnership. The court further refused to view the medical degree as a property interest, and noted that the lower court's concept of equitable restitution was virtually indistinguishable from such an equation. The court next found that an award of equitable restitution would be "extraordinarily speculative," holding that

> any formula which accomplished the Court's purpose would necessarily be inherently and highly speculative. If, for example, a Court awarded a lump-sum payment, the award would be based upon a wholly false assumption if the payor-spouse's working life were cut short by death, illness, change of profession, early retirement any other reason. Furthermore, whether a court awarded a lump-sum or periodic payment, the receiving spouse would be given what is tantamount to a lifetime estate in the payor-spouse's earnings that would have no necessary relationship to the receiving spouse's actual contribution to the enhanced earning power or to that spouse's needs, however broadly defined.[71]

The court held that, although the lower court's award of "equitable restitution" was improper, the fact that one spouse obtained a degree nonetheless may be considered indirectly. "If one

[69] *Id.* at 534.
[70] 818 P.2d 538 (Utah 1991).
[71] *Id.* at 541.

spouse's earning capacity has been greatly enhanced by the efforts of both spouses during the marriage, it may be appropriate for the trial court to make compensating adjustments in dividing the marital property and awarding alimony."[72]

Some courts view professional degrees or licenses as the potential to earn increased income post-separation, thereby excluding consideration of them as marital assets. In *Archer v. Archer*,[73] the Maryland Court of Appeals found that a spouse's medical degree and license do not constitute marital property for purposes of making a monetary award to the other spouse. The court surveyed the rationales set forth by other jurisdictions that have considered the issue, and found that: an advanced degree or professional license lacks the traditional attributes of "property," such items are too speculative to value, to characterize spousal contributions as an investment or commercial endeavor would demean the concept of marriage, the future earning capacity of a degree or license-holding spouse is personal to the holder and a mere expectancy, and such items are best considered when awarding alimony. At best, the *Archer* court held, a medical degree or license "represents a potential for increase in a person's earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute 'marital property' within the contemplation of the legislature."[74] Moreover, as *DeWitt v. DeWitt* makes clear, income earned after the marriage is dissolved as the result of a degree/license would in no event constitute "marital property since it would not have been acquired during the marriage."[75]

According to some courts, equity can be achieved by means other than including academic degrees in the marital estate as assets. In *Hughes v. Hughes*,[76] the Florida Court of Appeals considered whether the trial court improperly granted the wife lump sum alimony based on the future value of the husband's college degrees earned during the marriage. The court noted that most

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72 *Id.* at 542.

73 493 A.2d 1074 (Md. 1985).

74 *Id.* at 1080.

75 *Id.* at 1080 (citing DeWitt v. DeWitt, 296 N.W.2d 761 (Wis. Ct. App. 1980)).

76 438 So.2d 146 (Fl. Dist. Ct. App. 1983).

jurisdictions have declined to hold that academic degrees constitute marital property subject to equitable distribution, but agrees with the trial judge that if the value of an educational degree must be measured, it must be calculated by the possibility for future earnings and not by its cost. The court then asserts that a judge may award lump sum alimony provided that the evidence reflects a justification for the lump sum payment and the ability of the other spouse to make the payment.

> We conclude in accordance with the majority view, that an educational degree is not property subject to distribution as lump sum alimony because its value, which must be measured by future earning capacity, is too speculative to calculate. . . on remand the trial court may again exercise its discretion to modify related matters so as to do equity and justice. In doing so, the trial court should consider the husband's education in arriving at the distribution of other assets and determining the propriety and/or amount of alimony."[77]

2. *Practice Goodwill*

In *Litman v. Litman*,[78] a New York Supreme Court considered whether a negligence law practice is marital property subject to equitable distribution. The court examined various jurisdictions that have held that a law practice is an asset subject to equitable distribution, and then turned to the possibility that when a lawyer treats his practice as a commodity and sells it he may be in violation of the Code of Professional Responsibility, and, therefore, subject to disciplinary action. The court reasoned "a negligence practice by its very nature is speculative and contingent and would not be the proper subject of a valuation which could be relied on by the court in determining the value of the practice."[79] If the court were to attempt to make an equitable distribution of a negligence law practice, an evaluation of each case in the practice would be necessary, and that evaluation would require determinations regarding questions of liability and comparative negligence, and a determination as to what amount a jury would award in each case. For both of these reasons, a negligence practice may not be valued and subject to equitable distribution. This ruling, however, does not prohibit equitable

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77 *Id.* at 150.
78 453 N.Y.S.2d 1003 (N.Y. Sup. Ct. 1982).
79 *Id.* at 1006.

distribution of any fixed assets, such as furniture, leasehold interest, and library, and other assets the law firm may have.

Courts have approached the valuation of professional practices other than law somewhat differently, although the ultimate result may be the same. In *Donahue v. Donahue*,[80] the South Carolina Supreme Court considered whether a spouse's dental practice, and the goodwill attendant to that practice, should be included in the marital estate. The court first distinguished the instant case from state precedent holding that a professional degree is not marital property, and is therefore not subject to equitable distribution, on the ground that the court is concerned with the practice as opposed to the degree. Therefore, the trial court judge was correct to include the value of the dental practice in the marital estate. The trial judge, however, had also found that the entire value of that practice was its goodwill. The appellate court found that goodwill is entirely dependent upon the professional's future earnings, and is therefore too speculative to value for purposes of equitable distribution.

In *Metzner v. Metzner*,[81] the West Virginia Supreme Court of Appeals considered whether the compensation that an attorney might receive for contingent fee contracts, and other future earned fees for cases that are pending at the time of a divorce, constitute marital property within the meaning of the state statute. Following a very brief analysis, the court concluded that:

> accounts receivable are assets with a value that can be ascertained at the date of separation and are considered to be marital property for purposes of equitable distribution. Contingent and other future earned fees which an attorney might receive as compensation for cases pending at the time of a divorce should also be considered as marital property for purposes of equitable distribution. However, only that portion of the fee that represents compensation for work done during the marriage is "marital property" as defined by our statute. Because the ultimate value of a contingent fee case remains uncertain until the case is resolved, a court must retain continuing jurisdiction over the matter to determine how to effectuate an equitable distribution of this property.[82]

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80 384 S.E.2d 741 (1989).

81 446 S.E.2d 165 (W. Va. 1994).

82 *Id.* at 174.

In *Stern v. Stern*,[83] the New Jersey Supreme Court also considered whether accounts receivable in a professional practice should be considered in connection with distribution of a spouse's partnership interest. The husband argued that his interest in a professional partnership should not include the value of accounts receivable to the law firm. The court disagreed, finding that accounts receivable were one element to be considered in valuing the entire worth of the husband's partnership interest. The fact that the accounts receivable had not vested during the marriage did not mandate their exclusion from distribution upon divorce, since the New Jersey statute provides that property acquired during the divorce is available for distribution, without reference to vesting.[84] The court held that accounts receivable of the law firm would be considered in the proposed distribution of the husband's partnership interest.

A Delaware Family Court addressed various methods of valuing an accounting practice in *Jones v. Jones*.[85] Numerous experts testified at trial, each considering various factors and arriving at widely disparate values. The *Jones* court discussed the difficulties attendant upon placing a value on this professional practice: the absence of a recent purchase price; the fact that the asset is a single person firm; the disagreement among the various accountants who testified at trial; the fact that the practice is not currently on the market; and the difficulties with assigning a value to the firm's client list. The court determined that the appropriate manner for courts to deal with the valuation of assets consisting in large part of intangibles such as goodwill and client lists is through alimony "where risks and rewards can be shared, rather than trying to ascribe a present value to a stream of future income which is speculative at best and which may also result in duplication."[86]

In *Lee v. Lee*,[87] the Illinois Appellate Court held that accounts receivable of a medical practice are property to be included in the valuation of a medical practice in a dissolution

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[83] 331 A.2d 257 (N.J. 1975).

[84] *Id.* at 262.

[85] 1992 Del. Fam. Ct. LEXIS 34 (1992).

[86] *Id.* at 19 (quoting Bostwick v. Bostwick, Del. Fam. No. CN 89-7083, Wakefield, J. (March 8, 1991)).

[87] 615 N.E.2d 1314 (Ill. App. Ct.) *cert. denied*, 624 N.E.2d 808 (1993).

action. The court stated "'Clearly, future earned fees, like contingent fees, are not marital assets because their value is too speculative, and because they are fees earned in the future. Accounts receivable, however, are distinguishable because they are assets already earned with a known value, but have not yet been collected.'"[88]

The position ultimately taken on the distributability of intangible assets may be determined by the court's initial approach to the problem: Whether the court focuses on the difficulty of the valuation or the equity of the result. Result-oriented courts tend to include intangibles and require judges to find a way to value them. For example, in *McDiarmid v. McDiarmid*,[89] the District of Columbia Court of Appeals analyzed whether professional goodwill in a law firm is subject to distribution upon dissolution of marriage. The court noted a split in the jurisdictions: a number of courts concluded that professional goodwill is not property subject to equitable distribution since the concept of goodwill is indistinguishable from future earning capacity and thus too remote and speculative to be valued; other courts classify goodwill as marital property essentially because to hold otherwise would result in a windfall to the professional spouse. The court adopted the view that goodwill is an asset subject to valuation and distribution, further noting that the selection of an appropriate valuation method lies within the discretion of the trial court.

Some courts equate value with the ability to realize that value on sale. If the asset cannot be sold, these courts reason that it cannot be distributed. In *Travis v. Travis*,[90] the issue before the Supreme Court of Oklahoma was whether the goodwill of a law practice should be considered a marital asset for purposes of equitable distribution. The court defined goodwill as "essentially reputation that will probably generate future business."[91] The court then cited dozens of cases, concluding that an equal split exists between the states in determining whether to recognize goodwill in a law practice for purposes of dividing the

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88 *Id.* at 1321 (citing In re Marriage of Tietz, 605 N.E.2d 670, 679 (Ill. App. 1992).

89 649 A.2d 810 (D.C. 1994).

90 795 P.2d 96 (Okla. 1990).

91 *Id.* at 97.

marital estate. Moreover, the court mentioned its concern over the inequity in compelling a professional to pay his or her spouse a share of intangible assets at a judicially determined value, when the value could not be realized by sale. The court further noted that not only does the sale of goodwill produce no value, but also that if the attorney's spouse were to cease his practice of law he could not sell his files to another lawyer because the sale would violate the rules of professional conduct.[92] The court concluded, however, that "establishing earning capacity is much less speculative than trying to establish the goodwill value of a law practice. Projected earnings can be considered in establishing support alimony which, unlike property division of goodwill, may be adjusted upward or downward at a later date."[93] The court held that because

> law practices cannot be bought and sold as in other professional practices, we conclude that a consideration of the earning capacity of a lawyer and subsequent setting of support alimony based upon that earning capacity is more equitable than the speculative division of goodwill in the law practice of a sole practitioner.[94]

E. *Spouse's Nonprofessional Businesses*

In *Smerling v. Smerling,*[95] the Supreme Court of New York, Appellate Division, addressed the question of whether a trial court erred in valuing a party's interest in motion picture theaters at the time of the sale, rather than the time of the commencement of the action. The trial court noted that while passive assets generally should be valued as of the trial date, active assets generally should be valued as of the commencement date of the action. The trial court in this case found that expert testimony as to the value of the company at the time the action commenced was speculative, and, therefore, chose to apply figures based upon the actual sale proceeds. The court recognized that a trial court must have discretion to "select a date appropriate to the case before it in light of the particular circumstances presented: . . . Due to the speculative nature of the value of the movie chain in 1985 [at the

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92 Note that some states have adopted ABA Model Rule 1.17, permitting the sale of law practices.

93 795 P.2d at 100.

94 *Id.*

95 576 N.Y.S.2d 271 (N.Y. App. Div. 1991).

time the action was commenced], the trial court did not abuse its discretion in valuing it as of the date of sale."[96]

The inability to quantify the nonmonetary contributions of a homemaker spouse have precluded participation in the increase in value of a separate business. In *Jolis v. Jolis*,[97] the Supreme Court of New York, Appellate Division, considered whether a spouse's services as parent and homemaker in fact contributed to the appreciation of the other spouse's separate property, here a close corporation. The court noted numerous factors which contributed to the increased value of the stock, such as market factors, the efforts of other relatives, as well as the owner-spouse's personal pre-marital and marital social and business relationships. "Although the wife undoubtedly maintained warm friendships with some of her husband's social and business friends and spouses, the extent to which such relationships resulted in increased [close corporation] profits is purely speculative."[98] The court held that the wife was "not entitled to a distribution of the appreciated value of her husband's separate property" consisting of the stock.[99]

Another New York appellate court reached a dramatically opposed conclusion two years later in *Price v. Price*.[100] The issue in that case was whether a spouse's contributions as a homemaker and parent are entitled to recognition by the court in awarding a share of the appreciated value of the other spouse's separate property. In keeping with New York state precedent in *Jolis*, the trial court had held that the non-titled spouse's indirect contributions to the appreciation in value of the titled-spouse's closed corporation stock were "purely speculative."[101] The *Jolis* precedent was not binding on the *Price* court, which determined that such indirect contributions could appreciate the value of the stock, but warned that "a non-titled spouse must establish that his or her direct or indirect contributions to the marital relationship were causally related to the enhancement of a separate

96 *Id.* at 272.

97 470 N.Y.S.2d 584 (N.Y. App. Div. 1983).

98 *Id.* at 586.

99 *Id.*

100 496 N.Y.S.2d 455 (N.Y. App. Div. 1985) *aff'd.* 503 N.E.2d 684 (N.Y. 1986).

101 *Id.* at 458.

property assets so as to warrant an award of a percentage of the appreciation in value of the separate property assets."[102] The case was remanded to ascertain whether appreciation in the value of the business occurred between the date of the marriage and the commencement of the divorce action, and if so, the extent to which such appreciation was attributable to the non-titled spouse.[103]

Business interests may be distinguishable from such assets as pensions and stock options for purposes of immediate distribution. In *Ross v. Ross*,[104] the Maryland Court of Special Appeals considered whether the trial court abused its discretion when it established a monetary award payment schedule as a means of distributing a spouse's close corporation stock rather than making an award on an "if, as, and when" basis. The owner-spouse urged the latter position since his shareholder's agreement dictated that if the owner-spouse were to sell the stock prior to his retirement, he would incur a penalty if the corporation or other shareholder exercised their rights of first refusal and purchased the stock. The court distinguished the ownership of close corporation stock from both unexercised stock options and pensions, under which the "if, as, and when" approach is proper on the grounds that the owner-spouse had already acquired the stock at-issue. Therefore, his interest was readily available, and easily subject to equitable adjustment. It distinguished the ownership of the corporate stock from pension plans on the grounds that the uncertainties and complications attendant to pension plans were not present in the instant case, since even though the owner-spouse would incur a loss if he sold the stock presently, the spouse had sufficient assets to enable him to meet the payment schedule without sale of the stock. Accordingly, the monetary award was proper.

In *Piscopo v. Piscopo*,[105] the New Jersey courts dealt with the question of whether a celebrity could have distributable goodwill. Joe Piscopo's status had been incorporated in an entity in which he was the majority stockholder and his wife held a sig-

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102 *Id.* at 461.

103 *Id.* at 464.

104 600 A.2d 891 (Md. Ct. Spec. App.) *vacated*, 607 A.2d 933 (Md. 1992).

105 231 N.J. Super. 576 (N.J. Ch. 1988), *aff'd.* 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

nificant, but minority, interest. His wife had asserted that it would be unfair to deprive her of a share in her husband's excess earnings as to which she was so instrumental and supportive in creating. He countered with the position that professional goodwill, as to which distribution was allowed under the case law, was distinct from celebrity goodwill in that any person meeting the requirements may qualify as a professional, but celebrity status requires talent as to which no "average" may be measured for capitalization purposes.

The trial judge, disagreeing with the husband, said that

> [c]ontrary to [the husband's] assertions, neither an education nor a license is *per se* an asset in New Jersey. Rather it is the person with particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment that transforms the average professional or entertainer into one with measurable goodwill. It is a very small percentage of those who choose professional or entertainment careers who have the talent to generate above-average earnings."[106]

The trial court indicated that Piscopo's work product was a protectable right, infringement of which is actionable. The asset is therefore real, valuable, and divisible. The speculative aspect of the asset was not seen to detract from its divisibility.[107] The appeals court had no difficulty with the trial court's conclusion that celebrity goodwill was a divisible asset, but only as an element of the total value of the business.[108]

F. *Trust Interests*

In *Davidson v. Davidson*,[109] the Massachusetts Appeals Court considered whether an irrevocable remainder interest under a testamentary trust of a spouse's deceased father, which had at the time of the complaint vested in possession, constituted marital property subject to equitable distribution. The court looked to the trust instrument to ascertain that the beneficiary spouse's remainder interest would be distributed outright when both his mother died and the beneficiary spouse had reached the age of thirty-five. Additionally, the trust instrument provided

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106 *Id.* at 579.
107 *Id.* at 580.
108 *Id.* at 564-65.
109 474 N.E.2d 1137 (Mass. App. Ct. 1985).

that the trustees were empowered "in their uncontrolled discretion" to invade trust principal for the benefit of the lifetime beneficiary, the beneficiary's spouse's mother. The court found it significant that the value of the remainder interest was, therefore, uncertain, and actuarial calculations would be of no avail. In addition, the remainder was subject to a valid spendthrift clause and could not have then been reached by a creditor in satisfaction of a judgment or claims."[110]

The court ruled that the trust interest constituted marital property subject to equitable distribution regardless of the uncertainty of value or the discretionary nature of the interest. The court further noted that the trial judge was correct in valuing this remainder interest and the income distributions from the trust which the beneficiary spouse had received at the time of the trial.[111]

The appeals court next considered whether a life income interest at the discretion of the trustees of an unfunded trust, under the will of the beneficiary spouse's living mother, constituted marital property subject to equitable distribution. The court placed heavy significance on the fact that the beneficiary's spouse's mother was alive at the time of the divorce, and, therefore, could have changed her will, and ultimately found that the beneficiary's interest, if any, was too speculative to value.[112]

In *Frank G.W. v. Carol M.W.*,[113] the issue for the Supreme Court of Delaware was whether a spouse's interest in three trusts was marital property. One spouse had the following beneficiary interests in the trusts: remainder of a testamentary trust, the corpus of which was distributed to the beneficiary spouse during the marriage; remainder of an irrevocable inter vivos trust, the corpus of which was distributed during the marriage; and sole beneficiary of a testamentary trust that vested in the beneficiary spouse during the marriage, but the partial distribution of which took place after the divorce.

Starting from precedent that courts are limited to apportioning and dividing assets that are presently possessory, the court

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110 *Id.* at 1143.
111 *Id.* at 1147.
112 *Id.* at 1145.
113 457 A.2d 715 (Det. 1983) holding limited by Gregg v. Gregg, 510 A.2d 474, 478 (Det. 1986).

noted that this line of cases had been modified in subsequent cases addressing trust interests and pensions. The state statute created a presumption that any property "acquired" after marriage is marital property, and the court found three possible interpretations of the word "acquired": the time at which any form of title arises, the apportionment into non-marital and marital components according to the time of possession of each component, or actual or constructive possession of the trust interests. The court found that the most "conceptually correct" view is the apportionment method, but then determined that the transient existence of a future interest prevents the adoption of this method.[114] The logical impediment to the successful use of the apportionment method occurs not at the characterization phase, but at the segregation phase of property division, because "Unlike real property, a future interest has pecuniary value only in the period prior to possession of the corpus; once the latter interest becomes possessory the future interest has no value."[115] Consequently, apportionment would be unworkable because application of this method would be too speculative.[116] The court therefore adopted the possessory definition of "acquired," adding that "such definition also enables our Courts to value trust interests in a logical and workable manner based on values which were subject to the control and enjoyment of the marital unit."[117] The court held that a future interest cannot be 'acquired' within the meaning of the statute because it is not possessory, even though it may have a present monetary worth.[118] The court concluded that all of the trust interests except for distributions from the third testamentary trust that occurred after the divorce were marital property.

Noting that, unlike a retirement plan involving a future contingency, a beneficiary of a discretionary trust has a mere expectancy until the trustee actually makes a payment, the Colorado Supreme Court in *Jones v. Jones*,[119] held that a discretionary trust corpus cannot be considered the separate property of a benefici-

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114 *Id.* at 725.

115 *Id.* at 726.

116 *Id.* at 726.

117 *Id.*

118 457 A.2d at 726.

119 812 P.2d 1152 (Colo. 1991).

ary for purposes of equitable distribution. It further held that income which the beneficiary spouse received from the trust during the marriage was not marital income subject to division, since it was more closely analogous to a gift than to property to which she had a right. The court, however, did find that the wife's expectancy interest in the trust should be considered an "economic circumstance" for purposes of the state maintenance statute.[120]

G. *Vested and Unvested Stock Options*

While there is no standard definition of "stock options," that encompasses all things to all people,[121] they generally constitute the right to buy or sell a specified quantity of a particular security within a designated period for a determinable price. Stock options can be classified as falling into one of three distinct groupings: accrued and matured, accrued but unmatured, and unaccrued and unmatured. "Accrued" stock options are vested in the owner. "Matured" stock options are options that are currently exercisable. Courts treat these three basic patterns of stock options in divergent ways.[122]

1. *Accrued and Matured Options*

The majority position is that accrued and matured options are a marital asset if granted during the marriage. In *Richardson v. Richardson*,[123] the husband contended that nontransferable stock options for the purchase of a publicly traded stock were not a martial asset. The Arkansas Supreme Court disagreed, recognizing that there is a public exchange for many puts and calls (varieties of stock options), and these options could be valued. The court reasoned that although non-transferable options cannot be traded on an exchange, they nevertheless constitute marital property, just as publicly traded stock and stock options are marital property.[124] The court affirmed the trial court valuation,

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[120] *Id.* at 1158.

[121] *See* In re Marriage of Hug, 154 Ca. App. 3d 780, 784 (Col. Ct. App. 1984).

[122] *See generally* Katherine A. Kinser, "Identification and Allocation of Stock Options," Presentation to the American Academy of Matrimonial Lawyers, March 1996.

[123] 659 S.W.2d 510 (Ark. 1983).

[124] *Id.* at 513.

which had been calculated by subtracting the current share price of the publicly traded stock from the exercise price of the options, thereby, determining what subsequently has come to be known as the "intrinsic value."

2. *Accrued and Unmatured Options*

Courts have been less consistent in the manner they treat accrued but unmatured stock options. In *In re Marriage of Hug*, the California Court of Appeals found that stock options that had been granted before the parties separated, but which were exercisable after separation were community property subject to division. Based on the time rule formula, the court held that two thirds of the husband's stock options were community property, including options exercisable only after separation. In so doing, the Court articulated the distribution formula as follows:

> the number of options determined to be community property is a product of a fraction in which the numerator is the period in months between commencement of the spouse's employment by the employer and the date of separation of the parties, and the denominator is the period in months between commencement of employment and the date when each option is first exercisable, multiplied by the number of shares which can be purchased on the date the option is first exercisable.[125]

The court went on to warn that stock options should not always be classified as compensation for past, present, or future services.[126] Plans have different purposes, but they all relate to the "attraction and retention of executive, key or qualified personnel, and the getting of such option is considered a form of compensation."[127] The record showed that the husband anticipated receiving the options from the outset of his employment at the company that granted the options, and that they were granted in lieu of present compensation when the husband joined the company. The court rejected his contention that because the options could not be presently valued they could not be divided. Because the stock options were earned during the course of the marriage, they were marital property. Although the court affirmed the use of the time rule in this case, it reasoned that no

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125 154 Cal. App.3d at 782.
126 *Id.* at 784.
127 *Id.* at 785.

single valuation formula should be used in all cases.[128] In a footnote, the court indicated that an employee stock option granted after dissolution of the marriage is a community interest too speculative, and lacks the immediacy required for treatment as community property.[129]

The Washington Supreme Court applied a modified version of the *Hug* time rule when it divided accrued but unmatured options in *In re Marriage of Short*.[130] The issue was whether employee stock options are community property or separate property when the options were granted to the employee spouse during the marriage, but vest when the parties are living separate and apart. The husband had been induced to join Microsoft, rather than start a new computer company, after leaving Digital, by receiving options to purchase 25,000 shares of common stock. The stock options would vest at intervals over time. The Microsoft stock option plan indicated that the purpose for granting stock options "is to encourage ownership . . . enabling the company to attract and retain personnel."[131] The trial court had concluded that some options were acquired during the marriage, but that most were acquired after the date of separation. It treated the various stock option grants differently, awarding the wife fifty percent of one grant of stock options, twenty-five percent of two other grants, and none of the post-separation grants. The appellate court disagreed, finding that all of the stock options were acquired during the marriage, and that they were all community property.

The Washington Supreme Court contrasted a vested stock option, which is acquired when granted, with an unvested stock option, that provides no legal title or rights of absolute ownership.[132] The Microsoft options were contingent upon the husband's continued employment at Microsoft, and, therefore, unvested when granted. The court then reviewed the time rule announced in *Hug*, and found that it is not inflexible, and may be modified depending on the facts of the case, including the pur-

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128 *Id.* at 792.
129 *Id.* at 793, n. 4.
130 890 P.2d 12 (Wash. 1995).
131 *Id.* at 13.
132 *Id.* at 15.

pose served by granting the stock option.[133] A trial court must first determine how unvested stock options are characterized, by ascertaining whether the options were granted for past, present, or future employment services.[134] This involves a fact-finding inquiry into the circumstances surrounding the grant.[135]

Evidence supporting the trial court finding that certain options were granted for present services included Microsoft's front end loading of the stock options and the husband's acceptance of the position rather than forming his own company. Evidence that the options were granted for future employment included the language in the stock option plan. After determining whether the stock options were granted for past, present, or future performance, the supreme court applied the time rule. The stock options granted for present employment services were treated as community property. The time rule must be applied to stock options granted for future services. "Multiple stock options granted for future services vest consecutively, not concurrently. Such a ruling insures that stock options are characterized and apportioned to reflect their marital and nonmarital aspects. This interpretation of the "time rule" differs from that announced in *In re Marriage of Hug*."[136] The Supreme Court reversed the Court of Appeals, reinstated the trial court decision and remanded for the distribution of shares purchased with the wife's share of the stock options not granted for present services.

Stock options differ from pensions in several important respects, in the context of equitable distribution. For example, a vested stock option is often contingent upon future employment. In *In re Marriage of Miller*,[137] the Colorado Supreme Court considered proper distribution of matured and unmatured vested stock options, all of which were subject to termination. The husband received three grants of stock options in 1988, 1990, and 1991 that matured incrementally on the first, second, third, and fourth anniversaries of the agreement, allowing exercise of one-quarter, one-half, three-quarters, and all of the stock options in

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133 *Id.* at 16.

134 *Id.*

135 *Id.* There were no unvested employee stock options granted for past performance at issue, but presumably they would be acquired when granted.

136 *Id.* at 17.

137 915 P.2d 1314 (Colo. 1996).

each of the respective years. Each of the stock option grants was governed by an agreement providing that all rights to exercise the options terminated upon termination of the husband's employment, for any reason other than retirement because of age or disability, or in some circumstances because of death.[138] The husband also received 2,500 shares of restricted stock in 1991 that would vest in 1996, at which time the restriction would expire. The decree of dissolution was entered in November, 1992, and the trial court entered permanent orders in May, 1993. The trial court found that the stock options had been granted to the husband for services, and as an incentive to remain at Hewlett-Packard Company (HP); the restricted stock shares had been granted as a bonus for a specific project, and as an incentive to encourage the husband to remain at HP.

Following the reasoning in *In re Marriage of Frederick*,[139] the trial court held that portions of the stock options and portions of the restricted stock were marital property. The trial court awarded to the wife fifty percent of fifty percent of the 1990 stock option grant, fifty percent of twenty-five percent of the value of the 1991 grant and fifty percent of twenty-six percent of the value of the restricted shares.[140] The trial court retained jurisdiction to distribute the options when the options were exercised, and when the stock restrictions expired. The court of appeals affirmed the trial court's division, stating that it "is fully in accord with Colorado law regarding the division of other future interests in property earned during the marriage, but deferred until after dissolution."[141]

The Colorado Supreme Court reversed in part and remanded with directions on how to distribute the stock options and restricted stock. The court compared the stock options and restricted stock to retirement plans, stating

> a vested employer-supported pension plan constituted marital property for purposes of the Act even though receipt of the benefits was

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[138] *Id.* at 1315.

[139] 578 N.E.2d 612 (Ill. App. Ct. 1991).

[140] The court assumed that the 1988 stock options had been exercised and distributed.

[141] 888 P.2d 317 (Colo. Ct. App. 1994) (citing cases on pension rights, future severance pay, value of a professional practice, contingency attorney fees, and other miscellaneous deferred compensation).

> contingent on the employee-spouse's continued employment and survival until the commencement of retirement. We determined that the benefits were a form of deferred compensation and overruled prior decisions holding that rights to such benefits must have a present cash surrender or loan value to constitute marital property . . . We noted that [a] contingency should be considered by the trial court in determining the present value of the property and suggested that trial courts could retain jurisdiction of the case and order distribution of those assets at a later time to avoid valuation problems.[142]

The court recognized that a stock option is a contractual right and that, although nonstatutory employee stock options may be immediately exercisable upon grant, for tax planning purposes such options typically mature incrementally, or after a waiting period.[143]

Although both parties had characterized the stock options as "nonvested," the supreme court found that they in fact were vested.

> A nonvested interest is an expectancy and not property because the holder has no enforceable rights. Thus, a stock option might be deemed nonvested for purposes of determining its status as marital property if the grant of the option were conditional. In this case, HP's grant of the stock options to the husband were not conditional grants. Although the husband's ability to exercise the options is contingent on the passage of time and his continued employment, his rights under the options cannot be unilaterally repudiated by HP. Pursuant to the terms of the HP stock option plan, HP can modify, extend or renew outstanding options and authorize the grant of substitute options, but HP cannot alter or impair rights or obligations created by an option previously granted without the consent of the optionee.[144]

The supreme court distinguished stock options from pension benefits, since employee stock options may be considered compensation for future services as well as past and present services.[145] To the extent that a stock option is granted in consideration for past services, it is marital property when granted; to the extent that a stock option is compensation for future services, it does not constitute marital property until the employee has performed the future services.[146] Although the trial court understood the

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142 915 P.2d at 1316-17.

143 *Id.* at 1317.

144 *Id.* at 1318.

145 *Id.*

146 *Id.* at 1319.

distinction between stock options awarded for past, present, and future services, it misapplied the time rule formula. The court used the formula applicable to options granted solely for future services, whereby options are treated as marital property only to the extent that future services were rendered prior to the decree of dissolution. However, some of the options constituted marital property at the time of grant. The court remanded for a determination of what percentage of stock options were consideration for past services, suggesting in a footnote that the trial court employ the analysis announced in *Hug*.[147]

The supreme court next held that all of the restricted stock shares were marital property subject to distribution. Although language in the restricted stock agreement suggested that the shares were compensation for past and future services by the husband, the grant of ownership rights to the stock shares was inconsistent with that contention. The stock shares were subject to forfeiture, but HP could not unilaterally extinguish the husband's right to retain the stock. He had received the shares rather than a conditional right to receive the shares, indicating that they were a form of deferred compensation, and therefore marital property.[148] "That the husband's full enjoyment of the benefit is conditioned on his remaining an employee affects the present value of the restricted stock shares, not their marital nature."[149]

In *Green v. Green*,[150] the Maryland Court of Appeals held that accrued but unexercised options acquired during the marriage are marital assets subject to equitable division. Of the options to purchase 5,000 shares at issue, 2,500 were not exercisable until after the date of trial. The trial court found that none of the options were marital property because they had no fair market value. On appeal, the Maryland Court of Appeals cited *Archer v. Archer*,[151] which found that a medical degree and license to practice medicine obtained by a spouse during the marriage do not constitute marital property. The court also looked to decisions in other jurisdictions regarding stock options, and to Mary-

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[147] 915 P.2d at 1319, n. 9.
[148] *Id.* at 1319-20.
[149] *Id.* at 1320.
[150] 494 A.2d 721 (Md. Ct. Spec. App. 1985).
[151] 493 A.2d 1074 (Md. Ct. App. 1985).

land decisions on pension rights, retirement benefits, and other forms of deferred compensation.[152] The court reasoned that, like pension plans, stock options are a form of compensation and are therefore property within the meaning of divorce law.[153] The court held that the options granted during the marriage were "acquired" during the marriage and subject to division.[154]

With respect to valuation, the court stated, "Although it is true that an unassignable, unsalable option has no fair market value, it is nonetheless an economic resource, comparable to pension benefits, to which a value can be attributed."[155] The valuation of stock options requires a flexible approach to accommodate the circumstances in a particular case. The court must take into consideration the nature of the property right at issue. In this case, the court may not adopt an approach to equitable distribution that would compel immediate exercise of the options, because that would effectively deprive him of his property interest. The trial court instead must use an "if, as and when" approach in valuing all 5,000 options, just as it would in valuing and allocating unmatured pensions.[156] The court held that the trial court was clearly erroneous in its conclusion that the stock options were valueless and in failing to consider them in its division of marital property.[157]

In *Hann v. Hann*,[158] the Indiana Court of Appeals considered whether a spouse's stock options acquired during the marriage, but not exercisable until after the divorce is final, constitute marital property subject to equitable distribution. Both the trial court and the court of appeals agreed without discussion that the vested stock options, which were exercisable upon the date of filing the dissolution petition, or became exercisable prior to the final hearing on the dissolution proceeding, were marital property subject to division. The appellate court described the remaining stock options as accrued but "unvested"

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152 494 A.2d at 728.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 729 (citing Deering v. Deering, 437 A.2d 883 (Md. Ct. App. 1981).

157 494 A.2d at 729.

158 655 N.E.2d 566 (Ind. Ct. App. 1995).

in the sense that the options were subject to forfeiture if the husband died, was fired, or otherwise terminated his employment with the company. The husband had no "vested" interest because he was required to be in the employ of the company at the time of exercise, rendering the options a contingent rather than a vested interest.[159] The court noted that "we have consistently held that only property in which the party has a vested interest at the time of dissolution may be divided as a marital asset."[160] It compared the options to a future pension benefit, that could only be considered marital property in Indiana if the right to receive the pension was not contingent upon continued future employment. After noting that the treatment of stock options varies from state to state, the court decided to "classify only those stock options granted to an employee by his employer which are exercisable upon the date of dissolution or separation which cannot be forfeited upon termination of employment as marital property."[161]

A dissent by Judge Chezem rejected the majority's comparison of the stock options to pensions, and would have included them in marital property. First, the wife had participated in the marriage in a way that allowed the husband to achieve executive status and earn the stock options. Although the options were unmatured, they were a benefit earned by both parties. Second, the stock options were present compensation the husband received in exchange for services, as opposed to pension rights, which historically have not been used as, or in lieu of, compensation.[162] The reality is that the parties earned a lesser salary during the marriage in exchange for stock options. Third, a number of state and federal statutes apply specifically to pensions and do not apply to stock options. The stock options are a contractual right, and the incentive stock option plan at issue was drafted to give a committee at the husband's employer company great discretion in whether to accelerate options at any time, including upon termination. Fourth, the stock options were similar to disability payments, which are marital property subject to distribution upon dissolution. The appellate court previously had held

159 *Id.* at 569, n. 1.
160 *Id.* at 569.
161 *Id.* at 571.
162 *Id.* at 571-72 (Chezen, J., dissenting).

that the value of a disability pension "is readily ascertainable and susceptible to division. Its nature is no more speculative than an ordinary retirement (longevity) pension—except for one contingency. The benefits depend on [the husband's] continued disability."[163] Finally, the dissent reviewed cases in other jurisdictions that treat accrued but unmatured stock options as marital property and concluded that the trial court decision should be reversed for assignment of ownership ratios on the stock options.[164]

3. *Unaccrued and Unmatured Options*

Courts are divided in the treatment of unaccrued and unmatured options. Several courts have held that employee stock options accruing at a future date are marital property subject to division. In *Pascale v. Pascale*,[165] the New Jersey Supreme Court found that stock options granted after the date of the complaint were acquired during the marriage, and, therefore, property subject to equitable distribution. The wife filed for divorce ten days before receiving two stock option grants and argued that the stock options could not be considered in the equitable distribution. The trial court disagreed, dividing the two stock option grants equally between the parties. The appellate division took a different approach, treating one stock option grant as compensation for past performance and the second grant as awarded in recognition of a promotion in job responsibilities and designed to enhance future performance efforts.

The supreme court looked beyond the date of the complaint and questioned whether the stock options were the result of efforts put forth during the marriage, and, therefore, subject to equitable distribution.[166]

> The inequity that would result from applying the date of the complaint rule is obvious. James would be denied the benefit of stock options that were earned by Debra during the marriage but were not awarded

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[163] 655 N.E.2d at 573 (quoting Gnerlich v. Gnerlich, 538 N.E.2d 285, 288 (Ind. Ct. App. 1989)).

[164] *Id.* at 573-74.

[165] 660 A.2d 485 (N.J. 1995).

[166] *Id.* at 498.

> to her until slightly after the marriage terminated. Serious mischief could arise under such a hard-and-fast rule.[167]

The wife failed to prove that the effort to attain the two stock option awards was not put forth during the marriage. Like pension benefits in *Kikkert v. Kikkert*,[168] the wife's stock options were a form of deferred compensation for efforts expended during the marriage, and subject to equitable distribution.

In *Garcia v. Mayer*,[169] the options at issue were unvested at the time of the decree, but, due to a merger agreement signed just one day after entry of the decree, were fully vested the following day, and considerably more valuable. The New Mexico Court of Appeals found that the settlement agreement at issue was ambiguous, with respect to distribution of the unvested options, because it did not specifically mention the options, even though the parties had specifically waived the right to future divisions of property, earnings, and investments. The husband argued that the unvested stock options were his separate property and not subject to division. The appellate court disagreed, equating the stock options to a contingent benefit earned by labor performed during the marriage. The court reasoned that New Mexico already treated retirement benefits as marital property, even if they have no value at the time of the divorce.[170]

The court noted a split in jurisdictions over whether unaccrued stock options are marital property subject to division, but chose what it called the majority approach applied by community property states, "We therefore hold that the community had an interest in the unvested options to the extent that the ultimate vested rights were earned by [the husband's] labor during marriage."[171]

The court then turned to the valuation question, reasoning that the "court must determine whether the option rights were, in whole, or in part, compensation for effort before the agreement or whether they were granted solely as an incentive for future employment and effort." The district court had divided the op-

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167 *Id.*

168 427 A.2d 76 (N. J. Super. Ct. App. Div.), *aff'd.* 438 A.2d 317 (N.J. 1981).

169 920 P.2d 522 (N.M. Ct. App. 1996).

170 *Id.* at 525.

171 *Id.* at 525.

tions in accordance with the coverture formula designed in *Hug*.[172] The husband argued that the court should deviate from the *Hug* formula, and instead follow the formula of *In re Harrison*[173] because the options were granted solely to encourage future employment. Although the appellate court agreed with the husband that the options were intended as "golden handcuffs" to induce future employment, suggesting that the *Harrison* formula was more appropriate, the fact that the options had vested prematurely meant that the award was within the district court's broad discretion.

Conversely, some courts have refused to treat options accruing in the future as marital property subject to division. In *Baum v. Baum*,[174] the Arizona Court of Appeals considered whether the value of unexercised stock options transferred by the husband, for no consideration, to a closely held corporation, in which the husband owned eighty percent of the corporate stock, should be included as community property. The wife argued on appeal that the trial court had erred by not ascribing any value to the stock options and failing to include the options as a community asset. The appellate court first found that the wife had failed to offer evidence establishing the value of the option as a community asset, since she had argued that the option was worth the same amount as the stock and did not have any particular value of its own. The court further reasoned that, regardless of the value of the options, the community had lost any rights to it when the husband transferred the options to the corporation. The community had not paid anything for the option, and, therefore, had not lost anything.[175] No evidence had been presented that the community was interested in exercising the options, nor was there any evidence that the husband had benefitted from the transfer. The trial court was not in error in failing to divide the stock options.

The appellate court further rejected the wife's contention that she was entitled to a share of the increase in value of the husband's corporate stock during the course of the marriage. "Since the husband in this case received what appears to be an

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172 154 Cal. App. 3d 780.

173 179 Cal. App.3d 1216 (Cal. Ct. App. 1986).

174 584 P.2d 604 (Ariz. Ct. App. 1978).

175 *Id.* at 607.

adequate salary, and there has been no contrary contention, we hold that the community was adequately compensated for the husband's labor, and the increase in the separately owned stock remains his separate property."[176]

Likewise, in *Ettinger v. Ettinger,*[177] the Supreme Court of Oklahoma held that the trial court lacked jurisdiction to award unaccrued stock options. The trial court had ruled that the wife "is to receive one-half of any and all stock options that [the husband] shall have with OKC Corporation, even though said stock options shall or may accrue in the future . . . [she] is to receive one-half interest in all stock options that [the husband] now has or may have."[178] The husband refused to comply with the order, arguing in response to a motion for contempt that the award of unaccrued stock options was null and void. The trial court agreed, finding that it was without jurisdiction to make a division of property out of future earnings, or property acquired in the future. The supreme court affirmed, basing its reasoning on *Hubbard v. Hubbard*,[179] which found that a medical license is not property subject to division. "Stock options not in existence at the time of the entering of the divorce decree, and over which [the husband] had no direct interest whatsoever, is simply not property acquired by [wife and husband] during coverture and therefore is not subject to being divided by the court."[180]

G. *Miscellaneous Assets*

1. *Growing Timber*

In *Cobb v. Cobb*,[181] the North Carolina Court of Appeals examined whether the future value of growing timber on land that is marital property becomes vested during marriage, and subject to distribution in the same manner as deferred compensation. The court compared certain assets, which may be marital property if vested (such as pensions, retirement and other deferred compensation rights), with assets which are not vested, and, therefore, should be treated as the separate property of the

176 *Id.* at 609.
177 637 P.2d 63 (Okla. 1981).
178 *Id.* at 63.
179 603 P.2d 747 (Okla. 1979).
180 637 P.2d at 65.
181 420 S.E. 2d 212 (N.C. Ct. App. 1992).

spouse (such as options which are not exercisable as of the date of separation and which may be lost as a result of subsequent events). The court found that the future value of timber growing on marital property is more closely analogous to unvested options, commenting that the owner-spouse "may never realize the future value of the timber if, for example, the trees are destroyed by fire or insects, or if appellee decides to sell the property, or to not cut the trees at all."[182] The timber was not deemed to be marital property because "characterizing growing trees as a vested property right is far too speculative."[183]

2. *Personal Injury Claims and Awards*

A Connecticut Superior Court decision in *Raccio v. Raccio*[184] found that an unliquidated personal injury action may be subject to equitable distribution. The Connecticut court, among other jurisdictions, found that the majority rule is that awards for personal injuries, where the injury occurred during the marriage, are treated as marital property. Some states pro-rate the damages awards, awarding the non-injured spouse an interest to compensate the injured spouse for loss of earnings and permanent impairment of the ability to earn money, during the course of the marriage. The court then surveyed the states that have refused to award a non-injured spouse a share of the other's personal injury damages, and found that the courts have done so for three reasons: the interpretation of state statutory language; specific language in statutes excluded the award; and the fact that the award as to a pending claim is speculative. The *Raccio* court found that Connecticut courts "have had no hesitancy in making awards in dissolution cases where there have been uncertainties as to values and amounts, and they were premised on the occurrence of some contingency."[185] Though its value is undetermined (and it may prove to have none), a personal injury action does constitute a "presently existing interest" as required by the Supreme Court in *Rubin*. The court ruled, therefore, that an un-

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[182] *Id.* at 214.

[183] *Id.*

[184] 556 A.2d 639 (Conn. Super. Ct. 1987).

[185] *Id.* at 642 (quoting Thompson v. Thompson, 438 A.2d 839 (Conn. 1981)); Silver v. Silver, 365 A.2d 1188 (Conn. 1976); Rubin v. Rubin, 527 A.2d 1184 (Conn. 1987).

liquidated personal injury action is subject to an award pursuant to Conn. Gen. Stat. §46b-81.[186]

In *Landwehr v. Landwehr*,[187] the New Jersey Supreme Court considered whether settlement proceeds that a spouse received during the marriage, arising from claims for personal injuries to the husband, constitute a marital asset subject to distribution. The claims at issue were for lost wages, pain, suffering, mental and physical disabilities, and the wife's per quod claim for pain and suffering. The court determined that the proceeds of the settlement award at issue were divisible: they were in part compensation for lost wages and reimbursed medical expenses, in part compensation to the husband for pain, suffering and mental and physical disabilities and in part compensation to the wife for pain and suffering under her per quod claim. The court recognized that dividing the proceeds of the settlement was not a simple matter, but did "not expect that the allocation of such awards will present any serious problems. Trial courts are used to allocating and tracing assets in distribution cases."[188]

The court placed the burden of proof on the party seeking to establish immunity from equitable distribution, thereby, requiring the injured spouse to show what portion of the award represents compensation for pain, suffering and disabilities and requiring the uninjured spouse to establish the portion of the award that constitutes compensation for loss of services and consortium. A judge presiding at a jury trial can aid in this task by using special jury interrogatories to delineate separate factors of recovery, but even in the absence of such special interrogatories a matrimonial judge can determine pro rata distributions. The New Jersey Supreme Court, therefore, reversed the judgment of the appellate court, and reinstated the trial court order awarding the wife half of the proceeds from the claim for lost wages and all of the proceeds of her per quod claim. The husband was awarded one half of the proceeds from the claim for lost wages and all of the proceeds from his claim for his pain and suffering and physical and mental disability.[189]

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[186] *Id.* at 643.

[187] 545 A.2d 738 (N.J. 1988).

[188] *Id.* at 744.

[189] *Id.*

Where a tort settlement fails to differentiate between the components of the award, the court may decline to attempt an allocation, but simply include the entire amount as marital property subject to equitable distribution.[190]

3. *Tuition Benefits*

In *Wacholder v. Wacholder*,[191] the husband, by reason of his employment at RPI, was to receive a tuition benefit of up to one-half of RPI's tuition, payable to colleges his children might attend. At issue was whether a tuition benefit, initially acquired as part of the employee spouse's compensation package during the marriage, but usable only after the commencement of the divorce action when the children reached college age, constitutes marital property. The Supreme Court of New York, Appellate Division, noted that at the time the lawsuit was commenced, the tuition benefit had been merely a contingent asset, since it was subject to complete defeasance if the employee spouse chose to change employers before his children were old enough to attend college. The employee spouse, therefore, argued that the tuition-benefit should have been treated as his separate property, and, therefore, applied solely to reduce his share of the college costs. The court disagreed and analogized the tuition benefit to a nonvested pension that is considered to be marital property even though its value is contingent on continued employment. Like a pension, the tuition benefit was viewed as part of the husband's compensation package, and was, therefore, received in lieu of other compensation that would have added income or assets to the marriage.[192]

The court held that the tuition benefit was to be prorated, between marital and separate components, the same treatment that would be accorded a pension.[193]

4. *Rights to Purchase Stocks*

Distinguishing a preemption or right of first refusal to purchase stock from a stock option or pension plan, the Mary-

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190 Kozich v. Kozich, 580 A.2d 390 (Pa. Super. Ct. 1990).

191 593 N.Y.S. 2d 896, (N. Y. App. Div. 1993).

192 *Id.* at 899.

193 *Id.* at 900.

land Court of Special Appeals in *Ross v. Ross*[194] considered whether the trial court had erred in classifying a right of first refusal to purchase stock as marital property subject to equitable distribution, and found the right to be "a mere possibility or expectancy"[195] and, because of its speculative nature, could not be deemed marital property.[196]

5. *Military Retirement Pay*

In *Gallo v. Gallow,*[197] the Colorado Supreme Court examined whether military retirement pay is property subject to division in a dissolution of marriage proceeding. The court's starting point was its earlier decision in *Ellis v. Ellis*[198] in which the court held that a military retirement plan may never be of any value if the employee dies prior to retiring, and therefore its value is only speculative, and it cannot be considered marital property. In this decision, the court overruled *Ellis* on the grounds of changes in the law, at both the state and national level, in particular, the enactment of the Uniformed Services Former Spouses' Protection Act of 1982.[199] The court also noted that an employee with fully vested rights has a right to receive payment at some point in the future; that although contingencies may divest the interest, those contingencies are remote when the benefits have both vested and matured; that military retirement benefits are an earned property right, not a gratuity; and that military retirement pay must be viewed realistically, not as compensation for past services, and therefore constitutes a right to payment acquired during the marriage. "Vested and matured military retirement pay which has accrued during all or part of the marriage constitutes marital property subject to equitable division in a dissolution proceeding."[200]

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194 600 A.2d 891 (Md. Ct. Spec. App.) *vacated* 607 A.2d 933 (Md. Ct. App. 1992).

195 *Id.* at 895.

196 *Id.*

197 752 P.2d 47 (Colo. 1988).

198 552 P.2d 506 (Colo. 1976).

199 P.L. 97-252, §1006(a), 96 Stat. 737 (1982), effective February 1, 1983, 10 U.S.C. §1408.

200 752 P.2d at 54.

In *Hanify v. Hanify*,[201] the Massachusetts Supreme Judicial Court addressed the issue of whether the proceeds of two lawsuits for breaching an employment contract, pending at the time of the divorce, constitute marital property subject to equitable distribution. The court found that "[a] pending legal claim is distinguishable from an expectancy", noting that the instant contract claims were enforceable claims for income, and assets lost during the marriage. The fact that any recovery would replace lost marital income, that would have benefitted the spouses prior to separation, renders the claim a marital asset. The fact that the ultimate recovery was uncertain did not militate in favor of exclusion from the marital estate.[202]

6. *Anticipated Commissions*

In *Niroo v. Niroo*,[203] the Maryland Court of Appeals considered whether anticipated renewal commissions on insurance policies, sold by a spouse during the marriage, but accruing after dissolution of the marriage, constitute marital property subject to equitable distribution. Starting from the broad concept of "property" encompassed in the state's equitable distribution statute, the court analogized the commissions to various other assets such as pension benefits accumulated during marriage, and workers compensation benefits arising after dissolution of the marriage, which are marital property, and to personal injury claims arising from an injury which occurred during the marriage, and a medical degree and license to practice medicine obtained during the marriage, which are not subject to equitable distribution. The court further noted that in Maryland, insurance agents have a vested right to commissions on renewal premiums when provided for by contract, and that the agency contract at issue provided that should the agent's spouse die or become disabled, his right to receive the renewal commissions, as well as his heirs' right thereto, would not be affected. The court held that "contractually vested rights in renewal commissions are a type of property interest encompassed within the definition of marital prop-

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201 526 N.E.2d 1056 (Mass. 1988).

202 *Id.* at 1059.

203 545 A.2d 35 (Md. Ct. App. 1988).

erty."[204] The agent's spouse's right amounts to more than a "mere expectancy."[205]

7. *Fishing Rights*

In *McGee v. McGee*,[206] the husband received a fishing vessel in the equitable distribution process. After the decree was entered, a law was enacted that established quota shares for fishers based on the vessel's activity in the qualifying years. On appeal from an adverse post-judgment determination, the husband maintained that the value of such shares was too speculative. The appellate court held that while at the time of the divorce, in hindsight, valuation might have been speculative, once the government had sought to adopt the program the uncertainty, which existed at the time of the divorce, as to whether it would adopt the program disappeared. That uncertainty at the time of the divorce, held the court, was insufficient to deny the wife a share of the property as to which she had made contributions during the marriage.

I. *Hypothetical Deductions From Value*

1. *Tax Consequences*

Hypothetical deductions from value include, for the most part, theoretical calculations for income taxes upon a fictitious sale. Such deductions may also include other costs of sale, such as theoretical broker commissions.

Although a majority of courts are willing to value and distribute vested pension interests, in spite of their somewhat speculative nature, courts have been reluctant to deduct potential tax liability from the distribution of those assets. In *Smith v. Smith*,[207] a Pennsylvania Superior Court refused to deduct the potential tax liability associated with the distribution of the defined benefit pension plans. The court reasoned that if a taxable event, such as a sale or other transfer of property is required by the award of equitable distribution, or is certain to occur shortly thereafter, the tax liability of the parties can be reasonably ascer-

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[204] *Id.* at 39.
[205] *Id.*
[206] 974 P.2d 983 (Alaska 1999).
[207] 653 A.2d 1259 (Pa. Super. Ct. 1995).

tained. However, where merely a likelihood or possibility exists that a taxable event will occur, the court is left to speculate as to the tax consequences.

> In order to insure a "fair and just determination and settlement of property rights" we favor predictability over mere surmise in evaluation and distribution of marital property after divorce. Accordingly, we hold that potential tax liability may be considered in valuing marital assets only where a taxable event has occurred as a result of a divorce or equitable distribution of property or is certain to occur within a time frame such that the tax liability can be reasonably predicted.[208]

In *Wilkins v. Wilkins*,[209] the North Carolina Court of Appeals looked to other jurisdictions for the proposition that "[T]he trial court is not required to consider possible taxes when determining the value of property in the absence of proof that a taxable event has occurred during the marriage or will occur with the division of the marital property."[210] The court concluded that "to predict *variables*, including, *inter alia*, the government's tax structure, plaintiff's financial condition, the date of plaintiff's early withdrawals, if any, and the date of plaintiff's eventual retirement, that far in the future requires the trial court to engage in impermissible *speculation*."[211]

In *Stern v. Stern*,[212] the issue of tax consequences was raised in the context of whether accounts receivable should be considered in the valuation of a lawyer's interest in his law firm. He had argued that even if it were proper to include accounts receivable, their value should be diminished by the estimated amount of federal income tax that he would be required to pay on those accounts. Disagreeing with his position, the court held that anticipated federal income taxes that the husband would be required to pay upon receipt of the accounts receivable "misconceives the purpose for which the accounts receivable are being considered, that is, to fix a total value of defendant's partnership interest."[213]

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208 *Id.* at 1268 (quoting Hovis v. Hovis, N.C. Ct. App., 541 A.2d 1378, 1380-81 (Pa. 1988)).

209 432 S.E.2d 891 (N.C. Ct. App. 1993).

210 *Id.* at 897.

211 *Id.*

212 331 A.2d 257 (N.J. 1975).

213 *Id.* at 261.

The West Virginia Supreme Court of Appeals in *Hudson v. Hudson*[214] also considered tax implications on a theoretical sale, and cited *Bettinger v. Bettinger*[215] for the proposition that "the tax implications of a future sale of property to a third party are too speculative to allow for a tax deduction against the other spouse's share unless it can be ascertained under the court's decree that such sale will actually occur."

In *Orgler v. Orgler*,[216] the husband argued that the trial court erred in refusing to deduct from the value of the marital estate hypothetical taxes that would be payable upon the future sale or transfer of the marital home and his businesses. The Superior Court of New Jersey, Appellate Division, upheld the trial court decision on this issue, reasoning that "hypothetical tax consequences upon the future sale or transfer of marital assets should not be deducted from present value for equitable distribution purposes. The hypothetical tax is simply too speculative to permit a reduction in value."[217] The husband contended that hypothetical taxes on the sale of the marital home were "reasonably foreseeable," though impossible to determine at the time of trial. The court quietly distinguished *Moore v. Moore,*[218] in a footnote, stating that "*Moore* dealt with whether an asset should be *included* in the marital estate, not the manner in which the asset, as here, should be *valued*. We therefore do not read *Moore* as supportive of defendant's argument that hypothetical taxes must be deducted from the present value of marital assets."[219] The court also upheld the trial court's refusal to deduct taxes from the value of the husband's pension and retirement fund. Unlike a prior New Jersey decision in which tax on a pension was considered, the taxes on the husband's pension were not readily ascertainable because he would not receive payouts for several years, and he had some control over the timing of the payouts.

Despite universal acknowledgement of the inevitability of taxes, many courts are reluctant to tax-effect assets in the ab-

[214] 399 S.E.2d 913 (W. Va. 1990).

[215] 396 S.E.2d 709 (W. Va. 1990).

[216] 568 A.2d 67 (N.J. Super. Ct. App. Div. 1989)

[217] *Id.* at 73.

[218] 553 A.2d 20 (N.J. 1989). *See supra*, rest of notes 4-6.

[219] 568 A.2d at 74, n. 4 (*emphasis in original*). Moore discusses three methods by which an asset should be valued.

sence of an actual or imminent sale, or other taxable event. For example, in *Harvey v. Harvey*,[220] the North Carolina Court of Appeals considered whether a partnership interest should be valued on an after-tax basis. The *Harvey* court held that "'the trial court is not required to consider possible taxes when determining the value of property in the absence of proof that a taxable event has occurred during the marriage or will occur with the division of the marital property.'"[221] From prior North Carolina cases, the *Harvey* court recited the principle that "evidence of circumstances not in existence on the date of separation is not competent evidence for the purpose of valuing a marital asset."[222] The court held that "[i]t was improper for the trial court to consider such hypothetical and speculative tax consequences in valuing defendant's partnership interest."[223]

In *Goldman v. Goldman*,[224] the Superior Court of New Jersey, Appellate Division, examined the extent to which a trial judge may consider hypothetical taxes to the owner-spouse in valuing the spouse's percentage share of the stock. The court stated that hypothetical tax consequences upon the future sale or transfer of marital assets should not be deducted from the asset's present value for purposes of equitable distribution, but that those consequences nonetheless have an "important" place in the equitable distribution process.

> Here, the trial judge did not reduce the present value of plaintiff's interest in [the stock] to compensate for the tax consequences he would experience. He did, in this one instance, adjust the percentage of distribution, in recognition of potential tax consequences, to achieve a distribution which he considered equitable.

In *Bettinger v. Bettinger*,[225] the West Virginia Supreme Court of Appeals considered whether the trial court was correct in its determination that the non-owner spouse's share of the owner-spouse's interest in a professional corporation should be reduced by an amount for federal income taxes on the ground that if the

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220 437 S.E.2d 397 (N.C. Ct. App. 1993).

221 *Id.* at 400 (quoting Weaver v. Weaver, 324 S.E.2d 915 (N.C. Ct. App. 1985)).

222 *Id.*

223 *Id.*

224 646 A.2d 504 (N.J. Super. Ct. 1994) *cert. denied*, 652 A.2d 173.

225 396 S.E.2d 709 (W.Va. 1990).

owner-spouse were to sell his interest he would be liable for federal income tax. The court noted that I.R.C. section 1041 specifically exempts "from federal and state taxes transfers of property between spouses which arise incident to a divorce," but observed that if a party to a divorce were required to sell an asset to a third party to satisfy an equitable distribution obligation, such a sale would give rise to a taxable event.[226] The *Bettinger* court went on to note that "courts have generally concluded that tax implications of a future sale of property to a third party are too speculative to allow for a tax deduction against the other spouse's share unless it could be ascertained that under the court's decree, such a sale would actually occur."[227]

The court held that in the absence of record evidence that the husband intended, or was required, to sell the stock in order to pay the wife her equitable distribution share, there was no basis for a reduction for a theoretical tax liability.[228]

However, the Oregon Court of Appeals in *Marriage of Drews*,[229] affirmed a discount of forty percent to account for future income tax liability on husband's pension. The record contained expert testimony that husband's current federal tax rate of thirty-one percent and state tax rate of nine percent would probably remain the same upon retirement, and further testified that income from husband's retirement plans would indeed be taxable upon his retirement.

In *Book v. Book*,[230] the issue for the Delaware Family Court was whether it should consider tax implications in making its equitable distribution of real property. The court noted that potential tax consequences are unknown since the property is not for sale. The property is not anticipated to be sold, and if it is sold in the future, the capital gains tax rate may be different. The court held that the tax consequences are too speculative to be taken into consideration in valuing the asset for purposes of equitable distribution.

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226 *Id.* at 711.

227 *Id.* at 716.

228 *Id.*

229 956 P.2d 246 (Or. App. 1998).

230 1990 De. Fam. Ct. LEXIS 96 (1990).

In *Kelley v. Kirk*,[231] the South Dakota Supreme Court examined whether the trial court erred in using the after-tax value of assets rather than pre-tax values. Prior state precedent dictated that a "trial court must reduce a party's net assets by the deferred federal income tax accruable on total liquidation of assets if (a) their property division compelled a total liquidation of assets and (b) if it were probable that the most disadvantageous method of sale from a tax standpoint would be used."[232] The court noted that the owner-spouse had in fact incurred tax consequences, and further took note of the trial court's finding of fact that "the tax ramifications are not speculative, they are realistic and certain and represent a diminution in asset valuation which would occur even if the parties were not getting a divorce."[233] Since the court found no support in the record for the trial court's assertion that the liquidation was necessary to provide funds for the property distribution, it overruled the trial court's decision considering the post-tax rather than the pre-tax valuation of the property.

2. *Costs of Sale*

In *Wadlow v. Wadlow*,[234] the Superior Court of New Jersey, Appellate Division, considered whether the trial court erred by deducting a hypothetical brokerage commission from the parties' equity in the marital residence. The trial court had deducted the commission, even though it had not ordered that the property be sold or that one party's interest would be transferred to the other. The court determined that the trial court should not have deducted the commission "in the absence of evidence that the property will be sold to a third person."[235] The hypothetical brokerage commission was not a "reasonably foreseeable expense incident to the present and future disposition of the property and to assume such an expense is pure conjecture."[236]

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[231] 391 N.W.2d 652 (S.D. 1986).

[232] *Id.* at 656 (quoting Lien v. Lien, 278 N.W.2d 436 (S.D. 1979)).

[233] *Id.* at 657.

[234] 491 A.2d 757 (N.J. Super. Ct. App. Div. 1985).

[235] *Id.* at 763.

[236] *Id.* at 763-64.

In *Gould v. Gould*,[237] a Delaware court held that when one spouse is to buy out the other spouse's interest in real property, the court should not reduce the amount the buyer spouse is required to pay by four percent for real estate commissions and realty transfer taxes. The court reasoned that it is only speculative that the house will ever be sold, and it is unknown whether a realtor will be employed.

The overwhelming majority of courts decline to posit a theoretical sale of assets and to impute tax liability and other expenses of sale in the absence of evidence that an actual sale is imminent. The rare exceptions are those in which the request to tax-effect an asset is buttressed by expert testimony. The message to the practitioner is clear.

II. The Analysis

A. *Clearing The Quagmire*

To formulate a suggested scheme for dealing with assets that are themselves speculative, or whose values are not easily ascertainable, it would be helpful to first summarize the dizzying array of principal circumstances and fact patterns, philosophies and repetitive verbiage, and justifications and explanations employed by courts in arriving at their conclusions and holdings. It should be kept in mind that a good many courts hold that difficulty in the valuation process is an insufficient reason for non-inclusion if, in fact, an asset contains the requisite elements otherwise needed for inclusion.[238]

Vested Pensions

Most jurisdictions follow the rule that pensions, as to which the employee has obtained a non-forfeitable right, are subject to division. Moreover, the values of these assets are readily calculable.[239] The general theory for inclusion is based on contract

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[237] 1988 Del. Fam. Ct. LEXIS 20 (1988). *Accord*, Dowden v. Allman, 696 N.E.2d 456 (Ind. App. 1998).

[238] McDermott v. McDermott, 986 S.W.2d 843 (Ark. 1999); Bowen v. Bowen, 473 A.2d 73 (N.J. 1984).

[239] Query: But are they so easily calculated without speculation? Can one accurately forecast interest rates? Is an employee's future salary (on which defined benefit plans are usually based) capable of accurate prediction? Are use

rights as being differentiated from mere expectancies over which the expectant has no control. "Uncertainty" (ergo, speculation) is dismissed as being a "how" or "when" exercise rather than an "if" determination. In some cases, the speculation of attempting to value a future payout is sidestepped by the court retaining jurisdiction until such event, — a sort of "wait-and-see" approach — which is effective, but invites other problems, particularly the invitation to further litigation.

Unvested Pensions

The split of the states is more apparent when it comes to pensions that are forfeitable.[240] Some courts strain concepts of receipt of something of value, and marital contributions in order to rationalize inclusion. Others hedge inclusion on a trial judge's determination of probabilities of receipt in a sort of balancing maneuver of uncertainties, against a desire to reach a result. Still others view the receipt of a contract right (even though totally defeasible) as distinguishable from a chance expectancy.

Goodwill

Distinguishing personal goodwill (essentially, earning capacity) from business goodwill (essentially, calculated as a function of estimation of future earnings based on past performance) always brings a smile to the lips of the seasoned practitioner. For a professional, earning capacity (or, the opportunity to earn due to one's educational degree or professional license) is almost routinely judicially differentiated from that person's worth as a function of business ownership — the former being dismissed as too speculative to value, and the latter being embraced as being predictable. Some "renegade" courts even harbor the "imperti-

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of general life expectancy tables an acceptable justification for avoiding being characterized as a "crystal ball" exercise?

[240] The sweeping reference to one sentence in one case, unintended by its author, and taken completely out of the context of common law historical antecedents and engrafted onto a complex statutory scheme is, perhaps, more responsible for inclusion of unvested pensions for distribution than any other factor. See, Justice Mountain's statement in Stern v. Stern, 331 A.2d 257 (N.J. 1977) involving the issue of includibility of accounts receivable of a law firm) for the proposition that "the concept of vesting should probably find no significant place in the developing law of equitable distribution," *Id.* at 262.

nence" to think that spousal enjoyment of economic resources involving valuations based on earnings should be reflected in spousal support awards, thus avoiding double-dipping.

Deductions for Theoretical Taxes or Sales Costs

With few exceptions, courts have escaped the drudgery of dealing with challenging tax calculations by holding that attempting to adjust a valuation for taxes should the asset be sold is too speculative due to the "unpredictability" of tax rates.[241] The same result obtains relative to anticipated sales costs such as real estate sales commissions. Instead, some of the more imaginative courts suggest that the percentage of division of assets should somehow be adjusted to otherwise compensate therefor, — of course, in the almost unfettered latitude of a trial judge's *discretion*.

Trust Interests

Inconsistency, not surprisingly, reigns supreme in this category. The *Davidson-Jones* dichotomy[242] relative to interests subject to the complete discretion of another person (and totally beyond the legal reach of the beneficiary-spouse) illustrates the lengths to which courts will go in order to tortuously arrive at an includible result.

Stock Options

In an apparent exception to the general rule of confusion, which has reigned thus far, a good many courts have allowed inclusion of stock options that are granted, whether or not the options are presently exercisable. The *Hug* formula, as modified by the considerations set forth in the *Short* case, provides a practical resolution of the inclusion and valuations issues. That formula determines the number of options subject to division as a function of the number of years of employment to the appropriate division cutoff date relative to the number of years of em-

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241 Test this against the backdrop that predicting interest rates and employee's future salaries in pension calculations must be more readily ascertainable with greater certainty.

242 *See supra,* text at notes 109 and 85.

ployment to the exercise date of each set of options. Another method would be to multiply the number of each set of options by a fraction in which the numerator is the time between the date of grant and the appropriate division cutoff date, and in which the denominator is the time between the date of grant and the date that exercise is first available. Using either formula is akin to a "wait and see" approach to division, in that the value of the options under which such formula is employed will be determined at the time of exercise. Obviously, since the employed spouse holds the spouse's interest essentially in trust, appropriate safeguards and circumstances for exercise should be built into such a division. Moreover, upon exercise, the employed spouse will have a real tax consequence. In such posture, the tax-net should be the amount distributed to the spouse upon exercise.

B. *Arriving At A Distinguishable Pattern*

No ascertainable pattern can be synthesized over a broad spectrum of fact classifications as to what constitutes speculation. Issues of subjectability of assets to division are mistakenly intertwined with issues of valuation, which are, in turn, mistakenly intertwined with issues of distribution. Indeed, even within particular fact patterns (such as whether goodwill is subject to division), there is great divergence among the states.

By way of example, while some courts have articulated the general notion that trial judges should take into consideration tax consequences in dividing assets, leaving it to the discretion of a trial judge to somehow, unsystematically and randomly, adjust the division of asset for possible tax consequences appears to be preferable to the judiciary than a more certain process of calculation of taxes.

Consider, too, that while concepts of earnings capacity deal with many more imponderables, calculating one's value in a firm still, nonetheless, takes on a soothsayer-like character. Thus, the common thread is that both operations attempt to predict, foresee, divine, prophesize, foretell, theorize — in essence, *speculate* — about the future.

The bottom line is simply that it is only a matter of degree of certainty of the process which will render one so speculative as to be disallowed, and another permissibly taking tolerable chances. Stated another way, the object of the judicial exercise is to find

the line between acceptable theory and impermissible speculation — an exercise for which there are no rules, patterns, guidelines, or structured direction — only visceral chaos based on a regurgitation of "time-honored" precedents.

III. The Recommendations

There is no rhyme or reason to the disparate conglomeration of case law viscerally dealing with whether an asset is too speculative to include for division or to value. The courts, as an institution, have abandoned any pretense of an orderly, systematic development of case law dealing with the issue of speculation. In point of analysis, one was never assumed.

Thus, litigants are relegated to either unfair results which reward a spouse's personal best, without consideration of the other spouse's marital effort (usually in another direction), or which rely on the much over-patronized *discretion* of the trial judge.

Child support guidelines have now been adopted in all states pursuant to federal mandate. The main evil sought to be ameliorated by this imposition was the discordant outcomes inherent in such discretion. So, too, should there be a modicum of uniformity in dealing with matters of inclusion or valuation where the process is speculative in nature. Chaos should be replaced with a set of rules which not only standardize treatment of these issues, but do so in a way which will recognize the basic tenet universally acknowledged — that marriage is a partnership consisting of various contributions of each party.

In beginning efforts toward construction of such guidelines, we suggest the following:

A) Many high courts have taken an expansive view of the statutory schemes of division of assets which they interpret. Taking a cue therefrom, all assets which are not personal to the individual (such as the pain and suffering portion of a personal injury action) should be includible.

B) As for assets which may become non-forfeitable or fully vested in the short run, courts may wish to defer distribution — if such deferral can take place without disruption to the interrelationship of division of assets to assets, or support to assets.

C) Valuations should reduce assets to their lowest common denominator — present money. Pensions can be discounted to present value; tax effects of future receipt can be reduced by rea-

sonable tax assumptions; stock options can be discounted for years until maturity; goodwill can be calculated and distributed in a manner to avoid double-dipping with spousal support awards. Then, the mathematics of division can be accomplished by dealing with like commodities, thus obviating the apples-and-oranges approach presently employed.[243]

Comfort for this approach is found in the not analogous context of valuation for gift tax purposes in the recent case of *Eienberg v. Commissioner of Internal Revenue*.[244] In that case, the question was whether (for gift tax purposes) the value of stock in a closely-held corporation could be reduced by potential capital gains tax liabilities which the hypothetical seller of the stock would incur upon sale. The government argued that the level of capital gains which might be triggered would be too speculative because not knowing when the sale would take place, the exact rates could not be currently predicted.

The court disagreed with the government on the basis that in order to ascertain fair market value, a hypothetical transaction is envisioned. The valuation process takes into consideration those factors which a hypothetical buyer would consider. A hypothetical buyer would analyze the value from the viewpoint of maximizing his or her advantage.

> We believe it is common business practice and not mere speculation to conclude a hypothetical willing buyer having reasonable knowledge of the relevant facts, would take some account of the tax consequences of contingent built-in capital gains on the sole asset of the Corporation at issue in making a sound valuation of the property.
>
> We disagree with the Commissioner's reasoning that the critical point in this case is that there was no indication a liquidation was imminent or that 'a hypothetical willing buyer would desire to purchase the stock with a view toward liquidating the corporation or selling the assets, such that the potential tax liability would be of material and significant concern.' *The issue is not what a hypothetical willing buyer plans to do with the property, but what considerations affect the fair market value of the property he considers buying. . . . [T]here is simply no evidence to dispute the fact that a hypothetical willing buyer today*

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[243] This is not to say that the nature of assets should be avoided. For instance, many state statutes consider the custodial parent's award of the house to be a factor in the process of division of assets. On the contrary, the apples-for-apples approach allows for proper financial offset therefor.

[244] 155 F.3d 50 (2d Cir. 1998).

> *would likely pay less for the shares of a corporation because of the buyer's inability to eliminate the contingent tax liability.*[245]

We do not suggest that the aforementioned is the ultimate answer in resolving the present inconsistencies in this process. It is only advanced to identify the problem and begin the process of correction. We suggest that law-making bodies — legislatures and appellate courts — should rethink the current inharmonious matrix of decisional law dealing with these various issues. After consultation with experienced lawyers and judges, each such law-making body should adopt a *comprehensive* strategy for dealing with such issues.

Litigants deserve a reasonable range of predictability of judicial determinations to enjoy the consistency necessary to engender public perception of a overall systemic fairness. The system, on the other hand, needs such predictability to encourage settlements; avoid the wasteful use of judicial resources; and reduce intolerable backlogs plaguing every jurisdiction across the land. By reducing assets to their tax-net value, speculation is reduced and predictability and certainty of decision-making is enhanced.

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[245] *Id.* at 57 (*emphasis added)(citations omitted*) *See also Estate of Davis v. Commissioner*, Daily Tax Report (BNA No. 126 at K-17 (T.C. June 30, 1998).